No. 24-60013

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL AUTOMOBILE DEALERS ASSOCIATION;
TEXAS AUTOMOBILE DEALERS ASSOCIATION,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of a Final Trade Regulation Rule
of the Federal Trade Commission

PETITIONERS' OPENING BRIEF

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March 15, 2024

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CERTIFICATE OF INTERESTED PERSONS

1. No. 24-60013, *Nat'l Automobile Dealers Ass'n v. FTC*

2. The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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[1] NADA has no parent corporation, and no corporation owns 10% or more of its stock.
[2] TADA has no parent corporation, and no corporation owns 10% or more of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist this Court. This case presents several important issues bearing on the procedural and substantive validity of a significant Federal Trade Commission rule that would regulate tens of thousands of businesses across the country.

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INTRODUCTION

American automobile dealerships employ more than a million workers and sell more than 40 million new and used vehicles per year. These dealerships must comply with several overlapping federal and state regulatory regimes that comprehensively regulate dealers' advertising, pricing, financing, disclosures, fees, recordkeeping, and more. But that was not enough for the Federal Trade Commission, which recently finalized an additional trade regulation rule addressing purportedly unfair and deceptive acts by auto dealers. The so-called "CARS" Rule adds a new regulatory overlay that will impose significant compliance costs on auto dealers—and confuse and frustrate customers—by injecting new disclosures, paperwork, and recordkeeping requirements into the already lengthy and paperwork-intensive process of purchasing and financing a vehicle.

The Rule: (1) prohibits 16 redundant or poorly defined categories of already-unlawful misrepresentations; (2) imposes several new affirmative disclosure requirements; (3) imposes various complicated requirements governing charges for "add-ons" and other products and services; and (4) imposes significant new recordkeeping requirements. These requirements would overhaul and limit the way dealerships communicate with their customers and add time and complexity to *every stage* of motor vehicle transactions—from advertising a vehicle, to negotiating a final price, selling the vehicle, financing it, and protecting the customer's investment.

In promulgating the Rule, the FTC flouted both its own procedural regulations and the Administrative Procedure Act's mandate of reasoned decisionmaking. The FTC

unlawfully promulgated the Rule by issuing its Notice of Proposed Rulemaking without the advance notice expressly required by its own regulations. *See* 16 C.F.R. §1.10. And it acted arbitrarily and capriciously by failing to adequately substantiate the Rule's benefits and costs or rationally connect the evidence before it to its decision to impose a convoluted, far-reaching, industry-wide rule.

The rulemaking record was wholly devoid of any evidence showing an industry-wide *problem* that would justify creating a burdensome and intrusive new industry-wide regulatory regime. To the contrary, the FTC mostly invoked outdated, irrelevant, or unverified data, plus a handful of past enforcement actions. There was no finding whatsoever that the new rules would have *prevented* any of the claimed misconduct, or that preexisting federal and state laws were inadequate to protect consumers from any bad actors. And the agency's cost-benefit analysis was based primarily on *ipse dixit* and facially implausible assumptions about how the Rule will affect the car-buying process.

Because of these defects that pervade the rulemaking, this Court should set the Rule aside under 5 U.S.C. §706(2). In the alternative, the Court should remand the Rule to the FTC for consideration of additional evidence under 15 U.S.C. §57a(e)(2).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 15 U.S.C. §57a(e)(1)(A), which permits any interested person to petition for review directly in a Court of Appeals to challenge an FTC rule defining unfair or deceptive acts or practices. The Rule was announced on December 12, 2023 and published in the Federal Register on January 4, 2024. *Combating*

Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590. Petitioners—the National Automobile Dealers Association and Texas Automobile Dealers Association—filed this petition for review on January 4, 2024, within the 60-day deadline prescribed by §57a(e)(1)(A).

Petitioners have standing to file this petition. Both have members directly regulated by the Rule; the issues here are germane to Petitioners' purpose of representing auto dealers' business interests; and no individual member's participation is necessary to resolve the legal claims in this petition. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006).

Venue is proper in this Circuit because TADA has its principal place of business in Austin, Texas. 15 U.S.C. §57a(e)(1)(A).

STATEMENT OF THE ISSUES

I. Should the Rule be set aside because the FTC did not follow its own regulations—in particular, the advance notice requirement in 16 C.F.R. §1.10—in promulgating the Rule?

II. Should the Rule be set aside as arbitrary and capricious because the FTC failed to rationally explain or substantiate the need for the Rule?

III. Should the Rule be set aside as arbitrary and capricious because the FTC unreasonably assessed its costs and benefits?

IV. Alternatively, should the Rule be remanded to the FTC under 15 U.S.C. §57a(e)(2) for consideration of additional evidence?

STATEMENT OF THE CASE

I. Auto dealers are comprehensively regulated by both federal and state laws and are overwhelmingly compliant.

American automobile dealerships sell more than 40 million new and used vehicles every year. These transactions support an industry that operates tens of thousands of dealerships and employs more than a million Americans.

Every stage of these transactions is already heavily regulated by overlapping regimes of federal and state regulation. Among other laws, dealers' sales and financing activities must comply with obligations under the FTC Act, *see* 15 U.S.C. §45; Fair Credit Reporting Act, *see* 16 C.F.R. ch. I, subch. F; Gramm-Leach-Bliley Act, *see id.* ch. I, subch. C, pts. 313-314; Truth in Lending Act, *see* 12 C.F.R. §1026.18; Consumer Leasing Act, *see id.* §213.4; and Equal Credit Opportunity Act, *see id.* §§202.5-12; not to mention consumer protection statutes that exist in every state and prohibit unfair or deceptive trade practices. These laws govern every stage of a motor vehicle transaction, from advertising a vehicle, to negotiating a final price, selling the vehicle, financing it, and protecting the customer's investment with service contracts, insurance, or other protection products.

Data from the rulemaking record, including data gathered by the FTC itself, indicate overwhelming industry regulatory compliance and customer satisfaction. For example, an FTC "compliance sweep" of auto dealers' compliance with one FTC rule found "broad compliance" in the industry, and the FTC's extensive Consumer Sentinel database contains complaints regarding far less than 1% of automobile purchases.

Comment Submitted by Nat'l Automobile Dealers Ass'n at 10 n.38, 49 (Sept. 12, 2022), Admin. Dkt. 145 (NADA Comment), https://perma.cc/BK3E-E6C3. Additionally, studies by renowned market research firms like J.D. Power and Cox Automotive have consistently shown widespread consumer satisfaction with automobile dealerships. *Id.* at 14-18.

Market research also shows that customer satisfaction with auto dealers has improved in recent years. *See* Cox Automotive, *2022 Car Buyer Journey* at 5 (Jan. 2023), Admin. Dkt. 273, https://perma.cc/2R5F-ADVG; NADA Comment at 17. For example, between 2012 and 2021, auto dealers improved from 664 to 789 points on J.D. Power's 1000-point Sales Satisfaction Index. NADA Comment at 17. This increase reflects dealers' successful efforts to improve the car-buying experience by streamlining many of the time- and paperwork-intensive steps in the vehicle shopping process with online shopping and other innovative sales technologies. *See* Cox Automotive, *Digitization of End-to-End Retail* at 4-5, 7 (2021), Admin. Dkt. 242, https://perma.cc/EU7T-EEXD.

II. In 2010, Dodd-Frank streamlines the *statutory* procedural requirements for auto dealer trade regulation rules, but the FTC's separate *regulatory* procedural requirements remain in place.

Section 5 of the FTC Act has long prohibited "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(1). The FTC may bring enforcement proceedings against entities engaged in such unfair trade practices. *Id.* §45(b). Under Section 18 of the Act, the agency also has authority to promulgate "rules which define

with specificity acts or practices which are unfair or deceptive … within the meaning of §45(a)(1)." *Id.* §57a(a)(1)(B).[1] Such rules are known as "trade regulation rules." 16 C.F.R. §1.7.

In the FTC Improvements Act of 1980, Congress amended the FTC Act to require the Commission, among other procedural safeguards, to begin the rulemaking process with an advance notice of proposed rulemaking (ANPRM) when it promulgates trade regulation rules. *See* Pub. L. 96-252, §8, 94 Stat. 374, 376. Section 18(b) provides that "[w]hen prescribing a rule under subsection (a)(1)(B) of this section," "[p]rior to the publication of any notice of proposed rulemaking … the Commission shall publish an advance notice of proposed rulemaking in the Federal Register." 15 U.S.C. §57a(b)(1)-(2)(A).

In the Dodd-Frank Act of 2010, Congress exempted auto dealerships from the reach of the newly formed Consumer Financial Protection Bureau. *See* Pub. L. 111-203, §1029, 124 Stat. 1376, 2004-05 (codified at 12 U.S.C. §5519). But, at the same time, it relaxed some of the statutory procedural requirements that the FTC must follow when promulgating trade regulation rules regulating auto dealers. Specifically, Congress provided that "[n]otwithstanding section 57a of Title 15, the Federal Trade Commission is authorized to prescribe rules under sections 45 and 57a(a)(1)(B) of Title 15[,] in

[1] Congress added the provision now codified at 15 U.S.C. §57a(a)(1)(B) in 1975 as Section 18(a)(1)(B) of the FTC Act. *See* FTC Improvements Act of 1975, Pub. L. 93-637, §202(a), 88 Stat. 2183, 2193. Many sources continue to refer to this provision as "Section 18(a)(1)(B)."

accordance with section 553 of Title 5, with respect to [auto dealers]." 12 U.S.C. §5519(d). Thus, when promulgating trade regulation rules for auto dealers, the FTC would no longer be bound by the *statutory* procedural requirements in 15 U.S.C. §57a(b), including that subsection's ANPRM requirement.

But Dodd-Frank did not abrogate or modify any of the FTC's self-imposed procedural regulations, nor has the agency subsequently adopted any carve-outs for rulemakings regarding auto dealers. The FTC's Part 1, Subpart B regulations (16 C.F.R. §§1.7-1.20) prescribe a set of "rules" which "apply to and govern proceedings for the promulgation of rules as provided in … 15 U.S.C. 57a(a)(1)(B)." 16 C.F.R. §1.7. One of those requirements is that "[p]rior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding." *Id.* §1.10(a). The notice must contain a "brief description" of the FTC's proposal, objectives, and possible alternatives, it must "[i]nvite the response of interested persons," and it must be submitted to designated committees in the U.S. Senate and House of Representatives. *Id.* §1.10(b)-(c).

Notably, the FTC recently made substantial revisions to its Subpart B regulations to "modernize procedures for rulemakings to define unfair or deceptive acts or practices" and "provide for more efficient conduct of rulemaking proceedings." *Revisions to Rules of Practice*, 86 Fed. Reg. 38,542, 38,543 (July 22, 2021). The FTC made major changes to four regulations in Subpart B, including repealing certain procedures not "statutorily required" and dropping other provisions that it deemed "unnecessary." *Id.*

at 38,544. It also specifically considered whether to amend or repeal §1.10 and decided not to, instead making only minor revisions. *See id.* at 38,547-48. Even as it comprehensively reconsidered the procedural rules in Subpart B, the FTC neither proposed nor adopted any carve-out from §1.10 for trade regulation rulemaking proceedings regarding automobile dealerships.

The upshot is that although Dodd-Frank exempted the FTC from §57a(b)'s statutory ANPRM requirement for trade regulation rules involving auto dealers, the distinct ANPRM requirement in §1.10 of the FTC's regulations remains in force and applies by its terms to "any trade regulation rule proceeding." Despite comprehensively reconsidering its procedural regulations in 2021 and dispensing with other Subpart B rules that are "unnecessary" or otherwise not "statutorily required," 86 Fed. Reg. at 38,544, the FTC has not eliminated or modified any of these requirements for rules regulating automobile dealers.

III. The FTC sits on its hands for a decade then launches this rulemaking in 2022 with no advance notice to the industry.

A. The FTC responded to Dodd-Frank in 2011 by hosting a series of "motor vehicle roundtables" to determine "what consumer protection issues, if any, exist that could be addressed through a possible rulemaking or other initiatives." 76 Fed. Reg. 14,014, 14,015 (Mar. 15, 2011). The FTC specifically asked participants whether there was any "data and empirical evidence" showing widespread unfair or deceptive "practices in the industry as a whole or in any subset of the industry." *Id.* at 14,015. Despite

generating over 21 hours of testimony, 500 pages of written transcripts, and 100 supplemental comments, the roundtables did not yield any credible data suggesting deceptive or unfair trade practices were prevalent in the marketplace.

B. In 2022, after more than a decade of inaction—and with no advance notice to the industry—the FTC issued a sweeping notice of proposed rulemaking that would overhaul how auto dealers advertise to, and communicate and interact with, potential customers. *See Motor Vehicle Dealers Trade Regulation Rule*, 87 Fed. Reg. 42,012 (July 13, 2022). Despite soliciting stakeholder feedback on an open-ended set of 49 questions attached to its NPRM, *id.* at 42,028-31, the FTC failed, without explanation, to start the rulemaking process with an ANPRM as required by §1.10.

Under the proposed rule, virtually all written communications and many oral communications between dealership employees and potential customers concerning the sale, financing, or leasing of a vehicle would be directly regulated by the FTC. Such regulation would take the form of broad and vaguely worded prohibitions on express or implied misrepresentations or omissions (proposed 16 C.F.R. §463.3) and new affirmative disclosure and recordkeeping requirements (proposed §§463.4-463.6).

Many of the proposed new mandatory disclosures were confusing and potentially misleading—such as an "offering price" that would typically exceed the actual vehicle price to be paid by the customer after negotiation, rebates, and discounts. Under the proposed rule, dealership employees would be required to calculate and disclose a defined "offering price" to customers in their first communication about any specific

vehicle. 87 Fed. Reg. at 42,022-23. Thus, if a customer visits a lot and in their first inquiry about a specific vehicle asks about some characteristic of that vehicle—say, fuel economy or towing capacity—a dealership employee cannot answer that question without confirming and stating the "offering price," injecting an unasked-for discussion of the vehicle's price into the conversation before answering the customer's seemingly straightforward question.

Other provisions of the proposed rule were duplicative of existing regulations, such as a payment-total disclosure requirement that substantially overlaps with (but differs from) disclosures already required by the Truth in Lending and Consumer Leasing Acts. *See* 12 C.F.R. §1026.18 (lending); *id.* §213.4 (leasing). The proposal further added onerous new paperwork requirements and significant new recordkeeping obligations (proposed §§463.5 and 463.6).

The FTC also emphasized that another goal of the proposed rule was to allow the Commission to seek civil penalties in enforcement actions against auto dealers, which are authorized only for violations of trade regulation rules. *See* 87 Fed. Reg. at 42,013 (noting the proposed rule "would allow the FTC to seek redress for harmed consumers and obtain other forms of monetary relief in cases involving FTC Act violations"); *see also id.* at 42,047 (statement of Comm'rs Khan, Phillips, Slaughter, and Bedoya); 15 U.S.C. §45(m)(1) (FTC may seek civil penalties for violations of trade regulation rules).

Commissioner Wilson dissented from the NPRM, expressing concern that the FTC's proposal, if finalized, would "create market distortions that stifle innovation, increase costs and prices, and ultimately harm consumers." 87 Fed. Reg. at 42,047 (dissenting statement). Specifically, she predicted that "requir[ing] numerous disclosures related to offering price, add-ons, and monthly financing" would create "unintended but negative consequences." *Id.* at 42,048. She also noted that "the motor vehicle industry has benefitted from innovation in all areas," including that "consumer car shopping has moved online with services that assist consumers in price negotiation and location of desired vehicles." *Id.* She concluded that the FTC's proposal failed to account for this "market dynamism" and could thus lead to "ossification" of inefficient or outdated sales models. *Id.*

C. The FTC provided a mere 60 days for comment on the proposed rule (including its 49 open-ended questions about the industry, the automotive retail market, and the proposal's likely effects). 87 Fed. Reg. at 42,027. Multiple organizations requested an extension to allow for the preparation and submission of quantitative data on the rule's likely effects. *E.g.*, NADA Comment attach. 3; Comment Submitted by Nat'l Indep. Automobile Dealers Ass'n at 1 (July 21, 2022), Admin. Dkt. 145, https://perma.cc/MM6L-ZZDJ. NADA, for example, commissioned a study by the Center for Automotive Research, an independent third-party research organization, regarding the proposed rule's implementation costs and purported benefits, but this

research could not be completed within the short time allotted for comment. The FTC declined to extend the comment period, which closed on September 12, 2022.

Even so, numerous organizations and dealers submitted comments highlighting pervasive flaws in the proposed rule. Many commenters pointed out that the proposed rule was premised largely on anecdotes, unverified consumer complaints, and a handful of FTC enforcement actions—and included no quantitative evidence suggesting that the conduct targeted by the proposed rule was widespread in the marketplace. For example, the U.S. Small Business Administration's Office of Advocacy "encourage[d] the FTC to determine if there is a way to target the bad actors rather than this rulemaking which targets an entire industry for behavior that impacts less than one percent of the market." Comment Submitted by SBA Off. of Advocacy at 7 (Sept. 8, 2022), Admin. Dkt. 145 (SBA Comment), https://perma.cc/A2F7-Y7SB.

Commenters also explained that the proposed rule would confuse customers, increase prices, and add significant time and complexity to the already time- and paperwork-intensive process of purchasing a vehicle. And the FTC's estimate as to the benefit of this regulatory regime was simply pulled from thin air. The FTC assumed, with no evidence whatsoever, that the rule would make vehicle shopping 20% more efficient, and then used that *ipse dixit* to "quantify" the rule's purported benefits. 87 Fed. Reg. at 42,037 & n.180.

IV. The FTC finalizes the Rule.

Despite its refusal to extend the comment period, the FTC sat on the proposed rule for an additional 15 months. On December 12, 2023, the FTC—now with just three Commissioners—announced a final rule that modified its proposal in some respects but failed to address critical defects identified by stakeholders' comments. 89 Fed. Reg. at 590. Of note, the FTC still failed to provide any reliable data showing the conduct targeted by the Rule was widespread in the market or was not adequately regulated by preexisting state and federal laws.

The final rule removed some of the proposal's most burdensome disclosure requirements, but left multiple other affirmative disclosure requirements in place. *See id.* at 601. In its final cost-benefit analysis, the FTC no longer relied exclusively on the made-up 20%-efficiency assumption from the NPRM. But it supplemented that assumption with another equally baseless assumption: that its rule would increase efficiency by making in-person car shopping comparably efficient to online car shopping. *Id.* at 676-78.

The FTC set the Rule's effective date as July 30, 2024. *Id.* at 660.

V. The FTC stays the Rule in response to this petition.

NADA and TADA filed this petition for review on January 4, 2024. On January 8th, Petitioners moved this Court to stay the Rule's effective date pending judicial review. Petitioners explained that, unless stayed, the Rule would irreparably injure

Petitioners' members by requiring them to incur substantial unrecoverable compliance costs well in advance of the July 30 effective date. ECF No. 7.

On January 18th, the FTC responded to Petitioners' stay motion by itself staying the effective date of the Rule pending the completion of judicial review. *See* ECF No. 27 at 10 ("Balancing the equities here, the Commission has determined that it is in the interests of justice to stay the effective date of the Rule to allow for judicial review.").

SUMMARY OF ARGUMENT

I. The FTC flouted its own regulations by promulgating the Rule without an advance notice of proposed rulemaking. 16 C.F.R. §1.10(a) unambiguously requires the FTC to begin "any trade regulation rule proceeding" with an "advance notice of such proposed proceeding." This is unquestionably a trade regulation rule proceeding. *E.g.*, 89 Fed. Reg. at 590 ("Combating Auto Retail Scams Trade Regulation Rule").

Section 1.10(a) required the FTC to provide advance notice even though, under the Dodd-Frank Act, the distinct *statutory* advance notice requirement in Section 18(b)(2) of the FTC Act does not apply here. *See* 12 U.S.C. §5519(d). Dodd-Frank did not modify or abrogate the distinct advance notice requirement in the FTC's own regulations, which remains applicable here by its unambiguous terms.

The FTC's violation of Section 1.10 prejudiced Petitioners. Courts have repeatedly found procedural violations to be prejudicial when they curtail interested parties' opportunity to participate in a rulemaking process. And the Commission's conduct throughout the rulemaking here indicated that it was working with an incomplete

understanding of the relevant market and would have benefitted from greater and earlier stakeholder participation.

II. The Rule is a solution in search of a problem. It flunks the APA's standard for reasoned decisionmaking because the FTC has never identified evidence of widespread misconduct among auto dealers that would justify a new industry-wide intervention.

At most, the FTC relied on a handful of enforcement actions, an outdated and flawed qualitative survey with a tiny sample size, and unverified consumer complaints, none of which comes close to justifying the sweeping new rules it imposes. And the agency inadequately responded to comments showing that the alleged misconduct targeted by the Rule affects only a tiny portion of the market and is already pervasively regulated under preexisting state and federal laws.

Indeed, the FTC agrees that virtually all the conduct targeted by the Rule is already illegal. It has utterly failed to explain how imposing duplicative prohibitions on already-unlawful conduct—and redundant disclosure requirements—will somehow benefit consumers. The ultimate impact of the Rule will be to saddle law-abiding dealerships and their customers with more costs, redundancy, and red tape, while doing nothing to improve the customer experience or prevent isolated instances of unlawful conduct.

III. The Rule is arbitrary and capricious because the FTC's assessment of its costs and benefits was deficient in several critical ways. The primary benefit the FTC

expects the Rule to produce is "consumer time savings when shopping for motor vehicles." 89 Fed. Reg. at 674 (uncapitalized). This is a highly counterintuitive result for a regulation that primarily consists of injecting new mandatory disclosures, mandatory paperwork, and mandatory recordkeeping requirements into the process of purchasing a vehicle. The FTC simply assumed the Rule's required disclosures would help consumers and speed up transactions without any study, consumer testing, or other substantiation. Its attempts to explain and quantify the Rule's purported time-saving benefits are based on conjecture and *ipse dixit* rather than rigorous analysis.

The FTC also botched its analysis of the Rule's costs. It provided unreasonably low estimates of dealer compliance costs, even assuming that certain mandatory disclosure requirements would impose no ongoing compliance costs whatsoever. It also arbitrarily excluded the effects of compliance costs from its deadweight-loss analysis of the Rule's likely market effects. These and other errors wholly undermine the plausibility of the FTC's cost-benefit analysis and render the Rule arbitrary and capricious.

IV. In the alternative, the Court should retain jurisdiction and remand the Rule to the Commission. Under 15 U.S.C. §57a(e)(2), a court may remand an FTC rule for consideration of additional evidence that would be material to the proceeding if petitioners have shown reasonable grounds for not presenting it earlier.

Both standards are satisfied here. On remand, Petitioners could present additional evidence showing that the FTC significantly underestimated the Rule's compliance costs such that the Rule should either be reconsidered in its entirety or modified

to lower compliance burdens. Despite Petitioners' due diligence, this evidence did not exist in time to be included in the rulemaking record because of the Commission's failure to issue an ANPRM and refusal to extend the comment period to allow the completion of comprehensive research regarding the Rule's costs and alleged benefits.

ARGUMENT

The FTC Act provides that a court reviewing a trade regulation rule "shall hold unlawful and set aside the rule on any ground specified in [5 U.S.C. §706(2)(A)-(D)]." 15 U.S.C. §57a(e)(3). Section 706, in turn, requires this Court to set aside agency actions that are "arbitrary, capricious, an abuse of discretion," or "without observance of procedure required by law." 5 U.S.C. §706(2)(A), (D).

I. The FTC unlawfully issued the Rule without the advance notice required by its own regulations.

It is black-letter administrative law that agencies must follow their own regulations. *See, e.g.*, *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979). When they do not, "it is a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.'" *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997).

A. 16 C.F.R. §1.10 required the FTC to begin the rulemaking with an advance notice of proposed rulemaking.

16 C.F.R. §1.10(a) provides: "Prior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding." The FTC flouted Section 1.10(a) by skipping directly to an NPRM to begin this rulemaking without the required ANPRM.

This proceeding is unquestionably a "trade regulation rule proceeding" within the meaning of §1.10(a). "Trade regulation rules" are rules under Section 18(a)(1)(B) of the FTC Act that "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §57a(a)(1)(B); *see also* 16 C.F.R. §1.7 (defining trade regulation rule proceedings as "proceedings for the promulgation of rules as provided in … 15 U.S.C. §57a(a)(1)(B)."). The Rule's stated purpose is to define and prohibit specific acts or practices by auto dealers that are purportedly unfair or deceptive. *See* 89 Fed. Reg. at 594. Indeed, the FTC itself characterizes the Rule as a trade regulation rule in both the NPRM and final rule. *See* 89 Fed. Reg. at 590 ("Combating Auto Retail Scams Trade Regulation Rule"); 87 Fed. Reg. at 42,012.

Because this is a trade regulation rule proceeding, the FTC violated §1.10(a) by neglecting to begin the rulemaking process with an ANPRM. Section 1.10(a) requires advance notice for "any" trade regulation rule proceeding, which means all of them. *See United States v. Oswalt*, 771 F.3d 849, 852 (5th Cir. 2014) (when used in this context, the "plain meaning" of "the word 'any' means 'all'"). And no other FTC regulation creates any carve-out or exception for rulemakings involving auto dealers.

In the final rule, the FTC stated that Section 1029(d) of Dodd-Frank authorized it to begin this rulemaking without an ANPRM.[2] But that argument confuses the

[2] The FTC does not contend that any of its pre-NPRM actions satisfied Section 1.10's advance notice requirement. Nor could it, because the advance notice must include a discussion of the Commission's area of inquiry, objectives, and possible alternatives; must invite stakeholders' feedback; and

Commission's statutory obligations under the FTC Act and Dodd-Frank with its regulatory obligations under its own rules.

In 1980, Congress amended Section 18 of the FTC Act to require the Commission to begin the rulemaking process with an ANPRM when it promulgates trade regulation rules defining unfair or deceptive acts. *See* 15 U.S.C. §57a(b)(2). The next year, the FTC promulgated Section 1.10. *See Organization Changes in the Commission's Rulemaking and Investigatory Procedures*, 46 Fed. Reg. 26,284, 26,288 (May 12, 1981). At that point, the agency was subject to two distinct obligations to begin the rulemaking process with an ANPRM—a statutory one imposed by Congress and a regulatory one imposed by the agency itself.

In 2010, Section 1029(d) of Dodd-Frank repealed the statutory ANPRM requirement for trade regulation rules for auto dealers. *See* 12 U.S.C. §5519(d) ("Notwithstanding section 57a of Title 15, the Federal Trade Commission is authorized to prescribe rules under section 45 and 57a(a)(1)(B) of Title 15[,] in accordance with section 553 of Title 5, with respect to [auto dealers]."). But nothing in Dodd-Frank repealed the *separate* ANPRM obligation in Section 1.10 or limited the FTC's authority to impose additional regulatory procedures on itself beyond the statutory baseline. Section 1.10 remains valid and effective, and applies by its terms to "any" trade regulation rule proceeding, including this one.

must be submitted to designated congressional committees. *See* 16 C.F.R. §1.10(b)-(c). The FTC neglected all those steps here.

The FTC nonetheless insisted that it need not follow Section 1.10 because it is "acting under statutory authority under §1029(d) of the Dodd-Frank Act … which authorizes the Commission to promulgate rules using the APA's informal notice-and-comment procedure, *see* 5 U.S.C. 553, notwithstanding the additional procedural requirements set forth in section 18." 89 Fed. Reg. at 601 n.115. This misses the point. No one disputes that Dodd-Frank exempted the FTC from the statutory ANPRM requirement in Section 18 of the FTC Act. But nothing in Dodd-Frank repealed or otherwise rendered inapplicable the distinct and independent ANPRM requirement in the FTC's *own regulations*. To the contrary, Dodd-Frank confirms that any FTC rulemaking regulating auto dealers is "under section 45 and 57a(a)(1)(B) of Title 15," 12 U.S.C. §5519(d), meaning that it would qualify as a trade regulation rule under the plain text of 16 C.F.R. §§1.7 and 1.10.

The FTC also suggested that Section 1.10 merely "implements Section 18(b)(2) of the FTC Act," implying that Section 1.10 only applies where Section 18's statutory ANPRM requirement also applies. 89 Fed. Reg. at 601 n.115. But the FTC did not write Section 1.10 that way. Its text covers "any" trade regulation rulemaking, not just the subset of such rulemakings subject to Section 18's statutory ANPRM requirement. Because the text is clear, the "regulation 'just means what it means—and the court must give it effect, as the court would any law.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 476 (5th Cir. 2021).

Moreover, the statutory authorization for Section 1.10 is the FTC's general rule-making authority under Section 6 of the FTC Act—not Section 18(b). *See* 15 U.S.C. §46(g) (granting FTC general authority "to make rules and regulations for the purpose of carrying out" its Subchapter I authority, which includes promulgating trade regulation rules). Section 6 plainly gives the FTC authority to impose an ANPRM requirement on itself that is broader than any statutory ANPRM requirement to which Congress has subjected it. And that is exactly what the FTC has done.

Notably, the FTC recently overhauled its procedural regulations for trade regulation rulemakings, yet left Section 1.10 in place without any exception for rulemakings involving auto dealers. In 2021, the FTC comprehensively reconsidered its Subpart B regulations and eliminated certain rules that it considered "unnecessary" or not "statutorily required." 86 Fed. Reg. 38,542, 38,544. It also re-evaluated Section 1.10 and made minor revisions to that section. *See id.* at 38,547-48. Yet it neither proposed nor adopted any carve-out from Section 1.10 for rulemaking proceedings involving auto dealers. Because the FTC has "revised its regulations since the legislative change" in Dodd-Frank, it cannot justify an atextual interpretation of Section 1.10 by claiming the regulation's text "is now obsolete." *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 426 (5th Cir. 2006).

Finally, the FTC cannot sweep aside Section 1.10 by citing previous rulemakings it began without an ANPRM and claiming its practice here was "consistent" with its approach in those proceedings. *See* 89 Fed. Reg. at 601 n.115. Most of the previous

rulemakings cited by the FTC did not involve the regulation of motor vehicle dealers and thus do not implicate the interaction between Dodd-Frank and 16 C.F.R. §1.10. Most are also inapposite because they involved rulemakings under independent grants of rulemaking authority rather than Section 18(a)(1)(B) of the FTC Act. *See Made in USA Labeling Rule*, 85 Fed. Reg. 43,162, 43,162 (July 16, 2020) (rulemaking under 15 U.S.C. §45a); *Children's Online Privacy Protection Rule*, 64 Fed. Reg. 22,750, 22,750 (Apr. 27, 1999) (rulemaking under Section 1303 of the Children's Online Privacy Protection Act); *Telemarketing Sales Rule*, 74 Fed. Reg. 41,988, 41,989 (Aug. 19, 2009) (rulemaking under the Telemarketing Act, 15 U.S.C. §6102).

The FTC does cite two rulemakings involving auto dealers, but those do not help its position either. The first was not even a Section 18(a)(1)(B) rulemaking, but rather a Gramm-Leach-Bliley rule under 15 U.S.C. §6804(a)(1)(C) that narrowed the scope of the FTC's Privacy Rule in response to Dodd-Frank's transfer of authority from the FTC to the CFPB. *Privacy Rule Amendments*, 84 Fed. Reg. 13,150, 13,152 (Apr. 4, 2019). Moreover, even if Section 1.10's ANPRM requirement had applied there, the industry would have had no reason to object, nor would it have been prejudiced by the promulgation of a *deregulatory* rule. As for the other rulemaking, *see Used Motor Vehicle Trade Regulation Rule*, 77 Fed. Reg. 74,746 (Dec. 17, 2012), NADA objected to the Commission's failure to issue an ANPRM, *see* Comment Submitted by Nat'l Automobile Dealers Ass'n, ex. A at 5-7 (Mar. 17, 2015), FTC Dkt. P087604, https://perma.cc/84FP-NAT9, but the issue was not litigated and no court has ever considered the merits of that objection.

This is plainly not a case where the agency's interpretation merits deference as a longstanding practice that "has gone unchallenged" for years. *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 507 (8th Cir. 2002).

B. The FTC's failure to begin the rulemaking with an ANPRM prejudiced Petitioners.

The FTC's violation of Section 1.10 was not merely a foot-fault. The advance notice requirement protects stakeholders' ability to engage with the Commission and ensure that any rules are informed by accurate, comprehensive, and reliable information about the industry. The FTC's failure to follow Section 1.10 undermined the integrity of the rulemaking and prejudiced Petitioners' ability to meaningfully participate.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Cargill, Inc. v. United States*, 173 F.3d 323, 340 n.34 (5th Cir. 1999) (citation omitted). When agency rules are "'intended primarily to confer important procedural benefits upon individuals,'" agencies must "'follow their own procedures, even where the internal procedures are possibly more rigorous than otherwise would be required'" by statute. *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) and *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)) (cleaned up). When agencies violate such regulations, the agency action must be set aside unless the agency can make the difficult showing of "harmless error." *Id.*; *see also IMS, P.C.*, 129 F.3d at 621 (in such cases "it is

a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action'").

The ANPRM requirement in Section 1.10 is a "procedural rule[] that allow[s] interested parties to comment on and engage with administrative processes." *Backcountry Against Dumps v. FAA*, 77 F.4th 1260, 1270 (9th Cir. 2023). Those procedural protections are plainly for the benefit of "interested part[ies]" who gain the right to "engag[e] with an administrative action." *Id.* at 1271. Violating such rules thus prejudices parties denied the benefit of the procedure guaranteed by the rule. *See id.* at 1270-71 (collecting cases); *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003) (distinguishing "procedural rules benefitting the agency" from "procedural rules benefitting the party otherwise left unprotected by agency rules").

The FTC's violation of Section 1.10 prejudiced Petitioners and other stakeholders by substantially curtailing their ability to engage with the rulemaking proceeding. To begin, the Commission's conduct throughout the rulemaking suggested it was working with an incomplete understanding of the relevant market and would have benefitted from greater stakeholder participation. In addition to proposing specific new obligations, the NPRM requested comment on a wide-ranging and open-ended set of 49 questions, including basic questions reflecting the Commission's uncertainty about the automotive retail market. The FTC's inquiries included questions regarding market effects and compliance burdens that could only be answered with extensive research and further study of the broader automotive retail market. *See* 87 Fed. Reg. at 42,028-31.

For example, the FTC asked whether additional regulation would "further the Commission's goal of protecting consumers from unfair or deceptive acts or practices"; what "economic burdens would be imposed on dealers" by additional regulation; and whether requiring new disclosures in "an already lengthy, confusing and disclosure-heavy" transaction would "do more harm than good." *Id.* at 42,028.

These are precisely the sorts of issues that should be subject to comprehensive study, research, and public input to assist the agency in drafting new regulations—*i.e.*, subjects appropriate to address through an ANPRM. Given the uncertainty that pervaded the NPRM—and the significant changes between the NPRM and final rule—the FTC cannot plausibly contend that its "'mistake clearly had no bearing on the procedure used or the substance of decision reached.'" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004).

At bottom, an ANPRM is not merely a formality. It allows an agency to "improve the opportunities for public participation and to obtain that participation very early in the development process." U.S. Dep't of Transp., *Rulemaking Process* (June 7, 2022), https://perma.cc/DUT4-A2VM. An ANRPM would have been particularly appropriate in this proceeding, where the FTC acknowledged it was working with incomplete information about the relevant market and could have benefitted from additional stakeholder input. Because the FTC deprived Petitioners of this important procedural benefit in violation of its own regulations, the Rule must be set aside. 5 U.S.C. §706(2); *IMS, P.C.*, 129 F.3d at 621.

II. The FTC did not articulate a rational connection between its factual findings and its decision to impose a far-reaching, industry-wide rule.

To meet its obligation of "reasoned decisionmaking," an agency "must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Here, the FTC has never explained why the available evidence regarding alleged deception and fraud in the motor vehicle marketplace requires layering burdensome new disclosure, paperwork, and recordkeeping requirements atop a comprehensive array of preexisting state and federal laws that already address the very same issues.

A. The FTC failed to identify any widespread misconduct that justifies the Rule.

In 2010, Dodd-Frank relaxed some of the statutory procedural requirements the FTC must follow when exercising its preexisting authority under the FTC Act to promulgate trade regulation rules for auto dealers. Since then, the FTC has used various limited fact-finding mechanisms to assess the extent of any misrepresentations, fraud, or other misconduct in the motor vehicle market. The FTC has expressly focused on determining whether there is "data and empirical evidence" suggesting that unfair or deceptive trade practices are widespread throughout the industry. 76 Fed. Reg. at 14,015.

Despite the FTC's emphasis on empirical data, it has never identified any comprehensive or reliable data indicating that unfair or deceptive acts are widespread in the automobile marketplace. For example, the FTC's Motor Vehicle Roundtables in 2011

did not yield credible evidence showing widespread unfair trade practices, prompting the FTC to delay any rulemaking for over a decade. *See* NADA Comment at 43-44. And the FTC's own complaint data show that customers complain about auto dealers' conduct after only a miniscule fraction of interactions with them. *See id.* at 49-52. Other data in the rulemaking record—both studies cited by the FTC and ones brought to its attention in comments—show widespread and increasing consumer satisfaction with auto dealers. *Supra* at 4-5; NADA Comment at 14-18.

Multiple commenters highlighted the absence of any comprehensive data suggesting a problem or regulatory gap that could justify the FTC's decision to issue an industry-wide rule imposing significant new burdens on auto dealers. *E.g.*, NADA Comment at 41-45. For example, the SBA's Office of Advocacy submitted a comment stressing that the conduct addressed by the Rule affects less than 1% of transactions and urging the FTC to adopt a more targeted approach. SBA Comment at 7. In response, the FTC simply repeated its conclusory assertion that "a rule is needed to address ongoing problems related to bait-and-switch tactics and hidden charges." 89 Fed. Reg. at 671 n.518.

The FTC ultimately cited three types of "evidence" to justify the Rule: (1) past enforcement actions; (2) a "qualitative study of consumer experiences;" and (3) unverified consumer complaints. *Id.* at 598-99. But none of this comes close to justifying a burdensome new industry-wide regulatory framework. The FTC failed to "reasonably consider the relevant issues and reasonably explain" its decision, *Data Marketing*

Partnership, LP v. DOL, 45 F.4th 846, 856 (5th Cir. 2022) (cleaned up), or show a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 52.

First, in the NPRM, the FTC cited 53 past enforcement actions to justify the Rule, but 16 of those—nearly one-third—did not even involve auto dealerships. NADA Comment at 53. For example, the FTC cited an action against Uber for misrepresenting potential earnings to prospective drivers and falsely promising favorable deals for Uber drivers to buy or lease vehicles. Complaint at 10-11, *FTC v. Uber Techs., Inc.*, No. 3:17-cv-00261 (N.D. Cal. Jan. 19, 2017). Subtracting facially irrelevant actions left just 37 enforcement actions against auto dealerships over a decade, an average of fewer than four per year. And in the final rule, the FTC cited just two additional actions it had brought against dealers in the 17 months between the NPRM and final Rule. 89 Fed. Reg. at 600. A handful of enforcement actions per year (in an industry with tens of thousands of dealerships and tens of millions of transactions) hardly reflects a pattern of systemic or widespread misconduct justifying a sweeping industry-wide intervention. And the FTC gave no reason to think its new rules would have *prevented* the misconduct at issue in those cases, which was alleged to have violated preexisting laws.

Next, the "qualitative" study cited by the FTC involved a flawed and outdated 2017 survey of 38 consumers in a single market, out of over 40 million annual vehicle sales. *Id.* at 598-99. That study (conducted by FTC staff) conceded it was "qualitative and exploratory," and cautioned that "[b]ecause this is a qualitative study of a small,

non-representative sample of consumers, the data generated are not useful for forming quantitative or generalizable conclusions." M. Sullivan et al., *The Auto Buyer Study* at 1 (July 2020), Admin. Dkt. 99, https://perma.cc/AY6C-S7ST. And the study relied exclusively on interviews that were more than 6 years old by the time the Rule was published. *See id.* at 6. This makes it a dubious tool for drawing any conclusions about the contemporary vehicle purchasing experience, which has markedly evolved and improved since then with the proliferation of new technologies to streamline the shopping and purchasing process. *See supra* at 5. This study has also been discredited on its own terms due to geographic bias and clustering effects, database bias, filtering bias (*i.e.*, recruiting participants from the same locality who may have visited the same dealerships without any filtering), and numerous other issues. *See* NADA Comment attach. 9 at 2.

Finally, both the NPRM and final rule invoked unverified consumer complaints the FTC has received related to automobiles. *See* 87 Fed. Reg. at 42,015; 89 Fed. Reg. at 594. But the FTC declined to address comments showing it had vastly inflated the number of relevant complaints. For example, nearly half the "auto related" complaints concerned "Auto Parts & Repairs", "Auto Renting & Leasing," "Auto Service & Warranties," or "Gasoline"—categories with little or no connection to the Rule. FTC, *Consumer Sentinel Network Data Book 2022* at app. B3 (Feb. 2023), Admin. Dkt. 153, https://perma.cc/YA3G-2B8W. And even other nominally relevant categories—such as "Auto Financing" and new and used auto sales—undoubtedly include many complaints about entities other than dealers (*e.g.*, non-dealer finance sources). NADA

Comment at 49-50. Moreover, even without adjusting for the inclusion of these irrelevant complaints, the FTC's data show that customers complained about their interactions with auto dealers in far less than 1% of cases, which is hardly indicative of some industry-wide problem. *See id.* at 51. And, once again, the FTC failed to show that its convoluted, untested disclosure requirements and other new mandates would have prevented the alleged misconduct that was the subject of these unverified complaints.

At bottom, after stressing the importance of comprehensive quantitative data, the FTC sought to justify its final rule based on a single outdated and flawed qualitative survey, a handful of enforcement actions regarding conduct alleged to violate preexisting laws, and an inflated number of vague and unverified complaints. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150-51 (D.C. Cir. 2011) (agency violated APA when it "completely discounted" empirical data submitted by commenters and instead relied on limited and "relatively unpersuasive studies" of its own choosing). Throughout this rulemaking, the FTC has yet to show that a significant industry-wide problem exists that would justify a disruptive and burdensome industry-wide regulatory response. Its failure to do so means that the agency "failed to consider an important aspect of the problem" and did not engage in "reasoned decisionmaking." *State Farm*, 463 U.S. at 43, 52.

B. The FTC failed to identify any regulatory gap that needs to be filled by the Rule.

Agency rules must be the product of a "'process'" that is "'logical and rational.'" *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020) (quoting *Michigan v.*

EPA, 576 U.S. 743, 750 (2015)). Here, however, "the Commission acted without explaining what problems with the existing regulatory requirements it meant for the Rule to correct." *Id.*

Motor vehicle dealers are subject to a wide array of preexisting state and federal laws that prohibit fraud and misrepresentations, regulate claims in advertising and marketing, regulate the terms of financing agreements (including by requiring price and payment-total disclosures), and require dealers to preserve records to demonstrate compliance. The Rule spends pages highlighting the FTC's concerns about "unlawful tactics" and "unlawful practices" by auto dealers, 89 Fed. Reg. at 594-98, but fails to explain how adding new prohibitions targeting conduct that is already illegal, or adding redundant and untested disclosure requirements and onerous recordkeeping requirements, would fix these purported problems.

Start with the Rule's most burdensome affirmative disclosure requirements: the "offering price" disclosure requirement in Section 463.4(a) and the payment-total disclosure requirement in Section 463.4(d). These requirements are largely duplicative of disclosures required by existing law, but must be made at different times and in different ways, which is certain to confuse consumers and prolong transactions. The Truth in Lending Act, which covers auto dealers, already mandates disclosure of a vehicle's "total sale price" and the "total of payments" in any credit transaction. 12 C.F.R. §1026.18(h), (j). The Consumer Leasing Act similarly requires lessors to disclose the "total of payments" before leasing an automobile. *Id.* §213.4(e). Yet the Rule now imposes its own

distinct financing-related disclosures, which define the relevant price differently and must be made earlier in the process. *Compare* 89 Fed. Reg. at 694 ("Offering Price"), *with* 12 C.F.R. §1026.18(j) ("Total sale price"). These redundant-but-not-identical disclosures that must be made in different terms and at different times will, if anything, confuse customers, not help them, as dealers are forced to inject more government-scripted boilerplate throughout the transaction.

The FTC did not reasonably respond to comments explaining that such duplicative disclosures—which were never tested before being enacted—are unnecessary and counterproductive. *E.g.*, NADA Comment at 53 (explaining TILA and CLA "already establish federal disclosure standards pertaining to credit and lease advertising that are not in need of duplication"); *see also id.* at 69-70. For example, in addressing comments on the proposed offering-price requirement, the Commission stated that "[t]he disclosure requirement … is consistent with [TILA's] existing legal obligations and does not disturb them; dealers can and should make the disclosures required under TILA and other laws as well as the offering price disclosure required by the Final Rule." 89 Fed. Reg. at 633. But even if dealers *can* provide the new offering-price disclosure consistent with existing law, this hardly shows that adding another mandatory disclosure to TILA's comprehensive, consumer-tested disclosure regime is *necessary* or even helpful in filling some purported regulatory gap.

The same flawed reasoning plagued the FTC's analysis of the payment-total disclosure requirement. The Commission agreed that dealers must already provide

financing-related disclosures "to satisfy their obligations under TILA, the CLA, or their implementing regulations." *Id.* at 641. But it stated that the Rule's "similarity to existing laws" was not a problem because "this provision is indeed consistent with other laws, and commenters have not indicated how providing truthful information about total payment amounts … would unduly burden them or harm consumers." *Id.* Again, by simply asserting that the disclosures are not unduly burdensome, the FTC missed the point. A "'logical and rational'" explanation would have also identified "what problems with the existing regulatory requirements" created a need for duplicative disclosures in the first place. *N.Y. Stock Exch.*, 962 F.3d at 554.

An agency rule imposing new "required disclosures" is arbitrary and capricious if its analysis "fails to determine whether, under the existing regime, sufficient protections existed" to make additional disclosures unnecessary. *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178-79 (D.C. Cir. 2010); *see also Bus. Roundtable*, 647 F.3d at 1154 (finding rules arbitrary and capricious where "the Commission failed adequately to address whether the regulatory requirements of" a different statute "reduce the need for, and hence the benefit to be had from," the challenged rules). Here, the FTC arbitrarily responded to comments about duplicative disclosures by asserting that such duplication is *permissible* without showing that it is *useful* to consumers.

The FTC also failed to explain how the misrepresentation provisions in Section 463.3 of the Rule are needed to fill any regulatory gap. The FTC spilled much ink detailing problems with "deceptive advertising" and "misrepresentations" that it believes

exist in the motor vehicle market, especially regarding the sale of "add-on" products and services. 89 Fed. Reg. at 595. The Rule accordingly prohibits misrepresentations during vehicle sales, including as to "[t]he costs or terms of purchasing, financing, or leasing a Vehicle" and "[a]ny costs, limitation, benefit, or any other aspect of an Add-on Product or Service." *Id.* at 694.

But such misrepresentations are already prohibited both by the FTC Act, *see* 15 U.S.C. §45(a), and consumer protection laws that exist in every state and prohibit unfair or deceptive trade practices. Indeed, the FTC recognizes that the conduct it is targeting is already illegal, *see* 89 Fed. Reg. at 611, which is why it has already brought enforcement actions against dealers engaging in that conduct, *id.* at 598, and why it estimated that Section 463.3 would impose zero compliance costs on dealers, *id.* at 682. Moreover, it is not as though Section 463.3 meaningfully concretizes the FTC Act's general prohibition on misrepresentations by clarifying its application to specific factual circumstances. Rather, it broadly prohibits misrepresentations regarding the "costs or terms of purchasing, financing, or leasing a Vehicle," any "aspect of an Add-on Product or Service," "the availability of Vehicles at an advertised price," and other nebulous categories. *Id.* at 694. The FTC has failed to show how simply reiterating that unlawful conduct is unlawful will meaningfully deter misrepresentation or improve compliance.

In short, the Rule is arbitrary and capricious because the FTC has not shown how consumers would "obtain meaningful benefits" from a new regulatory regime that

is largely "duplicative" of existing law. *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023).

III. The FTC unreasonably evaluated the Rule's benefits and costs.

"A regulation is arbitrary and capricious if the agency 'failed to consider an important aspect of the problem,'" which "includes, of course, considering the costs and benefits associated with the regulation." *Chamber of Commerce v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023). Thus, a rule flunks arbitrary-and-capricious review if the agency "failed adequately to substantiate the rule's benefits and costs." *Id.*; *see also, e.g.*, *Bus. Roundtable*, 647 F.3d at 1148-49 (agency "inconsistently and opportunistically framed the costs and benefits of the rule; [and] failed adequately to quantify the certain costs or to explain why those costs could not be quantified").

A. The FTC arbitrarily assessed the Rule's alleged benefits.

The FTC expects the Rule to benefit consumers by saving them time shopping for vehicles. But it never reasonably explained how injecting more time-consuming disclosures and paperwork into the vehicle-buying process will somehow speed up the average transaction.

1. 3-hour time-saving assumption. In the NPRM, the FTC computed the Rule's benefits by simply assuming the proposed rule would save each vehicle purchaser an average of 3 hours per transaction. *See* 87 Fed. Reg. at 42,037 ("The Commission assumes that, as a result of the proposed rule provisions …, each consumer who ends up purchasing a vehicle will spend 3 fewer hours shopping online, corresponding with

dealerships, visiting dealer locations, and negotiating with dealer employees per motor vehicle transaction."). The 3-hour number was pulled from thin air—the FTC offered no data, study, survey, or analysis justifying this figure. *See id.* In a footnote, the FTC cited one study finding that the average consumer spends 15 hours shopping for a vehicle. *Id.* at 42,037 n.180. But it offered no explanation for assuming the proposed rule would save customers 20% of that time—rather than 0%, 5%, or 10% (or even increasing the length of such transactions due to new disclosures and paperwork). *See id.*

Commenters explained that the benefit calculation in the proposed rule was "simply pulled from thin air," NADA Comment at 113, but the FTC continued to insist in the final rule that the "3-hour time-saving assumption in the NPRM remains reasonable," 89 Fed. Reg. at 674-76. Yet the FTC failed to acknowledge or rebut commenters' basic point that the 3-hour assumption was seemingly chosen at random and unsupported by *any* actual analysis. At bottom, the Commission picked a wholly arbitrary foundation for its quantification of the Rule's benefits and disregarded comments documenting the obvious flaws of that approach.

2. Comparing online and in-person vehicle shopping. In the final rule, the Commission supplemented its 3-hour time-saving assumption with a new approach for quantifying the Rule's alleged benefits that claimed the Rule would help in-person shoppers achieve some of the benefits of online shopping. But this approach, which was proffered for the first time in the final rule, is no more reasonable than the agency's prior *ipse dixit*.

The FTC introduced this approach by explaining that "consumers who do various activities in the vehicle buying process digitally ('digital consumers') save time at the dealership relative to those who do not ('non-digital consumers')." 89 Fed. Reg. at 676. It then stated that it "expects the provisions of the Rule to emulate some of the time-saving features of completing these activities digitally," such that the Rule would cause non-digital consumers to save "a proportion of the time saved by status quo digital consumers." *Id.* The "proportion" would be "determined by how closely the status quo digital shopping experience is expected to resemble the shopping experience for all consumers once the Rule is in effect." *Id.* Applying this framework, the FTC asserted that the Rule would save the average non-digital customer 43 minutes negotiating a purchase price (equal to the time saved by digital customers negotiating a purchase price) and 39 minutes selecting "add-ons" and discussing and signing paperwork (half the time saved by digital customers on these activities). *Id.*

This reasoning is unsupported and nonsensical. The singular assumption supporting the FTC's new approach to assessing benefits, underneath all its rigorous-looking calculations, is that the Rule's effect will be to make in-person car shopping comparably efficient to online car shopping. But that assumption has no support whatsoever. Zero. That's because any purported time-saving benefits that could theoretically flow from the Rule have nothing to do with the typical time-saving benefits of online shopping, such as dispensing with face-to-face conversation, digitizing disclosures and paperwork, and automating steps in the transaction. As before, the critical assumption

underlying the Rule's calculation of benefits is mere *ipse dixit* without any data, study, survey, consumer testing, or other substantiation.

Zooming in on the specific aspects of the car-buying process addressed by the FTC further highlights the irrationality of assessing the Rule's benefits this way. The FTC first contends that the Rule will save non-digital vehicle shoppers 43 minutes negotiating a purchase price because "it is currently time-consuming to obtain comparable price quotes from dealerships," and "[m]andating offering price disclosures—which are comparable across dealerships by definition—early in the shopping process" would help fix this purported problem. *Id.* But digital and non-digital price disclosures are regulated the same way in the status quo. So the time savings digital shoppers experience cannot be a function of how price disclosures are regulated, but are instead due to the fact that a digital medium makes the shopping and purchasing process more efficient through automation, written rather than verbal communication, and reducing time spent at the dealership. No regime of FTC-mandated paperwork and disclosures could bring these efficiencies of online shopping to in-person shoppers, and the FTC arbitrarily assumed otherwise.

The FTC next asserts that the Rule will save non-digital customers an average of 39 minutes selecting finance and insurance "add-ons" and discussing and signing paperwork. These purported time savings are attributable to "prohibitions on various misrepresentations" and "several disclosures mandated by the Rule." *Id.* But, once again, digital and non-digital vehicle shopping are subject to the same preexisting rules

governing misrepresentations and mandatory disclosures. The FTC offers no evidence suggesting the more efficient process for digital shoppers is attributable to some sort of regulatory gap. The far more obvious inference, which the FTC fails to acknowledge or rebut, is that any time savings for digital purchasers are attributable to the efficiencies inherent in the digital medium, including digitization of paperwork and tools that allow easy side-by-side comparison of service contracts and other protection products. And, critically, even if digital purchasers' time savings did somehow flow from the governing regulatory regime, the FTC gives no reason to think that *adding more disclosures and mandatory paperwork* will somehow streamline the process for in-person shoppers.

In short, when one looks behind the FTC's veneer of statistics, fractions, and tables, what remains of the FTC's benefit analysis is simply an unsupported assertion that stricter regulation of auto dealers' communications—including more mandatory disclosures and paperwork—will save consumers time buying cars. Because the FTC has not substantiated this assertion, it "has failed to demonstrate that [consumers] would obtain meaningful benefits" from the rule. *Mexican Gulf Fishing Co.*, 60 F.4th at 973. "As a result, the [Rule] is arbitrary and capricious." *Id.*

3. Assuming new disclosures and paperwork will help consumers. Finally, according to the FTC, the Rule's benefits will come in the form of quicker and (as a result) less expensive vehicle shopping for consumers. 89 Fed. Reg. at 674-79. But it is counterintuitive, to say the least, that requiring more disclosures, paperwork, and recordkeeping will save consumers time and money. Rather, layering another "complex

regulatory framework[]" atop the many laws and regulations that already govern auto dealers will "stifle innovation" in an area where "sales practices … continue to evolve." 87 Fed. Reg. at 42,048 (dissenting statement of Comm'r Wilson). Indeed, even the FTC acknowledges that the average time consumers spend purchasing a vehicle is already decreasing due to online shopping and sales. 89 Fed. Reg. at 676; *see* Cox Automotive, *Digitization of End-to-End Retail*, *supra*, at 4-5, 7.

One would accordingly expect some sort of study, testing, or other rigorous analysis as to how more government-scripted disclosures and paperwork will end up saving consumers time and money. But the FTC provided no such explanation. It failed to rationally connect "the facts found and the choice made" because it did not connect the dots between the rules it is imposing and the benefits it expects to materialize. *State Farm*, 463 U.S. at 52.

Of note, the FTC simply assumed that additional disclosures would aid consumers, without research or consumer testing to determine whether the proposed disclosures would enhance or diminish consumers' understanding of the transaction. This is a marked departure from past practice, where the FTC has used robust consumer testing to evaluate proposed disclosure requirements. For example, in 2004 the FTC conducted a "study of over 500 recent mortgage customers in an experimental setting" to evaluate the impact of proposed mortgage broker compensation disclosures. J. Lacko et al., *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition* at ES-1 (Feb. 2004), https://perma.cc/3DJU-HWKG. After consumer testing, the FTC

concluded that the proposed disclosures, while well-intentioned, were "likely to confuse consumers … and create a substantial consumer bias against broker loans, even when the broker loans cost the same or less than direct lender loans." *Id.*

Similarly, the FTC, in conjunction with other federal agencies, used extensive consumer research and multiple rounds of "quantitative consumer testing" to create and evaluate a model privacy notice under the Gramm-Leach-Bliley Act. *Final Model Privacy Form Under the Gramm-Leach-Bliley Act*, 74 Fed. Reg. 62,890, 62,894 (Dec. 1, 2009). Other federal agencies have also relied heavily on consumer testing in evaluating the likely effects of proposed disclosure requirements. For example, in 2010 the Federal Reserve Board explained that it had withdrawn proposed disclosure requirements because "consumer testing" had revealed the proposed "disclosures could confuse consumers and undermine their decision making rather than improve it." *Truth in Lending*, 75 Fed. Reg. 58,509, 58,511 (Sept. 24, 2010).

Given the experience of the FTC and other federal agencies with proposed disclosure requirements that did not produce their intended effects on consumer understanding, the Commission's failure to rigorously analyze the effects of its proposed disclosure requirements—through consumer testing or otherwise—further underscores that the Commission has not "adequately substantiated" the purported benefits of the Rule. *Chamber of Commerce*, 85 F.4th at 777. And this concern is amplified here because the Rule's disclosure requirements are superimposed atop preexisting disclosure requirements under the Truth in Lending Act, Consumer Leasing Act, and state disclosure

regimes. The FTC has not substantiated the Rule's benefits by properly analyzing whether and how the Rule's new regulatory regime will actually improve the sales process for consumers, as opposed to adding complexity, delays, and confusion.

B. The FTC arbitrarily assessed the Rule's likely costs.

The FTC's analysis of the Rule's likely costs is also fundamentally flawed. Rather than undertaking any study or testing to determine the costs of the Rule, the FTC attempted to ballpark compliance costs by guessing how long dealers would spend to review and comply with each provision. The FTC's estimates are unreasonably low because, among other things, they typically assume one disclosure in each category per transaction, despite the typical consumer considering multiple cars, financing options, and optional features or protection products, which would significantly expand the number of mandatory disclosures. The Commission also did not account for the fact that many smaller dealers will need to outsource compliance tasks to third-party vendors at costs far greater than those in its estimates. And the FTC completely neglected to address the Rule's conceded compliance costs in its "deadweight loss" analysis of the Rule's likely market effects.

At the outset, it is telling that the FTC begins by estimating that many of the Rule's requirements—including the prohibited misrepresentations and required offering price disclosures—will impose no compliance costs at all. 89 Fed. Reg. at 682-83 ("Scenario 1" estimates). These estimates assume that "all motor vehicle dealers are compliant … under the status quo" because these aspects of the Rule prohibit conduct

that is already illegal. *Id.* at 682. This, of course, raises obvious questions regarding the necessity of additional rules prohibiting conduct that is already illegal. *See supra* Part II.B.

In all events, the FTC's subsequent analysis of compliance costs—based on the alternative assumption that dealers would in fact spend time and resources attempting to comply—ignored comments highlighting multiple "serious flaw[s]" that "render the resulting rule unreasonable." *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1288 (D.C. Cir. 2023) (cleaned up). Petitioners will focus on three examples.

1. Reductions in deadweight loss. The FTC claims the Rule will produce "reductions in deadweight loss," *i.e.*, economic benefits flowing from decreased automobile prices due to a more competitive and transparent automobile market. 89 Fed. Reg. at 678. But the FTC's model for calculating deadweight loss includes a critical and obvious oversight: The Commission factored in downward price pressure from the Rule's supposed benefits, but completely neglected to include the upward price pressure from the Rule's conceded costs. This "serious flaw" in the FTC's analysis "undermines its finding" that the Rule will produce economic benefits in the form of reduced deadweight loss. *Window Covering Mfrs. Ass'n*, 82 F.4th at 1288.

The math behind the concept of deadweight loss is complex, but the theory is simple enough: If distorted market forces artificially raise the price of a product, consumers will be able to purchase less of that product than in an efficient market, thereby lowering overall social welfare. The FTC claims that the market for automobiles is currently distorted by "consumer search frictions, shrouded prices, deception, and

obfuscation," which raise automobile prices above an efficient level. 89 Fed. Reg. at 678. It asserts that the Rule will alleviate these problems, resulting in "[a] decrease in vehicle prices" and a concomitant "increase in the number sold." *Id.* at 679. As a result, the Rule "unambiguously increases welfare by reducing … deadweight loss." *Id.*

But the FTC's failure to factor the conceded compliance costs of its Rule into its deadweight loss analysis renders the entire analysis unreliable and arbitrary. Even the FTC concedes that the Rule would impose tens of millions of dollars per year in compliance costs on auto dealers (a figure Petitioners explain is far too low, *see infra* at 46-48). 89 Fed. Reg. at 681-87. Yet the FTC nowhere acknowledges that at least some of these costs would likely be passed through to consumers, exerting upward pressure on automobile prices. *See, e.g.*, 87 Fed. Reg. at 42,048 (dissenting statement of Comm'r Wilson) ("[H]istorical experience demonstrates that complex regulatory frameworks … increase costs [and] raise prices."). To the contrary, the FTC again *assumes* with no evidence that "motor vehicle purchase, financing, and lease transactions will be stable at the [pre-Rule] level," without addressing the Rule's significant new compliance costs and the need for dealerships to factor those costs into pricing. 89 Fed. Reg. at 677.

The FTC also arbitrarily brushed aside extensive comments showing that the Rule may place upward pressure on prices by limiting price discovery. For example, the Rule would require dealers to disclose the "offering price" to a customer before learning information about the customer that may indicate their eligibility for a lower price (*e.g.*, through rebates or discounts). NADA Comment at 73. If customers interpret the

offering price as a one-price offer—or dealers shift to one-price sales models because of the requirement—the result will be higher prices due to the absence of customer-specific discounts. As another example, because the payment-total disclosure requirement must account for the value of any trade-in vehicle, 89 Fed. Reg. at 695, dealers often would need to conduct a trade-in valuation before discussing any financing options. This would substantially curtail dealers' ability to display financing options online, since a trade-in valuation generally must be performed at the dealership.

These omissions are critical because the FTC's conclusion that the Rule will decrease deadweight loss depends entirely on the premise that it will lower vehicle prices. This premise, in turn, requires believing that any downward price pressure from the Rule's purported benefits (*i.e.*, less "search frictions" and "deception") will exceed the countervailing upward price pressure from the Rule's compliance costs and effects on price discovery. Yet the Commission neglected to address *at all* this upward price pressure or factor it into its deadweight-loss analysis. The FTC plainly "'failed to consider an important aspect of the problem'" by invoking deadweight loss to substantiate its cost-benefit analysis while failing to consider compliance and other costs in that analysis. *Chamber of Commerce*, 85 F.4th at 777.

2. Offering-price disclosure requirement. Section 463.4(a) of the Rule requires a dealer to disclose an "offering price"—the "full cash price for which a Dealer will sell or finance the Vehicle to any consumer"—in any advertisement about a specific vehicle or in the dealer's first communication with a consumer about a specific vehicle.

89 Fed. Reg. at 694. The FTC assumed that once dealers spend 8 upfront hours "reviewing their policies and procedures for determining the public-facing prices of vehicles in inventory," the offering-price disclosure requirement would impose no continuing compliance burdens at all. *Id.* at 682.

This assumption that the offering-price disclosure requirement will impose *zero* ongoing compliance costs blinks reality. At least two forms of ongoing compliance costs will be significant. First, and most importantly, if dealers must disclose the "full cash price for which [they] will sell or finance the Vehicle to any consumer" upfront, *id.* at 694, they will need to devote additional resources to supporting and updating their upfront pricing models. Vehicle prices change, often frequently, based on market conditions, so keeping "offering prices" accurate on an ongoing basis will be costly and difficult, especially for smaller dealers. *See* NADA Comment attach. 19 at 7. The FTC simply ignored this concern.

Second, if a sales representative must make an upfront disclosure of the "offering price" in the first discussion of any specific vehicle with any customer, dealer representatives will spend at least some additional time determining and verifying the vehicle's offering price before disclosing it to a consumer. If a consumer is surveying and asking questions about several vehicles on a lot, this time will add up quickly. The FTC waved away this concern by asserting that "dealer-customer discussions regarding specific motor vehicles that occur under the status quo already include time devoted to a discussion of the vehicle's price." 89 Fed. Reg at 683. But this ignores that the stakes of such

discussions are far higher under the Rule, which will complicate and delay communication on the dealer's end.

3. Payment total disclosure requirement. Section 463.4(d) of the Rule requires dealers to disclose the total amount the consumer will pay "after making all payments as scheduled" whenever "making any representation … directly or indirectly, about a monthly payment for any Vehicle." *Id.* at 694. The FTC calculated compliance costs for this provision by assuming each transaction would include one required disclosure costing dealers two minutes of employee time and $0.15 in printing costs. *Id.* at 684.

The Rule's payment-total disclosure requirement differs from the comparable disclosure requirement under the Truth in Lending Act, *see* 12 C.F.R. §1026.18, because the Rule requires the payment total to be calculated and disclosed whenever a sales representative mentions any monthly payment, rather than once before financing terms are finalized (as TILA does). It is thus likely that negotiations over price and financing will trigger this disclosure multiple times throughout the vehicle shopping process as customers ask about multiple vehicles and financing plans. But the FTC's cost estimate assumes one disclosure per transaction. 89 Fed. Reg. at 684. This approach fails to account for the likelihood of multiple disclosures per complete transaction, not to mention disclosures preceding abandoned transactions. Once again, the Commission ignored a clear analytical problem with its cost-benefit analysis despite comments addressing it in detail. *See* NADA Comment attach. 19 at 8-9.

IV. In the alternative, the Court should remand the Rule to the FTC for consideration of additional evidence.

If the Court does not set aside the Rule, it should remand it to the FTC for consideration of additional evidence regarding the Rule's implementation costs and alleged benefits. 15 U.S.C. §57a(e)(2) allows a reviewing court to remand a rule to the FTC for consideration of additional evidence if the petitioner "shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions … before the Commission." When a court remands a rule under this section, it retains jurisdiction while the FTC reconsiders the rule, and the court may then review whatever revised or new rule the FTC promulgates after reconsideration. *See Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 419 (D.C. Cir. 1986); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 628 n.18 (D.C. Cir. 1979) (Wright, C.J., concurring in the result).

If the Rule is not set aside, a remand would be appropriate here because the additional evidence Petitioners would present is material to the rulemaking proceeding. At a minimum, Petitioners would submit a comprehensive study of the purported benefits and estimated costs of implementing the proposed rule prepared by the independent Center for Automotive Research. *See* Center for Automotive Research, Assessment of Costs Associated with RIN 2022-14214 (May 2023), https://perma.cc/UB2F-WVBJ. That study, which was based on 75 surveys and interviews with dealers, contract technology providers, IT developers, and regulatory training professionals, provides a

much more comprehensive analysis of the Rule's likely on-the-ground compliance burdens than the FTC's back-of-the-envelope assumptions. *Id.* at 4.

A remand would also give Petitioners and other stakeholders the opportunity to supplement that study with newer evidence about the likely compliance burdens of the final rules. For example, compliance vendors could provide the FTC with assessments of whether full compliance with the Rule is practicable, as well as cost estimates drawing on months of on-the-ground experience preparing compliance materials and consulting with dealers. This evidence is material because it would show that the FTC significantly underestimated compliance burdens in its cost-benefit analysis.

A remand under Section 57a(e)(2) would also give the FTC and interested stakeholders the opportunity to conduct consumer testing to determine what, if any, effect the Rule's disclosure requirements are likely to have on consumer understanding. As explained above, there are serious doubts about whether consumers would actually benefit from rules that layer new disclosures, red tape, and paperwork atop an already time- and paperwork-intensive sales process. Yet the rulemaking record contains no study, testing, or other analysis of how the Rule's disclosure requirements will *actually* affect consumer understanding and behavior—even though the FTC and other federal agencies routinely use consumer testing to evaluate how proposed disclosure requirements will affect consumers. *See supra* at 40-42. A remand would give the FTC or other stakeholders an opportunity to address this notable deficiency.

"[T]here were reasonable grounds" for the inability of NADA and other stake-holders to present this evidence during the allotted comment period. 15 U.S.C. §57a(e)(2). The evidence discussed above did not exist when the comment period closed, despite NADA's diligence in commissioning the Center for Automotive Research study and soliciting feedback on the proposed rule from dealerships and compliance vendors. NADA and other commenters requested an extension of the comment deadline to ensure this evidence could be included in the rulemaking record, but the FTC denied that request. *See also* 89 Fed. Reg. at 613 n.185 (refusing to consider Center for Automotive Research study).

In these circumstances, Petitioners had reasonable grounds for failing to present the Center for Automotive Research study, consumer testing, and other evidence related to the Rule's compliance burdens during the initial comment period. If the Court does not find that the Rule should be set aside, it should remand the Rule to the FTC under Section 57a(e)(2) to ensure the development of a properly comprehensive rule-making record before saddling tens of thousands of dealers and millions of customers with complex and costly new regulatory requirements.

CONCLUSION

The Court should set aside the Rule. In the alternative, it should retain jurisdiction and remand the Rule to the FTC for consideration of additional evidence under 15 U.S.C. §57a(e)(2).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: March 15, 2024 <u>*/s/ Jeffrey M. Harris*</u>

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 12,548 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: March 15, 2024 <u>*/s/ Jeffrey M. Harris*</u>