

No. 02-4237

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION,
Respondent,

ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,
Intervenor.

On Petition For Review of a Final Rule
Issued by Respondent Secretary of Transportation

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

Erika Z. Jones
Adam Sloane
David M. Gossett
MAYER, BROWN, ROWE & MAW
1909 K Street, NW
Washington, DC 20006
tel (202) 263-3000
fax (202) 263-3300

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Counsel for Intervenor

RULE 26.1 DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers, Inc. (“Alliance”) is a nonprofit trade organization that was formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The following companies comprise the membership of the Alliance: BMW Group; DaimlerChrysler Corporation; Fiat Auto S.p.A.; Ford Motor Company; General Motors Corporation; Isuzu Motors America, Inc.; Mazda North American Operations; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc.

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INTRODUCTION

Ignoring almost entirely the extensive record evidence supporting the Final Rule issued by the National Highway Traffic Safety Administration (“NHTSA”) – as well as the deferential nature of this Court’s review of an agency notice-and-comment rulemaking – petitioners ask this Court to overturn NHTSA’s careful decision about how to mandate the inclusion of tire pressure monitoring systems (“TPMSs”) in automobiles and other light vehicles. Petitioners’ claims have no merit; NHTSA, as it was required to do by the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 (“TREAD Act”), Pub. L. No. 106-414, 114 Stat. 1806, the National Traffic and Motor Vehicle Safety Act of 1966 (“Safety Act”), 49 U.S.C. §§ 30,101 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, balanced competing concerns and promulgated a rule that complies with the agency’s various statutory mandates. Therefore, the petition should be denied.

STATEMENT OF FACTS

A. The Early History Of Tire Pressure Monitoring Systems

It has been well known for decades that vehicle tires should be adequately inflated in order to optimize fuel economy, performance and safety. Thus, NHTSA first considered requiring automobile manufacturers to install “low tire pressure warning” devices in 1970, and considered the subject again in 1981. See Final Rule, 67 Fed. Reg. 38,704, 38,707 (June 5, 2002). However, on each occasion the

agency determined that the available systems were either too expensive or not sufficiently accurate and reliable, and thus on neither occasion did the agency issue a TPMS rule. See *id.* at 38,708; Notice, 46 Fed. Reg. 43,721 (Aug. 31, 1981).

Historically, TPMSs fell within two general types. See 46 Fed. Reg. at 43,721. The first were pressure-sensor-based systems (often referred to as “direct” systems), which rely on radio-equipped sensors installed within each wheel to communicate information about tire pressure to a central display unit located within the vehicle. The second were valve-stem systems, which again were installed on each wheel but which required physical (out-of-the-vehicle) inspection to determine tire pressure. Each system had problems; direct systems were quite expensive, whereas valve-stem systems were generally unreliable and could not inform the driver of underinflation while the vehicle was being driven. See 67 Fed. Reg. at 38,707-38,708; 46 Fed. Reg. at 43,721.

With the introduction of antilock brake systems (“ABSs”) in the 1990s, a third option for detecting tire underinflation, based on the information detected by the wheel speed sensors contained in ABSs, appeared to be feasible. Four-wheel ABSs closely monitor the motion of each wheel independently, in order to assist drivers to keep vehicles under control under adverse road conditions and, on some road surfaces, to stop a vehicle more rapidly while retaining control. See 67 Fed. Reg. at 38,719. The wheel-speed-sensor monitoring capability could also be used

to detect tire underinflation. Under basic laws of physics, if one tire is underinflated relative to other tires, that tire – which will be smaller in diameter than the remaining tires as a result of its underinflation – will rotate faster than the remaining tires. By comparing the wheel speeds to one another using the wheel speed information detected by the ABSs, wheel-speed-based TPMSs (often referred to as “indirect” systems) can tell when a tire is rotating faster than the others, and can thus detect tire underinflation. See *id.* at 38,716.

Starting in Model Year 1997, vehicle manufacturers began to install TPMSs in production vehicles. Manufacturers installed these systems despite being under no mandate to do so, because some customers found it convenient to have an in-vehicle indicator of low tire pressure. See Dkt. No. 16 (Alliance Comments) [JA-31].¹ As of November 2000, more than two million vehicles on the road contained TPMSs. See Dkt. No. 137, at 2 (Alliance Comments) [JA-176]. Of the TPMSs that have been installed on vehicles as original equipment to date, approximately 80% have been indirect, wheel-speed-based systems, and 20% have been direct systems. See Dkt. No. 216, at VI-8 (NHTSA, *Final Economic Assessment, Tire Pressure Monitoring System, FMVSS No. 138* (March 2002)) [JA-317].² Exam-

¹ Citations to “Dkt. No. XX” refer to filings in this rulemaking (NHTSA-2000-8572-XX).

² Because hundreds of thousands of new motor vehicles contain the direct TPMS preferred by petitioners, it is highly doubtful that petitioners have suffered

ples of vehicles with TPMSs as original equipment include the Toyota Sienna, the Oldsmobile Alero, the Ford Windstar, the BMW M3, the Chevrolet Corvette, and the BMW X5. See 67 Fed. Reg. at 38,716; Dkt. No. 29, at 6 (NHTSA, *An Evaluation of Existing Tire Pressure Monitoring Systems* (July 2001)) [JA-73]). Approximately 38 current vehicle models offer TPMSs as either standard or optional equipment. See NHTSA, *Buying a Safer Car 2002* (available at <http://www.nhtsa.dot.gov/cars/testing/NCAP/BASC2002>).

B. Section 13 Of The TREAD ACT

In the aftermath of Firestone's recall of 14.4 million tires (see Notice of Proposed Rulemaking, 66 Fed. Reg. 38,982, 38,989 n.13 (July 26, 2001), Congress held hearings that led to passage of the TREAD Act. Section 13 of the TREAD Act – offered as an amendment during subcommittee markup by Representative

the “injury in fact” that is constitutionally required to establish standing to challenge this regulation. The “harm” alleged by the individual members of the petitioner organizations was merely their desire to purchase vehicles equipped with the supposedly superior (i.e., direct) TPMS. The record demonstrates that these individual members have ample opportunity to purchase a new vehicle equipped with a direct TPMS. Thus, these individuals and their membership associations have no legitimate basis to claim that the public at large is “harmed” by the NHTSA’s decision to provide a choice between vehicles equipped with an indirect TPMS and vehicles equipped with a direct TPMSs for a period of time. To the extent petitioners are alleging harm caused by the phase-in of the mandate over a period of a few years, such alleged harm is not be redressable, because the record is clear that manufacturers could not have complied with a 100% installation mandate by November 1, 2003. See pages 14-15, *infra*.

Markey and hence often referred to as the “Markey Amendment” – requires the Secretary of Transportation (and through him, NHTSA) to issue a rule mandating that manufacturers include TPMSs in new motor vehicles. The Markey Amendment, which was enacted as originally proposed, reads:

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 rulemaking.

Pub. L. No. 106-414 § 13, 114 Stat. 1806 (codified at 49 U.S.C. § 30123 note).

The Markey Amendment is not discussed in either the committee reports or the floor debate about the TREAD Act. However, Representative Markey explained his “very simple amendment” (Dkt. No. 16 at Ex. 1 p.1 [JA-33]) when he introduced it during the subcommittee markup.³ The amendment, Representative Markey explained, “would require tire pressure warning systems to become standard features in automobiles.” *Ibid.* Representative Markey acknowledged that NHTSA had considered requiring TPMSs two decades earlier, but had determined

³ An unofficial transcript of the hearing at which Representative Markey introduced his amendment was attached to the Alliance’s March 23, 2001 submission to NHTSA. Although there is some dispute about how much weight to give Representative Markey’s description of his amendment (see, *e.g.*, Final Rule, 67 Fed. Reg. at 38,723), no one has questioned the accuracy of the transcript of that statement.

that at that point TPMSs were too expensive. See *ibid.*⁴ However, as he explained, “there ha[d] been significant development in this technology” since those earlier rulemakings – the ability to use an add-on “to the anti-lock brake system to measure the spin rate of the wheel” (*ibid.*) – which allowed TPMSs to be manufactured much more affordably. Representative Markey stressed that “this [indirect TPMS] technology * * * has now become a standard feature in the 2000 Toyota Sienna vans.” *Id.* at Ex.1 p.1-2 [JA-33-34]. Because TPMSs such as that in the Toyota Sienna were “already being done, but not being done by everybody” (*id.* at 2), Markey concluded that mandating the provision of TPMSs by all manufacturers would be practicable.

C. Current And Future Tire Pressure Monitoring Systems

All TPMS systems currently on the market have advantages and disadvantages. Specifically, direct systems, although somewhat more accurate, are quite expensive,⁵ often require the significant redesign of wheels and tires,⁶ may be

⁴ As we discussed above (at 1-2), the agency had also found there to be significant questions about the accuracy and reliability of many of the then-existing systems. See 67 Fed. Reg. at 38,708.

⁵ NHTSA estimates that adding a direct TPMS to a vehicle will cost \$70.35 (67 Fed. Reg. at 38,740), plus will require estimated maintenance costs of \$40.91 (*id.* at 38,741), for a total system cost of \$111.26 per vehicle. By contrast, an indirect TPMS will cost \$13.29 to add to a vehicle with ABS brakes. See *id.* at 38,740. There is some evidence that the costs of a direct system may in fact be significantly higher than this estimate. See, *e.g.*, Dkt. No. 158, at 1-2 (Hayes Lemmerz Int’l, Inc. Comments) [JA-238-239]; Dkt. No. 171, at 1 (Amy Kotula Comments) [JA-

damaged through minor trauma to a wheel,⁷ require periodic battery replacement and maintenance expenditures,⁸ have suffered some reliability problems,⁹ may complicate the process of replacing tires or rotating wheels,¹⁰ and are subject to interference from other radio transmitters.¹¹ Indirect systems – such as that in the Toyota Sienna discussed by Representative Markey – by contrast, are much less expensive to install than direct systems (at least in vehicles that already have ABS brakes),¹² and require no maintenance,¹³ but can detect decreases in tire pressure

249] (pointing out that NHTSA cost estimate is based on average price of different systems, but performance estimates are based on performance of most expensive system).

⁶ See Dkt. No. 158, at 1-2 (Hayes Lemmerz Int'l, Inc. Comments) [JA-238-239].

⁷ See Dkt. No. 29, at xxii (NHTSA, *An Evaluation of Existing Tire Pressure Monitoring Systems* (July 2001)) [JA-68].

⁸ See 67 Fed. Reg. at 38,741; Dkt. No. 137, App. A at 3 (Alliance Comments) [JA-184].

⁹ See 67 Fed. Reg. at 38,711 (sensor failure rate of 6.5%).

¹⁰ See Dkt. No. 216, at II-1 (NHTSA, *Final Economic Assessment, Tire Pressure Monitoring System, FMVSS No. 138* (March 2002)) [JA-300]; Dkt. No. 137, at App. A at 3 (Alliance Comments) [JA-184].

¹¹ See 67 Fed. Reg. at 38,729.

¹² See note 5, *supra*. In vehicles lacking ABS brakes it would be significantly more expensive to installing an indirect TPMS than a direct TPMS, because in order to do so the manufacturer would also have to install ABS brakes. See 67 Fed. Reg. at 38,740.

¹³ See 67 Fed. Reg. at 38,741.

only when they are somewhat larger than those detectable by direct systems,¹⁴ cannot always detect underinflation when specific combinations of tires are equally underinflated,¹⁵ and need somewhat more time to detect underinflation than direct systems.¹⁶ Finally, wheel-stem TPMSs, while affordable and relatively accurate, cannot “indicate *to the operator* when a tire is significantly under inflated” Pub. L. No. 106-414 § 13 (emphasis added), and therefore cannot be used to comply with the Markey Amendment.

Thus, TPMSs remain an evolving technology. Manufacturers are engaged in extensive R&D to create the next generation of TPMSs – systems that will be more accurate and reliable but at the same time more affordable. Specifically, manufacturers are seeking to improve indirect TPMS systems so that they can detect smaller reductions in tire pressure,¹⁷ and can detect underinflation in any combination of tires except for the equal underinflation of all four tires.¹⁸ R&D is also underway to determine the potential to create “hybrid” systems that rely largely on wheel-speed sensors but that add one or two pressure sensors,¹⁹ or a vibration-

¹⁴ See *id.* at 38,716.

¹⁵ See *ibid.*

¹⁶ See *id.* at 38,728.

¹⁷ See *id.* at 38,710.

¹⁸ See *ibid.*

¹⁹ See, e.g., *id.* at 38,716.

detection system,²⁰ to allow the system to approximate the detection ability of direct systems at significantly reduced cost.

STATEMENT OF THE CASE

A. The Notice Of Proposed Rulemaking

As discussed above (at page 5), the Markey Amendment ordered NHTSA to promulgate a rule requiring TPMSs. Therefore, on July 26, 2001, NHTSA issued a Notice of Proposed Rulemaking (“NPRM”) proposing to create a new Federal Motor Vehicle Safety Standard (“FMVSS” or “Safety Standard”) No. 138, to fulfill Congress’ TPMS mandate. See 66 Fed. Reg. 38,982. The agency limited its proposed rulemaking to vehicles with a gross vehicle weight rating of less than 10,000 pounds, and excluded motorcycles. See *id.* at 38,989. In the NPRM, the agency summarized the history of TPMSs, its prior rulemakings on the subject, and the TREAD Act. See *id.* at 38,983-38,988. It addressed evidence that some consumers monitor their vehicles’ tire pressure less frequently than warranted (*id.* at 38,984), that many vehicles on the roads are operating with underinflated tires (*id.* at 38,985), and that this underinflation has small but measurable effects on fuel economy, tire wear, vehicle performance, and safety. See *id.* at 38,985-38,986. The NPRM described the differences between direct and indirect TPMSs, and detailed some of the perceived benefits and disadvantages of each. See *id.* at 38,987-

²⁰ See *id.* at 38,710; Dkt. No. 156, at 3 (Toyota comments) [JA-214].

38,988.

NHTSA proposed two distinct versions of FMVSS 138 for public comment. Under the first option, a warning would have been required whenever one tire was, or any combination of tires were, 20% below the vehicle manufacturer's recommended ("placard") pressure or below a specified absolute pressure (for most tires, 20 pounds per square inch ("psi")). See *id.* at 39,002.²¹ The second option would have required a warning whenever one tire was, or any combination of up to three tires were, 25% below the placard pressure or below the same specified pressure of 20 psi. See *id.* at 39,003-39,004. The agency assumed that only modified direct TPMSs could comply with the first option (see *id.* at 38,997), but that next-generation indirect TPMSs could be used to comply with the second option. See *ibid.* (The agency had tested then-existent TPMSs and found that none could meet the criteria of either option. See *id.* at 38,996; Dkt. No. 29, at 57-66 (NHTSA, *An Evaluation of Existing Tire Pressure Monitoring Systems* (July 2001)) [JA-74-83]) (detailing performance of current direct TPMSs); Dkt. No. 57, at VI-8 (NHTSA, *Preliminary Economic Assessment* (July 2001)) [JA-112] ("the agency believes the direct systems could be changed at no cost to meet Alternative 1").) Finally,

²¹ 20 psi is the minimum pressure needed in "P-metric—Standard Load" tires; see 66 Fed. Reg. at 39,003. Although other tires (such as light truck tires) have different minimum absolute pressure requirements (see *ibid.*), the principle is the same. For ease of exposition in this brief we will refer to the minimum absolute pressure for tires as 20 psi.

NHTSA inquired whether for practicability reasons it should phase in the TPMS requirement. See 66 Fed. Reg. at 38,997.

B. Agency Consideration Of Comments On The Proposed Rule

NHTSA received numerous comments on the proposed rule, from, among others, tire manufacturers, wheel manufacturers, TPMS manufacturers, automobile manufacturers, truck manufacturers, consumers, and consumer groups. See 67 Fed. Reg. at 38,709.²² Based on those comments, and on the data submitted with those comments, NHTSA prepared a draft final rule. The draft final rule would have implemented the TPMS requirement over a four-year phase-in period. During the phase-in period, manufacturers would have been allowed to comply with the new FMVSS 138 by installing either (A) a system that would alert the driver whenever a tire was, or any combination of tires were, 25% below placard pressure or below a specified absolute pressure (nominally 20 psi) (whichever was higher) (the “4-tire/25% option”), or (B) a system that would alert the driver whenever any single tire was 30% below placard pressure or below that same 20 psi absolute pressure (the “1-tire/30% option”). After the phase-in period, however – that is, after November 1, 2006 – manufacturers would have been required to install sys-

²² Of the three petitioners in this case, only Public Citizen submitted any comments during the rulemaking. See Dkt. Nos. 148 [JA-211], 199 [JA-267], 209 [JA-290]. Intervenor (the Alliance) submitted a number of comments (see Dkt. Nos. 16 [JA-31], 137 [JA-175], 163 [JA-241], 166, 170, 176, 207, 231), and members of the Alliance submitted additional comments.

tems that complied with the first option in all covered vehicles. See *id.* at 38,712, 38,716-38,717.

C. OMB Review Of The Draft Final Rule

Executive Order 12,866 requires review by the Office of Management and Budget (“OMB”) of “significant” regulatory actions, such as the proposed TPMS rule. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Thus, on December 18, 2001, NHTSA submitted its draft final rule to OMB. See 67 Fed. Reg. at 38,722. OMB left untouched the first phase (2003-2006) as drafted by NHTSA, but as to the second phase (post-2006), OMB returned the rule for reconsideration. Specifically, OMB questioned why the draft rule required eventual compliance with the first option, rather than allowing compliance with either option. See *id.* at 38,711-38,712, OMB objected to the agency’s failure to consider safety benefits that might arise if manufacturers could continue to implement systems compliant with the second option, because the ability to equip vehicles with indirect TPMSs might prompt manufacturers to equip more cars with ABS brakes. OMB also questioned the data and analysis on which NHTSA based its presumptions regarding the second phase (post-2006) of the rule, questioning whether it was appropriate to default to the 4-tire/25% option absent better field performance data. See *ibid*; Dkt. No. 202, at 2 (OMB Return Letter) [JA-280]. It must be noted that NHTSA’s final decision about the second phase of the rule has been deferred

and is therefore not before this Court.

OMB's return letter was itself the subject to extensive public comment (see, e.g., Dkt. Nos. 199 (Public Citizen) [JA-267]; 204 (Consumers Union)), as well as testimony at a congressional hearing (see 67 Fed. Reg. at 38,712; *The Implementation of the Tread Act: One Year Later: Hearing before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 107th Cong. 92 (2002) (hereinafter "*Implementation of the TREAD Act*"). In view of the limited time periods provided in the Markey Amendment, NHTSA decided to issue a rule governing only the phase-in period, and defer determining the requirements for the post-phase-in period – that is, which TPMSs to allow on vehicles manufactured after November 1, 2006. NHTSA committed to issue the second part of the rule addressing these vehicles by March 1, 2005. See 67 Fed. Reg. at 38,722. NHTSA published the first part of its final TPMS rule, addressing the requirements applicable during the phase-in period, on June 5, 2002.

D. The Final TPMS Rule

The final rule as issued addresses implementation of the Markey Amendment between November 1, 2003 and October 31, 2006.²³ NHTSA decided to

²³ Except insofar as they object to NHTSA phasing in compliance with FMVSS 138 at all (see Pet. Br. 30-32; part I.C, *infra*), petitioners have not challenged NHTSA's decision to divide its final rule into two parts (one addressing the phase-in period and the other addressing the post-phase-in period).

phase in compliance over this period because of concerns about the production capacity of TPMS suppliers and possible implementation problems. For example, the Alliance explained that “the engineering resources of the supplier sector and the vehicle manufacturers combined cannot support a 100% implementation of the requirement in late 2003.”²⁴ Ford explained that implementation by November 1, 2003 would impose a massive engineering resource burden on the company, requiring numerous changes to programs outside the normal program cycles, but that a multi-year phase-in would allow the TPMS requirement to be aligned with model-year changes in vehicles’ electrical architecture (thereby reducing vehicle complexity and increasing the opportunity for a robust system prove-out).²⁵ Subaru of America commented that, aside from the time needed to design, test, validate, and produce the new components, vehicle manufacturers commonly order components for production two years ahead of time, making a phase-in of the TPMS requirements imperative.²⁶ Lear Corporation, which manufactures TPMSs, explained that the TPMS requirement could not be applied to 100 percent of the new vehicle fleet within two years because insufficient applications engineering support exists to validate and implement TPMSs for the hundreds of vehicle plat-

²⁴ See Dkt. No. 163, at A-2 (Alliance Comments) [JA-245].

²⁵ See Dkt. No. 141, at 2 (Ford Comments) [JA-207].

²⁶ See Dkt. No. 103, at 3 (Subaru of America Comments) [JA-129].

forms sold in North America.²⁷ And Hayes Lemmerz objected that 100% compliance by November 1, 2003, even if otherwise feasible, could result in the elimination of wheel choices in certain vehicles, which could have impacts on vehicle sales, vehicle costs, and on compliance with corporate average fuel economy (CAFE) standards (because vehicle manufacturers use wheels as an element in packaging vehicle model weights).²⁸

Thus, the Final Rule requires all vehicle manufacturers (except those that produce fewer than 5,000 cars annually, see *id.* at 38,748) to equip 10% of their covered vehicles with TPMSs during the first year (November 1, 2003 to October 31, 2004), 35% of those vehicles with TPMSs during the second year (November 1, 2004 to October 31, 2005), 65% of those vehicles with TPMSs during the third year (November 1, 2005 to October 31, 2006), and all covered vehicles with TPMSs thereafter. See *id.* at 38,738. This schedule is identical to that included in the draft final rule sent to OMB. See Dkt. No. 237, at 97 (NHTSA, Explanation of changes from draft final rule and reproduction of draft final rule) [JA-347].

During the phase-in period manufacturers could comply with FMVSS 138

²⁷ See Dkt. No. 102, at 3 (Lear Corp. Comments) [JA-126].

²⁸ See Dkt. No. 158, at 2 (Hayes Lemmerz Comments) [JA-239]. See also, *e.g.*, Dkt. No. 120 (Shrader Electronics Comments) [JA-151]; Dkt. No. 110, at 7 (TRW Comments) [JA-136]; Dkt. No. 134, at 2 (Sensor Technology Int'l Comments) [JA-173]; Dkt. No. 118, at 3 (AIAM Comments) [JA-148].

by implementing systems that meet either the 4-tire/25% option or the 1-tire/30% option. See 67 Fed. Reg. at 38,727. The agency again explained that it presumed that indirect TPMSs could comply with the second option, but that only direct TPMSs, hybrid TPMSs, or significantly improved indirect TPMSs could comply with the first option. See *id.* at 38,717-38,718. This aspect of the implemented final rule is also identical to NHTSA's plan under the draft final rule sent to OMB for review. See Dkt. No. 237, at 45 [JA-346].

E. Post-Final Rule Developments

Several entities – including the Alliance, but not including any of the petitioners – filed petitions with NHTSA requesting that the agency reconsider various aspects of the final rule. As petitioners acknowledge, these reconsideration petitions are not implicated in the instant litigation. Petitioners filed a petition for review in this Court on June 26, 2002. The Alliance moved to intervene to defend the agency's rulemaking, and this Court granted the Alliance's motion on August 23, 2002.

SUMMARY OF ARGUMENT

NHTSA carefully balanced a variety of factors in promulgating FMVSS 138. Its decision to phase in a TPMS requirement over three years, during which period manufacturers could comply with the requirement by meeting either of two options, reflects that detailed analysis and is manifestly not arbitrary, capricious, or

contrary to law.

Petitioners raise two sets of arguments to challenge NHTSA's rulemaking. In the first, they argue that the rule as promulgated must be set aside because it violates the Markey Amendment for three separate textual reasons. These arguments were never raised to the agency during the rulemaking, and are therefore waived. Furthermore, the arguments are frivolous. The Markey Amendment delineated NHTSA's basic task: to promulgate a TPMS mandate. The Amendment did not provide the agency with detailed instructions about *how* to implement the TPMS mandate. Therefore, NHTSA's understanding of the requirement imposed on it by the Markey Amendment – reviewed under the familiar *Chevron* standard – plainly are due this Court's deference.

Nor is the Final Rule arbitrary or capricious, as petitioners next argue. NHTSA's choice to phase in the TPMS requirement, and to allow manufacturers to install indirect TPMSs during that phase-in, are justified by the agency's careful balance of the needs of motor vehicle safety, reasonableness, and practicability. In particular, in arriving at the Final Rule the agency considered the need for further development of TPMSs, expected implementation problems, cost, and performance. This Court cannot substitute its judgment for that of the expert agency, and therefore should deny the petition in its entirety.

ARGUMENT

I. THE TPMS FINAL RULE COMPLIES FULLY WITH CONGRESS' MANDATE IN THE TREAD ACT.

Attempting to avoid the deferential review and presumption of regularity that courts must give to agency regulations, Petitioners spend eight full pages attempting to parse out of the 65 words of the Markey Amendment three separate and specific limits on NHTSA's discretion in implementing Congress' TPMS requirement. Besides never having been raised before the agency – and thus being waived – none of these arguments has any merit. Although the TREAD Act requires NHTSA to issue a final rule ordering manufacturers to install TPMSs, the Act leaves the specifics of that requirement to the expert agency.

A. This Court Should Not Reach Petitioners' Statutory Arguments Because They Were Not Raised During The Rulemaking.

None of petitioners' three separate statutory arguments was presented to NHTSA during the course of its rulemaking. It is well settled that "issues not raised before the reviewing agency generally cannot be raised on appeal." *Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437, 444 (2d Cir. 2001) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 34-37 (1952)). "It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036, (D.C. Cir. 2001) (citations and internal quotation marks omitted). In other words,

“there is a near absolute bar against raising new issues – factual or legal – on appeal in the administrative context.” *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); see also, e.g., *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 874 (D.C. Cir. 2002) (unless an issue is adequately “raised in comments before the agency,” that issue is waived on review); *Zatz v. United States*, 149 F.3d 144, 146 (2d Cir. 1998) (“By failing to present their jurisdictional argument to the Board * * * petitioners have waived their right to present it here for the first time.”).

Furthermore, as the D.C. Circuit recently reiterated in a parallel context, issues must not only be *raised* before the agency before they can be raised in court; those issues must be raised *with adequate specificity* to allow the agency to consider and respond to them. “An agency cannot be faulted for failing to address such issues that were not raised by petitioners.” *Appalachian Power*, 251 F.3d at 1036; see also *Nat’l Mining*, 292 F.3d at 874 (“general claim[s] fall[] well short of providing the agency with the required adequate notice of [the petitioner’s] specific claim”) (citation and internal quotation marks omitted).

Petitioners assert that the Markey Amendment expressly precluded NHTSA from implementing a rule that did not detect significant underinflation in every combination of tires (Pet. Br. 25-28); that the Final Rule is inconsistent with the statute because it includes two different compliance options (Pet. Br. 28-29); and

that NHTSA's decision to authorize a phase-in violates the statute (Pet. Br. 29-32). However, none of these arguments was made with sufficient clarity to the agency, and thus they cannot be raised now.

Specifically, although various comments in the docket addressed whether NHTSA *should* require the detection of underinflation in every combination of tires (see 67 Fed. Reg. at 38,710), no one argued that the agency lacked statutory *authority* to issue a rule that would not mandate this level of coverage. These comments failed to put the agency on any – let alone adequate – notice that petitioners believed the agency lacked authority to issue the final rule the agency chose. As a result, NHTSA never had the opportunity to consider this issue, nor to explain how it resolved this issue. This court cannot set aside an agency decision on grounds the agency never had the opportunity to address.

Similarly, petitioners have never raised their inconsistent-definitions-of-underinflation argument to the agency, even though the compliance options were both present in the draft final rule sent to OMB, on which Public Citizen commented extensively. See Dkt. No. 199 (Public Citizen Comments) [JA-267]. Therefore, besides for being frivolous – as we discuss below, the agency did not interpret the term inconsistently – this argument too is waived.

Finally, even though in the NPRM the agency *specifically asked* for comments about whether it should phase in the TPMS requirement (see 66 Fed. Reg. at

38,997), no commenter argued that NHTSA lacked authority to order such a phase in. See 67 Fed. Reg. at 38,737. The vast majority of commenters who addressed the issue supported a phase-in. See *id.* at 38,711.²⁹ One commenter objected in passing to a phase-in, as unnecessary (see Dkt. No. 89, at 7-8 (Consumers Union comments) [JA-121-122]), but this is fundamentally distinct from a commenter having argued that the phase-in is precluded by statute.³⁰ These comments were insufficient to present this statutory preclusion argument to the agency; therefore, petitioners cannot make the argument now. See, *e.g.*, *Appalachian Power, supra.*³¹

²⁹ See also, *e.g.*, Dkt. Nos. 103 (Subaru) [JA-127]; 104 (Vehicle Services Consulting); 114 (SEMA) [JA-138]; 118 (AIAM) [JA-146]; 120 (Shrader Electronics) [JA-151]; 122 (Continental Teves) [JA-154]; 125 (American Honda) [JA-163]; 137 (Alliance) [JA-175]; 163 (Alliance) [JA-241]; 165 (Porsche).

³⁰ For example, CU's nine-page-long comment stated simply with two sentences that NHTSA should not implement a phase-in, but that "if the agency decides to opt for phasing in the regulation, CU believes NHTSA should provide the phase-in according to vehicle type, rather than percentage of production for implementation." Dkt No. 89, at 8 [JA-122]. Had CU believed the agency statutorily could not phase in the rule, its alternative plan for a phase-in would also have been unlawful.

³¹ Although two of the three petitioners did not submit *any* comments to the agency, none of them may now to raise arguments not raised in the docket. Challenges to agency rulemakings are limited to the arguments raised within that rule-making, whether raised by the petitioner or by others. Petitioners, at the very minimum, should have raised their statutory arguments in petitions for rehearing to the agency. See *Appalachian Power*, 251 F.3d at 1036 ("[h]aving failed to raise their concern in the relevant agency docket, petitioners could perhaps have cured their waiver by seeking reconsideration before the [agency]").

B. The TREAD Act Did Not Limit NHTSA’s Discretion About Which TPMS Systems To Authorize.

Assuming petitioners have not waived their statutory claims, those claims are reviewed under the familiar *Chevron* standard. Where a litigant argues that a regulation conflicts with a statute, the first question is whether “Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984). If, however, “the statute is silent or ambiguous with respect to the specific issue,” courts must defer to the agency’s reasonable construction of that statute. *Id.* at 843; see also, *e.g.*, *Kuhali v. Reno*, 266 F.3d 93, 102 (2d Cir. 2001). Here, the statute in question is silent – or at the very least, ambiguous – about each of the three issues petitioners raise. Thus, this Court must defer to the agency’s reasonable interpretations of the statute that underlie the final rule.

1. The TREAD Act does not preclude NHTSA from authorizing indirect systems under FMVSS 138.

The TREAD Act mandates that NHTSA issue a regulation requiring manufacturers to include TPMSs “to indicate to the operator when a tire is significantly under inflated.” See Pub. L. No. 106-414 § 13, 114 Stat. 1806 (2000). Petitioners assert that the requirement that the system indicate when “a tire” is significantly

underinflated renders the Final Rule contrary to law, because the rule authorizes manufacturers to use systems that cannot always detect when certain *combinations* of two or four tires are significantly underinflated at the same time. See Pet. Br. 25-28. In effect, petitioners argue that because of the reference in the Markey Amendment to “a tire,” it was contrary to law to permit the use of modified indirect TPMSs during the four-year phase-in.³²

It simply cannot be said that Congress’ use of the phrase “a tire” reflects the “unambiguously expressed intent of Congress” to preclude NHTSA from authorizing the use of indirect TPMSs. It is not at all clear what Congress intended by the phrase “a tire,” and NHTSA had to make reasonable judgments about what Congress was seeking. For example, the Final Rule does not require TPMSs to detect underinflation in spare tires (see 67 Fed. Reg. at 38,723), or on aftermarket wheels (see *ibid.*). Petitioners have not challenged these limits found by NHTSA to exist on the definition of “a tire” covered by the requirement. Significantly, the legislative history of the statutory provision demonstrates that Representative Markey, the sponsor, believed that indirect TPMSs would comply with his Amendment. Representative Markey used the TPMS in the 2000 Toyota Sienna as evidence that his amendment was feasible. See page 6, *supra*. *No one denies that the TPMS in that*

³² As petitioners acknowledge (at Pet. Br. 25), current and foreseeable indirect TPMSs cannot always detect when combinations of tires are underinflated.

vehicle was an indirect system. It, like all current indirect TPMSs, can detect when any one tire is underinflated, but cannot always detect when certain combinations of tires are underinflated at the same time sufficiently accurately to meet certification standards.

Given this ambiguity, the agency's choice to interpret the phrase "a tire" to authorize indirect systems is eminently reasonable. First, its main proponent believed such systems would comply.³³ Second, 80% of all current TPMSs are indirect systems, and the industry is actively engaged in extensive R&D to enhance these systems. See pages 3, 8, *supra*. To presume that Congress meant to outlaw all indirect systems merely by the use of the phrase "a tire" and without otherwise saying so is a huge stretch. Third, on a literal level indirect systems plainly *do* comply with the Markey Amendment; they notify the vehicle operator when "*a* tire" is underinflated. The statute does not specify that they must notify the driver when specific combinations of tires are underinflated. Finally, petitioners' argument that NHTSA *should* have authorized only TPMSs capable of detecting

³³ In fact, during the February 28, 2002, hearing on implementation of the TREAD Act, Representative Markey explained that NHTSA could, and should, authorize ABS-based TPMSs during the phase-in period. See *Implementation Of The Tread Act, supra*, at 44. Furthermore, Representative Markey explained that he thought that "at some point *in the future* we need to move to a system that lets you know if you're at risk if two or all of your tires are underinflated." *Ibid.* (emphasis added). But that Congress or NHTSA might "*in the future*" feel that the appropriate balance of considerations under the Safety Act precludes indirect TPMSs implies that the *Markey Amendment itself* does not require such systems now.

underinflation in any combination of tires, because such systems have safety benefits over indirect systems (see Pet. Br. 26-27), has little or no bearing on the question what the statute itself *required* the agency to do. We address below (at Part II.B) the reasons why NHTSA’s implementation choice was not arbitrary or capricious.

2. *FMVSS 138 is not premised on the conclusion that 25% underinflation is “significant,” and thus the 1-tire/30% alternative does not violate the TREAD Act.*

Petitioners do not even attempt to argue that the phrase “significantly under inflated” is unambiguous. Thus, under *Chevron*, petitioners must show that the agency’s construction of that phrase is not reasonable. Sensibly – given the level of deference given to agencies in such technical matters – petitioners also do not argue that the statutory phrase “significantly under inflated” mandates the agency to require notifications at 25% underinflation rather than at, for example, 20%, 30%, 28.6%, or 24.923% underinflation.³⁴ Rather, their statutory argument is premised entirely on a perceived internal inconsistency within the Final Rule. Petitioners apparently believe that NHTSA determined that a tire is “significantly under inflated” when it is 25% below its placard pressure, and therefore cannot lawfully allow a system that may not detect until a tire is 30% below its placard pres-

³⁴ We address petitioners’ argument that the failure to choose a 20% standard was arbitrary or capricious below, in Part II.D.

sure.

This argument demonstrates how starting from fundamentally flawed premises results in obviously incorrect conclusions. There are numerous problems here. Most obviously, *the agency never asserts in the final rule that it views 25% underinflation to be the threshold of “significant” under inflation.* “Instead of defining the term ‘significantly under-inflated,’” “the agency decided to adopt a simpler, more direct approach,” and “specif[ied] performance requirements * * * for two compliance options” in the Final Rule. See 67 Fed. Reg. at 38,724. Implicit in that decision to allow two options is a conclusion that a TPMS that is compliant with *either* of these options will satisfy the statutory requirement.³⁵ Moreover, to the extent it is necessary to find language in the Final Rule that shows the agency’s implicit interpretation of the meaning of the term “significant under inflation,”³⁶ it is clear that the agency concluded that “significant under inflation” is adequately

³⁵ That there are multiple options, providing different levels of protection, is neither abnormal nor problematic; many NHTSA Safety Standards include similar sets of options. For example, for almost 20 years FMVSS 208, which addresses “occupant safety restraints,” authorized manufacturers either to install airbags or to install alternative safety restraints. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 876-877 (2000).

³⁶ We do not believe there is any need to do so; the Final Rule was issued under the Safety Act, not under the Markey Amendment. See 67 Fed. Reg. at 38,743 (showing that the authority citation for 49 C.F.R. pt. 571 remains unchanged, and does not reference the codification of the Markey Amendment). Thus, although FMVSS 138 must (and does) *comply* with the Markey Amendment, the agency was under no obligation to define all terms within that statute.

prevented by a warning at 20 psi or 30% below the recommended placard level, whichever is higher in a given tire.³⁷

First, under *both* options authorized under the final rule, TPMSs must notify the driver when tire pressure is less than 20 psi. See 67 Fed. Reg. at 38,725-38,726. Therefore, the agency has implicitly determined that anything less than this level may be a significant level of underinflation, regardless of the recommended pressure on the tire placard. Focusing on an absolute level of tire pressure, rather than a relative reduction from placard pressure, is sensible. As the agency recognized, manufacturers have a great deal of discretion in setting placard pressure. See *id.* at 38,725. Placard pressure often “takes into consideration ride, handling, and other factors for safe vehicle operation [as well as] a certain amount of reserve load capacity.” *Ibid.* The choice of 20 psi was also logical; NHTSA recently “tested a variety of [tires] at 20 psi with 100 percent load at 75 mph for 90 minutes on a dynamometer [and] [*n*]one of the tires failed” (*id.* at 38,726 (emphasis added)), and the agency also noted that until 2001 the Tire & Rim Association’s tire-pressure tables “listed 20 psi as the minimum acceptable pressure for Standard Load P-metric tires” (*ibid.*). Thus, as NHTSA explained, notification at this level “will give drivers sufficient time to check and re-inflate their vehicles’ tires before

³⁷ Like in the NPRM (see note 21, *supra*), 20 psi is the minimum pressure needed in “P-metric—Standard Load” tires in the Final Rule; other tires have different minimum absolute pressure requirements. See 67 Fed. Reg. at 38,748.

the tires fail.” *Ibid.*

Second, NHTSA’s Final Rule reflects the implicit conclusion that any pressure level lower than 30% below placard may be significant underinflation, because the rule contains an option that allows notification at 30% underinflation. Petitioners assume that, by providing 25% and 30% options, the agency views the statute to *require* notification at 25% underinflation. This is simply absurd; plainly, the agency does not view there to be a statutory notification requirement at anything less than 30% underinflation (so long as the tire is also inflated to more than 20 psi), because the agency authorized manufacturers to implement systems certified to detect that level of underinflation.³⁸ Although there may be additional benefits to notification of 25% underinflation instead of 30% underinflation, that is a question within the agency’s discretion (reviewed under the APA’s arbitrary-or-capricious standard, and addressed in Part II.B, below). As a *statutory* matter, the agency has not found any relative decrease in tire pressure less than 30% to be “significant” if absolute pressure remains above 20 psi, and has not used the term “significant under inflation” inconsistently.

³⁸ In fact, the agency specifically explained that “when tire pressure is down to 25 percent below the placard pressure, it is not necessarily below the pressure that is needed to safely carry the weight of the vehicle.” *Id.* at 38,725.

C. The TREAD Act Does Not Preclude NHTSA From Authorizing A Phase-In Of TPMS Systems.

Petitioners' third statutory argument is that NHTSA violated the Markey Amendment by authorizing a phase-in period during which manufacturers would be required to install TPMSs in some, but not all, of their vehicles. Petitioners stress that the Markey Amendment requires NHTSA to "complete a rulemaking for a regulation to require" TPMSs by November 1, 2001, and that "[s]uch a requirement shall become effective not later than 2 years after the date of the completion of such rulemaking" – that is, by November 1, 2003. According to petitioners, this later provision unambiguously means that all new vehicles manufactured after November 1, 2003, must have TPMSs, and therefore that NHTSA's phase-in is unlawful.

Petitioners are wrong. The statutory phrase "[s]uch a requirement shall become effective" is plainly ambiguous: what does "become effective" mean? Does the requirement become effective merely by final promulgation? See 1A N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 31.3, at 714 (6th ed. 2002) ("regulations take effect upon the occurrence of the last event required by law in the process of validation[, which] usually is publication"). Does it become effective on the "effective date" identified in the rule, which was August 5, 2002? See 67 Fed. Reg. at 38,704. Does it become effective when the regulation mandates TPMSs in *some* vehicles, or when the regulation mandates TPMSs in *all* vehicles?

NHTSA has explained that it believes that, under the Markey Amendment, “the final rule [must] take effect” by November 1, 2003 (*id.* at 38,737), but that the final rule does not need to apply to all vehicles (the agency excepted motorcycles and medium and heavy trucks from the rule; see *id.* at 38,723) and can include a phase-in of the TPMS requirement for those vehicles to which it does apply. See 67 Fed. Reg. at 38,737. Given the statutory ambiguities, NHTSA’s decision that the Markey Amendment does not preclude a phase-in is subject to deferential *Chevron* review, and is reasonable. The final TPMS rule was issued under authority of the Safety Act.³⁹ There is no prohibition in the Safety Act against phasing in the requirements of vehicle safety standards over a period of years, and NHTSA frequently has done so. Thus, recent amendments to FMVSSs 201, 208, 214, and 225 have all included phase-ins.⁴⁰

³⁹ See 67 Fed. Reg. at 38,743 (“The authority citation for part 571 continues to read as follows: Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.”).

Petitioners have not challenged NHTSA’s decision to issue a TPMS requirement as a Safety Standard rather than as, for example, a “Consumer Information Regulation” under 49 C.F.R. part 575. That decision was, in any event, reasonable. By issuing the regulation as a Safety Standard, rather than a consumer information regulation, the sale of vehicles with noncompliant systems is prohibited by law, and any noncompliant systems that were (inadvertently) sold are subject to recall. See 49 U.S.C. §§ 30118, 30120(a).

⁴⁰ See 49 C.F.R. § 571.201 S 6.1, 6.2 (2001); 49 C.F.R. § 571.208 S 14.1 (2001); 49 C.F.R. § 571.214 S 8.3 (2001); 49 C.F.R. § 571.225 S 4.1-4.4 (2001).

A vehicle safety standard can be “effective” without necessarily applying to

In fact, the D.C. Circuit specifically upheld NHTSA’s decision to phase in another safety standard, FMVSS 208 (in a case brought by Public Citizen, one of the petitioners here, among others). The court relied on two provisions of the Safety Act as providing NHTSA with authority to allow phase-ins of safety standards, notwithstanding the general presumption that a Safety Standard should take effect within a year of promulgation. First, the court noted that the Safety Act expressly authorizes NHTSA to establish an effective date of a Safety Standard that is more than a year after promulgation for “good cause.” See 49 U.S.C. § 30111(d).⁴¹ Second, the court noted that the Safety Act requires Safety Standards to be “practicable.” The court found that both of these provisions were sufficient to provide NHTSA with authority to “consider the abilities of producers to comply with the new requirement and of the public to grasp the need for the

all new motor vehicles. In fact, it is common for vehicle safety standards to become “effective” before they apply to *any* new vehicles. For example, the final rule establishing FMVSS 225 was “effective” on September 1, 1999, but the phased-in requirement for standardized lower anchorages in motor vehicles did not begin to apply until September 1, 2000. See Final Rule, 64 Fed. Reg. 10,786, 10,804, 10,814 (Mar. 5, 1999). Thus, the “effective date” of a standard does not necessarily govern the date on which it applies to any particular motor vehicle, nor does it affect the availability of a phase-in of a standard’s requirements.

⁴¹ *Pacific Legal* relied on the pre-recodification version of 49 U.S.C. § 30111(d), but there are no substantive differences between the two provisions. See Pub. L. 103-272 § 6(a) (1994) (codified as amended at 49 U.S.C. § 101 note) (recodification “restate[s], without substantive change, laws enacted before July 1, 1993”).

change” and to phase in a standard when those considerations support a phase-in. See *Pac. Legal Fdn. v. Dept. of Transp.*, 593 F.2d 1338, 1348 (D.C. Cir. 1979). Petitioners’ assertion that *Pacific Legal* “is inapposite” has no basis. The practicability requirement and “good cause” provision apply to *all* safety standards. In particular, those provisions apply to the TPMS safety standard promulgated in this final rule, FMVSS 138.

That the TREAD Act does not explicitly specify a phase-in for the TPMS requirements does not deprive the agency of authority to allow a phase-in. The absence of a detailed phase-in directive simply means that the agency retains its overarching flexibility to design a safety standard, and more particularly a phase-in schedule, that will comply with the agency’s basic mandate that Safety Standards “be practicable, meet the need for motor vehicle safety, and be stated in objective terms.” 49 U.S.C. § 30111(a).⁴² To find otherwise, this Court would have to presume that the “practicability” and “good cause” provisions of section 30111 were implicitly repealed in this context, but it is a commonplace that repeals by implication are disfavored. See, e.g., *Hagen v. Utah*, 510 U.S. 399 (1994); *United States v. Fausto*, 484 U.S. 439, 452 (1988). Here, the only evidence of congressional in-

⁴² *Natural Resources Defense Council v. Reilly*, 983 F.2d 259 (D.C. Cir. 1993), cited by petitioners, is not to the contrary. In that case, Congress specified *both* an effective date *and* a phase-in schedule. See *id.* at 264 n.8. Here, by contrast, Congress left the details of whether and how to institute a phase-in to the agency.

tent is a statement made by the sponsor of the provision, Congressman Markey, at the February 28, 2002 oversight hearing on the TREAD Act that is cited in the Final Rule. See page 13, *supra*; 67 Fed. Reg. at 38,723. His remarks clearly indicate that Congress knew the agency *could and would* phase in the TPMS requirement.⁴³ As we discuss below (see Part II.C, *infra*), the docket is replete with evidence that, as a practical matter, the agency had no choice but to phase in the TPMS requirement. That evidence showed that suppliers of TPMS technology could not support 100% implementation by November 1, 2003, given the need for platform-by-platform validation of systems, and that redesigning all vehicles to accommodate TPMSs (including redesigning the instrument panels to accommodate the display) was not feasible in such a short time period. That good cause existed to authorize the phase-in is manifest.

* * * * *

In sum, petitioners' attempt to avoid arbitrary-and-capricious review is futile. Their statutory arguments are waived, and furthermore have no basis.

⁴³ At the hearing, Representative Markey acknowledged without question NHTSA's authority to have "a transition" (see *Implementation Of The Tread Act, supra*, at 44), as did Representative Stearns, who stressed only that NHTSA should not allow the phase-in to be too lengthy (see *id.* at 28-29).

II. THE RULE EMBODIES NHTSA'S REASONABLE DISCRETION-ARY CHOICES, AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

Petitioner's remaining claims arise under the Administrative Procedure Act. This court "uphold[s] an order of an administrative agency * * * unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). "[T]he scope of judicial review under this standard is narrow and deferential." *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996). Although "a reviewing court must be certain that an agency has considered all the important aspects of an issue and articulated a satisfactory explanation for its action, * * * a review court *cannot substitute its judgment for that of the agency*, particularly when that determination is propelled by the agency's scientific expertise." *Id.* (emphasis added; citations and internal quotation marks omitted). Thus, this Court's review must be "extremely deferential" (*United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 379 (2d. Cir. 2001)) to the agency's final rule.

Although petitioners divide their arbitrary-and-capricious argument into two headings with four sub-parts, the argument has only one overarching focus: petitioners believe the Final Rule is arbitrary and capricious because NHTSA chose to promulgate a rule that allows manufacturers the option of installing indirect TPMSs in vehicles during the three-year phase-in period. See, e.g., Pet. Br. 33,

38, 41-42, 48. However, NHTSA's reasoned choice to authorize indirect systems during the phase-in was an appropriate balance of competing factors. Petitioners' argument to the contrary is legally flawed, and is based on a singularly one-sided presentation of the evidence before the agency.

A. NHTSA Was Under No Obligation To Require Manufacturers To Install The Most Sensitive TPMSs In All Vehicles.

The major fallacy underlying petitioners' argument is that because direct TPMSs can detect a smaller degree of underinflation than current indirect TPMSs, and can detect underinflation in a wider array of circumstances than indirect TPMSs, the agency was required to mandate direct TPMSs in all vehicles. The problem with this assumption is that NHTSA was under no obligation to require manufacturers to use only the most sensitive TPMSs. Rather, NHTSA's duty was, as always, to issue a Safety Standard that would "be practicable, meet the need for motor vehicle safety, and be stated in objective terms" (49 U.S.C. § 30111(a)), taking into account "available motor vehicle safety information" (*id.* § 30111(b)(1)) and "whether [the] proposed standard is reasonable, practicable, and appropriate" (*id.* § 30111(b)(3)). See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33-34 (1983) (hereinafter "*State Farm*").

Had NHTSA required direct TPMSs during the short-term merely because they are slightly more sensitive than indirect TPMSs – without considering the other advantages and disadvantages of both types of TPMSs, including cost, ease

of implementation, and flexibility to innovate – NHTSA would have violated the Safety Act. It has long been established that “[t]he Safety Act does not require [NHTSA] to adopt the technological alternative providing the greatest degree of safety. The Act expressly permits the Secretary to consider such factors as reasonableness and practicality in addition to safety features.” *Pub. Citizen v. Steed*, 851 F.2d 444, 449-450 (D.C. Cir. 1988) (quoting *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 486-487 n.23 (D.C. Cir. 1986)); *Simms v. NHTSA*, 45 F.3d 999, 1005, 1008 (6th Cir. 1995). The Supreme Court has explicitly held that NHTSA “is correct to look at the costs as well as the benefits” in promulgating Safety Standards. See *State Farm*, 463 U.S. at 54. And the D.C. Circuit has acknowledged that feasibility and adequate lead time are also relevant factors. See *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1343 (D.C. Cir. 1985) (“The Safety Act’s mandate is not * * * categorical. Not all risks of accident or injury are to be eliminated, but only those that are ‘unreasonable,’ and safety standards cannot be imposed unless they are ‘practicable.’ This qualifying language was added to ensure that NHTSA would ‘consider reasonableness of cost, feasibility and adequate lead time.’) (citing Safety Act; S. REP. NO. 89-1301, at 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2709)).

Once one leaves petitioners’ fictive realm of extreme safety and examines *all* of the factors relevant to the agency’s decision in the Final Rule, it is evident

that the agency had to, and did, balance many technical and feasibility issues. Therefore, this is precisely the sort of case that justifies the rule that courts must not substitute their judgment for that of expert agencies, and in particular must not do so when the agency's "determination is propelled by the agency's scientific expertise." *Henley*, 77 F.3d at 620.⁴⁴

B. NHTSA's Decision To Allow Manufacturers To Install Indirect TPMSs During The Phase In Was Reasonable, And Was Adequately Explained.

As petitioners elaborate at length (see Pet. Br. 33-37) direct TPMSs are somewhat more accurate than indirect TPMSs. Indeed, NHTSA recognized as much (see 67 Fed. Reg. at 38,716), as did the Alliance (see Dkt. No. 137, App. A at 3 [JA-184]). But this fact by itself in no way renders NHTSA's decision arbitrary or capricious. NHTSA was under no statutory obligation to mandate direct TPMSs. See Part I.B.1, *supra*. Thus, the relevant question is whether the agency's balancing of several factors – *including, but not limited to, system accuracy* – was so unreasonable as to warrant this Court's intervention. The agency reasonably explained that a number of significant factors militated in favor of a rule permitting indirect TPMSs during the phase-in period.⁴⁵

⁴⁴ Note that OMB, while questioning certain *post-phase-in* portions of the NHTSA's proposed final rule, did not question any aspect of the rule challenged by petitioners in this litigation. See 67 Fed. Reg. at 38,712; pages 12-13, *supra*.

⁴⁵ Beyond reiterating petitioners' dislike for indirect TPMSs, and for the man-

1. As NHTSA stressed, by not mandating that manufacturers use direct TPMSs during the phase-in period NHTSA “provid[ed] [manufacturers] additional time and flexibility for innovation and technological development.” 67 Fed. Reg. at 38,717; see also *id.* at 38,725. All TPMSs involve “relatively new” technologies. *Id.* at 38,738; see also page 8, *supra*. Thus, manufacturers are actively engaged in improving and perfecting them. For example, the agency was presented with unchallenged evidence demonstrating that the next-generation indirect TPMSs currently being developed will be able to detect underinflation in significantly more situations than current indirect systems, but at approximately the same cost.⁴⁶ Similarly, NHTSA learned through the rulemaking that hybrid systems based on indirect TPMSs are under development, and may approach the detection ability of direct TPMSs at a significantly lower cost than direct TPMSs.⁴⁷ Both of these promising developments would have been nipped in the bud had the agency issued a rule requiring vehicles to use direct TPMSs during the phase-in, because manufacturers would have needed to focus their attention on direct TPMSs in order

ner in which NHTSA balanced the relevant factors, petitioners’ attack on the agency’s explanation for its rule (Pet Br. 40-47) adds almost nothing to their more-general attack on the Final Rule (Pet. Br. 32-38).

⁴⁶ See 67 Fed. Reg. at 38,725.

⁴⁷ NHTSA estimates that a hybrid system that would meet the 4-tire/25% standard would cost \$39.90 (plus \$20.45 in maintenance costs), compared to \$70.35 (plus \$40.91 in maintenance costs) for a direct system meeting the same standard. See 67 Fed. Reg. at 38,740-38,741.

to comply with the Safety Standard, and stopped investing in the indirect TPMS technology.⁴⁸

2. Allowing indirect TPMSs during the phase-in period is also justified, as the agency explained, to ease the implementation of a TPMS standard. Eighty percent of the TPMSs that manufacturers have included as original equipment to date have been indirect systems. See page 3, *supra*. A rule setting a standard that currently could only be met by direct TPMSs would have required that manufacturers design TPMSs not only for vehicles that currently lack such systems, but also for those vehicles that *do* already utilize indirect TPMSs. See, *e.g.*, Dkt. No. 131, at 3 (BMW Comments) [JA-170]. Given the time and money that will need to be devoted to redesigning vehicles to include TPMSs (see pages 14-15, *supra*), the agency reasonably concluded that, *even if* direct TPMSs should be required after the phase-in period, in the short run the agency should authorize the use of indirect TPMSs as well (see 67 Fed. Reg. at 38,706, 37,738), which could be modified easily to comply with the second option.⁴⁹

⁴⁸ The agency also learned that many current *direct* TPMSs would need to be modified to meet the 4-tire/25% option, (see Dkt. No. 29, at 57-66 (NHTSA, *An Evaluation of Existing Tire Pressure Monitoring Systems* (July 2001)) [JA-74-83] (detailing performance of current direct TPMSs)) although it determined that these modification might be achievable at no cost. Dkt. No. 57, at VI-8 (NHTSA, *Preliminary Economic Assessment* (July 2001)) [JA-112]. But see 67 Fed. Reg. at 38,711 (discussing reliability issues with current sensors).

⁴⁹ Petitioners' challenge to NHTSA's authority to ease implementation prob-

3. Indirect TPMSs are also significantly less expensive than direct TPMSs. NHTSA estimates that, on vehicles with standard ABS brakes, an indirect TPMS will cost \$13.29. See *id.* at 38,740. By contrast, adding a direct TPMS to such a vehicle will cost \$70.35 (*ibid.*), and will require estimated maintenance costs of \$40.91 (*id.* at 38,741), for a total system cost of \$111.26 per vehicle.⁵⁰ Furthermore, direct TPMSs would not only be significantly more expensive than indirect TPMSs; as can be seen from the agency’s “Final Economic Assessment” (see Dkt. No. 216, at IX-2 [JA-326]), they would also be significantly more expensive than most other recent Safety Standards.

Petitioners’ reliance on *Whitman v. American Trucking Ass’n*s, 531 U.S. 457 (2001), to challenge NHTSA’s authority to consider this substantial cost differential is misplaced. As we have discussed, it is well established that costs are relevant under the Safety Act. See *State Farm*, 463 U.S. at 54. There is no evidence

lems (see Pet. Br. 42) misses the fundamental point that the proposed Safety Standard is being issued under the Safety Act, and thus must comply with NHTSA’s overarching mandate to consider various factors, including practicability and cost. See Part II.A, *supra*.

⁵⁰ In the Final Rule NHTSA estimated the total costs of a mandatory 4-tire/25% alternative by assuming that 67% of vehicles – all those with ABS brakes – would meet that requirement through a hybrid system. See 67 Fed. Reg. at 38,740. This assumption lowered the estimated total cost of that alternative, but is only reasonable *assuming* that manufacturers can continue to use indirect TPMSs while developing such hybrid systems (as they can under the Final Rule). See pages 15-16, *supra*. Thus, petitioners’ attack on the differential cost of a 4-tire/25% rule (Pet. Br. 44) is misguided.

that Congress intended NHTSA to ignore this overarching statutory mandate in implementing the TPMS requirement. Furthermore, the statute at issue in *Whitman* – as petitioners acknowledge – “instructed EPA to set air quality standards based on *specific factors*.” See Pet. Br. 44 (emphasis added). Based on the inclusion of these statutory factors, the Supreme Court held, the agency could not look to other factors. See 531 U.S. at 465. In contrast to the Safety Act, some environmental statutes preclude consideration of technological feasibility and cost. *E.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). But the Markey Amendment does not include any factors to instruct NHTSA in setting TPMS standards. Had the Amendment specified that the TPMS standard must be set to maximize safety regardless of the cost and other concerns, petitioners’ argument might have some weight. It did not, however, and thus the agency was fully justified in balancing cost among other factors.

4. Finally, missing entirely from petitioners’ brief is any recognition that indirect TPMSs detect underinflation in most circumstances, and are effective at warning drivers of a wide range of underinflation problems. Thus, the agency’s analysis shows that even were *all* covered vehicles to be equipped with indirect TPMSs rather than direct TPMSs – and, as we have explained, some vehicles will use direct TPMSs under this Final Rule – “79 fatalities [would be] prevented and 5,176 injuries [would be] prevented or reduced in severity each year.” 67 Fed.

Reg. at 38,740. Although the agency estimates that more fatalities and injuries would be prevented if all vehicles were required to use direct TPMSs during the phase-in (124 fatalities and 8,722 injuries prevented; see *ibid.*),⁵¹ NHTSA was “not require[d] * * * to adopt the technological alternative providing the greatest degree of safety.” *Steed*, 851 F.2d at 449. Furthermore, the agency specifically found that TPMS systems are supplemental, and “should not replace normal tire maintenance.” 67 Fed. Reg. at 38,726.

By weighing these factors and others, NHTSA decided to authorize manufacturers to use 1-tire/30% (that is, compliant indirect) TPMSs during the three-year phase-in period. Petitioners’ single-minded focus on the alleged safety benefits of direct TPMSs over indirect TPMSs gives short shrift to the complexity of this decision. When all the factors are considered, it is obvious that the agency’s choice was neither arbitrary nor capricious.

C. NHTSA’s Phase-In Plan Is Not Arbitrary Or Capricious.

Petitioners challenge NHTSA’s phase-in as arbitrary and capricious because they believe that manufacturers could comply with the rule during the phase in “us-

⁵¹ Because we question some specific details about the way in which NHTSA estimated the safety benefits of any TPMS (see 67 Fed. Reg. at 38,711), we do not put much faith in these specific numbers. Furthermore, these figures are based largely on current-generation systems; as discussed above, manufacturers are currently developing more sensitive systems which will again change the details of these figures.

ing exclusively indirect systems” (Pet. Br. 38). This has no legal significance even were it true; as we have stressed, NHTSA was under no statutory obligation to require direct TPMSs. See Part I.B.1, *supra*. Furthermore, as we have just explained (see Part II.B), the agency’s obligation is to balance a number of factors, and its analysis of relevant factors demonstrated that authorizing manufacturers to use indirect TPMSs during the phase-in period was justified.⁵²

Moreover, there is no factual support for either the claim that manufacturers will comply solely by using indirect systems or for the related aspersion that manufacturers will be unwilling or unable to meet whatever criteria NHTSA mandates for the post-phase-in period. A number of vehicle models *already* have direct TPMSs (see pages 3-4, *supra*), and other manufacturers have announced plans to introduce such systems in the immediate future (see, *e.g.*, Dkt. No. 230, at 1 (Porsche comments) [JA-340]). Thus, approximately 38 models currently under production have direct TPMSs. See page 4, *supra*. More importantly, a number of vehicles – particularly less expensive, high-production models – are regularly sold without ABS brakes. Adding direct TPMSs to such a vehicle would be less expen-

⁵² That NHTSA had to phase in the TPMS requirement in some fashion is manifest. Given supply issues and vehicle redesign requirements it is simple fallacy to presume that either direct or indirect TPMSs could readily be added to the 16 million vehicles manufactured yearly by next November. See pages 14-15, *supra*. Thus, the agency believed that a phase in was needed (see 67 Fed. Reg. at 38,738), a conclusion that almost no one questioned.

sive than adding ABS brakes and an indirect TPMS (see 67 Fed. Reg. at 38,740), and NHTSA presumes that most manufacturers will therefore choose to install direct TPMSs in these vehicles. See *id.* at 38,708. Therefore, manufacturers will likely develop and implement direct TPMSs during the phase-in *even if* the post-phase-in rule required compliance only with a 1-tire/30% standard. See *ibid.*⁵³

Furthermore, the fact that manufacturers theoretically might be able to comply with the TPMS requirement during the phase-in solely by using indirect TPMSs does not render the Final Rule arbitrary or capricious. NHTSA has stated (*id.* at 38,722) that it may mandate a 4-tire/25% system as of November 1, 2006. As NHTSA explained in justifying the phase-in, integrating a TPMS into a vehicle can be difficult, and is most easily undertaken during a scheduled redesign. Given NHTSA's notification that it may require 4-tire/25% systems after the phase-in, many manufacturers may choose to meet that requirement earlier, during the next redesign of any given vehicle model.

D. The Choice Of A 4-Tire/25% Rule, Rather Than A 4-Tire/20% Rule, Was Neither Arbitrary Nor Capricious.

Petitioners' final argument is that NHTSA acted arbitrarily and capriciously by not instituting the 4-tire/20% option that was explored in the NPRM. This ar-

⁵³ As the agency also recognized, indirect TPMSs cannot be added to the ABS brakes in certain pickup trucks without significant modification to those brakes; absent such modification, manufacturers will need to install direct TPMSs in these vehicles to comply with any TPMS standard.

gument, based simply on petitioners' vise-like attachment to the proposition that only direct TPMSs will do, is frivolous. As we explained above (see Part II.A, *supra*), the agency's task was to consider a number of factors, including safety, cost, practicability and ease of implementation. Its choice to afford manufacturers the 1-tire/30% and 4-tire/25% options during the phase-in (the only time-period before this Court) was plainly a reasonable balance of these factors. See Part II.B. That the agency rejected an option with which only one, expensive, technology could *hope* to comply, in favor of standards with which more affordable systems could also comply, is the epitome of agency cost-benefit balancing to which courts should defer.⁵⁴

Finally, it should have gone beyond saying that the purpose of a Notice of *Proposed* Rulemaking is to explore options, rather than to create rules. Thus, petitioners' assertion that NHTSA "recogni[zed] that 20 percent underinflation is significant" (Pet. Br. 49), merely by proposing a 4-tire/20% standard in the NPRM – and therefore, that the agency was bound to implement that proposed standard – is simply absurd. It is well established that NPRMs do not bind agencies, and do not create any enforceable legal right. See *CFTC v. Schor*, 478 U.S. 833, 845 (1986)

⁵⁴ It is unclear whether even current direct TPMSs can in fact meet the 4-tire/20% standard. NHTSA's testing found that several current direct TPMSs do not warn until tire pressure is more than 30% below placard. See Dkt. No. 216, at III-10 (NHTSA, *Final Economic Assessment*) [JA-309].

(“It goes without saying that a proposed regulation does not represent an agency’s considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act to tax an agency with ‘inconsistency’ whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment.”) (citation omitted).

* * * * *

Petitioners’ dislike for NHTSA’s Final Rule ignores various factors and asks this Court to substitute its judgment for that of the agency.. NHTSA balanced performance issues, practicability, cost, and likely future improvements in TPMS technology, and based on that analysis decided to authorize a three-year phase-in of TPMSs during which manufacturers could use either direct or compliant indirect systems. That decision accords with NHTSA’s statutory mandate, and was neither arbitrary nor capricious. This Court should therefore defer to the expert agency.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review in its entirety.

Respectfully Submitted.

Erika Z. Jones
Adam Sloane
David M. Gossett
MAYER, BROWN, ROWE & MAW
1909 K Street, NW
Washington, DC 20006
tel (202) 263-3000
fax (202) 263-3300

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Counsel for Intervenor

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I hereby certify that this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 11,500 words and thus complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The change in word-count from our page-proof brief is due solely to the insertion of references to the Joint Appendix.

Erika Z. Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2002, I served copies of the foregoing Page-Proof Brief for the Intervenor in Support of Respondent by e-mail and overnight delivery on Petitioners and Respondent herein, at the following addresses:

Allison M. Zieve
Scott L. Nelson
David C. Vladeck
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009

Douglas N. Letter
H. Thomas Byron III
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
601 D Street, N.W.
Washington, D.C. 20530-0001

Erika Z. Jones
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000