ORAL ARGUMENT HELD ON 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

SUPPLEMENTAL BRIEF FOR APPELLANTS

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In an order dated December 13, 2005, this Court directed the parties to file supplemental briefs addressing "the nature and extent of the authority of the Associate Administrator for Safety Assurance at the National Highway Traffic Safety Administration at the time he issued the August 1998 letters to automobile manufacturers, including whether he had authority to issue policy guidance for the Administration." In its supplemental brief (at 1), NHTSA concedes that its Associate Administrator for Safety Assurance had authority in 1998 to issue policy guidance relating to the agency's enforcement program for vehicle safety. NHTSA's concession is correct and should remove any remaining doubt that the 1998 letters issued to auto manufacturers by Kenneth Weinstein, then-Associate Administrator for Safety Assurance, constituted final agency action reviewable under the Administrative Procedure Act ("APA").

In 1998, NHTSA's regulations described the Associate Administrator for Safety Assurance "[a]s the principal advisor to the Administrator on the enforcement of motor vehicle standards and regulations" who "directs and administers programs to ensure compliance with Federal laws, standards, and regulations relating to motor vehicle safety . . . ." 49 C.F.R. § 501.3(c)(3) (1998).[1] As NHTSA correctly notes, the Administrator delegated to the Associate Administrator for Safety Assurance broad authority to "[a]dminister[] the NHTSA enforcement program for all laws, standards, and regulations pertinent to vehicle safety . . . under 49 U.S.C. chapter[] 301." 49 C.F.R. § 501.8(g), *quoted in* Appellee Supp. Br. 2-3. The Administrator had authority to "[e]stablish[] NHTSA program *policies*, objectives, and priorities" for the agency, *see* 49 C.F.R. § 501.3(a)(1)(ii) (emphasis added), and "[e]xcept for those portions that have been reserved to the Administrator or delegated to the Chief Counsel," the Administrator delegated to

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[1] Unless otherwise noted, all references to the Code of Federal Regulations are to the 1998 version.

the Associate Administrator for Safety Assurance "authority to exercise the powers and perform the duties of the Administrator" with respect to NHTSA's enforcement program relating to vehicle safety. *Id.* § 501.8(g); *see also id.* § 501.5(b) ("officers of the NHTSA and their delegates are governed by . . . policies, objectives, plans, standards, procedures, and limitations as may be issued from time to time . . . with respect to matters under their jurisdiction, by or on behalf of the Associate Administrators . . . ."). The Administrator did *not* reserve to himself the authority to make policy for NHTSA regarding motor vehicle safety, *see id.* § 501.7(a), and did not delegate that policy-making authority to the Chief Counsel. *See id.* § 501.8(d). Therefore, in 1998, NHTSA regulations conferred on the Associate Administrator for Safety Assurance "full authority to run NHTSA's enforcement program on a day-to-day basis," Appellee Supp. Br. 3, which included the authority to establish policy.

Consistent with that broad delegation of power, Kenneth Weinstein, in his capacity as Associate Administrator for Safety Assurance, issued hundreds of documents that were published in the Federal Register. Among these have been policy statements, *see* 62 Fed. Reg. 37,115 (July 10, 1997) (civil penalty policy for small entities); final rules relating to importation of motor vehicles, *e.g.,* 64 Fed. Reg. 51,922 (Sept. 27, 1999); 63 Fed. Reg. 45,183 (Aug. 25, 1998); and notices of proposed rulemakings on a wide range of topics concerning motor vehicle safety, *e.g.,* 64 Fed. Reg. 27,227 (May 19, 1999) (defect and noncompliance notifications to dealers); 64 Fed. Reg. 16,690 (Apr. 6, 1999) (civil penalties). Previous holders of Weinstein's position likewise issued policy statements. *See* 56 Fed. Reg. 43,556 (Sept. 3, 1991) (enforcement policy issued by

Associate Administrator for Enforcement).[2]

Oddly, however, NHTSA evades the question whether Weinstein's 1998 letter announced (at least) a policy statement or policy guidance—even though it admits that Weinstein had the authority to do so. Yet, before oral argument, the agency had conceded the point repeatedly. The issue, as NHTSA presented it in this litigation, was whether the letters announced a policy statement or a legislative rule—*not* whether they announced a policy statement or nothing at all. *See, e.g.,* Appellee Br. 6 ("[T]he 1998 letters set forth the agency's regional recall policy . . . ."); *see also id.* at 12, 19-25, 37 n.24, 40; Appellee's Motion for Summary Affirmance 10-12.[3] Indeed, the 1998 letter itself purports to set forth **"NHTSA's Regional Recall Policy."** J.A. 80 (bold typeface in original).[4] In Weinstein's 2002 letter to the Center for Auto Safety, he again referred to NHTSA's "regional recall policy," which he acknowledged had been "established" in 1998. J.A. 221. An agency's adoption of a general enforcement policy is subject to review under the APA. *See, e.g., OSG Bulk Ships, Inc. v. United States,* 132 F.3d 808, 812 (D.C. Cir. 1998); *Crowley Caribbean Transp. Inc. v. Peña,* 37 F.3d 671, 676 (D.C. Cir. 1994). Furthermore, an

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[2] The scope of the Administrator's delegation of authority to the Associate Administrator for Enforcement in 1991 was not materially different from his delegation in 1998 to the Associate Administrator for Safety Assurance. *See* 49 C.F.R. § 501.8(g) (1991).

[3] NHTSA also expressly conceded in the district court that the letters were policy statements. *See* Defendant's Motion to Dismiss (R. 8) at 35 ("Furthermore, the letters are within an exception to the notice and comment requirements because they are policy statements."); *see generally id.* at 33-37; Defendant's Mem. in Opp'n to Pltfs. Motion for Summary Judgment (R. 10) at 15-18.

[4] The text of NHTSA's so-called "regional recall policy," set out in the generic version of the letter at J.A. 80-82, is the same as in the letters sent to the various auto manufacturers. *See, e.g.,* J.A. 142-44 (1998 letter to Ford); J.A. 149-51 (1998 letter to Chrysler). Unless otherwise indicated, citations to NHTSA's 1998 letter are to the generic version.

agency's issuance of a guideline or guidance may constitute final agency action. *See Barrick Goldstrike Mines, Inc. v. Browner,* 215 F.3d 45, 48 (D.C. Cir. 2000); *Better Gov't Ass'n v. Department of State,* 780 F.2d 86, 93 (D.C. Cir. 1986).

Treating the 1998 letters as final agency action is consistent with this Court's longstanding "flexible" and "pragmatic" approach to the APA's finality requirement, *Ciba-Geigy Corp. v. U.S. EPA,* 801 F.2d 430, 435 (D.C. Cir. 1986), and with the Court's treatment of letters, memoranda, and guidance documents issued by subordinate agency officials as final agency action. *See, e.g., Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1019-23 (D.C. Cir. 2000) (EPA "guidance" issued by two subordinate EPA officials was both final agency action and a de facto legislative rule); *Her Majesty the Queen v. U.S. EPA,* 912 F.2d 1525, 1531-32 (D.C. Cir. 1990) (letter by subordinate agency official represented final agency action regarding the EPA's interpretation of the statute); *Natural Res. Def. Council, Inc. v. Thomas,* 845 F.2d 1088, 1094 (D.C. Cir. 1988) (memorandum by subordinate agency official who was the director of the relevant agency component was final agency action); *Ciba-Geigy,* 801 F.2d at 437 (court had no reason to believe that the subordinate EPA official "lack[ed] authority to speak for EPA on this issue," and thus his letter to company was final agency action). In *Her Majesty,* the letter-writer was the "principal advisor to the [EPA] Administrator in matters" related to the subject of the letters, and the Court had "no reason to question his authority to speak for the EPA." 912 F.2d at 1532. So, too, here, Weinstein was the "principal advisor to the [NHTSA] Administrator on the enforcement of motor vehicle standards and regulations." 49 C.F.R. § 501.3(c)(3). Weinstein purported to speak for NHTSA, just as the subordinate official purported to speak for the EPA in *Her Majesty*. *See, e.g.,* J.A. 80 ("Since that time, NHTSA has considered the matter in depth and

has developed the following policy guidelines with respect to such 'regional recalls.'"). Moreover, when the Center for Auto Safety wrote to Dr. Jeffrey Runge, NHTSA's Administrator, to protest the 1998 letters, J.A. 216-19, it was not the *Administrator* who responded in 2002, but Kenneth Weinstein, J.A. 221-24—further reinforcing the fact that the Administrator had delegated the matter of regional recalls to Weinstein to address on the agency's behalf.

NHTSA insists, however (at Appellee Supp. Br. 1), that the Administrator's reservations of authority rendered the 1998 letters "purely hortatory, advisory, and non-binding." This characterization is belied both by the letter's text and the record. As briefed in detail and discussed at oral argument, NHTSA's letter announced a regulatory regime describing when the agency would approve regional recalls and establishing several requirements for automakers to follow once the agency authorized a regional recall. Equally significant, NHTSA violated the National Traffic and Motor Vehicle Safety Act ("Safety Act") by relieving manufacturers conducting approved regional recalls of their obligation to provide notice and a free remedy to "the owners, purchasers, and dealers of the vehicle or equipment" containing a safety-related defect. 49 U.S.C. § 30118(c). Weinstein's letter to the Center for Auto Safety in 2002 confirmed that his 1998 letters "set[] forth certain requirements that would apply to all future regional recalls," J.A. 221, and reiterated those requirements. J.A. 222-23. Not only do NHTSA's standards governing regional recalls come replete with mandatory language, but seven years' experience under the 1998 rule has demonstrated that NHTSA and the auto industry alike have treated the 1998 standards as binding in practice. To date, the agency has not cited a single example in the record in which an automaker refused to comply with the requirements in a regional recall initiated *after* NHTSA established the 1998 regulatory regime. Appellants, by

contrast, have cited numerous examples of automakers changing their practices in conducting regional recalls and explicitly acknowledging and obeying NHTSA's 1998 requirements. *See* Appellants Reply Br. 14 & n.4, 28-31 & n.7; Appellants Br. 58 & n.12, 60-61 & n.13. Thus, the 1998 letters did not announce merely a policy statement—which would be reviewable as final agency action in any event—but a de facto legislative rule.[5]

NHTSA argues (at Appellee Supp. Br. 3-4) that the 1998 standards are nonetheless non-binding and advisory because the Administrator reserved the authority to "[m]ake final decisions concerning alleged safety-related defects and noncompliances with Federal motor vehicle safety standards." 49 C.F.R. § 501.7(a)(2). The argument betrays a fundamental misconception regarding what is contested here. Appellants do not challenge any decision made by Weinstein (or any other official at NHTSA) regarding a particular regional recall. The part of the 1998 letters that follows the heading **"NHTSA Regional Recall Policy"** does not purport to make any final determinations regarding whether a safety-related defect exists in particular vehicles, but instead, announces standards to govern when and how regional recalls must be conducted in the future—just like any regulation published in the Code of Federal Regulations.

For that reason, NHTSA's reliance (at Appellee Supp. Br. 5) on *DRG Funding Corp. v. Secretary,* 76 F.3d 1212 (D.C. Cir. 1996), and *Reliable Automatic Sprinkler Co. v. Consumer*

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[5] At oral argument, NHTSA's counsel attempted to distinguish *Community Nutrition Institute v. Young,* 818 F.2d 943 (D.C. Cir. 1987) ("*CNI*"), by contending that the action levels the FDA announced there were more concrete or objective than the standards announced in NHTSA's 1998 letter. It is difficult to see how the FDA's final action levels in *CNI* were any more specific, concrete, or objective than, for example, NHTSA's 1998 command "that, at a minimum, vehicles originally sold in or currently registered in the [20 specified states and the District of Columbia] *must* be included in any regional recall related to corrosion caused by road salt." J.A. 81-82 (emphasis added).

Product Safety Commission, 324 F.3d 726 (D.C. Cir. 2003), is misplaced. Both cases involved premature APA actions brought by companies to challenge agency proceedings in pending adjudications regarding the companies' conduct. In *DRG,* this Court held that the company could not pursue an APA action challenging HUD's collection of a debt by administrative offset while the agency's ultimate action remained "contingen[t]," 76 F.3d at 1214, and because the administrative adjudicatory process had not ended. *Id.* at 1214-16. Similarly, in *Reliable,* the Court held that the manufacturer could not challenge a letter informing it of the agency's intention to make a preliminary determination that the manufacturer's sprinkler heads presented a substantial product hazard where the agency had "not yet made any determination or issued any order imposing any obligation on Reliable, denying any right of Reliable, or fixing any legal relationship." 324 F.3d at 732.

DRG and *Reliable* would have been relevant authority if, after receipt of NHTSA's 1998 letter, an automaker had decided to sue the agency under the APA for threatening in the 1998 letter (or some other letter) to take enforcement action against it because of deficiencies in specific regional recalls conducted by that automaker. In that situation, the automaker's challenge (like the companies' challenges in *DRG* and *Reliable*) would have been premature because it would have been filed before the agency actually took action against the automaker. It is the part of NHTSA's letter to auto manufacturers announcing the agency's general regional recall regulatory scheme that appellants attack here, not the agency's handling of particular regional recalls. That NHTSA, in the exercise of its discretion, could elect not to pursue further administrative proceedings against any automaker who violated its 1998 regional recall regime does not render that regime any more "contingen[t]," *DRG,* 76 F.3d at 1214, non-binding, or non-

final than the agency's decision not to take enforcement action if an automaker flouted a particular provision in 49 C.F.R. Parts 573 or 577 would render those requirements somehow contingent, non-binding, or non-final.

NHTSA's assertions (at Appellee Supp. Br. 4) that its 1998 letters cannot limit or "usurp" the Administrator's authority or discretion to make a final determination of whether a safety-related defect exists in particular vehicles and that such determinations are "fact-bound" under *United States v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975) ("*Wheels*"), are similarly off-base. All regional recalls to date have been initiated by manufacturers, not by NHTSA; thus, manufacturers have been deciding, under 49 U.S.C. § 30118(c), that a defect in particular vehicles is related to motor vehicle safety, but then artificially limiting, with NHTSA's blessing, the scope of the notice and free remedy guaranteed by the Safety Act to a subset of those vehicles. The problem here is that NHTSA's 1998 letters expressly authorized manufacturers to do what the Safety Act prohibits—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. An agency "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin Indus., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 134-35 (1990). NHTSA is also wrong to characterize the determinations manufacturers are making regarding which vehicles to include in regional recalls (at least with respect to corrosion-related recalls) as "fact-bound." Appellee Supp. Br. 4. The requirements set out in the agency's 1998 letter are prophylactic. For example, NHTSA listed the minimum "salt states" for automakers to include, and the automakers have followed that directive—regardless of the facts in particular cases. The agency candidly admitted as much in its 2002 letter to the

Center for Auto Safety:

> Moreover, with respect to those regional recalls that address defects related to corrosion due to exposure to road salts, to assure consistency, we have required all manufacturers to cover the same 'salt belt' (i.e., 20 Northeastern states plus the District of Columbia), regardless of whether, in any specific recall, the number of corrosion-related complaints is low in one or more of those states.

See J.A. 222.

Whether the 1998 letter announced a policy statement or a legislative rule is unimportant for purposes of assessing whether the agency action was final and reviewable under the APA. Nonetheless, there can be no doubt that NHTSA's 1998 so-called "regional recall policy" was in fact a legislative rule that required public notice and comment. In evaluating whether an agency pronouncement amounts to a legislative rule, the Court has downplayed the importance of whether the pronouncement enjoys the formal trappings of a regulation, such as publication in the Federal Register, and placed much more emphasis on whether the agency action "either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA,* 290 F.3d 377, 383 (D.C. Cir. 2002) (EPA guidance document was legislative rule that required notice and comment) (citation omitted); *Appalachian Power,* 208 F.3d at 1023-24 (same). NHTSA's 1998 letter purports to be and, in practice, has been, binding in both senses.

To be sure, as NHTSA points out (at Appellee Supp. Br. 3-4), the Administrator reserved to himself the authority to "[i]ssue, amend, or revoke final federal motor vehicle safety standards and regulations," 49 C.F.R. § 501.7(a)(1), but that reservation of authority only reinforces appellants' challenge. A legislative rule "refer[s] to rules the agency *should have,* but did not, promulgate through notice and comment rulemaking." *Appalachian Power,* 208 F.3d at 1020

n.11 (emphasis added). In announcing a regulatory scheme governing regional recalls without notice and comment and without pursuing the formal rulemaking procedure dictated by NHTSA's own regulations, the agency made an end-run around the legal process for issuing regulations. This Court has refused in the past to allow agencies to "to immuniz[e] [their] lawmaking from judicial review," *id.* at 1020, in this manner, and it should decline to permit NHTSA to do so here.

Dated: December 23, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 23rd day of December, 2005, she caused the service of the foregoing Supplemental Brief for Appellants to be made (1) by electronic transmission to Jane.Lyons@usdoj.gov by 4:00 p.m. (per agreement of counsel); and (2) by mailing two copies thereof by first-class U.S. mail, postage prepaid, to the following:

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