

No. 02-70303

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

PUBLIC CITIZEN, INC., ET AL.

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION,

Respondent,

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

Intervenors.

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

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

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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; Ford Motor Company; General Motors Corporation; Mazda North American Operations; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc.

The Automotive Occupant Restraints Council (“AORC”) is a New York not-for-profit corporation. Its 45 member companies are engaged in the manufacture of passenger restraint systems for motor vehicles, including seat belts and air bags, and components of those systems. Originally organized in 1961 as the American Seat Belt Council, AORC adopted its present name in 1988. AORC represents the automotive restraints industry before the public, as well as before governmental and regulatory agencies. Its primary purpose, with and on behalf of its member companies, is to provide the motoring public with effective and reliable occupant

restraints and to promote the use of seat belts and public understanding of air bag restraints.

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INTRODUCTION

Respondent has systematically and comprehensively demonstrated that – but for the fact that this Court lacks jurisdiction to hear this case – petitioners’ claims would have to be dismissed as meritless. Rather than reiterate at length the basic administrative-law principles that mandate denial of the petition for review, in this brief we will mainly provide a more expansive treatment of the background of the Final Rule and of the statutory mandate that preceded it. This history helps to clarify how misleading petitioners’ brief is. When reviewed in light of this chronicle, it is manifest that the rule under review is neither contrary to law nor arbitrary or capricious.

STATEMENT OF FACTS

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

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

1 day – the day before Thanksgiving of this last year [1996] – this was the headline in Boise, Idaho – “*Air bag kills baby girl.*” The accompanying story reports that 1-year-old Alexandra Greer was in the front passenger seat of a car involved in a minor accident, a fender bender. The accident caused the passenger-side air bag to deploy so forcefully that little Alexandra was decapitated.

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

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

Ibid. (emphasis added).

It was the potential for deadly harm caused **by** air bags, particularly to children and small-statured women, that captured the Committee’s attention. For example, Senator Frist explained that “[a]lthough air bags – and there is no question – save lives, they are not a panacea. * * * Designed for the average driver, these devices pose an unacceptable risk to drivers who are smaller than average. That of course includes, and especially, children.” *Id.* at 9. As Senator Frist explained – quoting a friend whose 5-year-old daughter was killed by an air bag – “[e]ven one child killed by an item specifically marketed as a safety feature is a horrible waste of life.” *Ibid.* Chairman McCain echoed the same concerns. “In

recent months, reports have multiplied that air bags, auto safety devices which deploy with tremendous speed and force during an accident, can pose a serious risk to children and to small stature drivers, particularly those who sit very close to the steering wheel, and occupants who are not properly restrained by a seat belt.” *Id.* at 1. See also, *e.g.*, *id.* at 65 (Statement of Sen. Snowe) (“we designed a system that was not safe for everybody”).

Of course, not only Senators were disturbed by deaths like Alexandra’s. Every witness at the hearing – including Dr. Ricardo Martinez, the Administrator of the National Highway Traffic Safety Administration (“NHTSA”) (*id.* at 22), and Jim Hall, the Chairman of the National Transportation Safety Board (“NTSB”) (*id.* at 43) – shared the Committee’s concerns about air bag-related fatalities. Witnesses also addressed the background, the complexity, and some of the causes of these deaths.

Dr. Martinez summarized the problem well. He first stressed the advantages of air bags. As Dr. Martinez explained, “[m]otor vehicle injuries are the leading cause of all deaths under age 44.” *Id.* at 22. “[A]ir bags do a great job for the crash events in which they were designed – the frontal crashes that account for almost two-thirds of occupant fatalities. In those crashes, [NHTSA’s] data show that [air bags] reduce the chances of fatal injuries for unbelted occupants by more than one-third, and for belted occupants by 20 percent.” *Ibid.* According to NHTSA’s

estimates, Dr. Martinez testified, when all vehicles on the road are equipped with air bags “more than 3,000 people per year will be saved.” *Ibid.*¹

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

¹ By the time NHTSA published its 2000 Final Rule its estimate of the benefits of air bags had changed slightly – 3,200 lives saved per year (65 Fed. Reg. 30,680, 30,681 (May 12, 2000)) – but the general principles remained the same.

Other witnesses expanded on Dr. Martinez' explanation of the problem of air bag safety. In particular, Andrew Card, the president of the American Automobile Manufacturers Association ("AAMA") – a now-defunct organization whose membership comprised a portion of the membership of intervenor the Alliance of Automobile Manufacturers ("Alliance") – explained Senator Kempthorne's allusion to the fact that *NHTSA's own regulations* had helped to exacerbate the risks of air bags.

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

Id. at 80-81.

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

2. Although the January 1997 hearing was the first time that Congress had devoted significant attention to the risks of air bags, the subject had received intense public scrutiny for much of the prior year. A search of Lexis-Nexis finds at least 324 newspaper stories during 1996 that focused on how air bags could potentially harm children;² Jayne O'Donnell, a reporter for *USA Today*, alone wrote 43 stories touching on the subject that year.³ For example, the July 8, 1996 issue of *USA Today* included four related stories. The lead article in section B that day, entitled "*Deadly air bags: How a government prescription for safety became a threat to children*," discussed the matter thoroughly.⁴ But it was surely the linked story, "*Twenty-two children: The sad tally of a fatal flaw*" – which included photographs of six children killed by air bags – that most affected readers.⁵

By the time of the 1997 hearing, NHTSA also was well aware of the problem. See Final Rule, 65 Fed. Reg. 30,680, 30,741-30,742 (May 12, 2000); Resp.

² This number was generated by a search within the LEXIS-NEXIS "ALLNWS" file using the following criteria: "headline ((("air bag" or airbag) and (child! or kid or infant or baby)) and date(geq (1/1/96) and leq (12/31/96))."

³ This number was generated by a search within the LEXIS-NEXIS "USATDY" file using the following criteria: "byline (o'donnell) and ("air bag" or airbag) and (child! or kid or infant or baby) and date(geq (1/1/96) and leq (12/31/96))."

⁴ See James R. Healey & Jayne O'Donnell, *Deadly air bags: How a government prescription for safety became a threat to children*, USA TODAY, July 8, 1996, at 1B.

⁵ See Jayne O'Donnell, *Twenty-two children: The sad tally of a fatal flaw*, USA TODAY, July 8, 1996, at 2B.

Br., at 7-8. Thus, in early 1995 NHTSA promulgated a short-term rule to allow manual air bag deactivation devices in vehicles where a rear-facing infant seat could be placed only in the front passenger seat (such as many sports cars). As Dr. Martinez later explained, in late 1995 the agency also “embarked on a massive public education campaign” to bring the message that “[a]ir bags can be dangerous; everyone should be properly buckled up; children should sit in back * * * to the American public in a host of ways. In November 1995 [NHTSA] issued a press release highlighting the problem and solution. [Dr. Martinez then] sent a letter to over 200 groups asking their help in spreading the word.” *Airbags, Car Seats, and Child Safety: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Apr. 28, 1997)* (statement of Dr. Martinez, at 6); see also 65 Fed. Reg. at 30,742. In 1996 NHTSA changed the warning labels it required manufacturers to place in new motor vehicles to emphasize the importance of placing children in the back seat of those vehicles (see 65 Fed. Reg. at 30,742) – a rule that Dr. Martinez stressed was issued “in literally record time.” *Air Bag Hearing*, at 25. And just three days before the 1997 Senate hearing NHTSA extended for several more years the expiration date of the temporary provision allowing manual air bag deactivation devices.

The most important change NHTSA made in response to the perceived prob-

lems with air bags and children was also proposed three days before the 1997 Senate hearing. On January 6, 1997, NHTSA issued a Notice of Proposed Rulemaking (“NPRM”) to allow manufacturers to depower their air bags, thereby lessening the risk that future air bags would pose to children and small-statured adults. See Notice of Proposed Rulemaking, 62 Fed. Reg. 807 (Jan. 6, 1997). The final rule implementing that NPRM was released barely three months later. See Final Rule, 62 Fed. Reg. 12,960 (Mar. 19, 1997) (Petitioners’ Excerpts of Record (“ER”) Tab 1); Resp. Br., at 8.

3. To understand the 1997 depowering rule, one must first understand the preexisting testing regime. Federal Motor Vehicle Safety Standard No. 208, which covers the “occupant crash protection” of motor vehicles, contains the Federal Government’s regulations applicable to air bags. This regulation was first promulgated in 1967, at which point it merely required manufacturers to install seat belts in all new motor vehicles. See Order, 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). The agency first considered mandating air bags in 1969 (see Advanced Notice of Proposed Rulemaking, 34 Fed. Reg. 11,148 (July 1, 1969), but a requirement that manufacturers provide *any* form of passive restraint system – either an air bag or an automatic seat belt – only went into effect for Model Year 1987. See 65 Fed. Reg. at 30,741. The automatic seat belt option was deleted, in favor of an all-air bag mandate, in Standard No. 208 only after Congress ordered the agency to

do so, in 1991 (see 49 U.S.C. § 30,127(b)); the implementing rule was issued on September 2, 1993, and required manufacturers to phase in air bags such that all new passenger cars would include them by Model Year 1998 and all new light trucks would include them by Model Year 1999. See Final Rule, 58 Fed. Reg. 46,551, 46,553 (Sept. 2, 1993); 65 Fed. Reg. at 30,741.

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

By early 1997 it was clear that these tests – and in particular the *unbelted* test – although intended to ensure that air bags provided adequate protection in a crash, were a significant part of the problem. In order to protect an unbelted 50th-percentile male dummy in an accident an air bag must be quite large and its inflator must be very powerful so that the air bag inflates extremely rapidly; otherwise, it will fail to cushion the dummy, who will experience excessive trauma during his “second collision” with the vehicle interior or windshield. But an air bag that inflates with sufficient force to restrain this unbelted 50th percentile male dummy

in a 30 mph accident is so powerful that in certain circumstances it could prove fatal to smaller passengers. See pages 4-5, *supra*.

The depowering rule was NHTSA's *interim* solution to this problem. In order to allow manufacturers rapidly to install air bags that would inflate with somewhat less force, the agency authorized manufacturers to "certify[] the air bag performance of their vehicles with an unbelted dummy in a sled test * * * instead of in [the 30-mph] vehicle-to-barrier crash test." 65 Fed. Reg. at 30,741.⁶ Manufacturers still had to crash-test their vehicles in 30 mph crash tests using *belted* dummies. After the March 1997 modification, however, manufacturers could substitute this "30 mph sled test," which approximated a 22 mph crash test (see *id.* at 30,689) for the 30 mph *unbelted* crash test. This alteration allowed manufacturers to install somewhat less powerful air bags, which posed a significantly lower risk to children and small-stature adults. NHTSA included a "sunset provision" in the depowering rule, such that for vehicles manufactured after September 1, 2001, manufacturers would have to meet the original 30 mph unbelted test rather than the 30 mph sled test. The agency emphasized that the sled test was necessary to "maintain the public acceptability of air bags." 62 Fed. Reg. at 12,970.

⁶ "In sled tests, no crash takes place. The vehicle is placed on a sled-on-rails, and instrumented test dummies are placed in the vehicle. The sled and vehicle are accelerated very rapidly backward by means of a generic acceleration pulse. As the vehicle moves backward, the dummies move forward inside the vehicle in much the same way that people would in a frontal crash." 65 Fed. Reg. at 30,738.

4. Shortly after NHTSA released the depowering rule, the House of Representatives entered the fray; between April 1997 and November 1997 the Subcommittee on Telecommunications, Trade, and Consumer Protection held three separate hearings at which air bag safety was discussed.⁷ As these hearings postdated NHTSA's depowering rule, that rule was itself the subject of some discussion. More generally, the hearings focused on the question of what the next steps should be.

Two main themes were evident at these hearings. First, many witnesses and committee members addressed the problem that, under the preexisting rule, air bags were required to be designed to protect adult passengers who chose not to wear their seat belts, which necessarily increased the risk of air bag injuries faced by infants and children. For example, General Motors Corporation's representative, Bob Lange, stressed that "the occupant protection rule [should be revised] to focus on protection for belted occupants while minimizing the risks to children and small adults, and still providing reasonable protection to unbelted occupants." *Air-*

⁷ See *Airbags, Car Seats, and Child Safety: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Apr. 28, 1997)*; *Reauthorization of the National Highway Traffic Safety Administration: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (May 22, 1997) (Serial No 105-30)*; *Markup of H.R. 2691, National Highway Traffic Safety Administration Reauthorization Act of 1997: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Oct. 29, 1997) (Serial No 105-52)*.

bags, Car Seats, and Child Safety: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Apr. 28, 1997) (statement of Bob Lange, at 11). Sam Kazman, from the Competitive Enterprise Institute, explained that

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

*Reauthorization of the National Highway Traffic Safety Administration: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. 34 (May 22, 1997) (Serial No. 105-30) (statement of Sam. Kazman) (quoting L. Lomasky, *Sudden Impact: The Collision Between The Air Bag Mandate And Ethics*, at 3 (CEI, 1997)).*

The second theme at these hearings was the need to approach future changes to air bag technology deliberately, with caution and care. As Subcommittee Chairman Billy Tauzin explained, "[m]anufacturers need time to design and produce [new advanced] equipment. We need to be cautious about any new technologies so that we do not end up in the same situation we are in today because we

have prematurely forced a new technology on the American people.” *Airbags, Car Seats, and Child Safety: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong.* (Apr. 28, 1997) (statement of Rep. Tauzin, at 5). In particular, many witnesses objected to the “sunset” provision for the sled test. Andrew Card of the AAMA, whose testimony at the Senate hearing is discussed above, appeared before the House Subcommittee at its May 22, 1997 hearing. He clarified that under the depowering rule the AAMA’s “members [were] quickly responding by installing [depowered] systems into most or all of the 1998 model year vehicles.” *Reauthorization of the National Highway Traffic Safety Administration: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong.* 12 (May 22, 1997) (Serial No 105-30) (statement of Andrew Card). But, Mr. Card explained, because of the sunset provision,

in four years the rule will automatically revert to the unbelted barrier crash test requirement developed in the early 1980s that resulted in the higher powered inflators used in today’s air bags. Not only would we be rolling back from the safety enhancement associated with depowered bags, but we also would be potentially limiting technologies that could be used in developing next generation restraint technologies. We see depowering of air bags not as an interim measure, but rather as a first step in the direction of advanced technology systems. And their use effectively would be precluded if this sunset provision is not eliminated.

Ibid. See also *Airbags, Car Seats, and Child Safety: Hearing before the House*

Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce, 105th Cong. (Apr. 28, 1997) (statement of Chrysler Corp., at 9-10); *id.* (statement of Ford Motor Company, at 5).

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

The Committee has consistently emphasized the importance of seat belts to the safety of motor vehicle occupants. The Committee was concerned that, in an effort to maximize protection for unrestrained occupants, the current standard had the unintentional effect of increasing the risk to occupants who took the affirmative step of wearing a seat belt. This is not an acceptable trade-off. Therefore, the Committee has included language directing the Secretary of Transportation (the Secretary) to maximize protection of unbelted occupants only to the extent that such protection would not substantially increase the risk of injury to belted occupants.

H.R. REP. NO. 105-477, at 7.⁸

⁸ A few witnesses questioned this measure. The Deputy Administrator of NHTSA objected to the provision because of its potential effects on children; he acknowledged that on the surface the requirement was sensible, but stressed that

5. The Senate also drafted legislation to mandate that NHTSA focus on protecting belted occupants. Senate Bill 1173, The “Intermodal Surface Transportation Efficiency Act of 1997,” would have forbidden NHTSA to require *any* unbelted testing. See S. 1173, 105th Cong., 1st Sess. § 1407 (1997). The Senate Report stressed that the then-existing “Section 4.1.2.1 [of Standard No. 208] requires that all air bags must be designed to deploy at a force great enough to protect an average sized male not wearing his seat belt. The current standard protects adults who deliberately choose not to obey seat belt laws while it jeopardizes the lives of children, and small statured adults. This is an unacceptable policy choice.” S. REP. NO. 105-95, at 45 (1997).

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

By early 1998, a consensus existed in both houses to order NHTSA to improve air bag safety. Although the final bill differed from those that had been under consideration in both the House and the Senate, it grew out of these predecessor bills; both H.R. 2691 and S. 1173 were still pending when the “Transportation

many of the infants and children who had been fatally injured by air bags had either not been wearing seat belts or had been improperly restrained. See *Markup of H.R. 2691, National Highway Traffic Safety Administration Reauthorization Act of 1997: Hearing before the House Subcomm. on Telecommunications, Trade, and Consumer Protection, Comm. on Commerce*, 105th Cong. (Oct. 29, 1997) (Serial No 105-52) (statement of Philip Recht, at 5). Joan Claybrook, the president of petitioner Public Citizen, also objected, arguing that it would make “improperly restrained or out-of position occupants * * * second class citizens when it comes to safety.” *Id.* (statement of Joan Claybrook, at 5).

Equity Act for the 21st Century” (referred to as “TEA-21”) reached the floor of Congress, and large portions of H.R. 2691 were inserted into it during the Conference Committee’s consideration of TEA-21. See H.R. CONF. REP. NO. 105-550, at 520 (1998), *reprinted in* 1998 U.S.C.C.A.N. 70, 195. In particular, the conferees included a provision to address air bag safety.

TEA-21 directed the Secretary of Transportation to “issue a notice of proposed rulemaking to improve occupant protection for occupants of different sizes, belted and unbelted, under Federal Motor Vehicle Safety Standard No. 208, while minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags, by means that include advanced air bags.” Pub. L. No. 105-178, § 7103(a)(1), 112 Stat. 466 (1998). The statute broadly provided that the resulting “final rule” should be “any provision the Secretary deems appropriate, consistent with paragraph (1) [of § 7103(a)] and the requirements of [the Safety Act, 49 U.S.C. § 30,111].” *Id.* § 7103(a)(2), 112 Stat. 466. It set forth a schedule for the rulemaking and for the applicability of the resultant rule, and also specifically blocked the “sunset” provision of NHTSA’s depowering rule; NHTSA was ordered to continue to allow manufacturers to certify air bags using the sled test – included as S13 of the version of Standard No. 208 then in force – “unless and until changed by the [new] rule required by this subsection.” *Id.* § 7103(a)(4), 112 Stat. 466.

Unlike the other bills that had been considered prior to its enactment, TEA-21 did not mandate that NHTSA ignore the safety of unbelted passengers *altogether* – as S. 1173 would have done. Nor did it order NHTSA to address the safety of unbelted passengers only “to the extent that doing so does not substantially increase the risk of injury to properly restrained and positioned occupants” – as H.R. 2691 would have done. Instead, TEA-21 mandated that NHTSA pursue two distinct goals: “to improve occupant protection for occupants of different sizes, belted and unbelted,” while at the same time “minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags.” But TEA-21’s predecessor bills, and the hearings both Houses held during 1997 that led to those bills, nonetheless formed the background of the final statute. Thus, the only concern that the TEA-21 Conference Committee raised in its Report with regards to the air bag rulemaking was that “air bags do not substitute for lap and shoulder belts and all occupants should always wear lap and shoulder belts regardless of whether there is an inflatable restraint in the vehicle.” H.R. CONF. REP. NO. 105-550, at 521, *reprinted in* 1998 U.S.C.C.A.N. at 196.

C. NHTSA’s Resultant Air Bag Rulemaking.

Pursuant to TEA-21, NHTSA issued a Notice of Proposed Rulemaking to modify Standard No. 208 on September 18, 1998 (see 63 Fed. Reg. 49,958 (Sept. 18, 1998)); after receiving numerous comments on that NPRM, the agency issued a

Supplemental Notice of Proposed Rulemaking (“SNPRM”) a year later (see 64 Fed. Reg. 60,556 (Nov. 5, 1999)).

Both intervenors – the Alliance and the Automotive Occupant Restraints Council (“AORC”) – actively participated in the agency rulemaking. As the Alliance explained in its comments on the SNPRM,

Industry has worked with the agency for many years to alert the public about air bag-related risks and to instruct consumers on how to take advantage of a vehicle’s occupant protection performance. Over the past several years, [the Alliance’s] members have voluntarily provided letters to owners of air bag-equipped vehicles, changed information labels, developed a new generation of (“de-powered”) air bags, and provided the principal funding for the Air Bag and Seat Belt Safety Campaign. The Alliance views itself as a partner with NHTSA in improving occupant safety. Thus, [its] goals in providing * * * comments [on the SNPRM] are identical to those of the agency – to foster further developments in air bag technology, increase occupant protection, and further reduce air bag deployment-related risks.

Respondent’s Supplemental Excerpts of Record (“SER”) 97. Similarly, AORC explained that it and its members were “dedicated to automotive occupant safety through providing the highest quality restraint components and systems to the automobile industry and working with and supporting the National Highway Traffic Safety Administration on issues affecting occupant safety.” AORC Comment, Docket No. 1999-6407-116, at 1.

Respondent has provided this Court a detailed history of the air bag rulemaking. See Resp. Br., at 9-14; see also Pet. Br., at 12-21. Rather than reiterate that entire history, we focus on two critical aspects of it and of the resultant Final Rule. First, the new rule is vastly more complex, and significantly more protective of occupant safety, than the previous rule had been. For example, where the previous rule mandated just two crash tests – the belted and unbelted tests using a 50th percentile male dummy – and 26 injury measurements, the new final rule requires manufacturers to certify that their vehicles comply with five different crash tests involving 70 injury measurements, as well as an additional set of new, complicated tests to assure compliance with the risk minimization performance requirements when an air bag deploys. Second, the only portion of this rulemaking that generated any serious controversy – and the only portion that petitioners have challenged – is one, albeit important, test condition in just one of the five crash tests ordered under the new rule.⁹ But NHTSA’s policy choice on this issue was eminently rational, and was supported by the vast majority of commenters, including not only automobile and air bag manufacturers but also a wide variety of independent safety experts.

1. Before NHTSA issued its final rule, manufacturers were required to

⁹ There was little more than technical dispute over the many other aspects of the final rule.

certify that the air bag system in any new vehicle satisfied 12 performance requirements and injury measurements (6 each for the driver and outboard front passenger) in each of two crash tests (belted and unbelted), plus one additional injury criterion for both the driver and the outboard front passenger in the sled test – for a total of 26 specific measurements. In particular, vehicle manufacturers had to certify that head, two chest, and two leg injury measurements were below specified levels for belted 50th-percentile male dummies – in both the driver’s and outboard passenger’s seats – in a 30 mph collision (head-on or up to ± 30 degrees from perpendicular) into a rigid barrier, and that the dummy remained contained in the vehicle during that crash test. They also had to certify that the same performance requirements and injury criteria, as well as neck injury measurements, were met for unbelted 50th-percentile dummies in the “sled test” discussed above. See 65 Fed. Reg. at 30,717.¹⁰ These 26 performance requirements and injury measurements are laid out in the following table:

¹⁰ Although manufacturers could have elected to certify compliance for 50th percentile male unbelted dummies in the old 30 mph rigid barrier test, as a practical matter most if not all vehicle models newly certified after the sled-test option was made available were certified to that new option. If a manufacturer had chosen to certify a vehicle using the 30 mph unbelted crash test, it would not have had to test for neck injury measurements. See Final Rule, 62 Fed. Reg. 12,960, 12,970 (Mar. 19, 1997).

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

* all tests use 50th percentile male dummy

Each of these 26 measurements is present in some form in the 2000 final rule, but under that new rule many new measurements are also required. Thus, the two crash tests required under the earlier rule must now be performed using both 50th percentile male dummies and 5th percentile female dummies – each in both the driver and outboard front passenger seats – and must in each instance be certified to limit neck injuries as well as head, chest, and leg injuries. A fifth crash test at a 40% offset into a “deformable barrier” with 5th percentile female dummies is also required, in order to “ensure that vehicle manufacturers upgrade their crash sensing and software systems” (*id.* at 30,708) – again in both positions and for each of the injury criteria. In addition, new risk-minimization tests are mandated under the rule, for four types of passengers: 1-year olds in rear-facing child seats in the front passenger seat, 3-year olds in the front passenger seat, 6-year olds in the front passenger seat, and 5th percentile adult female dummies in the front passenger seat. See *id.* at 30,709-30,716. For each of these four types of passengers, the manufacturer has a distinct set of risk-minimization certification

options involving either suppressing the passenger air bag or certifying that the air bag's deployment in specified circumstances meets a variety of test measurements designed to ensure that deployment is unlikely to create a risk of injury to the specified type of passenger. Thus, for example, the manufacturer can certify compliance for the 3-year old dummy by certifying either (a) that the air bag will not deploy if that dummy is present; (b) that the air bag will not deploy if that dummy is "out of position"; or (c) that the air bag's deployment when the dummy is out of position meets five performance requirements and injury criteria designed to minimize risk to the dummy.

Thus, there are 70 distinct injury measurements from 5 crash tests, and a set of complicated risk-minimization tests, under the 2000 final rule – instead of the 26 measurements from 2 crash tests that had been required under the earlier rule. (The 70 injury measurements and the set of risk-minimization tests are presented in the table on the next page.) Furthermore, although there are parallels to the 26 measurements from the earlier rule in the new rule, every one of these injury measurements under the 2000 rule is significantly more stringent in at least some manner than the equivalent criterion had been under the preceding rule, either in its own right or due to a change in test conditions. Under the new rule the head injury, neck injury, and chest deflection criteria became stricter (see *id.* at 30,717-30,718); the sled test (to test injuries to unbelted 50th percentile male dummies)

was replaced with a 25 mph rigid barrier crash test (see *id.* at 30,687-30,688); and during the second phase of the 2000 rule the 30 mph belted crash test using 50th percentile male dummies will be changed to require a 35 mph crash test (see *id.* at 30,707).

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

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

Only test at issue in this litigation:

Unbelted, 25 mph test

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

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

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

2. The question presented by petitioners in this litigation is whether the agency reasonably decided to require that the rigid barrier crash tests for unbelted dummies – injury measurements to the right of the extracted cell in the above chart – be conducted at 25 mph (as the final rule provides), or if the agency was instead legally obligated to require those tests to be conducted at 30 mph. As both petitioners and respondent have discussed (see Pet. Br., at 12-21; Resp. Br., at 10-16), the question of how to design these specific tests troubled the agency, which proposed different versions of them in the NPRM, the SNPRM, the draft of the final rule that the agency sent to the Office of Management and Budget, and the final rule. See 65 Fed. Reg. at 30,692-30,695. On the one hand, most commenters believed that there was a significant risk that, were the agency to implement a 30 mph crash test for unbelted dummies, it would heighten the risk that the next-generation air bags would pose to infants, children, and small-statured adults. On the other hand, some commenters stressed that a 30 mph crash test would require manufacturers to provide somewhat more protection for unbelted adults.

Rather than discuss all of these comments in detail, we will focus on one in particular: a letter addressing the issue that was sent to Rodney Slater, then the Secretary of Transportation, on February 16, 2000. See NHTSA-1999-6407-109, SER 152. The most remarkable thing about this letter is the breadth and importance of its signatory organizations; the letter was signed by the Chairman of the

National Transportation Safety Board, the President of the Insurance Institute for Highway Safety, the Executive Director of the American Trauma Society, the Chairman of the National Association of Governors' Highway Safety Representatives, and senior representatives of the American Automobile Association and the National Safety Council. As the joint letter explained, “[w]ith one exception, there appear[ed at that point] to be remarkable agreement among the automakers and much of the safety community that [the range of NHTSA’s proposed] amendments will enhance air bag protection, even though meeting the new requirements will not be easy or simple.” SER 152. But, the letter continued, there remained a debate over this one important issue in the rule: whether to mandate that air bags be tested using a “30 mph rigid-barrier crash test[] to assess unbelted occupant protection,” or whether performing the same test at 25 mph would be more appropriate. SER 152-153. In their letter these leading safety experts came down firmly on the side of promulgating a 25 mph test. As they explained, they “***strongly oppose[d] a mandatory return to 30 mph rigid-barrier tests with unbelted dummies at this time. There is no justification for reinstating such tests.***” *Id.* at 153 (emphasis added).

Three months later, NHTSA issued its Final Rule, which mandated the 25 mph test called for by these independent safety experts. As respondent discusses at length (see Resp. Br. at 13-16), the agency gave six distinct reasons to justify its

decision. Specifically, the agency concluded (1) that because it was critically important that advanced air bags be properly designed from the beginning – to avoid any further public outcry about air bag safety – and because of the complexity of the new rules, the agency should resolve any design uncertainty in favor of minimizing the risks of air bag-induced harm (65 Fed. Reg. at 30,687-30,688); (2) that there were unresolved issues about how manufacturers could both meet a 30 mph unbelted standard with 5th percentile females and mid-sized males *and*, at the same time, minimize air bag-induced injuries (*id.* at 30,688); (3) that, by requiring a 25 mph crash test, manufacturers would have more design flexibility to address the fact that real-world accidents can differ radically from the crash tests in Standard No. 208 (*id.* at 30,688-30,689); (4) that the 25 mph crash test would afford manufacturers more design flexibility in those vehicles with “stiff crash pulses,” where it might be very difficult to satisfy a 30 mph crash test (*id.* at 30,689); (5) that the agency did not believe manufacturers would significantly depower their air bags so as to “minimally comply” with the 25 mph test (*ibid.*); and, finally, (6) that the 25 mph test would provide a “significantly higher level of safety” than the sled test that previously was required under Standard No. 208 (*ibid.*).

SUMMARY OF ARGUMENT

The assertion that the final rule violates TEA-21, because the rule fails to “improve” occupant protection for unbelted large men, lacks any foundation what-

soever. NHTSA reasonably adopted a rule that is consistent with TEA-21's mandate to improve overall occupant protection. Under *Chevron*, this Court must defer to the agency's reasonable construction of TEA-21. Congress afforded the agency substantial discretion to balance the conflicting goals in the statute in such a way that the protection for some particular subgroups might not, in fact, be improved. But the agency did not go down that route, because the final rule *does* improve occupant protection for all subgroups, including for unbelted large men.

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

TEA-21.

ARGUMENT¹¹

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

Petitioners claim that anything less than a 30 mph unbelted crash test would not “improve” occupant protection for large unbelted males, and assert that the final regulation therefore is “contrary to law” because TEA-21 required the agency to improve occupant protection for this group of people. See Pet. Br. 36-41. There

¹¹ Intervenors agree with respondent’s argument (Resp. Br., at 20-26) that this Court lacks jurisdiction to hear this case because it was untimely filed, and in any event was filed in the wrong Circuit. Rather than repeat that argument, we merely note that there is nothing irregular or unlawful, or even unseemly, about the agency having established in a rulemaking what date a rule is viewed to be “issued” for purposes of judicial review. See Final Rule, 60 Fed. Reg. 63,648, 63,650 (Dec. 12, 1995) (“the time period for judicial review does not begin to run on the publication date [in the Federal Register]; rather it runs from the date the regulation, standard, or decision on reconsideration is ‘issued’ or ‘promulgated’ by the agency.”). In fact, the D.C. Circuit has repeatedly urged agencies to interpret the judicial review provisions in their statutes – by rulemaking or other publicly available references – to explain to the regulated industry and interested persons how to compute the relevant dates for judicial review periods under those agencies’ statutes. If an agency’s interpretation is clear and reasonable, the court has deferred to it. See, e.g., *Adams Telecomm., Inc. v. F.C.C.*, 997 F.2d 955, 957 (D.C. Cir. 1993) (“this court has encouraged administrative agencies, whenever possible, to specify – by regulation or in their notices to persons subject to agency action – the beginning of the relevant judicial review period”); *Carter/Mondale Presidential Comm., Inc. v. F.E.C.*, 711 F.2d 279, 280 (D.C. Cir. 1983) (same). Under the judicial review provision in the Safety Act, as publicly and openly interpreted by NHTSA, the petition for review in this case – filed by sophisticated and experienced participants in litigation concerning federal agency action – was filed more than 59 days after the regulation was issued and therefore is untimely.

are two obvious flaws with this argument: it is factually inaccurate and legally incorrect.

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

Here, the statute in question is silent about whether NHTSA should require manufacturers to crash-test vehicles containing unbelted 50th percentile male dummies into a rigid barrier at 25 mph, or instead at 30 mph. Rather, the statute merely instructs the agency to “improve occupant protection” while at the same time “minimizing the risk” that air bags pose. Thus, the legal question is whether the agency’s view that TEA-21 did not require the unbelted crash test to be conducted at 30 mph is based on a reasonable construction of the statute. There are at least three distinct reasons why it is: First, the agency could legitimately interpret the statute not to require the agency to conduct a subgroup-by-subgroup analysis of

occupant safety, but instead merely to ensure an *overall* increase in occupant safety. Second, given TEA-21's conflicting goals the agency reasonably could have concluded that even if a subpopulation-by-subpopulation analysis were appropriate the statute did not require there to be an increase in safety for each and every possible subpopulation of vehicle occupants. Finally, even if the agency were to have interpreted the statute as petitioners would interpret it – that is, that the final rule needed to mandate an improvement of occupant safety in all subpopulations, including unbelted large males – as a factual matter the rule NHTSA adopted requires just that.

1. Petitioners' argument is based on an analysis that focuses on the effects of NHTSA's final rule on discrete occupant subpopulations, rather than on occupants viewed collectively. However, there is no clear requirement in TEA-21 that the agency undertake such a subpopulation-by-subpopulation analysis of improvements in occupant protection. Rather, the statute requires NHTSA's revised Standard No. 208 to "improve occupant protection for occupants of different sizes, belted and unbelted." Pub. L. No. 105-178, § 7103(a)(1), 112 Stat. 466. This statutory mandate can reasonably be interpreted merely to require the agency to ensure an improvement in *overall* occupant protection, taking into account the various types of vehicle occupants; it does not require a monocular focus on safety improvements for 50th percentile unbelted males, 97th percentile belted females;

8th percentile belted males, 6.2 year old unbelted children, or any other specific subtype of vehicle occupant. It is indisputable that the final rule will significantly increase *overall* occupant protection compared to the version of Standard No. 208 in effect when Congress enacted TEA-21. See 65 Fed. Reg. at 30,734-30,735.¹² But that is all that TEA-21's mandate obviously requires, and thus under *Chevron* petitioners' statutory argument must fail.

2. Even were it the case that TEA-21 should be interpreted to require the agency to look at the new final rule's effects on individual subpopulations, and even if the agency had decided to provide slightly less protection to unbelted large adults (which it did not do), given the conflicting goals of TEA-21 it would have been perfectly reasonable to interpret the statute to authorize such a choice, particularly because these unbelted large adults could avoid any such increased risk entirely by simply fastening their seat belts, as they are legally required to do in every state but New Hampshire. As the agency and most commenters recognized, TEA-21 places on NHTSA somewhat conflicting missions: to increase the protectiveness of air bags but also to minimize the risks that air bags themselves can pose. See page 17, *supra*; 65 Fed. Reg. at 30,687-30,688. The Alliance elaborated on the tension between the various requirements of TEA-21 in its

¹² As we discuss below (at pages 33-35), it also increases protection for each specific subgroup, including 50th percentile unbelted males.

rulemaking comments:

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

This does not mean that a reasonable level of occupant protection cannot be offered to a broad range of front seat occupants. However, *maximum or optimal* protection cannot be provided to any specific occupant, especially those who are unbelted, without affecting protection offered to occupants of different size, age, or physical condition involved in crashes of different types and severity. The challenge for the designers of the vehicles and their components is to balance these conflicting goals in the manner that provides the most societal benefits.

SER 97-98 (emphasis in original).

Because TEA-21's statutory goals are in some tension with each other – as Congress and the participants in this rulemaking proceeding recognized – and because TEA-21 specifically requires the new Standard also to comply with the Safety Act (49 U.S.C. § 30,111) – which requires that all Safety Standards be practicable, meet the needs of motor vehicle safety, and be objective – any of a broad range of alternative methods of balancing these factors would satisfy the statute.

See Resp. Br., at 30-31.¹³ In particular, given the number of times legislators stressed to the agency how important it was that the agency prevent air bags from harming children (see pages 1-3, *supra*), NHTSA's choice to balance TEA-21's conflicting goals in a fashion that protected unbelted adult males but at the same time particularly addressed the risks air bags could pose to children and others would plainly have been a reasonable interpretation of the statute's dichotomous mandate under *Chevron*.

3. As we've just explained, *Chevron* deference is sufficient to defeat petitioners' statutory argument. However, there is no need to rely on deference here, because petitioners' argument fails by its own terms: the 2000 rule significantly improves safety even for unbelted large men when compared to the preexisting regulatory scheme, and thus cannot be said to be "contrary to law" even under petitioners' reading of the statute:

- Under the prior version of Standard No. 208, manufacturers could certify compliance for purposes of 50th percentile unbelted male dummies using a sled test equivalent to a rigid barrier crash test conducted at 22 mph; the new version requires a rigid barrier crash test conducted at 25 mph. See 65 Fed. Reg. at 30,689. Petitioners' argument (Pet. Br., at 39) that the appropriate comparison is with the 30 mph crash test that was required before 1997 is absurd; Congress *specifically ordered* the agency to continue allowing certification under the sled test until and unless the new rule modified that requirement. See

¹³ It is, of course, conceivable that NHTSA's decision could avoid running afoul of the statute, yet nevertheless be arbitrary or capricious – but as we discuss below in this case the final rule is not arbitrary or capricious.

page 16, *supra*.

- Under the prior – that is, 1997 – version of Standard No. 208, head injury criterion measurements were undertaken over a 36 millisecond time period, and each measurement – including the measurements taken during the 50th percentile male unbelted dummy crash test – had to be below 1000 on NHTSA’s scale for the manufacturer to be able to certify that a vehicle complied with Standard No. 208. The new version measures this criterion over a 15 millisecond time period, and requires the value to be less than 700. The agency noted that this new version of the head injury criterion is stricter than the prior version in certain types of crash pulses. See *id.* at 30,717.
- Under the prior version of Standard No. 208, the chest deflection limit for 50th percentile adult male dummies in any crash test was 76 mm; this injury measurement under the 2000 final rule has been reduced to 63 mm for all crash tests (including the 50th percentile male unbelted dummy crash test). See *id.* at 30,718.
- Under the prior version of Standard No. 208, manufacturers who certified their vehicles using the sled test were required to monitor and minimize neck trauma to dummies using four distinct measurements. The new version instead uses the “Nij” criterion, which is an “improvement over [the four distinct tests] because it accounts for the superposition of loads and movements, and the additive effects on injury risk.” See *id.* at 30,717-30,718.
- The 40 percent offset deformable crash test in the new rule will increase occupant safety for all front-seat occupants, including unbelted 50th percentile male dummies. (That the test is performed using 5th percentile female dummies is irrelevant to this broader benefit.) The purpose of this test is to ensure that air bags deploy sooner in an accident than under the old rule, thus increasing protection and minimizing air bag-caused injuries for all occupants. See *id.* at 30,708-30,709.

Thus, unbelted 50th percentile male dummies are ***significantly*** better protected under the final rule adopted by NHTSA than they were under the previous version of Standard No. 208. So even were it the case that the final rule would violate TEA-

21 if unbelted 50th percentile male dummies received less protection than they had received under the prior rule, NHTSA's final rule would nonetheless be valid under TEA-21. But given the fact that TEA-21 did not place an unambiguous mandate on the agency to improve occupant protection specifically for large unbelted males, petitioners' statutory claims should be dismissed as unsupportable.

II. THE FINAL RULE IS NOT ARBITRARY OR CAPRICIOUS

Petitioners' argument that the final rule is arbitrary or capricious is as baseless as their argument that the final rule violates TEA-21.¹⁴ As respondent demonstrated at length in its brief, NHTSA appropriately balanced many complex, competing factors before issuing its final rule, and in that final rule carefully explained the basis for its choices. In particular, the agency chose to focus initially on the risks of air bags, and to require manufacturers to pay special attention to reducing

¹⁴ Notably, petitioners fail to elaborate on the relevant standard of review. See Pet. Br., at 26. Under the Administrative Procedure Act, this court must uphold an order of an administrative agency unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5. U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and ***a court is not to substitute its judgment for that of the agency.***" *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 914 (9th Cir. 1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added). "This is especially [true] where * * * the challenged decision implicates substantial agency expertise." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000) (quoting *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993)); see also *Dombeck*, 222 F.3d at 556 ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving ... scientific matters.") (quoting *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989)).

those risks. See page 26, *supra*; Resp. Br., at 33-34, 36. At the same time, the agency added a host of new crash tests and injury criteria (see pages 21-23, *supra*), which will ensure that new air bags increase occupant safety for all occupants (including, as we showed above (at pages 33-35), large unbelted males). These were utterly reasonable decisions for the agency to make.

Rather than reiterate respondent's extensive rebuttal of petitioners' arbitrary-or-capricious argument – an argument based on challenging the agency's explanation for its eventual conclusion that a 25 mph unbelted crash test was the best means to balance TEA-21's competing concerns and in the best overall interests of safety – we will instead discuss two specific points that warrant further attention.

1. In the final rule NHTSA gave six separate reasons for choosing to require that unbelted crash tests be conducted at 25 mph rather than 30 mph. See pages 25-26, *supra*. Petitioner focuses on the fourth reason – that manufacturers would have particular difficulty meeting a 30 mph crash test in vehicles with a “stiff crash pulse,” such as many SUVs – and argues that NHTSA should have subdivided its rule, requiring automobiles to use a 30 mph unbelted test but allowing LTVs (the technical term for the category including SUVs, light trucks and

vans) to use a 25 mph unbelted crash test. See Pet. Br., at 55.¹⁵ The agency reasonably chose not to do this, for two reasons.

First, as NHTSA explained in response to the petition for reconsideration raising this issue (filed by two of the petitioners in this litigation (see NHTSA-2000-7013-19, at 2-3)), the agency has provided *five other reasons* in the final rule to justify its decision to mandate a 25 mph unbelted crash test. These reasons apply to vehicles whether they have a stiffer or softer crash pulse, and thus suffice to support the decision to mandate a 25 mph test even in vehicles with softer crash pulses. See Final Rule, 66 Fed. Reg. 65,376, 65,380 (Dec. 18, 2001).

Second – as NHTSA also explained in response to the petition for reconsid-

¹⁵ The agency explained what “crash pulses” are in Appendix A to the final rule:

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

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

eration – petitioners’ proposal to establish a different crash test for LTVs than for automobiles is both over- and under-inclusive, and thus unjustifiable. As noted above, the agency’s concern was that in vehicles with *stiff crash pulses* it would be especially difficult to balance competing concerns while using a 30 mph unbelted crash test. But, as the agency explained, although some LTVs have stiff crash pulses, some do not; moreover, some small cars also have stiff crash pulses. See *id.* at 65,381. Thus, a rule that mandated a 30 mph unbelted crash test for automobiles and a 25 mph unbelted crash test for *LTVs* would not address the balance of concerns for *all* vehicles with stiff crash pulses, to which NHTSA was responding. In fact, there is no generally accepted way to differentiate the group of vehicles with stiff crash pulses from those with “softer” crash pulses *ex ante*, and thus no consensus on how to define the regulatory subcategory of vehicles to which a 30 mph requirement should apply that petitioners suggest.¹⁶

2. To support their arbitrary-or-capricious argument petitioners litter their brief with aspersions on the motives of industry in this rulemaking. See, *e.g.*, Pet. Br. at 48, 50. Petitioners’ arguments ignore the fact that a broad cross-section of independent safety experts also urged NHTSA to implement a 25 mph unbelted crash test. See pages 24-25, *supra*. Moreover, there is no support for the implica-

¹⁶ Notably, the petition for reconsideration on this issue, NHTSA-2000-7013-19, *supra*, did not proffer a manner in which the agency could create appropriate subcategories.

tion that manufacturers were motivated by cost in objecting to the 30 mph unbelted crash test. As the Alliance and the Insurance Institute for Highway Safety explained to NHTSA, “the cost of technology is not the issue for this rulemaking. * * * [T]he industry is developing and implementing all of the advanced air bag technologies.” SER 146. Rather, the Alliance – and most other commenters – disputed that technology yet exists that will adequately minimize the risk of air bag-induced injuries but at the same time be consistently able to pass a 30 mph unbelted crash test. Thus, for example, Ford’s comments discussed its recent design of the advanced air bag system in the Ford Taurus. As Ford explained,

[i]f variable rate inflators as currently conceived actually allowed minimizing the risk from air bags and repowering to provide additional high speed crash protection, Ford would have so designed its “Personal Safety System” and would not object to the return of a 30 mph unbelted barrier. ***There simply would be no reason not to do so.*** The fact that we did not, and continue to object to the 30 mph barrier is based on our extensive experience in air bag system design and concern for the overall safety of our customers. To suggest that Ford would do otherwise is without basis.

SER 88 (emphasis added).

Similarly unsupported is the allegation that automobile manufacturers have any plans to depower their air bags so as minimally to comply with the final rule. As the Alliance and its members “state[d] unequivocally for the record” in a letter to the Office of Management and Budget during this rulemaking, “the assertion

that industry will reduce the high speed protection of airbags systems through widespread depowering is false, without foundation, and counter to our commitment above.” SER 160. That letter further went on “to confirm the industry’s commitment to build safe airbags to protect occupants of all sizes in low- and high-speed crashes.” *Ibid.* Automobile and occupant restraint manufacturers are actively developing the range of advanced air bag technologies (see, *e.g.*, *id.* at 146), rather than relying on preexisting equipment (which in any event could not meet the many new strictures of Standard No. 208). See 65 Fed. Reg. at 30,687, 30,700, 30,704. There is neither a cost advantage nor any other reason for manufacturers to design ineffective air bags in this process.

* * * * *

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

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction. Alternatively, if this Court reaches the merits of the petition, the petition should be denied in its entirety.

Respectfully Submitted.

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STATEMENT OF RELATED CASES

Intervenors are not aware of any cases in this Court that are related within the meaning of Ninth Circuit Rule 28-2.6.

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

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 10,775 words and thus complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2003, I served copies of the foregoing Brief for the Intervenors in Support of Respondent by e-mail and overnight delivery on Petitioners and Respondent herein, at the following addresses:

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