

ORAL ARGUMENT SET FOR DECEMBER 9, 2005

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

REPLY BRIEF FOR APPELLANTS

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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
<i>CNI</i>	<i>Community Nutrition Institute v. Young</i> , 818 F.2d 943 (D.C. Cir. 1987).
Ford	Ford Motor Company
<i>GE</i>	<i>General Electric Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002).
NHTSA	National Highway Traffic Safety Administration
Safety Act	National Traffic and Motor Vehicle Safety Act
Volkswagen	Volkswagen of America, Inc.
<i>Wheels</i>	<i>United States v. General Motors Corp.</i> , 518 F.2d 420 (D.C. Cir. 1975).

SUMMARY OF ARGUMENT

In 1998, the National Highway Traffic Safety Administration (“NHTSA”) expressly sanctioned regional recalls as lawful in certain circumstances and established criteria that simultaneously—and finally—impose legal obligations on automakers while relieving them of the absolute requirement of the National Traffic and Motor Vehicle Safety Act (“Safety Act”) that they provide notice and a free remedy to *each* owner of a vehicle containing a safety defect. Center for Auto Safety (“CAS”) and Public Citizen challenge the scheme announced at that time, operative now without modification for seven years.

To this day, NHTSA has not justified the substance of its 1998 letter or its construction of the Safety Act in a manner compatible with the statute’s text, purpose, and structure. The agency discounts the fact that some vehicles excluded from regional recalls will fail, observing that “it is quite common that there are failures that do not result in recalls.” Appellee Br. 36. Yet many vehicles, like the 1995 Ford Mercury Tracer owned by Mary Ann Morgan, Appellants Br. 1-2, and like those owned by myriad consumers who have complained to NHTSA, *id.* at 47 n.7, 48 & n.9, 49 & n.10, suffer the exact same failures being remedied for free under recalls restricted to owners in other states. Most strikingly, NHTSA dismisses the inherent mobility of vehicles—an insurmountable obstacle to reading the Safety Act to permit regional recalls—as a mere “theoretical

problem[.]” Appellee Br. 40. The agency’s 1998 letter and the regulatory regime it announced depend on a construction of the Act that is contrary to its plain meaning, is patently unreasonable, and reflects arbitrary and capricious decisionmaking. At a minimum, the letter unlawfully announced a legislative rule without public notice and comment.

ARGUMENT

I. NHTSA’S 1998 LETTER IS SUBJECT TO CHALLENGE UNDER THE APA.

A. The 1998 Letter Constitutes Agency Action.

Characterizing this lawsuit as a challenge to “NHTSA’s failure to require each manufacturer to expand every regional recall into a nationwide recall,” Appellee Br. 10, the agency contends that it took no “agency action” cognizable under the Administrative Procedure Act (“APA”). Appellants, however, challenge NHTSA’s 1998 letter itself. Whether characterized as a “legislative rule” or a “policy statement,” the 1998 letter is a “rule” under the APA, 5 U.S.C. § 551(4), and accordingly, an agency action. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).¹

¹ Thus, NHTSA’s reliance on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), Appellee Br. 17 n.11, and its claim that appellants are essentially seeking mandamus relief, *id.* at 27 n.18, are equally off-base. As the district court properly recognized, appellants “seek not to *compel* any agency

B. The 1998 Letter Constitutes Final Agency Action.

NHTSA tacitly concedes that its 1998 letter satisfies the first condition for final agency action—that the action mark the consummation of the agency’s decisionmaking process. It argues, however, that the letter is not final agency action because it is not an order, because it was promulgated by a subordinate official, and because it does not determine rights or obligations or engender legal consequences. Appellee Br. 12-15. None of these objections has merit.

NHTSA’s regional recall rule need not take the form of an order for it to qualify as final agency action. This Court has frequently admonished that an agency may not avoid judicial review “merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.” *Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986)); accord *Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1132 (D.C. Cir. 1994). Nor is it significant that the 1998 letter was issued by the head of NHTSA’s enforcement division, rather than the Administrator himself. Appellee Br. 12. In the letter, the division head purports to speak for NHTSA. *E.g.*, J.A. 80 (“NHTSA

action,” but, instead, to challenge NHTSA’s discrete agency action—its 1998 letter—that “permits certain regional recalls.” J.A. 30 n.17.

has considered the matter in depth and has developed the following policy guidelines with respect to . . . ‘regional recalls.’”). This Court has often deemed letters issued by subordinate officials in similar circumstances to constitute final agency action. *See Her Majesty*, 912 F.2d at 1532; *Natural Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988); *Ciba-Geigy*, 801 F.2d at 437.²

NHTSA’s claim that the 1998 letter does not constitute final agency action because it is “not determinative of any rights or obligations, and legal consequences do not flow from [it],” Appellee Br. 12, fares no better. First, it is irrelevant that the letter “did not finally determine whether any particular recall could be regional in scope.” *Id.* The purpose of the letter was not to address particular regional recalls (though some of the letters did, *e.g.*, J.A. 142-47), but to announce NHTSA’s conclusion that regional recalls *could be lawful* in appropriate circumstances and to establish requirements to govern those recalls.

Second, it is untrue that the 1998 letter does not “order any manufacturer to do anything.” Appellee Br. 12. Whereas, before then, automakers conducted regional recalls in an ad hoc manner, the 1998 letter imposes several new requirements, while, at the same time, *releasing* manufacturers from the Safety

² Notably, when CAS wrote to NHTSA’s Administrator, Dr. Jeffrey Runge, in 2002 to protest the agency’s regional recall rule, J.A. 216-19, the same division head responded on the Administrator’s behalf. J.A. 221-24.

Act's absolute guarantee of notice and a free remedy to each vehicle owner once the manufacturer or NHTSA identifies a safety defect. The letter's new requirements are described in Appellants' Brief at 9-12, 24-25, 56. NHTSA's characterization of its letter as simply "an enforcement guidance that fail[s] to impose obligations on a party," Appellee Br. 14, is both conclusory and incorrect.

But even if it were true, the test for final agency action is not merely whether a legislative rule or policy statement imposes obligations, as NHTSA suggests. A final agency action is "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) (emphasis added). For example, as noted above, NHTSA's 1998 letter has legal consequences for vehicle owners, including appellants' members, in that it relieves automakers of their obligations under the Safety Act to notify and provide a free remedy to each owner of a vehicle containing a safety-related defect, regardless of the state of original purchase or registration. The letter also has legal consequences for owners in that it excuses manufacturers from conducting corrosion-related recalls in states *other than* those designated by NHTSA. Indeed, the letter has legal consequences for *every* owner whose vehicle falls on the wrong side of the lines drawn by the agency. If NHTSA had written that heat-related recalls must always be national in scope, or

that all owners must at least receive the statutory notice of a defect, Mary Ann Morgan might have learned in advance about her defective fuel tank and received a free repair. J.A. 64-65. If NHTSA had written that corrosion-related recalls must always be national in scope or expanded the list of designated “salt states,” vehicle owners in Virginia who commute daily to Washington, D.C. or Maryland would receive the notice and free remedy to which they are entitled under the Act.

The ramifications of NHTSA’s argument are sweeping. If the agency were correct that plaintiffs can challenge only agency pronouncements that impose obligations on a party, then many of this Court’s leading cases involving citizen challenges to agency policy statements, guidance documents, manuals, and interpretive documents because they did not go far enough, relieved a party or regulated entity of requirements imposed by statute, or harbored some other legal consequences, could never have been brought. *See, e.g., Better Gov’t Ass’n v. State*, 780 F.2d 86 (D.C. Cir. 1986) (Justice Department guidelines governing Freedom of Information Act fee waiver requests constitute final agency action under APA); *Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (“*CNI*”) (FDA action levels diminishing food producer obligations actionable under APA); *American Bus Ass’n v. United States*, 627 F.2d 525 (D.C. Cir. 1980) (ICC pronouncement lessening constraints on motor carriers subject to APA

challenge). The standards announced in the 1998 letter “alter[ed] the legal regime,” *Bennett*, 520 U.S. at 178, marked “the consummation of [NHTSA’s] decisionmaking process,” *General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) (“*GE*”), and “determine[d] the rights and obligations,” *id.*, of appellants’ members who own vehicles in “the wrong states” and automakers alike. The 1998 letter is therefore final agency action.

C. No Adequate Alternative Remedy to an APA Challenge is Available.

NHTSA argues that the APA itself, 5 U.S.C. § 704, prohibits appellants from bringing this challenge to its 1998 letter because an adequate alternative remedy lies elsewhere. Appellee Br. 15-17. To begin with, NHTSA has waived this argument. Although the agency maintained in the district court that appellants were required to exhaust administrative remedies before filing their APA action, it never suggested that the lawsuit was barred under § 704 because there was an alternative “adequate remedy in a court.”

In any event, NHTSA’s argument is unfounded. The agency cites a passage from *El Rio Santa Cruz Neighborhood Health Center, Inc. v. HHS*, 396 F.3d 1265 (D.C. Cir. 2005), stating that “where a statute affords an opportunity for *de novo* district-court review, the court has held that APA review was precluded because

‘Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA.’” Appellee Br. 15-16 (quoting *El Rio*, 396 F.3d at 1270-71).

At bottom, what NHTSA is actually arguing is that one APA lawsuit is an adequate alternative to another APA lawsuit. The Safety Act provides no opportunity for district-court or any other judicial review (much less de novo review) with respect to motor vehicle recalls. There is no duplication of remedies because appellants’ *sole* avenue for judicial review is the APA. NHTSA points to 49 U.S.C. § 30118(e), which authorizes interested persons to petition for a hearing to decide whether a manufacturer has reasonably met its § 30118 notification requirements, and to § 30162, which authorizes petitions for NHTSA to decide whether to issue an order under § 30118(b) finding a safety defect. Although these sections afford administrative remedies, neither provides for judicial review if NHTSA denies the petitions. It is questionable whether petitioners would have any means of challenging such a denial in court, *see Center for Auto Safety v. Dole*, 846 F.2d 1532, 1535 (D.C. Cir. 1988), but even if they did, their only judicial recourse, at best, would be to file an APA action attacking the denial subject to the APA’s deferential standard of review.

Most charitably, NHTSA’s new argument is an exhaustion-of-

administrative-remedies argument in sheep’s clothing. Fatal to its position, the agency points to nothing in either the Safety Act or its own regulations that requires such exhaustion. *See Darby v. Cisneros*, 509 U.S. 137, 153 (1993). In any event, a petition under § 30118(e) or § 30162 would not serve as an adequate substitute for this action. As NHTSA recognized on page 1 of its brief: “This case is not about any particular automobile or line of vehicles.” A citizen petition would provide an administrative avenue to challenge a particular recall, but no means of attacking the lawfulness of NHTSA’s 1998 regulatory regime itself.

II. REGIONAL RECALLS VIOLATE THE SAFETY ACT.

NHTSA maintains that the Safety Act does not bar regional recalls and that its construction of the statute is entitled to *Chevron* deference.³ Congress has foreclosed NHTSA’s reading of the Safety Act, but even if not, NHTSA points to no agency pronouncement deserving of *Chevron* deference. Moreover, even if the Court were to reach *Chevron* step two, the agency’s steadfast refusal to respond to appellants’ arguments that the 1998 letter authorizing and regulating regional

³ NHTSA states that “Appellants recognize that the Act is silent regarding conditions under which regional recalls would be appropriate and the manner in which they must be conducted.” Appellee Br. 29 (citing Appellants Br. 53). That is a misstatement. The statement upon which the agency relies was preceded by the phrase “*Even assuming that the Safety Act permits regional recalls*”—an assumption appellants had already fully put to rest.

recalls is arbitrary and capricious dooms its effort to justify its interpretation of the statute as reasonable.

A. The Safety Act Unambiguously Forecloses Regional Recalls.

1. NHTSA evidently concedes that if it or an automaker identifies a defect relating to motor vehicle safety, the Safety Act requires that notification and a free remedy be provided to *each* owner, regardless of where the vehicle was originally purchased or registered. The agency disputes, however, that manufacturers initiating regional recalls have actually identified safety defects in vehicles registered in states they propose to exclude from the regional recalls. NHTSA's argument apparently rests on the assumption that when an automaker initiates a regional recall, it has *not* "learn[ed] that the vehicle or equipment contains a defect and decide[d] in good faith that the defect is related to motor vehicle safety," 49 U.S.C. § 30118(c)(1), with respect to vehicles registered in excluded states, and thus the requirements of notification and a free remedy guaranteed each owner under §§ 30119 & 30120 have not been triggered. Unless NHTSA then steps in and uses its investigatory and enforcement powers to find a safety defect affecting vehicles in the rest of the states and forces a manufacturer to expand its regional recall, the argument goes, the Safety Act's notification and remedy requirements are inapplicable. Appellee Br. 30.

NHTSA's analysis is wrong for several reasons. First, the vehicles excluded from regional recalls are identical to those that are included; the only difference is the state of registration. Although the manufacturers' 573 reports are not identical in format, it is clear enough that automakers are acknowledging that a particular model and year of vehicle is at issue in the planned regional recall, but proposing to restrict the recall remedy to vehicles registered in specific states. *See* Appellants Br. 30 & n.2. NHTSA itself recognizes that the affected population of vehicles is larger than the number of vehicles to be included in a regional recall. *See, e.g.,* J.A. 330 (vehicle population of 1,328,921, but only 225,000 vehicles in "salt belt" states covered).

More importantly, automakers' careful wording of their 573 reports is beside the point. Appellants are not challenging the manufacturer reports or any particular regional recall. It is *NHTSA* that has violated the Safety Act, and hence the APA, by authorizing automakers to restrict the scope of the statutory notice and free remedy solely on the basis of a vehicle's state of original sale or current registration, when included and excluded vehicles are otherwise identical. And while appellants believe, as discussed below, that the only reasonable understanding of what NHTSA has done is to allow manufacturers to limit the scope of the *remedies* required by the Safety Act, its authorization of regional

recalls is unlawful even if the Court construes it to allow manufacturers to restrict their safety-defect findings to those vehicles registered in designated states.

Before CAS wrote to NHTSA protesting the 1998 letter, the agency did not doubt that manufacturers were admitting the existence of a safety-related defect under 49 U.S.C. § 30118(c) when they submitted 573 reports notifying the agency that, if a particular vehicle component were exposed to certain environmental conditions, it was prone to fail in a way that could jeopardize safety. *See* Appellants Br. 31-32. 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 weather conditions—not about whether manufacturers’ defect findings were expansive enough. *See* J.A. 80 (1998 letter reiterating 1997 statement that “safety-related defects must be remedied on a nationwide basis, unless the manufacturer can justify a limited geographic scope”); J.A. 136-38 (1997 letter).

This reading of NHTSA’s longstanding view that regional recalls limit the scope of the remedy rather than the scope of the safety-defect admission is buttressed by the agency’s threat to Ford in an August 1998 letter in which NHTSA warned that if Ford did not follow the standards set out in the letter, the agency would consider “commenc[ing] a proceeding under 49 U.S.C. § 30118(e)

and 30120(e).” J.A. 146. NHTSA attempts to avoid the import of that threat by nitpicking the differences between § 30118(b) and § 30118(e). Appellee Br. 34-35 & n.22. Whether or not these two provisions overlap, NHTSA’s letter to Ford did not cite only § 30118(e). It also threatened Ford with enforcement action under § 30120(e), which provides for a hearing “to decide whether the manufacturer has reasonably met the remedy requirements under this section.” As NHTSA argues here, the remedial provisions of § 30120 do not come into play until the predicate finding of a safety-related defect is met. Appellee Br. 34. If the agency did not take Ford’s safety-defect notifications to encompass all vehicles of the particular makes, models, years, and engine types, it would have been premature to address whether Ford met its remedy obligations under the statute.

NHTSA says that whether particular vehicles contain safety-related defects is a fact-bound, not a legal, determination. Appellee Br. 35, 39, 40. Appellants do not disagree with this statement as a general matter. But even if the Court accepted the proposition that a manufacturer *could*, consistent with the Safety Act, make a fact-bound assessment that a vehicle registered in one state contained a safety defect, while an identical vehicle registered in another state did not (a point disputed at Appellants Br. 45-51), automakers’ designations of states, at least in the corrosion context, are not based on such assessments. Their lists of states to be

included are *not* based on case-by-case, fact-bound determinations of the states in which their vehicles can be said to be defective. Instead, automakers are conducting the corrosion-related recalls in the 20 states plus the District of Columbia required by NHTSA. Not coincidentally, in regional recall after recall announced after the fall of 1998, automakers have tailored their corrosion recalls to cover the very states NHTSA instructed them to include.⁴

That automakers are proposing the same, or virtually the same, jurisdictions required by NHTSA underscores that the selection has almost nothing to do with fact-based assessments of defect occurrences and everything to do with the arbitrary cut-off NHTSA authorized in its 1998 letter. Conceptually, it is as if NHTSA told automakers that when they find a safety defect in a particular vehicle, they are free to restrict notice and a free remedy to the red vehicles and ignore vehicles of other colors. The agency would not be able to evade a challenge to such a pronouncement as contrary to the Safety Act simply by arguing that the manufacturers were limiting the scope of their defect notifications under § 30118(c). There, NHTSA would be expressly *authorizing* manufacturers to

⁴ *See, e.g.*, NHTSA Recall #00V189, #01V199, #01V200, #01V255, #02V101 (post-1998 corrosion-related recalls covering the 20 “salt states,” plus the District of Columbia, as specified in NHTSA’s 1998 letter) (J.A. 92-93, 95-97). Recall #05V030 likewise covers the required jurisdictions. Information on that new recall is available from NHTSA’s website. Appellants Br. 12 n.1.

circumvent the statute’s categorical requirements of notice and a free remedy for all owners by arbitrarily distinguishing between identical vehicles. *See Nevels v. Ford Motor Co.*, 439 F.2d 251, 258 (5th Cir. 1971) (“[I]f Ford discovered in one car a defect common to automobiles manufactured by it, Ford then had a duty to notify other purchasers.”).

2. NHTSA’s argument that the Safety Act permits regional recalls is based on the theory that vehicles registered in states where certain weather conditions are more common can contain safety defects when identical vehicles in other states do not. Its construction depends in part on a confusing discussion of the leading case construing “defect” under the Safety Act, *United States v. General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975) (“*Wheels*”). *See* Appellee Br. 31, 36-40. This Court’s analysis in *Wheels* is more straightforward than NHTSA conveys. As *Wheels* explained:

We find that a vehicle or component “contains a defect” if it is subject to a significant number of failures in normal operation, including failures either occurring during specified use or resulting from owner abuse (including inadequate maintenance) that is reasonably foreseeable (ordinary abuse), but excluding failures attributable to normal deterioration of a component as a result of age and wear.

518 F.2d at 427. The Court used the term “significant” to indicate that there must be a non-de minimis number of failures. *Id.* at 438 n.84. By filing a 573 report

stating that a vehicle or component is prone to a failure presenting a safety hazard when exposed to heat, cold, ice, or salt, etc. and voluntarily initiating a safety recall, a manufacturer is acknowledging, for purposes of § 30118(c), that the threshold failure level has been met for that particular vehicle. *See* 49 C.F.R. § 573.6(a) (“Each manufacturer shall furnish a report to the NHTSA for each defect in his vehicles . . . that he or the Administrator determines to be related to motor vehicle safety”); J.A. 235 (¶ 8); *see also* Appellants Br. 30. Vehicles or components prone to failure in environmental conditions common in the United States contain safety defects under the statute in the sense that an “error or mistake” was made “in design, manufacture, or assembly.” *Wheels*, 518 F.2d at 433 (citation omitted); *see also United States v. General Motors Corp.*, 565 F.2d 754, 758 (D.C. Cir. 1977); 49 U.S.C. § 30102(a)(2) & (8) (definitions of “defect” and “motor vehicle safety”); Appellants Br. 34-35.

We agree that the analysis need not *necessarily* end with a showing of a non-de minimis number of failures. A manufacturer may establish that “the failures were attributable to gross and unforeseeable owner abuse or unforeseeable neglect of vehicle maintenance.” *Wheels*, 518 F.2d at 438; *see also id.* at 427. The Court elaborated by stating that the manufacturer would bear the burden of proving that “the failures occurred on vehicles operated outside conditions of use

or maintenance that were reasonably foreseeable under the circumstances,” considering “the expected range of actual operation.” *Id.* at 438 n.88. Thus, the Court pointed out, it would not be foreseeable that a truck would be loaded far in excess of its carrying capacity. *Id.* at 439 n.88.

It is in this context that the Court discussed performance, observing that “the reasonably foreseeable use and abuse of police cars is sufficiently different from the expected use of family owned cars that failure in police cars of a component common to both classes of vehicles might not signify a defect that would require notice to all owners.” *Id.* The Court left it open to the manufacturer to limit the scope of a defect determination “by establishing that the failures in performance of a particular component are restricted to a specific, distinct type of use that differs from other types of vehicle operation.” *Id.* But if an automaker made that showing, it would have rebutted “[t]he presumption arising from proof of a significant number of . . . failures,” *id.* at 438, and established that the vehicle contained no safety defect for ordinary owners.

That *Wheels* allowed for the possibility that an automaker could demonstrate that a particular use or abuse of a vehicle fell outside “the expected range of actual operation” or that failures were restricted to a “specific, distinct type of use that differs from other types of vehicle operation” is irrelevant. Such

vehicle abuse or distinctive use is far removed from the situation here, where a vehicle is put at risk simply by being exposed to weather conditions common in the United States—not because it is subject to a distinctive use. There are no impassable barriers between included and excluded jurisdictions. No manufacturer could claim that it was not a “reasonably foreseeable use” or that it was beyond “the expected range of actual operation” for a vehicle to spend time in states—much less adjacent *counties*—with (supposedly) differing climates. *See* Appellants Br. 35-36, 41-45. Because, as a matter of law, manufacturers cannot take refuge in this use/abuse/performance caveat expressed in *Wheels*, NHTSA’s post hoc construction of the Safety Act to allow automakers to restrict their § 30118(c) defect determinations in this artificial manner is both incorrect and unreasonable.

3. Finally, NHTSA’s strained interpretation of the Safety Act ignores the “traditional tools of statutory construction,” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), which look to more than a statute’s text to determine its meaning. “The meaning of a statutory provision is its use in the context of the statute as a whole.” *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997). “The traditional tools include examination of the statute’s text, legislative history, and structure”—an inquiry

that “may be characterized as a search for the plain meaning of the statute.” *Id.*

NHTSA completely ignores the incongruities of interpreting the Safety Act to permit regional recalls. The statute imposes various obligations on manufacturers, distributors, and dealers that come into play when a safety-related defect is identified; these obligations would be unworkable—even nonsensical—if the presence of a safety defect depends on the state in which the vehicle will ultimately be registered, a fact unknown at the time of sale. *See* Appellants Br. 38-39 (discussing 49 U.S.C. § 30116(a) & 30120(i)). These additional obligations imposed by the Safety Act are couched in categorical terms because the statutory notice and remedy requirements are themselves categorical. The legislative history of the Act, cited at Appellants Br. 37-38, further buttresses the notion that Congress intended to guarantee uniform notification of vehicle owners nationwide of safety-related defects and to ensure that consumers who own vehicles containing such defects never have to pay for necessary repairs.

For all these reasons, the plain meaning of the Safety Act precludes regional recalls.

B. NHTSA's Interpretation of the Safety Act Is Unreasonable and Does Not Merit *Chevron* Deference.

Under *Chevron*, if the meaning of the statute is plain, the inquiry is at an end. If the meaning is ambiguous, however, courts will defer to an agency's construction of the statute the agency is charged with implementing, so long as that interpretation is reasonable. *Chevron*, 467 U.S. at 843. Here, however, even if the Safety Act's meaning were unclear, the Court should reject NHTSA's construction as unreasonable. The Court's "inquiry at the second step of *Chevron*, i.e., whether an ambiguous statute has been interpreted reasonably, overlaps with the arbitrary and capricious standard." *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (citation omitted); see also *National Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994). Tellingly, although NHTSA asks for deference, it makes no attempt to show that it is reasonable to read the statute as permitting automakers to restrict recalls based on the vehicle's state of original purchase or registration when vehicles are inherently mobile, especially given the many commonplace situations in which a vehicle is purchased or registered in one state, but driven primarily or regularly in another. See Appellants Br. 41-45. NHTSA's reading of the Safety Act contemplates vehicles flitting in and out of a defective status depending on the state in which they happen to be registered at

any given moment. The agency simply has not responded to appellants' arguments as to why its acceptance of regional recalls is both unreasonable and arbitrary and capricious.

Moreover, NHTSA fails to identify to what agency statement interpreting the Safety Act it believes the Court should defer. The agency's litigation position certainly does not warrant deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Smiley v. Citibank, N.A.*, 517 U.S. 735, 741 (1996); *see also City of Kansas City v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991). Therefore, NHTSA's plea for deference cannot be based on statements made in the briefing of this case. Presumably, then, the agency is seeking deference to its 1998 letter. Such deference is unwarranted for two reasons.

First, although, as a general matter, agency rules that are the product of notice-and-comment rulemaking are deserving of deference, *see United States v. Mead*, 533 U.S. 218, 226-27, 230 (2001), no such formal rule has been issued in this case. NHTSA argues that its 1998 letter does not constitute even a de facto legislative rule, but is only a policy statement. If the agency is correct, its *Chevron* argument fails because it is settled that, with limited exception, "[i]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."

Christensen v. Harris County, 529 U.S. 576, 587 (2000); accord *Mead*, 533 U.S. at 534; see, e.g., *Public Citizen v. HHS*, 332 F.3d 654, 660 (D.C. Cir. 2003) (agency manuals are archetypal documents not entitled to *Chevron* deference). The letter did not rest on a longstanding, consistent, or previously formal agency position that might warrant deference.⁵ NHTSA’s regulations are silent on the subject of regional recalls. Compare *Barnhart v. Walton*, 535 U.S. 212, 219, 221-22 (2002) (deference appropriate to regulations promulgated without notice-and-comment rulemaking where they reflected agency’s “careful consideration . . . over a long period of time”).

Second, if the letter announced a de facto legislative rule as appellants contend, see Appellants Br. 53-61; *infra* Part IV, the rule was not “promulgated in the exercise of” NHTSA’s rulemaking authority, *Mead*, 533 U.S. at 226-27, and does not reflect the kind of “fairness and deliberation that should underlie a pronouncement of such force.” *Id.* at 230. Indeed, the 1998 letter does not even discuss the statutory language or purport to interpret it. It is “[t]he expertise of the agency, not its lawyers, [that] must be brought to bear on this issue in the first

⁵ NHTSA cites *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1280 (D.C. Cir. 2004), Appellee Br. 28, but that decision is distinguishable. There, the Court accorded *Chevron* deference to FDA opinion letters where the agency’s decision relied on similar previous determinations and its own regulations.

instance.” *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218 (D.C. Cir. 2004) (citing *SEC v. Chenery*, 318 U.S. 80, 87-88 (1943)). And even NHTSA does not have the temerity to suggest that its 2002 letter responding to CAS after, in an obvious prelude to litigation, CAS demanded that the agency put an end to regional recalls, J.A. 221-24, deserves deference.

In any event, the Safety Act is not ambiguous, and NHTSA’s plea for *Chevron* deference must be rejected. NHTSA states that, at a minimum, its construction of the statute is “entitled to respect.” Appellee Br. 29 n.19. But interpretations “contained in formats such as opinion letters are ‘entitled to respect’” under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), “only to the extent that those interpretations have the ‘power to persuade.’” *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140). The agency’s reading of the Act is not persuasive. The Court should “not alter the text in order to satisfy the policy preferences of the [agency]. These are battles that should be fought among the political branches and the industry.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

III. NHTSA'S REGIONAL RECALL RULE IS ARBITRARY AND CAPRICIOUS.

Appellants briefed at length both in the district court and this Court why NHTSA's scheme governing the conduct of regional recalls announced in its 1998 letter is arbitrary and capricious. NHTSA ignored the arguments in both courts. The Court should deem the agency to have waived its right to defend the substance of its letter and not remand to give it a chance to make arguments it could have, but did not, advance in opposition to plaintiffs' motion for summary judgment.

NHTSA asserts in a footnote that no administrative record has been submitted for review and that "[a]gency action may be reviewed only on the basis of the record before the agency, not a separate record created during litigation." It also states that appellants' "preferred [sic] affidavits and argument (Appellants Br. at 45-51) fail to meet the standard for admissibility under Fed. R. Civ. P. 26(a)(2)(B) and Fed. R. Evid. 702." Appellee Br. 23 n.14.

Of course, there is no *formal* administrative record here because NHTSA did not conduct a notice-and-comment rulemaking before issuing its regional recall rule. Nevertheless, appellants' arbitrary-and-capricious argument at Appellants Br. 45-51, cited by NHTSA, does not rely on expert declarations, but on NHTSA's 1998 letter and on the *agency's own records*, many of which were

provided to CAS in response to Freedom of Information Act requests seeking documents on which NHTSA relied in formulating its 1998 letter, *see* J.A. 70-71 (describing chronology of FOIA requests and authenticating attached documents received from NHTSA), and supplemented only by readily available, authoritative climate information from the National Climatic Data Center. In addition, NHTSA submitted documents to the district court regarding specific regional recalls.

Although the agency complained in the district court that no formal administrative record had been filed, it did not contend that any critical documents were missing from the district court record or offer to supply them. As this Court has recognized: “The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.” *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997).

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

NHTSA insists that its 1998 letter is not a legislative rule requiring notice-and-comment rulemaking procedures. Its characterization of the letter as a policy statement is entitled to little weight. *See CNI*, 818 F.2d at 946 (Court gives “far greater weight to the language actually used by the agency” than to its own characterization of its statement). Likewise, the agency’s decision not to publish

the letter in the Federal Register has minimal significance. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (Court has never “taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent”). Whether an agency pronouncement is a legislative rule ultimately depends on whether “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. NHTSA argues that the letter meets neither alternative, but its argument is contradicted both by the letter’s text and the record.

A. The 1998 Letter Is Binding on its Face.

Through the 1998 letter, NHTSA has given automakers their “marching orders,” clearly expecting them “to fall in line.” *Appalachian Power*, 208 F.3d at 1023. From beginning to end, the letter is rife with mandatory language establishing new obligations and relieving manufacturers of Safety Act requirements, thereby constraining NHTSA’s enforcement discretion. *See* J.A. 80-82; Appellants Br. 9-12, 24-25, 56 (summarizing 1998 letter’s commands). NHTSA reaffirmed in 2002 that its 1998 letter had indeed “set[] forth certain requirements that would apply to all future regional recalls,” J.A. 221, and then restated the specific requirements in a manner that emphasized their binding character. J.A. 222-23.

Contrary to NHTSA’s suggestion, Appellee Br. 20, the phrase “in general” in two sentences in the 1998 letter does not alter NHTSA’s imposition of standards governing regional recalls. For example, the statement that “In that [1997] letter, I noted 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, both refers back to what NHTSA’s 1997 letter had said and is consistent with the overall view expressed in the 1998 letter—that recalls must be national in scope unless the manufacturer can justify limiting the recall to a particular region. The letter then delineates mandatory standards regarding how regional recalls should be conducted.⁶

The conditional nature of the sentence, “if the manufacturer is able to demonstrate . . . NHTSA will approve a regional recall,” J.A. 81, also does not diminish the letter’s binding tenor. *See* Appellee Br. 20. If an automaker were unable to demonstrate that the relevant environmental factor was more likely to exist in one region than the rest of the United States, NHTSA’s disapproval of the regional recall would not show that the agency retained discretion to ignore the

⁶ *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986), cited at Appellee Br. 20, is inapposite. The Department of Labor guidelines there were expressed in tentative language, replete with reminders that nothing in the policy should be regarded as altering contractors’ compliance responsibilities.

letter's standards, *see* Appellee Br. 25, but only that the agency disagreed with the automaker's factual determination in that case. "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 Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988); *see also* Appellants Br. 57-58. If nothing else, the letter "cannot help but focus [NHTSA's] attention on the . . . criteria" it established, narrowing the agency's "field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated" if NHTSA had conducted a rulemaking before announcing its standards. *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

B. The 1998 Letter Has Been Binding in Practice.

The weakness of NHTSA's counter-examples underscores that the 1998 letter has been binding in practice. The agency's contention that, when it addressed Ford's regional recalls in its August 1998 letter to Ford, it "did not apply the policy guidelines in the letter . . . as a binding rule," Appellee Br. 21 n.13, 22, is incorrect. Although NHTSA did not insist that Ford retroactively revise its selection of states, J.A. 146 n.1 (*see infra* for discussion on retroactivity), the agency nonetheless told Ford that four proposed regional recalls fell into the

first category described in the letter (short-term exposure) and that “further action by Ford [was] required.” J.A. 144. Because each of these “address[ed] a problem that can occur due to a single exposure to cold temperatures,” NHTSA “urge[d] Ford to send defect notification letters to all owners that were not previously notified of these recalls.” J.A. 146. NHTSA threatened that if Ford did not comply, it would consider taking enforcement action. *Id.* It is difficult to imagine what more the agency could have said to impress upon Ford that the new standards were binding.

NHTSA’s handling of Volkswagen’s cold-weather recall, Appellee Br. 22-23, is to the same effect. Perplexingly, NHTSA reads an ambiguous signal into its standard request for information from Volkswagen regarding how the automaker determined that regional treatment was appropriate. J.A. 362-70. NHTSA would have to collect information from Volkswagen to assess whether vehicle failures are triggered by short-term exposure to meteorological conditions (regional recall not permissible) or by long-term exposure (regional recalls permissible). J.A. 80-81. Evidently, NHTSA believed the former to be the case and pressured Volkswagen to expand the recall to cover the entire United States. J.A. 372-73. NHTSA’s successful coercion of an automaker to comply with its letter demonstrates that the letter is binding, not optional. *See* Appellants Br.

57-58 & n.12.

NHTSA cites two examples in which it did not impose its new “salt states” requirement retroactively. Appellee Br. 23-24. In one instance, Chrysler initiated a recall in January 1998, before the issuance of NHTSA’s letter, that covered only 15 salt states. J.A. 240-41. In 1999, the agency asked Chrysler to expand the recall to cover the 20 states and the District of Columbia designated in the agency’s 1998 letter. Chrysler objected, but in a later regional recall post-dating the 1998 letter, it acknowledged and complied with NHTSA’s new requirements. J.A. 411-12; Appellants Br. 61 n.13. Similarly, in May 1998, before NHTSA’s letter, Ford initiated a corrosion-related regional recall that did not cover the District of Columbia, J.A. 238-39, 291, and NHTSA did not insist that Ford expand the recall to include it.

Nothing can be read into NHTSA’s refusal to impose the standards of its 1998 letter retroactively. Indeed, if the letter announces a legislative rule as appellants contend, the agency could not have imposed its requirements retroactively without permission from Congress. *See Bowen*, 488 U.S. at 208. At most, NHTSA exercised its discretion not to impose the standards retroactively. That automakers are treating the letter as binding is obvious from the fact that ever since the 1998 letter, they are including, at a minimum, the salt states specified in

NHTSA’s letter—a change from previous practice.⁷ Finally, the few occasions on which manufacturers have included the 21 required “salt state” jurisdictions *plus* a few others, Appellee Br. 24 n.16, are fully consistent with the requirement that corrosion-related recalls include, “at a minimum,” J.A. 81, the 21 “salt states” specified by NHTSA. *See* Appellants Br. 61.

CONCLUSION

The district court’s judgment should be reversed.

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Respectfully submitted,

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⁷ Compare NHTSA Recall #94V056, #95V244, #97V058, #97V072, #97V116 (J.A. 86, 95, 101, 102) (pre-1998 corrosion-related recalls conducted in fewer states than specified in NHTSA’s letter), *with* post-1998 regional recalls cited *supra* note 4, covering the 20 “salt states,” plus the District of Columbia, specified in the letter, *and* NHTSA Recall #98V323, #01V216, #03V153, #04V332 (J.A. 91-92, 104, 108, 409) (post-1998 corrosion-related recalls covering more than the required states).

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

I hereby certify that the foregoing Reply 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 6,999 words.

Bonnie I. Robin-Vergeer

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 21st day of October, 2005, she caused two copies of the foregoing Reply Brief for Appellants to be served by first-class U.S. mail, postage prepaid, on the following:

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