

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

**BRIEF OF AMICI CURIAE PROFESSORS OF ECONOMICS
IN SUPPORT OF RESPONDENT**

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CERTIFICATE OF INTERESTED PERSONS

No. 24-60013, *National Automobile Dealers Association v. FTC*

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the Petitioners’ Certificate of Interested Persons—the following listed persons 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. Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel further states that amici curiae have no parent corporations, and no publicly held corporation has a 10% or greater ownership interest in amici curiae.

- Petitioner National Automobile Dealers Association.
- Petitioner Texas Automobile Dealers Association.
- Counsel for petitioners Consovoy McCarthy, PLLC, Jeffrey Matthew Harris, and Seanhenry Nathaniel VanDyke.
- Amicus curiae Neale Mahoney, Professor of Economics, Stanford University.
- Amicus curiae Charles Murry, Wieler Family Associate Professor of Economics, Boston College.

- Amicus curiae Babur De Los Santos, Associate Professor Economics, Clemson University.
- Amicus curiae Tobias Salz, Castle Krob Career Development Associate Professor, Massachusetts Institute of Technology.
- Amicus Curiae Matthijs Wildenbeest, Professor of Economics, University of Arizona.
- Counsel for amicus curiae Center for Consumer Law and Economic Justice, Seth E. Mermin and David S. Nahmias.

Respectfully submitted,

/s/ Seth E. Mermin

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89 Fed. Reg. 590 (Jan. 4, 2024)..... passim

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OTHER AUTHORITIES

Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257 (2020)..... 8, 9, 19

Alexander W. Butler, Erik J. Mayer & James B. Weston, *Racial Disparities in the Auto Loan Market*, 36 Rev. Fin. Studies 1 (2022)..... 19

Ambarish Chandra, Sumeet Gulati & James M. Sallee, *Who Loses When Prices Are Negotiated? An Analysis of the New Car Market*, 65 J. Indus. Econ. 235 (2017)..... 19

Andreas Grunewald et al., *Auto Dealer Loan Intermediation: Consumer Behavior and Competitive Effects* (2023) 8, 12, 19

Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & Econ. 297 (1978) 5

Bureau of Labor Statistics, *What Can Search Frictions Tell Us About the Labor Market?* (Oct. 2020)..... 6

Charles Murry & Henry S. Schneider, “The Economics of Retail Markets in New and Used Cars,” in *Handbook on the Economics of Retail and Distribution* 350 (Emek Basker ed., 2016)..... 19

Charles Murry & Yiyi Zhou, *Consumer Search and Automobile Dealer Colocation*, 66 Mgmt. Sci. 1909, 1929 (2020)..... 7, 14, 17

Cox Automotive, *2022 Car Buyer Journey: Top Trends Edition 6* (2023)..... 8

Fed. Reserve Bank of St. Louis, *Total Vehicle Sales* (last updated May 3, 2024)..... 15

Fiona Scott Morton, Florian Zettelmeyer & Jorge Silva-Risso, *Consumer Information and Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?*, 1 *Quantitative. Mktg. & Econ.* 65 (2003)..... 19

Fiona Scott Morton, Jorge Silva-Risso & Florian Zettelmeyer, *What Matters in a Price Negotiation: Evidence from the U.S. Auto Retailing Industry*, 9 *Quantitative Mktg. & Econ.* 365 (2011) 7

George J. Stigler, *The Economics of Information*, 69 *J. Pol. Econ.* 213 (1961) 6

Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 *Am. Econ. Rev.* 304 (1995)..... 19

José Luis Moraga-González, Zsolt Sándor & Matthijs Wildenbeest, *Consumer Search and Prices in the Automobile Market*, 90 *Rev. Econ. Studies* 1394 (2023)..... 7, 17, 18

Marco A. Haan, José Luis Moraga-González & Vaiva Petrikaite, *A Model of Directed Consumer Search*, 61 *Int’l J. Indus. Org.* 223 (2018)..... 10

Michael Havlin, *U.S. Bureau of Labor Statistics, Automotive Dealerships 2019–22: Dealer Markup Increases Drive New-Vehicle Consumer Inflation* (2023)..... 9

Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & Econ.* 233 (1979)..... 5

Peter A. Diamond, <i>A Model of Price Adjustment</i> , 3 J. Econ. Theory 156 (1971).....	10
Press Release, Netherlands Authority for Consumers and Markets, <i>ACM Instructs Car Industry To List Unavoidable Costs With Prices</i> (Oct. 8, 2016)	17
Sean Tucker, <i>Study: Dealers Lose Repeat Business Through Markups</i> , Kelley Blue Book (Aug. 9, 2022)	8
<i>Search Theory (New Perspectives)</i> , in <i>The New Palgrave Dictionary of Economics</i> (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed., 2008).....	6
Sridhar Moorthy, Brian T. Rutherford & Debabrata Talukdar, <i>Consumer Information Search Revisited: Theory and Empirical Analysis</i> , 23 J. Consumer Rsch. 263 (1997).....	7

INTERESTS OF AMICI CURIAE¹

Amici curiae Neale Mahoney (Professor of Economics, Stanford University)²; Charles Murry (Wieler Family Associate Professor of Economics, Boston College); Babur De Los Santos (Associate Professor Economics, Clemson University); Tobias Salz (Castle Krob Career Development Associate Professor, Massachusetts Institute of Technology), and Matthijs Wildenbeest (Professor of Economics, University of Arizona) are economists with expertise in consumer search, information economics, and the motor vehicle industry. Amici hold or have held appointments with the Center for Economic Policy Research, National Bureau of Economic Research, Stanford Institute for Economic Policy Research, and the Federal Competition Commission of Mexico, among others. Amici have conducted multiple empirical studies and published articles in numerous peer-reviewed academic journals.

Based on their training and expertise in consumer behavior and information economics, amici believe that the Commission's cost-benefit analysis supporting the Combating Auto Retail Scams (CARS) Trade Regulation Rule, 89 Fed. Reg.

¹ No counsel for any party authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a). All parties have consented to the filing of this brief.

² Amici join in their individual capacities; institutional affiliations are included for identification purposes only.

590 (Jan. 4, 2024) (“CARS Rule”) is sound, and that the Rule will benefit consumers and increase market efficiency. Amici therefore have an interest in providing the Court additional background and context with which to assess the foundational economic principles at play in this case. Amici also have an interest in preserving the validity of a congressionally mandated regulation that will promote transparency in the motor vehicle market and economic benefits for consumers nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a matter of economics, the CARS Rule should be upheld. It is no secret that buying a car is fraught with inefficiencies, uncertainty, and, all too often, fraud and misrepresentation. Hidden fees, unnecessary add-ons, and unscrupulous dealerships that charge prices above what they advertise and offer misleading or false promotions have long characterized the automotive sales industry. At its core, this market suffers from asymmetric information and a lack of transparency, which drive prices above their economically efficient level and cause what is known in economics as “deadweight loss”—a loss to society where overall prices exceed the marginal costs and socially beneficial transactions do not occur.

The FTC issued the CARS Rule to help steer this market toward transparency, fairness, and efficiency. Consistent with its congressionally delegated authority, *see* 12 U.S.C. § 5519(d) (2010 Dodd-Frank Act); 15 U.S.C. §§

45(a)(1), 57a(1)(B), 57b-3(b)(2) (1980 FTC Improvements Act), the Commission conducted a careful and thorough economic analysis of the vehicle sales market. That analysis ultimately resulted in a rule that will foster price transparency and the overall efficiency of the market.

The FTC properly adhered to foundational economic principles in designing the CARS Rule. For example, the Rule takes account of the inefficiencies caused by search frictions and the importance of price transparency in countering those inefficiencies. By requiring price transparency, the Rule will likely lower not only search costs but also prices, which in turn will likely generate greater sales and reduce deadweight loss.

These expected impacts of the CARS Rule find additional support in peer-reviewed economics literature. Studies show that search frictions are substantial in the automobile market, and that dealers can raise prices without significant repercussions as a result. The empirical evidence and the nature of the automobile market itself suggest that dealers enjoy significant incentives to engage in practices that decrease price transparency. In reducing or eliminating those incentives, the Rule will likely cause both total search costs and final prices to decrease, thereby generating long-term economic welfare.

In sum, the CARS Rule is rational, well-reasoned, and rooted firmly in widely accepted principles of economics. The Rule is neither arbitrary nor

capricious. Furthermore, statute and common sense both provide that a rule involving complex economic analysis is better committed to an agency staffed with expert economists and statisticians than to courts that may generally lack equivalent subject matter expertise. The Rule, and the analysis it embodies, warrant approval by this Court.

The petition for review should be denied.

ARGUMENT

I. THE CARS RULE PROMOTES AN ECONOMICALLY EFFICIENT MOTOR VEHICLE MARKET.

The FTC exercised its congressionally granted authority to regulate the motor vehicle industry, *see* 12 U.S.C. § 5519(d); 15 U.S.C. § 57a(a)(1)(B), by adhering to fundamental economic principles. As the Commission properly found, the motor vehicle market has long been characterized by opaque and deceptive pricing. *See* 89 Fed. Reg. at 595-96, 678-80. The lack of price transparency in combination with search frictions in the cars market has allowed dealerships to

“hold up”³ consumers by raising prices substantially after consumers visit the dealers. These higher prices, in turn, produce inefficiencies and create deadweight loss. In a market with fully transparent advertised prices—like that anticipated by the CARS Rule—hold-up incentives are effectively eliminated since sellers are required to honor the prices they advertise. Moreover, when search frictions are reduced and prices are transparent, an individual dealership has an incentive to lower prices to attract more customers. These lower prices benefit consumers and also lead to additional sales, an outcome that, through a reduction in deadweight loss, increases overall economic efficiency.

A. In A Non-Transparent Vehicle Market, Search Costs Distort Prices, Raising Them Above An Economically Efficient Level.

Well-established economic principles undergird the Commission’s approach in the CARS Rule. For example, economists have long recognized that “search

³ “Hold up” describes a situation in which one party to a transaction takes advantage of situational market power to extract surplus from the other party. In the vehicle sales context, the parties are the consumer and the dealer. Hold up occurs when a consumer has invested substantial search costs in the vehicle purchase process (such as visiting the dealer, test-driving the vehicle, and learning about vehicle attributes). The dealer, knowing the consumer may agree to worse terms rather than undergo the search costs entailed with restarting the purchase process with another dealer, then changes the terms of the offer in a way that benefits the dealer and harms the consumer. For early descriptions of the hold-up problem in economics literature, see, for example, Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979), and Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & Econ. 297 (1978).

frictions,” the non-negligible costs associated with acquiring information to conduct a transaction,⁴ can have profound implications for the functioning of markets.⁵ In most markets, consumers lack sufficient information about product attributes, so they must search to learn about price and non-price characteristics.⁶ This search process takes time and effort. As a result, consumers are likely to consider only a limited number of alternatives when making a purchase decision. Retailers exploit this information asymmetry: if consumers consider only a subset of products, retailers effectively have fewer competitors than they would if consumers had perfect information. With fewer competitors, retailers can raise their prices above the levels that an efficient market would permit.

The vehicle market exemplifies a context in which search frictions play an important role—and thus where inefficiencies can result in higher prices and

⁴ “Search frictions” refer to the obstacles or difficulties that prevent two parties from easily finding and agreeing to a transaction. These frictions can include factors like information gaps, geographic distances, and time delays. *See, e.g.,* Bureau of Labor Statistics, *What Can Search Frictions Tell Us About the Labor Market?* (Oct. 2020), <https://tinyurl.com/7dswsan4>; *Search Theory (New Perspectives)*, in *The New Palgrave Dictionary of Economics* (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed., 2008).

⁵ *See* George J. Stigler, *The Economics of Information*, 69 *J. Pol. Econ.* 213 (1961) (providing future Nobel laureate’s groundbreaking analysis of the search problem from the perspective of consumers).

⁶ Stigler, *supra* note 5, at 213 (defining the phenomenon of search as where “[a] buyer (or a seller) who wishes to ascertain the most favorable price must canvass various sellers (or buyers)”).

diminished consumer welfare.⁷ Automobiles are complex products with many different attributes. Even though many of these attributes are easily quantified (for instance, horsepower, maximum speed, number of doors) and thus can often be deduced through online research, most consumers must visit a dealership in person to learn the aspects of a vehicle that are more difficult to quantify (comfort, engine noise, etc.).⁸ Moreover, incomplete advertised price information—for example, the exclusion of features that all cars and trucks on the lot contain—creates additional search frictions that require consumers to visit a dealership to ascertain the ultimate cost of the vehicle.

Consumers' price expectations play a key role in their purchase decisions.

⁷ Economic research widely supports the proposition that search frictions play a significant role in the automobile industry. *See, e.g.*, Fiona Scott Morton, Jorge Silva-Risso & Florian Zettelmeyer, *What Matters in a Price Negotiation: Evidence from the U.S. Auto Retailing Industry*, 9 *Quantitative Mktg. & Econ.* 365, 366-68 (2011) (finding consumers with lower search costs pay an average of \$278 less, or 18 percent of the average dealer margin, than consumers with high search costs); Sridhar Moorthy, Brian T. Rutherford & Debabrata Talukdar, *Consumer Information Search Revisited: Theory and Empirical Analysis*, 23 *J. Consumer Rsch.* 263, 273-76 (1997) (evaluating the amount of search conducted by consumers with different perceptions of the market for new car purchases).

⁸ *See, e.g.*, José Luis Moraga-González, Zsolt Sándor & Matthijs Wildenbeest, *Consumer Search and Prices in the Automobile Market*, 90 *Rev. Econ. Studies* 1394 (2023) (“In many markets, such as those for automobiles . . . consumers typically have to visit stores to find out which product they like most”); Charles Murry & Yiyi Zhou, *Consumer Search and Automobile Dealer Colocation*, 66 *Mgmt. Sci.* 1909, 1929 (2020) (“Cars are experience goods, so websites could never fully inform a consumer completely about the utility, as personal interaction can”).

But when the advertised price does not reflect the cost of add-ons that are all but inevitable, consumers may be left feeling misled and frustrated.⁹ In the automobile market in particular, search costs are high because of the time it takes for consumers to travel to a dealership and especially the time spent at the dealership, which can amount to a substantial number of hours—far more than for other consumer goods.¹⁰

Search costs arising from a lack of price transparency have led to an economically inefficient motor vehicle market. In the current U.S. vehicle market, as a result of add-ons and markups, dealerships' advertised prices are lower than

⁹ See, e.g., Sean Tucker, *Study: Dealers Lose Repeat Business Through Markups*, Kelley Blue Book (Aug. 9, 2022), <https://perma.cc/7ZB9-LG4G> (reporting, based on survey data, that American car buyers “are frustrated with mystery charges” and that a third “said they had paid ‘fees they had never heard of before’”).

¹⁰ See, e.g., Cox Automotive, *2022 Car Buyer Journey: Top Trends Edition 6* (2023), <https://perma.cc/NNE4-KEST> (finding that vehicle buyers spend about three hours per dealership per visit); Andreas Grunewald et al., *Auto Dealer Loan Intermediation: Consumer Behavior and Competitive Effects* (2023), <https://perma.cc/8337-XXD9> (noting that dealers regularly base markup rate decisions on “‘showroom information,’ which they gather during a sales process that is typically several hours long”); Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1285-1287 (2020) (describing the “psychology of the [vehicle] sale” and that “by the time the consumer walks into the dealership, the consumer has already invested substantial time in terms of research and travel”).

the prices those dealerships actually charge.¹¹ Since consumers are likely to make search decisions based on advertised prices, an individual dealership benefits from setting its advertised prices as low as possible, which increases the likelihood that a consumer will visit that dealership. However, once consumers arrive at the dealership, they have likely already traveled a considerable distance and will soon face a retailer whose objective is “to get the consumer invested in the idea of the purchase, to make the consumer feel locked in to going through with the transaction, and to wear down consumer resistance through sheer exhaustion and exasperation.”¹² In such circumstances it is costly for consumers to visit even one dealership, much less several or many. In a very real way—and in line with standard operating procedure at car dealerships around the nation¹³—the consumer is locked into completing the transaction at the first dealership she visits. High search costs thus create an incentive to hold up customers: once a consumer is at a dealership, the dealership can increase actual prices beyond the advertised prices

¹¹ See, e.g., Michael Havlin, U.S. Bureau of Labor Statistics, *Automotive Dealerships 2019–22: Dealer Markup Increases Drive New-Vehicle Consumer Inflation* (2023), <https://tinyurl.com/2hsbf4yx> (finding an increase in dealership profit margins due to markups increased vehicle costs between 2019 and 2022); Levitin, *supra* note 10, at 1301-04 (explaining the practice of “loan packing” in which vehicle customers are sold various add-on products “at a significant markup over their wholesale cost so they tend to be high-profit margin products for dealers”).

¹² Levitin, *supra* note 10, at 1287.

¹³ Levitin, *supra* note 10, at 1285-86.

without the consumer leaving and visiting a different dealership. With essentially captive customers, dealers have the ability (and incentive) to raise prices through add-ons like extended warranties, service agreements, and finance charges while the consumer is at the dealership.¹⁴ In other words, there exists an illusion of competition through advertised prices that is not borne out in the actual purchase process.

That scenario contrasts sharply with the anticipated market once the CARS Rule is in effect. That market will feature price transparency; advertised prices will in principle match actual prices.¹⁵ Just as in the pre-Rule market, a given auto dealership will have an incentive to advertise low prices to make sure that a consumer will visit its dealership first. However, unlike in the non-transparent pricing market, once the CARS Rule is in effect, consumers can no longer be held up once they arrive at the dealership, because actual and advertised prices will be the same.

Furthermore, greater price transparency makes it easier for consumers to

¹⁴ The mechanism behind this effect is similar to the so-called Diamond Paradox, according to which, because of search frictions, retailers can increase prices without losing consumers. See Peter A. Diamond, *A Model of Price Adjustment*, 3 J. Econ. Theory 156 (1971).

¹⁵ For a theoretical model in which price transparency leads to lower prices, see Marco A. Haan, José Luis Moraga-González & Vaiva Petrikaite, *A Model of Directed Consumer Search*, 61 Int'l J. Indus. Org. 223 (2018).

obtain the information necessary to make an informed purchase decision. This reduction in search costs directly benefits consumers through time savings. Moreover, lower search costs may also allow consumers to visit more dealerships and increase competition in the market, which will help consumers to obtain a fairer price and will pressure dealerships to lower their markups—thereby creating a more efficient marketplace.

B. Greater Transparency In The Motor Vehicle Market Will Diminish Deadweight Loss.

Lower prices will also increase efficiency in the cars market by reducing deadweight loss. Deadweight loss is a basic economic precept that characterizes an inefficient market. A market is efficient when all consumers who are willing to pay above the seller's marginal cost actually purchase the product. When prices are higher than marginal costs, there are some consumers who would have purchased the product at marginal cost pricing, but opt not to because of the higher price. Consumers and sellers both would have received surplus, or economic benefit, had this transaction occurred—with the seller's surplus equal to their profit from the sale and the consumer's surplus equal to the amount they would have been willing to pay less the purchase price. The deadweight loss is the lost surplus from the missing transactions caused by the higher price, aggregated over all of the transactions that were priced out of the market. The greater the deadweight loss, the more inefficient the allocation of resources in that market, and the greater the

loss of benefit and well-being to society.

Deadweight loss is particularly relevant in the vehicle market. Because of opaque pricing and hidden markups, actual prices for vehicle buyers are higher than the marginal costs for the dealerships to sell vehicles. Greater price transparency will lower dealer markups and move prices downward toward dealers' marginal costs. The lower prices will yield a smaller set of missing transactions and, thus, a smaller deadweight loss.¹⁶

The Commission recognized the twin problems of search frictions and greater deadweight loss in the motor vehicle market and crafted the Rule to address both. *See* 89 Fed. Reg. at 678-81. The Commission recognized the presence of substantial search costs, including the investment of “significant time and effort traveling to, and negotiating at, the dealership premises,” and the “wasted time” transacting with dealers that use deceptive pricing schemes. *Id.* at 672, 678. The Rule’s mandate of greater price transparency, therefore, was designed to “save consumers time” by eliminating the incentives for dealers to misrepresent their prices in order to attract consumers to the dealership and then pile on markups during the actual transaction. *Id.* at 674. Moreover, based on its determination that “[t]he status quo in this industry features consumer search frictions, shrouded

¹⁶ *See* Grunewald et al., *supra* note 10, at 35-40 (finding that eliminating the ability of dealers to add markups lowers the overall transaction price and increases consumer surplus”).

prices, deception, and obfuscation,” the Commission concluded that “increase[ing] price competition and shifting prices closer to marginal costs” would result in a reduction in deadweight loss. *Id.* at 678-81. It calculated the benefit to society as ranging from \$1.4 to \$2.3 billion over ten years. *Id.* at 681. That prediction accurately characterizes the scale of the impact of the CARS Rule.

II. EXPERT ECONOMIC RESEARCH SUPPORTS THE COMMISSION’S ANALYSIS.

The Rule serves salutary economic objectives by reducing the incentives that dealerships have to hold up consumers when search costs are high and prices are not transparent. Empirical evidence shows that new and used car buyers incur substantial costs in searching for vehicles, and that the CARS Rule will result in reduction of markups as a result of lower search costs and greater price transparency.

A. The CARS Rule Will Substantially Lower Consumers’ Search Costs.

A review of the economics literature broadly supports the Commission’s determination that the Rule will result in significant savings to consumers, and that those cost savings will catalyze further economic benefits and prosperity in local and national economies. The Commission has estimated that, over ten years, the Rule will result in a present-value savings of \$12.3 to \$14.9 billion in search costs to consumers, or approximately \$1.75 billion saved per year. 89 Fed. Reg. at 677.

To arrive at these figures, the FTC used estimates of the value-of-time and expected time savings (benchmarking to online shopping) to compute total search cost savings. *Id.* at 674.

Expert economic research support both the approach and the results obtained by the FTC. Notably, a 2020 study conducted by amicus curiae Professor Charles Murry and Professor Yiyi Zhou found that consumers incur an average of \$45 per mile driven to the dealer in search costs in order to purchase a new car.¹⁷ Using data on new vehicle transactions in Ohio from 2007 to 2014, Professors Murry and Zhou determined that the average consumer travels 6.8 miles to visit each geographic dealer cluster¹⁸ and visits an average of two clusters before they purchase a car.¹⁹ Therefore, the average consumer will incur \$612 in search costs for a single transaction (\$45 per-mile search cost x 6.8 miles per cluster x 2 clusters visited).

¹⁷ Murry & Zhou, *supra* note 8, at 1929.

¹⁸ A “dealer cluster” refers to the common phenomenon in automotive sales in which competing dealerships will locate their businesses in a same neighborhood or geographic area, like an auto row or auto mall. Murry and Zhou found, for example, that in Ohio, where they conducted their study, more than 85 percent of new car dealers are located within a half mile of a rival dealer. Murry & Zhou, *supra* note 8, at 1910.

¹⁹ Murry & Zhou, *supra* note 8, at 1923. Because Murry and Zhou considered the search for clusters of dealers, their analysis likely understates costs because it does not separately consider per-dealer or per-car costs.

This study suggests that as a result of the transparent prices mandated by the Rule, consumers will obtain widespread aggregate savings in search costs. Because the Rule requires dealers to disclose all additional costs up front, advertised prices will be much closer, if not identical, to actual prices. Therefore, consumers will incur lower search costs during their purchase process. As described in Table 1 below, if even 10 percent of consumers save one visit to a dealer during their search process as a result of the Rule, the aggregate savings for new car purchases would be \$5.61 billion over 10 years.²⁰ If 20 percent of consumers save a single dealer visit, the aggregate cost savings would be \$11.21 billion.²¹

²⁰ Note these numbers are based on new car sales only; including used vehicle sales would increase the cost savings due to the Rule. Also, given that Murry and Zhou used data from Ohio between 2007 and 2014 to conduct their analysis, amici curiae have adjusted their numbers by 1.31 to account for inflation between 2014 and 2024.

²¹ This analysis assumes an average of 14 million vehicles sold per year nationwide, which is likely an underestimate. *See* Fed. Reserve Bank of St. Louis, *Total Vehicle Sales* (last updated May 3, 2024), <https://perma.cc/PVV7-R5NR> (last visited May 20, 2024) (observing a seasonally adjusted annual rate of 15-16 million vehicles sold in 2023).

Table 1. Direct Search Costs Savings Due To The CARS Rule.

Percent of consumers who visit one fewer dealer	Aggregate 10-year search cost savings
10%	\$5.61 billion
15%	\$8.41 billion
20%	\$11.21 billion
30%	\$16.83 billion
50%	\$28.06 billion

B. The Rule Will Foster Transparent Pricing And Lower Dealer Markups.

The CARS Rule will also promote transparent pricing by reducing the incentives for dealers to mark up prices above the advertised price. In fact, based on other academic studies, amici curiae estimate that the effect on markups is likely to be much greater than in the base scenario employed by the FTC in its regulatory analysis. This reduction in markups will more than offset the potential rise in prices due to potentially higher compliance costs borne by dealers—the concern expressed by the trade groups. *See* Pet. Br. at 42-43. Indeed, any compliance cost increase will likely be several orders of magnitude less than the negative effect on marginal price through increased price transparency and lower search frictions.

Expert economic studies demonstrate that transparent pricing will result in decreased dealership markups and consumer search costs—and, by consequence,

significant price and time savings to consumers. In the study by Murry and Zhou discussed above, for example, the researchers measured the magnitude of search costs that consumers face when purchasing new cars and used those estimates to quantify (1) markups (price minus marginal costs) when search frictions are reduced and (2) prices in the absence of search costs.²² The study found that search costs alone contribute an average of \$333 to the price of each vehicle sold in the form of dealer markups.²³ As applied to the U.S. auto market, that number is very likely an underestimate, since the study assumed a market where prices were fully transparent. In a non-transparent market, like the United States at least until the CARS Rule goes into effect, search costs per vehicle probably exceed—by a significant margin—the estimated \$333.

Similarly, in another recent study, Professors José Luis Moraga-González, Zsolt Sándor, and amicus curiae Matthijs R. Wildenbeest found that a combination of search frictions and lack of transparency increases vehicle prices by

²² Murry & Zhou, *supra* note 8, at 1924-25.

²³ Murry & Zhou, *supra* note 8, at 1924, 1929. The study assumed full price transparency when obtaining the marginal cost estimates, which were then used to calculate prices for a counterfactual example that contained search frictions.

approximately 13 percent.²⁴ Unlike earlier studies, this investigation did not assume that consumers have perfect information about prices. The study found that the lack of price transparency by itself increases average dealership markups by over \$3,000.²⁵

Together, the studies described here suggest that the benefits of greater transparency in pricing and reduced dealer markups may in fact *exceed* those calculated by the FTC. The Commission’s prediction of \$12.3 to \$14.9 billion in savings related to time spent over ten years is based on Professors Murry and Zhou’s per-vehicle search costs estimate of \$333. *See* 89 Fed. Reg. at 680. Since that figure does not take into account the positive effects of price transparency, a comparison of the counterfactual findings in the two studies discussed here

²⁴ Moraga-González, Sándor & Wildenbeest, *supra* note 8, at 1423. While the study by Moraga-González et al. used data from the Netherlands from 2003-2008, *id.* at 1412, its findings have relevance for the current U.S. market. The Dutch vehicle market is structured similarly to the U.S. market in terms of brands and dealership operations, and search costs and lack of price transparency are significant issues. For example, in 2016 – eight years after the close of data for this study – the Netherlands competition authority called for greater price transparency upon finding “[i]n almost all cases, [Dutch] consumers end up paying more than the advertised price” by a magnitude of 600 to 1,500 euros. Press Release, Netherlands Authority for Consumers and Markets, *ACM Instructs Car Industry To List Unavoidable Costs With Prices* (Oct. 8, 2016), <https://perma.cc/WX4M-2ELC> (last visited May 20, 2024).

²⁵ Moraga-González, Sándor & Wildenbeest, *supra* note 8, at 1398.

indicates that the Rule might result in even larger downward effects on markups than what the FTC has calculated.

C. The Rule’s Positive Impact On Price Transparency Will Concretely Benefit Consumers.

Finally, amici note that the idea that car dealers can leverage price opacity to exercise market power is not just a theoretical argument. The economics literature has documented that car dealers are able to tailor prices based on individual customer attributes at the point of sale. For example, a 2003 study concluded that on-line shopping lowers prices for consumers looking for new cars by lowering search costs.²⁶ A more recent study of auto sales financing found substantial variation in the cost of credit across consumers that could not be explained by typical variables used in the loan approval process, and concluded that dealers were adding costs opportunistically.²⁷ These examples suggest that dealers exercise

²⁶ See Fiona Scott Morton, Florian Zettelmeyer & Jorge Silva-Risso, *Consumer Information and Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?*, 1 *Quantitative Mktg. & Econ.* 65, 84 (2003) (finding “higher search costs when buying a vehicle may be responsible for a large part of the price premium paid”).

²⁷ Grunewald et al., *supra* note 10, at 13 (finding “dealers determine markups using showroom information that lenders do not have”); Charles Murry & Henry S. Schneider, “The Economics of Retail Markets in New and Used Cars,” *in Handbook on the Economics of Retail and Distribution* 350 (Emek Basker ed., 2016) (noting that the vehicle market is “unusual for being a large retail market where consumers pay what are essentially personalized prices”).

market power at the point of sale, and, as explained above, that this power can exacerbate harm to consumers when prices are not transparent.

Mandatory price transparency therefore will likely provide significant benefits to consumers and markets and a marked increase in economic efficiencies.

III. CONGRESS HAS DIRECTED THAT COURTS MAY NOT SECOND-GUESS THE COMMISSION’S ECONOMIC ANALYSIS.

While the foregoing economic analysis confirms the validity of the FTC’s evaluation of the CARS Rule, it is, strictly speaking, unnecessary. As the Commission explains, *see* FTC Br. at 54-56, the plain text of the statute setting forth Magnusson-Moss rulemaking procedures precludes “any judicial review in any court” of FTC regulatory analyses like this one.²⁸ 15 U.S.C. § 57b-3(c)(1); *cf.* *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 505-06 (D.C. Cir. 2019) (declaring

The impact of opportunistic individual pricing is not borne equally across the U.S. population. *See, e.g.*, Levitin, *supra* note 10, at 1297-1301 (taking stock of the “substantial evidence indicating that dealer markups may, in some cases, be discriminatory” and citing studies); Alexander W. Butler, Erik J. Mayer & James B. Weston, *Racial Disparities in the Auto Loan Market*, 36 *Rev. Fin. Studies* 1, 39 (2022) (finding that Black and Hispanic consumers on average pay \$410 in auto loan costs than other groups); Ambarish Chandra, Sumeet Gulati & James M. Sallee, *Who Loses When Prices Are Negotiated? An Analysis of the New Car Market*, 65 *J. Indus. Econ.* 235, 272 (2017) (finding age and gender disparities in prices consumers paid for new cars); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 *Am. Econ. Rev.* 304, 219 (1995) (same).

²⁸ The only exception, which permits a court to set aside a rule “if the Commission has failed entirely to prepare a regulatory analysis,” 15 U.S.C. § 57b-3(c)(1), is inapposite here, since the Commission conducted a thorough analysis.

that “[w]hen Congress provides that ‘there shall be no administrative or judicial review’ of specialized agency actions, its intent to preclude review is clear” (quoting 42 U.S.C. § 1395nn(i)(3)(l)).²⁹

The nonreviewability of FTC cost-benefit analyses distinguishes the Commission’s rulemaking from that conducted by other federal agencies. Just as Congress can decide whether and how an agency can conduct its regulatory assessments, *see Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981) (“Congress uses specific language when intending that an agency engage in cost-benefit analysis”), so Congress also can—and does—set the parameters for judicial review of those assessments. *See, e.g.*, 15 U.S.C. § 1262(h)-(i) (prohibiting “independent judicial review” of any cost-benefit analysis conducted by the Consumer Products Safety Commission connected to a rule classifying an article as a banned hazardous substance). The drafters of the 1980 FTC Improvements Act,

²⁹ Even outside the context of Magnusson-Moss rulemaking, Congress has determined that a robust economic analysis like the one the FTC’s expert economists performed to substantiate the CARS Rule is sufficient by itself. *See Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 452 (5th Cir. 2021) (explaining that, under the APA, this Court’s “job is not to undertake [its] own economic study, but to determine whether the agency has established in the record a reasonable basis for its decision”); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (Scalia, J.) (holding that, because of the technical skills required, “cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency”). The additional explicit congressional directive in Magnusson-Moss rulemaking underscores the particular need for courts to rely on agency expertise in evaluating the economic impact of rules promulgated by the FTC.

Pub. L. No. 96-252, 94 Stat. 374, which sets forth the Commission’s special rulemaking procedures, chose to forgo judicial scrutiny of the FTC's regulatory analysis. In the final version of the legislation, Congress rejected the Senate’s version of the bill, which would have rendered the regulatory analyses “reviewable as part of the whole record”; instead, Congress adopted the House bill, which “provided that the regulatory analyses would not be judicially reviewable unless the commission failed entirely to prepare the analyses.” H.R. Rep. 96-917, at 33-34 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 1143, 1150-51.

The FTC conducted a thorough economic analysis to demonstrate that a motor vehicle market characterized by transparent prices and free of deception and misrepresentation will spur billions of dollars in economic benefit. As a review of academic economic research on the topic confirms, in developing the CARS Rule the Commission properly applied economic principles regarding consumer search behavior and pricing in inefficient markets. In sum, the Rule makes fundamental economic sense and should be upheld.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,324 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word. The text is in 14-point Times New Roman type.

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