UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY, INC.,	)	
	)	
and	)	
	)	
PUBLIC CITIZEN, INC.,	)	
	)	
Plaintiffs,	)	Case No. 04-0392 (ESH)
	)	
v.	)	
	)	
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION	)	
	)	
	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 108(h), plaintiffs Center for Auto Safety and Public Citizen hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, Plaintiffs submit the accompanying (1) memorandum in support of Plaintiff's motion for summary judgment; (2) statement of material facts as to which there is no genuine dispute; and (3) declarations of Clarence Ditlow (with accompanying exhibits 1-25), Joan Claybrook, and Mary Ann Morgan; and a proposed order.

Respectfully submitted,

June 24, 2004

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

When a non-trivial number of vehicles of a particular make, model, or year suffer from a safety-related defect, the National Traffic and Motor Vehicle Safety Act (Safety Act) requires the National Highway Traffic Safety Administration (NHTSA) to assure that manufacturers provide notice of the defect and a free remedy to all owners of the affected vehicles nationwide, and to oversee the efficacy of the remedy program. However, since at least the mid-1980s, NHTSA has allowed manufacturers to limit sharply the geographic scope of certain vehicle recalls when the safety defect is triggered by climactic conditions more common in certain regions of the country.

In August 1998, NHTSA mailed a letter to auto manufacturers outlining the circumstances under which NHTSA would authorize automakers to conduct "regional recalls" and setting forth a list of rules governing them. The agency did not provide a notice-and-comment period before issuing these rules. If it had, it might have realized that despite its attempts to regularize regional recalls, the recalls would nonetheless continue arbitrarily to

exclude many unsafe, failure-prone vehicles. As NHTSA is aware, regional recalls fail to provide the consumer protections mandated by Congress in the Safety Act, leaving thousands of consumers without knowledge of dangerous safety defects in their vehicles and with no way to obtain a free remedy. For instance, consumers who live in states not covered by a regional recall but who drive frequently in covered states are excluded from the protections of the Safety Act, as are consumers who move into a covered state only after a regional recall begins. Furthermore, thousands of highway users who live in states with climates similar to covered states, but which are themselves excluded from the recall, are also at risk. Finally, even vehicle owners who NHTSA has determined are entitled to notice and a free remedy often are not actually given the notice and have no way of finding out that they are covered by the recall.

Plaintiffs seek summary judgment on three grounds: 1) that regional recalls violate the Safety Act; 2) that NHTSA has arbitrarily and capriciously allowed manufacturers to conduct regional recalls that threaten consumer safety; and 3) that even if regional recalls were legal under some circumstances, NHTSA was required to conduct notice-and-comment rulemaking before adopting a rule governing how they would be conducted.[1]

BACKGROUND

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 the vehicle contains a "defect" that is "related to motor vehicle safety."

[1] Plaintiffs have filed with this motion declarations establishing their standing to bring this lawsuit.

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). Manufacturers must remedy the defects in their vehicles at no charge to owners. 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." Ditlow Decl. ¶ 5.

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; s*ee* Ditlow Decl. ¶ 11 & Exh. 5 (Sample 573 Reports). The Safety 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. *United States v. General Motors Corp.*, 518 F.2d 420, 427 (D.C. Cir. 1977).

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[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).

When a safety defect is identified in a class of vehicles, 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. § 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 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). The regulations go so far as to mandate particular words and typefaces, designed to catch owners' attention, that must be included in the letter. 49 C.F.R. § 577.5(a). 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).

In addition to information about the defect and the recall, consumer notification letters contain information that may help reduce the risk that a defect poses to consumers, including an evaluation of the "risk to motor vehicle safety" caused by the defect, 49 U.S.C. § 30119(a)(2); 49 C.F.R. § 577.5(f), whether there are any "operating or other conditions that may cause the malfunction to occur," 49 C.F.R. § 577.5(e)(1)-(3), and a "statement of the precautions, if any, that the owners should take to reduce the chance that the malfunction will occur before the defect . . . is remedied." *Id.* § 577.5(e)(4). The manufacturer must also include contact information for NHTSA so that consumers can easily seek more information about their vehicles (or can complain to NHTSA). *Id.* § 577.5(g)(1)(vii).

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 are permitted to choose which

[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).

remedy to provide and can structure certain other aspects of the recall remedy plan around limiting factors, such as the availability of parts. For example, when a manufacturer must newly fabricate the parts needed to complete the repair, it might commence the recall in the region with the highest failure rate, and then expand the recall as more parts become available. *See, e.g.,* Ditlow Decl. ¶ 8 & Exh. 1. Manufacturers must describe remedy plans in "dealer bulletins" that inform dealers about defects, describe 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.

In addition to conducting the repair, dealers compile information for the manufacturers about how many consumers have sought the recall remedy at their shops. Manufacturers submit this information to NHTSA in quarterly reports for each of the six quarters following the commencement of the recall. 49 C.F.R. § 573.7(a). The reports show the total number of vehicles brought in to dealers, the number remedied, whether any of those vehicles were inspected and determined not to possess the defect, and how many consumers have not yet had their vehicles remedied. 49 C.F.R. § 573.7. These quarterly reports help NHTSA decide whether the rate of consumer participation in the recall campaign is too low, in which case the agency can require the manufacturer to issue one or more follow-up notifications to consumers. 49 C.F.R. § 577.10; *see also* 49 U.S.C. § 30119(e) (second notification).

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 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 implicit or explicit 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. *See, e.g.,* Ditlow Decl. ¶¶ 7-8.

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. *See, e.g.,* Ditlow Decl. ¶ 15 & Exh. 20.

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.

Moreover, at that time, NHTSA permitted manufacturers to conduct recalls in states largely of their own choosing, resulting in different recalls that corrected defects that manifested themselves under similar conditions, but which covered different states. For example, in 1993, General Motors ("GM") began a recall of 1991-1992 Chevrolet Caprice police cars to correct a corrosion-related defect that could result in "a disabled vehicle or vehicle fire." Ditlow Decl. Exh. 3 (NHTSA Recall No. 93V-018).[4] GM recalled the vehicles from 14 states. *Id*. In a 1995 corrosion-related recall, however, Nissan repaired 1989-1993 Maximas and 1990-1992 Stanzas in 20 states. *Id*. (NHTSA Recall No. 95V-244).

Although many regional recalls dealt with corrosion-related defects, manufacturers also initiated regional recalls to remedy defects that they claimed manifested themselves only when the vehicles were exposed to heat, cold, or snow. *See, e.g.,* Ditlow Decl. Exh. 3 (Recall Nos. 95V-231 (Ford), 97V-019 (Ford), 99V-309 (Ford)). Some of these recalls broke down the included region to specify not just particular states, but particular counties. *See*, *e.g., id*. (Recall No. 99V-309).

Regional recalls continued in this 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 including different states in recalls that supposedly applied to defects triggered by similar climactic conditions). Then, NHTSA sent to manufacturers a letter

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[4] Information about individual recalls is also available on NHTSA's website, http://www-odi.nhtsa.dot.gov/cars/problems/recalls/recallsearch.cfm, and can be accessed by entering either the recall number, or the year, make, model, and affected component of the recalled vehicle.

expressing concern about some 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." *See* Ditlow Decl. ¶ 13 & Exh. 10. The letter stated that NHTSA would be auditing all regional recalls.

B. NHTSA's 1998 Letter to Manufacturers

In 1998, NHTSA sent to manufacturers another letter setting forth what NHTSA termed its "Regional Recall Policy." *See* Ditlow Decl. ¶ 9 & Exh. 2 ("NHTSA 1998 Letter").[5] The 1998 Letter described two categories of weather-related defects: (1) those which 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 which 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" defects, NHTSA stated that they could be addressed through regional recalls and set forth specific requirements governing such recalls. *Id*. at 2-3.

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[5] NHTSA mailed slightly different versions of the letter to various manufacturers, *see, e.g.,* Ditlow Decl., Exhs. 10 & 11, and also provided CAS a generic version of the letter. Ditlow Decl. ¶¶ 9, 13. Unless otherwise noted, cites to the "1998 Letter" refers to the generic version of the letter, attached as Exhibit 2 to the Ditlow Declaration.

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 advance 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 imposed 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*.[6]

Third, NHTSA observed that many regional recalls had been prompted by corrosion 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.

NHTSA has permitted 21 regional recalls since its 1998 Letter, including two in 2003. *See* Ditlow Decl. ¶ 10 & Exhs. 3-4.

[6] In response to a Freedom of Information Act (FOIA) request by the Center for Auto Safety seeking copies of such follow-up notifications by manufacturers, NHTSA indicated that, as of August 2002, no such notifications had been sent. Ditlow Decl. ¶ 14 & Exh. 18. NHTSA's FOIA response stated that requests for follow-up notifications were not made until at least three years after the recall. However, by August 2002, nearly four years had elapsed since manufacturers began conducting recalls in compliance with the 1998 Letter.

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 were permitted by the Safety Act. Ditlow Decl. ¶ 23 & Exh. 23 ("CAS 2002 Letter"). CAS explained that when manufacturers conduct regional recalls they often draw illogical distinctions between included and excluded states. To illustrate this point, CAS cited two recalls. *Id.*, Exh. 23 at 1-2. In the first, Recall No. 99V-309, Ford recalled its 1995 Windstars to correct a defect that led to fuel tank cracks. The recall included Arizona and Texas, along with 10 other warm-weather states, but excluded neighboring New Mexico, parts of which experience higher average yearly high temperatures than cities in the included states. And although the southernmost ten counties in California were included, the recall excluded Death Valley, the hottest spot in the nation. *See* US Geological Survey *Death Valley's Incredible Weather* (2003), *at* http://wrgis.wr.usgs.gov/docs/usgsnps /deva/weather.html. In the second, Ford recalled 1992-1995 Tauruses and Mercury Sables, Recall No. 97V-019, to correct a defect that could result in ice and snow blockages in engine fans, potentially causing a fire. Ford recalled the cars from six snowy states, but excluded New York, although Buffalo receives an average of 91 inches of snow annually. *See* National Climactic Data Center, *Snowfall—Average Total In Inches*, *available at* http://lwf.ncdc.noaa.gov/ oa/climate/online/ccd/snowfall.html.

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. CAS specifically noted that NHTSA's complaint database contained reports of corrosion-related

failures from 30 consumers who were excluded from Recall No. 93V-106, including reports of two failures that resulted in crashes. Ditlow Decl., Exh. 23 at 2-3.

Citing NHTSA's 1998 letter, CAS also charged that the agency had disregarded its own regulation prohibiting "disclaimers" in consumer notices, 49 C.F.R. § 577.8, by informing manufacturers that the agency would approve consumer notices that included a statement that, in the case of short-term defects, the "defect is unlikely to cause a safety problem if the vehicle is not exposed to the meteorological condition at issue." Ditlow Decl., Exh. 23 at 1. Although CAS believed that NHTSA may have issued its 1998 letter for the laudable purpose of "limit[ing] some of the more egregious abuses" of the regional recall process, CAS criticized the letter for effecting a "secret rulemaking" without public notice and comment. *Id.*

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.

NHTSA's letter to CAS 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 the 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.

Finally, NHTSA sought to justify its decision to permit "disclaimer" language in consumer notifications relating to short-term exposure defects. It asserted that disclaimers were contemplated by 49 C.F.R. § 577.5(d), which allows manufacturers to inform consumers that "the defect . . . may not exist in each such vehicle" covered by the recall. *Id*. at 3.

On September 10, 2003, CAS sent another letter to NHTSA, this time drawing the agency's attention to 1,201 consumer complaints that had been reported to CAS. Ditlow Decl. ¶ 23 & Exh. 25. CAS described six of the complaints in detail. In two, the consumers had been excluded from regional recalls, but had experienced the safety problem caused by the defect. In the first, a Tennessee resident reported "the defective fuel tank in his 1995 Ford Windstar not being covered by Ford's geographic recall." Id. ¶ 23, Exhs. 3 (Recall No. 99V-309) & 25. In the second, a North Carolina resident who had experienced a windshield wiper failure while driving in North Carolina complained that "'Chevy Dealers refuse to help repair as a recall, because the

recall is limited to geographic regions, and closest state is our nearby neighbor West Virginia (where, of course, our NC residents naturally travel regularly during the winter for the sport of winter skiing).'" *Id*. (Recall No. 01V-068). NHTSA did not respond to CAS's September 2003 letter. *Id*.

ARGUMENT

I. THE SAFETY ACT REQUIRES MANUFACTURERS TO REMEDY ALL MOTOR VEHICLE DEFECTS NATIONWIDE, REGARDLESS OF GEOGRAPHY.

A. The Plain Language of the Safety Act Requires Manufacturers to Provide A Remedy to "Each Owner" of a Defective Vehicle.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Bullcreek v. Nuclear Regulatory Comm.*, 359 F.3d 536, 541 (D.C. Cir. 2004) (citations omitted). Here, the plain language of the Safety Act requires 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 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.

Despite the Safety Act's clear directive, NHTSA permits manufacturers to withhold notice of an acknowledged safety defect and the availability of a free remedy to consumers

whose vehicles are registered in states where the climate is less likely to trigger the defect. Ditlow Decl., Exh. 2 at 2; Ditlow Decl., Exh. 24 at 2. The Safety Act, however, imposes a categorical requirement that focuses on whether the vehicle contains the defect, not on how likely it is that the defect will manifest itself in any particular vehicle. In this way, the Act leaves no room for regional recalls. Rather, as soon as NHTSA finds or a manufacturer concedes the existence of a safety defect in a class of vehicles, the Safety Act requires the automaker to give notice and a recall remedy to "each" registered owner.

Invariably, regional recalls have been initiated by a manufacturer with the filing of a 573 Report that acknowledges a defect and proposes to restrict notice and the recall remedy to vehicles registered in certain states. *See supra* pp. 3, 7-8. A 573 Report is submitted by the manufacturer pursuant to 49 C.F.R. § 573.6, the regulation that governs manufacturer reporting requirements when the manufacturer discovers a defect in its vehicles. Thus, at the time a manufacturer initiates a regional recall, it has effectively admitted that the vehicles are defective and subject to the recall provisions of the Safety Act.

Moreover, the term "defect" refers broadly to vehicle characteristics in a way that is inconsistent with predicating a finding of a safety defect on a vehicle's state or county of registration or initial purchase. The Safety Act uses "defect" to refer to "*any* defect in performance, construction, a component, or material of a motor vehicle." 49 U.S.C. § 30102(a)(2) (emphasis added). *Cf., Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002) (definition of employee beginning "'[t]he term 'employee' shall include any employee' . . . reiterates the breadth of the ordinary dictionary definition") (citations omitted). The Act further provides that a determination of whether a defect is safety-related is based on the characteristics of the *vehicles* themselves (specifically, the "design, construction, or performance" of the

vehicles), 49 U.S.C. § 30102(8), rather than on where the vehicles are driven. *See also Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm.*, 824 F.2d 1071,1097 (D.C. Cir. 1987) (commission's discretion limited by list of factors to which Congress directed its consideration).

Furthermore, under the Safety Act, a vehicle is defective "if it is subject to a significant number of failures in normal operation . . . excluding failures attributable to normal deterioration of a component as a result of age and wear." *United States v. General Motors Corp*., 518 F.2d 420, 427 (D.C. Cir. 1975). A "significant" number of failures means "a non-de minimus number of failures," determined "in terms of the facts and circumstances of each particular case." *Id.* at 438 n.84. A defect is related to motor vehicle safety if "commonsense" indicates that it poses "an unreasonable risk of accidents" to consumers. *Id*. at 435. When a non-de minimus number of failures occurs "under conditions of operation that are within the manufacturer's specifications or departures therefrom that could not reasonably be deemed gross abuse, the manufacturer cannot avoid [a finding of a safety defect under the Safety Act] unless he contradicts or negatives this showing." *Id.* at 442.[7] Driving in the climactic conditions used to justify regional recalls—for example, snow or heat—is far from "gross abuse." Rather, that circumstance is easily foreseeable by manufacturers.

As noted above, the Safety Act provides two exceptions that may prevent manufacturers from being required to conduct recalls under certain circumstances. The Act excuses

[7] Accordingly, whether a defect is safety-related is determined by evaluating whether consumer safety would be compromised when the defect manifests, not by judging the probability that the defect will actually cause a particular safety-related problem. For example, in *United States v. Ford Motor Co.*, 453 F. Supp. 1240 (D.D.C. 1978), this Court found that since windshield wiper failure poses an unreasonable risk to visibility, the defect was safety related. *Id*. at 1250. It was sufficient that there were a "significant number of failures" of windshield wipers; the number of failures "need not be and normally will not be a substantial percentage of the total number of components produced." *Id*. at 1249.

manufacturers from remedying a vehicle that was first purchased "more than 10 calendar years . . . before notice is given" under the Safety Act. 49 U.S.C. § 30120(g). And manufacturers may petition for an "inconsequential" designation, a label applied to defects that do not affect safety. *See* 49 U.S.C. § 30120(h); 49 C.F.R. Part 556. NHTSA violates the Act by reading other "implicit" exceptions into it. *See Qi-Zhuo v. Meissner*, 70 F.3d. 136, 139 (D.C. Cir. 1995) (statute containing explicit exceptions should not be read to include other, non-explicit exceptions).

B. Regional Recalls are Inconsistent with the Purpose of the Safety Act.

Because regional recalls violate the plain language of the Safety Act, it is not necessary to consider other sources of statutory interpretation. *Consumer Product Safety Commission*, 447 U.S. at 108. Nonetheless, the Act's purpose and legislative history confirm the plain language. The purpose of the Safety Act could not be stated more clearly: "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. Consistent with the Safety Act's purpose, courts have consistently interpreted the law as a prophylactic one, 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); s*ee also United States v. Ford Motor Co.*, 574 F.2d 534, 539 (D.C. Cir. 1978) (purpose of Safety Act is to "protect the public against unreasonable risk of accidents"); *General Motors*, 518 F.2d at 431 (Safety Act "is designed specifically to warn a consumer *before an accident occurs*") (emphasis added) (quoting district court opinion).

As NHTSA expressly acknowledges, regional recalls will not reach all affected owners. *See* Ditlow Decl., Exh. 2 (NHTSA 1998 Letter stating that "manufacturers must assure that vehicles from outside the designated area that experience a problem due to the defect are taken

care of appropriately," and that "owners of vehicles that are not covered by the recall . . . that experience the problem in question are entitled to have the problem repaired at no charge"). Regional recalls undermine the purpose of the Act by permitting safety defects that may cause deaths and injuries to go unabated in many areas of the country.

The legislative history of the Safety Act confirms that Congress intended to impose a rigorous, mandatory procedure on manufacturers of defective vehicles. Congress was concerned about the huge number of annual traffic fatalities, and it believed that manufacturers would not protect motorists' safety on their own. *See* S. Rep. 89-1301, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709 (noting "automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection"). The Senate Commerce Committee report emphasizes Congress's intent to impose firm rules on the industry: "Deficiencies in past industry practices relating to the notification and curing of manufacturing defects necessitate the imposition of mandatory procedures to insure such notification of purchasers and correction of all safety-related defects." *Id*. Notably, the Committee also stated that the primary responsibility for vehicle safety should be vested in the federal government and not left to the states, *id*., and that the notice provisions of the Act were intended to "insure the *uniform* notification of car owners as to any safety-related defects and to facilitate the prompt curing of such defects." *Id*. at 2716 (emphasis added). This statement reflects, in part, Congress's effort to avoid a patchwork of standards that would result in vehicles deemed defective or noncompliant in one state but not another—precisely the result achieved by regional recalls.

Subsequent amendments to the Safety Act made safety recalls more inclusive and required that manufacturers give more information to NHTSA and consumers, not less. For

example, in 2000, Congress made vehicle safety recalls more rigorous by extending the period during which the free recall remedy is available from eight to ten years, 49 U.S.C. § 30120(g)(1), and providing for reimbursement of consumers who pay to have defects repaired before a recall is implemented. *Id*. § 30120(d). NHTSA's practice of allowing regional recalls defies Congress's consistent and recently reiterated preference for raising, not lowering, the bar for vehicle safety.

II. NHTSA'S RULE ALLOWING REGIONAL RECALLS IS ARBITRARY AND CAPRICIOUS.

The Administrative Procedure Act (APA) empowers courts to set aside agency actions that are arbitrary and capricious. 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, courts must invalidate agency action when the agency has failed to provide a reasoned explanation for its decision, when the agency has failed to rely on relevant factors or has relied on factors not contemplated by statute, or when the agency has made a clear error in judgment. *DIRECTV, Inc. v. Federal Communications Comm.*, 110 F.3d 816, 826 (D.C. Cir. 1997). Thus, in instituting its regional recall practices, NHTSA was required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (citations omitted). Here, even if the Safety Act permitted regional recalls under some circumstances, NHTSA could not allow such recalls because they are inherently arbitrary and capricious.

NHTSA's regional recall rule, set forth in its 1998 Letter, is arbitrary and capricious for at least three reasons: (1) it does not account for the mobility of vehicless; (2) it is based on factual premises that are contradicted by NHTSA's own information; and (3) even vehicles that are ostensibly included in the recall do not always receive the notice and free remedy to which

NHTSA agrees they are entitled. Moreover, these problems cannot be corrected by tweaking NHTSA's procedures. They are endemic to any rule that permits manufacturers to recall vehicles from some parts of the country while excluding others.

A. Regional Recalls Disregard the Mobility of Vehicles.

Perhaps the most irrational aspect of regional recalls is that they treat vehicles as though they remain, throughout their useful lives, in the same state in which they were originally sold. Thus, many consumers who spend significant amounts of time driving in states that are actually *included* in a regional recall never receive the notice or remedy. Three main categories of vehicles are excluded from regional recalls despite their long-term presence in an included state: (1) vehicles that travel to an included state on a regular basis but are registered in an excluded state; (2) vehicles that are first registered in a covered state only after a recall has commenced or are registered in a different state than the one in which they are kept; and (3) many secondhand vehicles. Thus, even if manufacturers could accurately predict the states in which vehicles could experience a problem associated with a safety defect, the mobility of vehicles would pose insurmountable obstacles to conducting an effective regional recall.

1. ***Interstate Travel.*** Many vehicle owners live in excluded states but travel to included states on a regular basis. For example, corrosion-related recalls that include all the states required by NHTSA in its 1998 Letter encompass vehicles registered in Maryland and the District of Columbia, but not Virginia. *See* Ditlow Decl., Exh. 2 at 3. As a result, the approximately 194,916 owners who live and register their vehicles in Northern Virginia, but drive to work in the District of Columbia or Maryland every day, will not receive notice of corrosion-related recalls. *See* George Mason University Center for Regional Analysis, *Commuting Trends and Patterns in the Washington Region* 4-9 (in 2000, approximately 195,000

workers commuted by automobile on a regular basis from Northern Virginia to the District of Columbia or Maryland for work), *available at* http://www.gmupolicy.net/cra/alerts.htm. Similarly, rental car companies allow drivers to pick up a vehicle in one state, drive to another state, and then either return to the first state or drop the vehicle off in another state, where it would remain until another renter drove it somewhere else. Furthermore, rental car companies sometimes sell their vehicles directly to consumers, who have no way to know where the vehicles have been. There are countless other common situations in which vehicle owners from one state might visit other states for extended periods of time. For instance, northeasterners who drive to Florida to spend the winter, college students who drive back and forth between school and home, and people who frequently drive to visit family members living in other states could all be adversely affected by NHTSA's rule permitting regional recalls.

Although NHTSA requires that excluded owners whose vehicles actually experience the problem be "taken care of appropriately," Ditlow Decl., Exh. 2 at 2—whatever that means—it imposes no obligations with respect to owners whose vehicles have not yet manifested the defect, even when owners frequently drive in included states in which the defect is supposedly more likely to manifest itself. By contrast, in a national recall required by the Safety Act, the Virginia driver would receive the same prophylactic notice and remedy as his District of Columbia neighbors (without his vehicle actually having to fail first).

2. ***Interstate Migration.*** Many drivers who move to (and register their vehicles in) an included state after a regional recall begins will almost certainly not receive the notice or remedy afforded by the recall. Although NHTSA recognizes that vehicle owners who move from one state to another pose significant problems for regional recalls, Ditlow Decl., Exh. 2 at 2, it has not implemented a meaningful solution that affords these owners the notice and remedy to which

they are entitled. *Cf.*, *Bangor Hydro-Electric v. FERC*, 78 F.3d 659, 664 (D.C. Cir. 1996) (agency's decision must be reasonably related to agency goals and information).

The impact of this problem on the feasibility and reasonableness of regional recalls can hardly be overstated, considering that over 22 million people changed their state of residence between 1995 and 2000 alone. *See* United States Census Bureau, *Domestic Migration Across Regions, Divisions, and States: 1995-2000*, 1 (Aug. 2003), *available at* http://www.census.gov/prod/2003pubs/censr-7.pdf. Approximately 11 million of these people moved to a state in a different region. *Id.* For example, between 1995 and 2000, 378,000 people moved between New York, a "salt state" and Florida, a "heat" state. United States Census Bureau, *State-to-State Migration Flows: 1995 to 2000*, at 2 (Aug. 2003), available at http://www.census.gov/prod/2003pubs/censr-8.pdf.[8]

Similarly, many states allow non-residents to maintain their vehicle registration in another state. For example, university students often maintain their registration in their parents' home state, and members of the military may maintain vehicle registrations in their home states, even when they are stationed elsewhere for years. *See, e.g.*, California Vehicle Code § 6701 (military personnel not required to obtain California vehicle registration while on active duty in state); NYS Department of Motor Vehicles Internet Office, *Definition of a Resident of NYS* (students attending college in New York normally not required to register their vehicles in the state), *available at* http://www.nysdmv.com/resident.htm. These owners will receive neither the

[8] In its 1998 Letter (at 2), NHTSA states that manufacturers are generally required to issue a follow-up notice two to three years after the initial notice to capture those owners who have moved into an included state during that time period. However, when CAS made a FOIA request for copies of follow-up notices in regional recalls that had been approved since the 1998 letter, NHTSA responded that no follow-up notices had yet been required. Ditlow Decl. ¶ 14 Exh. 18. Moreover, even if NHTSA enforced its rule requiring follow-up notifications, the rule by its own terms allows defects in vehicles that move to a covered state to go unchecked for up

consumer notice nor the free remedy, although they may actually drive their vehicles primarily in included states.

Put simply, it is a virtual certainty that regional recalls miss millions of owners who move with their vehicles from one region of the country to another every year, or whose state of registration does not reflect the state or county in which the vehicle is actually driven.

3. ***Multi-Owner Vehicles.*** Vehicles that have had more than one owner present another set of problems. NHTSA's 1998 letter requires manufacturers to give notice and a free remedy to owners who are registered in a covered state at the time the regional recall begins, and only "in some cases" to owners whose vehicles were "originally sold" in a covered state. Ditlow Decl., Exh. 2 at 2. This procedure sets up an unjustifiable dichotomy between buyers of new and used vehicles.

For example, if a consumer purchased a new 1995 Ford Windstar in New Mexico and then moved to Arizona in 1996, where he sold the Windstar to another consumer who moved back to New Mexico in 1998, the second owner would be excluded from Recall No. 98V-308 because neither the current state of registration (New Mexico) nor the state where the vehicle was originally sold (also New Mexico) were included in the recall. However, if a consumer purchased a new Windstar in Arizona in 1995, and then moved to New Mexico the following month, that consumer would receive notice of the recall, because the state of original purchase (Arizona) was included in the recall. The outcome in this example is particularly arbitrary because the Windstar in the first scenario was driven in the included state for much longer. Nowhere does NHTSA offer a justification for this disparate treatment. "[W]here an agency treats two similar situations differently without a reasoned explanation, its decision will be

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to three years and does nothing at all for owners who do not register their cars in the covered state or who move into the area after the follow-up notification has issued.

vacated as arbitrary and capricious." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815-16 (D.C. Cir. 1998); *see Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 172 (D.C. Cir. 1997).

B. NHTSA's Regional Recall Policy is Based on a Factual Premise That is Contradicted by the Agency's Own Records.

"Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard." *City of Kansas City v. HUD*, 923 F.2d 188, 194 (D.C. Cir. 1991) (citing *State Farm*, 463 U.S. at 43). At least two important aspects of NHTSA's regional recalls rule are contradicted by its own records: NHTSA's attempt to create a bright-line distinction between long-term and short-term exposure defects and its choice of states for inclusion in particular regional recalls.

1. NHTSA's Distinction Between "Long Term" and "Short Term" Exposure Defects is Unsupported by the Agency's Own Information and Prior Statements.

In its 1998 letter, NHTSA drew a bright-line distinction between long-term and short-term exposure defects, maintaining that it would approve regional recalls only for the former. This way, NHTSA claimed, consumers who traveled to another region on a trip or who encountered a "freakish weather condition[]" would be protected from defects that might materialize as a result. Ditlow Decl., Exh. 2 at 2. NHTSA's 2002 letter to CAS reiterated that, under the 1998 letter, defects that could cause a safety problem after a "short-term or single exposure to a meteorological condition (such as extreme cold or heavy snow)" were not eligible for regional recalls. *Id*., Exh. 24 at 2. However, contrary to NHTSA's premise, the distinction between long- and short-term exposure defects is not easily discerned and, the facts show, is difficult to apply rationally.

NHTSA's regional recalls list suggests that several regional recalls have addressed single or short-term exposure defects. Even after the 1998 letter, NHTSA continued to permit manufacturers to conduct regional recalls to address defects that are likely to manifest themselves following a single exposure to a particular weather condition, including heavy snow and cold. For example, in Recall No. 99V-131, Volkswagen indicated that a failure arising from the brake defect will occur "at temperatures below -4 F under certain driving conditions." *See* Ditlow Decl. ¶ 16 & Exh. 3. Thus, a single trip through New York or Illinois in February could be enough to cause a braking problem. Furthermore, NHTSA's consumer complaint database includes at least four complaints from excluded consumers who appear to have experienced poor braking performance as a result of this defect, including one consumer from Virginia who specifically referenced the recall and stated that none of the dealers in the area had the parts necessary to fix the defect. *Id*., Exh. 19. Similarly, Hyundai conducted a 2001 regional recall limited to 23 allegedly "cold" states to correct a throttle defect that could manifest itself "[w]hile driving . . . for an extended period of time during extremely cold ambient temperatures." Ditlow *Id*. at ¶ 16 & Exh. 3 (Recall No. 01V-346); *see also id.*, Exh. 3 (Recall No. 01V-068, a 2001 GM recall to correct windshield wiper defect triggered by a buildup of snow or ice).

Corrosion recalls also demonstrate the irrationality of NHTSA's distinction between long-term and short-term exposure defects. There is great variation as to how long vehicles can safely be exposed to corrosive materials. Various materials corrode at different rates and, more importantly, after differing degrees of exposure to salt, sand, grit, and other corrosive agents. Ditlow Decl. ¶ 17. In some vehicles, corrosion can be triggered by a winter holiday visit to a heavily-salted area. Moreover, the corrosion process does not stop when the vehicle returns to a

non-corrosive environment. *Id*. Accordingly, even corrosion-related regional recalls pose a threat to excluded consumers.

2. States are Selected for Inclusion in Regional Recalls Based on Arbitrary or Incomplete Criteria.

In its 1998 letter, NHTSA set forth a list of 20 states plus the District of Columbia that manufacturers must include in corrosion recalls. Ditlow Decl., Exh. 2 at 2-3. However, this list of "salt states" cannot be squared with the information upon which NHTSA relied in making the list. Furthermore, NHTSA does not have a principled basis on which to approve the scope of manufacturers' proposed regional recalls in non-corrosion cases. As a result, manufacturers have conducted regional recalls based on incomplete or nonsensical criteria.

As NHTSA noted in its 1998 letter, *id*., Exh. 2 at 2-3, pre-1998 corrosion recalls had included different groups of states selected by each manufacturer based on different criteria. Apparently hoping to bring some regularity to regional recalls, NHTSA established a list of 20 states, plus the District of Columbia, that manufacturers must include in corrosion-related regional recalls. NHTSA based its selection on a series of documents showing average salt use in various states and a spreadsheet showing the number of corrosion-related complaints that the agency received between 1993 and 1997. *Id*., ¶¶13, 20 & Exhs. 14-17. The documents also referred to a report compiled by the Transportation Research Board about highway deicing practices in various states. *Highway Deicing: Comparing Salt and Calcium Magnesium Acetate*, http://ntl.bts.gov/DOCS/HS-041_382/HS-041_382.htm (1998) ("Salt Report"). Neither the report nor NHTSA's own documents support the agency's choice of "salt states."

NHTSA's documentation reveals that of the 3,126 corrosion complaints that the agency received between 1993 and 1997, nearly one quarter, or 699, come from states that manufacturers are *not* required to include in corrosion recalls under NHTSA's rule. *See* Ditlow

Decl., Exh. 17 ("Corrosion Reports by State").[9] This fact alone renders NHTSA's policy arbitrary and capricious. NHTSA's Corrosion Spreadsheet gives each state a weighted value reflecting the seriousness of vehicle corrosion within the state by taking into account several factors (*e.g.*, the number of miles driven annually per registered motor vehicle, the number of miles of highway in the state, the number of miles driver per licensed driver, and the number of corrosion complaints reported to NHTSA) that bear on the relative amount of corrosion occurring within the state, with higher values indicating more corrosion. The values range from a low of zero in Wyoming (the *only* state showing no corrosion complaints) to 9.874 in New York, with an average score for all states of 1.198. Oddly, NHTSA selected Iowa, with a score of .088 (six corrosion reports), for inclusion in regional recalls, but neglected both California with a score of 3.281 (167 corrosion complaints), and Florida with 2.134 (115 corrosion complaints). *Id*. Thus, NHTSA did not select the states with the highest corrosion scores for inclusion in corrosion-related recalls, and therefore cannot justify its choice on that basis.

Moreover, NHTSA's regulations governing corrosion-related recalls cannot be justified by the relative salt usage in the included states. *See Id*. ¶ 20 & Exhs. 14-16 (Salt Use Tables). A partial list of states' average salt loads on highways where salt is normally applied reveals that excluded Virginia and California use three times more salt on some of their highways than included Missouri. *Id.*, Exh. 14. Further, NHTSA has selected for inclusion some states from

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[9] For example, Ford implemented Recall No. 01V-199 to correct a corrosion-related defect in the front coil springs. NHTSA's own complaint database contains several complaints from excluded consumers, such as "Noticed loss of steering. Vehicle towed to dealer. Dealer informed consumer that the problem was due to front coil spring failure." Office of Defects Investigation (ODI) Complaint No. 863118 (from Mallory Town, CA); "Right coil spring breakage for no apparent reason," ODI Complaint No. 751986 (from Havelock, NC); "consumer was traveling 75 MPH and front coil spring on driver's side punctured tire. Vehicle was kept in control. Ford dealer had heard nothing about this, and wouldn't stand behind problem," ODI Complaint No. 879576 (from Sioux Falls, SD). Ditlow Decl., Exh. 19.

low-salt-use regions (*e.g.*, Minnesota, Iowa, and Missouri), while excluding many other states from higher-use regions (*e.g.*, North Carolina, Virginia, and Tennessee). *Id*., Exh. 15.

Finally, the Transportation Research Board's Salt Report fails to justify NHTSA's choices. The Report shows that for each application of road salt, excluded California uses as much or more salt per lane-mile of highway in its mountainous region (500 pounds per lane-mile) as included Connecticut, Massachusetts, New Hampshire, Maryland, West Virginia, Ohio, Wisconsin, and Iowa. Salt Report at 22.

The arbitrariness of NHTSA's regional recall rules is further demonstrated by the states selected by manufacturers for inclusion in heat-related recalls. In one heat-related recall implemented to repair cracked fuel tanks in 1995 Ford Escorts, *see* Ditlow Decl., Exh. 3 (Recall No. 97V-144), NHTSA permitted the company to recall vehicles from 12 states—Alabama, Arkansas, California, Florida, Georgia, Hawaii, Louisiana, Mississippi, Nevada, Oklahoma, South Carolina, and Texas—that "experienced more than 2500 cooling degree days." *Id*., Exh. 11 at 5.[10] Ford's reason for selecting 2500 cooling degree days as its cut-off for inclusion in a recall is unclear, but NHTSA "[did] not dispute the use of this criterion." *Id*. NHTSA did not require Ford to expand the recall to additional states, despite nearly 30 complaints from excluded consumers in its complaint database as of July 10, 2002: *e.g.,* "Cracks have developed in fuel tank, resulting in an odor. Owner has contacted dealer about the fuel odor. A recall has been issued on vehicle, however this vehicle was not included due to VIN," Office of Defects Investigation Compliant No. 838775 (Baltimore, MD); "Fuel tank has cracks causing fuel to leak," ODI Complaint No. 843482 (Axton, VA); "Crack in fuel tank near heat shield attachment

[10] The number of cooling degree days reflects the cumulative number of degrees above 65 of each day's average temperature for a year.

resulting in fuel leaking from tank. We contacted Ford and were told this recall was regional due to climate," ODI Complaint No. 734462 (Blackstone, MA); "Fuel tank has a crack on the inside. There is gasoline leaking from underneath [] vehicle. Dealership is aware of problem," ODI Complaint No. 8012649 (Mt. Prospect, IL). *Id*., Exh. 19.[11]

Despite the obvious inadequacy of the 2500 cooling degree day criterion, one year later, when Ford instituted a recall to correct heat-related cracking fuel tanks in its 1995 Windstar vans, it *narrowed* the covered "heat" region even further. Instead of including all of California and Nevada, NHTSA permitted the automaker to include only the southernmost ten counties in California and only Clark County in Nevada. *Id*. at ¶ 19 & Exh. 3 (NHTSA, *Regional Recalls* (Recall No. 99-309)). This recall excluded Inyo County, California, which contains Death Valley, the hottest location in North America. *See* U.S. Geological Survey, *Death Valley's Incredible Weather* (2003), *available at* http://wrgis.wr.usgs.gov/docs/usgsnps /deva/weather.html. More significantly, Ford's list of included states clearly did not catch all Windstars in danger of experiencing a cracked fuel tank because NHTSA's own consumer complaint database includes more than 20 complaints from owners living outside the regional recall area who have had problems with cracks in their Windstars' gas tanks. *See* Ditlow Decl., Exh. 19.[12]

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[11] Because only a fraction of consumers who experience a problem with their vehicles report that problem to NHTSA, the agency is unlikely even to be aware of vehicle failures in excluded states until a significant amount of time has elapsed. *See* Department of Transportation, Office of the Inspector General, *Review of the Office of Defects Investigation*, viii (Jan. 3, 2002) (NHTSA's consumer complaint database contains less than 10% of the complaints that manufacturers receive), *available at* www.oig.dot.gov/item_details.php?item=662.

[12] Some of the more troubling consumer complaints include the following: "dealer refuses to take care of recall repairs because vehicle is not in recall region," Office of Defects Investigation (ODI) Compliant No. 857646 (Marion, IL); "Consumer was denied recall replacement due to the

In both of these heat recalls, Ford included Arizona and Texas, but excluded neighboring New Mexico, as well as North Carolina, Kansas, and Colorado. However, data from the National Oceanic and Atmospheric Administration (NOAA) shows that summers in these excluded states have been roughly as hot as in many of the included states over the past 30 years. For example, of all the locations in which the NOAA measured, the hottest normal daily maximum temperature in included Alabama was 92.7 degrees (Montgomery in July), and in included Hawaii was 88.9 degrees (Honolulu in July and August) (Alabama and Hawaii were included in both heat recalls). By comparison, the equivalent temperatures in excluded Colorado, New Mexico, North Carolina, Kansas, and Tennessee were, respectively, 92.1 degrees (Grand Junction in July), 94.8 degrees (Roswell in July), 89.9 degrees (Wilmington in July), 92.8 degrees (Dodge City in July), and 92.1 degrees (Memphis in July). *Normal Daily Maximum Temperature, Deg F*, *available at* http://www.ncdc.noaa.gov/oa/climate/online/ccd /maxtemp.html. Furthermore, in congressional hearings on Firestone tire failures, NHTSA identified Tennessee, also excluded, as a "warm-weather climate." *See* S. Rep. 106-423, at 2 (2000).

These recalls exemplify NHTSA's failure to justify its selection of states for inclusion in corrosion-related recalls and to require manufacturers to give a reasoned basis for selecting particular states before the agency approves a regional recall.

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location of residence," ODI Complaint No. 557863 (Ohio); "Vehicle was not included [in recall] due to VIN," ODI Complaint No. 891420 (Bloomington, California); "Fuel did leak out all over our garage, driveway, and my wife drove it with our two children for days without realizing the gas was leaking over the exhaust, tires, & brakes . . . there is already a recall for the exact problem, but my VIN number is not included," ODI Complaint No. 749470 (Salida, CA). Ditlow Decl., Exh. 19.

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

NHTSA's 1998 letter is vague about what manufacturers are required to do for consumers who are excluded from a recall, stating only that it expects that manufacturers will ensure that vehicles that manifest a problem are "taken care of appropriately." Ditlow Decl., Exh. 2 at 2. Not only does a policy of remedying vehicles only *after* they fail contravene the goals of the Safety Act and risk serious injury or death, *see supra* Part B, but NHTSA's directive to manufacturers to "take care of" vehicles that experience a defect-related problem is largely useless. First, because excluded consumers do not receive notice of the safety defect, they would have no reason to bring their vehicles to a dealer for a free repair instead of to a neighborhood mechanic, where many consumers go to save money on routine repairs. Second, even those consumers who happen to bring their affected vehicles to a dealer are not guaranteed a free remedy. Dealers usually learn whether particular vehicles are covered by any recalls either by entering each vehicle's VIN into a computer database or by referring to dealer bulletins. Ditlow Decl. ¶ 21. However, the VINs of excluded vehicles are unlikely to be included in the database, and manufacturers may tell dealers in excluded states that they are not responsible for repairing or covering the cost of repairing vehicles. *See, e.g.*, *id*., Exh. 21 at 2 (Dealer Bulletin for Recall No. 01V-068, stating "[a]ny dealer not receiving a computer listing [containing information about vehicles involved in the recall] with the campaign bulletin has no involved vehicles currently assigned").

This aspect of regional recalls is especially disturbing considering the large number of complaints from consumers who have been excluded from regional recalls. As discussed above, NHTSA's consumer complaint database contains numerous entries from out-of-region owners whose vehicles appear to have manifested a defect for which a manufacturer has conducted only

a regional recall. Although some of these complaints reflect knowledge of the recall (and frustration over the consumer's inability to obtain a free repair), most consumers appear to have no idea that the manufacturer already was aware of a defect in vehicles like theirs.

NHTSA's 1998 letter describes one manufacturer's response to this issue, which involves giving consumers a free remedy only after the dealer obtains approval from a regional office. Ditlow Decl., Exh. 2 at 2. NHTSA did not explain what criteria a manufacturer should use to decide whether to approve a free remedy. However, even if a manufacturer only verified that the consumer had the same problem that the recall was designed to remedy, this extra step would undoubtedly cause delay, requiring the consumer either to pay up front and wait for a possible reimbursement from the manufacturer or secure manufacturer approval before having the work done. Because a remedy is available only for vehicles that have *already* experienced a problem, this waiting period could also involve considerable expense in terms of paying for a rental car, taxi cabs, or other alternate transportation, as well as risk to the operator of the vehicle should the defect manifest itself while driving.

NHTSA's own attempt to convince CAS of the wisdom of regional recalls shows that its position is untenable. In its 2002 letter to CAS, NHTSA asserted that regional recalls pose no threat to consumer safety because if, after allowing the recall to proceed on a regional basis, NHTSA "become[s] aware of a significant number of failures outside of the covered region, [it] can open a recall query investigation to consider whether to compel the manufacturer to broaden the geographic coverage of the recall." Ditlow Decl., Exh. 24 at 2-3. Of course, if a significant number of vehicles that are affected by a known defect actually fail, the prophylactic, safety-enhancing purpose of the "Safety" Act has already been defeated.

III. NHTSA'S 1998 LETTER CONSTITUTES A LEGISLATIVE RULE ISSUED WITHOUT NOTICE-AND-COMMENT RULEMAKING IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

If this Court finds that regional recalls violate the Safety Act, or that regional recalls are conducted arbitrarily and capriciously, it need not decide whether NHTSA's 1998 letter constitutes a legislative rule. On the other hand, if this Court does not agree that regional recalls violate the Safety Act or that they are implemented in an arbitrary and capricious manner, it should find, at minimum, that the 1998 letter sets forth a legislative rule because it uses mandatory language, constrains NHTSA's own discretion, and places enforceable conditions on manufacturers. Because NHTSA issued this rule without notice-and-comment rulemaking, it violated the APA § 553.

Although NHTSA styles its 1998 letter as a "policy guideline," this designation cannot survive a close reading of the letter. To distinguish a policy statement from a legislative rule, courts have recognized that one must look behind the agency's label, to the actual effect of the statement. *General Motors v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (agency cannot escape notice and comment by calling a substantive, binding statement an interpretive rule). The D.C. Circuit has endorsed a two-part test to distinguish a "policy statement" from a legislative rule. *See American Bus. Ass'n*, 627 F.3d at 529; *Community Nutrition Inst.*, 818 F.2d at 946. The test looks 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." *Id*. On both counts, NHTSA's 1998 letter constitutes a legislative rule.

Whereas a legislative, or substantive, rule binds the regulated industry in the present, *Croplife America v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003), a policy guideline is "merely an

announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). This definition has two important components. First, a policy does not have the "force of law," so, for example, an agency cannot take enforcement action based solely on a failure to comply with the policy. *Id*.; *American Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). Second, a policy statement is prospective, telling the public and the regulated industry about the agency's intentions for the future, which are subject to change. *Panhandle Eastern Pipeline Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999).

By its own terms, NHTSA's 1998 letter is binding on vehicle manufacturers and cabins NHTSA's own discretion in approving recalls. The agency continually uses the terms "will" and "must" to describe manufacturers' obligations when conducting a regional recall. Ditlow Decl., Exh. 2 at 2 (*e.g.*, "manufacturer *will* be required to send a notification letter" and "the following states *must* be included in any regional recall related to corrosion") (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). An agency's use of "will" and "must" demonstrates that a statement, despite being dubbed a policy statement, is actually a legislative rule. *Community Nutrition Inst.*, 818 F.2d at 946.

In fact, even NHTSA recognizes that its 1998 letter imposed binding norms on manufacturers. In NHTSA's 2002 Letter to CAS, NHTSA stated that the 1998 letter "set[] forth

certain *requirements* that would apply to all future regional recalls." Ditlow Decl., Exh. 24 at 1 (emphasis added). For example, the letter states that "[f]or [short-term exposure defects] all owners throughout the country *must* be notified," that "owners . . . are *entitled* to have the problem repaired at no cost," that "we have *required* all manufacturers to cover the same 'salt belt,'" that "we *require* manufacturers to issue a supplemental defect notification," and that "manufacturers *must* recall vehicles that contain a defect that relates to motor vehicle safety." *Id*. at 2 (emphasis added). In effect, NHTSA tried to allay CAS's concerns about regional recalls by showing that they are conducted according to a rigorous procedure dictated and enforced by NHTSA.

Even if the 1998 letter is a policy statement, agencies may not amend or alter existing legislative rules with policy statements or interpretive rules without a notice-and-comment period. "Once an agency gives its regulation an interpretation, it can only change that regulation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). As the D.C. Circuit has explained, if agencies could change their prior legislative rules while avoiding the perceived hassle of a rulemaking, it is likely that no agency would ever conduct another one. *Appalachian Power Co.*, 208 F.3d at 1020.

As described above, under the 1998 letter, NHTSA may permit consumer notifications for recalls of vehicles with short-term exposure defects to state that the "defect is unlikely to cause a safety problem if the vehicle is not exposed to the meteorological condition at issue." Ditlow Decl., Exh. 2 at 1. This statement is incompatible with 49 C.F.R. § 577.8, which prohibits manufacturers from including "disclaimers" in their owner notification letters. In its 2002 Letter to CAS, *see* Ditlow Decl., Exh. 24 at 3, NHTSA contended that such disclaimers

were permitted by 49 C.F.R. § 577.5(d). However, that regulation states only that "[w]hen a manufacturer determines that the defect or noncompliance may not exist in such vehicle . . . he may include an additional statement to that effect" in the consumer notification. The regulation allows manufacturers to explain that, for example, only a particular batch of components is defective, but that the manufacturer cannot determine whether a particular vehicle contains one of the defective parts until it is inspected by a dealer. The provision does *not* permit manufacturers to tell consumers that although every vehicle is defective, the defect is somehow unimportant in some vehicles. By significantly broadening the provision to include a whole new class of statements, NHTSA has changed its regulation by means of its 1998 letter.

Similarly, by imposing a list of states that manufacturers are required to include in corrosion-related recalls and ruling out short-term exposure defects as candidates for regional recalls, NHTSA dramatically altered its then-existing regional recall scheme. Whereas, up until 1998, NHTSA approved particular defects and manufacturers' proposed list of included states on a case-by-case basis, the 1998 letter changed that policy to eliminate much of the agency's discretion, without allowing a chance for advocacy groups or manufacturers to comment. *See Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035-36 (D.C. Cir. 1998) (FAA required to conduct notice-and-comment rulemaking before changing policy to subject guide pilots to commercial aviation regulations). This change "in effect amended [NHTSA's] rule, something it may not accomplish without notice-and-comment." *Id.* at 1034.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court (1) declare that regional recalls violate the Safety Act, are conducted in an arbitrary and capricious fashion, and

are conducted pursuant to a *de facto* legislative rule announced without public notice and comment; and (2) enjoin NHTSA from conducting or authorizing any future regional recalls.

Respectfully Submitted,

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