UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY, et al.,	)	
	)	Case No. 04-0392 (ESH)
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

This case challenges a de facto legislative rule, promulgated in a 1998 letter to auto manufacturers from the National Highway Traffic Safety Administration ("NHTSA"), that permits vehicle manufacturers to conduct "regional recalls." Regional recalls exclude vehicle owners residing in large parts of the country from the warning and free remedy that is guaranteed by the National Traffic and Motor Vehicle Safety Act ("Safety Act") to all owners of motor vehicles containing safety-related defects. In its motion to dismiss, NHTSA suggests that plaintiffs Public Citizen and the Center for Auto Safety want to substitute their judgment for that of the agency. To the contrary, through this lawsuit, plaintiffs hope to force NHTSA to comply with *Congress*'s judgment that safety recalls should protect all motorists, not just those living in select states.

NHTSA's motion falters from the start by mischaracterizing the complaint. Contrary to NHTSA's repeated statements, plaintiffs are not challenging individual past or future regional recalls. Rather, plaintiffs challenge NHTSA's across-the-board rule authorizing and setting the standards for regional recalls. The agency's 1998 letters to auto manufacturers contain specific

directives and requirements controlling the conduct of regional recalls, which both bind manufacturers and limit NHTSA's discretion to take certain actions. Furthermore, plaintiffs have standing to bring this action, as amply illustrated by the complaint, declarations ignored by NHTSA, and additional declarations submitted with this opposition. Finally, because plaintiffs are challenging NHTSA's de facto rule governing these recalls and not any particular agency enforcement action (or lack of enforcement action), there is no barrier to this Court exercising its jurisdiction to enjoin NHTSA's illegal recall rule. Accordingly, the agency's motion to dismiss should be denied.

STATEMENT OF THE CASE

A complete statement of facts is set forth in plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pltf SJ Mem.") at 2-15. For the Court's convenience, a Statement of the Case is also set forth below.

I. National Recalls Under the National Traffic and Motor Vehicle Safety Act

The Safety Act was enacted in 1966 to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. Under the Safety Act, every auto manufacturer is required to notify owners, purchasers, and dealers of their vehicles if the manufacturer learns that a vehicle contains a "defect" that is "related to motor vehicle safety." 49 U.S.C. § 30118(c), (c)(1). 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).[1] Manufacturers must remedy the defects in their vehicles at no charge to owners.

[1] In its Memorandum in Support of its Motion to Dismiss ("Def. MTD Mem.") at 26 & n.12, NHTSA complains that plaintiffs mischaracterize the Safety Act by using the phrase "class of vehicles" to describe vehicles that are subject to a safety recall and by "refer[ring] to vehicles in the plural while the statute speaks in the singular." In fact, the statute clearly contemplates that manufacturers will conduct recalls to correct safety defects present in groups or classes of

49 U.S.C. § 30120(a). The provision of notice and a free remedy to owners of a class of vehicles is called a "recall." Declaration of Clarence M. Ditlow ¶ 5 ("Ditlow Decl.") (submitted with Plaintiffs' Motion for Summary Judgment).

Recalls may be initiated by either NHTSA or the auto manufacturer. 49 U.S.C. §§ 30118-30120.[2] In the former case, NHTSA makes an initial finding that a class of vehicles contains a defect related to motor vehicle safety following a review of consumers' reports of vehicle problems, information submitted by manufacturers, and the results of its own investigation and testing. § 30118(a). If, following publication in the Federal Register and an opportunity for interested persons to present information, NHTSA affirms its initial finding of a safety-related defect, it must order the manufacturer to give notice of the defect and a free remedy to owners, purchasers, and dealers. § 30118(b). Alternatively, a recall can begin when a manufacturer voluntarily acknowledges a safety defect. This process is initiated when the manufacturer files with NHTSA a "573 report" (named after the relevant part of the C.F.R.) containing 11 categories of information about the defect and the manufacturer's plan to notify consumers and remedy affected vehicles. 49 U.S.C. § 30118(c); 49 C.F.R. § 573.6. The Safety

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vehicles. For example, when describing owner notification requirements, the Safety Act states that "[a] manufacturer of a motor vehicle . . . shall notify . . . the owners, purchasers, and dealers of the vehicle." 49 U.S.C. § 30118(c). If Congress had actually intended to refer to a *single* motor vehicle, it doubtlessly would have required manufacturers to notify the "owner, purchaser, or dealer" of the vehicle. Thus, plaintiffs have employed the phrase "class of vehicles" as shorthand for the concept that manufacturers will conduct safety recalls to correct defects present in, for example, all vehicles of a particular make and model that were manufactured during a particular year. Furthermore, the D.C. Circuit's decisions interpreting the recall provisions of the Safety Act plainly assume that the statute deals with classes or groups of vehicles. *See, e.g., United States v. General Motors*, 518 F.2d 420, 438 (D.C. Cir. 1975) (to establish a defect, NHTSA must establish "a significant number" of failures).

[2] The Secretary of Transportation has delegated authority to administer the Safety Act, including its recall provisions, to NHTSA. 49 C.F.R. § 1.50(a).

Act requires a recall even if only a small proportion of vehicles actually contain a defective part, if common sense suggests the potential for a dangerous malfunction in a non-*de minimis* number of vehicles. *General Motors,* 518 F.2d at 427 (D.C. Cir. 1977).

Once a safety defect is determined, whether by NHTSA or the manufacturer, the notification and recall provisions of the Safety Act are automatically triggered. 49 U.S.C. § 30118(b)(2)(A) & (B), (c)(1). First, a manufacturer must notify by first-class mail "the owners, purchasers and dealers of the vehicle," § 30118(b)(2)(A) & (c), including "*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 content of consumer notifications is controlled by the Safety Act and NHTSA regulations. *See* 49 U.S.C. § 30119; 49 C.F.R. Part 577. The notice procedures 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. Manufacturers must include in the owner notification letter detailed information about the safety defect, the risk to motor vehicle safety, the measures to be taken to remedy the defect, and a statement that the manufacturer will remedy the defect without charge. 49 U.S.C. § 30119; 49 C.F.R. § 577.5(e), (f), (g) & (i). If the manufacturer believes that a defect may *not* exist in every vehicle for which an owner notification letter is sent (for example, because only half of the particular model vehicles for a given year are fitted with a defective part, but the manufacturer cannot identify the defective vehicles without inspecting them), it is allowed to include a statement to that effect in

the letter. *Id.* § 577.5(d). The letters must also inform purchasers of how and when to obtain the recall remedy. *Id.* § 577.5(g).

The regulations are equally specific about what manufacturers may *not* include in an owner notification letter. Unless specifically authorized elsewhere, manufacturers are prohibited from attempting to soft-pedal the notice through "any statement or implication that there is no defect, that the defect does not relate to motor vehicle safety, or that the defect is not present in the owner's or lessee's vehicle." *Id.* § 577.8(a).

After a manufacturer notifies "each person" who is registered under state law of the defect and the availability of a free remedy, the manufacturer must work with dealers to provide the remedy to vehicle owners in a timely fashion. 49 U.S.C. § 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).[3] Manufacturers must describe remedy plans in "dealer bulletins" that inform dealers about defects, explain how to remedy them, and direct dealers to provide the remedy for free. *See* Ditlow Decl. ¶ 21 & Exh. 21. The bulletins also tell dealers which vehicles are involved in each recall by listing the vehicles' Vehicle Identification Numbers (VINs). *See id*. This information is also made available to dealers in proprietary computer database systems, into which dealers can type a VIN to access information about the vehicle and its recall history. Dealers use these resources to determine whether any recalls are applicable to vehicles that consumers bring in for repair. Ditlow Decl. ¶ 21.

The Safety Act contains only two exceptions to its categorical requirements that manufacturers provide every owner of a vehicle that contains a safety-related defect with notice

[3] Manufacturers are also required to reimburse owners who paid to repair their vehicles within "a reasonable time" before a recall begins. 49 U.S.C. § 30120(d).

of the defect and a free remedy. First, the requirement that a remedy be provided without charge does not apply if the motor vehicle was bought by the first purchaser more than ten years before notice is given. 49 U.S.C. § 30120(g)(1). Second, a manufacturer may obtain an exemption from the notice and remedy requirements if, after providing notice and receiving public comment on the manufacturer's petition, 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.

II. Regional Recalls

A. Early Regional Recalls

Starting in about the mid-1980s, manufacturers began to limit some safety recalls to vehicles registered in, and sometimes vehicles originally purchased in, specified states. Manufacturers would commence these "regional recalls," with NHTSA's approval, in situations in which they claimed that the defect was likely to result in a safety problem only when the vehicle was exposed to a particular weather condition.

Manufacturers commenced regional recalls much like nationwide recalls, by submitting to NHTSA a "573 Report" that acknowledged and explained the defect and its relation to motor vehicle safety. However, the 573 Report also typically asserted that the defect caused safety problems only in a certain climate and then specified a limited number of states or areas in which automakers would provide the notification and free remedy. After receiving a 573 Report that proposed a regional recall, NHTSA sometimes asked a manufacturer to explain its rationale for selecting particular states for inclusion in the recall. However, NHTSA apparently never questioned the manufacturers' premise that they were not required to provide notice and a free remedy to "each person" who owned one of the affected vehicles nationwide.

Regional recalls continued in an ad-hoc fashion until at least 1997, with manufacturers submitting plans to conduct regional recalls without explaining their basis for including or excluding particular states and often including different states in different recalls addressing defects triggered by similar climactic conditions. In 1997, NHTSA sent to manufacturers a letter expressing concern about regional recalls and stating that, in the future, manufacturers would be required to "discuss the need for limiting a recall's geographic scope with the agency before the manufacturer makes a public statement concerning the scope of the recall." The letter stated that NHTSA would be auditing all regional recalls. Ditlow Decl. ¶ 13 & Exh. 10.

B. NHTSA's 1998 Letter to Manufacturers

In 1998, NHTSA sent to manufacturers another letter setting forth what NHTSA termed its "Regional Recall Policy." Ditlow Decl., Exh. 2 ("NHTSA 1998 Letter").[4] The 1998 letter described two categories of weather-related defects: (1) those that were likely to manifest themselves following only a brief exposure to a weather condition, such as extreme heat or cold or severe precipitation, and (2) those that were likely to manifest themselves only after long-term exposure to a weather condition. NHTSA concluded that short-term exposure defects were inappropriate for regional recalls because a "freak" weather event or a trip to a region where the particular weather condition was common could trigger the defect after a single exposure and create a safety problem. *Id*. at 1-2. The letter stated, however, that NHTSA would consider permitting a manufacturer to include language in a consumer notification suggesting that such a defect was unlikely to manifest itself in a particular region. *Id*. As to "long-term exposure"

[4] NHTSA mailed slightly different versions of the letter to various manufacturers. *See, e.g.,* Ditlow Decl., Exhs. 11, 12. Unless otherwise noted, cites to the "1998 Letter" refer to the generic version of the letter at *id*., Exh. 2.

defects, NHTSA stated that they could be addressed through regional recalls and set forth specific requirements governing such recalls. *Id*. at 2-3.

To begin with, NHTSA explained that a defect qualifies as a "long-term exposure defect" for which it will approve a regional recall when "the consequences of the defect occur only after recurring exposure to environmental factors." *Id.* at 2. The agency specified that it "will approve a regional recall" if manufacturers can "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*. Although it did not further define the phrase "significantly more likely," NHTSA required that a manufacturer's justification for a regional recall "be based on objective factors, and not merely on differences in complaint rates among the states." *Id*.

Next, NHTSA set forth several requirements for how regional recalls were to be conducted. First, when NHTSA approves a regional recall, the manufacturer "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*. at 2 (emphasis in original). However, NHTSA recognized that other vehicles could be exposed to the condition either because they are located in "border states"—that is, excluded states located near states covered by the recall—or because they are "regularly driven" in included states. Therefore, NHTSA instructed manufacturers to "assure that vehicles from outside the designated area that experience a problem due to the defect are taken care of appropriately." *Id*. NHTSA did not specify what "taken care of appropriately" meant, but noted with approval one plan in which dealers, after obtaining approval from a regional office, could provide a free remedy to excluded owners whose vehicles actually experienced the problem. *Id.* NHTSA's 1998 letter did not address the fact that these excluded owners would not receive any

notice of the defects in their vehicles and thus, presumably, would have no idea that their vehicles needed to be "taken care of" unless they actually failed, nor did it mention that providing a remedy only after vehicle failure imposes safety risks on consumers.

Second, NHTSA observed that an owner residing in an included state might have purchased a vehicle from an excluded state, or an owner might have moved from an excluded to an included state. To capture these owners, who would otherwise have no way to learn of the defect or the free remedy, NHTSA explained that "in most cases, [the Office of Defects Investigation] will require manufacturers to conduct at least one follow-up notification, usually after two or three years." *Id*.

Third, NHTSA observed that many regional recalls had been prompted by corrosion-related defects exacerbated by exposure to road salt in states that experience snow and ice during the winter. Rather than allow manufacturers to continue to designate a list of states themselves, NHTSA's 1998 letter established a list of 20 states, plus the District of Columbia, that manufacturers "must" include in such corrosion-related recalls: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, West Virginia, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, and Missouri. *Id.* at 2-3.

C. The Center for Auto Safety's Correspondence With NHTSA Regarding Regional Recalls.

On May 15, 2002, plaintiff Center for Auto Safety ("CAS") wrote a letter to the Administrator of NHTSA, detailing a list of inconsistencies and problems arising from various regional recalls and questioning whether regional recalls are permitted by the Safety Act. Ditlow Decl. ¶ 23 & Exh. 23 ("CAS 2002 Letter"). Providing two detailed examples, CAS explained

that when manufacturers conduct regional recalls they often draw illogical distinctions between included and excluded states. CAS also called to NHTSA's attention the agency's own consumer complaint database, which included complaints from vehicle owners who, although excluded from a regional recall, had actually experienced the vehicle failure that the recall was intended to prevent. *Id*. at 2-3.

In a response letter, NHTSA justified regional recalls by claiming, first, that regional recalls were "rare," and second, that they actually "promoted motor vehicle safety." Ditlow Decl. ¶ 23 & Exh. 24, at 1 ("NHTSA 2002 Letter"). NHTSA argued that regional recalls promote safety because in "most (if not all)" regional recalls, "the overall nationwide failure rates were relatively low, raising serious doubts as to whether a NHTSA defect determination could be sustained." *Id.*, Exh. 24, at 1. The letter acknowledged "several problems" with regional recalls prior to its 1998 letter, but stated that they had been resolved by "certain requirements that would apply to all future regional recalls," as set forth in the 1998 letter. *Id*. NHTSA explained that the distinction between long-term and short-term exposure defects would prevent manufacturers from conducting regional recalls when a "single exposure to a meteorological condition (such as extreme cold or heavy snow)" was enough to cause a safety problem. *Id*. at 2. The agency also noted that it had imposed other prospective requirements for regional recalls, such as promulgating a list of states to be included in future corrosion recalls and directing manufacturers to ensure that consumers who have been excluded from regional recalls, but whose vehicles actually manifest the defect, have the problem repaired at no charge. *Id*.

NHTSA also questioned the notion that vehicles sold and registered in excluded states could possess a defect related to motor vehicle safety. In the context of corrosion recalls, the

letter stated that "[e]ven if it could be argued that the component was in some sense 'defective' in a vehicle located in an area where road salts are not used because it was not made with corrosion-resistant metal, such a 'defect' would not be 'related to motor vehicle safety' in such a vehicle, since it would not lead to failures or crashes." *Id*. If, however, there were "a significant number of failures outside the proposed region at the time of the defect determination," NHTSA stated that it would not approve a regional (as opposed to a national) recall. *Id*. at 2-3.

On September 10, 2003, CAS sent another letter to NHTSA, this time drawing the agency's attention to a number of consumer complaints that had been reported to CAS, including some from consumers who had been excluded from regional recalls. Ditlow Decl. ¶ 23 & Exh. 25. CAS described six of the complaints in detail. In two of these, the consumers had been excluded from regional recalls, but had experienced the safety problem caused by the defect. NHTSA did not respond to CAS's September 2003 letter. *Id*.

D. This Lawsuit

Plaintiffs CAS and Public Citizen brought this lawsuit to challenge the regulatory regime established in NHTSA's 1998 letter to manufacturers. The complaint alleges that this regime violates the Safety Act by permitting manufacturers to conduct recalls that exclude certain states and that, even if regional recalls were lawful under some set of circumstances, NHTSA's current regional recalls rule violates the APA because it is arbitrary and capricious and was promulgated without notice and comment.

CAS is a non-profit consumer advocacy organization that, among other things, works for strong federal safety standards to protect drivers and passengers. The Center was founded in 1970 to provide consumers a voice for auto safety and quality in Washington and to help

"lemon" owners fight back across the country. CAS, which today has over 15,000 members, advocates for auto safety before the Department of Transportation and in the courts.

Public Citizen, a nationwide consumer advocacy organization, is a nonpartisan, non-profit group founded in 1971, with a membership of approximately 160,000. Public Citizen advocates before Congress, administrative agencies, and the courts for strong and effective health and safety regulation, and has a long history of advocacy on auto safety matters.

Plaintiffs bring this action on behalf of their members who are placed at heightened risk of vehicle failures and crashes because of NHTSA's regional recalls rule. Their members own vehicles that have been and will continue to be excluded from regional recalls. At least some of these members will be excluded from recalls implemented to correct serious safety-related defects, which have the potential to manifest themselves while the member is driving. In addition to the increased risk of physical injury, these members have been and will continue to be forced to pay for costly repairs that are provided for free in some areas of the country. Other members have been or will be forced to share the roads with other vehicles whose owners have been unknowingly excluded from safety recalls because of the state in which they purchased and registered their vehicles, placing plaintiffs' members at greater risk of a crash.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

NHTSA contends that plaintiffs failed to demonstrate Article III standing because they purportedly did not allege that any of their members own vehicles that were affected by past regional recalls or that a judicial declaration that NHTSA's de facto rule authorizing regional recalls is unlawful will redress plaintiffs' injury, given the independent actions of third-party

automakers. Even more remarkably, NHTSA maintains that plaintiffs have failed to establish prudential standing because they are not within the zone of interests of the statute.

NHTSA's effort to distract this Court from the agency's own affirmative conduct is unavailing. As discussed below, Center for Auto Safety and Public Citizen do not bring this action to challenge either a broad, programmatic *failure to act* on NHTSA's part or the lack of agency enforcement action against manufacturers which have initiated safety recalls restricted to particular states. Instead, plaintiffs challenge a discrete and final agency action: NHTSA's 1998 letter authorizing manufacturers to conduct (unlawful) regional recalls so long as automakers follow the standards announced in the letter—standards adopted by the agency without the benefit of public notice and comment. NHTSA's rule allowing regional recalls has inflicted, and will continue to inflict, serious injury on the members of both plaintiff groups. This injury to plaintiffs' members will be redressed by the judicial relief plaintiffs seek.

A. Plaintiffs Have Article III Standing to Challenge NHTSA's 1998 Letter Authorizing Auto Manufacturers to Conduct Regional Recalls.

As NHTSA recognizes, an organizational plaintiff has standing to sue on behalf of its members when (a) at least one of its members would have standing to sue in his or her own right; (b) the interest the organization seeks to protect is germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). NHTSA challenges plaintiffs' standing only with respect to *Hunt*'s first prong. Defendant's Memorandum in Support of Motion to Dismiss ("Def. MTD Mem.") 12. As discussed below, plaintiffs have standing to attack NHTSA's practice of allowing manufacturers to conduct regional safety recalls, as embodied in the agency's 1998 letter,

because their members have suffered and will continue to suffer injury as a result of this agency action.[5]

1. *Plaintiffs' Members Have Suffered and Will Continue to Suffer Injury as a Result of NHTSA's Practice of Authorizing Regional Recalls.*

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (citation omitted); *see also American Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus,* 317 F.3d 334, 336 (D.C. Cir. 2003). Here, plaintiffs allege in their complaint that they brought this action

> on behalf of their members who have been excluded from past and ongoing auto safety recalls because of their states of residence and who currently own vehicles subject to recalls in other states. Some of these vehicles have already manifested the defect that prompted the safety recall, causing their owners to seek out repairs or replacements themselves. Further, because NHTSA permits manufacturers to avoid giving notice of defects to those owners whose vehicles neither are nor were initially registered in a recall state, other members likely have vehicles covered by regional recalls of which they were unaware. Based on the size of the present membership of both groups, the experiences of members excluded from past and present regional recalls, and the frequency with which NHTSA has allowed regional recalls, many of plaintiffs' members will likely be excluded from both notice of and remedies for serious safety defects in the future. These members will therefore be forced to bear the cost of remedying defects for which manufacturers would otherwise be responsible. These members and their families will also be at heightened risk of dangerous crashes because of unmitigated defects in their own vehicles and in those with which they share the road.

Complaint ¶ 4. For purposes of defeating a motion to dismiss, this allegation alone is sufficient to establish that members of the plaintiff organizations have been harmed by NHTSA's

[5] As discussed in Part I.C., *infra,* plaintiffs also have standing in their own capacity to challenge the denial of their procedural rights to notice and the opportunity to comment on NHTSA's de facto legislative rule governing regional recalls.

authorization of regional recalls. Such allegations are sufficiently "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990).

a. Injury that is "concrete and particularized."

To show "injury in fact," plaintiffs must have suffered "an invasion of a legally protected interest" that is "concrete and particularized." *Lujan,* 504 U.S. at 560. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin,* 422 U.S. 490, 500 (1975) (citations omitted). For example, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information" required pursuant to a statute. *FEC v. Akins,* 524 U.S. 11, 21 (1998); *see also Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373-74 (1982); *Public Citizen v. FTC,* 869 F.2d 1541, 1548 (D.C. Cir. 1989). Here, as alleged in the Complaint (at ¶¶ 7-12) and as discussed in depth in Plaintiffs' Summary Judgment Memorandum (at 15-20), the Safety Act requires manufacturers to provide notification and a free remedy to each owner of a vehicle with a safety-related defect. Plaintiffs have members who own vehicles excluded from regional recalls and who accordingly have not received the notice and free remedy guaranteed by statute. These members must either pay to remedy the defects themselves or remain at heightened risk that their vehicles will fail. *See* Complaint ¶ 4.

Plaintiffs have adduced facts beyond the allegations of their complaint, however. The Declarations of Clarence Ditlow, Joan Claybrook, and Mary Ann Morgan, all filed with plaintiffs' motion for summary judgment nearly two weeks before NHTSA moved to dismiss, and the Declaration of Grady Stone and Second Declaration of Clarence Ditlow, filed with this opposition, establish beyond dispute the concrete and particularized nature of the harm NHTSA's regional recalls practice has inflicted on plaintiffs' members. For example, Mary Ann

Morgan, a CAS member, states that she is the original purchaser of a 1995 Ford Mercury Tracer, which was excluded from a regional recall because her car was registered in Missouri, which did not qualify as a "hot weather" state. Morgan Decl. ¶¶ 2, 5. Because her car was excluded from the recall, she never received a notification from Ford that her car contained a defect. *Id.* ¶ 5. In August 2000, her car began to leak gasoline because of a crack in the gas tank, *id.* ¶ 3—the very defect at issue in NHTSA Recall No. 97V-144, *see* Ditlow Decl., Exh. 3, from which she was excluded. Because no safety recall covered her car, the Ford dealer refused to pay for the new gas tank, leaving Morgan to bear the full cost. Morgan Decl. ¶¶ 4, 6.[6]

The experience of Grady Stone, a member of Public Citizen, was similar. Mr. Stone was the original purchaser of a 1993 Ford Taurus with a 3.8 Liter engine. Stone Decl. ¶ 2. Because his car was bought and registered in Georgia, he has been excluded from four different regional recalls (Recall Nos. 97V-019, 97V-025, 98V-094, and 98V-323), *id.* ¶ 4; *see also* Ditlow Decl., Exh. 3, announced both before and after NHTSA's 1998 letter. He never received a notice from Ford about the defect. Stone Decl. ¶ 5. Mr. Stone brought a list of these four regional recalls to his local Ford dealer asking that the dealer make the repairs, but was told that his car was not in the dealer's computer database, the dealer did not have the necessary parts, and that there was nothing the dealer could do for him. *Id.* ¶ 6. Thus, Mr. Stone has been left to hunt down a dealer with the parts and then pay for the repairs himself, or else make do without the repairs, jeopardizing his safety and that of his family. *Id.* ¶ 7.

[6] It is well established that plaintiffs can augment their pleadings with declarations and other materials for purposes of establishing their standing at the Rule 12(b)(1) motion to dismiss stage. *See Warth,* 422 U.S. at 501; *Haase v. Sessions,* 835 F.2d 902, 906-07 (D.C. Cir. 1987).

Ms. Morgan's and Mr. Stone's experiences are representative of those of other members of CAS and Public Citizen. As Joan Claybrook explains, Public Citizen posted a survey about regional recalls on its website inviting members to provide information about their vehicles and the states of purchase and registration to gain insights into whether Public Citizen's membership was adversely affected by regional recalls. Claybrook Decl., ¶ 8. Although only a small fraction of Public Citizen's 160,000 members responded, 33 individuals indicated that they owned vehicles excluded from at least one regional recall based on the vehicles' states of purchase and registration. *Id*. Clarence Ditlow likewise reports that the Center for Auto Safety has received numerous complaints from members complaining of exclusion from regional recalls. Ditlow Decl. ¶ 22. Indeed, although an organizational plaintiff need allege only that *a single member* has suffered injury as a result of NHTSA's practice of authorizing regional recalls, *Hunt,* 432 U.S. at 342-43 (quoting *Warth,* 422 U.S. at 511), quite a significant number of plaintiffs' members likely have been harmed by regional recalls, given that *thousands* of members of both groups reside in states *consistently* excluded from such recalls. *See* Claybrook Decl. ¶ 6 (over 83,000 members reside in states authorized to be excluded from regional recalls addressing corrosion-related defects); *id.* ¶ 7 (nearly 30,000 members reside in California, excluded from nearly every regional recall); *see also* Ditlow Decl. ¶¶ 24-25.[7] Accordingly, CAS and Public Citizen have alleged and supported through declarations the injuries their members have suffered and will continue to suffer from regional recalls.

[7] Moreover, *all* of plaintiffs' members who live and drive in these typically excluded states are at heightened risk—regardless of whether they personally own vehicles excluded from regional recalls—because they share the road with *other* owners whose excluded vehicles have unmitigated defects. *E.g,* Claybrook Decl. ¶ 5; Stone Decl. ¶ 7.

b. Injury that is "actual or imminent, not "conjectural" or "hypothetical."

Plaintiffs' allegations and evidence regarding the injury to its members are sufficient from a temporal standpoint as well. It is important that plaintiffs do not seek relief from past individual recalls, but to set aside on a prospective basis NHTSA's 1998 letter authorizing manufacturers to conduct regional recalls and setting the standards to govern such recalls. To have standing to seek such forward-looking relief, plaintiffs must allege that their members will suffer injury from NHTSA's action authorizing automakers to conduct regional recalls. In other words, to show "injury in fact," plaintiffs' members must establish that the invasion of their legally protected interests is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan,* 504 U.S. at 560 (citations omitted). Plaintiffs have easily done so. This Court need look no further than the complaint, which alleges that:

> Based on the size of the present membership of both groups, the experiences of members excluded from past and present regional recalls, and the frequency with which NHTSA has allowed regional recalls, many of plaintiffs' members will likely be excluded from both notice of and remedies for serious safety defects in the future These members will therefore be forced to bear the cost of remedying defects for which manufacturers would otherwise be responsible. These members and their families will also be at heightened risk of dangerous crashes because of unmitigated defects in their own vehicles and in those with which they share the road.

Complaint ¶ 4. Because this Court must accept these allegations as true at the motion to dismiss stage, it need engage in no further inquiry.

Nonetheless, plaintiffs have done more than allege standing in their complaint. As discussed above, far from engaging in "unadorned speculation," Def. MTD Mem. 15, regarding the effects of regional recalls on their memberships, plaintiffs have established through sworn declarations that regional recalls conducted by manufacturers have caused their members current and ongoing injury, as well as the imminent likelihood of future injury. Manufacturers, with

NHTSA's blessing, have conducted 40 regional recalls between 1992 and the present. Second Ditlow Decl ¶ 2. New regional recalls are announced every year. *See* Ditlow Decl., Exh. 3 (NHTSA regional recalls list through April 2002); *id.,* Exh. 4 (NHTSA regional recalls in 2003); Second Ditlow Decl., Exh. 1 (regional recall in 2004). And plaintiffs have *thousands* of members who reside in states routinely excluded from regional recalls. Claybrook Decl. ¶¶ 6-7; Ditlow Decl. ¶¶ 24-25. *Cf. Public Citizen v. FTC,* 869 F.2d at 1551-52 (plaintiff organizations need not identify particular members "for the court to be satisfied that the requisite injury really has occurred or will occur in the future to members of the organizations"). The future injury to plaintiffs' members is far more concrete and imminent than that claimed in *Nuclear Energy Inst., Inc. v. EPA,* 373 F.3d 1251, 1266 (D.C. Cir. 2004), in which the D.C. Circuit recently found it sufficient that one of plaintiffs' members alleged injury to his ground-water supply even though radionuclides escaping from the Yucca repository might not reach the member's community for thousands of years.

As this Court has recognized, "[p]ast exposure to illegal conduct satisfies the injury in fact requirement where it is accompanied by continuing adverse effects." *Natural Law Party of the United States v. FEC,* 111 F. Supp. 2d 33, 43 (D.D.C. 2000). NHTSA's reliance on *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), is misplaced because that case involved a single, isolated episode of allegedly illegal conduct so unlikely to be repeated that the threat of future injury was too attenuated to support Article III standing. *See id.* at 104-08. Here, by contrast, NHTSA's regional recalls rule is not an isolated incident, but a green light to auto manufacturers to continue to limit some of their safety recalls to certain states. Regional recalls are current and ongoing, and it is "all but certain," *Louisiana Envtl. Action Network v. U.S. EPA,* 172 F.3d 65, 68 (D.C. Cir. 1999)—or, put another way, there is a "substantial probability," *American Petroleum*

Inst. v. U.S. EPA, 216 F.3d 50, 63 (D.C. Cir. 2000) (per curiam)—that regional recalls will continue to be conducted in the future and that plaintiffs' members will continue to be harmed by them. Indeed, in July 2004, yet another regional recall was announced, affecting 1999-2001 Ford Tauruses and Mercury Sables. The recall is intended to address a corrosion-related defect in front coil springs that could potentially fracture, rupturing a front tire and causing a crash, but is limited to the usual 20 "salt states" plus the District of Columbia. *See* Second Ditlow Decl. ¶ 3 & Exh. 1.

2. Plaintiffs' Members Have Satisfied the Requirements of Causation and Redressability.

NHTSA argues that plaintiffs' members have failed to demonstrate that their injuries are likely to be redressed by a favorable court ruling. The crux of its argument is that the members' injuries arise from NHTSA's regulation of independent third parties and that plaintiffs cannot show that the manufacturers' decisions to conduct regional recalls will be affected by a judicial declaration that NHTSA's practice of authorizing manufacturer-initiated regional recalls is unlawful. Def. MTD Mem. 16-17.

This argument has no merit. When, as here, "the plaintiffs' claim hinges . . . on an agency's failure to prevent injurious third party behavior, the 'fairly traceable and redressability inquiries appear to merge.'" *Natural Law Party,* 111 F. Supp. 2d at 49. As the D.C. Circuit has recognized, "mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice." *Telephone & Data Sys., Inc. v. FCC,* 19 F.3d 42, 47 (D.C. Cir. 1994) (citation and internal quotation marks omitted).

The causation requirement is met when a challenged agency action authorized the third-party conduct that caused plaintiffs' injury if that conduct otherwise would be illegal. *Animal Legal Defense Fund, Inc. v. Glickman,* 154 F.3d 426, 440-41 (D.C. Cir. 1998) (en banc) ("*ALDF"*); *Natural Law Party,* 111 F. Supp. at 47; *see also Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976). Plaintiffs "need not *prove* that the agency action it attacks is unlawful . . . to have standing to level that attack" because whether "a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *ALDF,* 154 F.3d at 441 (citations omitted). Even if the third-party conduct would not otherwise be unlawful, "[w]hen an agency order permits a third-party to engage in conduct that allegedly injures a person, the person has satisfied the causation aspect of the standing analysis." *Consumer Fed'n of America v. FCC,* 348 F.3d 1009, 1012 (D.C. Cir. 2003). No "high degree" of independent agency action is required. "[T]he causation element is satisfied by a demonstration that an administrative agency authorized the injurious conduct." *America's Community Bankers v. FDIC,* 200 F.3d 822, 827 (D.C. Cir. 2000). Plaintiffs "need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *Competitive Enter. Inst. v. NHTSA,* 901 F.2d 107, 113 (D.C. Cir. 1990).

Here, plaintiffs allege that the Safety Act requires auto manufacturers to provide both notification of the defect and a free remedy to each owner of a vehicle with a safety-related defect. *See* Complaint ¶¶ 7-12; Pltf SJ Mem. 15-20. Plaintiffs further allege that NHTSA has allowed manufacturers to limit provision of notification and a free remedy to particular states for certain recalls, usually excluding the majority of the country—a practice that culminated in its 1998 letter expressly authorizing manufacturers to conduct regional recalls and delineating the

conditions under which the agency would approve them. Complaint ¶¶ 13-26; *see, e.g.,* NHTSA 1998 Letter at 2 (Ditlow Decl., Exh. 2) ("[I]f 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, *NHTSA will approve a regional recall*.") (emphasis added). Manufacturers have availed themselves of the agency's permission to conduct regional recalls, to the detriment of plaintiffs' members who own vehicles in excluded states and who, as a result, have been denied the defect notification and free remedy to which they are entitled under the Safety Act.

Because plaintiffs have adequately alleged and demonstrated causation, they likewise have shown redressability. NHTSA suggests, however, that its role is purely passive and that manufacturers may well initiate regional recalls regardless of what this Court says about the agency's practice. Def. MTD Mem. 17-18. This contention is refuted by the record, which establishes that, by and large, manufacturers are *obeying* NHTSA's 1998 directive regarding how regional recalls must be conducted. *Compare* NHTSA Recall No. 94V-056 (Ditlow Decl., Exh. 3) (Ford corrosion-related recall announced in 1994 conducted in only 14 states), *and* NHTSA Recall No. 97V-058 (General Motors corrosion-related recall announced in 1997 conducted in only 14 states), *with* NHTSA Recall Nos. 01V-199, 01V-255, 02V-101 (three Ford corrosion-related recalls announced in 2001 and 2002 conducted in the 20 "salt states" plus the District of Columbia specified in NHTSA's 1998 letter), *and* NHTSA Recall Nos. 00V-189, 01V-200 (two General Motors corrosion-related recalls announced in 2000 and 2001 conducted in the "salt states" specified in NHTSA's 1998 letter). *See* Second Ditlow Decl. ¶ 5. Indeed, in correspondence with the agency, manufacturers emphasize their compliance with the requirements set out in NHTSA's 1998 directive. *See, e.g., id*., Exh. 2, at 1 (2001 letter from

DaimlerChrysler to NHTSA) ("DaimlerChrysler will conduct a safety recall covering the defined 'salt belt' states to correct this [corrosion-related defect]."); *see also id.* at 2.

In other words, auto manufacturers' decisions about whether and how to conduct regional recalls "are not made substantially independent of" NHTSA's edicts on the subject. *Competitive Enter. Inst.,* 901 F.2d at 116. "Causation and redressability thus are satisfied in this category of cases, because the intervening choices of third parties are not truly independent of government policy." *National Wrestling Coaches Ass'n v. Department of Educ.,* 366 F.3d 930, 940-41 (D.C. Cir. 2004).

Aside from the record evidence refuting NHTSA's position, plaintiffs allege that the regional recalls conducted by auto manufacturers are unlawful. Without assurances from NHTSA that the agency will accept manufacturer-initiated regional recalls, it is far-fetched to suggest that automakers would defy the Safety Act after NHTSA's 1998 letter authorizing regional recalls has been set aside by this Court.[8] In any event, the agency's speculation that automakers would persist in their illegal conduct in the face of such a ruling is insufficient to defeat plaintiffs' standing. *See, e.g., ALDF,* 154 F.3d at 441 (plaintiffs have standing where the relief sought "would make the injurious conduct of third parties complained of in this case illegal; only by taking extraordinary measures—*i.e.,* violating the law . . . could third parties prevent redress of the appellants' injuries"); *accord National Wrestling Coaches,* 366 F.3d at

[8] As Ford's Vice President testified in another context: "[P]aying fines is not an alternative for Ford Motor Co. . . . Failure to meet the standard is unlawful conduct. To us, that means that in the absence of an adjustment to the standard we have to carry out a plan that meets the law, even if it means curtailing availability of larger cars and engines, restricting the availability of these products to consumers, and even if it brings the jobs dislocation of closing down plants." *Automobile Fuel Economy Standards: Hearing Before the Subcomm. on Energy Regulation and Conservation of the Senate Comm. on Energy and Natural Res.*, 99th Cong. 71 (1985) (statement of Helen O. Petrauskas).

941. Nor is it material, for redressability purposes, that plaintiffs conceivably could win a victory in this Court only to have NHTSA subsequently decline to enforce the notice and remedy requirements of the Safety Act against manufacturers who chose to ignore them. As the Supreme Court said in rejecting a similar argument, "that fact does not destroy Article III 'causation,' for we cannot know that the FEC would have exercised its prosecutorial discretion in this way. . . . For similar reasons, the courts in this case can 'redress' respondents' 'injury in fact.'" *FEC v. Akins,* 524 U.S. 11, 25 (1998); *accord ALDF,* 154 F.3d at 443-44.

Finally, it does not matter whether the Safety Act specifically requires NHTSA to "approve" or "disapprove" manufacturer proposals to conduct regional recalls. NHTSA's 1998 letter was an invitation to unlawfulness, a "get out of jail free card," for auto manufacturers, which limits the agency's *own* discretion to enforce the provisions of the Safety Act against them so long as automakers comply with the standards announced in NHTSA's 1998 letter. In so fettering its own enforcement discretion, and as discussed further below in Part II.C, NHTSA promulgated a de facto legislative rule, without notice and comment, that has caused concrete and palpable injury to plaintiffs' members. *See, e.g., Community Nutrition Inst. v. Young,* 818 F.2d 943, 949 (D.C. Cir. 1987) ("*CNI*") ("FDA by virtue of its own course of conduct has chosen to limit its discretion and promulgated action levels which it gives a present, binding effect."). Accordingly, plaintiffs have Article III standing.

B. Plaintiffs Have Prudential Standing.

NHTSA also contends that plaintiffs lack prudential standing because the interests they assert supposedly fall outside the zone of interests protected by the Safety Act. Def. MTD Mem. 18-21. That argument is frivolous. The zone-of-interest test "is not demanding." *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.,* 362 F.3d 786, 791 (D.C. Cir. 2004). It is enough that

"the interest sought to be protected by the complainant is *arguably* within the zone of interest to be protected . . . by the statute." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 492 (1998).

As plaintiffs discussed in their motion for summary judgment, Pltf SJ Mem. 18-20, the purpose of the Safety Act is clearly stated: "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101; *see United States v. Ford Motor Co.,* 574 F.2d 534, 541 (D.C. Cir. 1978) ("The purpose of the [Safety] Act is to protect the public against the unreasonable risk of accidents which might result from defects in motor vehicles and from the unreasonable risk of death or injury caused by such accidents."). Consistent with this purpose, courts consistently have interpreted the Safety Act to impose prophylactic protections designed to "prevent serious injuries stemming from established defects *before they occur*." *United States v. General Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (emphasis added); *United States v. General Motors Corp.,* 518 F.2d 420, 431 (D.C. Cir. 1975) (Safety Act "is designed specifically to warn a consumer *before an accident occurs*") (emphasis added).

The particular statutory provisions on which plaintiffs rely—those guaranteeing their members notice of safety-related defects and a free remedy, 49 U.S.C. §§ 30118(b) & (c), 30119(d), 30120(a), *see generally* Complaint ¶¶ 7-12; Pltf SJ Mem. 15-18—effectuate the statute's purposes both of warning consumers about safety-related defects in their vehicles and of preventing injuries by requiring manufacturers to repair those defects at no charge. *See Bennett v. Spear,* 520 U.S. 154, 175-76 (1997) (whether a plaintiff's interests satisfy zone-of-interests test is determined by reference "to the particular provision of law upon which the plaintiff relies"). As NHTSA itself stated: "The primary objective" of its 1998 letter was "to ensure that

the owners of all vehicles for which a safety defect may cause adverse safety consequences have the opportunity to obtain a free remedy from the manufacturer." Ditlow Decl., Exh. 2, at 1.

Plaintiffs' members have been deprived of the statutory notification and free repair central to the prophylactic scheme established by the Safety Act (and share the roads with others deprived of that notification and repair). Accordingly, plaintiffs' members are exposed to an unreasonable risk of crashes that might result from unmitigated defects in vehicles and are forced to bear greater costs in paying to repair these defects themselves. *See* Part I.A.1, *supra*. It is more than "arguable" that their interests fall within the zone of interests protected by the Safety Act. *See Scheduled Airlines Traffic Offices, Inc. v. Department of Defense,* 87 F.3d 1356, 1359 (D.C. Cir. 1996) (a plaintiff may show that it is within a statute's zone of interests "if it is among those [who] Congress expressly or directly indicated were the intended beneficiaries of a statute," or "if it is a 'suitable challenger' to enforce the statute," by virtue of having "interests . . . sufficiently congruent with those of the intended beneficiaries") (citations omitted); *e.g., International Bhd. of Teamsters v. Pena,* 17 F.3d 1478, 1483 (D.C. Cir. 1994) ("The union's interest in highway safety is indisputably one that the Safety Act . . . seek[s] to advance, and so the union plainly has [prudential] standing"). Not only are plaintiffs and their members proper parties "who in practice can be expected to police the interests that the statute protects," *Mova Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1075 (D.C. Cir. 1998), but the interests of plaintiffs' members—consumers who own and drive vehicles excluded from various regional recalls—are the *very kinds of interests* that Congress intended to protect. Plaintiffs therefore have prudential standing.

C. Plaintiffs Have Standing to Challenge NHTSA's Failure to Conduct Notice-and-Comment Rulemaking in Accordance with the APA.

Defendants argue in passing, without citation to authority, that plaintiffs do not allege that any of their members suffered an injury from the alleged violation of the notice and comment requirements of the APA. Def. MTD Mem. 13. In fact, the complaint sufficiently establishes plaintiffs' right to challenge the violation of their procedural rights as a result of NHTSA's failure to comply with the APA's notice-and-comment rulemaking requirements. *See, e.g.,* Complaint ¶¶ 2-3 (plaintiffs' organizational interests in auto safety), ¶ 18 (conditions established in NHTSA's 1998 letter not published in the Federal Register), ¶ 32 (1998 letter established a de facto legislative rule issued without notice and comment rulemaking, in violation of the APA). Plaintiffs have the right to challenge this procedural deprivation both in their own capacities and on behalf of their members. *See, e.g., ALDF,* 154 F.3d at 431 n.4 (citing 943 F. Supp. 44, 53-54 (D.D.C. 1996)).

Of course, plaintiffs cannot assert with certainty that the notice-and-comment rulemaking process would have altered NHTSA's decision about whether to authorize automakers to conduct regional recalls or the standards that would govern such recalls, but plaintiffs need make no such allegation. A "special standing doctrine . . . applies when litigants attempt to vindicate their 'procedural rights,' such as their right to have notice of proposed regulatory action and to offer comments on such proposal." *Iyengar v. Barnhart,* 233 F. Supp. 2d 5, 12 (D.D.C. 2002). In such a case, "'where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,' they can establish standing 'without meeting all the normal standards for redressability and immediacy.'" *Id.* (quoting *Lujan,* 504 U.S. at 572 n.7). Rather, "'a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise

of that authority'—such as the APA's notice and comment requirements—'at least if the procedure is intended to enhance the quality of the substantive decision.'" *Id.* (quoting *Teamsters,* 17 F.3d at 1484). And although a plaintiff asserting a procedural violation must show that "the procedural step was connected to the substantive result," it "never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers Coop. of Fla. v. Veneman,* 289 F.3d 89, 94-95 (D.C. Cir. 2002); *accord City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C. Cir. 2003).

Plaintiffs' institutional interests are undeniably germane to the interests they seek to vindicate here. *See* Ditlow Decl. ¶¶ 2-6 (describing CAS's promotion of auto safety and extensive involvement in issues relating to safety recalls); Claybrook Decl. ¶¶ 2-3 (describing Public Citizen's interest in and promotion of auto safety). Both plaintiff organizations and their members excluded from regional recalls fall within the Safety Act's zone of interests and thus within the ambit protected by the procedural requirement that NHTSA follow the APA's notice-and-comment rulemaking process before issuing a legislative rule setting the standards governing regional recalls.[9]

Furthermore, the procedural rights at stake, notice and the right to comment on these standards, are "quite obviously linked to [plaintiffs'] concrete interest," *Iyengar*, 233 F. Supp. 2d at 13—namely, their right to ensure that their members are *included,* not excluded, from recalls

[9] Although plaintiffs need not assert, without seeing the substance of a notice of proposed rulemaking by NHTSA governing regional recalls, that they necessarily would have commented on it, Clarence Ditlow states that, given CAS's longstanding concern about NHTSA's authorization of regional recalls, as conveyed in its correspondence to the agency protesting NHTSA's 1998 letter, *see, e.g.,* Ditlow Decl., Exhs. 23 & 25, the Center certainly would have commented on and protested such a proposed rule and encouraged its members to do so as well. Second Ditlow Decl. ¶ 7.

of vehicles with safety-related defects. There is also little room to dispute that notice-and-comment procedures in this context, as in others, are intended to enhance the quality of NHTSA's ultimate decision. *See, e.g.,* Office of Management and Budget, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15014, 15035 (2002) ("The failure to comply with the APA's notice-and-comment requirements or observe other procedural review mechanisms can undermine the lawfulness, quality, fairness, and political accountability of agency policymaking."). "It requires no imaginative leap to conclude that by cutting plaintiffs out of the loop" by issuing a de facto substantive rule on regional recalls "without notice and comment, the agency appreciably increased the risk that plaintiffs' interest would be compromised." *Iyengar,* 233 F. Supp. 2d at 13. Plaintiffs have standing to challenge this procedural violation.

II. PLAINTIFFS HAVE STATED A CLAIM.

A. Plaintiffs State a Claim For Relief Based on NHTSA's Violation of the Safety Act and the APA.

NHTSA claims that the Safety Act "clearly" does not prohibit regional recalls. Def. MTD Mem. 23. However, nowhere does the agency quote any language from the Safety Act in support of its position. In fact, the "spare terms" of the Safety Act, to which the agency only alludes, *id.* at 25, require manufacturers of defective vehicles to "notify . . . the owners, purchasers, and dealers of the vehicle or equipment." 49 U.S.C. § 30118(b)(2)(A) & (c), (c)(1). The notice provision applies to "*each person* registered under State law as the owner [of a defective vehicle] and whose name and address are reasonably ascertainable by the manufacturer," or, failing that, "the most recent purchaser known to the manufacturer." 49 U.S.C. § 30119(d)(1)(A) & (B) (emphasis added). As to "each person" entitled to notice, the

manufacturer must also remedy the defect without charge, 49 U.S.C. § 30120(a), provided the owner seeks to obtain the remedy within ten years of the initial purchase of the vehicle. Thus, the plain language of the Safety Act, particularly the "each person" language of 49 U.S.C. § 30118, leaves no room for recalls to exclude some registered owners based on their state of vehicle registration or purchase.

Furthermore, the stated purpose of the Safety Act is to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. Regional recalls circumvent this statutory goal by providing a remedy only *after* an excluded vehicle has already failed. *See* Ditlow Decl., Exh. 2, at 2; *see also General Motors*, 565 F.2d at 758 ("[t]he basic purpose of the Safety Act is to reduce motor vehicle accidents, injuries, and property damage" and when a defect creates the risk of a serious hazard such as an engine fire, "the Act's basic purpose of protecting the public requires that notification be provided"); *Nevels v. Ford Motor Co.*, 439 F.2d 251, 258 (5th Cir. 1971) (rejecting Ford's contention that it was not obligated to give notice unless it was aware of defect in a particular vehicle: "if Ford discovered in one car a defect common to automobiles manufactured by it, Ford then had a duty to notify other purchasers"); Pltf SJ Mem. 18-20 (discussing legislative history of the Safety Act).

NHTSA attempts to avoid confronting its statutory mandate by asserting that it does not "approve" the notices that manufacturers send to the agency when conducting a recall. Def. MTD Mem. 23. This statement is only one example of a persistent theme in NHTSA's motion to dismiss: that NHTSA is uninvolved in manufacturer-initiated recalls unless and until the agency chooses to take enforcement action to compel a manufacturer to implement or expand a recall.[10]

[10] Similarly, NHTSA makes much of the "fact bound" considerations involved in determining whether or not a vehicle is defective. Def. MTD Mem. at 25. These considerations are not relevant to this case because the 1998 letter does not address the question of whether or not a

However, at the same time, NHTSA concedes that its 1998 letter told auto manufacturers that the agency "will *approve* a regional recall if the manufacturer demonstrates that the relevant environmental factor is significantly more likely to exist in the area proposed for inclusion." *Id*. at 22 (emphasis added). The 1998 letter also set forth the criteria that the agency would use when deciding whether to approve particular recalls: "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, NHTSA will *approve* a regional recall." Ditlow Decl., Exh. 2, at 2 (emphasis added). Indeed, in the version of the 1998 letter sent to Volkswagen of America, the agency "reiterate[d] that[] manufacturers must discuss all proposals to limit the geographic scope of any recall with ODI prior to making any public statements regarding that scope." Def. MTD Mem., Exh. 1, at 6. Thus, NHTSA's persistent claim in the context of this litigation that its only role in manufacturer-initiated regional recalls is that of a rubber stamp is belied by the agency's own communications with automakers.

Moreover, as the D.C. Circuit has recognized, NHTSA's role in overseeing safety recalls is more than that of a mere passive receptacle for manufacturers' submissions. *See United States v. General Motors*, 841 F.2d 400, 402 (D.C. Cir. 1988) (NHTSA pressured GM to take remedial action before taking administrative or judicial action against the company, causing GM to conduct a voluntary recall); *Walsh v. Ford Motor Co*., 130 F.R.D. 260, 267 (D.D.C. 1990) (Safety Act "designed and intended to empower principally the Department of Transportation . . .

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defect exists in a particular type of vehicle. Rather, the rule laid out in the 1998 letter regarding whether a defect may be remedied through a regional (as opposed to national) recall comes into play only when the existence of a defect is already established (usually because it has been admitted by the manufacturer). *See, e.g.,* Ditlow Decl., Exh. 2, at 1 (referring to the scope of recalls conducted to address "safety-related defects").

to order and oversee motor vehicle recalls"); *cf. Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1017-18 (9th Cir. 1998) (discussing NHTSA's ongoing investigations of and negotiations with Chrysler, which culminated in a voluntary service campaign deemed by NHTSA as effective as a recall).

Whatever the extent of NHTSA's involvement in recalls, it has exceeded its authority by issuing a rule that purports to authorize manufacturers to ignore the Safety Act. Even if the agency's 1998 letter were only a "policy statement" rather than a rule (which it is not), such a "policy" would violate the Safety Act and thus the APA. 5 U.S.C. § 706(2)(A); *see Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990) (agency "does not have the power to adopt a policy that directly conflicts with its governing statute"). Thus, regardless of whether NHTSA gave manufacturers permission to conduct any particular regional recall, the agency acted unlawfully when it gave manufacturers carte blanche to conduct regional recalls in contravention of the Safety Act's language.

NHTSA next claims that even if its plain language argument fails, its reading of the Safety Act is entitled to deference under *Chevron v. Natural Resources Defense Council*, 476 U.S. 837 (1984). Def. MTD Mem. 23-25. Agency actions are eligible for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). A rule enacted through notice-and-comment rulemaking procedures is the prototype agency action that meets this definition, although, as NHTSA points out (Def. MTD Mem. 24), other agency conduct, such as adjudications, can also meet the *Mead* requirements. However, NHTSA's 1998 letter does not qualify for *Chevron* deference under any interpretation.

As discussed below, in Part II.C, NHTSA's 1998 letter is a legislative rule that was unlawfully promulgated without notice-and-comment rulemaking procedures. Congress's delegation of rulemaking authority to NHTSA is contingent on the agency's compliance with the procedures set forth in the APA. *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc) (notice-and-comment process is prerequisite to judicial deference to agency rules), *aff'd sub nom Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co*., 516 U.S. 152 (1996); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (notice-and-comment procedures help ensure that rule has received due deliberation by the agency). Because NHTSA ignored these requirements, choosing instead to promulgate a rule through a letter to the regulated community, its 1998 letter is entitled to no deference. Furthermore, if the 1998 letter were, as NHTSA claims, a policy statement, it still would not receive *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"); *accord Mead*, 533 U.S. at 234.

B. Plaintiffs Were Not Required to Exhaust Administrative Remedies Prior to Filing Suit.

In the course of challenging plaintiffs' standing, NHTSA asserts that plaintiffs failed to exhaust their administrative remedies prior to filing suit because they did not file a petition under 49 U.S.C. § 30162 requesting NHTSA to begin a proceeding to decide whether the agency should order a recall under 49 U.S.C. § 30118(b). Def. MTD Mem. 4, 20 n.10. However, because plaintiffs are challenging the agency's de facto legislative rule, set forth in its 1998 letter to manufacturers, not its failure to take action in any particular case, there is no exhaustion

requirement. Moreover, neither the governing statute nor the applicable regulations impose an exhaustion requirement.

As a threshold matter, even if plaintiffs had something to gain from filing a petition to seek a defect determination from NHTSA that had already been made by the manufacturer, it is black-letter law under the APA, 5 U.S.C. § 704, that there is no requirement of exhaustion of administrative remedies where neither the underlying statute nor agency rule requires it. *See Darby v. Cisneros,* 509 U.S. 137, 146 (1993); *CIBA-Geigy Corp. v. EPA,* 46 F.3d 1208, 1210 n.2 (D.C. Cir. 1995). Here, neither the statute, 49 U.S.C. § 30162(a), nor NHTSA regulations, 49 C.F.R. Part 552, require the filing of a petition as a prerequisite to seeking judicial review. But, in fact, plaintiffs would have had nothing to gain by filing a petition.

Notably, the agency order NHTSA argues that plaintiffs should have sought would have simply been an agency determination under 49 U.S.C. § 30118(b) that a particular motor vehicle subject to a regional recall contained a defect related to motor vehicle safety. However, manufacturers conducting regional recalls *already* have made that safety-defect determination under § 30118(c). The issue in this case is not whether vehicles subject to regional recalls contain defects related to motor vehicle safety, but what notification requirements and remedies flow from that determination, once made. The manufacturers' legal obligations under the Safety Act to provide "each" owner and purchaser of a vehicle with a safety defect with notice and a free remedy do not differ depending on whether it is the agency or the manufacturer who finds the defect. *Compare* 49 U.S.C. § 30118(b)(2), *with* § 30118(c); *see also* §§ 30119(d), 30120(a). In fact, courts have recognized that the Safety Act "imposes an independent duty upon manufacturers of motor vehicles to give notification of and to remedy known safety-related defects." *United States v. General Motors Corp.,* 574 F. Supp. 1047, 1049 (D.D.C. 1983); *see*

also Ford, 574 F.2d at 541; *Namovicz v. Cooper Tire & Rubber Co.,* 225 F. Supp. 2d 582, 584 n.5 (D. Md. 2001). Thus, there would have been no reason for plaintiffs to have filed a petition seeking a superfluous *agency* determination of a safety defect under § 30118(b) with respect to any of the 40 regional recalls conducted from 1992 to the present. Indeed, given that such a petition could properly seek only a defect determination, it properly would be rejected as moot with respect to any existing regional recall.

C. NHTSA's 1998 Letter Constitutes a Legislative Rule.

When an agency promulgates a substantive rule, "effect[ing] a dramatic change in the agency's established regulatory regime," the agency must follow the APA's notice-and-comment procedure. *Croplife America v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003). Failure to do so requires that the rule be vacated. *Id*. Here, NHTSA attempts to escape the APA's notice-and-comment requirements by calling its 1998 letter a policy statement. However, regardless of what the agency labels the letter, because the letter purports to bind NHTSA and manufacturers, it is a de facto legislative rule and should have been promulgated in accordance with the APA.

A legislative rule is one that "intends to create new law, rights or duties." *Interport, Inc. v. Magaw*, 135 F.3d 826, 828 (D.C. Cir. 1998) (internal quotations omitted). By contrast, a policy statement is "'neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.'" *Panhandle Eastern Pipeline Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (quoting *Pac. Gas & Elec. Co. v. Fed. Power Comm*., 506 F.2d 33, 38 (D.C. Cir. 1974)). In distinguishing a legislative rule from a policy statement, courts look to whether the agency's statement has a

"present-day binding effect," and whether it "genuinely leaves the agency and its decisionmakers free to exercise discretion." *CNI*, 818 F.2d at 946.[11]

Here, NHTSA's 1998 letter sets out specific requirements using mandatory language. Specifically, the 1998 letter states that "manufacturer[s] *will* be required to send a notification letter" and "the following states *must* be included in any regional recall related to corrosion"). Ditlow Decl., Exh. 2, at 2 (emphasis added). NHTSA uses the same language to limit its own ability to compel manufacturers to conduct expanded recalls: "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, NHTSA *will approve* a regional recall." *Id*. (emphasis added). And: "The manufacturer *will only have* to provide the free recall remedy to those vehicles." *Id.* (emphasis added). As the D.C. Circuit has repeatedly held, language such as "will" and "must," is enough to demonstrate that an agency-styled policy statement is a legislative rule, and not, in NHTSA's words (Def. MTD Mem. 37), just regulatory "saber rattling." *See, e.g., McLouth Steel Prods Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); *CNI*, 818 F.2d at 946; *Brock v. Cathedral Bluffs Shale Oil*, 796 F.2d 533, 538 (D.C. Cir. 1986) (citing *American Bus. Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980)). Furthermore, in a 2002 letter to CAS, NHTSA itself described the 1998 letter as "setting forth certain requirements that would apply to all future regional recalls." Ditlow Decl., Exh. 24, at 1;

[11] NHTSA cites the three-part test first set out in *Molycorp v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999), under which the court considers "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." Def. MTD Mem. 34-35. The final *Molycorp* factor, which is "the ultimate focus of the inquiry," *Molycorp*, 197 F.3d at 546, overlaps with the *CNI* test. *See Croplife*, 329 F.3d at 883.

see also Pltf SJ Mem. 36 (providing examples from NHTSA's 2002 letter to CAS in which the agency characterized the 1998 letter as binding on manufacturers).

NHTSA claims that its 1998 letter "did not place a new substantive burden on any manufacturer." Def. MTD Mem. 37. In fact, the requirements of the 1998 letter comprise an entirely new regulatory scheme that places limitations on both manufacturers and NHTSA. Before the 1998 letter, there were no regulations in place regarding the practice of regional recalls, and, as discussed above, at page 7, each manufacturer conducted regional recalls differently. For example, corrosion-related regional recalls often included as few as 14 states, *see* page 22, *supra*, and manufacturers freely conducted regional recalls to repair what were classed by the 1998 letter as "short-term exposure" defects that are now ineligible for regional recalls. *See* Ditlow Decl., Exh. 11, at 5 (1998 letter to Ford). Through the 1998 letter, NHTSA instructed manufacturers regarding what types of defects could be addressed in regional recalls and which states manufacturers had to include in corrosion-related regional recalls. Manufacturers have followed NHTSA's instructions. *See* pages 22-23, *supra*. Accordingly, the agency would be hard-pressed to take action against a manufacturer that adhered to the standards in the 1998 letter. *See*, *CNI*, 818 F.2d at 948 (even though violation of agency pronouncement did not automatically subject regulated entities to enforcement action, it was legislative rule because it cabined agency's discretion to take enforcement action against entity that complied); *accord Sec'y of Labor, Mine Safety & Health Admin. v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 327 n.6 (D.C. Cir. 1990); *State of Alaska v. Dep't of Transp.*, 868 F.2d 441, 447 (D.C. Cir. 1989). For example, a manufacturer that included in a corrosion-related recall only those "salt states" listed in the 1998 letter, or who sent notice of the defect only to those owners whose

vehicles were registered or purchased in the included states, would likely be immune to many of the enforcement tools in NHTSA's arsenal.

In many of the cases cited by NHTSA, Def. MTD Mem. 35-36, the courts deemed the agency statements at issue not to be legislative rules because the statements contained equivocal language indicating only the agency's general orientation towards future discretionary enforcement action. *See, e.g., Molycorp*, 197 F.3d at 546 (EPA document indicated that it was "not a substitute for [] legal requirements; nor is it a regulation itself," which, coupled with agency's assurances that document was only an indication of its future enforcement interests and would receive no weight in enforcement proceedings, was enough to bring document under policy statement exception); *Brock*, 796 F.2d at 538 ("language of the guidelines is replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit"); *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667-68 (D.C. Cir. 1978) (in close case, use of word "may," coupled with agency's broad discretion and fact that pronouncement reiterated existing requirements, indicated that agency pronouncement was policy statement, not legislative rule). In other cases cited by NHTSA, the agencies simply reiterated existing policies or rules without imposing any new substantive requirements on either the agency itself or the regulated community. *See, e.g., General Motors v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004); *Aulenback, Inc. v. Federal Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997). The agency pronouncements in these cases are easily distinguishable from the 1998 letter, which both uses mandatory language and implements a series of new requirements applicable to manufacturers conducting regional recalls.

Nonetheless, NHTSA argues that the 1998 letter is not a legislative rule because NHTSA did not publish it in the Federal Register and because "[b]y their own terms, the Weinstein letters

are policy guidelines." Def. MTD Mem. 33. This argument ignores this Circuit's longstanding rule that "the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." *Croplife*, 329 F.3d at 883; *see also General Motors*, 363 F.3d at 448 (D.C. Circuit has "eschew[ed] the notion that labels are definitive"). In fact, *Brock v. Cathedral Bluffs Shale Oil Co.*, cited by NHTSA for the proposition that its failure to publish the 1998 letter in the Federal Register should be seen as an "indication" that the letter is not a rule, Def. MTD Mem. 35, states that "[w]hile the agency's characterization of an official statement as binding or nonbinding has been given some weight . . . *of far greater importance* is the language used in the statement itself." 796 F.2d at 537-38 (citations omitted) (emphasis added).

Furthermore, when an agency "has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see also Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). As described in Pltf SJ Mem. at 36-37, the 1998 letter altered NHTSA's interpretation of 49 C.F.R. § 577.8, which prohibits manufacturers from including "disclaimers" in their owner notification letters. Whereas the regulation already permitted manufacturers to inform consumers that a defect may not *exist* in all vehicles, in its 1998 letter, NHTSA stated that it would allow manufacturers conducting recalls to correct short-term exposure defects to include a statement that, although a defect exists, it is unlikely to manifest itself and cause a safety problem. Ditlow Decl., Exh. 2 at 1. This change represents a significant departure from NHTSA's interpretation of the notice provisions of the Safety Act and its own regulations and thus required notice-and-comment rulemaking.

D. NHTSA's Issuance of the 1998 Letter Constitutes Final Agency Action.

NHTSA claims that plaintiffs' complaint does not challenge a final agency action. This argument again either ignores or misunderstands the fact that plaintiffs are attacking NHTSA's legislative rule, and not any particular decision by the agency not to undertake enforcement action to compel a national recall in a specific case. As a legislative rule, NHTSA's 1998 letter exemplifies the quintessential agency action under this definition. *See* 5 U.S.C. § 551(13).

Even if the 1998 Letter did not constitute a legislative rule, it would still qualify as agency action under the APA. Under the APA, a "rule" encompasses more than "legislative" rules. *Compare* 5 U.S.C. § 551(4) (defining rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"), *with Association of American Railroads v. U.S.*, 603 F.2d 953, 962 n.22 (D.C. Cir. 1979) ("A legislative rule is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.") (citing K. Davis, Administrative Law Treatise § 5.03, at 299 (1958)); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) ("'[i]nterpretive rules' and 'policy statements' may be rules within the meaning of the APA"). An agency pronouncement that is not a legislative rule is nonetheless reviewable agency action when it is "binding." *Appalachian Power Co.*, 208 F.3d at 1021; *Office of Communication of United Church of Christ v. FCC*, 826 F.2d 101, 105-06 (D.C. Cir. 1987). According to the D.C. Circuit:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties of State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

Appalachian Power Co., 208 F.3d at 1021. Thus, NHTSA's 1998 letter constitutes agency action, whether or not it is a legislative rule.

Furthermore, the 1998 letter qualifies as *final* agency action because it "mark[s] the 'consummation' of the agency's decisionmaking process" and through the letter, "'rights and obligations have been determined,' or . . . 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). In the six years since the letter was first sent to manufacturers, NHTSA has not modified its position or initiated a formal rulemaking on the subject, and more than twenty regional recalls have been conducted by manufacturers pursuant to the letter's terms.

NHTSA's claim that the 1998 letter does not constitute final agency action is grounded in the agency's persistent, but incorrect, assumption that this case is about particular regional recalls. NHTSA complains that the 1998 letter, which was signed by Kenneth Weinstein, the Associate Administrator for Safety Assurance, cannot be final agency action because it is "only the ruling of a subordinate official." Def. MTD Mem. 33. The agency asserts that "the authority to make final decisions concerning alleged safety-related defects is reserved to the Administrator of NHTSA." *Id*. These statements miss the point. First, as already explained, the 1998 letter purports to govern all regional recalls conducted after its issuance. Furthermore, an agency action need not be executed by the head of an agency to be subject to challenge in the courts. Quite the opposite, "where the subordinate is the director of the relevant component unit of the administration, where no further action by the administrator is directly implicated, and where no further proceedings are noticed," final agency action exists. *National Resources Defense Counsel, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988); *see also Student Loan Marketing*

Ass'n v. Riley, 104 F.3d 397 (D.C. Cir. 1997); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

NHTSA relies on *Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 640 (6th Cir. 2004), for the proposition that the 1998 letter cannot qualify as final agency action because it was signed by the Associate Administrator for Safety Assurance. That case is inapposite. In *Air Brake*, the court was deciding whether an opinion letter issued by NHTSA's chief counsel qualified as final agency action. In concluding that it did not, the Sixth Circuit pointed out that the Chief Counsel was not charged with making the type of fact-bound determinations that were at issue in the letter and that the letter contained tentative conclusions based on untested factual submissions of the parties. In contrast, the 1998 letter expresses NHTSA's prospective requirements for all regional recalls, uses mandatory language, and is signed by the head of the relevant division of the agency.

Citing its 1998 letter to Ford as an illustration, NHTSA also claims that the 1998 letter cannot constitute final agency action because it does not make any determination about any particular recall, but only refers to the possibility of bringing future enforcement action against Ford to force the company to broaden the scope of a few regional recalls. Def. MTD Mem. 34. But this point severely undermines the agency's position. First, it shows that, indeed, the letter announces a generally applicable rule that goes beyond any particular recall. Indeed, NTHSA emphasized in the letter that further action by Ford was "required." Ditlow Decl., Exh. 11, at 3. Second, the fact that NHTSA raised the specter of bringing enforcement action if Ford failed to conform its conduct retroactively to the 1998 rule, *id*. at 5, shows that the agency intended its 1998 letter to establish requirements, not guidelines or suggestions.

E. NHTSA's 1998 Letter is Not an Exercise of "Enforcement Discretion" that is Exempt From APA Review.

Throughout its brief, NHTSA attempts to bring regional recalls under the ambit of *Heckler v. Chaney,* 470 U.S. 821 (1985), by mischaracterizing plaintiffs' claims as challenges to NHTSA's failure to take enforcement action regarding particular regional recalls. Again, it is NHTSA's legislative rule, as embodied in the agency's 1998 letter, that is the target of plaintiffs' complaint. The agency's rule is fully reviewable by this Court.

To begin with, whether the 1998 letter is denominated a "policy," as NHTSA describes it, Def. MTD Mem. 35, or a legislative rule, as plaintiffs view it, plaintiffs' challenge is appropriate for judicial review. As the D.C. Circuit has repeatedly held, although a specific *application* of enforcement discretion is not typically reviewable, "an agency's statement of general enforcement policy may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process or has otherwise articulated it in some form of universal policy statement." *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (citing *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993), and *National Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992)); *accord OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *see also International Union v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986) (*Heckler* does not preclude "challenge of an agency's announcement of its interpretation of a statute," even when interpretation is advanced in context of decision not to take enforcement action). Thus, this challenge to the 1998 letter—whether described as an enforcement policy or a rule—is reviewable.

As the above cases reflect, it is not enforcement discretion for an agency to *invite* companies to conduct unlawful regional recalls. "Enforcement discretion" refers to an agency's freedom to decide whether or not to take enforcement action in response to particular violations

of the statute that the agency is charged with implementing. *See Heckler*, 470 U.S. at 830. *Heckler*, for instance, involved the FDA's decision not to take enforcement action regarding states' use of certain drugs to carry out the death penalty. The Supreme Court explained that an agency's refusal to institute an enforcement action reflects a "complicated balancing of a number of factors [that] are peculiarly within its expertise," such as how to prioritize its resources and whether the agency would be likely to succeed if it acts. Such agency decisions are excepted from judicial review because they fall within the category of "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *see* 5 U.S.C. § 701(a)(2). For that reason, an agency's decision not to take enforcement action is presumptively unreviewable. *Heckler*, 470 U.S. at 832.

Here, NHTSA has not chosen to overlook a statutory violation in a particular case. Rather, it has adopted a generally applicable rule that invites and authorizes violations of the Safety Act. These circumstances are a far cry from *Heckler v. Chaney*. Unlike the situation in *Heckler*, there is surely "law to apply" here in considering whether the agency's action runs counter to the statute: namely, the procedures and standards set forth in the Safety Act and the agency's implementing regulations. Moreover, as discussed above, at page 37, unlike the typical exercise of enforcement discretion, the 1998 letter effectively ties the agency's hands in a legally binding way.

Because this case is about NHTSA's affirmative conduct in implementing a regulatory scheme, the agency's discussion of *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), is irrelevant. *See* Def. MTD Mem. 8-10. There, the plaintiffs sought to "compel agency action unlawfully withheld or unreasonably delayed," under the APA, 5 U.S.C. § 706(1).

124 S. Ct. at 2376. Plaintiffs claimed that, by not regulating off-road vehicle use, the Bureau of Land Management was failing to manage federal lands so as not to impair their suitability for preservation as wilderness, *id*. at 2380, and failing to comply with certain provisions in the agency's land use plans. *Id*. at 2381. The Court held that an agency's failure to act may be subject to judicial challenge, but that such a challenge is limited to the agency's failure to take "discrete agency action." *Id*. at 2378-79. Here, however, plaintiffs are not challenging NHTSA's "failure to act on manufacturers' regional recalls." Thus, the complaint does not ask this Court to compel NHTSA to take enforcement action against manufacturers for past regional recalls, or even to compel NHTSA to prosecute manufacturers for conducting future recalls. *See* Complaint, Relief Requested. Rather, plaintiffs seek a judicial order setting aside a discrete final agency action—NHTSA's 1998 letter—as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2).

CONCLUSION

For all the reasons stated above, NHTSA's motion to dismiss should be denied.

Respectfully Submitted,

/s/

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