

NO DATE FOR ORAL ARGUMENT HAS YET BEEN SET

No. 04-5402

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

CENTER FOR AUTO SAFETY AND PUBLIC CITIZEN, INC.,
Appellants,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Appellee.

On Appeal from the
United States District Court for the District of Columbia

BRIEF FOR APPELLANTS

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**APPELLANTS' CERTIFICATE OF COUNSEL AS TO PARTIES,
RULINGS AND RELATED CASES (D.C. CIR. R. 28(a)(1))**

Pursuant to D.C. Circuit Rule 28(a)(1) (and Federal Rule of Appellate Procedure 26.1), counsel for appellants certify as follows:

A. Parties

Appellants Center for Auto Safety and Public Citizen, Inc. are national nonprofit membership organizations that work to promote auto safety and quality. Pursuant to Federal Rule of Appellate Procedure 26.1, counsel state that neither appellant has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public. Appellants were the plaintiffs in the district court.

Appellee is the National Highway Traffic Safety Administration. Appellee was the defendant in the district court.

B. Rulings Under Review

Petitioners seek review of the final order of the district court dated and entered September 30, 2004, by U.S. District Judge Ellen S. Huvelle, granting defendant-appellee's motion to dismiss and denying plaintiffs-appellants' motion for summary judgment. The district court's order and accompanying memorandum opinion are available at J.A. 15-56 and reported at 342 F. Supp. 2d 1 (D.D.C. 2004).

C. Related Cases

The case on review has not previously been before this Court. Counsel is not aware of any related cases pending in this Court or any other court.

Respectfully submitted,

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GLOSSARY

573 report	A report submitted by an automobile manufacturer to the National Highway Traffic Safety Administration pursuant to 49 C.F.R. Part 573.
APA	Administrative Procedure Act
CAS	Center for Auto Safety
Chrysler	Chrysler Corporation
CNI	<i>Community Nutrition Inst. v. Young</i> , 818 F.2d 943 (D.C. Cir. 1987).
Ford	Ford Motor Company
GE	<i>General Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002).
GM	General Motors Corporation
IEDA	<i>Independent Equipment Dealers Ass'n v. EPA</i> , 372 F.3d 420 (D.C. Cir. 2004).
NCDC	National Climatic Data Center
NHTSA	National Highway Traffic Safety Administration
Safety Act	National Traffic and Motor Vehicle Safety Act
VIN	Vehicle identification number
Volkswagen	Volkswagen of America, Inc.
Wheels	<i>United States v. General Motors Corp.</i> , 518 F.2d 420 (D.C. Cir. 1975).

INTRODUCTION

Mary Ann Morgan, a member of appellant Center for Auto Safety (“CAS”) who resides in Springfield, Missouri, owns a 1995 Ford Mercury Tracer. She bought and registered the car in Missouri and has not driven it in any other state for a significant period of time. In 2000, her gas tank cracked and leaked fuel whenever it contained more than one gallon of gas. The Ford dealership from which she bought the car told Ms. Morgan that it had received a bulletin from Ford describing the same fuel-tank problem that Ms. Morgan was experiencing, but that no safety recall covered her car. The dealership informed her that it would take 45 days for a new tank to arrive and that it would cost her \$427. While she waited, Ms. Morgan poured a single gallon of gas into the tank every time she needed to drive—at least twice every work day. J.A. 64-65.

When the new fuel tank arrived, Ms. Morgan paid the full cost—an enormous financial hardship to her. Only later, after contacting CAS, did Ms. Morgan learn that Ford had announced a safety recall covering 1995 Mercury Tracers registered in “hot weather” states, providing owners of such vehicles with notice of the fuel-tank defect and a free repair. *Id.* As NHTSA’s summary of this recall explained, the cracked fuel tank presented a risk of a vehicle fire. J.A. 89 (NHTSA Recall #97V144). Although owners of identical cars registered in Oklahoma, only 30 miles from where Ms. Morgan lives, received notice and a free

remedy, those who registered their cars in Missouri did not. J.A. 65.

Unfortunately, Mary Ann Morgan's story is not unique. Across the country, owners of motor vehicles with defects posing safety hazards continue to drive their vehicles ignorant of the defects. Even after they become aware of safety defects, many have been denied the free remedy guaranteed by the National Traffic and Motor Vehicle Safety Act ("Safety Act") simply because they purchased or registered their vehicles in the "wrong" states. In 1998, the National Highway Traffic Safety Administration ("NHTSA") blessed this practice, instituting a de facto legislative rule that both authorizes and regulates such "regional recalls." Appellants challenge this legislative rule and appeal the district court's order upholding the legality of such recalls.

JURISDICTION

Appellants brought this action in the district court pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 706(2). The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and issued a final order on September 30, 2004. J.A. 15. Appellants timely filed a notice of appeal on October 29, 2004. J.A. 487-88. The Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in an addendum to this brief.

STATEMENT OF ISSUES

1. Whether NHTSA's 1998 letter to automobile manufacturers outlining the circumstances under which the agency would authorize regionally restricted recalls and describing the conditions that would govern such recalls constitutes final agency action.
2. Whether NHTSA's 1998 letter authorizing automakers to conduct regional recalls of motor vehicles containing defects related to motor vehicle safety violates the Safety Act, 49 U.S.C. § 30101 *et seq.*, and thus is "not in accordance with law" under the APA, 5 U.S.C. § 706(2)(A).
3. Whether NHTSA's 1998 letter to automakers setting standards to govern regional recalls was arbitrary, capricious, and/or an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A).
4. Whether NHTSA's 1998 letter to automakers institutes a de facto legislative rule, thereby requiring the agency to follow the "notice and comment" procedures of the APA, 5 U.S.C. §§ 553, 706(2)(D).

STATEMENT OF THE CASE

A. Background

1. The Statutory Framework

The Safety Act was enacted in 1966 “to reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C. § 30101. The Act, as amended, protects motor vehicle consumers by requiring, among other things, that manufacturers of vehicles that contain “a defect” related to “motor vehicle safety” provide both notice of the defect and a free remedy to each owner, purchaser, and dealer of the vehicles. 49 U.S.C. §§ 30118, 30119, 30120; *see United States v. Ford Motor Co.*, 574 F.2d 534, 541 (D.C. Cir. 1978). The provision of notice and a free remedy to address vehicles with safety-related defects is known as a “recall.” J.A. 67 (¶ 5), 230 (¶ 4).

Under the Safety Act, a “‘defect’ includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.” 49 U.S.C. § 30102(a)(2). “[M]otor vehicle safety’ means the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident” § 30102(a)(8). A “defect” related to “motor

vehicle safety” may be identified in one of two ways, either of which will trigger the automaker’s notice and remedy obligations. First, NHTSA may make an initial finding that a vehicle contains a safety-related defect based on its review of consumers’ reports of vehicle problems, information submitted by manufacturers, and/or the results of the agency’s own investigation and testing. § 30118(a). If, following publication in the Federal Register, *id.*, and an opportunity for interested persons to present information, NHTSA affirms its initial finding of a safety-related defect, the Safety Act provides that the agency “shall order” the manufacturer to give notice of the defect “to the owners, purchasers, and dealers of the vehicle,” § 30118(b)(2)(A); *see also* § 30119(d), and to remedy the defect at no charge. § 30118(b)(2)(B); § 30120(a).

Alternatively, an automaker may voluntarily acknowledge a safety-related defect. § 30118(c). It initiates the process by notifying NHTSA that a vehicle or equipment contains a defect related to motor vehicle safety. It effectuates notice to NHTSA by filing a “573 report” (named after the relevant C.F.R. part) containing information about the defect and the company’s plan for notifying consumers and remedying affected vehicles. *Id.*; 49 C.F.R. Part 573. As is the case for NHTSA-identified safety defects, when the manufacturer discovers a defect related to motor vehicle safety, the Safety Act dictates that the automaker

“shall notify . . . the owners, purchasers, and dealers of the vehicle or equipment.” § 30118(c). The manufacturer must provide the notice by first-class mail “to each person registered under State law as the owner [of an affected vehicle] and whose name and address are reasonably ascertainable by the manufacturer through State records or other available sources,” § 30119(d)(1)(A) (emphasis added), or, failing that, “the most recent purchaser known to the manufacturer.” § 30119(d)(1)(B). The Safety Act further provides that the manufacturer “shall remedy the defect . . . without charge.” § 30120(a). The Act requires a recall if common sense suggests the potential for a dangerous malfunction in a non-de minimis number of vehicles. *United States v. General Motors Corp.*, 518 F.2d 420, 427, 435-36, 438 n.84 (D.C. Cir. 1975) (“*Wheels*”); accord *United States v. General Motors Corp.*, 565 F.2d 754, 757 (D.C. Cir. 1977).

The content of consumer notifications is controlled by the Safety Act and NHTSA regulations. Manufacturers must include in the owner notification letter detailed information about the defect, the risk to motor vehicle safety, and the measures to be taken to remedy the defect. 49 U.S.C. § 30119(a); 49 C.F.R. § 577.5(e), (f), & (g). The notifications are intended to “adequately inform and effectively motivate owners of potentially defective or noncomplying motor vehicles or items of replacement equipment to have such vehicles or equipment

inspected and, where necessary, remedied as quickly as possible.” 49 C.F.R. § 577.2.

After a manufacturer notifies “each person who is registered under State law” of the safety defect and the availability of a free remedy, 49 U.S.C. § 30119(d)(1)(A), it must work with dealers to provide the remedy to vehicle owners in a timely fashion. § 30120(a)(1) & (c). The remedy may consist of a free repair, a replacement vehicle, or a refund of the owner’s purchase price, adjusted for depreciation. § 30120(a)(1)(A). Manufacturers describe their remedy plans in “dealer bulletins” that inform dealers about defects, explain how to remedy them, and direct dealers to provide the remedy for free. Automakers also set out their general company policies regarding recalls in policy manuals consulted by dealers. J.A. 74-75 (¶ 21); *see, e.g.*, J.A. 186-206. Dealers typically determine whether an individual vehicle qualifies for a free remedy according to the vehicle identification number (“VIN”), which a dealer can input into the company’s proprietary database to retrieve information about the vehicle and its recall history. J.A. 74 (¶ 21).

The Safety Act allows only two exceptions to its categorical requirements that automakers provide each owner of a vehicle containing a safety-related defect both notice of the defect and a free remedy. First, a free remedy is not required

(although notice still is) if the vehicle was first purchased more than 10 years before the notice is given. 49 U.S.C. § 30120(g)(1). Second, an automaker may obtain an exemption from the consumer notification and remedy requirements if, after providing notice and receiving public comment on a petition by the automaker, NHTSA determines that the defect is “inconsequential to motor vehicle safety.” § 30120(h); *see also* 49 C.F.R. Part 556.

2. Regional Recalls and NHTSA’s 1998 Letter to Automakers

In the mid-1980s, automakers began to limit certain voluntary safety recalls to vehicles registered in designated states. In each instance, the manufacturer would submit a 573 report identifying a safety-related defect in its vehicles and commencing a “regional recall” that limited the notice and free remedy to owners of vehicles registered in (and, sometimes, originally purchased in) states in which the weather conditions most likely to trigger the defect were prevalent. J.A. 68-70 (¶¶ 7-8, 11); *see* J.A. 84-108, 409 (summary of regional recalls from 1990s to 2004), 110-15 (sample 573 reports), 261-400, 474-86 (information on select regional recalls). For years, NHTSA permitted manufacturers to conduct recalls under circumstances and in states largely of their own choosing, which led to inconsistent treatment of similarly situated vehicles and vehicle owners.

Compare, e.g., NHTSA Recall #93V018 (J.A. 95) (General Motors (“GM”) recall

to correct a corrosion-related defect that could result in “a disabled vehicle or vehicle fire,” limited to 14 states), *with* NHTSA Recall #95V244 (J.A. 102) (Nissan recall of a corrosion-related defect that could “result in a fire,” limited to 20 states). In addition to corrosion-related defects, manufacturers also initiated regional recalls to remedy defects that they claimed manifested themselves only when the vehicles were exposed to heat, cold, or snow. *See, e.g.*, NHTSA Recall #95V231, #97V019, #97V144, #01V068 (J.A. 86-89, 96). Some of these recalls were limited not only to particular states, but also to particular *counties* within states. *E.g.*, NHTSA Recall #98V190 (J.A. 91).

Regional recalls proceeded in an ad hoc fashion until at least 1997, when NHTSA sent automakers a letter stating that it had “concerns” regarding their regional-recall practices. J.A. 136-38. The following year, NHTSA sent automakers another letter announcing what it termed its “Regional Recall Policy.” J.A. 80-82 (generic version of 1998 letter); *see also* J.A. 142-47, 149-51, 256-59 (letters to Ford Motor Co. (“Ford”), Chrysler Corporation (“Chrysler”), Volkswagen of America (“Volkswagen”)) (collectively referred to as NHTSA’s “1998 letter,” unless otherwise noted). NHTSA’s 1998 letter emphasized that, “as a general matter, safety-related defects must be remedied on a nationwide basis, unless the manufacturer can justify a limited geographic scope.” J.A. 80.

NHTSA explained that, since its 1997 letter, it “ha[d] considered the matter in depth” and “developed the following policy guidelines” to govern regional recalls. *Id.* The letter then described two categories of weather-related safety defects: (1) those likely to manifest themselves after only a brief exposure to a weather condition (such as extreme heat or cold or severe precipitation), and (2) those likely to occur only after long-term or recurring exposure. NHTSA determined that short-term exposure defects were inappropriate candidates for regional recalls because a freak weather event or visit to a particular region could trigger the problem after a single exposure. *Id.* at 80-81. For long-term exposure defects, however, NHTSA announced that it “*will* approve” a regional recall “if the manufacturer is able to demonstrate that the relevant environmental factor (or factors) is significantly more likely to exist in the area proposed for inclusion than in the rest of the United States.” *Id.* at 81 (emphasis added). NHTSA stated that each automaker must justify its proposal to conduct a regional recall “based on objective factors, and not merely on differences in complaint rates among the states.” *Id.*

Next, NHTSA set forth several requirements standardizing how regional recalls, once justified, would be conducted. First, when a regional recall is “approved by the agency,” the automaker “*will be required* to send a notification

letter to the owners of subject vehicles currently registered in the designated states (or portions of states) and, in some cases, to the owners of vehicles originally sold in the designated states.” *Id.* (emphasis added). NHTSA relieved automakers of their obligation to conduct a national recall in such circumstances. *Id.* (“The manufacturer *will only have to* provide the recall remedy to those vehicles.”) (emphasis added). The agency recognized that other vehicles, such as those located in “border states,” could be exposed to the triggering condition and, accordingly, ordered that manufacturers “*must assure* that vehicles from outside the designated area that experience a problem due to the defect are taken care of appropriately.” *Id.* (emphasis added). NHTSA did not specify what “taken care of appropriately” meant, but noted approvingly one approach in which dealers, after obtaining approval from the company, could provide a free remedy to excluded owners whose vehicles had already experienced the problem the recall was intended to prevent. *Id.*

Second, the 1998 letter recognized that some vehicles would be registered outside the designated states at the time of the original notification and then later sold to residents within the designated states and that some owners would move into a covered area after the original notification was sent. To capture these owners, who otherwise would not learn of the defect or free remedy, NHTSA

stated that, “in most cases, the agency *will require* manufacturers to conduct at least one follow-up notification, usually after two or three years.” *Id.* (emphasis added).

Third, NHTSA recognized that many regional recalls had been prompted by corrosion-related defects exacerbated by exposure to road salt in states that experience snow and ice. For the first time, the 1998 letter established a list of 20 states, plus the District of Columbia, that “*at a minimum . . . must* be included” in any corrosion-related regional recall. J.A. 81-82 (emphasis added). The letter closed by admonishing that “manufacturers *must* discuss all proposals to limit the geographic scope of any recall” with the agency prior to proceeding with the recall. *Id.* at 82 (emphasis added).

Between 1992 and 1998, automakers had conducted 18 regional recalls. Between the issuance of NHTSA’s 1998 letter and August 2004, they conducted an additional 22. J.A. 404 (¶ 2).¹ Since its 1998 letter, NHTSA has issued no further pronouncements regarding the permissibility of or the requirements

¹ Three additional regional recalls have been announced in the past year: NHTSA Recall #04V368 (Volvo recall in designated hot-weather states), #04V495 (Audi recall in designated cold-weather states), and #05V030 (Ford recall in designated salt states). Information about individual recalls is available at <http://www-odi.nhtsa.dot.gov/cars/problems/recalls/recallsearch.cfm> and can be accessed by entering either the NHTSA recall number (with three zeros added at the end) or the year, make, model, and affected component of the recalled vehicle.

governing regional recalls, and, as discussed *infra* Part IV, both the agency and regulated manufacturers have adhered to the letter's standards.

3. The Center for Auto Safety's Correspondence with NHTSA Regarding Regional Recalls.

On May 15, 2002, CAS wrote to the NHTSA Administrator detailing a list of inconsistencies and problems highlighted by particular regional recalls and questioning whether such recalls are permitted by the Safety Act. J.A. 75-76 (¶ 23), 216-19. CAS explained its concern that when manufacturers conduct regional recalls they often draw irrational distinctions between included and excluded states. As one example, CAS cited Ford's regional recall involving its 1995 Windstars (NHTSA Recall #99V309, J.A. 92) to correct a defect that caused fuel tank cracks that could lead to a vehicle fire. J.A. 216. The recall included Arizona and Texas, along with ten other hot-weather states, but excluded neighboring New Mexico, parts of which experience higher average maximum temperatures than their counterparts in the neighboring included states. *Id.* And although the southernmost 10 counties in California were covered, the recall excluded Death Valley, California, the hottest spot in North America. *Id.*; see U.S. Geological Survey, *Death Valley's Incredible Weather* (2004), at <http://wrgis.wr.usgs.gov/docs/parks/deva/weather.html>. CAS also cited Ford's

regional recall involving 1992-1995 Tauruses and Mercury Sables (NHTSA Recall #97V019, J.A. 88) to correct a defect that could result in ice and snow blockages in engine fans, potentially causing a fire. J.A. 216. Ford recalled the cars from six snowy states, but excluded New York—even though Buffalo receives 91 inches of snow annually. *Id.*; see National Climatic Data Center (“NCDC”), *Snowfall—Average Total in Inches* (2004), at <http://lwf.ncdc.noaa.gov/oa/climate/online/ccd/snowfall.html>.

CAS also called attention to the agency’s own consumer complaint database, which included complaints from vehicle owners who, although excluded from various regional recalls, had actually experienced the vehicle failures that the recalls were intended to prevent. CAS specifically noted that NHTSA’s complaint database contained reports of corrosion-related failures from 30 consumers excluded from Ford’s first subframe bolt corrosion recall on its Tauruses, Mercury Sables, and Lincoln Continentals (NHTSA Recall #93V106), including reports of two crashes in Georgia and California. J.A. 217-18.

In a November 1, 2002 letter, NHTSA attempted to allay CAS’s concerns by citing its “current policy” that the agency “established” in its letters to automakers in 1998. J.A. 221. The agency explained that its 1998 letters “set[] forth certain requirements that would apply to all future regional recalls” to alleviate the

“several problems associated with some regional recalls” prior to that time. *Id.* NHTSA’s response to CAS reiterated the requirements set out in its 1998 letter to emphasize the additional level of regulation to which manufacturers proposing to conduct regional recalls were now subject. J.A. 222-23.

On September 10, 2003, CAS sent another letter to NHTSA, this time citing consumer complaints it had received regarding regional recalls and highlighting two instances in which consumers had been excluded from regional recalls even though they had experienced the safety problem the recall was designed to prevent. J.A. 75-76 (¶ 23), 226. In the first, a Tennessee resident complained about “the defective fuel tank in his 1995 Ford Windstar not being covered by Ford’s geographic recall.” J.A. 75, 226; *see* NHTSA Recall #99V309 (J.A. 92). In the second, a North Carolina resident whose windshield wipers failed while driving because of heavy snows hitting North Carolina complained: “Chevy Dealers refuse to help repair as a recall, because the recall is limited to geographic regions, and closest state is our nearby neighbor West Virginia (where, of course, our NC residents naturally travel regularly during the winter for the sport of winter skiing).” J.A. 75, 226; *see* NHTSA Recall #01V068 (J.A. 96). NHTSA did not respond.

B. The Legal Challenge

1. Plaintiffs

On March 10, 2004, CAS and Public Citizen filed this lawsuit pursuant to the APA, 5 U.S.C. §§ 553, 706(2). J.A. 3-14. They challenged the regulatory regime governing regional recalls established in NHTSA's 1998 letter to automakers, arguing that the de facto legislative rule violates the Safety Act and that, even if regional recalls were lawful under some circumstances, NHTSA's current regional recall rule violates the APA because it is arbitrary and capricious and was promulgated without public notice and comment.

CAS and Public Citizen are nonprofit consumer advocacy organizations that, among other things, work for strong federal auto safety protections for drivers and passengers. J.A. 4, 59-60, 66-68. They brought this action on behalf of their members, many of whom own vehicles that have been and will continue to be excluded from regional recalls and who are accordingly placed at heightened risk for vehicle failures and crashes because of NHTSA's regional recall rule. At least some of these members have been and will be excluded from recalls implemented to correct serious safety-related defects. In addition to the increased risk of physical injury they face, these members have been and will continue to be forced to pay for costly preventive repairs that are provided free of charge in some

areas of the country. Other members have been or will be forced to share the roads with vehicles whose owners have been excluded from safety recalls because of the states in which they purchased or registered their vehicles, placing appellants' members at greater risk of a crash. J.A. 4-5 60-63, 68, 76; *e.g.*, J.A. 64-65, 401-03 (member declarations).

2. The District Court's Decision

On September 30, 2004, the district court denied appellants' motion for summary judgment and granted NHTSA's motion to dismiss. J.A. 15-56. At the outset, the court rejected the agency's challenge to appellants' standing to bring the suit. J.A. 26-33. The court also dismissed out-of-hand as a "misapprehension of plaintiffs' claim," J.A. 33, NHTSA's contention that its 1998 letter was not reviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). It found that *Heckler* posed no bar because appellants were not challenging NHTSA's exercise of its enforcement discretion in any specific case, but rather, the lawfulness of its "regional recall policy" as a whole. J.A. 33-34.

The court then held that the Safety Act does not preclude regional recalls. J.A. 34-40. Reasoning that, under the Act, a determination whether a recall is required "will be fact-specific, and thus, subject to the agency's expertise and judgment," J.A. 35, the court stated that it is "readily apparent that the statute does

not outlaw regional recalls; rather, it envisions that the agency will exercise its discretion to determine whether a safety-related defect exists in a given scenario.”

J.A. 36. “To this end,” the court continued, “it is logical to include a vehicle’s locale of operation when considering its ‘use’ and ‘normal operation.’” *Id.*

(quoting *Wheels*, 518 F.2d at 427). If a vehicle experiences a significant number of failures in a specific climate, the court thought it “fair to conclude that the vehicle has a safety-related defect related to performance.” *Id.*

Next, the district court addressed appellants’ claim that NHTSA had failed to follow the APA’s notice-and-comment procedures in issuing its 1998 letter.

The court agreed with the agency’s characterization of its letter as a “policy statement” exempt from the APA’s rulemaking requirements, *see* 5 U.S.C.

§ 553(b). J.A. 42.

Finally, appellants had argued that NHTSA’s 1998 letter setting forth the circumstances under which regional recalls would be permitted and standards governing such recalls was arbitrary, capricious, and an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A). NHTSA had said almost nothing in defense of the substance of its 1998 letter. Nevertheless, the district court did not reach the issue because it ruled that the agency’s letter did not constitute “final agency action” under the APA, 5 U.S.C. § 704. The court stated that whether

agency action is final, much like the determination of whether agency action constitutes a rule or policy, “hinges on whether the agency’s statement was binding.” J.A. 52. Referring back to its legislative rule analysis, the court reiterated that NHTSA’s 1998 letter was “not binding” because it “left it free to exercise its discretion in enforcing regional recalls, neither requiring nor ordering the manufacturers to do anything.” J.A. 54.

3. Proceedings in this Court

NHTSA moved for summary affirmance of the district court’s decision. On May 4, 2005, the Court denied the motion.

SUMMARY OF ARGUMENT

In 1998, NHTSA instituted a new regulatory regime to govern when and how automakers would conduct regional recalls of motor vehicles with safety-related defects, explicitly authorizing automakers to limit sharply the geographic scope of certain safety recalls when defects are triggered by climatic conditions more common in certain regions of the country than in others.

Whether characterized as a legislative rule or as a policy statement, NHTSA’s 1998 letter constitutes final agency action. The letter marked the consummation of a deliberative process that had been some time in the making at the agency, and for seven years now, the agency and automakers alike have

followed the standards it announced. In the letter, NHTSA instituted new requirements governing the conduct of regional recalls, altering the legal regime with consequences both for automakers—now forced to conform their practices to the agency’s standards—and for automobile consumers who have fallen on the wrong side of the lines drawn in the letter.

NHTSA’s 1998 letter was unlawful in three respects. First, the agency established its regional recall scheme in violation of the Safety Act, which requires automakers to provide notice and a free remedy to *each* owner or purchaser of a vehicle with a safety-related defect, regardless of the state in which the vehicle is registered or purchased. Second, despite NHTSA’s attempt to regularize regional recalls, the agency’s legislative rule arbitrarily and capriciously excludes many unsafe, failure-prone vehicles, leaving thousands of consumers without knowledge of dangerous safety defects in their vehicles and with no means of obtaining a free remedy. Finally, NHTSA issued its de facto legislative rule without public notice or input, in disregard of the APA’s notice-and-comment procedures.

STANDARD OF REVIEW

This Court reviews de novo the district court’s decision granting NHTSA’s motion to dismiss. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety*

Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003). The Court also reviews a district court's evaluation of agency action de novo, *Senior Resources v. Jackson*, 412 F.3d 112, 117 (D.C. Cir. 2005), and will strike down agency action shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (citing 5 U.S.C. § 706(2)(A)).

ARGUMENT

The district court erred in ruling (1) that NHTSA's 1998 letter to automakers authorizing them to conduct regional recalls and establishing requirements governing such recalls does not constitute final agency action; (2) that regional recalls of motor vehicles with safety-related defects do not violate the Safety Act; and (3) that the 1998 letter represented an agency policy statement not subject to the APA's notice-and-comment requirements. Although the court below did not reach the issue, NHTSA's letter is also arbitrary and capricious under the APA.

I. NHTSA'S 1998 LETTER CONSTITUTES FINAL AGENCY ACTION.

The existence of "final agency action" is a prerequisite to judicial review of both the Safety Act and arbitrary-and-capricious challenges to NHTSA's 1998 letter. 5 U.S.C. § 704. Under the "flexible" and "pragmatic" approach to finality dictated by this Court's cases, *see, e.g., National Ass'n of Home Builders v. United*

States Army Corps. of Eng'rs, --- F.3d ---, 2005 WL 1789740, at *5 (D.C. Cir. July 29, 2005); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986), the 1998 letter meets the APA's threshold finality requirement.

The district court's fundamental error in holding that the 1998 letter did not constitute final agency action was in assuming that the test for whether agency action is "final" under the APA is identical to that for whether agency action constitutes a legislative rule requiring rulemaking procedures. Relying on *General Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004), and *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004) ("*IEDA*"), the court explained that, "much like the determination of whether agency action constitutes a rule or a policy," the question whether agency action is final "hinges on whether the agency's statement was binding." J.A. 52. Having already determined that NHTSA's 1998 letter was not binding for purposes of its legislative rule analysis, J.A. 40-52—an error addressed *infra* Part IV—the court concluded that the letter could not constitute final agency action. J.A. 54.

Although the two issues are similar, the tests for whether an agency action is a legislative rule and for whether it is final are not the same. If the district court were right, then *no* policy statements or interpretative rules, which invariably are not binding (or else they would be legislative rules), would ever constitute final

agency action subject to challenge under the APA. Yet as the district court recognized in addressing whether the 1998 letter violated the Safety Act, “an agency’s statement of a general enforcement policy may be reviewable for legal sufficiency where the agency has . . . articulated it in some form of universal policy statement.” J.A. 34 (quoting *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994)); see also *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (“[A]n agency’s adoption of a general enforcement policy is subject to review.”). As this Court elaborated in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), although “[o]nly ‘legislative rules’ have the force and effect of law,” *id.* at 1020 & n.11, “[i]nterpretive rules’ and ‘policy statements’ may be rules within the meaning of the APA,” and therefore subject to challenge, even though “neither type of ‘rule’ has to be promulgated through notice and comment rulemaking.” *Id.* at 1021; see also 5 U.S.C. § 551(4) (defining “rule”). An agency action may be binding but not final, and a final agency action need not necessarily have binding effect. *Id.* at 1022 & n.15. One point, however, is clear: “That the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years.” *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000); see, e.g., *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93

(D.C. Cir. 1986).

For an agency action to be final, two conditions must be satisfied: First, “the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and second, “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *accord Barrick*, 215 F.3d at 48; *Appalachian Power*, 208 F.3d at 1022. NHTSA’s action here satisfies both requirements.

First, NHTSA’s 1998 letters marked the consummation of a deliberative process that had been underway for some time. Although automakers had been conducting regional recalls on an occasional basis since the 1980s, NHTSA had not issued any public statements sanctioning such recalls as lawful under the Safety Act and had not issued any guidelines regarding when and how automakers could conduct regional recalls. In 1997, NHTSA raised “concerns” with manufacturers about restricting safety recalls to certain regions. J.A. 136-38. Finally, in 1998, the agency issued a letter to manufacturers both expressly authorizing regional recalls in specified circumstances—which it had not previously done—and, for the first time, setting forth requirements for conducting regional recalls. J.A. 80-82.

The 1998 letter represents the culmination of the agency’s deliberations. It

states that since the agency's 1997 letter, NHTSA "has considered the matter in depth and has developed the following policy guidelines with respect to such 'regional recalls.'" J.A. 80. It represents a break from previous practice insofar as "[i]n the past," automakers proposed to conduct regional recalls in the case of both short-term and long-term exposure to weather conditions, *id.*, but now NHTSA "has concluded" that, in general, regional recalls are inappropriate when the defect can manifest itself after a short-term exposure to a weather condition. *Id.*

Whereas automakers previously conducted regional recalls on an ad hoc basis, designating whichever states and providing whatever remedies to consumers they believed appropriate, the 1998 letter, far from embodying an "idle[] statement of agency policy," *Home Builders*, 2005 WL 1789740, at *5, establishes "rights" and "obligations," *Bennett*, 520 U.S. at 178, by specifying the states that, at a minimum, must be included for corrosion-related recalls, imposing the requirement of providing notice to all vehicle owners affected by short-term exposure defects, clarifying how consumers in border states should be treated, and announcing the need for issuing supplemental notifications. J.A. 80-82. The letter "is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990); *see also Barrick*, 215 F.3d at 50 (agency letter final because "firm and

conclusive”); *Ciba-Geigy*, 801 F.2d at 437 (agency letter final where “it gave no indication that it was subject to further agency consideration or possible modification”).

In 2002, NHTSA acknowledged that its “current” regional recall “policy” had been “established” in its 1998 letter. J.A. 221. And for seven years now, the agency and automakers have followed it. *See Better Gov’t*, 780 F.2d at 93 (guidelines in effect for over two years were final). As evidenced by its insistence that automakers comply with the standards announced in the letter, *see infra* pp. 57-58 & n.12, NHTSA acts as if the letter “is controlling in the field,” leading automakers to believe that it will declare their regional recalls “invalid unless they comply with the terms of the document.” *Appalachian Power*, 208 F.3d at 1021. It is obvious that “no further procedural or substantive evolution is expected.” *Better Gov’t*, 780 F.2d at 93.

Thus, the district court’s conclusion that the 1998 letter failed to meet the second prong of the finality test because the letter carried no legal consequences, imposed no rights or obligations, and created no new regulatory regime, is incorrect. J.A. 54-55. The letter announced requirements for automakers planning to conduct regional recalls and immediately put them into effect—as can be seen from NHTSA’s 1998 letter to Ford applying the standards announced in that letter

to several regional recalls proposed by the company. J.A. 144-47 (“Applicability of These Principles to Ford’s Proposed Regional Recalls”); *see also infra* pp. 31-32, 58 n.12. The requirements “alter[ed] the legal regime,” *Bennett*, 520 U.S. at 178, and had “a direct and immediate impact on the parties,” *Her Majesty*, 912 F.2d at 1532—both on automakers, now forced to conform their practices to NHTSA’s pronouncement, and on members of the appellant groups who have fallen on the wrong side of the lines drawn in NHTSA’s letter.

For these reasons, *General Motors* and *IEDA*, cited by the district court, J.A. 52-53, are patently distinguishable. In *General Motors*, the EPA letters at issue were not final agency action because the agency’s position had been settled long before the letters were issued. 363 F.3d at 449. They “neither mark[ed] the consummation of EPA’s decisionmaking process nor impose[d] new substantive rights or obligations.” *Id.* at 450. So, too, in *IEDA*, the challenged EPA letter was not final agency action because it had no “concrete impact” on the plaintiff association and its members but merely restated a “longstanding” agency interpretation; the letter “was purely informational in nature; it imposed no obligations and denied no relief”; “[c]ompell[ed] no one to do anything,” 372 F.3d at 427, and “tread no new ground.” *Id.* at 428.

It is difficult to see how the same could possibly be said of the 1998 letter.

As in *Appalachian Power*, the letter “reads like a ukase. It commands, it requires, it orders, it dictates.” 208 F.3d at 1023. Accordingly, the letter is final agency action subject to APA review.

II. REGIONAL RECALLS VIOLATE THE SAFETY ACT.

A. Regional Recalls Are Inconsistent with the Plain Language and Purpose of the Safety Act.

“[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Safety Act’s plain language requires manufacturers of vehicles with safety-related defects—whether identified by NHTSA or the automaker—to “notify . . . the owners, purchasers, and dealers of the vehicle or equipment.” 49 U.S.C. § 30118(b)(2)(A) & (c). The entitlement to notice applies “to *each* person registered under State law as the owner and whose name and address are reasonably ascertainable by the manufacturer,” or else “to the most recent purchaser known to the manufacturer.” § 30119(d)(1)(A) & (B) (emphasis added). As to each person entitled to notification under § 30118(b) or (c), the automaker “shall remedy the defect . . . without charge.” § 30120(a).

1. Throughout this litigation, NHTSA has sought to divert attention from the Safety Act’s requirement that “each” owner of a vehicle with a safety-related defect receive notice and a free remedy by attempting to cast doubt on the premise that vehicles subject to regional recalls contain safety-related defects in the first place. The agency has argued that, with respect to manufacturer-initiated regional recalls, NHTSA has never found that the affected vehicles contain a defect relating to motor vehicle safety and that, therefore, the predicate for the statutory remedies is absent. The district court accepted NHTSA’s argument, stating that the Safety Act “does not outlaw regional recalls,” but rather “envisions that the agency will exercise its discretion to determine whether a safety-related defect exists in a given scenario.” J.A. 36. In the court’s view, NHTSA could reasonably conclude that if a vehicle were more likely to fail in states in which certain weather conditions are more common, then *only* those vehicles registered in the higher-risk states contain safety defects because only the “performance” of those vehicles would contribute to an “unreasonable risk of death or injury in an accident.” J.A. 36 (citing 49 U.S.C. § 30102(a)(8)). Moreover, the court believed, the Safety Act leaves it to the agency “in the exercise of its discretion and expertise, to determine, based on the specific facts presented, whether a safety-related defect exists in a vehicle.” J.A. 40.

The district court’s analysis is flawed in several respects. First, a safety-related defect may be identified by either NHTSA or the automaker. The filing of a 573 report by an auto manufacturer signifies that the *manufacturer* has determined that its vehicles contain a defect related to motor vehicle safety—an admission that automatically triggers the statute’s remedial provisions. *See* 49 U.S.C. § 30118(c); 49 C.F.R. § 573.6(a). Thus, the process by which the *agency* is authorized to determine whether a safety-related defect exists does not come into play here at all. Indeed, NHTSA’s 1998 letter specifically addresses the scenario in which automakers proposing to conduct regional recalls have *found* safety-related defects in their vehicles and want to limit the scope of the remedy. J.A. 80. Notably, the distinction automakers have drawn between included and excluded vehicles has been based solely on the vehicles’ states of registration or original purchase—*not* on differences in the vehicles themselves.²

Second, the district court confused the issue of the *likelihood* that a safety-

² *See, e.g.*, J.A. 113-14 (Ford 573 report acknowledging that 275,167 total vehicles are potentially affected, including 198,585 registered in designated states); J.A. 262 (Ford 573 report identifying affected vehicles based on models, years, and manufacturing plants, but then restricting remedy to designated states); J.A. 327 (Chrysler 573 report listing potentially affected vehicles based on makes, models, years, and manufacturing dates, but proposing to limit remedy to designated states), J.A. 360-61 (Volkswagen 573 report listing affected vehicles based on makes, models, years, and transmission type, but proposing to restrict remedy to designated states).

related defect will actually manifest itself with the issue whether a particular vehicle has a safety-related defect *at all*. Before this litigation, however, NHTSA never questioned that manufacturers were admitting the existence of a safety-related defect under 49 U.S.C. § 30118(c) whenever they submitted a 573 report notifying the agency that, if a particular vehicle component were exposed to such conditions as salt, cold, heat, or snow, it was prone to fail in a way that could jeopardize safety. Rather, the concern NHTSA expressed about regional recalls was always about the proper scope of the *remedy* for a safety-related defect more apt to manifest itself in particular climates—an issue addressed in the Safety Act itself—not about whether the automaker had failed to acknowledge a safety-related defect in the first place. Hence, NHTSA’s 1998 letter proceeded from the premise that regional recalls involve safety-related defects, declaring that, “as a general matter, safety-related defects must be *remedied* on a nationwide basis.” J.A. 80 (emphasis added); *see also* J.A. 136-38 (1997 letter).

Accordingly, when NHTSA threatened Ford with enforcement action if it did not immediately comply with the requirements announced in the 1998 letter, the agency did *not* threaten to initiate a proceeding under 49 U.S.C. § 30118(a) & (b), to determine whether affected vehicles contained a defect related to motor vehicle safety. Instead, treating the existence of a safety defect as resolved by

Ford's own admission, NHTSA threatened to commence a proceeding under 49 U.S.C. §§ 30118(e) & 30120(e) and 49 C.F.R. Part 557, to determine "whether Ford has reasonably met the [Safety Act's] notification and remedy requirements." J.A. 146. The cited provisions concern whether an automaker has complied with the notification and remedy requirements of the Safety Act and are triggered only *after* the statutory predicate of a safety-related defect has been satisfied.

2. The vehicles that have been subject to regional recalls plainly involve safety defects. Many of the components at issue are prone to the same kinds of failures that this Court and others previously have found to constitute safety-related defects.³ The real question, then, is whether the fact that the risk of such failures may be lower for vehicles driven in some regions of the country than in others means that the lower-risk-region vehicles contain no safety-related defects, in contrast to identical vehicles driven in higher-risk regions. This Court has

³ Compare NHTSA Recalls #93V018 (GM), #97V019, #97V144, #97V145, #97V159, #98V190, #99V309 (all Ford), #95V244, #97V072 (both Nissan) (J.A. 88-92, 95, 102), involving the risk of vehicle fire, *with General Motors*, 565 F.2d at 757 (possible engine fire poses unreasonable safety risk). Compare NHTSA Recall #01V068 (GM) (J.A. 96), involving risk of windshield wiper failure, *with United States v. Ford Motor Co.*, 453 F. Supp. 1240, 1250 (D.D.C. 1978) (risk of windshield wiper failure unreasonable under Safety Act). Compare NHTSA Recalls #94V056, #98V323 (both Ford), #97V058, #00V189, #01V200 (all GM) (J.A. 86, 91-92, 95-97), involving risk of losing steering control, *with United States v. General Motors Corp.*, 561 F.2d 923, 924 (D.C. Cir. 1977) (possible loss of control over car creates "unreasonable risk of accidents").

resolved a similar question in the negative. In *General Motors*, 565 F.2d 754, the Court rejected GM’s contention that because only a “negligible” number of cars would burst into flames in the future, the defects in its vehicles posed no “unreasonable” risk to safety. *Id.* at 758. Taking a “commonsense approach,” *id.* at 757, the Court reasoned that “even an ‘exceedingly small’ number of injuries from this admittedly defective and clearly dangerous carburetor appears . . . ‘unreasonably large.’” *Id.* at 759.

Here, NHTSA does not dispute that some vehicles excluded from regional recalls because of their states of purchase or registration will experience the failures the recalls were intended to redress. Accordingly, its 1998 letter directed manufacturers to make sure that owners of vehicles registered in “border states” or who travel “regularly” in covered states “are taken care of appropriately”—*after* their vehicles fail. J.A. 81.⁴ But it is insufficient for an automaker to “take care of” consumers after their vehicles fail, with potentially dangerous consequences, or even for NHTSA to expand regional recalls after many excluded consumers

⁴ *See also* J.A. 237 (¶ 14) (NHTSA concession that “[w]e examined the data and, *at times*, there were not substantial numbers of complaints outside the regional recall area”) (emphasis added); J.A. 323 (NHTSA report noting that 87% of known or suspected stress failures had occurred in southern states, meaning that 13% of failures occurred outside covered region), J.A. 329 (Chrysler bulletin directing dealers “[i]n the event a *non-recall* vehicle” exhibits corrosion brake problem, to contact district managers “for authorization”).

have risked or actually suffered injuries or death, as the district court suggested. J.A. 38 n.21. As this Court has recognized: “The purpose of the Safety Act . . . is *not* to protect individuals from the risks associated with defective vehicles only *after* serious injuries have already occurred; it is to prevent serious injuries stemming from established defects *before they occur.*” *General Motors*, 565 F.2d at 759 (emphasis added); *accord Ford*, 574 F.2d at 541 (purpose of Safety Act is “to protect the public against the unreasonable risk of accidents”); *Wheels*, 518 F.2d at 431 (Safety Act “is designed specifically to warn a consumer *before an accident occurs*”) (emphasis added) (quoting lower court opinion). Automakers may not withhold the statutory notice and free remedy from owners of vehicles containing safety-related defects until after the vehicles fail.

3. Citing this Court’s decision in *Wheels*, the district court incorrectly found that if a vehicle were more likely to fail in a “salt state” (say, Illinois) than in a non-salt state (say, Kentucky), then the defect was not safety-related, but performance-related, with vehicles driven in Illinois (but not Kentucky) containing the safety defect. J.A. 35-39. The court’s reliance on *Wheels* was misplaced.

First, if a vehicle component experiences a “non-de minimus” [sic] number of failures, *Wheels*, 518 F.2d at 438 n.84, when exposed to salt, cold, heat, snow, etc.—all of which are reasonably foreseeable conditions in the United States—and

those failures can lead to serious driving hazards, then that component contains a safety-related defect in that “an error or mistake” has been made “in design, manufacture or assembly,” *id.* at 433 (citation omitted), and is not suffering merely from a deficiency in “performance.” Nothing in the Safety Act permits an automaker, once it or NHTSA identifies a safety-related defect, to limit the statute’s all-inclusive remedies to the locales in which the automaker believes vehicle failure is the most likely. Instead, the Safety Act provides one limited recourse for manufacturers to address this kind of situation: An automaker may obtain an exemption from the Act’s otherwise applicable notification and remedy requirements if, after notice and public comment, NHTSA determines that the defect is “inconsequential to motor vehicle safety.” 49 U.S.C. § 30120(h); *see also* 49 C.F.R. Part 556. No such exemption has been sought or granted with respect to any regional recalls.

Second, although *Wheels* stated that it is “possible that the same component may contain a defect in performance relating to motor vehicle safety in one class of vehicle or use but not in another,” it explained that whether a performance defect exists must be evaluated based on “reasonably foreseeable” conditions within “the expected range of actual operation” of the vehicles. 518 F.2d at 438 n.88; *accord General Motors*, 561 F.2d at 929 (defect assessment based on

“normally encountered circumstances”). In other words, a component that failed when subjected to extreme maneuvers might be deemed to contain a performance defect in police cars, but not in identical passenger cars. *Wheels*, 518 F.2d at 438 n.88. Such vehicle “abuse” is far removed from the situation here, where a vehicle is put at risk simply by being exposed to a climate common in the United States. No manufacturer could claim that it was not a “reasonably foreseeable use” or that it was beyond “the expected range of actual operation,” *id.*, for a vehicle to spend time in states—much less adjacent *counties*—with (supposedly) differing climates.

B. NHTSA’s Interpretation of the Safety Act Leads to Absurd Results.

“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *accord FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001). Thus, this Court should reject a reading of the Safety Act that classifies identical vehicles as containing or not containing safety defects depending on their states of registration or purchase.

In ignoring the inherent mobility of motor vehicles, the district court critically erred in interpreting the Safety Act. Even assuming that a vehicle with a

component prone to corrosion-related failures could be said to contain a safety defect if driven in Illinois but not if driven in Kentucky, the court’s opinion fails to take into account that vehicles and their owners *move* and that “state of registration” is not a good proxy for where vehicles are actually operated. As discussed in Part III, *infra*, vehicles registered in excluded states frequently are driven in, or moved in or out of, covered states, yet their owners receive neither the defect notification that enables them to have their vehicles remedied *before* they fail nor the free repair guaranteed by the Safety Act. There is no way to eliminate this problem, no matter how carefully crafted the regional recall scheme. Automakers cannot monitor the movements of each vehicle they sell so that whenever a vehicle encounters a particular climate, they can track down the owner to provide the necessary notice and free remedy. Only the national notification and remedy scheme enacted by Congress can achieve the Safety Act’s prophylactic goals.

Accordingly, the Act’s notification and remedy provisions are written in categorical terms for the purpose of imposing “mandatory procedures to insure . . . notification of purchasers and correction of *all* safety-related defects.” S. Rep. No. 89-1301, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712 (emphasis added). The statute was intended “to insure the *uniform* notification of car owners

as to any safety-related defects and to facilitate the prompt curing of such defects,” *id.* at 8, *reprinted in* 1966 U.S.C.C.A.N. at 2716 (emphasis added), as well as “to insure that the consumer never again will be forced to pay for the repair of safety related defects.” S. Rep. No. 93-150, at 7 (1973). By authorizing manufacturers to conduct regional recalls, NHTSA has flouted both the text and purpose of the Safety Act.

Regional recalls also lead to bizarre results when viewed in the context of the rest of the Safety Act. For example, the statute requires that if, after a vehicle has been sold to a dealer, the manufacturer determines that the vehicle contains a safety defect, the manufacturer must either repurchase the vehicle or give the dealer the part or equipment necessary to correct the defect. 49 U.S.C. § 30116(a). In the case of a vehicle subject to a regional recall, however, the automaker and dealer would not know how to comply, particularly for dealers who operate near the border between included and excluded states and sell vehicles to residents of both. Thus, a dealer in Northern Virginia who sells vehicles affected by a corrosion-related defect may not even be aware of a regional recall regarding those vehicles because Virginia is not one of the “salt states” required by NHTSA. *See* J.A. 82. However, the vehicles would be deemed to contain safety defects once sold to consumers who register them in the District of Columbia. *See id.*

Furthermore, the statute prohibits dealers from selling or leasing such vehicles before they have been repaired. 49 U.S.C. § 30120(i); *see also* 49 C.F.R. §§ 573.11 & 573.12. The Safety Act does not address how a dealer would determine in this situation the purchaser’s expected state of registration, and for good reason—because the statute’s remedial provisions contemplate that *all* affected vehicles on the dealer’s premises would be repaired.

For all these reasons, NHTSA’s 1998 letter authorizing and regulating regional recalls violates the Safety Act, and the district court’s decision on this point should be reversed.

III. NHTSA’S REQUIREMENTS GOVERNING THE CONDUCT OF REGIONAL RECALLS ARE ARBITRARY AND CAPRICIOUS.

Regardless of whether the Safety Act permits regional recalls in some circumstances, NHTSA’s 1998 letter authorizing and regulating such restricted recalls was arbitrary and capricious, 5 U.S.C. § 706(2)(A). *See Hüls America, Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (“An agency violates the [APA] if its application of a statute is arbitrary and capricious in a particular context, even if this application is based on a permissible construction of the statute.”). The district court did not address this issue. Because appellants’ motion for summary judgment on this ground was fully briefed below, however, and the question is a

purely legal one that this Court is well situated to address, it is ripe for decision without need for a remand. *See Holland v. National Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir. 2002) (reviewing administrative action directly with no deference to district court); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (equating district court's and appellate court's roles in reviewing agency action under the "arbitrary and capricious" standard).

Here, NHTSA's 1998 letter cannot survive APA scrutiny, and not surprisingly, the agency offered virtually no defense of its substance in the district court. The regional recall rule set forth in the letter is arbitrary and capricious for at least three reasons: (1) it fails to account for the mobility of vehicles; (2) it is based on factual premises contradicted by NHTSA's own information; and (3) even owners of vehicles ostensibly included in the restricted recalls often do not receive the notice and free remedy to which NHTSA agrees they are entitled. These problems cannot be corrected by tweaking regional recall procedures; they are endemic to any rule that permits automakers to restrict recalls of *identical* vehicles based on states of registration or original sale.

A. Regional Recalls Disregard the Mobility of Vehicles.

The most irrational aspect of a regional recall, as conceived in NHTSA's 1998 letter, is that it treats the vehicle's state of original purchase or registration as a good proxy for where the vehicle is actually operated throughout its lifetime. Yet even overlooking the irrational assumption (*see infra* III.B) that the line between included and excluded states is not itself arbitrary and that vehicles operated in states included by regional recalls are sometimes equally, if not more, prone to failure than those operated in excluded states, many consumers who spend significant amounts of time driving in *included* states will never receive the statutory notice or remedy to which they are entitled.

For example, many vehicle owners live and register their vehicles in excluded states but drive to included states on a regular basis. Corrosion-related recalls that include the states required by NHTSA in its 1998 letter would encompass vehicles registered in Maryland and the District of Columbia, but not Virginia. J.A. 82. As a result, the 191,253 workers commuting in 2000 from Virginia to the District of Columbia and the additional 52,484 to Maryland—the vast majority commuting by automobile—will not receive notice of corrosion-related recalls or a free remedy. *See* George Mason University Center for Regional Analysis, Trends Alert #5, *Commuting Trends and Patterns in the*

Washington Region 4, 8, 9 (2003), at <http://www.cra-gmu.org/alerts.htm>.

Countless other situations routinely arise in which a vehicle owner from one state might visit another state for an extended period of time. Northeasterners who drive to Florida to spend the winter, college students who commute between school and home, and people who drive frequently to visit family members in other states could all be adversely affected by NHTSA's rule permitting regional recalls.⁵

Likewise, many drivers who move to and register their vehicles in an included state *after* a regional recall begins will almost certainly not receive the statutory notice or free repair. Although NHTSA recognizes that vehicle owners who move from one state to another pose a significant obstacle to effective regional recalls, J.A. 81, 365 (¶ 5), its 1998 letter fails to implement a solution that affords these owners the notice and remedy they are due.⁶ Thus, regional recalls,

⁵ Similarly, rental car companies allow drivers to pick up vehicles in one state, drive to another state, and then return the vehicle to the first state or drop it off in another, where it remains until another renter drives it somewhere else. And rental car companies sometimes sell their vehicles directly to consumers, who have no way of knowing where the vehicles have traveled.

⁶ In its 1998 letter, NHTSA states that automakers will generally be required to issue follow-up notices two to three years after the initial notice to capture owners who moved into an included state in the interim. J.A. 81. In response to CAS's Freedom of Information Act request seeking copies of such follow-up notifications, however, NHTSA stated in 2002 that none had been sent,

as envisioned in NHTSA's 1998 letter, deny owners of *covered* vehicles both notice of the defect and the free remedy to which they are entitled. *See Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663, 664 (D.C. Cir. 1996) (agency action must be "reasonably related to [its] goal").

The impact of this difficulty on the feasibility and reasonableness of regional recalls can hardly be overstated, considering that over 22 million people changed their states of residence between 1995 and 2000 alone. U.S. Census Bureau, *Domestic Migration Across Regions, Divisions, and States: 1995-2000*, at 1 (2003), at <http://www.census.gov/prod/2003pubs/censr-7.pdf>. Approximately 11 million of these people moved to a state in a different region. *Id.* For example, between 1995 and 2000, 378,448 people moved between New York, a "salt state," and Florida, a "heat" state. U.S. Census Bureau, *State-to-State Migration Flows: 1995 to 2000*, at 2 (2003), at <http://www.census.gov/prod/2003pubs/censr-8.pdf>.

Moreover, many states allow nonresidents operating their vehicles within their borders to maintain their vehicle registrations in other states. For example,

J.A. 71 (¶ 14), 123, 164, and the agency presented no evidence of such notifications in the district court. Even if NHTSA enforced the follow-up notification requirement, however, the 1998 letter by its own terms allows safety defects in vehicles that move to a covered state to go unknown and unremedied for up to three years and does nothing for owners whose vehicles are not registered in the covered states or who move into them after the follow-up notification.

university students often bring their vehicles to school while maintaining their registrations in their parents' home states. Members of the military often maintain vehicle registrations in their home states, even when they are stationed elsewhere for years. *See, e.g.*, Cal. Veh. Code § 6701 (military personnel not required to obtain California vehicle registration while on active duty in state); Iowa Code § 321.1A (exempting students and members of armed forces from state vehicle registration requirements); Md. Code Transp. § 13-402.1(c) & (d) (same); Alaska Stat. § 28.10.121 (exempting students); D.C. Code § 50-1401.02(e) (same). These vehicle owners will receive neither notification of safety defects nor a free remedy if their vehicles are registered in excluded states—even if they live and drive primarily in covered states.

In overlooking both the short-term and long-term mobility of vehicles and the fact that registration is an inadequate indicator of where vehicles are actually operated, NHTSA “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004). The inherent mobility of vehicles poses an insurmountable obstacle to conducting an effective regional recall and underscores that NHTSA’s 1998 rule does not “articulate a satisfactory explanation for its action including a ‘rational connection

between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (citation omitted).

B. NHTSA’s Standards for Regional Recalls Are Based on Factual Premises Contradicted by the Agency’s Own Records.

“Agency action based on a factual premise that is flatly contradicted by the agency’s own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard.” *City of Kansas City v. HUD*, 923 F.2d 188, 194 (D.C. Cir. 1991). NHTSA’s own records undermine a central premise of its regional recall rule: that a rational line can be drawn between states for inclusion in particular regional recalls.

In its 1998 letter, NHTSA set forth a list of 20 states, plus the District of Columbia, that manufacturers must include in corrosion-related regional recalls. J.A. 81-82. Its list of “salt states,” however, cannot be squared with the information upon which NHTSA relied in making the list. Furthermore, NHTSA lacks any principled basis on which to approve the scope of manufacturers’ proposed regional recalls in non-corrosion cases. As a result, manufacturers have conducted regional recalls based on incomplete or irrational criteria.

As NHTSA noted in its 1998 letter, manufacturers conducting corrosion-related recalls had been including different states without attempting to justify the

states selected. J.A. 81. In an effort to bring some regularity to the practice, NHTSA established a list of 20 states, plus the District of Columbia, that automakers “at a minimum” “must” include in such recalls in the future. J.A. 82-83. The agency based its selection on documents showing average salt use in various states and a spreadsheet showing the number of corrosion-related complaints that the agency received between 1993 and 1997. J.A. 70-71 (¶ 13), 73-74 (¶ 20), 153, 155-62. These documents do not support the agency’s choice of “salt states.”

NHTSA’s documentation reveals that of the 3,126 corrosion complaints that the agency received between 1993 and 1997, nearly one quarter, or 699, come from states that automakers are *not* required to include in corrosion recalls under NHTSA’s 1998 rule. *See* J.A. 162 (1993-1997 Corrosion Reports by State). The agency’s corrosion spreadsheet gives each state a weighted value reflecting the seriousness of vehicle corrosion within the state by taking into account several factors (*e.g.*, number of miles driven annually per registered vehicle, number of highway miles in the state, number of corrosion reports) that bear on the relative amount of corrosion occurring within the state—with higher values indicating greater corrosion. The values range from a low of zero in Wyoming to 9.874 in New York, with an average score of 1.198. Oddly, NHTSA selected Iowa, with a

score of .088 (6 corrosion reports) for inclusion in the “salt states,” but neglected both California, with a score of 3.281 (167 corrosion complaints), and Florida, with a score of 2.134 (115 corrosion complaints). *Id.* Because NHTSA did not consistently select the states with higher corrosion scores for inclusion in corrosion-related recalls, it cannot justify its choice on that basis.

Nor can NHTSA’s rule governing corrosion-related regional recalls be justified by the relative salt usage in the included states. J.A. 155-160 (salt use tables). A partial list of states’ average salt loads on highways where salt is normally applied (in tons/lane-mile) reveals that excluded Virginia and California use three times more salt than included Missouri. J.A. 156. Further, NHTSA has selected for inclusion some states from low-salt-use regions (*e.g.*, Minnesota, Iowa, and Missouri), while excluding many other states from higher-use regions. (*e.g.*, North Carolina, Tennessee, and Virginia). J.A. 158.⁷

⁷ Unsurprisingly, given the arbitrariness of the “salt state” designation, excluded consumers have experienced vehicle failures the recalls were intended to prevent. For example, Ford announced NHTSA Recall #01V199 (J.A. 92-93) to correct a corrosion-related defect in the front coil springs. NHTSA’s complaint database contains several complaints from excluded consumers, such as: “Noticed loss of steering. Vehicle towed to dealer. Dealer informed consumer that the problem was due to front coil spring failure.” Complaint #863118 (California), J.A. 173; “Right coil spring breakage for no apparent reason.” Complaint #751986 (North Carolina), J.A. 174; “Consumer was traveling 75mph and front coil spring on driver’s side broke [and] punctured tire. Vehicle was kept in control. Ford dealer had heard nothing about this, and wouldn’t stand behind

NHTSA’s authorization of regional recalls has been problematic with respect to heat-related recalls as well. In its 1998 letter to Ford, NHTSA specifically addressed Ford’s contemplated heat-related recall implemented to repair cracked fuel tanks in 1995 Ford Escorts and Mercury Tracers (NHTSA Recall #97V144, J.A. 89). *See* J.A. 146. The agency permitted the company to recall vehicles from 13 states (Arizona, Nevada, Florida, Hawaii, Texas, California, Louisiana, Georgia, South Carolina, Mississippi, Oklahoma, Alabama, and Arkansas) that “experience more than 2500 cooling degree days.” *Id.*⁸ Ford’s reason for selecting 2500 cooling degree days as its cut-off is unclear, but NHTSA did “not dispute the use of this criterion.” *Id.* By July 10, 2002, NHTSA had already received a number of complaints from excluded consumers who (like Mary Ann Morgan) claimed their fuel tanks had cracked—the hazardous failure the recall was supposed to prevent.⁹

problem.” Complaint #879576 (South Dakota), J.A. 175.

⁸ The number of cooling degree days reflects the number of degrees above 65 of each day’s average temperature for a year.

⁹ *See, e.g.*, “Crack[s] have developed in the fuel tank, resulting in an odor. Owner has contacted dealer about the fuel odor. A recall has been issued on vehicle, however this vehicle was not included due to VIN.” Complaint #838775 (Maryland), J.A. 177; “The fuel tank has cracks, causing fuel to leak.” Complaint #843482 (Virginia), J.A. 178; “Crack in fuel tank near heat shield attachment resulting in fuel leaking from tank. We contacted Ford and were told this recall

One year later, despite the seeming inadequacy of its designation of “heat” states, Ford instituted a recall to correct heat-related cracking fuel tanks in its 1995 Windstar vans that narrowed the covered “heat” region still further. Instead of including all of California and Nevada, Ford included only the ten southernmost counties in California and only Clark County in Nevada (NHTSA Recall #99-309, J.A. 92). The recall *excluded* Inyo County, California, in which Death Valley, the hottest spot in North America, *see supra* p. 13, is located, as well as counties containing other hot inland cities such as Fresno, with a normal daily high temperature in July of 96.6°, and Sacramento, with a normal daily high in July of 92.4°. NCDC, *Normal Daily Maximum Temperature, Deg F* (2004), at <http://www.ncdc.noaa.gov/oa/climate/online/ccd/maxtemp.html>. More significantly, Ford’s list of included states evidently did not catch all Windstars in danger of experiencing cracked fuel tanks because NHTSA’s consumer complaint database includes more than 20 complaints from Windstar owners living outside the regional recall area who experienced problems with cracked fuel tanks.¹⁰

was regional due to climate.” Complaint #734462 (Massachusetts), J.A. 179; “Fuel tank has a crack on the inside. There is gasoline leaking from underneath of vehicle. Dealership is aware of problem.” Complaint #8012649 (Illinois), J.A. 180.

¹⁰ Some of the more troubling consumer complaints include the following: “Dealer refuses to take care of recall repairs because vehicle is not in recall

In both of these heat recalls, Ford included Arizona and Texas, but excluded neighboring New Mexico, as well as Colorado, North Carolina, Kansas, and Tennessee. However, NOAA data shows that summers in these excluded states have been roughly as hot as in many of the included states over the past 30 years. For example, the hottest normal daily maximum temperature in included Alabama was 92.7° (Montgomery in July) and in included Hawaii, 88.9° (Honolulu in July and August). By comparison, the equivalent temperatures in excluded Colorado, New Mexico, North Carolina, Kansas, and Tennessee, respectively, were 92.1° (Grand Junction in July), 94.8° (Roswell in July), 89.9° (Wilmington in July), 92.8° (Dodge City in July), and 92.1° (Memphis in July). NCDC, *Normal Daily Maximum Temperature, Deg F* (2004). Thus, NHTSA's authorization of regional recalls to address safety-related defects stemming from "long-term exposure to

region." Complaint #857646 (Iowa); "Consumer was denied recall replacement due to the location of residence." Complaint #557863 (Ohio); "Fuel tank is leaking fuel because there is a whole [sic] in top of tank. . . . Vehicle was not included [in recall] due to VIN." Complaint #891420 (California); "Fuel did leak out all over our garage, driveway, and my wife drove it with our two children for days without realizing the gas was leaking, over the exhaust, tires, & brakes [T]here is already a recall for the exact problem, but my VIN number is not included." Complaint #749470 (California). Appellants cited these complaints in their motion for summary judgment but, due to an oversight, they were omitted from appellants' exhibits. The complaints, which NHTSA did not contest, may be retrieved from <http://www-odi.nhtsa.dot.gov/cars/problems/complain/complaintsearch.cfm>.

temperature extremes,” J.A. 80, suffers from the same arbitrariness that besets its sanctioning of regional restrictions on corrosion-related recalls.

C. Excluded Vehicle Owners Whose Vehicles Manifest a Defect May Never Receive a Free Remedy.

NHTSA’s 1998 letter provides that “manufacturers must assure that vehicles from outside the designated area that experience a problem due to the defect are taken care of appropriately.” J.A. 81. Not only does a policy of remedying vehicles only *after* they fail risk serious injury or death and contravene the goals of the Safety Act, but the agency’s directive to automakers to “take care of” vehicles that experience a problem caused by a safety defect—whatever that means—is largely useless.

Because excluded consumers will generally not receive notice of the safety defect, they would have no reason to bring their vehicles to dealers for a free repair rather than to a neighborhood mechanic, where many consumers go to save money on routine repairs. Even those consumers who happen to bring their affected vehicles to a dealer are not guaranteed a free remedy. Dealers usually learn whether particular vehicles are covered by recalls by entering the vehicle’s VIN into a computer database or by referring to dealer bulletins. *See supra* p. 7. VINs of excluded vehicles are unlikely to be included in the database, *see, e.g.,*

supra pp. 48-50 nn. 9-10 (consumers reporting exclusions because of their VINs); J.A. 402-03 (¶ 6) (same), and manufacturers may tell dealers in excluded states that they are not responsible for repairing vehicles. *See, e.g.*, J.A. 187 (dealer bulletin: “Any dealer not receiving a computer listing with the campaign bulletin has no involved vehicles currently assigned.”). As the experiences of appellants’ own members, such as Mary Ann Morgan, attest, *see supra* pp. 1-2, it is far too easy, even for an excluded vehicle that has actually *failed*, to fall through the gaping cracks that regional recalls have opened. *See* J.A. 64-65, 75 (¶¶ 22-23), 226.

NHTSA’s 1998 letter describes one potential response to this difficulty—giving consumers a free remedy after the dealer obtains company approval. J.A. 81. The agency failed to explain, however, what criteria manufacturers should use in deciding whether to approve a free remedy. However, even if an automaker did no more than verify that the consumer had experienced the same problem the recall was designed to remedy, this extra step would undoubtedly cause delay, requiring the consumer either to pay up front and await possible reimbursement from the company or to secure manufacturer approval before having the work done. Because a remedy in this situation would be available only for vehicles that have “experience[d] a problem due to the

defect,” *id.*, the waiting period also could prolong the safety risk to the vehicle’s operator should the defect manifest itself in the interim or lead to the owner’s incurring the expense of paying for a rental car or alternative transportation.

NHTSA’s own attempt to convince CAS of the wisdom of permitting regional recalls demonstrates the irrationality of its position. In its 2002 letter, the agency asserted that regional recalls pose no threat to consumer safety because if, after allowing the recall to proceed on a regional basis, NHTSA “become[s] aware of a significant number of failures outside of the covered region, [it] can open a recall query investigation to consider whether to compel the manufacturer to broaden the geographic coverage of the recall.” J.A. 223. Congress rejected exactly that kind of wait-and-see approach. If a significant number of vehicles affected by a known safety-related defect actually have to fail before they are repaired, then the Safety Act’s prophylactic, safety-enhancing purpose already has been defeated.

IV. NHTSA’S 1998 LETTER ANNOUNCED A LEGISLATIVE RULE.

Even assuming that the Safety Act permits regional recalls, the Act is silent regarding the conditions under which regional recalls would be appropriate and the manner in which they must be conducted. NHTSA issued the 1998 letter to bring order to a set of ad hoc and inconsistent industry practices, establishing

standards for regional recalls and thereby “modif[ying] or add[ing] to a legal norm based on the agency’s own authority”—the quintessential function of a legislative rule. *See Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis omitted). NHTSA may fill such a legislative gap—assuming statutory authority to authorize regional recalls at all—but *not* without first providing the public notice and an opportunity to comment. 5 U.S.C. §§ 553, 706(2)(D).

The district court agreed with NHTSA that notice-and-comment procedures were not required, ruling that NHTSA’s 1998 letter was a policy statement and not a de facto legislative rule. *See* J.A. 40-52. In its view, “[t]he letter reflects non-binding prospective enforcement policies designed to inform the industry and agency personnel regarding how the agency intends to exercise its enforcement discretion.” J.A. 54. The court erred.

A legislative or substantive rule is one that “‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests,’ or which ‘effect[s] a change in existing law or policy.’” *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citations omitted). By contrast, a general policy statement is akin to a “press release” that “announces the agency’s tentative intentions for the future.” *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *accord Community Nutrition Inst. v. Young*, 818

F.2d 943, 948 (D.C. Cir. 1987) (“*CNI*”). In drawing the line between legislative rules and policy statements, this Court considers whether the agency action (1) “impose[s] any rights and obligations,” or (2) “genuinely leaves the agency and its decisionmakers free to exercise discretion.” *General Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (“*GE*”); *see also CNI*, 818 F.2d at 946. Whether the action has binding effects on private parties or the agency is the most important consideration because the “ultimate focus of the inquiry is whether the agency action . . . has the force of law.” *GE*, 290 F.3d at 382; *accord CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003).¹¹

NHTSA’s 1998 letter reads nothing like a tentative announcement of its future intentions, and everything like a regulation setting forth standards governing regional recalls. Both by word and by deed, the 1998 letter imposes specific obligations on manufacturers and significantly affects the rights and interests of the auto industry and consumers of vehicles alike. An agency

¹¹ In contrast, the agency’s characterization of its action as a policy statement is entitled to little weight. *See CropLife*, 329 F.3d at 883 (agency characterization of action not controlling “if it self-servingly disclaims any intention to create a rule . . . but the record indicates otherwise”); *United States Tel. Ass’n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (schedule of fines a legislative rule even though agency reiterated 12 times that it retained discretion to depart from the schedule); *CNI*, 818 F.2d at 946 (greater weight given to language used by agency than to its characterization).

pronouncement will be considered binding “if it either appears on its face to be binding . . . *or* is applied by the agency in a way that indicates it is binding.” *GE*, 290 F.3d at 383 (emphasis added) (citing cases). The standards announced in NHTSA’s 1998 letter both purport on their face to be binding and have been applied in a binding manner.

First, this Court has repeatedly recognized that the use of mandatory language in an agency document can be dispositive. *See id.*; *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); *CNI*, 818 F.2d at 946-47. Here, NHTSA’s 1998 letter undeniably is “couched in terms of command,” *American Bus Ass’n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (citation omitted), and in language that binds both the agency and the regulated industry. The letter states the circumstances under which NHTSA “*will* approve a regional recall,” J.A. 81 (emphasis added), and it uses mandatory terms like “must” and “will” to impose a series of requirements on automakers conducting these recalls. J.A. 80-82; *see also supra* pp. 10-12. In its 2002 letter to CAS, the agency itself characterized the 1998 letter as “setting forth certain requirements that would apply to all future regional recalls,” J.A. 221, and then emphasized those specific requirements as binding on manufacturers. J.A. 222.

The district court discounted the use of such definitive language in

NHTSA’s 1998 letter by stating that the letter’s mandatory terms, read in context, were not intended to bind the agency. The court emphasized the conditional nature of the agency’s obligation to find that an automaker had shown that a regional recall was justified, J.A. 43-44, and observed that “[t]he letter does nothing to limit the agency’s discretion to determine *whether* a safety-related defect exists.” J.A. 44. The court also pointed to statements in NHTSA’s 2002 letter confirming the agency’s plan to continue evaluating each regional recall on a case-by-case basis and to exercise its authority to enforce the Safety Act’s notice requirements when appropriate. *Id.* at 44-45, 49.

Although the district court cited the applicable precedents, its reasoning was flawed. The court conflated the question whether NHTSA retained discretion to decide if a *particular* regional recall met the criteria the agency set out in its 1998 letter—that is, “the policy’s applicability to the facts of a given case,” *Pacific Gas*, 506 F.2d at 39—with the question whether the agency was willing to question “the underlying validity of the policy itself.” *Id.*; *see also American Bus*, 627 F.2d at 530. The examples cited by the district court, J.A. 45-46, in which NHTSA told automakers to expand their proposed regional recalls, were all instances in which the regional recalls *did not meet* the criteria the agency set out in its 1998 letter. As this Court explained in rejecting EPA’s argument that its failure to follow an

agency model in four instances showed that the model was not binding: “*If a rule says, ‘If A, then B,’ an agency does not show its open-mindedness when it refuses to find B after being persuaded that A is not the case.*” *McLouth*, 838 F.2d at 1321 (emphasis added). Thus, the examples cited by the district court at J.A. 45-46 underscore that, far from revisiting the validity of or relieving automakers from obeying the criteria, NHTSA was successfully *enforcing* the standards it announced in 1998.¹²

None of the other reasons offered by NHTSA or the district court for deeming the 1998 letter a policy statement withstands scrutiny. In its motion for

¹² Thus, for example, when GM initiated a corrosion-related regional recall limited to 15 states, NHTSA insisted that it expand it to 20, *see* J.A. 46 (court opinion); J.A. 242 (¶ 21), 375-79, 388-89—the minimum number of states required by the 1998 letter. *See* J.A. 81-82. Similarly, in its 1998 letter to Ford, NHTSA pointed out that four of Ford’s proposed regional recalls addressed single-exposure safety defects and accordingly that Ford was “required” to take further action and send defect notices to all owners nationwide or else risk enforcement proceedings, J.A.144, 146; *see* J.A. 45-46 (court opinion)—in accordance with NHTSA’s requirement that automakers provide nationwide notice in the event of short-term exposure defects. J.A. 80-81, 142-43. So, too, when Volkswagen filed a 573 report in 1999 to begin recalling vehicles in 17 states to correct a defect triggered by exposure to cold temperatures, J.A. 361, NHTSA reminded Volkswagen that its “policy is to require manufacturers to discuss the possibility of limiting a recall’s geographic scope with the agency before the manufacturer files a [573 report].” J.A. 362. After meeting with the agency, Volkswagen agreed to expand its recall to the entire United States, J.A. 373—consistent with NHTSA’s treatment of short-term exposure defects in its 1998 letter. J.A. 80-81; *see* J.A. 46 (court opinion).

summary affirmance (at 11 n.10), NHTSA argued that if it “were dissatisfied with a manufacturer’s inaction, it would need to bring a *de novo* enforcement action and the norm would be that enunciated in *Wheels*”—not that the automaker violated the 1998 letter’s requirements. However, in *CNI*, this Court rejected a similar argument. There, the FDA contended that its “action levels” informing food producers of the allowable levels of certain contaminants were not legislative rules because, in an enforcement action, the agency would be obliged to prove that the corn was “adulterated” within the meaning of its governing statute, not merely prove noncompliance with the action level. 818 F.2d at 948. The Court explained that it did not matter that the action level did not bind food producers in the sense that producers would be “automatically subject to enforcement proceedings for violating the action level” because the agency nevertheless “bound itself.” Having issued the action levels, the Court in *CNI* reasoned, it “would be daunting indeed” for the agency to convince a court to sustain an enforcement action against a producer for shipping corn that *satisfied* the agency’s action level. “[T]his type of cabining of an agency’s prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.” *Id.*; accord *Alaska v. DOT*, 868 F.2d 441, 446 (D.C. Cir. 1989).

Likewise, here, NHTSA would find it equally difficult to prosecute an automaker that initiated a regional recall that complied with the terms of the 1998 letter. *See, e.g.*, 49 U.S.C. § 30121(b)(1) (enforcement of agency order assessing civil penalties may be enjoined if automaker’s failure to notify was “reasonable”). The 1998 letter’s language and the agency’s subsequent practices confirm that the standards set out in the letter “will not be questioned” and that an automaker “reasonably could rely upon that implication.” *GE*, 290 F.3d at 384. For instance, an automaker who conducted a corrosion-related recall in the “salt states” specified by NHTSA would almost certainly be immune to penalties for failing to include Virginia. In other words, the letter creates a “safe harbor” by which manufacturers can “shape their actions” and hence is binding not only on its face, but as a practical matter as well. *Id.* at 383 (citation omitted); *accord National Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005).

Furthermore, the fact that, in one instance, Chrysler challenged the application of the 20-state requirement with respect to one of its corrosion-related recalls does not signify that automakers believed NHTSA’s 1998 pronouncement “was not set in stone,” as the district court suggested. J.A. 50 n.30; *see* J.A. 341,

346, 353.¹³ As this Court has often observed, the fact that exemptions are sought or even granted does not detract from the “binding force” of a particular agency action in “standard cases.” *GE*, 290 F.3d at 384; *see also Alaska*, 868 F.2d at 446; *McLouth*, 838 F.2d at 1321; *CNI*, 818 F.2d at 947. Likewise, that NHTSA’s 1998 letter established a “floor” and not a “ceiling” in setting standards to govern regional recalls, *see* J.A. 50, 55, does not make those minimum requirements any less binding or any less meaningful for consumers who, like CAS member Mary Ann Morgan and thousands of others, fall below the “floor” and have accordingly been excluded from the Safety Act’s notice and remedy requirements.

¹³ As the district court recognized, this particular regional recall was a continuation of one that predated the 1998 letter. J.A. 50 n.30. In later Chrysler corrosion-related regional recalls initiated after the 1998 letter issued, however, the company acknowledged and complied with the requirements of the letter. *See* J.A. 412 (“DaimlerChrysler will institute the recall consistent with NHTSA’s published list of states within the salt belt . . .”).

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

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Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Appellants complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 13,992 words.

Bonnie I. Robin-Vergeer

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 7th day of September, 2005, she caused two copies of the foregoing Brief for Appellants and one copy of the Joint Appendix to be served by first-class U.S. mail, postage prepaid, on the following:

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