IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

BRAKE PLUS NWA, INC.
and WILLIAMS & LAKE, LLC **PLAINTIFFS**

vs. **CASE NO.: 5:23-cv-05185-TLB**

UNITED STATES DEPARTMENT OF TRANSPORTATION, Through Pete Buttigieg In His Official Capacity As Secretary of Transportation; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Through Ann Carlson In Her Official Capacity As Acting Administrator of The National Highway Traffic Safety Administration **DEFENDANTS**

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' PRELIMINARY-INJUNCTION MOTION

Respectfully submitted,

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INTRODUCTION

For decades, the National Highway Traffic Safety Administration ("NHTSA"), a component of the U.S. Department of Transportation ("DOT") tasked with overseeing compliance with the Federal Motor Vehicle Safety Standards ("FMVSS"), has maintained that "pulsing" stop lamps on motor vehicles violate FMVSS 108, which requires stop lamps to be "steady burning" once activated. Plaintiffs Brake Plus NWA, Inc. and Williams & Lake, LLC (together, "Plaintiffs") distribute devices that when installed cause a vehicle's stop lamps to pulsate.

NHTSA sent Plaintiffs "Request Letters" to inform them that consistent with NHTSA's decades-long view, Plaintiffs' customer dealerships, by installing Plaintiffs' products, violate the "make inoperative" provision of the National Traffic and Motor Vehicle Safety Act ("Vehicle Safety Act"). *See* 49 U.S.C. § 30122(b) (prohibiting manufacturers, distributors, dealers, rental companies, and motor vehicle repair businesses from "knowingly mak[ing] inoperative any part of a device or element of design installed on or in a motor vehicle or motor vehicle equipment in compliance with an applicable motor vehicle safety standard"). The Request Letters also asked Plaintiffs to supply information about their customers and stated NHTSA's plan to send "Notification Letters" to Plaintiffs' customers about the federal prohibition under 49 U.S.C. § 30122(b) regarding taking a vehicle's stop lamps out of compliance with FMVSS 108.

In response, Plaintiffs brought this instant action seeking to preliminarily enjoin NHTSA from informing Plaintiffs' customers of NHTSA's decades-long view on the application of 49 U.S.C. § 30122(b) and FMVSS 108 to pulsing stop lamps. This Court should deny Plaintiffs' motion.

First, Plaintiffs fail to show that they are likely to prevail on the merits. At the outset, this dispute is not justiciable as Plaintiffs likely lack Article III standing and the dispute is not ripe for review. Because neither the Request Letters nor the Notification Letters carry any legal consequences, Plaintiffs attempt to allege Article III standing by speculating about future *practical* consequences as a result of the Notification Letters. Most notably, Plaintiffs speculate that once their dealer customers receive these Notification Letters, they will halt all purchases of Plaintiffs' products—effectively destroying Plaintiffs' businesses. This prediction is especially speculative, not only because it relies on the future behavior of third-party dealers, but also because dealers have not halted their purchase of Plaintiffs' products in the past *despite* NHTSA's longstanding, public position on pulsing brake lights. For similar reasons, this dispute is not ripe for review.

Even if this Court had jurisdiction over the dispute, Plaintiffs are unlikely to prevail on the merits mainly because neither the Request Letters nor the Notification Letters amount to final agency action under the Administrative Procedure Act ("APA") as neither carry any legal consequences for Plaintiffs, dealers, or anyone else. Rather, the Letters simply restate, without enforcing, NHTSA's longstanding legal *view* that pulsing brake lights do not meet the requirements of FMVSS 108. And to the extent that Plaintiffs fear that informing the dealers of NHTSA's legal view will create a chilling effect among them, any such consequence would be "practical, not legal." *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 808, 811 (D.C. Cir. 2006).

Moreover, even if the Court reached the merits of Plaintiffs' APA claims, Plaintiffs' challenges are unlikely to succeed because notice-and-comment rulemaking was not required for NHTSA to interpret FMVSS 108's "steady burning" requirement, because NHTSA did not otherwise act contrary to law, and because its interpretation of FMVSS 108 was not arbitrary or capricious.

Second, Plaintiffs fail to show any imminent irreparable harm. Even if their speculative fears regarding customer behavior come to fruition once the Notification Letters are sent out, Plaintiffs fail to show that such economic harm would "threaten[] the very existence of the [Plaintiffs'] business[es]," *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986), as is necessary to sustain their claim for emergency relief.

Third, enjoining NHTSA from sending out the Notification Letters would not be in the public interest or equitable. The Government has a "compelling interest[]" in protecting "public safety." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989). That interest is served through the Notification Letters as the Government maintains that pulsing stop lamps hinder public safety by causing confusion among drivers. The speculative or modest harm to Plaintiffs' businesses does not outweigh the Government's compelling interest in protecting public safety.

This Court should deny Plaintiffs' preliminary-injunction motion.

BACKGROUND

I. Statutory Background

In 1966, Congress enacted the Vehicle Safety Act, the purpose of which "is to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. To that end, the Vehicle Safety Act directs the Secretary of Transportation (the "Secretary") to establish FMVSS that are "practicable, meet the need for motor vehicle safety, and . . . stated in objective terms." *Id.* § 30111.[1] The Secretary has delegated authority to enforce the Vehicle Safety Act to NHTSA. *See* 49 C.F.R. § 1.95(a). NHTSA's authority applies to all vehicles "driven or drawn by mechanical power" and used primarily on public roads, including passenger cars and commercial motor vehicles ("CMVs") such as trucks and buses. *See* 49 U.S.C. § 30102(a)(7) (defining "motor vehicle").

[1] In addition, the Vehicle Safety Act permits any interested party to petition the Secretary to prescribe or amend a motor vehicle safety standard. *See* 49 U.S.C. § 30162.

A manufacturer or distributor of motor vehicles or motor vehicle equipment must certify to the dealer or distributor at delivery that the vehicle or piece of equipment complies with all applicable motor vehicle safety standards in effect. *Id.* § 30115. Furthermore, "a person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or motor vehicle equipment," *id.* § 30112(a)(1), unless it complies with all applicable motor vehicle safety standards and is covered by a certification issued pursuant to section 30115. *See id.* § 30112(a)(1). As is relevant here, to ensure vehicles and equipment remain safe after that first retail sale, the Vehicle Safety Act also prohibits manufacturers, distributors, dealers, rental companies, and motor vehicle repair businesses from "knowingly mak[ing] inoperative any part of a device or element of design installed on or in a motor vehicle or motor vehicle equipment in compliance with an applicable motor vehicle safety standard." *Id*. § 30122(b).

A dealer or other covered entity that violates the statutory "make inoperative" provision is liable for civil penalties, which the Secretary is authorized to compromise. *Id*. §§ 30165(a)(1), (b)(1). The Attorney General may also bring a civil action in federal district court to enjoin violations. *Id.* § 30163(a)(1). Before such a lawsuit is filed, the Secretary is required, "[w]hen practicable," to notify the defendant and give the defendant "an opportunity to present that person's views." *Id.* § 30163(b). In order to carry out investigations under the Vehicle Safety Act, the Secretary has the authority to require any person to file reports and answer specific questions and require the appearance and testimony of witnesses and the productions of records. *Id.* § 30166(g).

NHTSA enforcement actions regarding the "make inoperative" provision are rare. Since 1999, NHTSA has entered into settlements providing for the total payment of $23,000 in civil penalties by four entities alleged to have violated the "make inoperative" provision.[2] NHTSA has not sought to impose civil penalties through litigation during this time.

II. Regulatory Framework

A. Federal safety standards require stop lamps to be steady burning.

Pursuant to the Congressional directive to issue motor vehicle safety standards, the Secretary first issued Federal Motor Vehicle Safety Standard No. 108, *Lamps, Reflective Devices, and Associated Equipment* (FMVSS 108), in 1967. *See* Initial Federal Motor Vehicle Safety Standards, 32 Fed. Reg. 2408 (Feb. 3, 1967). The purpose of FMVSS 108 is to "to reduce traffic accidents and deaths and injuries resulting from traffic accidents, by providing adequate illumination of the roadway, and by enhancing the conspicuity of motor vehicles on the public roads so that their presence is perceived and their signals understood, both in daylight and in darkness or other conditions of reduced visibility." 49 C.F.R. § 571.108, S2. FMVSS 108 specifies the lamps that are required for different types of vehicles, the color of those lamps, and the activation requirements for each required lamp. *See id*. Table I-a-c. Since FMVSS 108's inception, the standard has required stop lamps to be steady burning, and this requirement applies to the center high mounted stop lamp ("CHMSL"). *See* 32 Fed. Reg. 2408, at 2412; 49 C.F.R. § 571.108, Table I-a.[3] The Office of Vehicle Safety Compliance ("OVSC") within NHTSA is responsible for overseeing compliance of motor vehicles and motor vehicle equipment with applicable FMVSS.

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[2] *See Civil Penalty Settlement Amounts*, NHTSA, *available at https://www.nhtsa.gov/laws-regulations/civil-penalty-settlement-amounts* (last accessed on Nov. 15, 2023); *Civil Penalty Settlement Amounts*, NHTSA, *available at* https://www.nhtsa.gov/laws-regulations/civil-penalty-settlement-amounts-archive (last accessed on Nov. 15, 2023).

[3] FMVSS 108 required passenger cars to be equipped with a CHMSL starting September 1, 1985 and light trucks to be equipped with a CHMSL starting September 1, 1993. *See* Final Rule, FMVSS; Lamps, Reflective Devices and Associated Equipment, 56 Fed. Reg. 16015 (Apr. 19, 1991).

OVSC monitors compliance with the FMVSS through testing, analysis, and evaluation. *See OVSC Mission*, NHTSA, *available at* https://www.nhtsa.gov/sites/nhtsa.gov/files/ovsc_mission.pdf (last accessed on Nov. 15, 2023).

NHTSA has long emphasized the importance of standardizing the appearance of required lamps, so that the messages they convey are easily understood. *See* FMVSS; Lamps, Reflective Devices, and Associated Equipment, Statement of Policy, 63 Fed. Reg. 59482, 59484 (Nov. 4, 1998) ("A vehicle signaling system must be as simple and as unambiguous as possible to others who share the roadway if traffic is to proceed in a safe and orderly fashion."); FMVSS; Denial of Petition for Rulemaking, 70 Fed. Reg. 29470, 29471 (May 23, 2005) ("NHTSA is concerned that allowing alternative signal configurations violates the basic principle of standardization that is necessary to minimize driver confusion and to promote a quick and appropriate driver response to the condition that is being signaled, which in this case is a slowing lead vehicle.").

B. NHTSA has consistently stated that lamps that pulse are not steady burning.

Over the past 50 years, NHTSA has repeatedly and consistently expressed the view that lamps which "pulse" are not steady burning.

In 1973, NHTSA responded to an inquiry from the manufacturer of a pulsing brake light—similar to Plaintiffs' products—that "does not [e]ver turn the bulb out but only changes [its] brilliance in a pulsating manner." Letter from E.T. Driver, Director, Office of Operating Systems, NHTSA, to Mel Aanerud, Manager, Reservation Business Enterprise (Dec. 7, 1973), *available at* https://www.nhtsa.gov/interpretations/nht73-125 (last accessed on Nov. 15, 2023). The manufacturer asked: "[D]oes 'steady burning' mean that the bulb must always be on, and therefore our product falls within that definition or does it require it to burn at a steady intensity which would make our product fall outside the definition[?]" *Id.* NHTSA responded that its "definition of 'steady' is 'regular, uniform; not changed, replaced or interrupted; not fluctuating or varying widely,'" and that stop lamps activated by the manufacturer's product "would therefore not be 'steady burning.'" *Id.*

In 1999, NHTSA's Chief Counsel responded to a similar inquiry about a device that "will pulse the center high mounted brake light for approximately 6 seconds and reactivate it if the brakes are reapplied." *See* Letter from Frank Seales, Jr., Chief Counsel, NHTSA to Evan W. Johnson, Administrator, Department of Housing and Consumer Affairs (Aug. 27, 1999), *available at* https://www.nhtsa.gov/interpretations/20288ztv (last accessed on Nov. 15, 2023). The Chief Counsel stated that FMVSS 108 "does not allow a stop lamp that pulses," that "a vehicle with a stop lamp that pulses does not meet Federal requirements," and that federal law "prohibits a dealer from installation of [the device] on a vehicle after it is sold." *Id.*

C. NHTSA informed Plaintiff Williams & Lake that installation of its product by motor vehicle dealers made inoperative equipment required by the FMVSS.

Plaintiff Williams & Lake distributes a product called Pulse, which is sold to and installed by motor vehicle dealers. ECF No. 2, ¶ 7 ("Compl."). OVSC became aware of Plaintiff Williams & Lake's product through multiple inquiries about the product including an inquiry from an attorney regarding whether the product complied with FMVSS 108. On February 5, 2019, OVSC issued Williams & Lake an information request letter. *See* Letter from Claudia Covell, NHTSA to William Wetmore, CEO, Williams & Lake, LLC (Feb. 5, 1999), Ex 6. Aff. of William Wetmore, III, ECF No. 5-1 at 53-57. The letter stated that "[y]our system causes a high-mounted stop lamp to dim and brighten and is not considered by NHTSA to be a steady-burning lamp," that a "modulating stop lamp is not a steady-burning one," and that installation of the Williams & Lake product "may be rendering inoperative motor vehicles required to be equipped with a high-mounted stop lamp." *Id.* at 52. By the letter, OVSC advised Williams & Lake that it had opened an investigation and asked Williams & Lake to: (1) provide information about all entities covered by the statutory "make inoperative" provision to which it had sold its device or which had installed the device; (2) indicate what actions it planned to take in response to the letter; and (3) indicate whether it intended to remove from its website the "false or misleading" statement that the product "causes the third brake light to remain steady burning and within the acceptable range of specified minimum and maximum photometric threshold, throughout the pulsing," or explain why it did not believe the statement to be false or misleading. *Id.* at 55.

On April 5, 2019, Williams & Lake submitted a partial response to OVSC arguing that its product complies with FMVSS 108 because when a CHMSL equipped with Williams & Lake's product pulses, the lamp's photometric values remain within the maximum and minimum intensity values permitted of stop lamps. Letter from Jacqueline Glassman, Partner, King & Spalding, to Claudia Covell and Leroy Angeles, NHTSA (Apr. 5, 2019), Ex 7. Aff. of William Wetmore, III, ECF No. 5-1 at 63. Williams & Lake further argued that NHTSA letters of interpretation were not binding on Williams & Lake, that NHTSA was attempting to change the requirements of FMVSS 108, that several states permitted pulsing lamps under those states' motor vehicle codes, and that pulsing lights promote safety. *See id.* Williams & Lake did not address how its product conformed to the plain meaning of the phrase "steady burning" as it is commonly understood. *See id.*

On July 10, 2019, Williams & Lake sent a letter to NHTSA's Chief Counsel repeating the arguments in Williams & Lake's April 5, 2019 response to OVSC and highlighting exemptions from a similar steady burn requirement granted by the Federal Motor Carrier Safety Administration ("FMCSA"), and recent Congressional activity related to pulsing stop lamps. Letter from Jacqueline Glassman, Partner, King & Spalding, to Jonathan Morrison, Chief Counsel, NHTSA (July 10, 2019), Ex 9. Aff. of William Wetmore, III, ECF No. 5 at 82. On August 28, 2019, Williams & Lake provided OVSC with its list of customers and on September 24, 2019, representatives from Williams & Lake met with staff from OVSC and NHTSA's Office of Chief Counsel.

D. Plaintiff Brake Plus NWA was aware that pulsing stop lamps installed by motor vehicle dealers make inoperative a vehicle's compliance with FMVSS 108.

Subsequent to issuing the information request letter to Williams & Lake, OVSC became aware of Plaintiff Brake Plus NWA's product. Brake Plus NWA's product is also sold to and installed by motor vehicle dealers. Compl. ¶ 7.

On December 14, 2020, Intellistop, Inc.,[4] a sister company of Plaintiff Brake Plus NWA that sells a product that causes the stop, clearance, and ID lamps on CMVs to pulse, petitioned FMCSA for an exemption from a "steady burning" requirement applicable to CMVs. As noted, *supra* 3, the NHTSA authorities apply to CMVs. In addition, an FMCSA regulation issued under the Motor Carrier Safety Act of 1984 requires motor carriers who operate CMVs in interstate commerce to maintain "steady burning" brake lights (including auxiliary lights not required by the FMVSS). 49 C.F.R. § 393.25(e). Intellistop asked FMCSA for an exemption from that regulation that would apply to all motor carriers in the country. *See* Letter from Michelle Hanby, President, Intellistop to Administrator, FMCSA (Dec. 14, 2020) (Exhibit 1A).

On June 28, 2022, the Federal Trade Commission ("FTC") sent a cease-and-desist letter to Intellistop stating that Intellistop's advertising was in violation of the FTC Act because Intellistiop's "advertising claims represent, expressly or by implication, that [Intellistop's] product has the approval of the DOT and FTC." *See* Letter from Serena Viswanathan, Associate Director, Division of Advertising Practices, FTC, to Michelle, Hanby, President, Intellistop (June 28, 2022)

[4] Michelle Hanby, owner of Plaintiff Brake Plus NWA, is also the President of Intellistop.

(Exhibit 1B). The FTC further stated that "DOT has not made a specific determination that [Intellistop] is complying with its laws or regulations. In fact, it is our understanding that there is a pending application before DOT seeking an exemption for your pulsating brake light product from compliance with DOT regulations." *Id.* Plaintiff Brake Plus NWA's website contained similar statements indicating that its product complied with DOT regulations. *See* Letter from John Donaldson, Acting Chief Counsel, NHTSA, to Michelle Hanby, Owner, Brake Plus NWA (July 26, 2023).

On October 7, 2022, FMCSA denied Intellistop's exemption petition, stating that in consultation with NHTSA, it had determined that it lacked data to support a blanket exemption for the CMV industry. *See* Parts and Accessories Necessary for Safety Operation; Application for an Exemption From Intellistop, Inc. 87 Fed. Reg. 61133, 61136 (Oct. 7, 2022). In denying the petition, FMCSA further stated that "[g]ranting an industry-wide exemption would make it extremely difficult, if not impossible, to monitor the installation of the devices and the 'make inoperative' provisions of the [Vehicle] Safety Act." *id.* at 61137, because it would be difficult to determine whether the devices were installed by the owner or operator, or an entity covered by the "make inoperative" provision. *Id.*

Intellistop filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of FMCSA's denial of its exemption request. On July 7, 2023, the D.C. Circuit denied Intellistop's petition for review. *Intellistop v. DOT*, 72 F.4th 344 (D.C. Cir. 2023). The Court held that although Intellistop had cited studies reporting "potential safety benefits of pulsing brake lights," FMCSA had reasonably determined that these studies did not address the agency's "concern regarding widespread driver confusion stemming from the rapid introduction of pulsing brake lights across the motor carrier industry and its concern that Intellistop's module altered the performance of original equipment manufacturers' lights covered by a FMVSS." *Id.* at 350. The Court also held that FMCSA's conclusion was buttressed by the agency's determination that "it, and the NHTSA, would have difficulty monitoring whether the entities listed in section 30122 had in fact installed Intellistop's device." *Id.* at 352.

Given the similarity between the product sold by Intellistop and the products sold by Plaintiffs, OVSC had paused further action related to compliance of Plaintiffs' products pending FMCSA's decision on Intellistop's exemption request and resolution of the resulting litigation—both of which have now concluded.

E. NHTSA's July 26, 2023 letters to Plaintiffs

NHTSA sent Request Letters to each Plaintiff on July 26, 2023, reiterating its longstanding view that pulsing lamps do not comply with the requirement in FMVSS 108 that stop lamps be steady burning, and requiring Plaintiffs to provide information about their purchasers by August 25, 2023. *See* Letter from John Donaldson, Acting Chief Counsel, NHTSA, to William Wetmore, III (July 26, 2023) ("Request Letter to W&L"); Letter from John Donaldson, Acting Chief Counsel, NHTSA, to Michelle Hanby, Owner, Brake Plus NWA (July 26, 2023) ("Request Letter to Brake Plus"). The Request Letters further stated that since the products are only sold through dealerships and must be installed by certified technicians, the products cannot be installed on a motor vehicle consistent with federal law, which prohibits dealers from installing equipment that takes a vehicle out of compliance with FMVSS 108. *Id.*

NHTSA informed Plaintiffs that the agency intended to send Notification Letters to Plaintiffs' customers informing them of the federal prohibition on taking a vehicle's stop lamps out of compliance with FMVSS 108. *Id.* NHTSA stated in the Request Letters that it would provide Plaintiffs with a copy of any Notification Letter sent to Plaintiffs' purchasers seven days prior to issuance. *Id.* NHTSA subsequently extended the deadline for Plaintiffs to respond to October 24, 2023. Compl. ¶ 45. At Williams & Lake's request, NHTSA staff met with representatives from Williams & Lake on August 18, 2023, to further discuss Williams & Lake's position regarding the Letters. *Id.* ¶ 42.

III. This Lawsuit

On October 19, 2023, Plaintiffs requested that NHTSA further extend the deadline for Plaintiffs to submit purchaser information. Compl. ¶ 59. On October 24, 2023, NHTSA extended the deadline for Plaintiffs to provide purchaser information until October 25, 2023, but indicated that NHTSA was unwilling to extend the deadline further. *See* Letter from John Donaldson, Acting Chief Counsel, NHTSA, to Christie Iannetta, Nelson Mullins (Oct. 24, 2023). On October 25, 2023, Plaintiffs filed the instant action seeking to enjoin NHTSA from sending to Plaintiffs' customers Notification Letters stating that installation of Plaintiffs' products would render required stop lamps inoperative with FMVSS 108. *See* ECF No. 1. That same day, Defendants agreed not to send Notification Letters to Plaintiffs' purchasers pending resolution of Plaintiffs' motion for a preliminary injunction. *See* ECF No. 18. Defendants also agreed to delay the deadline for Plaintiffs to provide their purchaser lists until after this Court's resolution of that motion. *Id.*

ARGUMENTS

"A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 997 (8th Cir. 2023) (citation omitted). To prevail on a preliminary-injunction motion, a movant must demonstrate: "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Padda v. Becerra*, 37 F.4th 1376, 1381–

82 (8th Cir. 2022) (citation omitted). Where the federal government is a party to the motion, the final two factors merge because "the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016); *Eggers v. Evnen*, 48 F.4th 561, 564–65 (8th Cir. 2022). But the "probability of success" remains "the most significant" factor. *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1016 (8th Cir. 2022).

I. Plaintiffs Are Not Likely To Succeed On The Merits.

A. Plaintiffs are not likely to establish standing.

A plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court's exercise of jurisdiction is within the bounds of the Constitution and is authorized by statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must resolve all issues of subject-matter jurisdiction before it proceeds to the merits of the plaintiff's claims. *See, e.g., Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Moreover, a "difficult question as to jurisdiction" makes it more difficult for the plaintiff to show a likelihood of success on the merits and therefore weighs against preliminary relief. *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

The jurisdictional requirement of "standing" is rooted in the constitutional separation of powers. It prevents courts from taking action to address matters better suited to legislative or executive action. *See Allen v. Wright*, 468 U.S. 737, 750 (1984). A plaintiff in federal court must show "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Standing entails three elements:

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2)

> the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

Here, Plaintiffs cannot establish standing because they have not plausibly alleged that the Request Letters or any potential future Notification Letters to their customers harm or imminently threaten to harm them, nor have they demonstrated that the speculative harm they fear would be caused by those letters and redressable through this lawsuit.

At the outset, Plaintiffs do not attempt to identify any harm or imminent threat of harm as a result of the Request Letters that the agency sent in July. And for good reason: other than requiring Plaintiffs to provide NHTSA with a customer list,[5] the Request Letters do not impose any restriction or penalty on Plaintiffs and do not have the legal authority to define or modify Plaintiffs' rights or obligations under the Vehicle Safety Act.

Unable to identify any harm or imminent future harm as a result of any agency action, Plaintiffs attempt to establish standing by speculating about the harmful impact of hypothetical future agency action—namely, the Notification Letters that the agency stated it plans to send to Plaintiffs' customers in the future. Plaintiffs argue that NHTSA will issue Notification Letters to their customers, and that the customers, in turn, will "immediately cease the purchase and installation" of Plaintiffs' products, "resulting in the destruction of Plaintiffs' businesses" ECF No. 6 at 10, ("Br.").

This theory of standing does not identify a cognizable injury-in-fact because it rests on multiple layers of speculation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992)

[5] Plaintiffs do not argue that NHTSA's request for information is improper, and they in fact assert that they "will be complying." Compl. ¶ 64. The agency's broad investigative authority pursuant to 49 U.S.C. § 30166 clearly encompasses this type of information request.

(noting that an injury that has not yet occurred must be "imminent" in order "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending" (citation omitted)). First, Plaintiffs speculate about the content of these Letters, claiming that NHTSA will "warn[] [Plaintiffs' customers that] installation of Plaintiffs' safety devices is unlawful." Br. 10. But in its Request Letters, NHTSA simply informed each Plaintiff that "[o]nce NHTSA is in receipt of [Plaintiff's] purchaser list, NHTSA intends to send letters to [Plaintiff's] purchasers to inform them of the prohibition under Federal law on taking a stop lamp out of compliance with the FMVSS." *See* Request Letter to W&L at 2; Request Letter to Brake Plus at 3. Based on this statement, Plaintiffs can only speculate about the exact content of these Notification Letters.

Second, Plaintiffs further speculate that the dealers will react to these Notification Letters by "immediately ceas[ing] the purchase and installation" of Plaintiffs' products. Br. 10. This prediction is even more speculative. Even if Plaintiffs are correct about the contents of the Notification Letters, at most, the Letters will merely be *restating* NHTSA's longstanding position that pulsing brake lights do not meet the requirements of FMVSS 108. These Notification Letters will not impose any immediate legal consequences, requirements, or penalties on the dealers. Put simply, the Letters will neither prohibit dealers from purchasing Plaintiffs' products nor impose any penalties on the dealers for continuing to do so. Yet, Plaintiffs claim that these Letters will "destroy" their business because dealers will *voluntarily* halt purchase of Plaintiffs' products as to avoid any risk of hypothetical future enforcement proceedings. *See, e.g.*, Whitmore Decl. ¶ 91 ("In my opinion, no customer would take the risk of a Court ruling that NHTSA's position is correct and face the imposition of staggering financial penalties and fines for continuing to purchase and install the Pulse Module."). In other words, Plaintiffs speculate about a potential chilling effect on

Plaintiffs' businesses that might ensue once third parties are informed about NHTSA's longstanding position on pulsing brake lights like the ones sold by Plaintiffs. But Plaintiffs fail to support their speculation about this feared chilling effect with any degree of certainly, let alone meet the heavy burden of showing that the harm is "*certainly* impending." *Lujan*, 504 U.S. at 565 n.2 (citation omitted).

This asserted chilling effect is especially speculative because the information that Plaintiffs speculate will be contained in the Notification Letters is not new. NHTSA's longstanding position that pulsing brake lights do not meet the requirements of FMVSS 108 has been public for decades and has received considerable public attention in light of the Intellistop litigation, the Congressional activity Plaintiffs identify throughout their brief, and even this litigation. In fact, a dealer trade association has already contacted NHTSA regarding the Request Letters it sent to Plaintiffs in July. Email from Daniel Ingber, Vice President of Regulatory Affairs, National Automobile Dealers Association, to Thomas Healy (Aug. 30, 2023) (Exhibit 1C). Yet—as evident by the rapid growth of Plaintiffs' businesses over the years, s*ee* Br. 9 n.4—NHTSA's public view on this issue has not deterred dealers from purchasing Plaintiffs' products. So, Plaintiffs' prediction that the Notification Letters will be the straw that breaks the camel's back is pure speculation.

Moreover, while Plaintiffs assert that their dealer customers "face the imposition of staggering financial penalties and fines" if NHTSA eventually takes enforcement action, *see* Whitmore Decl. ¶ 91, there is no reason to suspect that customers will fear such drastic consequences. Historically, NHTSA has taken few enforcement actions related to the "make inoperative" provision. Since 1999, NHTSA has entered into settlements with four entities alleged to have violated the "make inoperative" provision.[6] Critically, during that time, NHTSA has not sought *any* civil penalties for violations of that provision through litigation. Furthermore, even if NHTSA did take enforcement action against a dealer, the dealer could argue, as Plaintiffs attempt to argue in this suit, that installation of Plaintiffs' products does not take a vehicle out of compliance with FMVSS 108.

Third, Plaintiffs speculate that if their current dealer customers cease purchasing and installing their devices, that will result in "the destruction of Plaintiffs' businesses." Br. 10. But the "make inoperative" provision only prohibits certain entities, including dealers, from taking vehicles out of compliance with the FMVSS. *See* 49 U.S.C. § 30122(b). Even if Plaintiffs' customers ceased *installing* the devices for fear of liability, that would not stop those same customers from buying the devices and reselling them to the millions of vehicle fleet owners and individual vehicle owners who are not covered by the "make inoperative" provision, and it would not stop Plaintiffs from selling their devices directly to such vehicle owners.

For similar reasons, Plaintiffs cannot show that the feared fatal harm to their businesses is either "fairly traceable" to the Notification Letters or likely to be redressed by a favorable decision in this lawsuit. As the Supreme Court has explained, it is "substantially more difficult to meet the minimum requirement of Art. III" when Plaintiffs' injury depends on the independent actions of a third party. *Warth*, 422 U.S. at 505. And where, as here, the prediction on which Plaintiffs' standing claim is based—in this case, that dealers will halt purchase of Plaintiffs' products once they receive these Letters—is particularly speculative, the standard is not satisfied.

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[6] *See Civil Penalty Settlement Amounts*, NHTSA, *available at https://www.nhtsa.gov/laws-regulations/civil-penalty-settlement-amounts* (last accessed on Nov. 15, 2023); *Civil Penalty Settlement Amounts*, NHTSA, *available at* https://www.nhtsa.gov/laws-regulations/civil-penalty-settlement-amounts-archive (last accessed on Nov. 15, 2023).

Given that NHTSA has already publicly stated its position that dealers' installation of Plaintiffs' products and similar products violates 49 U.S.C. § 30122(b) and FMVSS 108, and that NHTSA and the Department of Justice would have enforcement authority under the Vehicle Safety Act even if NHTSA never sent any letters, Plaintiffs cannot show that any changes to dealer behavior would be attributable to the Notification Letters in particular. A court order enjoining NHTSA from sending out the Notification Letters, moreover, would have no bearing on the agency's public position or its authority to bring enforcement action against dealers who continue to engage in such installation. *See Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1382 (9th Cir. 1979) (explaining that "[t]he source of the plaintiffs' injury" was the statute authorizing workers' compensation claims, not an agency notice that interpreted the statute, given that "[t]he revocation of [the notice] would not eliminate this risk" of enforcement).

At bottom, Plaintiffs' theory of standing is that *if* NHTSA sends Notification Letters to a substantial portion of its dealer-customer base; and *if* those letters unequivocally state NHTSA's position that the installation of Plaintiffs' devices is unlawful; and *if*, in response to those letters, a significant portion of Plaintiffs' dealer customers halt their purchase of Plaintiffs product, *then* Plaintiffs will suffer injury. This theory of standing based on various degrees of separation between the agency actions taken thus far and the hypothetical future injury to Plaintiffs is precisely the type of "highly attenuated theory of injury" that fails the Article III standing requirement. *State v. Biden*, 52 F.4th 362, 369 (8th Cir. 2022), *cert. denied*, No. 22-1248, 2023 WL 6558409 (U.S. Oct. 10, 2023).

Because Plaintiffs lack standing, this Court should deny the instant motion without reaching the merits of Plaintiffs' APA challenge.

B. Plaintiffs are not likely to show that their claim is ripe for review.

For many of the same reasons, Plaintiffs are unlikely to satisfy the requirements of ripeness. A plaintiff in federal court bears the burden of showing that its claim is ripe. *See Kokkonen*, 511 U.S. at 377. A claim is not ripe if it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Ripeness incorporates both a constitutional requirement and a prudential requirement. *Pub. Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570, 572 (8th Cir. 2003). The constitutional ripeness requirement overlaps with the "injury-in-fact" requirement of standing. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases, "standing and ripeness boil down to the same question"). The prudential ripeness test calls for a court to consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Pub. Water Supply Dist. No. 10*, 345 F.3d at 572–73 (citation omitted).

On the question of constitutional ripeness, Plaintiffs' claims fail because the future harm they allege rests on speculations regarding the conduct of (1) NHTSA (i.e., the issuance and contents of future Notification Letters), and (2) independent third parties, namely, dealers (i.e., whether they will halt purchase of Plaintiffs' products in response to the Notification Letters). In other words, this lawsuit "involves 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Mo. Roundtable for Life v. Carnahan*, 676 F.3d 665, 674 (8th Cir. 2012) (quoting *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011)). At least "[a]t this time, the timing and type of injury to the [Plaintiffs] cannot be determined" with any confidence or specificity. *Johnson v. Missouri*, 142 F.3d 1087, 1089 (8th Cir. 1998). That creates a ripeness problem: "[a] federal court is neither required nor empowered to wade through a quagmire of whatifs." *State of Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1338 (8th Cir. 1997); *see also Minnesota Pub. Utilities Comm'n. v. F.C.C.*, 483 F.3d 570, 582–83 (8th Cir. 2007) (holding that plaintiff's challenge to an FCC order, which only "suggest[ed]" what the FCC would do in a hypothetical situation that had not yet arisen was not "ripe for review").

Plaintiffs also cannot satisfy the prudential ripeness requirement. As for hardship, for the same reasons Plaintiffs fail to show a certainly impending future harm sufficient to support standing, they fail to show that the lack of judicial intervention at this stage would lead to hardship for purposes of ripeness. As for fitness, Plaintiffs have also failed to show that the issues presented in this lawsuit are fit for judicial review. The substance of Plaintiffs' challenge goes to whether their products comply with FMVSS 108. That challenge will only be ripe for review if and when the agency brings an enforcement action against an entity covered by the "make inoperative" provision, such as a dealer that installs that product.

But in any event, at this point, no enforcement action has been brought or even threatened against any dealers by the agency, which has only sent out Request Letters to Plaintiffs and stated its plan to send out Notification Letters to dealers informing them of its view of the law. Unlike an enforcement action, moreover, neither the Request Letters nor the Notification Letters impose any legal consequence on Plaintiffs, dealers, or anyone else. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808–12 (2003) (holding that the plaintiffs' challenge to an agency's general statement of policy was not ripe, in part because the statement did not impose any legal consequences on the plaintiffs); *Lujan*, 497 U.S. at 891 ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action.").

The Eighth Circuit has dismissed cases as unripe in similar circumstances. In *Nat'l Right to Life Political Action Committee v. Connor*, 323 F.3d 684 (8th Cir. 2003), for example, two organizations challenged statutory registration and disclosure requirements under the First Amendment. The Eighth Circuit held that the challenges were unripe because there was no clear indication that the organizations would face adverse consequences if they failed to meet some of the challenged requirements, and it was unclear whether the State would enforce other provisions against the plaintiffs at all. *See id.* at 693–94. "Without additional factual development," the court concluded, "we cannot be sure there is even a dispute here to resolve." *Id.* at 694. Similarly, here, there is no indication that the agency and any dealership will engage in a dispute in the form of an enforcement action about the application of 49 U.S.C. § 30122(b) and FMVSS 108 to Plaintiffs' products. Without any such live dispute regarding a concrete set of facts, Plaintiffs' claim is unfit for review.

Because Plaintiffs' claim is not ripe for review, the Court need not reach the merits of Plaintiffs' APA challenge to deny the instant motion.

C. Plaintiffs are not likely to succeed on the merits of their APA claims.

1. Plaintiffs do not challenge a "Final Agency Action" as required by the APA.

The Request Letters and future Notification Letter do not carry any independent legal effect, and therefore do not qualify as "final agency action," under the APA. 5 U.S.C. § 704.

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." *Id*; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). A challenge under the APA also must be directed at a discrete, identifiable agency action the agency has taken or failed to take. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62–64

(2004). The APA does not permit a "broad programmatic attack" on a general course of conduct. *Id.* at 64.

> [T]wo conditions . . . generally must be satisfied for agency action to be "final" under the APA. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."

U.S. Army Corps of Eng'rs, 578 U.S. at 597 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Plaintiffs have failed to identify any agency action that meets these criteria. As an initial matter, Plaintiffs fail to identify a discrete agency action as the "final agency action." Instead, Plaintiffs contend that the Request Letters, "in conjunction with" hypothetical future Notification Letters, "constitute final agency action." Compl. ¶ 67. This type of "broad programmatic attack" on the agency's course of conduct is impermissible under the APA. *Norton*, 542 U.S. at 64.

But regardless, none of the past or future actions identified by Plaintiffs amount to "final agency action" under the APA because none of them—taken together or separately—satisfies both prongs of the *Bennett* test.

As for the first prong of the *Bennett* test, the future Notification Letters plainly fail for the simple reason that no such letters have been issued. In other words, the agency is yet to "act," let alone act in a way that marks the "consummation of the agency's decisionmaking process." *See Florida Medical Ass'n v. Dep't of Health, Educ., & Welfare*, 947 F. Supp. 2d 1325, 1354 (M.D. Fla. 2013) ("[W]hile the APA authorizes a court to enjoin a specific final agency decision it finds arbitrary, capricious or contrary to law, the APA does not afford a vehicle for enjoining possible future agency actions."); *Brancheu v. Sec. of Labor*, 2011 WL 4105047, at *2 (M.D. Fla. Sept. 15, 2011) (denying preliminary injunction sought by plaintiffs who feared information could be publicly disclosed at upcoming hearing, noting that "so far as the record shows, no Defendant ha[d] decided whether to release" the materials, and holding that in the "absence of final agency action" the court could not "review a decision under the APA"); *Watson v. Chessman*, 362 F. Supp. 2d 1190, 1196 (S.D. Cal. 2005) (holding that "the APA has no relation to this case" when the plaintiff sought prospective injunctive and declaratory relief and "the alleged 'agency action' . . . ha[d] not yet happened"). Thus, the hypothetical future Notification Letters are not final agency actions. And the Request Letters and Notification Letters are not, as Plaintiffs allege, final agency actions "in conjunction with" one another. If the Request Letters that the agency sent in July are only final if considered together with other actions that have not yet occurred, then by definition, the Request Letters are not final agency actions.

In addition, neither the Notification Letters nor the Request Letters satisfy *Bennett*'s second prong as they do not determine "legal rights or obligations" or give rise to "legal consequences." Plaintiffs take issue with NHTSA's statement in the Request Letters (which they speculate will also appear in the Notification Letters), that the installation of Plaintiffs' products by dealerships violates 49 U.S.C. § 30122(b) and FMVSS 108. This statement is, at most, an expression of NHTSA's *view* on a legal question without any legal consequences for the Plaintiffs, dealerships, or anyone else. But to satisfy *Bennett*'s second prong, an agency action "must inflict some legal injury," and "[a]n agency does not inflict injury merely by expressing its view of the law." *Sisseton-Wahpeton Oyate of Lake Traverse v. U.S. Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018).[7]

[7] As noted earlier, *supra* 14 n.5, the Request Letters impose legal obligations in one respect: they require Plaintiffs to provide information about their customers to NHTSA. But Plaintiffs do not challenge this request for information as improper.

To the extent that legal obligations are discussed in the Request Letters or Notification Letters, those obligations stem from 49 U.S.C. § 30122(b) and FMVSS 108: binding federal laws that the Letters neither promulgate nor enforce. Rather, the Letters merely state—without attaching any consequences—NHTSA's view of those legal obligations. Courts have routinely recognized that such agency letters, which merely articulate the agency's views on pre-existing laws, are not final agency actions. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940, 946 (D.C. Cir. 2012) (holding that APA review is improper "where an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party" (citation omitted)); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (same).

Indeed, courts have repeatedly refused to find that NHTSA documents like the letters here—which articulate NHTSA's view on the law but lack legal consequences—are final agency actions. For example, in *Air Brake Systems v. Mineta*, a district court held that NHTSA letters to plaintiff's potential customer, which expressed the view that plaintiff's product would not comply with the FMVSS, were not final agency action because they were "advisory in nature and ha[d] no legal effect," even though "economic consequences 'flow[ed]' from the opinion Letters." 202 F. Supp. 2d 705, 712 (E.D. Mich. 2002). And in *Ctr. for Auto Safety v. NHTSA*, the D.C. Circuit court held that NHTSA's guidance documents, which "express[] its view of what the law requires of a party," are not a final agency action "even if that view is adverse to the party." 452 F.3d at 808 (citation omitted).

The principle that an agency does not take final action simply by articulating a legal position is particularly relevant where, as here, the agency is only restating its long-established views. As NHTSA emphasized to Plaintiffs in its Request Letters, NHTSA has "consistently explained in several decades of interpretations that pulsing is not steady burning."[8] In this way, by "merely restat[ing]" its "longstanding interpretation," NHTSA "left the world just as it found it." *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427-28; *see also Clayton County v. FAA*, 887 F.3d 1262, 1266-67 (11th Cir. 2018) ("An agency's restatement of an already-existing policy or interpretation does not, on its own, determine any rights or obligations and imposes no legal consequences.").

At bottom, "[t]he flaw in [Plaintiffs'] argument is that the 'consequences' to which they allude are practical, not legal." *Ctr. for Auto Safety*, 452 F.3d at 811. At most, Plaintiffs allege that the dealerships will refrain from purchasing Plaintiffs' products—not because the Letters are legally binding orders or carry penalties—but because the dealerships will *fear* that if they continue to install Plaintiffs' products, NHTSA *might* bring enforcement action and *might* prevail with respect to its interpretation. But even if Plaintiffs' speculations about this chilling effect come to fruition, courts have repeatedly held that *voluntary* compliance with nonbinding agency guidance does not amount to legal consequence. *Ctr. for Auto Safety*, 452 F.3d at 811 ("It may be that, to the extent that they actually prescribe anything, the agency's guidelines have been voluntarily followed by automakers and have become a *de facto* industry standard for how to conduct regional recalls. But this does not demonstrate that the guidelines have had legal consequences."); *Parsons v. United States Dep't of Just.*, 878 F.3d 162, 168 (6th Cir. 2017) ("[H]arms caused by agency decisions are not legal consequences if they stem from independent actions taken by third parties." (citation omitted)); *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S.E.P.A.*, 313 F.3d 852, 858-59 (4th Cir. 2002) (holding that an EPA report, which classified environmental tobacco smoke

[8] Plaintiffs challenge the *substance* of these previous agency interpretations. Br. at 33-34. But this challenge misses the point. These agency interpretations are relevant so far as they demonstrate that the legal view NHTSA identified in the Request Letter was simply a restatement of its prior view.

as a human carcinogen, lacked legal consequences because it "ha[d] no direct regulatory effect," despite "coercive pressures on third parties" to comply).

Accordingly, Plaintiffs are unlikely to establish that any of the actions they identified are reviewable under the APA because none amount to "final agency action." Plaintiffs therefore cannot establish that the relief they request is warranted, and the Court need not reach the merits of Plaintiffs' APA challenge to deny the instant motion.

2. Even if NHTSA's actions amount to "final agency action," Plaintiffs have not shown that NHTSA's conduct was subject to notice-and-comment rulemaking, contrary to law, or arbitrary or capricious.

Even if Plaintiffs had identified a "final agency action"—which they did not, *see supra* 21-26—Plaintiffs' challenge is still unlikely to succeed on the merits. To succeed on the substance of their APA claims, Plaintiffs must show that NHTSA promulgated a rule without notice-and-comment, acted contrary to law, or acted arbitrarily or capriciously. *See Daisy Mfg. Co., Inc. v. CPSC*, 133 F.3d 1081, 1083 (8th Cir. 1998); 5 U.S.C. § 706(2)(A); 5 U.S.C. § 553(b). Plaintiffs have not come close to meeting that burden.

i. NHTSA's action was not subject to notice-and-comment rulemaking under the APA.

Plaintiffs assert that NHTSA needed to use notice-and-comment rulemaking to interpret the term "steady burning" because NHTSA's interpretation amounted to a "*de facto* amendment" of FMVSS 108. *See* Br. 39-40. This argument fails because NHTSA did nothing here but "simply state what [it] thinks the [regulation] means." *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). FMVSS 108 requires that brake lights be "steady burning," and NHTSA explained to Plaintiffs that per "several decades of interpretations," a light that is "pulsing is not steady burning." *See* Request Letter to Brake Plus, at 2; Request Letter to W&L at 2. On its face, the agency interpreted rather than amended FMVSS 108—it explained "the meaning and significance" of the regulation as applied to Plaintiffs' devices, without "chang[ing] the wording of" its text. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 103-05 (2015). The Supreme Court has unequivocally rejected the argument that interpreting a regulation "effectively amend[s]" it. *Id*. Rather, it has held that, per the plain text of the APA, an agency's interpretation of a rule is "categorical[ly]" exempted from notice-and-comment rulemaking. *Id.* at 100 (applying 5 U.S.C. § 553(b)(A)).[9]

ii. Congress has not directed NHTSA to conduct studies and a rulemaking regarding pulsing brake lights.

Plaintiffs claim that NHTSA's action was contrary to law because it disregarded "Congressional intent" that it "move forward with . . . studies and rulemaking" on pulsing brake lights. *See* Br. 37-38. Plaintiffs locate this intent in a 2019 report by the House Committee on Appropriations, *see* H.R. Rep. 116-106 (2019), and in public statements by "[m]any members" of Congress, *see* Br. 37-38. But their argument is self-refuting—committee reports and individual members' comments do not bind federal agencies because they are not the law. *See NLRB v. SW General, Inc.*, 580 U.S. 288, 306 (2017); *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 911 n.101 (E.D. Ark. 2022). And in any event, none of these Congressional statements purported to require NHTSA to change its longstanding legal view.

iii. NHTSA's interpretation of "steady burning" is not arbitrary or capricious.

NHTSA's interpretation of "steady burning" is consistent with the plain meaning of that term, and Plaintiffs have failed to show that NHTSA reached it arbitrarily and capriciously. Agency action is arbitrary and capricious when it:

[9] In any event, if NHTSA had "*de facto*" amended FMVSS 108, this Court would lack jurisdiction over a challenge to such an amendment, which would lie exclusively in the Courts of Appeals. *See* 49 U.S.C. § 30161.

> relie[s] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product or agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Interpretation of agency regulations "begins with the text" at issue. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011). An agency's interpretation will be upheld if it is "clearly consistent with the [regulation's] unambiguous text." *Cognitive Professional Servs. Inc. v. SBA*, 254 F. Supp. 3d 22, 42-43 (D.D.C. 2017).

NHTSA's interpretation of "steady burning" to exclude Plaintiffs' devices—which are purpose-built to generate pulses of light visible from other vehicles—is clearly consistent with the ordinary meaning of that term. Dictionary definitions of "steady" reveal a clear and consistent meaning—"[f]ree or almost free from change, variation, or fluctuation; uniform." Steady, *Am. Heritage Dictionary* (5th ed. 2022); *see also* Steady, *Merriam-Webster.com Dictionary* (last accessed on Nov. 15, 2023) ("showing little variation or fluctuation : Stable, Uniform"); Steady, *Oxford English Dictionary* (1916) ("Regular in operation or intensity; that is maintained at an even rate of action, output, or the like; uniform; equable."). Nor is NHTSA's interpretation new—the agency has consistently applied that same ordinary meaning for decades. *See, e.g.*, NHTSA Interpretation — Reservation Business Enterprise (Dec. 7, 1973), *available at* https://www.nhtsa.gov/interpretations/nht73-125 (last accessed on Nov. 15, 2023) ("Our definition of 'steady' is 'regular, uniform; not changed, replaced or interrupted; not fluctuating or varying widely.'"); NHTSA Interpretation — Takayuki Amma (Aug. 1, 2005), *available at* https://www.nhtsa.gov/interpretations/koito2 (last accessed on Nov. 15, 2023) ("[W]e have explained that the 'steady burning' requirement under the standard means 'a light that is essentially unvarying in intensity.'").

Plaintiffs' devices, by contrast, are designed to operate by rapidly varying the intensity of a vehicle's brake light. Compl. ¶¶ 19, 22. These are significant fluctuations—Plaintiffs proudly claim that they "provide a heightened visual alert" which "draws the [trailing] driver's attention." *Id.* ¶ 11. NHTSA did nothing more than compare Plaintiffs' description of their products to its longstanding ordinary-meaning interpretation of "steady burning," and concluded that a light which sharply varies its intensity in attention-grabbing pulses is not "steady burning." NHTSA's reasoning was clearly consistent with the ordinary meaning of FMVSS 108, and the agency did not act arbitrarily and capriciously in drawing its conclusion. Plaintiffs' claims to the contrary are wholly unavailing:

First, Plaintiffs ignore the ordinary meaning of "steady burning"[10] to argue that in the context of FMVSS 108, that term is "defined by the . . . [regulation's] photometric standard" for a brake light's maximum and minimum brightness. *See* Br. 23-27, 31-34. Plaintiffs point to no textual reason why this should be the case, and could not have done so—the structure of FMVSS 108 makes clear that its brightness and "steady burning" provisions impose separate requirements. *Compare* 49 C.F.R. § 571.108 Table I-a (requiring that high-mounted stop lights be "steady burning") *with id.* Table XV (defining permissible range of brightness for such lights). Nor is there any practical reason that the former standard should be tied to (let alone define) the latter.

[10] Plaintiffs' sole appeal to ordinary usage is to argue that "a candle when lit will flicker and vary in brightness, but never goes out, and thus remains steady burning at all times." Br. 32. But Courts interpret the meaning of a legal text in light of "the problem [the drafter] sought to solve," *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 487 (D.C. Cir. 2007), which in this case was the development of standards for "steady burning" electric lights—not candles.

Equipment might easily (as Plaintiffs' products do) cause a brake light to burn unsteadily but within the range of permissible brightness, or to burn steadily outside that range.[11]

Second, Plaintiffs argue that as interpreted by NHTSA, the "steady burning" requirement violates Congress's directive that safety standards be "stated in objective terms." *See* Br. 23-25 (citing 49 U.S.C. § 30111(a)). That is not the case. Whether a light operates at a *uniform*, *unvarying* intensity is an objective standard even if NHTSA opts not to quantify it in numerical terms. As Plaintiffs' own authorities recognize, "qualitative requirements" may still be objective for purposes of the Vehicle Safety Act, *see Chrysler Corp. v. Rhodes*, 416 F.2d 319, 323-24 (1st Cir. 1969), and NHTSA is permitted to promulgate standards "dependent upon simple visual observation, where there is no room for disagreement concerning the results and which is not dependent upon the subjective opinions of human beings," *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659, 676 n.22 (6th Cir. 1972).[12]

Third, Plaintiffs complain that NHTSA has inconsistently applied its view of what it means to be "steady burning." *See* Br. at 35-37. In support, they point to a 2019 NHTSA interpretation that tentatively concluded that a system of *auxiliary* lamps (that is, lights in addition to those required by FMVSS 108) would not impair the effectiveness of a vehicle's *required* lighting equipment. *See* NHTSA Interpretation — Pedestrian Safety Solutions (Sept. 9, 2019), *available at* https://www.nhtsa.gov/interpretations/571108-ama-schaye-front-color-changing-light (last accessed on Nov. 15, 2023). Plaintiffs assert that their products are similarly situated to that system

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[11] Plaintiffs' focus on whether their products cause brake lights to "flash" is a red herring. *See, e.g.*, Br. 32, 34. Whether a light "flashes" is a distinct question from whether it is "steady burning" under FMVSS 108. *See* 49 C.F.R. § 571.108 S4 (defining "flash").

[12] To the extent NHTSA's interpretation of the "steady burning" requirement leaves any ambiguities, they are not presented by this case, where all parties agree that the intended effect of Plaintiffs' products is to create highly visible fluctuations in brightness.

because both cause lights to "brighten[] or dim[] in response" to changing vehicle speed. *See* Br. at 35. But that is not accurate—the 2019 interpretation considered a set of LEDs which varied in *color*, not *brightness*, and in which each color LED "steadily burn[ed]" while activated.[13] At issue in that interpretation was whether *color*-changing *auxiliary* lights would impair the safety purposes of *required* lighting equipment, and therefore make that required equipment *indirectly* inoperative. By its nature, that question required NHTSA to analyze how multiple aspects of the auxiliary equipment at issue would affect drivers' ability to understand and react to the information communicated by a vehicle's required lighting. The question here, by contrast, is the permissibility of a device that *directly* modifies the operation of *required* brake lights by inducing changes in *brightness*. These are facially different products and questions, and NHTSA did not act arbitrarily or capriciously here by simply asking whether a light that visibly varies in brightness falls within the ordinary meaning of "steady burning."

Fourth, Plaintiffs argue that NHTSA was required to consider whether their products would practically "impair[] the effectiveness" of the CHMSL in addition to or instead of whether they would permit "steady burning" within the meaning of FMVSS 108. *See* Br. 28-29 (citing 49 C.F.R. § 571.108 S6.2.1). That is incorrect. Because Plaintiffs' products directly take a vehicle's center-mounted light out of compliance with the "steady burning" requirement of FMVSS 108, they "make [that equipment] inoperative." Plaintiffs are not entitled to argue that—and NHTSA is not required to consider whether—their devices are safe notwithstanding that non-compliance with

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[13] NHTSA Interpretation — Pedestrian Safety Solutions (Sept. 9, 2019) ("You state that your product consists of a strip of amber and white LEDs, although you do not provide the exact photometric intensity. Either the white or amber LEDs are activated, depending on the underlying condition. You state that the white LEDs are activated and steadily burn while the vehicle is accelerating or travelling at a constant speed, and that the amber LEDs are activated and steadily burn while the vehicle is decelerating or stopped.").

the plain text of the regulation. The pair of interpretations Plaintiffs cite are not to the contrary. *See* Br. 28 (citing NHTSA Interpretation — Michael Haas (May 6, 2019), *available at* https://www.nhtsa.gov/interpretations/571108-hdc-supplemental-turning-lamps-haas-15-4155 (last accessed on Nov. 15, 2023)); Br. 35 (citing NHTSA Interpretation — Pedestrian Safety Solutions (Sept. 9, 2019)). Both these interpretations assessed whether *auxiliary* systems, which did not affect the *actual* operation of any required lighting, would nevertheless make that lighting *legally* "inoperative" by interfering with their safety functions. They simply do not speak to cases like this one, in which the product in question directly modifies the operation of the required equipment itself, and the only question is whether, so modified, the required equipment is "steady burning" as specified in FMVSS 108.

Fifth, Plaintiffs are wrong to suggest that NHTSA was required to consider deferring to the fact that some state laws permit pulsing brake lights. *See* Br. 30. State legislatures and administrative agencies cannot, as a general matter, control the meaning of federal regulations, and the Vehicle Safety Act's provision that NHTSA "*may* . . . cooperate" with states in developing safety standards, *see* Br. 30 n.10 (citing 49 U.S.C. 30111(c)), does not *require* NHTSA to take states' views into account, *see Kingdomware Techs. v. United States*, 579 U.S. 162 171-72 (2016) (explaining that unlike mandatory language like "shall," "the word 'may,' when used in a statute, usually implies some degree of discretion" (citation omitted)).

Finally, Plaintiffs assert that NHTSA failed to consider Plaintiffs' reliance interest given that products, such as Plaintiffs', have been sold to and installed by dealerships since 1999. *See* Br. 38-39. To be sure, the Supreme Court has held that an agency should "take account of legitimate reliance" when it *changes* an interpretation, but nothing "which can accurately be described as a change of official agency position has occurred here." *See Smiley v. Citibank (S.D.)*, *N.A.*, 517 U.S. 735, 742 (1996). As explained earlier, *supra* 6-7, NHTSA has for decades interpreted "steady burning" to exclude pulsing lights and reiterating that long-held view does not unsettle established reliance interests.

II. Plaintiffs Fail to Demonstrate Irreparable Harm.

For the same reasons that Plaintiffs have not established an injury for standing purposes, Plaintiffs fail to show the type of imminent irreparable harm needed to justify a preliminary injunction. "In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013). "Speculative harm," *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012), or a "possibility of irreparable harm" is not enough, *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). With respect to the type of economic harm alleged by Plaintiffs, the Eighth Circuit has explained that "economic loss does not, in and of itself, constitute irreparable harm [unless] the loss threatens the very existence of the [Plaintiffs'] business[es]." *Packard Elevator*, 782 F.2d at 115. As explained above, *supra* 14-17, Plaintiffs' highly attenuated theory of injury fails to show that any economic harm—let alone existential harm—to its business is imminent.

Unlike the standing inquiry—which looks to see whether Plaintiffs have made a showing of *some* economic harm that is certainly impending—to demonstrate irreparable economic harm, economic injuries must be more than "substantial, in terms of money, time and energy." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). They must "threaten[] the very existence of the [Plaintiffs'] business[es]." *Packard Elevator*, 782 F.2d at 115. So, even if the Court accepts that Plaintiffs are in danger of suffering *some* immediate economic harm following the issuance of the Notification Letters, Plaintiffs have failed to show that such harm will be so "certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc.*, 725 F.3d at 895 (citation omitted). Indeed, Plaintiffs' businesses seem to have thrived despite NHTSA's longstanding (and notably public) position that pulsing lights are not steady burning as required by FMVSS 108. *See* Br. 9 n.4. In this light, Plaintiffs' fear that future Notification Letters will kneecap their businesses is the type of speculative irreparable harm that does not meet this standard.

Moreover, preliminary injunctive relief is also improper when it would not actually prevent the harm the plaintiff fears. In *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701 (8th Cir. 2011), the Eighth Circuit rejected several assertions of harm for this reason. *See id.* at 706 (holding that a preliminary injunction was not warranted in part because it would not prevent or undo the plaintiff's claimed harm in the form of "disruption to the physician-patient relationship," "possible liability suits, charges of patient abandonment, and reputational damages"). As explained, *supra* 18, an injunction preventing the agency from sending out the Notification Letters would not change the Government's authority to bring enforcement suits against dealers that violate 49 U.S.C. § 30122(b) and FMVSS 108 by installing the Plaintiff's products—an authority that Plaintiffs do not challenge here. Such direct enforcement action against dealers may cause the same type of chilling effect among Plaintiffs' customers that Plaintiffs fear would result from the Notification Letters. *Roudachevski*, 648 F.3d at 706 (holding that an injunction was not warranted because it would not eliminate the risk of "possible liability suits" or disruption of patient relationships).

III. The Balance of Equities and Public Interest Make Injunctive Relief Inappropriate.

Although the balance of the equities and the public interest typically are considered as separate factors, "[t]hese factors merge when the Government is the opposing party." *Nken v.*

Holder, 556 U.S. 418, 435 (2009). Here, these combined factors strongly counsel against issuing the requested preliminary injunction. NHTSA is seeking to exercise its authority to inform relevant parties about the application of 49 U.S.C. § 30122(b) and FMVSS 108. Under such circumstances, if the Government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Moreover, granting Plaintiffs' requested preliminary injunction would significantly harm the Government's interests in public safety. The Government has a "compelling interest[]" in protecting "public safety." *Nat'l Treasury Emps. Union*, 489 U.S. at 677. The stated purpose of the Vehicle Safety Act is to "is to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. The Government would be serving that purpose through the Notification Letters. As the Government has maintained for decades, it believes "the presence of both flashing and steady-burning stop lamps could result in momentary confusion" for the drivers, threatening motorists' safe vehicle operation. Letter from Frank Seales, Jr., Chief Counsel, NHTSA to Evan W. Johnson, Administrator, Department of Housing and Consumer Affairs (Aug. 27, 1999), *available at* https://www.nhtsa.gov/interpretations/20288ztv (last accessed on Nov. 15, 2023). On the other side of the balance, the harms claimed by Plaintiffs are speculative or modest. *See supra* 14-17. Even if executing the Notification Letters would impose substantial costs on Plaintiffs, which it does not, that would not outweigh the Government's compelling interest in protecting public safety.

In sum, the balance of the equities and the public interest both weigh in favor of denying Plaintiffs' motion, and the Court may deny their motion on this basis alone. *See Gen. Motors Corp.*

v. Harry Brown's, LLC, 563 F.3d 312, 321 (8th Cir. 2009); *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 460 (5th Cir. 2016).

CONCLUSION

For the reasons explained above, the Court should deny Plaintiffs' preliminary-injunction motion.

DATED: November 15, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JULIE STRAUS HARRIS
Assistant Branch Director

/s/ Pardis Gheibi
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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

BRAKE PLUS NWA, INC.
and WILLIAMS & LAKE, LLC **PLAINTIFFS**

vs. **CASE NO.: 5:23-cv-05185-TLB**

UNITED STATES DEPARTMENT OF TRANSPORTATION, Through Pete Buttigieg In His Official Capacity As Secretary of Transportation; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Through Ann Carlson In Her Official Capacity As Acting Administrator of The National Highway Traffic Safety Administration **DEFENDANTS**

Declaration of Gabriel I. Schonfeld

Pursuant to 28 U.S.C. § 1746, I, Gabriel I. Schonfeld, hereby declare:

1. I am an attorney in the U.S. Department of Justice, Civil Division, Consumer Protection Branch. I am assigned to represent Defendants in the above-captioned case. The statements made herein are based on my personal knowledge, and on information made available to me in the course of my duties and responsibilities as Government counsel in this case.

2. I submit this declaration in support of Defendants' Opposition to Plaintiffs' Preliminary Injunction Motion.

3. Filed herewith as Exhibits 1A-1C are true and correct copies of the following documents:

Exhibit No.	Exhibit Name
1A	Letter from Michelle Hanby, President, Intellistop to Administrator, FMCSA (Dec. 14, 2020)
1B	Letter from Serena Viswanathan, Associate Director, Division of Advertising Practices, FTC, to Michelle Hanby, President, Intellistop (June 28, 2022)
1C	Email from Daniel Ingber, Vice President of Regulatory Affairs, National Automobile Dealers Association, to Thomas Healy (Aug. 30, 2023)

I swear under penalty of perjury that the foregoing is true and correct. Executed on Nov. 15, 2023.

/s/ Gabriel I. Schonfeld
GABRIEL I. SCHONFELD

Counsel for Defendants

Exhibit 1A

INTELLISTOP SMART SAFETY SOLUTIONS

December 14th, 2020

Administrator
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
1200 New Jersey Avenue SE
Washington, D.C. 20590-0001

Re: Application for Exemption from 49 C.F.R. 393.25(e)[1]

Dear Administrator,

Pursuant to 49 C.F.R. Part 381, Subpart C,[2] Intellistop, INC. respectfully requests that the Federal Motor Carrier Safety Administration (FMCSA) exempt Intellistop on behalf of commercial motor carriers from the 49 C.F.R. § 393.25(e) requirement that all CMV's (including flatbed trailers and straight trucks) be equipped with steady burning brake lamps. This is akin to the 5-year exemption granted to the NTTC[3] in October and the 5-year exemption recently granted to *Grote Industries LLC*[4] by the FMCSA.

Specifically, Intellistop Inc. requests a 5-year exemption to allow the use of the Intellistop module which pulses the preexisting brake, clearance and I.D. lamps.

Our company, *Intellistop*, manufactures a module that fits right into the nosebox of any trailer (or in-line with the body builder light connector on straight trucks) and prompts the preexisting brake and marker lights to pulse 4 times in under 2 seconds while simultaneously maintaining the burn—no extra equipment is required. Intellistop is designed and manufactured such that, should the module ever fail, the brake, clearance, and I.D. lamps will default to normal OEM function and illumination.

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[1] 49 C.F.R. 393.25 https://tinyurl.com/y2ckaktr or https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&ty=HTML&h=L&mc=true&=PART&n=pt49.5.393#se49.5.393_125
[2] 49 C.F.R. Part 381, Subpart C https://tinyurl.com/yytbkfue or https://www.law.cornell.edu/cfr/text/49/part-381/subpart-C
[3] 5-year exemption granted to the NTTC https://tinyurl.com/y3h5grqq or https://www.fmcsa.dot.gov/regulations/notices/2020-22233
[4] 5-year exemption granted to Grote Industries LLC https://tinyurl.com/y692b2us or https://www.fmcsa.dot.gov/regulations/notices/2020-26772

Intellistop requests this exemption on behalf of all motor carriers. Previous NHTSA research has shown that use of pulsating brake lamps increases visibility of motor vehicles. Incorporating the *Intellistop* module with the preexisting brake, clearance, and I.D. lamps, creates a pulsing cycle while maintaining the steady burning red brake lamps as required by the FMCSRs. During the 4 pulses, the light does not go out, and after the 4 pulses the lamp finishes at full burn until the driver releases their foot from the brake pedal. This would allow commercial carriers to not only maintain operational safety levels, but also implement more efficient and effective operations.

Research conducted by the U.S. Department of Transportation National Highway Traffic Safety Administration (NHTSA)[5,6,7] has shown that enhanced rear signal systems, such as pulsing brake lights, which is the subject of this exemption application, may significantly reduce the frequency of rear-end accidents. NHTSA has previously interpreted that clearance lamps and I.D. lamps may have dual functionality as long as the primary function of that lamp is maintained.

Intellistop seeks the ability for all motor carriers to upgrade their existing safety features while maintaining those required under the FMCSRs. If the FMCSA grants Intellistop's temporary exemption, the company and their customer motor carriers and manufacturers will be allowed to voluntarily upgrade the brake lamp functionality on the rear of all CMVs (including flatbed trailers and straight trucks) and be able to utilize them in its daily operations to more safely share the highways with the motoring public.

Intellistop has satisfied the necessary requirements under 49 C.F.R. § 381.305[8] for issuance of the requested exemption, in that: (1) Intellistop and commercial motor carriers are currently prevented from utilizing pulsing brake, clearance, and I.D. lamps by the FMCSRs. The company and commercial motor carriers could operate its equipment in a safer manner if the FMCSA were to grant this exemption request; and (2) Intellistop has shown that operating a pulsing brake activated warning light on the rear of all CMVs (including flatbed trailers and straight trucks) on a fleet-wide basis would allow motor carriers to maintain a level of safety that is equivalent to, or greater than, the level that it would achieve without the requested exemption.

For these reasons, Intellistop reverently requests that the FMCSA grant Intellistop a 5-year temporary exemption to the requirements of 49 C.F.R. § 393.25(e). Use of the Intellistop module to pulse the existing brake, clearance, and I.D. lamps would allow

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[5] NHTSA Study—Evaluation of Enhanced Brake Lights Using Surrogate Safety Metrics https://tinyurl.com/y5dh7ok2 or https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/811127.pdf

[6] NHTSA Study—Enhanced Rear Lighting and SIgnaling Systems https://tinyurl.com/y2romx76 or https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/task_3_results_0.pdf

[7] NHTSA—Traffic Safety Facts https://tinyurl.com/yxglsdax or https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/tsf811128.pdf

[8] 49 C.F.R. § 381.305 https://tinyurl.com/y5mscgra or https://www.ecfr.gov/cgi-bin/text-idx?SID=b9f85ce66184f8d3ad1e3ed990651747&mc=true&node=pt49.5.381&rgn=div5#se49.5.381_1305

Intellistop and its motor carrier customers and manufacturers to continue their unwavering commitment to safely and efficiently servicing customers and sharing the nation's roadways with the motoring public.

To view Intellistop operating on different types of trailers please visit our website[9] and watch our videos[10]. We believe this request for exemption satisfies all requirements as outlined in 49 C.F.R. § 381.310[11]. However, if it does not, or if you have any questions, please contact me at any time. Thank you.

Sincerely,
Michelle Hanby

President — Intellistop, Inc.
mhanby@intellistopusa.com
www.intellistopusa.com
(479) 466-7653
1608 E. Cypress Lane,
Fayetteville, AR 72703

INDEPENDENT REFERENCES:

1. NHTSA, ANALYSIS OF REAR-END CRASHES AND NEAR-CRASHES IN THE 100-CAR NATURALISTIC DRIVING STUDY TO SUPPORT REAR-SIGNALING COUNTERMEASURE DEVELOPMENT, October 2007 https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/analyses20of20rear-end20crashes20and20near-crashes20dot20hs2081020846.pdf
2. NHTSA, ASSESSING THE ATTENTION-GETTING CAPABILITY OF BRAKE SIGNALS: EVALUATION OF CANDIDATE ENHANCED BRAKING SIGNALS AND FEATURES, June 2010 https://one.nhtsa.gov/Research/Human-Factors/Rear-signaling
3. NHTSA, EVALUATION OF ENHANCED BRAKE LIGHTS USING SURROGATE SAFETY METRICS, April 2009 https://one.nhtsa.gov/Research/Human-Factors/Rear-signaling
4. NHTSA, Traffic Safety Facts, STUDY OF PRESENT-DAY LED BRIGHTNESS AND CORRESPONDING REAR SIGNALING CONCEPTS (LED OPTIMIZATION), May 2009
5. 81 Federal Register 76 BEYOND COMPLIANCE PROGRAM https://one.nhtsa.gov/Research/Human-Factors/Rear-signaling
6. National Safety Council, UNDERSTANDING THE DISTRACTED BRAIN: WHY DRIVING WHILE USING HANDS-FREE CELL PHONES IS RISKY BEHAVIOR, April 2010 https://www.cartalk.com/content/understanding-distracted-brain-why-driving-while-using-hands-free-cell-phones-risky-behavior

[9] Intellistop Website www.IntellistopUSA.com
[10] Intellistop Website—videos www.intellistopusa.com/videos/
[11] 49 C.F.R. § 381.310 https://tinyurl.com/y5ulxfls or https://www.law.cornell.edu/cfr/text/49/381.310

Exhibit 1B

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

June 28, 2022

CEASE AND DESIST DEMAND

Ms. Michelle Hanby
President
Intellistop, Inc.
1608 E. Cypress Lane
Fayetteville, AR 72703
mhanby@intellistopusa.com

Re: False or unsubstantiated endorsement claims by Intellistop, Inc.

Dear Ms. Hanby:

This is to advise you that Federal Trade Commission staff has reviewed your website at https://intellistopusa.com/ in June 2022. We also reviewed your social media website at www.facebook.com/intellistopusa/ and your YouTube videos at https://www.youtube.com/channel/UChpP3gN6tKhBbfUM1kD6D0Q. We have reason to believe that you are unlawfully advertising that Intellistop, Inc. and its eponymous vehicular add-on device are endorsed by the U.S. Department of Transportation (DOT) and the Federal Trade Commission (FTC), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).[1]

Specifically, you make express claims about the DOT and the FTC on your website, in your video ads, and in social media posts. Examples of these claims include:

A. Intellistop website:

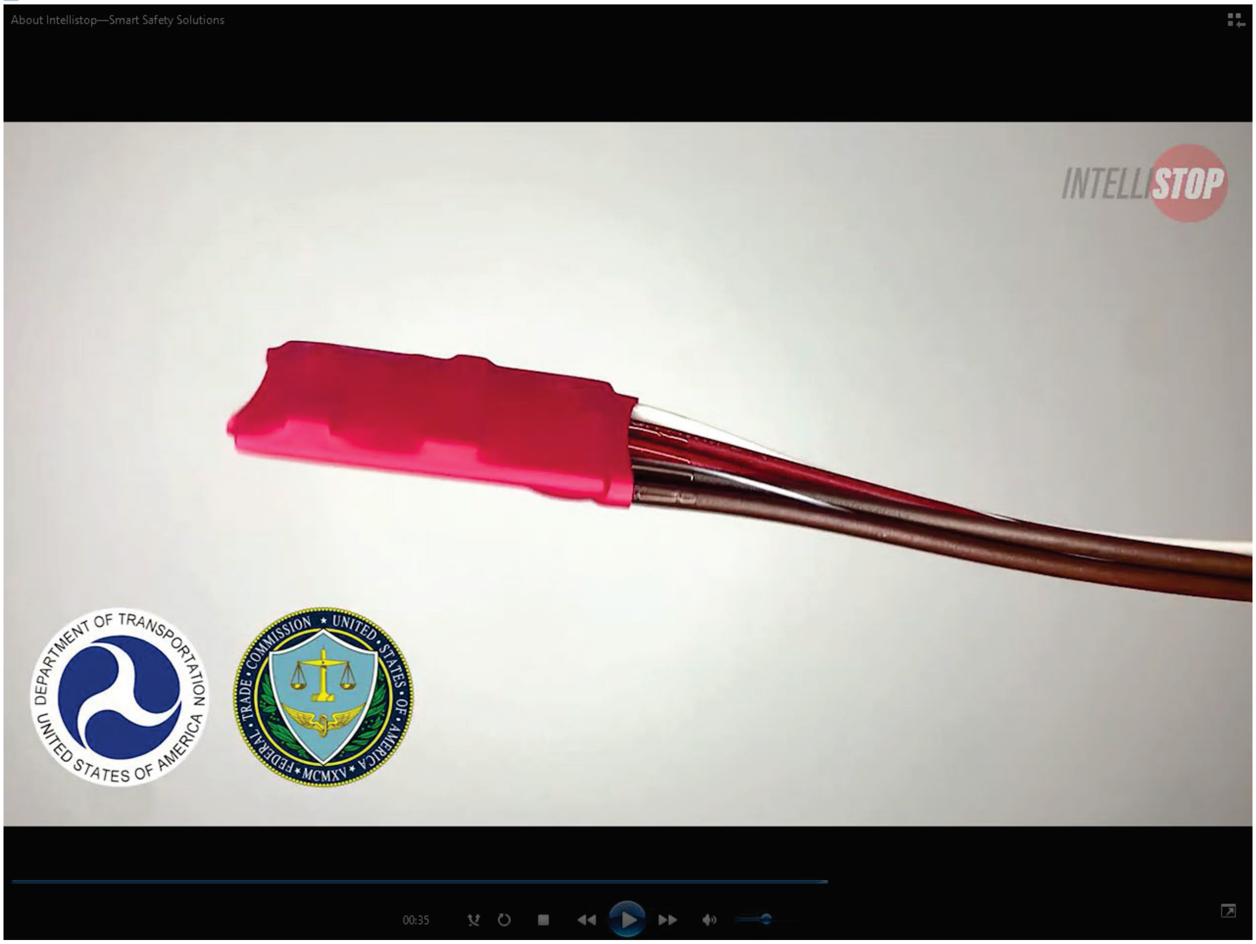
"Isn't flashing or strobing illegal without special permission?

Yes, flashing or strobing is illegal without a special circumstance. . . .
Intellistop is D.O.T. and F.T.C. compliant in all 50 states."

Frequently Asked Questions, *available at* https://intellistopusa.com/faq/ (emphasis added).

[1] Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

B. Video ad (as of May 10, 2022):



Voiceover: "Intellistop is DOT-compliant in all 50 states"
Image: Intellistop device with official DOT seal and FTC seal[2]

Video, "About Intellistop—Smart Safety Solutions" at 00:35, *available at* https://intellistopusa.com/ (as of May 10, 2022) and https://www.youtube.com/channel/UChpP3gN6tKhBbfUM1kD6D0Q (as of May 10, 2022)

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[2] We note that as of June 2, 2022, these seals no longer appear on this Intellistop video. However, we remain concerned by your use of these seals in any ads.

C. Facebook post:

Caption: Intellistop is D.O.T. and F.T.C. compliant in all 50 states."
Image: "INTELLISTOP IS D.O.T. AND F.T.C. COMPLIANT IN ALL 50 STATES."

Intellistop Facebook post (May 17, 2021), *available at* www.facebook.com/intellistopusa/.

Your advertising claims represent, expressly or by implication, that your product has the approval of the DOT and FTC. First, DOT has not made a specific determination that your company is complying with its laws or regulations. In fact, it is our understanding that there is a pending application before DOT seeking an exemption for your pulsating brake light product from compliance with DOT regulations. Second, the FTC does not pre-approve advertising for any products or services, and has not made any determination that your company is "FTC-compliant." In addition, neither agency has authorized use of its official seal by your company. Your use of the DOT and FTC seals in any of your ads suggest that your product has the approval of the DOT and FTC. Accordingly, the impression left by your advertising that your product or advertising has been approved by DOT or the FTC is false. Therefore, the marketing material identified above violates Section 5 of the FTC Act.

By July 20, 2022, please send a message to Carolyn L. Hann, Chief of Staff for Advertising Practices, via electronic mail at chann@ftc.gov certifying that you have ceased making the false claims identified above. If you have any questions regarding this letter, please contact Ms. Hann at (202) 326-2745.

Very truly yours,

Serena Viswanathan

Serena Viswanathan
Associate Director
Division of Advertising Practices

Exhibit 1C

From: Ingber, Daniel
To: Healy, Thomas (NHTSA)
Subject: Letter to Williams & Lake, LLC
Date: Wednesday, August 30, 2023 11:54:40 AM
Attachments: Letter to Safety F1rst - Final signed.pdf

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Hi Mr. Healy:

My name is Daniel Ingber and I am a regulatory attorney for NADA—the trade association representing franchise auto dealers. I would like to discuss the attached letter that was sent to Williams and Lake regarding Pulse products. I am aware you are asking for information related to dealers who may have installed Pulse and I wanted to discuss NHTSA's next steps and plans regarding a manufacturer recall, etc. Would if be possible to arrange a call this week?

Sincerely,
Dan

Daniel Ingber
Vice President of Regulatory Affairs,
National Automobile Dealers Association

ingberd@nada.org
o 703.821.7184
8484 Westpark Drive
Suite 500
Tysons, VA 22102
nada.org