No. 13-___

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re Dr. Greg **GULBRANSEN**; Sue Auriemma; Consumers Union of United States; Advocates for Highway and Auto Safety; Kids And Cars, Inc.,

Petitioners,

Anthony Foxx, Secretary of the United States Department of Transportation; United States Department of Transportation,

Respondents.

PETITION FOR A WRIT OF MANDAMUS TO ANTHONY FOXX, SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION, AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, corporate petitioners Consumers Union of United States, Advocates for Highway and Auto Safety, and Kids And Cars, Inc., state that none of them is owned by a parent corporation, and there is no publicly held corporation that owns 10% or more of any corporate petitioner.

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INTRODUCTION

Petitioners seek a writ of mandamus compelling respondents, the Department of Transportation (DOT) and its Secretary Anthony Foxx, to take action to protect the most vulnerable Americans from backover crashes. Backover crashes (or "backovers") are collisions in which a vehicle moving backwards strikes a person (or object) behind the vehicle. Each year on average, according to DOT, backovers kill 292 people and injure 18,000 more — most of whom are children under the age of five, senior citizens over the age of seventy-five, or persons with disabilities. Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or too slow to move out of the way of the vehicle, even one moving at slow speed.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed and the President signed the Cameron Gulbransen Kids Transportation Safety Act, Pub. L. 110-189, 122 Stat. 639-42 (2008), *codified at* 49 U.S.C. § 30111 note (Gulbransen Act). The Gulbransen Act directed DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles. The Gulbransen Act mandated that DOT issue the final rule within three years of the law's enactment — i.e., by February 28, 2011. The Act also allowed DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."

DOT failed to issue a final safety standard before the February 2011 deadline. Instead, DOT has repeatedly pushed the deadline back, failed to meet its revised deadline, and then set yet another, later deadline. The agency has extended the timetable for promulgation of a final safety standard four separate times. Most recently, nineteen months after preparing a draft final rule, DOT announced that it plans to issue the final rule by January 2, 2015. It did not make a showing that the previous deadline "cannot be met." Assuming DOT does not again delay the rule, the backover rulemaking will have taken nearly seven years — more than twice as long as Congress envisioned for the rulemaking — at a significant cost in human lives.

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries that will occur while the public waits for the final rule, this Court should "let [the] agency know, in no uncertain terms, that enough is enough." *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). DOT's failure to promulgate the regulation constitutes "agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act (APA). 5 U.S.C. § 706(1). Accordingly, Petitioners seek an order from this Court directing DOT to issue a final backover rule within ninety days.

STATEMENT OF THE ISSUE

Whether DOT's delay in issuing a new automobile safety standard to protect the most vulnerable Americans from injury or death as a result of backover crashes constitutes unreasonable delay under the APA, 5 U.S.C. § 706(1).

JURISDICTION

This Court has jurisdiction over this petition for a writ of mandamus under the All Writs Act. 28 U.S.C. § 1651(a). "[T]he statutory commitment of review of [agency] action to the Court of Appeals, read in conjunction with the All Writs Act, affords this court jurisdiction over claims of unreasonable [agency] delay." *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (*TRAC*) (citation omitted).[1]

Specifically, where a statute provides a court of appeals with jurisdiction over petitions by persons adversely affected by an agency order, that jurisdiction also covers petitions by parties adversely affected by the agency's *failure* to act: "Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may

[1] In the alternative, should this Court determine that unreasonable agency delay should be reviewed via a petition for review of agency action unreasonably withheld, rather than a petition for mandamus, petitioners respectfully request that this Court, in the interest of justice, treat this petition as seeking the appropriate form of review. *See, e.g., Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 654 n.1 (2d Cir. 1980) (correcting technical error in the designation of appellate filing "in the interests of justice").

resolve claims of unreasonable delay in order to protect its future jurisdiction." *Id.* at 76.

Here, jurisdiction to review challenges to DOT safety standards lies in this Court under 49 U.S.C. § 30161(a), which grants the Court jurisdiction to review petitions filed by parties "adversely affected by an order prescribing a motor vehicle safety standard under this chapter." The "chapter" in question includes 49 U.S.C. § 30111, under which DOT is responsible for issuing motor vehicle safety standards, including the standard at issue in this case. Because this Court would have jurisdiction to review DOT's final backover rule, it has jurisdiction to review DOT's failure to issue that rule. *TRAC*, 750 F.2d at 75-76.

PARTIES

Petitioner Dr. Greg Gulbransen is a pediatrician living in Syosset, New York. Ex. A, Gulbransen Decl. ¶ 1. Dr. Gulbransen's two-year-old son Cameron died in a backover crash in October 2002. *Id.* ¶ 2. Dr. Gulbransen was driving the car that struck Cameron; although Dr. Gulbransen used both side-view mirrors and the rearview mirror and looked over his shoulder before backing up, in the absence of additional rear-visibility safety features, he was unable to see that Cameron, who had run into the driveway, was behind the vehicle. *Id.* Over the past decade, Dr. Gulbransen has spoken publicly and met with government officials to advocate for rules to protect children from backover crashes. *Id.* ¶ 3. The law Congress

enacted directing DOT to regulate to prevent backover crashes is named in honor of Dr. Gulbransen's son Cameron.

Petitioner Susan Auriemma is a resident of Manhasset, New York. In May 2005, she backed over her three-year-old daughter Kate in her driveway. Ex. B, Auriemma Decl. ¶ 2. Although Kate survived the backover crash, and Kate is now taller than she was at the time of the incident, Ms. Auriemma remains deeply concerned for Kate's safety given how large the blind zones are on many vehicles. *Id.* ¶¶ 3-4.

Petitioner Consumers Union of United States is a non-profit organization that does business as Consumer Reports and is based in Yonkers, New York. Ex. C, Hershenov Decl. ¶ 1. Founded in 1936, Consumer Reports' mission is to promote a fair, just and safe marketplace for all consumers and to empower consumers to protect themselves. *Id.* ¶ 2. Consumer Reports has a voting membership of approximately 300,000 people. *Id.* The various print and electronic publications of Consumer Reports, which provide consumers with a broad range of consumer information, have a combined subscribership of more than 8 million people. *Id.* Consumer Reports employs lobbyists, grassroots organizers, and outreach specialists who work with the organization's more than one-million online activists to change legislation and the marketplace in favor of the consumer interest. *Id.* at ¶ 4. As part of this work, Consumer Reports has for more than a

decade engaged in research, advocacy, and public education to prevent injuries and deaths resulting from backover crashes. *Id.* Consumer Reports files this petition on behalf of its members, some of whom are parents whose children are at increased risk of injury or death because of DOT's failure to issue the backover rule, and some of whom intend shortly to buy cars with rear-visibility technology but will pay more for such features in the absence of federal regulation. *See id.* ¶¶ 8, 9; Ex. D, Halford Decl. ¶¶ 4-7; Ex. E, Shecter Decl. ¶¶ 3-9; Ex. F, Mannering Decl.

Petitioner Advocates for Highway and Auto Safety (Advocates) is an alliance of consumer, health and safety groups and insurance companies and agents working together to make America's roads safer. Ex. G, Gillan Decl. ¶ 3. Advocates promotes the adoption of laws, regulations and programs that prevent motor vehicle crashes. *Id.* Advocates' members include safety, health and consumer organizations that seek to advance the cause of highway and traffic safety, as well as leading domestic casualty insurance companies that seek to promote motor vehicle safety and to reduce property damage, medical injury and liability claims resulting from motor vehicle crashes. *Id.* ¶ 4. Backovers are among the auto safety issues of greatest concern to Advocates. *Id.* ¶ 5. Advocates files this petition on behalf of its insurance-company members, who must pay more in claims resulting from backover deaths and injuries (and backover-related property damage) than they would otherwise have to pay if DOT issued the rule. *Id.* ¶¶ 6-9.

Petitioner Kids And Cars, Inc. (KAC) is a national non-profit organization dedicated to preventing injuries and death to children in or around motor vehicles. Ex. H, Fennell Decl. ¶¶ 1-2. KAC works to prevent backover crashes through data collection, education and public awareness, and survivor advocacy. *Id.* Backover prevention is a core priority for KAC, which has run public service announcements, organized press events, and distributed "BlindZone kits" to raise awareness of the dangers of backovers. *Id.* ¶ 7. On average, KAC spends 45% of its budget per year on public education regarding backovers. *Id.* ¶ 8. Absent DOT action to promulgate a backover rule as required by Congress, KAC must focus more staff time and resources on backover-related public education than would be necessary if the rule were in place, in which case KAC could devote its time and resources to its other auto-safety priorities. *Id.* ¶ 11. By virtue of this diversion of its resources and impairment of activities that further its mission, KAC suffers ongoing injury as a result of DOT's failure to promulgate the regulation at issue.

Respondent DOT is the federal agency responsible for ensuring the safety of American transportation systems. Among DOT's responsibilities is the issuance of federal motor vehicle safety standards.

Respondent Anthony Foxx is the Secretary of DOT. He is responsible for carrying out DOT's legal responsibilities, including the issuance of the safety standard at issue in this petition.

FACTUAL BACKGROUND

According to DOT, each year 292 people die and another 18,000 are injured in backovers, collisions in which a vehicle moving in reverse gear strikes a person behind the vehicle. *See* Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements; Proposed Rule, 75 Fed. Reg. 76186, 76187 (Dec. 7, 2010) (hereinafter "Proposed Rule").[2] Of the 18,000 annual injuries, 3,000 are incapacitating. *Id.* Light vehicles weighing less than 10,000 pounds — a category that includes passenger cars, multipurpose passenger vehicles (such as SUVs), trucks, buses, and low-speed vehicles — account for 228 of the 292 annual fatalities and 17,000 of the 18,000 annual injuries. *Id.*; *see also id.* at 76197 (citing SUVs as an example of "multipurpose passenger vehicles"). Children under age five account for 44% of backover deaths. *Id.* at 76187. Each week, 50 small children are injured, two fatally, by backover crashes; in over 70% of child backover incidents, a parent or other close relative inadvertently backs over a young child. *See* KidsAndCars.org, Backovers Fact Sheet, *available at* http://www.kidsandcars.org/userfiles/dangers/backovers-fact-sheet.pdf. Backovers

[2] In a notice regarding a non-regulatory program unrelated to the Gulbransen Act, DOT subsequently used slightly lower casualty estimates. *See* Proposed Rules, New Car Assessment Program, 78 Fed. Reg. 38266, 38267 (June 26, 2013). DOT's revision does not implicate the substance of any of the arguments raised in this petition, only the specific number of individuals affected.

thus inflict emotional pain on family members in addition to the physical harm that they cause to children. *See* Proposed Rule, 75 Fed. Reg. at 76238 ("In some of these cases, parents are responsible for the deaths of their own children; avoiding that horrible outcome is a significant benefit.").

On February 28, 2008, President Bush signed the Gulbransen Act into law. The Gulbransen Act required DOT to revise Federal Motor Vehicle Safety Standard 111 to expand the required field of vision to enable drivers of motor vehicles to see better behind their vehicles. Pub. L. 110-189, § 2(b). The purpose of the statute was to reduce deaths and injuries due to cars backing over vulnerable individuals, particularly children and people with disabilities. *Id*. The Gulbransen Act required that DOT issue a final rule within three years, by February 28, 2011. *Id*. A separate section of the Act allowed DOT to establish a new deadline for any of the various rulemakings (including the backover rule) required under the Act if the Secretary determined that the applicable deadline "cannot be met." *Id.* § 4.

DOT, through its component the National Highway and Traffic Safety Administration (NHTSA), initially made progress toward meeting the statutory deadline and published an Advance Notice of Proposed Rulemaking (ANPRM) approximately one year after the Gulbransen Act became law. Federal Motor Vehicle Safety Standard; Rearview Mirrors, 74 Fed. Reg. 9478 (Mar. 4, 2009). As noted in the ANPRM, for almost two decades NHTSA has researched various

backing aid technologies with the goal of minimizing injuries and deaths due to backovers. *See id.* at 9486. The ANPRM summarized NHTSA's wide-ranging research on backovers and backover aids, including its research regarding rear-mounted convex mirrors, *see id*. at 9486-90, rearview video systems, *see id*. at 9490, sensor-based rear object detection systems, *see id*. at 9490-92, and backing aids involving multiple technologies, *see id*. at 9492. The ANPRM also analyzed the nature and prevalence of backover-related injuries and deaths, *see id.* at 9481-85; the relationship between rear visibility and backovers, *see id*. at 9504; existing rear visibility requirements in the United States and abroad, *see id.* at 9480-81; drivers' performance when using technologies to enhance rearward visibility, *see id*. at 9493-96; and the costs and benefits of regulating to require greater rearward visibility, *see id.* at 9505. In November 2010, NHTSA published a Preliminary Regulatory Impact Analysis that further analyzed the various technologies available to prevent backovers, along with their respective costs and benefits. DOT/NHTSA, Preliminary Regulatory Impact Analysis (Dec. 14, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=NHTSA-2010-0162-0034.

On December 7, 2010, DOT published a Notice of Proposed Rulemaking (NPRM) and set a 60-day comment period. Proposed Rule, 75 Fed. Reg. at 76186. In formulating a proposed safety standard, DOT considered the wide-ranging public comments on the ANPRM, *see id.* at 76199-213, along with DOT's own

research and analysis of various technologies to prevent backovers, *see id.* at 76189, 76196-99, 76217-27, 76239, including post-ANPRM research on rearview video systems, rear-mounted convex mirrors, and rear sensors, *see id.* at 76222-23. DOT characterized its rearward-visibility testing as "extensive." *Id.* at 76239.

In light of its research and the public comments, DOT proposed a safety standard that specifies an area immediately behind each light vehicle that a driver must be able to see when the car is in reverse gear. *Id.* at 76187, 76227. Although the proposed rule gives manufacturers flexibility as to how to meet the safety standard, DOT concluded that "rearview video systems currently represent the most effective technology to address the problem of backover crashes" and cautioned that "current rear object detection sensors and rearmounted convex mirrors would not be sufficient as stand-alone technologies to meet the proposed rear visibility requirement." *Id.* at 76227. DOT estimated that the proposed safety standard would prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries each year. *Id.* at 76238. In conducting a cost-benefit analysis that considered both quantifiable and non-quantifiable costs and benefits, DOT "conclude[d] that the benefits do justify the costs." *Id.* In particular, DOT noted several factors, not easily quantifiable, that weighed strongly in favor of its proposed rule: the young age of most victims of backovers, the trauma faced by drivers who unintentionally injure or kill young children, and the increased

convenience that rear-visibility aids would provide drivers, particularly when parking. *Id.* at 76238-39. In the NPRM, DOT noted that it "anticipate[d] publishing a final rule by the statutory deadline of February 28, 2011." *Id.* at 76188.

But days before the statutory deadline, DOT announced that it would not meet the deadline; instead, it re-opened the comment period and informed Congress it would publish a final safety standard by December 31, 2011. *See* Ex. I, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce (Feb. 25, 2011).[3] In extending the deadline, DOT cited significant comments on test procedure issues, requests that it extend the original comment period, and the necessity of additional analysis and testing. *Id.* at 1.

DOT then prepared a final rule and, on November 16, 2011, sent its rule to the Office of Management and Budget (OMB) for review as required by Executive Order 12866. *See* Ex. J, OIRA Conclusion of EO 12866 Regulatory Review.[4] Although OMB is required to complete its review with 90 days (with one 30-day

[3] All of the letters cited herein, along with the similar letters sent to other chairs and ranking members of congressional committees on the same dates as the cited letters, can be found at the following web addresses: http://www.regulations.gov/#!documentDetail;D=NHTSA-2010-0162-0148; http://www.regulations.gov/#!documentDetail;D=NHTSA-2010-0162-0230; http://www.regulations.gov/#!documentDetail;D=NHTSA-2010-0162-0231; http://www.regulations.gov/#!documentDetail;D=NHTSA-2010-0162-0251.

[4] As of the filing of this petition, this page was also available at: http://www.reginfo.gov/public/do/eoDetails?rrid=121226.

extension available), *see* Executive Order 12866, § 6(b)(2), the rule remained at OMB for nineteen months. During that time, DOT granted itself two additional extensions. First, on January 10, 2012, it extended the deadline to February 29, 2012, on the ground that it needed additional time in light of the complexity of the issues and the volume of public comments — even though it had already prepared a final rule. *See* Ex. K, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce (Jan. 10, 2012). Second, on February 28, 2012, DOT further extended the deadline to December 31, 2012, to "ensure that the final rule is appropriate and the underlying analysis is robust." *See* Ex. L, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce, at 1 (Feb. 28, 2012). DOT's self-imposed December 2012 deadline passed without the promulgation of a final rule.

On June 20, 2013, DOT withdrew the rule from OMB review. *See* Ex. J, OIRA Conclusion of EO 12866 Regulatory Review. That same day, DOT notified Congress that it would "move expeditiously toward issuing final requirements — no later than January 2, 2015." Ex. M, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce, at 2 (June 20, 2013). In extending the deadline for a fourth time, DOT stated that it had made "significant progress" toward developing a final rule,

including the completion of additional research. *Id.* at 1. Nonetheless, DOT claimed that "additional time [was] required" so that it could obtain information through DOT's Special Crash Investigations Program to "refine [the agency's] understanding of how the proposed requirements address the real world safety risk." *Id.* at 1-2.

If DOT issues the rule by January 2015 — rather than granting itself yet another extension — the rule will issue nearly seven years after the enactment of the Gulbransen Act, which envisioned the promulgation of a rule within three years. Given DOT's repeated extensions in the face of Congress's clear indication through the statutory deadline that promulgation of the safety standard should proceed expeditiously, there is no reason to think that DOT will meet its 2015 goal.

STANDARD OF REVIEW

The remedy of mandamus is warranted when there is a clear right to the relief sought, "a plainly defined and peremptory duty on the part of the defendant to do the act in question," and no other adequate remedy. *Anderson v. Bowen*, 881 F.2d 1, 5 (2d Cir. 1989). In the context of a claim of "agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. § 706(1), this Court applies the "*TRAC* factors" developed by the D.C. Circuit. *See Natural Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013) (citing *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*")).

Under that test, courts consider:

> (1) [T]he time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (citations and internal quotation marks omitted); *see also Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987) (distilling *TRAC* factors down to three: "the length of time that has elapsed"; "any legislative mandate in the statute"; and "the consequences of the agency's delay").[5]

REASONS FOR ISSUANCE OF THE WRIT

The Statutory Mandate, Regulatory History, And Deadly Consequences Of Failing To Issue The Rule Demonstrate That The Agency's Delay Is Unreasonable.

In the face of extended delay, courts must sometimes force agencies to act because "inordinate agency delay would frustrate congressional intent by forcing a

[5] Several other circuits have also adopted the *TRAC* or *Cutler* factors. *See, e.g.*, *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (*TRAC*); *Nat'l Grain & Feed Ass'n, Inc. v. OSHA*, 903 F.2d 308, 310 (5th Cir. 1990) (*Cutler*); *Towns of Wellesley, Concord & Norwood v. Fed. Energy Reg. Comm'n*, 829 F.2d 275, 277 (1st Cir. 1987) (*TRAC*).

breakdown of regulatory processes." *Cutler*, 818 F.2d at 897 n.156. The *TRAC* analysis demonstrates that this is one such instance.[6]

A. The agency's delay contravenes Congress's timetable for the rulemaking (*TRAC* factors 1 & 2).

DOT's delay in issuing a final safety standard on rearward visibility is unreasonable in light of the first two *TRAC* factors, which require courts to consider the length of the agency's delay in light of any timetables set by Congress. *See TRAC*, 750 F.2d at 80.

1. DOT has failed to meet the statutory prerequisite for extending the deadline provided by Congress.

Under the Gulbransen Act, "[t]he Secretary shall prescribe final standards pursuant to this subsection not later than 36 months after the date of enactment of this Act." Pub. L. 110-189, § 2(b). The Act became law in February 2008. By setting a precise deadline of three years from enactment, Congress gave a clear indication of the speed with which it expected the agency to proceed.

Congress gave the agency some flexibility by permitting it to extend the deadline, but only on the condition "that the deadlines applicable under this Act *cannot* be met." *Id.* § 4 (emphasis added). DOT's most recent letter to Congress, dated June 20, 2013, did not meet, or even attempt to meet, this extension criterion.

[6] Although *TRAC* is typically described as having six parts or "factors," petitioners' analysis does not separately discuss the sixth *TRAC* factor, which is merely an instruction to proceed with the remainder of the analysis even when an agency's inaction is not tainted by an improper motive. *See TRAC*, 750 F.2d at 80.

The letter asserted that "additional time is required before the Department can finalize" the proposed rule, but this bare assertion was unsupported by any specific facts or considerations "requir[ing]" delay. Ex. M, Letter from Ray LaHood, Secretary of Transportation, to Rep. Fred Upton, Chairman, House Comm. on Energy & Commerce, at 1 (June 20, 2013).

All that DOT has offered by way of explanation for this extension — its fourth — is the agency's interest in further study through NHTSA's Special Crash Investigations Program to "identify[] and analyz[e] cases that involve vehicles equipped with rear visibility systems" in order to "refine [the agency's] understanding of how the proposed requirements address the real-world safety risk." *Id.* at 2. But DOT has not claimed, nor explained why, this research and "refine[ment]" of the agency's understanding is so crucial that the regulation "cannot" be issued without it. Indeed, the administrative record suggests quite the opposite: DOT has already conducted research — which the agency itself has rightly characterized as "extensive" — about rear visibility systems. Proposed Rule, 75 Fed. Reg. at 76239; *see id.* at 76217-27 (discussing agency's research on sensors, cameras, mirrors, and the combination of multiple technologies). Informed by this research, the agency has already drafted a final rule. *See id.* at 76244-50.

The Special Crash Investigations Program referenced in the June 20 letter examines crash data to create "an anecdotal data set useful for examining special

crash circumstances or outcomes from an engineering perspective."[7] It is unclear why the rulemaking "cannot" be completed without additional anecdotal data, given that the agency has already spent years studying the problem and is quite familiar with the various technologies and their relative effectiveness. *See* Proposed Rule, 75 Fed. Reg. at 76223-27 (section entitled "Countermeasure Effectiveness Estimation Based on NHTSA Research Data"). None of DOT's previous letters to Congress even mentioned the Special Crash Investigations Program, much less suggested that it was indispensable. In fact, in crafting the proposed rule, DOT *already considered* the Special Crash Investigations data. *See id.* at 76193-94 (discussing investigations of 58 backover crashes through the Special Crash Investigations Program). If a rule cannot be issued without *reexamining* data from this program, then the rule can never be issued at all, for new crashes will continue to generate additional data. Permitting repeated extensions on such a basis would render the congressional criterion for extension of the deadline — as well as the statutory deadline itself — a nullity.

An agency can always gather more data, conduct more studies, and further "refine" its understanding before acting. But as the Third Circuit explained in rejecting an argument, similar to the one DOT has advanced here, that the need for

[7] NHTSA, Special Crash Investigations, *at* http://www.nhtsa.gov/Data/Special+Crash+Investigations+(SCI)/Special+Crash+Investigations+Overview (last viewed Sept. 20, 2013).

additional information justified a lengthy delay by the Occupational Safety and Health Administration (OSHA) in regulating workers' exposure to the carcinogen hexavalent chromium, "scientific certainty in the rulemaking process" is not required; the agency "'cannot let [individuals] suffer while it awaits the Godot of scientific certainty.'" *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980)). The mere possibility that additional information might be learned hardly demonstrates that the applicable deadline "cannot be met." Allowing DOT to continue to delay for the purpose of "refin[ing] its understanding" based on additional data from a source it has already consulted would accomplish little other than to undermine the purpose of the Gulbransen Act: to protect children from backover crashes by requiring prompt issuance of a safety standard on rearward visibility.

2. For the agency to take seven years to complete the rulemaking — more than twice as long as Congress envisioned — constitutes unreasonable delay.

Although there is no per se rule as to how long a delay violates the APA, *see In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (per curiam), a reasonable delay "could encompass 'months, occasionally a year or two, but not several years or a decade.'" *Midwest Gas Users Ass'n v. Fed. Energy Reg. Comm'n*, 833 F.2d 341, 359 (D.C. Cir. 1987) (quoting *MCI Telecommunications*

Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980)). Moreover, permitting an agency to extend a congressionally-set deadline again and again over a period of years — as DOT has done here — disregards Congress's intent that the rule be a priority and effectively writes the deadline out of the statute.

Shortly before the statutory deadline of February 28, 2011, DOT announced its intent to publish a final rule ten months after that deadline, in December 2011, and it in fact completed a draft final rule by November 16, 2011, when it sent the rule to OMB. Since then, DOT has extended the deadline three more times, first to February 29, 2012, then to December 31, 2012, and most recently to January 2, 2015. Thus, DOT has now granted itself almost four years' worth of extensions, giving itself almost seven years from enactment of the statute and more than four years from issuance of the NPRM, even though Congress stated that the entire rulemaking process should take only three years.

In measuring the length of an agency delay in light of a proposed agency timetable, courts look to the time elapsed from when an agency is directed to act or decides to act, to the end of the agency's proposed timetable. *See, e.g., Int'l Chem. Workers*, 958 F.2d at 1145, 1150 (counting delay of six years from filing of rulemaking petition in 1986 to agency's anticipated completion date in 1992); *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (counting delay of six years from agency's announcement of its intent to regulate

in 1982 to agency's anticipated completion date in 1988); *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (per curiam) (counting delay of three years from initial petition for rulemaking in 1981 to agency's anticipated completion date in 1984).

Here, the period of nearly seven years from the passage of the Gulbransen Act in February 2008 to the agency's anticipated completion of the rule in January 2015 is longer than other delays that the D.C. Circuit has held unreasonable in the context of safety-related rulemaking. For instance, *In re International Chemical Workers Union* concerned OSHA's six-year delay in promulgating a rule to protect workers against exposure to the dangerous chemical cadmium. The court imposed a deadline on that rulemaking "in light of the admittedly serious health risks associated with" the existing rule. 958 F.2d at 1150. Similarly, the court in *Public Citizen Health Research Group v. Brock*, acknowledging that "lives [were] hanging in the balance," imposed a judicial deadline on the regulation of the carcinogen ethylene oxide (EtO) where the period from OSHA's announcement of its intent to regulate to its anticipated completion date was six years. 823 F.2d at 628-29. In *Public Citizen Health Research Group v. Auchter*, which considered an earlier iteration of OSHA's regulatory process regarding EtO, the length of the agency delay was three years, 702 F.2d at 1152-53; the court ordered agency action in light of "the significant risk of grave danger to human life." *Id.* at 1159.

The reasons that might justify a lengthy delay are not present here. For instance, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003), declined to order relief where the Bureau of Indian Affairs had not acted for seven years on a tribe's petition for federal recognition. The court noted that the delay resulted from "a shortage of resources addressed to an extremely complex and labor-intensive task"; in particular, the court cited the glut of applications and the difficulty of evaluating every application "against a demanding set of regulatory criteria by a three-person team comprising an historian, a cultural anthropologist, and a genealogist." *Id.* at 1100. Here, by contrast, DOT does not face a resource constraint that prevents it from taking action. It has already published an ANPRM, conducted a preliminary regulatory impact analysis, published an NPRM, and conducted testing that DOT characterized as "extensive," Proposed Rule, 75 Fed. Reg. at 76239 — all by December 2010, nearly three years ago and before the statutory deadline. Moreover, nearly two years ago the agency drafted a final safety standard, which it sent to OMB in November 2011.

Even if the delay is measured from Congress's original deadline rather than the enactment of the statute, the length of the delay is unreasonable. The Gulbransen Act required DOT to promulgate a safety standard within three years, by February 2011. Pub. L. 110-189, § 2(b). Though the statute allowed DOT to

establish a new deadline if the applicable deadline "cannot be met," *id.* § 4, even if that criterion were satisfied here — and it has not been, *see supra* Section A.1 — the statute offered no indication that Congress envisioned repeated extensions adding up to a longer period of time than it originally provided for the issuance of the final safety standard. By stating an explicit three-year deadline, Congress indicated the rule's level of importance and its belief about when the rule should be issued. Allowing DOT to continue delaying the final rule for years beyond Congress's explicit deadline disregards Congress's intent by treating the statute as if it had expressed no view regarding when the agency should act.

Because DOT has failed to satisfy the statutory criterion for extending Congress's deadline, and because the length of its delay is in any case out of all proportion to Congress's intended timetable, the first two TRAC factors strongly counsel in favor of compelling DOT action.

B. The risk to human life and safety requires prompt action on the backover rule (*TRAC* factors 3 & 5).

The third and fifth *TRAC* factors require that courts consider, respectively, whether "human health and welfare are at stake," and "the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80; *see also Natural Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 84 (2d Cir. 2013) (noting specifically that these two factors are part of the unreasonable delay analysis). "Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when

human lives are at stake. This is particularly true when the very purpose of the governing Act is to protect those lives." *Auchter*, 702 F.2d at 1157-58 (internal citations omitted); *see also Brock*, 823 F.2d at 628 ("With lives hanging in the balance, six years is a very long time."); *Cutler*, 818 F.2d at 898 ("The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay.").

The text and history of the Gulbransen Act make clear that Congress passed the law to protect children from injury and death — a goal that it considered to be of paramount importance. The Gulbransen Act is named for a child killed in a backover crash. The statute's full title makes its purpose clear: "An Act to direct the Secretary of Transportation to issue regulations to *reduce the incidence of child injury and death* occurring inside and outside light motor vehicles, and for other purposes." 122 Stat. at 639 (emphasis added). The Senate report on the bill likewise notes Congress's goal, in passing the Gulbransen Act, to "reduce the incidence of injury and death" due to several types of automobile crashes, including backovers. S. Rep. No. 110-275, at 1 (2008).

DOT estimated that the safety standard it proposed in 2010, prior to the statutory deadline and more than four years before its current projected date for the completion of the rulemaking, would have prevented between 95 and 112 deaths and between 7,072 and 8,374 injuries each year. *See* Proposed Rule, 75 Fed. Reg.

at 76238. Therefore, by DOT's own estimates, its delay past the statutory deadline has so far allowed between 237 and 280 preventable deaths — almost half of which have befallen young children, *id.* at 76187 — along with thousands of preventable injuries. By the same estimates, another 118 to 140 people will die in preventable backover crashes before DOT regulates — even assuming that DOT does not extend the date yet again. The third and fifth *TRAC* factors thus weigh strongly in favor of judicial action to require a firm deadline for DOT to promulgate the repeatedly delayed backover rule and thereby prevent further injuries and loss of life.

C. Because DOT has already conducted extensive testing, issued a proposed rule, and drafted a final rule, a court order would not interfere with other agency priorities (*TRAC* factor 4).

The fourth *TRAC* factor — whether mandating agency action would interfere with other agency priorities, *TRAC*, 750 F.2d at 80 — also supports relief.

Requiring the agency to act here will not undermine its ability to comply with other deadlines. DOT long ago completed the most onerous parts of the rulemaking process: conducting research on backover crashes and available technologies to prevent them, publishing an ANPRM, conducting a preliminary regulatory impact analysis, receiving and considering public comments, publishing a proposed rule, reviewing comments, and preparing a final rule.

The notion that prompt regulatory action would interfere with other agency priorities is even weaker here than in previous cases in which courts have found the fourth *TRAC* factor to be no barrier to ordering agency action. For instance, in *Auchter*, where OSHA had already issued an ANPRM but had not yet issued an NPRM, 702 F.2d at 1152-53, the court rejected OSHA's claim that an order to regulate would interfere with three of the agency's other regulatory actions, *id.* at 1158. Similarly, the court in *International Chemical Workers* rejected OSHA's claim that a court-ordered deadline would impair its ability to meet deadlines imposed by Congress with respect to other rulemaking proceedings, since the agency itself had suggested a deadline for the rulemaking at issue. 958 F.2d at 1150.

Given that DOT issued an NPRM more than two and a half years ago and sent a final rule to OMB for review more than 22 months ago, the rulemaking process here is even further along than was the process in *Auchter*. With the process practically complete, ordering agency action now to prevent backover crashes would not interfere with other agency priorities. Instead, it would give effect to Congress's intent that DOT act with dispatch to protect vulnerable individuals, particularly children, from injury and death. And it would serve as a needed backstop against further agency foot-dragging. *Cf. Int'l Chem. Workers*, 958 F.2d at 1150 ("[F]or three years, OSHA has not met any timetable proposed to

the court, and we have grave cause for concern that if we do not insist on a deadline now, some new impediment will be pleaded five months hence.").

RELIEF SOUGHT

Petitioners ask the Court to declare that DOT has unreasonably delayed in issuing a backover rule as required by the Gulbransen Act. Petitioners ask that the Court issue a writ of mandamus directing DOT to issue a backover rule within ninety days. The Court should also retain jurisdiction to monitor DOT's compliance with the Court's order.

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Respectfully submitted,

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