No. 17-1229

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

IN RE KIDS AND CARS, Inc., and THE CENTER FOR AUTO SAFETY,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS

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October 30, 2017

PETITIONERS' CERTIFICATE OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

A. Parties

Petitioners are KIDS AND CARS, Inc., and the Center for Auto Safety. They seek a writ of mandamus directed to the Secretary of the Department of Transportation.

B. Corporate Disclosure Statement

Petitioners KIDS AND CARS, Inc. and the Center for Auto Safety are non-profit organizations. Neither has any parent companies or issues any stock or partnership shares.

C. Related Cases

Petitioners are unaware of any related cases.

Respectfully submitted,

___/s/_____

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INTRODUCTION

Petitioners seek a writ of mandamus to compel the Secretary of the Department of Transportation ("DOT") to comply with statutorily mandated deadlines to promulgate a critical automobile safety standard that will save almost a thousand lives each year—including those of young children—and prevent many other thousands of people, including children, from experiencing physical injuries, pain, and suffering. The standard at issue—which has already been mandated by Congress—would require a safety belt warning system for all designated rear seating positions of vehicles, *i.e.*, an audible warning if someone in the back seat of the car were not buckled up, similar to the warning that currently exists when *drivers* fail to fasten their seat belts.

On June 29, 2012 Congress enacted legislation requiring all designated seating positons in the rear seats of cars to be equipped with a seat belt warning as part of the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). Pub. L. 112-141, § 31503, 126 Stat. 405, 774 (2012) (codified at 49 U.S.C. § 30127 note). Congress directed the Secretary to initiate a rulemaking proceeding to promulgate that standard within two years of the effective date of the statute, i.e., by October 1, 2014, and to issue a final rule by October 1, 2015. *Id.*

However, more than three years since the *proposed* rule was to be published for public comment—*and despite many thousands of preventable deaths and*

injuries of children and others due to the lack of this important safety standard—the Secretary has yet to even *initiate* the requisite rulemaking to establish this much needed safety standard. Accordingly, the Secretary has unlawfully withheld and unreasonably delayed action required by law within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Therefore, because this Court would have jurisdiction over a challenge to any final safety standard, *see* 49 U.S.C. §30161(a), it has authority to issue the requested writ of mandamus. *See, e.g., Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 72 (D.C. Cir. 1984); *see also* 49 U.S.C. §30161(a) (challenges to final motor vehicle safety standards are reviewed by the Court of Appeals).

BACKGROUND

A. Seat Belts Save Thousands of Lives Each Year

According to the National Highway Traffic Safety Administration ("NHTSA")—the agency within the Department of Transportation responsible for issuing motor vehicle safety standards—"[o]f the 35,092 people killed in motor vehicle crashes in 2015, 48 percent"—or 16,845 people—"were not wearing seat belts." *See* NHTSA Seat Belt Report, Petitioners' Exhibit ("Pet. Ex.") A at 4. Also according to NHTSA, "[i]n 2015 alone, seat belts *saved an estimated 13,941 lives*." *Id.* at 1 (emphasis added). NHTSA further estimates that, on average, about 38 people each day who do not wear their seat belts are killed in motor vehicle

crashes, and that half of these people would be alive today if they had worn their seat belts. *See* NHTSA Most Wanted: 45 million Americans still not buckling up," Pet. Ex. B; *see also* Pet. Ex. A at 4 ("Not buckling up can result in being totally ejected from the vehicle in a crash, which is always deadly"); *id.* at 9 ("wearing your seat belt is your best insurance to prevent injury and death in the tragic case of a motor vehicle crash"); *id.* at 19 ("[w]earing a seat belt *can reduce the risk of fatal injury by 45%*" (emphasis added)).

Those sitting in the rear seats of cars are particularly at risk of death or injury as a result of not wearing seat belts during a crash. According to a 2017 Report by the Insurance Institute for Highway Safety ("IIHS"), unrestrained rear-seat occupants are nearly 8 times more likely to be seriously injured in a crash as restrained rear-seat occupants. Status Report, "Unbelted," Insurance Institute for Highway Safety (Aug. 3, 2017), Pet. Ex. C, at 2. Moreover, according to NHTSA, in 2014 58% of back seat passengers killed in crashes were not buckled up. NHTSA Poster ("Sitting in the Back Doesn't Excuse You from Using a Seat Belt"), Pet. Ex. D.

This risk to back-seat passengers is particularly significant for children, who routinely ride in the back seats of vehicles. In fact, NHTSA has *instructed parents to put children in the back seats of cars as the safest place to be in a car*. *See, e.g.*, Pet. Ex. A at 12 ("All children under 13 should ride in the back seat for maximum

safety. The back seat is the safest place for your children"); *see also* Pet. Ex. F (NHTSA directing parents to "keep kids in the back seat at least through age 12").

However, according to NHTSA, "[e]very 33 seconds, one child under the age of 13 is involved in a crash," and, in the last five years, "1,552 kids between ages of 8 and 14 died in cars crashes" and "of those who died, almost half were unbelted." *See* NHTSA, Child Passenger Safety Week, Facts and Talking Points (Sept. 2017), Pet. Ex. E. In fact, "[v]ehicle crashes are one of the leading causes of death for children between 1 and 13 years old." *See* NHTSA Report, "Keeping Kids Safe: A parent's guide to protecting children in and around cars" (2017), Pet. Ex. F at 5; *see also* NHTSA Report, "Identifying Strategies to Reduce the Percentage of Unrestrained Young Children (2009), Pet. Ex. G at 3 (Motor vehicle crashes are *the leading cause of death and disability for pediatric and adolescent children*); *id.* (Of the 3,300 unrestrained children of the same age group involved in crashes involving a fatality between 1998 and 2002, 27.7% were killed).

Yet, children often do not wear their seat belts, or start off wearing them but unfasten them at some point. *See, e.g.,* Pet. Ex. F at 12 ("Children can get bored during car trips and may play with the seat belt—sometimes pulling the seat belt all the way out"); Pet. Ex. A at 11 ("As your child grows, you may face challenges enforcing seat belt safety").

Teenagers and young adults who are passengers in cars also often do not wear their seat belts, placing them at great danger of serious injury or death. In 2015, 57% of unrestrained 13-15 year olds were killed in car crashes, Pet. Ex. A at 14, and 59% of passenger vehicle occupants 21-24 years old not wearing seat belts were killed in traffic crashes—"the highest percentage of all groups." *Id.* at 10; *see also id.* at 21 ("NHTSA data show that as children get older they are less likely to want to buckle up. Over the last 5 years, 1,552 kids between the ages of 8 and 14 died in car, SUV and van crashes—of those who died, *almost half were unbelted*") (emphasis added).

It is also well established that people riding in the *front* seat of a vehicle wearing a seat belt can be killed by an unbelted passenger in the *rear* seat in a crash who is propelled forward. As explained by Dr. Alisa Baer, a pediatrician and nationally certified child passenger safety instructor, being hit by someone riding in the rear seat weighing 100 pounds in a typical 30-mile-an hour crash is the equivalent of being slammed by someone weighing 2,000 to 2,500 pounds.[1]

B. <u>Seat Belt Warnings Save Lives</u>.

Although there is a current Federal Motor Vehicle Safety Standard ("FMVSS") requiring the driver's seating position to be equipped with a seat belt

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[1] Kate Rope, *Car Seat Mistakes You May Be Making*, PARENTING, http://www.parenting.com/gallery/car-seat-laws-requirements-installation?page=8 (last visited Oct. 24, 2017).

warning system that activates when the driver's seat belt is not buckled, FMVSS 208 (codified at 49 C.F.R. § 571.208), despite the fact that in 2012 Congress enacted legislation requiring a comparable warning when passengers in the *rear seats of the vehicle* are not wearing seat belts, to date no such standard has been promulgated. However, it is absolutely clear that such a warning system would save almost a thousand lives each year.

To begin with, audio warnings now provided for drivers in the front seat have proven to be "*highly effective in increasing belt wearing rates of a vehicle's front seat occupants*." "Advanced Seat Belt Reminder System for Rear Seat Passengers," Report of the International Electronics and Engineering ("IEE") at NHTSA's 2015 Enhanced Safety of Vehicles Conference, Pet. Ex. H (emphasis added). According to that same report, in a laboratory study conducted in Japan in 2012, when an audiovisual warning was used to remind rear seated passengers to fasten their seat belts, *95% of the initially non-belted rear seat occupants fastened their seat belts*. *Id.* at 3. Indeed, according to the recent IIHS report, nearly two-thirds of part-time and nonusers said audible rear seat belt reminders would make them more likely to buckle up. Pet. Ex. C at 4; *see also, e.g.,* Buckling Up Technologies to Increase Seat Belt Use, Special Report 278 (2003), Transportation Research Board, National Academy of Sciences, Pet. Ex. I at 13 (73% of drivers interviewed reported that they had buckled their seat belts after being reminded to

do so by a reminder system); *id.* at 77 (83% of drivers interviewed after being observed not wearing their safety belts in traffic said they would buckle up if they rented a car with an aggressive audible warning system).

NHTSA itself has acknowledged the importance of rear seat belt safety warnings, particularly to saving the lives of children riding in the back seats of cars. *See* Pet. Ex. F at 6-7 (identifying "Rear seat belt safety warnings" as one of the "Car Safety Features that Help Protect Kids"); *see also* Pet. Ex. E at 4 ("Parents need regular and salient reminders to consistently secure seatbelt compliance for themselves and their tweens [children 8-14 years old] children").

However, again, despite the fact that in 2012 Congress instructed the Secretary of Transportation to promulgate such a standard, to date the Secretary has failed to do so, and, as a result, very few vehicles sold in the United States have belt reminders for the rear seating positions. According to the recent IIHS Report, in 2015 *only 3 percent of models sold in the U.S. had them, and the number has not increased appreciably in newer vehicles*. Pet. Ex. C at 4. This statistic stands in sharp contrast to the situation in European countries and Australia where, since 2015, almost all new cars sold there come equipped with rear seat belt reminders[2]—a development that has surely decreased the number of

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[2] *See, e.g.,* Europe New Car Assessment Program ("NCAP") Seat Belt Reminder Data (2017), Pet. Ex. J, (showing that since 2015, between 95-100% of tested new cars sold in the European Union had rear seat belt reminders); Australia

deaths and injuries by vehicle passengers in those countries. *See, e.g.,* Pet. Ex. H (IEE report concluding that *front* seat belt warnings have proven to be "*highly effective in increasing belt wearing rates of a vehicle's front seat occupants*."); *id.* at 3 (reporting that a 2012 Japanese study demonstrated that use of an audiovisual warning to remind rear seated passengers to fasten their seat belts resulted in 95% of the initially non-belted rear seat occupants fastening their seat belts).

C. Congress Enacts Legislation Mandating A Safety Standard Requiring a Warning System for Rear Seat Belt Restraints.

On July 6, 2012, Congress enacted MAP-21—a funding and authorization bill governing United States federal surface transportation spending. Subtitle E of MAP-21 includes provisions that require the Secretary of Transportation to promulgate "Child Safety Standards" by specified statutory deadlines. Pub. L. 112-141, § 31503, 126 Stat. 405, 774 (2012) (codified at 49 U.S.C. § 30127 note).

The Map-21 statute provided that "[n]ot later than 2 years after the date of enactment of this Act, the Secretary shall initiate a rulemaking proceeding to amend Federal Motor Vehicle Safety Standard Number 208 (relating to occupant crash protection) to provide a safety belt use warning system for designated seating

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NCAP Seat Belt Reminder Data, Pet. Ex. K (showing that since 2015, approximately 90% of tested new cars sold in Australia had rear seat belt reminders.); *see also* Economic and Social Council Report (September 2, 2016), Pet. Ex. L, (recommending that all new cars sold world-wide have rear seat belt reminders).

positions in the rear seat." *Id.* The statute further provided that "[e]xcept as provided under paragraph (2) and section 31505, the Secretary shall issue a final rule under subsection (a) not later than 3 years after the date of enactment of this Act." *Id.*

Congress included only two caveats that would excuse the Secretary from promulgating a final rule within three years of enactment of the legislation. First, a final rule would not be required within three years if the Secretary determined within that timeframe that an amendment to the standard did not meet the requirements and considerations that govern all motor vehicle safety standards as set forth in the Motor Vehicle Safety Act, 49 U.S.C. § 30111(a)–(b), in which event the Secretary was required to submit a report describing the reasons for not prescribing such a standard to: (A) the Senate Committee on Commerce, Science, and Transportation; and (B) the House of Representatives' Committee on Energy and Commerce.

Second, § 31505 of MAP-21 provided that

> [i]f the Secretary determines that any deadline for issuing a final rule . . . cannot be met, the Secretary shall—(1) provide the Committee on Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives with an explanation for why such deadline cannot be met; and (2) establish a new deadline for that rule.

Id. § 31505, 126 Stat. at 775.

The statute provided that the provisions requiring a new seat belt safety warning system would take effect on October 1, 2012. *Id.* § 3(a), 126 Stat. at 413. This means that *the Secretary of Transportation was required to publish a proposed standard by October 1, 2014, and, unless one of the caveats described above applied, a final rule by October 1, 2015.*

However, to date—more than three years after being required to do so by Congress—the Secretary has not even published a *proposed* rule for the standard required by the statute. Nor, as far as Petitioners are able to ascertain, has the Secretary made and transmitted to the relevant congressional committees any of the determinations that would have excused DOT from issuing a final rule by October 1, 2015. Accordingly, Petitioners seek an order compelling the Secretary to immediately initiate the rulemaking required for rear seat belt reminders and to issue a final standard within one year from the date of publication of the proposed rule, as required by Congress.

ARGUMENT

I. THE COURT SHOULD ISSUE A WRIT OF MANDAMUS ORDERING DOT TO INITIATE AND COMPLETE A RULEMAKING PROCEEDING TO SET A STANDARD FOR A MANDATORY REAR SEAT BELT REMINDER, AS REQUIRED BY CONGRESS.

The Administrative Procedure Act provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1). This Court assesses several factors to determine whether an agency's

delay is "unreasonable." *TRAC*, 750 F.2d at 80. Further, after the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), analysis of whether an agency action has been "unlawfully withheld" versus "unreasonably delayed" also hinges on application of the *TRAC* factors. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189-90 (D.C. Cir. 2016).

Here, as demonstrated below, application of the *TRAC* factors compels the conclusion that the agency's delay in promulgating a standard for rear seat belt reminders is patently unreasonable. Accordingly, the Court should issue a writ of mandamus requiring DOT to initiate and complete the process for promulgating a rear seat belt warning standard.

A. Because The Agency Has Already Violated The Statutory Timetable By Three Years, Its Delay Is Unreasonable.

The first two factors to be applied under *TRAC* are closely related—i.e., (1) the "time agencies take to make decisions must be governed by a 'rule of reason,'" 750 F.2d at 80 (quoting *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir.1983)); and (2) "[w]here 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 the rule of reason*." *Id.* (citations omitted).

These factors are inextricably intertwined because, as this Court has succinctly explained, where a statute provided a mandatory deadline for agency

action, "Congress meant what it said." *In re United Mine Workers of Am. Int'l Union* ("*In re UMW*"), 190 F.3d 545, 551 (D.C. Cir. 1999); *see also Harbor Gateway Commercial Prop. Owners Ass'n v. EPA*, 167 F.3d 602, 606 (D.C. Cir. 1999) ("[W]hen a statute's meaning is clear, and the enactment is within the constitutional authority of Congress, the '*sole function of the court's is to enforce it according to its terms.*'" (emphasis added) (quoting *Higgins v. Marshall,* 584 F.2d 1035, 1038 (D.C. Cir. 1978))); *Public Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 n.30 (D.C. Cir. 1983) ("The reasonableness of the delay must be judged *in the context of the statute which authorizes the agency's action*." (emphasis added) (internal quotation omitted)); *Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987) ("The court must also examine *the extent to which the delay may be undermining the statutory scheme* . . . ." (emphasis added)).

Here, over five years ago Congress made the decision that DOT must promulgate a safety standard requiring rear seat belt reminders to protect the public's health and safety, and that to carry out that mandate, the proposed rule must be published by October 1, 2014, and, absent certain findings and congressional reports by the agency, a final rule must be published by October 1, 2015. Therefore, by imposing these statutory deadlines, Congress has already determined that the requisite standard is important to protect the public's safety, and that this standard must be in place by October 2015—over two years ago.

Accordingly, under *TRAC*'s "rule of reason factor," as informed by the statutory deadlines actually imposed by Congress, the agency's delay is clearly unreasonable. *See, e.g.*, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d at 191 (finding HHS's failure to meet a statutorily prescribed 90-day deadline unreasonable because "*[f]ederal agencies must obey the law*" (emphasis added)).

B. DOT's Delay is Particularly Unreasonable Because Peoples' Lives—Including Those of Children—are at Stake.

The third and fifth *TRAC* factors—whether "human health and welfare are at stake" and "the nature and extent of the interests prejudiced by delay," 750 F.2d at 80, are also closely related. As this Court held in *TRAC*, "delays that might be reasonable in the sphere of economic regulation are *less tolerable when human health and welfare are at stake*." *Id.* (emphasis added) (citations omitted); *see also In re Barr Labs. Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (explaining that under the third *TRAC* factor, the court "asks whether the case is primarily about 'human health and welfare' or 'economic regulation'"); *Auchter*, 702 F.2d at 1156 (in determining that an agency's delay is unreasonable the court must take into account the fact that "'*the interests at stake are not merely economic interests in a license or a rate structure, but personal interests in life and health*'" (emphasis added) (quoting *Wellford v. Ruckelshaus*, 439 F.2d 598, 601 (D.D. Cir. 1971))); *Cutler v. Hayes*, 818 F.2d at 898 (acknowledging that, even in the absence of a statutory deadline, "[t]he deference traditionally accorded to an agency to develop

its own schedule is sharply reduced *when injury likely will result from avoidable delay*" (emphasis added)); *Public Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) ("When an agency is charged with the administration of a statutory scheme whose paramount concern is protection of the public health, *the pace of agency decisionmaking must account for this statutory concern*." (emphasis added)).

Here, where the lives of people—and especially young children—are at stake, there can be no question that the agency's delay in issuing the motor vehicle safety standard mandated by Congress is patently unreasonable. Again, Congress has already made the policy decision that this standard is required to *save lives*. Indeed, as explained, *supra*, NHTSA itself has reported that "[e]very 33 seconds, one child under the age of 13 is involved in a crash," and approximately half of children between the ages of 8 and 14 who died in car crashes were not wearing their seat belts." Pet. Ex. A at 21; *see also* 2017 IIHS Report, Pet. Ex. C, at 3 (unrestrained rear-seat occupants are nearly 8 times as likely to sustain a serious injury in a crash as restrained rear-seat occupants); NHTSA Poster, Pet. Ex. D, (in 2014 58% of back seat passenger vehicle occupants killed in crashes were not buckled up).

As NHTSA has also reported, "[i]n 2015 alone seat belts saved an estimated 13,941 lives." Pet. Ex. A at 2. And, as the IIHS recently demonstrated, "nearly

two-thirds of individuals who do not regularly use seat belts stated that audible rear seat belt reminders would make them more likely to buckle up." IIHS Report, Pet. Ex. C, at 4; *see also* National Academy of Sciences Report (2003), Pet. Ex. I, at 13 (73% of drivers interviewed reported that they had buckled their seat belts after being reminded to do so by a reminder system); *id.* at 77 (83% of drivers interviewed after being observed not wearing their safety belts in traffic said they would buckle up if they rented a car with an aggressive audible warning system).

Indeed, bizarrely, at the same time it is violating its mandatory duty to promulgate a rear seat belt reminder safety standard, NHTSA is actively advising the public that "Rear seat belt safety warnings" are one of the "*car safety features that help protect kids*" from death and serious injury. *See* Pet. Ex. F at 6-7 (emphasis added). Yet, according to the recent IIHS Report, in 2015 *only 3% of cars sold in the United States had such reminders*. Pet. Ex. C at 5. This is in sharp contrast to the situation in other countries where the vast majority of cars sold since 2015—the year the standard was supposed to be imposed in *this* country—have rear seat belt reminders, demonstrating that the requisite technology for implementing this standard is clearly available. *See* Pet. Exhs. J-K.

Therefore, particularly when the agency itself is conducting a public education campaign touting the importance of "rear seat belt warning systems" to *save children's lives*, Pet. Ex. F, the agency's egregious delay in promulgating this

standard should not be tolerated by this Court. *See, e.g., Public Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d at 34 (recognizing that where the agency itself is "conducting an education campaign to warn physicians and parents of the potential risks that salicylates pose" to children's health, the "record strongly suggests that *the pace of agency decisionmaking* [in issuing an appropriate warning label] *is unreasonably dilatory*" (emphasis added)); *see also In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015) (explaining that when the agency itself acknowledges the risk to public health posed by a pesticide, the court "has little difficulty concluding it should be compelled quickly to resolve the administrative petition" seeking to ban the use of the substance).

Accordingly, under the third *TRAC* factor—whether the agency's delay adversely affects "human health and welfare"—and the fifth factor, "the nature and extent of the interests prejudiced by delay," 750 F.2d at 80—DOT's over three-year delay in publishing even a *proposed* rear seat belt warning standard is clearly unreasonable.

C. The Remaining *TRAC* Factors Further Demonstrate That DOT's Delay Is Unreasonable.

The final *TRAC* factors—"the effect of expediting delayed action on agency activities of a higher or competing priority," and the fact that the court need not find "any impropriety lurking behind agency lassitude," 750 F.2d at 80 (citations omitted)—also demonstrate that DOT's delay here is unreasonable.

As the Supreme Court has observed, the Motor Vehicle Safety Act was "created for the purpose of '*reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents* [.]'" *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983) (quoting 15 U.S.C. § 1381) (emphasis added)). Therefore, there simply is no higher priority for DOT than to comply with a congressional command requiring it to promulgate a safety standard that Congress has already decided, and as demonstrated above, NHTSA agrees, is needed to protect the lives of the public, including our most vulnerable citizens—children.

Moreover, particularly in light of Congress' inclusion of a specific timetable for the requisite standard, "[h]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, *there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act within [a specified timeframe]*." *In re UMW*, 190 F.3d at 554 (emphasis added). In any event, as this Court recently succinctly explained, "*[f]ederal agencies must obey the law, and congressionally imposed mandates and prohibitions trump discretionary decisions*." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d at 193 (emphasis added).

Finally, as emphasized by the Court in *TRAC*, Petitioners need not demonstrate any "impropriety lurking behind" the agency's delay in order to be

entitled to a writ of mandamus. 750 F.2d at 80. Rather, for the Court to find that the agency has "unreasonably delayed" the agency action at issue within the meaning of the APA, 5 U.S.C. §706(1), it is enough that: (1) Congress has directed the agency to promulgate the requisite safety standard; (2) Congress included specific statutory deadlines for this purpose; (3) the standard at issue will save thousands—indeed, over time, *tens of thousands*—of lives, including those of children; and (4) the agency has not even *begun* the mandated rulemaking proceeding required by Congress five years ago. As this Court has observed, "although courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities, *our ultimate obligation is to enforce the law as Congress has written it*." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d at 193 (emphasis added).

II. PETITIONERS HAVE ARTICLE III STANDING TO REQUEST A WRIT OF MANDAMUS.

Petitioners also have the requisite standing to request a writ of mandamus. To satisfy Article III, they must show that (1) they are currently being injured or face an imminent injury; (2) that injury is "fairly traceable" to the challenged action of the defendant; and (3) the injury will "likely" be redressed if Plaintiffs prevail on the merits. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Further, the Court need only find that one Plaintiff has the requisite standing, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981), and in determining standing the

Court "must . . . assume that on the merits the plaintiffs would be successful in their claims." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)). Here, Petitioners meet all of the requirements for standing.

A. Injury-In-Fact

Petitioner KIDS AND CARS, Inc. is a non-profit organization founded to protect children in and around motor vehicles. Declaration of Janette Fennell, Pet. Ex. M, ¶ 2. It has long advocated for a safety standard that would require rear seat belt reminders and its President and founder, Janette Fennell, testified in support of the MAP-21 requirement for such a standard. *Id.; see also* Testimony of Janette E. Fennell, before the Subcommittee on Commerce, Trade and Consumer Protection of the House Commerce Committee on Energy and Commerce (May 18, 2009), Pet. Ex. N. KIDS AND CARS brings this case on behalf of its officers and board members who, with their families, as a result of DOT's failure to promulgate the mandated standard, are exposed to the increased risk of personal and economic injury, and even death, from a vehicle crash if they or their children are sitting in the rear seat of a vehicle and not wearing their seat belts.

Petitioner Center for Auto Safety ("the Center") is a non-profit membership organization founded in 1970 by Consumers Union and Ralph Nader to advocate for auto safety on behalf of consumers, and it is the nation's leading consumer

advocacy group dedicated to these issues. Declaration of Jason Levine, Pet. Ex. O, ¶ 1. In furtherance of its mission, it has long advocated for motor vehicle safety standards that would increase the use of safety belts in automobiles and school buses, and has consistently advocated for incorporating available safety technology in motor vehicle safety standards wherever possible. *Id.* ¶ 2. The Center brings this case on behalf of its thousands of members who ride in rear seating positions or are parents of children riding in the back seats of motor vehicles—whether in the parents' or others' vehicles.

KIDS AND CARS' officers and board members and Center members are injured by DOT's challenged inaction because it exposes them to an imminent risk of serious injury or death if they or their family members sitting in the back seats of cars are involved in vehicle crashes but are not restrained in seat belts. As Congress understood when it enacted the legislation at issue, rear seat passengers clearly face such an increased risk of injury and death. Further, because drivers cannot always ensure that their children and other occupants are fastened in safety belts, a mandated audio reminder would significantly increase the probability that passengers would be wearing safety belts in the rear seats.

Indeed, the standard mandated by Congress was intended to decrease, or even eliminate, the risk that passengers would not wear safety belts in the rear seats of vehicles. Hence Defendants' failure to promulgate the standard required by

Congress is directly responsible for the continuing risk of injury and death to passengers in those seating positions, and others. These injuries are more than adequate to satisfy the injury-in-fact component of Article III standing. *See, e.g., Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) ("Injuries from car accidents—including death, physical injuries, and property damage—are plainly concrete harms under the Supreme Court's [Article III] precedents."); *see also Ass'n of Data Processing Serv. Orgs. Inc., v. Camp*, 397 U.S. 150, 154 (1970) (providing that those who are "likely to be financially" injured demonstrate a sufficient injury in fact for Article III standing) (citation omitted).

This risk of injury is by no means speculative. As demonstrated *supra*, NHTSA itself has determined that "[o]f the 35,092 people killed in motor vehicle crashes in 2015, 48 percent"—or almost 17,000 people—"were not wearing seat belts." Pet. Ex. A at 4. NHTSA has also reported that "[e]very 33 seconds, one child under the age of 13 is involved in a crash," and that, in the last five years, "1,552 kids between ages 8 and 14 died in car crashes," and "of those who died, almost half were unbuckled." *Id.* at 21. NHTSA has also found that in 2015, 57% of unrestrained 13-15 year olds were killed in car crashes," *id.* at 15, and that 59% of passenger vehicle occupants 21-24 years old not wearing seat belts were killed in traffic crashes. *Id.* at 10.

NHTSA has also reported that "[i]n 2015 alone, seat belts saved an estimated 13,941 lives," Pet. Ex. A at 4, that, on average, nearly half of the people killed in car crashes "would be alive today if they had worn their seat belts," *id.* at 4, and that "[r]ear seat belt safety warnings" "help protect kids" from death and injury. Pet. Ex. F at 6-7. Therefore, clearly the *absence* of such warnings—mandated by Congress over five years ago—are presently contributing to such deaths and injuries.

For all of these reasons, and regardless of the fact that many people would have standing to complain about the agency's unreasonable delay in promulgating this standard, Petitioners have demonstrated the requisite injury-in-fact for standing purposes. *See also, e.g.*, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1330 (D.C. Cir. 1986) (acknowledging that the Center for Auto Safety has standing to represent its members in a challenge to NHTSA's amendment to fuel economy standards—regardless of the fact that its members' injuries are common to the entire society); *accord In re Ctr. for Auto Safety*, 793 F.2d 1346, 1351 (D.C. Cir. 1986).[3]

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[3] The Center meets all of the other requirements for representational standing. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). "[T]he interests it seeks to protect are germane to the organization's purpose"—to protect the public from unnecessary injuries and fatalities due to car crashes, *see* Levine Dec. ¶¶1-2—and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343.

B. Causation

Petitioners' injuries are also "fairly traceable" to Defendants' failure to promulgate the mandatory standard for rear seat belt reminders, *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), because, as a direct result of the DOT's unreasonable delay, the vast majority of new cars sold in this country since October 1, 2015 do *not* have rear seat belt warning systems, as required by Congress.

As this Court has held, "Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that *the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise.*" *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc) (emphasis added). As the Court has also observed: "[t]he proper comparison for determining causation is not between what the agency did and the status quo before the agency acted. Rather, *the proper comparison is between what the agency did and what the plaintiffs allege the agency should have done under the statute.*" *Id.* at 441 (emphasis added).

Of course here, the "status quo," *id.*, is that Congress decided over five years ago that DOT must promulgate the safety standard at issue to protect the public from avoidable deaths and injuries. In any event, Plaintiffs contend—and hence

this Court must accept for purposes of determining standing, *Defenders of Wildlife v. Gutierrez*, 532 F.3d at 924—that DOT must *prohibit*, not allow, the sale of new cars that do not have rear seat belt warnings. Therefore, because the agency has violated Congress' statutory command by failing to promulgate this much needed safety standard, KIDS AND CARS' board members and officers, the Center's members, and their families presently face an increased risk of death or injury.

C. Redressability

Petitioners can also demonstrate that their injuries would "likely" be redressed if Defendants were compelled to promulgate the safety standard required by Congress, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000), because this would mean that at some point in the near future all new cars sold in this country would have to be equipped with rear seat belt reminders, which in turn would reduce injuries and fatalities from the failure to wear seat belts. There is no question that if the mandated standard were in place, these injuries would be greatly reduced, because a warning would sound in the car every time a rear seat belt was not fastened, or was unfastened while the car was in motion, which in turn would ensure that more back seat passengers actually fasten their seat belts.

For example, as a result of the present Federal Motor Vehicle Safety Standard requiring a warning if the *driver* of a vehicle is not buckled up, FMVSS

208 (codified at 49 C.F.R. § 571.208), many more drivers wear seat belts than would do so if that warning were not heard. Again, according to the IEE's recent presented at NHTSA's 2015 Enhanced Safety of Vehicles Conference, the audio warnings now provided for drivers in the *front* seat have proven to be "*highly effective in increasing belt wearing rates of a vehicle's front seat occupants*." "Advanced Seat Belt Reminder System for Rear Seat Passengers," Report of the IEE, Pet. Ex. H, at 2 (emphasis added). According to that same report, a laboratory study conducted in Japan demonstrated that use of an audiovisual warning to remind rear seated passengers to fasten their seat belts resulted in 95% of the initially non-belted rear seat occupants fastening their seat belts. *Id.* at 3.

The IIHS also recently reported that nearly two-thirds of part-time and nonusers of seat belts said audible rear seat belt reminders would make them more likely to fasten their seat belts, Pet. Ex. C at 5—a finding that is supported by a previous study by the National Academy of Sciences. *See* Buckling Up Technologies to Increase Seat Belt Use, Special Report 278 (2003), Transportation Research Board, National Academy of Sciences, Pet. Ex. I, at 13 (73% of drivers interviewed reported that they had buckled their seat belts *after being reminded to do so by a reminder system*). Indeed, Congress itself recognized that a mandatory rear seat belt warning would save many people's lives—which is precisely why it enacted the legislation requiring this standard.

Therefore, as demonstrated above, Petitioners have the requisite Article III standing to request this Court to issue a writ of mandamus.

CONCLUSION

For all of the foregoing reasons, this Court should issue a writ of mandamus requiring the Department of Transportation to immediately publish in the Federal Register a proposed safety standard requiring rear seat belt reminders, and, within one year from the date of the proposed rule, issue a final standard, as required by the 2012 MAP-21 legislation.

Respectfully submitted,

___/s/_____
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Date: October 30, 2017

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains 6371 words.

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Mandamus has been served on the Secretary for the Department of Transportation by having a copy delivered by hand this 30th day of October, 2017 to:

Judith S. Kaleta, Deputy General Counsel
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