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 RULE OF THE FEDERAL TRADE COMMISSION, AGENCY NO. P204800, RIN 3084-AB72

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS

No. 24-60013, *Nat'l Auto. Dealer's Ass'n v. FTC*

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the National Automobile Association ("NADA") and Texas Automobile Dealers Association's ("TADA") Certificate of Interested Person—the following listed persons and entities as described in the fourth sentence of 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.

Under Fed. R. App. P. 26.1, The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has a 10% or greater ownership interest in the Chamber.

1. NADA is Petitioner.

2. TADA is Petitioner.

3. Consovoy McCarthy, P.L.L.C. is Counsel for NADA and TADA.

4. Jeffrey Matthew Harris is Counsel for NADA and TADA.

5. Seanhenry Nathaniel VanDyke is Counsel for NADA and TADA.

6. The Chamber is *amicus curiae* in support of Petitioners NADA and TADA.

7. Wilson Sonsini Goodrich & Rosati, P.C. is Counsel for the Chamber.

8. Steffen N. Johnson is Counsel for the Chamber.

9. Maureen K. Ohlhausen is Counsel for the Chamber.

10. Brett Weinstein is Counsel for the Chamber.

11. Kelsey J. Curtis is Counsel for the Chamber.

12. U.S. Chamber Litigation Center is Counsel for the Chamber.

13. Tyler S. Badgley is Counsel for the Chamber.

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Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI

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The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

This is such a case. The FTC ignored its very own procedural rule—a rule that requires the agency to give the public advanced notice of any trade regulation—and flouted the APA's requirements that safeguard notice, a fundamental value of due process. Those failures should be corrected. And unfortunately, the FTC's failure to adhere to mandatory rulemaking procedures is not limited to this case, but rather reflects a range of procedural and other irregularities that have become the agency's standard operating procedure, subjecting the agency to widespread criticism. The Chamber urges this Court to intervene.

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No one other than the amicus, its members, or its counsel made a contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FTC has a long and storied history of administrative overreach, prompting procedural reforms that add FTC-specific guardrails to other general statutory and constitutional protections to bring the agency back in check. This case is but the latest unfortunate example of attempted overreach. Here, however, this Court can provide the remedy, simply by holding the FTC to its own rules—rules grounded in longstanding and generally applicable requirements of due process.

The FTC's actions in adopting the Rule Combating Auto Retail Scams (the "CARS Rule") both ignored its own duly adopted regulation, which required it to provide advanced notice of the proposed rulemaking, and flouted the APA's notice requirement that an agency provide "data underlying" and a "basis for" its proposed rules. The "essential purpose" of those procedural notice safeguards "is to reintroduce public participation and fairness" when power is exercised by "unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). And in its effort to speed its rule through the regulatory process, the FTC put itself on a collision course with historical and contemporary understandings of due process.

Adhering to process and procedure matters. Beyond the ways in which those values ensure fairness, "an agency's judgment [is] only as good as the information upon which it dr[aws]," and procedural protections like those at issue here enable the FTC "to educate itself." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620

(5th Cir. 1994). In bypassing those protections, the FTC "deprive[d] itself of that education." *Glob. Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1299 n.9 (5th Cir. 1983). Not surprisingly, the rule suffered, and must now be vacated.

More troubling still is the fact that the FTC's failure to adhere to the regulatory "rules of the road" is not an aberration, but a trend in its adoption of rules regulating the business community and the public at large. To cite just one example, the FTC recently stripped away many procedural protections for rulemakings that proceed under the Magnuson Moss framework (which, to be clear, does not apply to the CARS Rule). Former Commissioners have decried these changes, noting that they are "based solely on the need for speed" and are antithetical to "the development of high-quality rules." J. Howard Beales III & Timothy J. Muris, *Back to the Future: How Not to Write a Regulation*, American Enterprise Institute 1 (June 2022).[2] Former Commissioners have also warned of the dangers posed by these changes, such as "facilitat[ing] manipulation of the fact-finding process" (Christine Wilson, *Rule-A-Palooza: Realities and Repercussions*, Remarks at the Past, Present, and Future

[2] https://www.aei.org/wp-content/uploads/2022/05/Back-to-the-Future-How-Not-to-Write-a-Regulation.pdf?x91208.

of FTC Rulemaking Conference 13 (Feb. 24, 2023))[3] and "increas[ing] political control of rulemaking while decreasing public participation" (Beales III & Muris, *Back to the Future: How Not to Write a Regulation* 1, *supra* note 2).

The FTC's behavior across its rulemaking efforts discourages the public from commenting on, and affecting the substance of, the regulations that bind them. It disregards the idea that the public has important insights. It promotes the unsupportable notion that a handful of government officials are unerring in their understanding of complex issues. And it diminishes the quality of the final regulations. This Court should require the FTC "to turn square corners"—running roughshod over regulatory, statutory, and constitutional protections should not be tolerated.

ARGUMENT

I. The FTC failed to follow the prescribed notice procedure and thus violated fundamental fairness principles enshrined in the Constitution.

In enacting the CARS Rule, the FTC ignored important procedural protections codified in both its own rules and the APA. That offends both historical and contemporary notions of due process, and particularly its promise of adequate notice. And such requirements are not just procedural niceties. When, as here, the FTC proceeds without the educational benefit of public participation, it diminishes the quality of the agency's rules. The CARS Rule must be vacated.

[3] https://www.ftc.gov/system/files/ftc_gov/pdf/wilson-byu-speech.pdf.

A. The FTC refused to follow its own notice requirement and failed to disclose information required by the APA.

1. After Congress amended the FTC Act, the FTC published a procedural rule requiring itself to provide both the public and Congress with "advance notice" of any proposed "trade regulation" rulemaking. 16 C.F.R. § 1.10; *see Org. Changes in Comm'n's Rulemaking & Investigatory Procs.*, 46 Fed. Reg. 26,284, 26,286, 26,288 (May 12, 1981). Later, although Congress repealed the statutory advance notice requirement, the FTC chose not to rescind its own advanced notice requirement. *See Revisions to Rules of Prac.*, 86 Fed. Reg. 38,542, 38,547-48 (July 22, 2021). Thus, unless and until it duly repeals that requirement, the FTC must publish an advance notice of rulemaking before starting any trade regulation proceeding. 16 C.F.R. § 1.10.

Holding agencies to their published regulations makes sense, and courts have so held in wide-ranging contexts. In 2018, for example, Congress amended federal law to allow prisoners to seek a sentence reduction for "extraordinary and compelling" reasons, as defined by the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A). Previously, only the Bureau of Prisons could request such a reduction, and—based on the previous statutory language—the Sentencing Commission's rule defined "extraordinary and compelling" only for "motion[s] of the Bureau of Prisons." U.S.S.G. § 1B1.13 (2018). But there was no amendment for nearly five years, as the Sentencing Commission lacked the quorum necessary to update its guideline by adding "or

the defendant." *E.g.*, *United States v. McGee*, 992 F.3d 1035, 1049-50 (10th Cir. 2021). Nevertheless, courts nationwide held that the unamended rule had independent force—it "must [not] be read … as a description of the former statute's requirements" (*United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020)), and it remained binding as written unless and until the Sentencing Commission revised it (*e.g.*, *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (collecting cases)).

There is no question that the FTC could have changed its advance notice requirement here. After Dodd-Frank Act authorized it to rescind such requirements, the FTC comprehensively revised its procedural rules but ultimately amended its procedures to eliminate only *other* rules that were not "statutorily required." *Revisions to Rules of Prac.*, 86 Fed. Reg. at 38,547-48, 38,544.

Having allowed its advance notice requirement to stand, the FTC is "obliged to follow it[]." *Ballard v. CIR*, 544 U.S. 40, 59 (2005) (citing *Service v. Dulles*, 354 U.S. 363, 388 (1957)). Its failure to do so here deprived the public of promised notice, thus "render[ing] its decision invalid." *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1308 (5th Cir. 1978) (collecting cases). Indeed, the Supreme Court has repeatedly invalidated agency actions where the agencies failed "to follow their own procedures" that affected "the rights of individuals," including where those self-imposed procedures were "more rigorous than otherwise would be required." *United*

States v. Caceres, 440 U.S. 741, 751 n.14 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)) (collecting cases). The same result is warranted here.

2. Beyond ignoring its own regulation, the FTC also failed to disclose any basis for, or data underlying, an important part of its cost analysis. In discussing the "estimated benefits of time savings," the FTC asserted that if the proposed rule were in place, the average consumer would spend three fewer hours buying a car, and that this purported 3-hour savings, together with the average hourly wage, would produce economic savings of "between $31.1 billion and $36.3 billion." *Motor Vehicle Dealers Trade Regul. Rule*, 87 Fed. Reg. 42,012, 42,037 (July 13, 2022). In support, the agency cited a study stating that "consumers spent roughly 15 hours researching, shopping, and visiting dealerships for each motor vehicle transaction." *Id.* at 42,037 n.180. The agency then stated: "3 hours corresponds to 20% of an average consumer's time spent in such activities." *Id.*

Nowhere, however, did the FTC explain whether it believed an average consumer would spend 20% less time per transaction, how it arrived at that 20% figure, what data were used to reach it, or why it mattered. And where an agency "fail[s] to provide any data underlying" or any "basis for attributing" particular benefits to its proposed rule, its "notice" is "inadequate under the[] traditional APA standards" and does not "allow for meaningful and informed comment." *See Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995). Indeed, commenters raised that

they had no idea where the 20% (3 hour) figure came from and thus could not respond to it. Comment Submitted by NADA at 113 (Sept. 12, 2022), Admin. Dkt. 145. But the FTC doubled down in the final rule, simply calling the 3-hour assumption "reasonable." *Combating Auto Retail Scams Trade Regul. Rule*, 89 Fed. Reg. 590, 674-76 (Jan. 4, 2024). The FTC's inadequate notice here defies "congressional emphasis on careful procedures" to ensure that "all participants would have a full opportunity to present their views and analyses of the data underlying the proposed regulation." *Nw. Tissue Ctr. v. Shalala*, 1 F.3d 522, 529-30 (7th Cir. 1993) (quoting *Becton, Dickinson & Co. v. FDA*, 589 F.2d 1175, 1181-82 (2d Cir. 1978)). For that reason too, the Chamber urges this Court to vacate the CARS Rule.

B. The FTC's failure to provide notice conflicts with both historical and contemporary understandings of due process.

1. The FTC's actions in adopting the CARS Rule violate the historical understanding of due process. The "requirement of notice" is not just a technicality—it is a matter of basic fairness with historical roots deeply "[e]ngrained in our concept of due process." *Lambert v. California*, 355 U.S. 225, 228 (1957); *see Earle v. McVeigh*, 91 U.S. 503, 504, 510 (1875). "For more than a century the central meaning of procedural due process has been clear": notice must be "granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (collecting cases). That "essential constitutional promise[]" "may not be eroded." *Id.* Indeed, "[p]rocedural fairness" is "the indispensable essence of liberty"

and what due process "most uncompromisingly requires." *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

As early as the 1800s—before courts had "define[d] with precision the words 'due process of law'"—the Supreme Court held that due process at a minimum covered "certain immutable principles of justice," including "due notice," that "inhere[d] in the very idea of free government." *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898); *see also State of Mo. ex rel. Hurwitz v. North*, 271 U.S. 40, 42 (1926) (due process requires "reasonable notice"); *Honeyman v. Hanan*, 302 U.S. 375, 378 (1937) (same). This traditional understanding of "[d]ue process" likewise required following "rules and forms" that had been "established for the protection of private rights." *Rees v. City of Watertown*, 86 U.S. 107, 122 (1873). Thus, where an agency acts "contrary to [its own] existing valid regulations" requiring appropriate notice, it violates "that due process required by the regulations." *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). That is the situation here.

2. The FTC's actions here also flout the contemporary understanding of due process, which the APA's and FTC's procedures were designed to safeguard. Today, as at the Founding, "fair notice" remains a "fundamental principle" that requires the "clarity in regulation" that is "essential" to due process. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

When Congress adopted the APA, it did so with these longstanding due process norms in mind. The APA acts as "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by [federal] agencies." Admin. Proc. Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 298 (1946). "Hence, it is not surprising" that "democratic governance and traditions of due process" continue to demand that the public be "heard before they are subjected to the coercive power of the state," such as "when agencies are given the power to bind persons with the force of law." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 886 (2001). As this Court has explained, "notice to the regulated parties" is "[a] common requirement for the promulgation of interpretations and decrees by an administrative agency." *Trinity Marine Nashville, Inc. v. Occupational Safety & Health Rev. Comm'n*, 275 F.3d 423, 430 (5th Cir. 2001).

Indeed, the "fair notice requirement" has "now been thoroughly 'incorporated into administrative law.'" *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357, 374-75 (5th Cir. 2024) (citations omitted). "[I]n the civil administrative context," due process's mandate of "elementary fairness compels clarity" in the notice. *Id.* (citations omitted). Moreover, the very "object" of notice and comment is "fair notice." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). But "even if Congress repealed the APA tomorrow, the

Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice." *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1144 (10th Cir. 2010). That is because the "procedural safeguards" that "require proper notice" promote the fairness "fundamental[]" to due process. *Ciechon v. City of Chi.*, 686 F.2d 511, 517 (7th Cir. 1982) (collecting Supreme Court cases); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions" were "designed to assure fairness.").

That does not diminish the importance of the procedural guardrails erected by the APA and FTC. "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 413-14 (1945). Procedure "spells much of the difference between rule by law and rule by whim or caprice," and "[s]teadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). It is the requirement that agencies must "give notice to, and accept comments from, the public before undertaking to place manacles on the invisible hand" that "most distinguishes our government from others." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1092 n.16 (9th Cir. 2011) (citation omitted). Moreover, procedural safeguards like notice are especially important in the context of "unrepresentative agencies." *Batterton*, 648 F.2d at 703; *see also DHS v. Regents of the Univ. of Cal.*, 140

S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring in part and dissenting in part) (discussing "the inherently undemocratic and unaccountable rulemaking process").

In sum, an agency's "[f]ailure to adhere to regulations can constitute a denial of due process." *Arzanipour v. INS*, 866 F.2d 743, 746 (5th Cir. 1989) (citing *Accardi*, 347 U.S. 260 (1954); *Bridges v. Wixon*, 326 U.S. 135 (1945)). And because the FTC's process in adopting the CARS rule ran roughshod over notice, that is the case here. *See Caceres*, 440 U.S. at 751 n.14 (quoting *Morton*, 415 U.S. at 235).

C. The FTC's inadequate notice and improper procedure deprived the FTC of important education and diminished the quality of the final CARS Rule.

The "[p]rocedural requirements" that the FTC bypassed are not "idle and useless formalit[ies]." *Regents*, 140 S. Ct. at 1909. They "serve[] important values," such as "promot[ing] 'agency accountability'" and "ensuring that parties and the public can respond fully" and "timely … to an agency's exercise of authority." *Id.*

"[N]otice requirement[s]" like those in the APA and FTC "reflect[] the desirability of the interactive process itself." *Backcountry Against Dumps v. FAA*, 77 F.4th 1260, 1270 (9th Cir. 2023) (citation omitted). "[A]n agency's judgment [is] only as good as the information upon which it dr[aws]." *Phillips Petroleum*, 22 F.3d at 620. Providing sufficient notice "ensure[s]" that affected parties can participate "at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). Sufficient

notice also "enable[s] the agency … to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Glob. Van Lines*, 714 F.2d at 1299 n.9 (quoting *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969)). For all these reasons, "the agency should be fully informed" before acting. *Texas v. United States*, 787 F.3d 733, 762 & n.97 (5th Cir. 2015) (quoting *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974)).

Here, the FTC foreclosed such early participation, and its rule suffered. Take, for instance, the CARS Rule's 16 redundant and poorly defined categories of misrepresentations coupled with its new affirmative disclosure requirements. *Combating Auto Retail Scams Trade Regul. Rule*, 89 Fed. Reg. at 613-45. Far from helping consumers, these new impositions will cause wary auto dealers to inundate customers with unnecessary and unwanted information and significantly increase the administrative burden.

Having "deprive[d] itself of [the needed] education," it should come as little surprise that the FTC adopted a deficient rule. *Glob. Van Lines*, 714 F.2d at 1299 n.9. What little FTC analysis there is "only points up the importance of providing the public with adequate notice and opportunity to comment"—it does not "account … convincingly" for its CARS Rule. *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1143 (D.C. Cir. 1995). This Court should "prevent[] [the FTC] from promulgating inadequately considered rules in the perhaps half-formed belief that the courts will

surely think of some way of upholding them." *Glob. Van Lines*, 714 F.2d at 1299 n.10.

D. Because the FTC failed to provide proper notice under its own regulations, its CARS Rule must be vacated as invalid.

Where an agency "[f]ail[s] to provide the required notice," that "fundamental flaw" in administrative procedure "'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). This case is no exception.

Courts routinely vacate agency rules for failing to provide proper notice or procedure. For example, the Ninth Circuit recently vacated an FAA decision where "the FAA failed to comply with its own regulation by not providing notice of the second comment period." *Backcountry*, 77 F.4th at 1271. "[T]his procedural error" deprived a constituent of the "opportunity to state its 'substantive aeronautical comment on the proposal.'" *Id*.

Likewise here, the FTC's violation of 16 C.F.R. § 1.10 left NADA with insufficient time to submit a neutral, third-party study that it had commissioned on the proposed rule's costs and benefits. NADA did the best it could, submitting the study as soon as it was done—some seven months before the FTC published the final rule. But since the study was filed outside the FTC's truncated comment period, the agency announced that it was "not part of this rulemaking record" and would not be

considered. *Combating Auto Retail Scams Trade Regul. Rule*, 89 Fed. Reg. at 613 n.185.

D.C. Circuit precedent is instructive on this score. In *MCI*, for example, the court vacated an FCC decision that unbundled certain telecommunications services that offered the set rates together with other specific features. That unbundling decision "was not preceded by adequate notice"—the FCC had mentioned the possibility just once, in a footnote. 57 F.3d at 1142-43. As the court explained, the single mention was not, in that context, "notice … 'adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.'" *Id.* at 1142.

Similarly, in *Reno*, the court held that the DEA's notice was "inadequate under the[] traditional APA standards" and did not "allow for meaningful and informed comment" where the agency, in disclosing its proposed rule, "failed to provide any data underlying the budget of the diversion control program or its basis for attributing particular costs to that program." 57 F.3d at 1132-33. The FTC likewise "commit[ted] serious procedural error" in handling advance notice here (*id.*), both by keeping the public from meaningfully participating in the rulemaking process and by failing to give any data or basis for parts of its analysis. *See supra* at 5-8.

Other precedent confirms that the adequacy of notice depends on factors such as the complexity, scope, and impact of the proposed regulations. Numerous courts have invalidated rules for lack of notice when the comment period was too short to

allow for meaningful participation.[4] Here, beyond NADA's inability to complete necessary studies on the effects of the proposed rule, other commenters noted the inability to submit meaningful comments, requesting an extension of the allotted comment period. The FTC refused—but without giving any reasons or identifying any "exigent circumstances" mandating a quick turnaround. *See Centro Legal*, 524 F.Supp.3d at 955. Indeed, after the comment period closed, the FTC waited almost 16 months to publish the final rule. *Combating Auto Retail Scams Trade Regul. Rule*, 89 Fed. Reg. at 590-695. Thus, time plainly was not of the essence, the advance notice was deficient, and the FTC's denial of the opportunity to meaningfully participate in the rulemaking process violated basic fairness and due process.

[4] In *Centro Legal de la Raza v. Executive Office for Immigration Review*, 524 F.Supp.3d 919 (N.D. Cal. 2021), for example, the court explained that a 30-day comment period was "already short" and "extremely limited" in light of the "breadth and import of the new regulations"—particularly since the agency did not "identify any exigent circumstances requiring a compressed comment period." 524 F.Supp.3d at 955; *see id*. at 954, 956 (holding that the plaintiffs were likely to succeed in showing that the notice "was deficient under the APA," and noting that "numerous commenters" complained that they "could not fully address" relevant topics in the "short comment period"); *see also Cal. by & through Becerra v. U.S. Dep't of the Interior*, 381 F.Supp.3d 1153, 1176-77 (N.D. Cal. 2019) (the "brevity of the [30-day] comment period" "underscored" that the agency had "fail[ed] to provide a meaningful opportunity to comment"; "at least one circuit ha[d] recognized that 90 days is the 'usual' amount of time allotted for a comment period" (citing *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012); and *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011))); *Est. of Smith v. Bowen*, 656 F.Supp. 1093, 1099 (D. Colo. 1987) (holding a 60-day comment period "inadequate").

II. The process that led to the CARS Rule is representative of a larger FTC effort to evade procedural guardrails on its rulemaking.

The FTC's failure to follow regulatory notice requirements in the CARS rulemaking is, unfortunately, not an aberration. Rather, it represents the agency's growing tendency to blow past any procedural hurdle impeding the speedy implementation of its policies, however well or poorly conceived. The Chamber urges this Court to put a stop to that practice.

A. The FTC routinely removes important procedural safeguards.

The FTC's procedural evasions here are not atypical. The agency's failure to "turn square corners" has arisen time and time again.

Just over three years ago, several Supreme Court justices voiced concerns at oral argument about intentional FTC overreach. For instance, Justice Alito noted that when the FTC faced a procedural requirement that "was too time-consuming," it "looked for a workaround" even if it did not believe that it had the statutory authority to do so. Transcript of Oral Argument 42, *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021) (No. 19-508) (Jan. 13, 2021). The FTC admitted that "Congress was understandably concerned" that "an agency would have too much power," and "therefore, included procedural protections"—which Justice Kagan emphasized was "exactly why [the Court] should maintain the integrity of those protections rather than [adopt the FTC's] interpretation, which essentially ma[de] them irrelevant." *Id.* at 47-48. Justices Breyer and Gorsuch voiced similar concerns. *Id.* at 37-39 (Justice

Breyer explaining that the FTC had repeatedly removed protections and taken advantage of the less-protected routes); 50 (Justice Gorsuch noting that "our core concern is" that the FTC was "rendering … protections superfluous" and creating "very little incentive for the agency to ever comply with them"). Ultimately, the Court unanimously corrected the FTC's overreach. *AMG*, 593 U.S. at 75-78.

But the FTC has continued to evade other procedural protections. For example, the FTC has amended several Magnuson Moss procedures to allow it to rush rules into force. *See Revisions to Rules of Prac.*, 86 Fed. Reg. at 38,542-51. While those changes do not govern the CARS Rule, they illuminate the FTC's habit of enacting regulations with minimal public input, a deficient evidentiary record, and a desire to rush rules through a process without important procedural safeguards.

For example, these newly minted rules take an independent judge's power to appoint a presiding officer and give it instead to the FTC Chair. *Id.* at 38,543. They also grant the FTC new powers to determine who can speak, and what they can speak about, at an informal hearing, including plenary power to declare "a final list of disputed issues of material fact." *Id.* at 38,544. As one former Commissioner has explained, these revisions "facilitate manipulation of the fact-finding process" and, without "[a]n independent hearing process," create incentives to address "pet projects of unelected Commissioners" rather than "actual market failures." Christine Wilson, *Rule-A-Palooza: Realities and Repercussions* 13, *supra* note 3 (Feb. 24,

2023). Consolidating "power over the rulemaking process" in the Chair only exacerbates the problem. *Id.*

Former Commissioner Wilson is not alone. A former FTC Chair and a former director of the FTC Bureau of Consumer Protection issued a report explaining that the amendments were "based solely on the need for speed." Beales III & Muris, *Back to the Future: How Not to Write a Regulation* 1, *supra* note 2. Indeed, the agency "did not even consider the problems that led to the failures of 1970s rulemaking," such as "the lack of . . . systematic evidence to evaluate the extent of the problem and efficacy of the remedies." *Id.* And as the authors warn, the new procedures "increase political control of rulemaking," "decreas[e] public participation," and make changes "inconsistent with statutory requirements [and] sound public policy"—all "contrary to the goals of Congress" and antithetical to "the development of high-quality rules." *Id.*

Even the current Commissioners (who enacted the recent procedural changes) admit that speed—not the quality or transparency of the rules—was their aim. Impersonation Rule: Statement of Chair Khan, Joined by Commissioners Slaughter and Bedoya (Feb. 15, 2024).[5] Moreover, a recent House Judiciary Committee report

[5] https://www.ftc.gov/system/files/ftc_gov/pdf/r207000impersonationrulelmkstmt.pdf.

identified several other deficiencies in current FTC practices, including FTC procedural changes that facilitate speed and eliminate reasoned decision-making. *See* H.R. Comm. on the Judiciary, Interim Staff Report, *Abuse of Power, Waste of Resources, and Fear: What Internal Documents and Testimony from Career Employees Show About the FTC Under Chair Lina Khan* (Feb. 22, 2024).[6]

No one likes "red tape," and eliminating it can be admirable where the tape is bureaucratic overkill or an impediment to economic efficiency in the private sector. But as a closer look reveals, what the FTC now calls "red tape" are fundamental due process norms—safeguards on thorough factfinding, reasonable notice, and a meaningful opportunity for the regulated public to highlight the real-world implications of agency regulation. The CARS Rule is just the latest example from an agency that refuses to follow important procedural guardrails. This Court should hit the brakes.

B. The FTC has failed to apply even its truncated procedural safeguards.

In recent rulemakings, the FTC has skirted even the abbreviated procedures that remain after the agency's July 2021 changes. Two examples are illustrative. One, even for rules that are indisputably subject to Magnuson Moss requirements,

[6] https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-02-22%20Abuse%20of%20Power%20Waste%20of%20 Resources%20and%20Fear_0.pdf.

the FTC has forgone advanced notice. Two, the FTC has consistently refused to identify disputed issues during rulemaking to avoid hearings on such issues.

1. In its efforts to expand the Rule on Impersonation of Government and Businesses, the FTC ignored Magnuson Moss's statutory advanced notice requirement. Although rule amendments must follow all Magnuson Moss's procedural requirements (15 U.S.C. § 57a(d)(2)(B)), the FTC's currently proposed amendments to that Rule did not start with advanced notice and the attendant requirements (*Trade Regul. Rule on Impersonation of Gov't and Bus.*, Supplemental notice of proposed rulemaking, 89 Fed. Reg. 15,072, 15,072 (March 1, 2024)). Rather, the FTC proposed its substantive amendments via a "supplemental notice of proposed rulemaking"—a procedure nowhere contemplated by the statute. *Id*.

2. Also, after arrogating to itself the power to decide which disputed issues of material fact deserve a hearing (*Revisions to Rules of Prac.*, 86 Fed. Reg. at 38,544), the FTC has consistently refused to identify or acknowledge disputed issues or allow hearings on them. It has chosen to ignore the many commenters' requests that the agency identify disputed factual issues for resolution at informal hearings. The result is an incomplete record on which to enact (or not enact) a rule.

Faced with the FTC's inaction, an administrative law judge presiding over one recent rulemaking felt she had no choice but to designate two issues as disputed—notwithstanding the FTC's attempt to bypass that procedure. *Negative Option Rule*,

Order Setting Hearing (Jan. 25, 2024).[7] As she explained, the "two issues turn[ed] on specific facts that c[ould] be presented through testimony, cross examination, and documentary submissions." *Id.* Moreover, the "issues [we]re … 'necessary to resolve' because the Commission [wa]s required to consider them under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively." *Id.*

C. The FTC's illegal rulemaking practices result in inadequate and invalid final rules.

As explained above, deficient rulemaking procedures produce deficient rules. And unfortunately, recent deficiencies are not limited to the CARS Rule. Here again, take the FTC's proposed amendments to the Rule on Impersonation of Government and Businesses. Those amendments would expand the Rule's coverage from impersonation of certain government and business entities to impersonation of *all* individuals, real or fictitious. *Trade Regul. Rule on Impersonation of Gov't and Bus.*, Supplemental Notice of Proposed Rulemaking, 89 Fed. Reg. at 15,072-83; Impersonation Rule: Statement of Chair Khan, *supra* note 5. In addition, the FTC "recommends extending liability to any actor that provides the 'means and instrumentalities' to commit an impersonation scam," provided that actor "knew or should have known that their AI software tool" would be used "to deceive people" (*id.*), but fails to grapple with or adequately cabin the potential breadth of that liability.

[7] *See* https://www.regulations.gov/comment/FTC-2024-0001-0014.

These vague and overbroad proposals illustrate the FTC's efforts to ram rule amendments through without following the requisite procedures—and in particular without providing advanced notice or allowing the public to participate "at an early stage." *U.S. Steel Corp.*, 595 F.2d at 214. But "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Wages & White Lion*, 90 F.4th at 362 (quoting *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021)). That principle rings especially true "when considering how the unelected administrators of the Fourth Branch of Government treat the American people." *Id*.

The FTC's actions in adopting the CARS Rule, like its recent rulemaking more generally, "bear no resemblance to square corners." *Id*. The public is entitled to "the benefit of a full and fair regulatory" process. *Id*. And with "adequate notice and opportunity to comment," the FTC might, at the very least, "account more convincingly for whatever decision[s] it ultimately makes." *MCI*, 57 F.3d at 1143. This Court should require no less.

CONCLUSION

For the foregoing reasons, NADA and TADA's petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system. A copy of the foregoing was served on all counsel of record via CM/ECF in compliance with Fed. R. App. P. 25(b) and (c).

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CERTIFICATE OF COMPLIANCE

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