

**[ORAL ARGUMENT HELD FEBRUARY 16, 2007]**

**Nos. 05-1188, 05-1294, and 05-1391**

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

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PUBLIC CITIZEN, INC.,

Petitioner,

v.

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

Respondents,

ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,

Intervenor.

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**SUPPLEMENTAL BRIEF OF INTERVENOR  
IN SUPPORT OF RESPONDENTS**

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## **GLOSSARY**

Alliance	Alliance of Automobile Manufacturers, Inc.
FRIA	Final Regulatory Impact Analysis
FMVSS	Federal Motor Vehicle Safety Standard
MAP	minimum activation pressure
MIL	malfunction indicator light
NHTSA	National Highway Traffic Safety Administration
placard pressure	vehicle manufacturer's recommended cold tire inflation pressure
psi	pounds per square inch
PC	Public Citizen, Inc.
RMA	Rubber Manufacturers Association
Safety Standard	Federal Motor Vehicle Safety Standard
TPMS	tire pressure monitoring system
T&RA	Tire and Rim Association
TREAD Act	Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000)

## STATEMENT OF THE ISSUE

Whether Public Citizen's petitions should be dismissed for lack of standing.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Despite the fact that there are more than 10 million vehicles equipped with tire pressure monitoring systems ("TPMSs") on the roads in the United States, Public Citizen ("PC") has not been able to identify a single member who has suffered a tire failure in a TPMS-equipped vehicle. Nor has PC been able to identify a single member who has been inconvenienced by replacement tires that are incompatible with a TPMS.

In its June 15, 2007 decision, the Court noted that PC was basing its standing on an assertion that its members face an increased risk of harm from future accidents due to alleged inadequacies in the NHTSA standard. Slip op. 21. The Court further noted that PC's "injury-in-fact theory flouts" the Supreme Court's "settled" analysis of the requirements that an injury be "actual or imminent." *Id.* at 22-23.

Nevertheless, citing *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996), the Court stated that "this Court has not closed the door to all increased-risk-of-harm cases. We have allowed standing when there was at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." Slip op. at 25.

Because the Court concluded that the “record is incomplete” (*id.* at 27) with regard to PC’s standing, the Court directed PC to file briefs and affidavits with regard to the actual or imminent increased risk of harm and causation. *Id.* at 28. PC has failed to carry its burden both with regard to injury and causation.<sup>1</sup>

The declarations submitted by PC do not show that its members face a substantially increased risk of harm as a result of the final rule challenged here. In particular, the statistical predictions prepared by Dr. Jeffrey L. Coffey do not demonstrate substantial harm to any of PC’s members. First, his analysis contains fundamental methodological flaws that deprive it of any probative value. Second, his analysis utterly ignores numerous factors that mitigate any actual risks. Third, even his flawed analysis does not predict a “*substantially* increased” risk of imminent harm to any PC member.

Ignoring this Court’s admonition not to “string together 130,000 remote and speculative claims” (*id.* at 23-24), Dr. Coffey predicts that the rule will result in 45 more crashes annually involving PC’s members. However, PC members already face a probability of being involved in approximately 2,700 crashes per year. *See* Marais Dec. ¶ 38 n.54. Even if the prediction of 45 more crashes were valid,

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<sup>1</sup> Because the declarations submitted by PC are outside the administrative record, they should not be considered on the merits in the event that the Court does find that PC has standing. *See N.W. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997).

which it is not, a predicted increase of 45 crashes is not only *not* a “substantially increased” risk of harm, it is within the range of probability of crashes that PC members face anyway. *Id.*

PC’s legal and evidentiary presentation also is marred by significant factual errors that undermine its arguments. Thus, with regard to replacement tires, PC substantially overstates the number of tires that are likely to be incompatible with TPMSs.

With regard to the 20-minute low pressure detection period, PC all but acknowledges that it faces no imminent harm from this aspect of the rule. Current TPMS technology does not require a full 20-minute detection time, and PC has not even attempted to demonstrate that new technology is likely to be introduced that will require a 20-minute detection time.

With regard to causation, PC relies on declaration “evidence” that is completely insupportable and that fails to carry the burden imposed by the Court. The Alliance of Automobile Manufacturers, Inc. (“Alliance”), however, has presented evidence that manufacturers have exceeded the minimum requirements set forth by the TPMS rule. Finally, PC ignores the fact that its own erstwhile competitors are responsible for any risks that may arise due to the incompatibility of replacement tires with TPMSs.

## ARGUMENT

A petitioner must establish standing with regard to each of its claims. *E.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. \_\_\_, 126 S. Ct. 1854, 1867 (2006). The Court will not assume the presence of missing links in a petitioner’s showing on standing. *Am. Chemistry Council v. Dep’t of Transp.*, 468 F.3d 810, 819-820 (D.C. Cir. 2006). When the petitioner is an association or membership organization – as is PC here – it must identify at least one member who would have standing. *Id.* at 820 (“At the very least, the identity of the party suffering an injury in fact must be firmly established.”).

A petitioner must demonstrate its standing through citations to the record or affidavits. *E.g.*, *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002).<sup>2</sup> Here, notwithstanding its assertions that the Court must presume that PC will prevail on the merits (PC Supp. Br. 13, 24), it is clear that PC bears the burden of production and proof. *See Lujan*, 504 U.S. at 561; *Am Chemistry Council*, 468 F.3d at 818; *Grassroots Recycling Network, Inc. v. EPA*, 429 F.3d 1109, 1112 (D.C. Cir. 2005); *Sierra Club*, 292 F.3d at 899. Based on this Court’s prior cases, the review of PC’s assertions should be searching. *E.g.*, *Miami Bldg. & Constr.*

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<sup>2</sup> Where, as here, the petitioner “is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation marks omitted); *accord, e.g., Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).

*Trades Council v. Sec’y of Defense*, \_\_\_ F.3d \_\_\_, No. 06-5142, 2007 WL 2011745, at \*5 (D.C. Cir. July 13, 2007) (rejecting appellant’s factual contention on standing); *Am. Chemistry Council*, 468 F.3d at 816-822; *Grassroots Recycling*, 429 F.3d at 1112-13; *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1156-62 (D.C. Cir. 2005); *Freedom Republicans, Inc. v. Fed. Election Comm’n*, 13 F.3d 412, 418 (D.C. Cir. 1994) (“Upon careful review, we conclude that Freedom Republicans has not adduced sufficient evidence to demonstrate the requisite causal connection between the FEC and its asserted injury.”).

At a minimum, this Court should consider whether there are evidentiary gaps between PC’s assertions and the evidence for those assertions, and whether PC’s declarations provide competent evidence. Similarly, this Court need not passively accept expert declarations – such as Dr. Coffey’s – that are completely unreliable and inconsistent with accepted professional standards.

Despite the fact that the phase-in of TPMSs began two years ago, and that TPMSs now are used in millions of vehicles, PC has not even claimed, much less demonstrated, that a single one of its members has suffered an actual injury as a result of the TPMS regulation. In light of this, the Court has described the issues here as whether there are “*both* (i) a *substantially* increased risk of harm and (ii) a

*substantial* probability of harm with that increase taken into account.” Slip op. 25.<sup>3</sup> Thus, PC’s claims to the contrary notwithstanding (PC Supp. Br. 3-4), this is an unusual case in which if standing exists at all, it does on the basis of probabilistic harm.<sup>4</sup>

In such a case, this Court has refused to find standing when petitioners have fallen “short of establishing certainly impending dangers for any particular member of the petitioners’ associations.” *Am. Chemistry Council*, 468 F.3d at 819; *see also Lujan*, 504 U.S. at 564 n.2 (“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending.”) (internal quotation marks omitted).

In providing an opportunity for PC to attempt to prove standing on the basis of probabilistic harm, this Court recognized a tension between D.C. Circuit precedent and Supreme Court precedent. Slip op. 27. Nevertheless, the Court concluded that *Mountain States*, especially as construed in *Natural Resources Defense Council v. EPA*, 464 F.3d 1 (D.C. Cir. 2006) (“*NRDC*”), leaves the door open to standing in increased-risk-of-harm cases. Slip op. 25. *But see Ctr. for Law*

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<sup>3</sup> The Court also directed PC to establish causation, and set forth specific issues to address on that issue. Slip op. 28 n.3.

<sup>4</sup> PC’s assertion that most cases seeking prospective relief involve probabilistic injury ignores the fact that, often, the petitioner or plaintiff is the regulated entity and its injury is ongoing.

& *Educ.*, 396 F.3d at 1161 (“Outside of increased exposure to environmental harms, hypothesized ‘increased risk’ has never been deemed sufficient ‘injury.’”).

There are, however, substantial distinctions between *Mountain States* and *NRDC*, on the one hand, and this case, on the other. These distinctions undermine PC’s efforts to justify standing based on the principles identified in those two cases.

In *Mountain States*, appellants challenged a regulatory decision on lumber harvesting, principally claiming that the limits on logging imposed by the Forest Service failed to reduce fire risks adequately. *See* 92 F.3d at 1231-32, 1234. Thus, *Mountain States* involved a Government-imposed *ceiling* on risk reduction, rather than, as the Court recognized is the case here, a Government-established *baseline* or minimum safety standard (*see* slip op. 16), which can be – and is being – exceeded by the vehicle manufacturers. *See infra* at 15, 21, 24. In addition, in *Mountain States*, there was little or no dispute – and, hence, little uncertainty – about the relative levels of risk posed by the different harvesting options at issue in the case; indeed, the Government recognized the options at issue related to important risk variables, and that the differences between these options were not trivial. 92 F.3d at 1232 (plaintiffs set forth facts “each in enough (unrebutted) detail”); *id.* at 1235 (Government recognized importance of alternatives). Here, by contrast, the Government does not recognize any substantial risk posed by its

chosen approach. Moreover, there are – as we show below – ample grounds for questioning the existence and, certainly, the extent of a difference in risks between the TPMS rule and PC’s preferred alternative. In addition, the uncertainties here are compounded by the fact that, because NHTSA’s rule sets a baseline, any risks posed by the TPMS may (indeed, the Alliance’s evidence shows that they will) be mitigated by independent third-party action – that is, by manufacturers exceeding the minimal requirements. Thus, in the face of such uncertainties, *Mountain States* provides scant guidance here, except for the precedent of basing standing on probabilistic risk of some kind.

*NRDC* is similarly limited in the guidance it affords here. First, *NRDC* is an environmental risk case, and, although this Court has not definitively resolved the issue of the degree of risk necessary to establish a “substantial probability” in environmental cases, the Court has suggested that a lesser showing of increased risk is required for standing in environmental cases than in other cases. *See Va. State Corp. Comm’n v. FERC*, 468 F.3d 845, 848 (D.C. Cir. 2006) (discussing *NRDC*); *Ctr. for Law & Educ.*, 396 F.3d at 1161. Moreover, *NRDC* involved the risk of an injury – skin cancer – that the Government itself argued was not amenable to expression in “annualized terms,” but rather should be expressed “as a population’s cumulative or lifetime risk.” *NRDC*, 464 F.3d at 7 (internal quotation marks omitted). The risks here, by contrast – risks of vehicle crashes – are readily

and meaningfully expressed in annualized terms, and it makes no sense to dilute the imminence requirement by focusing, as PC and Dr. Coffey do, in lifetime terms. A vehicle crash does not have a lengthy development and latency period; the exposure to the risk and the realization of the harm – if any – will occur in close temporal proximity to one another. Moreover, in *NRDC*, the Government’s and the petitioner’s risk assessments were fairly consistent with one another, reflecting far less uncertainty than the risk assessments at issue here. *Id.* (affiant Anthony stated lifetime risk is about 1 in 200,000; EPA’s declarant placed risk at 1 in 129,000).

**I. PC HAS FAILED TO DEMONSTRATE THAT ANY OF ITS MEMBERS FACE A SUBSTANTIALLY INCREASED RISK OF HARM AS A RESULT OF ANY OF THE CHALLENGED ASPECTS OF THE TPMS FINAL RULE.**

**A. PC Has Failed To Demonstrate Injury Resulting From NHTSA’s Choice Of A Minimum Activation Pressure.**

PC’s argument that it has standing to challenge NHTSA’s selection of the Minimum Activation Pressure (“MAP”) of 25% below placard pressure (or 20 psi, whichever is higher) rests largely on the analysis of Dr. Coffey.<sup>5</sup> The Alliance

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<sup>5</sup> PC also attempts to buttress Dr. Coffey’s analysis with the declaration of Dr. Joseph V. Rodricks. Dr. Rodricks, however, merely vouches for the quality of the data on which Dr. Coffey allegedly relied, and notes that Dr. Coffey has not based his analysis on “multiple conservative assumptions.” Rodricks Dec. ¶ 12. Dr. Rodricks, however, clearly did not independently evaluate, or even carefully review, Dr. Coffey’s statistical analyses, and does not address the profound

retained Dr. Laurentius Marais, of William E. Wecker Associates, Inc., to analyze Dr. Coffey's declaration. As described below (and detailed in Dr. Marais' declaration), Dr. Coffey's declaration is rife with fundamental statistical errors.

Before turning to those issues, however, we pause to note three especially problematic aspects of PC's arguments. *First*, despite this Court's direction not to aggregate risks across its membership (slip op. 23), in several instances in its brief, PC appears to aggregate the risk assessments over the population of PC's membership. *See, e.g.*, PC Supp. Br. 9-10, 10 n.5, 14; *see also, e.g.*, Coffey Dec. ¶¶ 18, 25. *Second*, despite the fact that there is no basis for considering crashes resulting from under-inflation in terms of lifetime risk, PC (and Dr. Coffey) repeatedly do so. *See, e.g.*, PC Supp. Br. 9, 10, 14-15. For the reasons stated above (*supra* at 8-9), these assessments are irrelevant and should be disregarded. *Third*, PC asserts that the risks posed by NHTSA's regulation are higher for members who drive pickups and SUVs. As Dr. Marais shows, however, when Dr. Coffey's analysis is actually unpacked to control for types of vehicles, that analysis shows that drivers of pickup trucks and SUVs appear to face *increased* risk as tire pressure reserve increases. Marais Dec. ¶ 15.

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methodological flaws (noted below and discussed in detail in the declaration of Dr. Laurentius Marais) that deprive Dr. Coffey's analysis of any probative value.

Turning to Dr. Coffey, his criticisms of the NHTSA analysis “are ill-informed and essentially unfounded, and his own calculations are fundamentally and fatally flawed – to a degree that falls well short of competent, professional statistical practice.” Marais Dec. ¶ 5.<sup>6</sup> Thus, his “estimates of purported additional risks to members of Public Citizen due to NHTSA’s TPMS rule are specious. . . .” *Id.* at ¶ 38.

For one thing, his “tire failure reduction method” yields no conclusions that are relevant to this case. As Dr. Marais explains, this method addresses the “difference in the expected total annual tire-related crashes in a hypothetical national passenger-vehicle fleet having tires inflated to a uniform 2 psi of pressure reserve compared to a hypothetical national passenger-vehicle fleet having tires inflated, instead, to a uniform 8 psi of pressure reserve.” *Id.* at ¶ 7. But this “comparison of hypotheticals” does not shed any light on the question at issue in this case: “What is the difference, if any, in the expected total annual tire-related crashes between the national passenger-vehicle fleet operating under” NHTSA’s TPMS rule “compared to a hypothetical national passenger-vehicle fleet operating, instead, under the TPMS rule proposed by Petitioners.” *Id.*

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<sup>6</sup> Moreover, Dr. Coffey opines on matters (such as those regarding tire characteristics, the impacts of under-inflation, causes of tire failures, placard pressures, and the bases for and implications of T&RA handbook pressures) for which he has no proffered expertise. *See* Coffey Dec. ¶¶ 35, 37, 42, 45-77, 97-116. His discussions of such matters should be disregarded.

Similarly, “Dr. Coffey’s ‘simple ratio method’ relies on a proration that is invalid because it uses a ratio of two percentages that are not logically comparable and whose ratio is, consequently, meaningless.” *Id.* at ¶ 8.

Moreover, Dr. Coffey’s description of one of the figures used in his “simple ratio method” is fundamentally mistaken. He contends that the NHTSA MAP results in “58% of the tires continuing to be operated without a warning when the measured tire pressure is below the T&RA minimum pressure for the maximum load.” Coffey Dec. ¶ 17; *see also id.* at ¶ 92. But this figure is actually derived from a Rubber Manufacturers Association (“RMA”) study of owner’s manual information in 100 sample vehicles, which are not identified by make or model. Dr. Coffey does not claim that they are representative of the fleet as a whole; rather he says that they reflect “a good mix of vehicle *types* that approximates the mix in the actual vehicle fleet.” *Id.* at ¶ 81 (emphasis added). Absent competent evidence that these 100 vehicles are statistically representative of the current and projected fleet population, there is no basis for Dr. Coffey’s extrapolation. *See* Marais Dec. ¶¶ 31-37; Lange Dec. ¶¶ 9, 12.<sup>7</sup>

It also is simply wrong to assume that vehicles are typically or “frequently” operated at maximum load or that typical operations below the T&RA minimum

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<sup>7</sup> NHTSA thoroughly considered RMA’s 100-sample vehicle study and concluded that it was not “convinced that the calculations presented by the RMA reflect real-world conditions.” JA 1515.

pressure for maximum load pose any risk. *See* Coffey Dec. ¶¶ 64, 66, 68, 71. NHTSA, in fact, has found that operation at maximum loads is the rare exception, not the rule. *See* JA 1511 (“most vehicle trips involve the driver alone, without significant vehicle cargo”); *see also* Lange Dec. ¶ 9.

In addition, Dr. Coffey’s analysis pools data involving different vehicle types that have very different field experience, and introduces confounding factors by including tire failures involving recalled tires. As Dr. Marais explains, such pooling of data “does not conform to competent statistical practice.” Marais Dec. ¶ 12. In addition “[t]he pooling of recall and non-recall data . . . obscures a ‘heterogeneity problem’ that was recognized and accounted for by NHTSA but not Dr. Coffey.” *Id.* at ¶14. “Pooling inherently dissimilar types of data arising from different underlying phenomena for analysis is likely to yield errors of . . . statistical bias, and likely to yield estimates that are unreliable. . . .” *Id.* at ¶ 13.

Dr. Coffey’s inclusion of recalled tires in his analysis is all the more remarkable because he previously criticized a NHTSA study for not adequately addressing data spikes induced by recalled tires. *See* JA 784, 790 (Coffey analysis of 1979 and 1981 studies). As Dr. Marais notes, “NHTSA’s treatment of this issue is reasonable: focus the analysis on the tires not subject to recall, which comprise more than 90 percent of the vehicles in the Special Order data, in order to measure the effect of pressure reserve on rates of tire failure without potential confounding

by specifically identified safety defects. Dr. Coffey’s treatment, which simply ignores this major confounding factor, is unreasonable, unscientific, and unwise.” Marais Dec. ¶ 14 (footnote omitted).

In addition, and inexplicably, Dr. Coffey also assumes that he can derive future lifetime risks to PC members (which, as we argued above, are irrelevant in any case) by multiplying their annual risks by 70 (Coffey Dec. ¶ 20), even though most current PC members are not likely to live another 70 years, and there is no basis for an assumption that technology and risks will remain the same for 70 years. *See* Marais Dec. ¶ 39.

Dr. Coffey’s analysis also is marred by his failure to consider a variety of factors that would substantially reduce the relative increase in risk that he asserts will result from NHTSA’s rule (as compared to PC’s preferred alternative). For one thing, he fails to discount the alleged benefits of PC’s proposal by excluding accidents involving vehicles driven by PC members that could have been prevented by routine maintenance pursuant to the instructions in the owner’s manual. Injuries arising from such accidents are essentially self-inflicted, and, although the Court rejected the Alliance’s argument that PC was relying on self-inflicted injuries to establish standing, the Court clearly did not countenance the inclusion of self-inflicted injuries in the standing calculus. Because Dr. Coffey has

not analyzed such accidents – and there is no basis for assuming that they are *de minimis* – his analysis is incomplete and, in all likelihood, substantially overstated.<sup>8</sup>

Dr. Coffey also ignores the fact that vehicle manufacturers *exceed* the minimum standards set by NHTSA. *See* Baloga Aff. ¶¶ 6-9; Bergmann Aff. ¶¶ 6-9; Lange Dec. ¶¶ 7, 10, 14-16; Mince Dec. ¶¶ 5-8; Speth Dec. ¶¶ 6-9; Strassburger Dec. ¶¶ 21; Tinto Dec. ¶¶ 7-9; *cf. also* Strassburger ¶¶ 5-20. Thus, the differences between NHTSA’s rule and PC’s desired alternative are certainly smaller than the differences analyzed by Dr. Coffey, which means the risks of NHTSA’s rule are smaller than Dr. Coffey asserts.

Further, Dr. Coffey based his analysis on 1998-2004 data, and used it to make predictions of future crashes involving tire failures. In 1998-2004, however, FMVSS No. 139, 49 C.F.R. § 571.139, was not in effect. This standard, which goes into effect on September 1, 2007, requires even severely under-inflated tires to operate safely at high speeds for prolonged periods. FMVSS No. 139 will, therefore, substantially mitigate any risks posed by under-inflation, and Dr. Coffey

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<sup>8</sup> PC’s argument that NHTSA’s rule will cause PC members economic harm – in the form of increased tire wear, shorter lifespans of tires, and increased fuel costs – falls into the same category of self-inflicted harm. Such injuries should be prevented through routine maintenance procedures set forth in the owner’s manual notice mandated by the TPMS rule. *See* Alliance Merits Br. 15 (under NHTSA’s rule, “the primary method for discovering under-inflated tires is regular routine maintenance by the driver, and a notice (or warning) to this effect is mandated for [the] owner’s manual”).

should have considered it in his analysis of the future risks allegedly created by NHTSA's rule. *See* Lange Dec. ¶¶ 5, 8; Strassburger Dec. ¶¶ 22, 24-25. Similarly, Dr. Coffey has not considered the potential impact of the recent amendments to FMVSS No. 110, 49 C.F.R. § 571.110 (also effective September 1, 2007), which have the effect of creating a tire pressure reserve. *See* Lange Dec. ¶ 7; Strassburger Dec. ¶¶ 26-27.

Finally, Dr. Coffey's analysis of the relative risks posed by NHTSA's rule and PC's desired alternative fails to account for the drivers who will manually check their tire inflation (and therefore not rely principally on a TPMS, no matter what MAP it utilizes). He also fails to consider the drivers who will ignore TPMS notifications (regardless of when they occur). With regard to the latter, as PC itself acknowledges (PC Supp. Br. 24), approximately ten percent of drivers will ignore TPMS notifications. Because PC's desired rule would not affect the conduct of these drivers, Dr. Coffey's estimates of the alleged increased risk posed by NHTSA's rule (as compared to PC's desired alternative) are overstated.<sup>9</sup>

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<sup>9</sup> The number of people who will ignore warnings under PC's proposed rule because of the "nuisance" effect of such warnings is probably much higher. PC argues that "a warning light that signals that one or more tires lack the pressure necessary to support a vehicle should not be dismissed as a 'nuisance.'" PC Supp. Br. 24. It is not clear whether this assertion is normative or factual. If its force is normative, then we agree: people *ought not* to ignore warning lights. Nevertheless, people predictably do many things they "should" not do. If the sentence is making a factual claim, then PC should have presented some evidence to back it up. But neither here nor in the Reply Brief pages cited by PC is any

And, even if Dr. Coffey’s analysis was not flawed, his projection of the additional crashes that PC members may face annually as a result of NHTSA’s decision is too small to amount to a “substantially increased” risk of harm. PC members already face a risk of approximately 2,700 crashes per year. Marais Dec. ¶ 38 n.54. Within the bounds of proper statistical probabilities, this number could be as low as 2,600 crashes per year or as high as 2,800 crashes per year. *Id.* Dr. Coffey’s projection of 45 additional crashes due to the TPMS standard is thus within the range of crashes that PC members may face in any given year, and is not a “substantially increased” risk of harm. *Id.*

For the foregoing reasons, PC has not met its burden to demonstrate that NHTSA’s failure to adopt PC’s preferred alternative substantially increases the probability that a PC member will suffer injury.

**B. PC Has Failed To Demonstrate Injury Resulting From NHTSA’s Decision Not To Require TPMSs To Operate With All Replacement Tires.**

PC also has not carried its burden on the replacement tire issue. PC argues that NHTSA “acknowledged” that between one and ten percent of replacement

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support given for the proposition that *everyone* will heed TPMS notifications under PC’s proposed rule. Finally, PC’s argument that this matter is irrelevant because it “goes to the merits” (*id.*) is nonsense. Even if NHTSA was wrong to reject petitioner’s preferred alternative on the basis of “nuisance” (which is the merits issue), the question whether PC’s estimates of future harm should have been discounted to account for predictable instances in which people would ignore TPMS warnings is relevant here, and should have been addressed in Dr. Coffey’s analysis.

tires may not be compatible with TPMS systems, and Dr. Coffey has based his analysis of the replacement tire issue on this assumption. PC Supp. Br. 14; Coffey Dec. ¶¶ 30-31. The assumption, however, is unfounded.

NHTSA actually said it “has been presented with data demonstrating that a very small number of replacement tires (estimated at less than 0.5 percent of production) may have construction characteristics and material content that cause the vehicle’s TPMS to exhibit functional problems.” JA 1129. The Final Regulatory Impact Analysis (“FRIA”) to which PC refers merely states between one and, “[a]t the high end,” less than ten percent of the time, the TPMS may not “be working at some later stage in a vehicle’s life.” JA 1181. Such periods of non-functionality are attributed to “replacement tire designs [that] would not work with a TPMS” *and to* other malfunctions. *Id.* Thus, there is no basis for Dr. Coffey to analyze ten percent incompatibility rates, and it is likely that even the one percent figure is too high.

In addition, although PC compares NHTSA’s rule to an alternative requiring manufacturers to certify that their TPMSs were compatible with all possible replacement tires, that is *not* the alternative that PC has advocated in this case. According to its merits brief, PC’s desired alternative is that manufacturers should be required to provide lists of compatible tires. *See* Pet. Reply Br. 42 n.24 (“Additionally, Public Citizen’s position is that NHTSA could simply require

vehicle manufacturers to certify that their TPMSs function with a list of specific tires.”).

Under PC’s proposed alternative, nothing would bar vehicle owners from opting for non-compatible tires – because they would remain available. PC, however, has not sought to analyze the extent, if any, to which this possibility would reduce the benefits of its preferred approach. Thus, PC has not established the incremental risk to PC members posed by NHTSA’s rule, as compared to PC’s desired alternative.<sup>10</sup>

PC also conjectures that NHTSA’s rule might cause economic harm to PC members who unknowingly purchase an incompatible tire, drive the vehicle out of the tire store before discovering the incompatibility, and then face the choice of having the incompatible tire replaced (which might involve the costs of mounting and balancing the new tire), or of keeping the incompatible tire and thereby forgoing the use of the TPMS whose cost was included in the purchase price of the vehicle. PC estimates that a consumer who returns an incompatible tire to the tire store might incur \$50 in remounting and rebalancing costs. PC Supp. Br. 15. A consumer who decides to forgo a working TPMS (rather than returning the

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<sup>10</sup> Under PC’s desired alternative, injuries to PC members who chose tires that were not listed as compatible by the vehicle manufacturer would be self-inflicted.

incompatible tire) would, according to PC, incur a \$48-\$66 economic loss. *Id.* at 15-16 & n.8.

The risk of this economic harm, however, is far too insubstantial to support PC's standing. Quite apart from the attenuated and speculative chain of causation that this risk involves, an at-most one percent chance that a tire replacement would result in an at-most \$66 economic loss amounts to a 66-cent risk ( $0.01 \times \$66 = \$0.66$ ). Standing cannot be predicated upon such an insubstantial risk.<sup>11</sup>

**C. PC Has Failed To Demonstrate Injury Resulting From NHTSA's Decision To Allow A 20-Minute Detection Time.**

PC appears to recognize that existing TPMSs do not require 20 minutes to detect significant under-inflation. Indeed, PC recognizes that the 20-minute detection time was intended as a possible accommodation to technology that is not currently in use. PC Supp. Br. 18 ("Injuries attributable to the rule will occur when (and to the extent that) such systems are developed and adopted.").

Current TPMSs do not require a full 20-minute detection time. *See* Baloga Aff. ¶ 9; Bergmann Aff. ¶ 9; Lange Dec. ¶ 14; Mince Dec. ¶ 8; Speth Dec. ¶ 8 (DaimlerChrysler's TPMSs are designed to notify within 72 seconds); Tinto Dec. ¶

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<sup>11</sup> Finally, PC ignores the fact that the asserted risks of NHTSA's approach to the replacement tire issue are attributable to the independent actions of third parties – specifically, tire manufacturers. Under both NHTSA's rule and PC's desired alternative, they will be permitted to continue to manufacture tires with characteristics likely to create incompatibilities with TPMSs. They could eliminate the risks of which PC complains by ceasing to market such tires.

9. In fact, recent NHTSA testing confirms that detection times on recently tested vehicles range from virtually instantaneous to just a few minutes. Strassburger Dec. ¶¶ 28-29. Thus, this aspect of the rule poses no harm to PC's members, even those who make trips of less than 20 minutes.

PC argues, however, that the possibility that alternative TPMS systems that require a full 20-minute detection time may come into use is sufficient to confer standing. This argument is unavailing. There is no evidence any manufacturer is planning to introduce such alternative systems, and, therefore, the introduction of such systems is entirely conjectural and cannot establish an "imminent harm."

The cases cited by PC (PC Supp. Br. 19) cannot salvage their argument. As discussed in the Alliance's response to Petitioners' Rule 28(j) letter on *Massachusetts v. EPA*, that case addresses state standing and, by its terms, provides little guidance on the standing requirements for petitioners like PC. In *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004), the Court's finding of an imminent injury was not based on the fact that radioactive waste might reach the community of one petitioner's members in several thousand years. To the contrary, the Court held that imminent injury was based on the very fact that the Government planned to bury the waste adjacent to where the member lived. *See id.* at 1266 ("Although radionuclides escaping from the Yucca repository may not reach Goedhart's community for thousands of years, his injury

is ‘actual or imminent,’ for he lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste – *a sufficient harm in and of itself.*”) (emphasis added).

Thus, PC has failed to establish that it has standing to challenge the 20-minute detection time.

**D. PC Has Made No Attempt To Demonstrate Injury Resulting From NHTSA’s Adoption Of Test Conditions.**

PC has not even tried to demonstrate injury resulting from the test conditions selected by NHTSA in the TPMS final rule. Accordingly, the challenge to this aspect of the final rule should be dismissed.

**II. PC HAS FAILED TO PROVE CAUSATION.**

This Court instructed PC to present evidence on three specific issues relating to causation: whether manufacturers would exceed the minimum requirements set by the TPMS rule; whether vehicle owners could be expected to check their tire pressures manually; and whether vehicle owners would heed TPMS notifications.

Slip op. 28 n.3.<sup>12</sup>

PC has utterly failed to show that manufacturers will not exceed the requirements of the rule. Indeed, PC's “evidence” on this point, in the form of the

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<sup>12</sup> Each of these issues also is relevant to the injury-in-fact inquiry. Because both the imminence requirement and the causation requirement address causal uncertainty, their requirements tend to merge in a case such as this.

declarations of Joan Claybrook and Dr. Martha Warren Bidez, is patently insufficient.

Ms. Claybrook has provided no grounds for concluding that she has actual knowledge of modern vehicle design decisions, particularly with respect to TPMS design. She offers an anecdote about a nearly thirty-year-old conversation with the President of one company regarding one model's compliance testing for one FMVSS (Claybrook Dec. ¶ 2), along with other anecdotes involving events that are twenty years old and older (*id.* at ¶¶ 2-3, 6). One of her anecdotes does not even involve safety designs. *Id.* at ¶ 4 (discussing alleged failure of manufacturer to keep its promise on fuel economy).

Dr. Bidez's declaration is almost entirely irrelevant. She has not established her competence to offer admissible testimony on manufacturers' practices with regard to safety standards. Moreover, none of her anecdotes and quotations – many of which are not only rank hearsay but also unattributed – actually support the conclusions that she purports to draw from them.

The vehicle manufacturers, however, have submitted affidavits and declarations that clearly and unequivocally *do* establish that they have designed their TPMS systems to exceed the minimum requirements of NHTSA's standard. *See supra* at 15.

With regard to the other issues raised by the Court, PC has adverted to the administrative record, which establishes that most, but not all, drivers are likely to re-inflate their tires after a dashboard warning, although, as we noted above, PC does not evaluate the extent to which this number would drop under its preferred approach as a result of the nuisance effect. PC also cites the administrative record in support of its contention that many drivers do not regularly check their tire inflation. As we also noted with regard to this issue, PC has not considered the effects of the drivers who will continue to check their inflation levels on the risks of which they complain.

Finally, as we also noted above with regard to the replacement tire issue, the actions of the tire manufacturers themselves, in continuing to manufacture and market incompatible tires, should not be ignored. Their conduct is a substantial – indeed, the principal – contributor to the risks of which PC complains.

### **CONCLUSION**

For the foregoing reasons, PC has failed to establish that any of its members face a substantially increased risk of crashes or injuries caused by NHTSA's rule. Accordingly, PC's petitions should be dismissed.

Respectfully Submitted.

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July 27, 2007

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) AND  
CIRCUIT RULE 32(a)(3)(B)(i)**

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 5,943 words and thus complies with Circuit Rule 32(a)(3)(B)(i).

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2007, I served copies of the foregoing Supplemental Brief of Intervenor in Support of Respondents and the addendum thereto by e-mail and overnight delivery on Petitioners and Respondents, herein at the following addresses:

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