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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CONSUMERS FOR AUTO RELIABILITY .  
AND SAFETY, et al., .  
Plaintiffs, . Case Number 17-cv-540  
vs. . Washington, D.C.  
FEDERAL TRADE COMMISSION, . September 18, 2018  
Defendant. . 10:50 a.m.  
- - - - -

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE KETANJI BROWN JACKSON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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## P R O C E E D I N G S

(Call to order of the court.)

THE COURTROOM DEPUTY: Your Honor, this is Civil Action 17-540, Consumers for Auto Reliability and Safety, et al., versus Federal Trade Commission.

Counsel, please approach the podium and identify yourselves for the record and introduce any parties at your table.

MS. MEYER: Good morning, Your Honor. Katherine Meyer for the plaintiffs, and with me at my table is one of the directors of one of the plaintiffs, Rosemary Shahan.

THE COURT: Thank you.

MS. MELMAN: Good morning, your Honor. Leslie Melman from the Federal Trade Commission. With me at counsel table is Joel Marcus, deputy general counsel for litigation, Bradley Grossman, also from the Office of General Counsel, and Evan Zullow from the Commission's Bureau of Consumer Protection.

THE COURT: Good morning to all of you.

The Court scheduled this hearing to give the parties in this matter the opportunity to provide argument and, hopefully, insight into the pending dispositive motion, which is the FTC's motion to dismiss the plaintiffs' complaint.

I am familiar with your arguments, but you should certainly feel free to restate them and to provide as much background information as you deem necessary to illuminate the issues. And because the purpose of this hearing is to have the Court's

1 questions answered so that I can rule on the motion, I will be  
2 asking questions, although I will try not to interrupt you too  
3 much, because I do want to hear your prepared remarks.

4 As far as the procedure that we will follow, it's my  
5 practice not to have time limits. I find them distracting. But  
6 I do follow a slightly unconventional pattern with respect to  
7 motions to dismiss. Although I realize that this is the  
8 defendant's motion, I typically ask plaintiffs' counsel to speak  
9 first with respect to motions to dismiss in order to provide an  
10 overview of the case and the claims that are being brought. And  
11 then the movant, defendant's counsel, can respond and explain  
12 why those claims should be dismissed. I then give the  
13 plaintiffs an opportunity to respond to defendant's motion to  
14 dismiss arguments and then entertain any replies. All right?

15 So I do recognize that's a bit unorthodox, but Ms. Meyer,  
16 if you might approach and just lay the groundwork by explaining  
17 to me what claims are being brought in this case. And I will  
18 say as you prepare, I find that particularly important here  
19 because I really didn't see like count numbers in your  
20 complaint. So I was trying to figure out, is this one count,  
21 how many counts, what exactly is being alleged with regard to  
22 the claims.

23 MS. MEYER: Thank you, your Honor.

24 Plaintiffs challenge the Federal Trade Commission's  
25 decisions to allow used car dealers to sell certified used cars

1 as safe, repaired for safety, and subject to a rigorous  
2 inspection when, in fact, those cars are not safe and are  
3 subject to open safety recalls that have been required by the  
4 National Highway Traffic Safety Administration.

5 And it's our position that those decisions violate the  
6 Commission's own Used Car Rule which has been on the books since  
7 1984 and which provides that it is an unfair and deceptive act  
8 and practice for used car dealers to, quote, misrepresent the  
9 mechanical condition of their car. That rule was promulgated 33  
10 years ago and is still on the books, and yet, the FTC, through  
11 the issuance of these six consent decisions, has decided to  
12 nevertheless allow used car dealers to sell these cars as safe  
13 and repaired for safety when, in fact, they are subject to an  
14 open recall.

15 So it's our position that --

16 THE COURT: Can I just stop you, because I am far from  
17 an expert on FTC and the regulations and statutes that are at  
18 issue here.

19 When you say the FTC is allowing them, I'm just wondering  
20 whether we're not being precise enough, because it's not as  
21 though the FTC is the agency that regulates or promulgates rules  
22 in the area of car repair or whatnot.

23 Isn't the FTC's purview about the advertisements and the  
24 representations that are being made in the marketplace?

25 MS. MEYER: That's right, your Honor. The FTC has

1 jurisdiction over the marketing and sale of used cars in the  
2 market.

3 THE COURT: The marketing.

4 MS. MEYER: Yes.

5 THE COURT: So what is really being challenged here is  
6 not so much the sale of these cars in an unsafe capacity but,  
7 what, the representations that are being made about the cars,  
8 you say, pursuant to the FTC's orders?

9 MS. MEYER: Well, it is the sale, your Honor, because  
10 they're allowing the used car dealers to -- when people come in  
11 to the lot to buy a used car, they're allowing these used car  
12 dealers to say this car, this certified used car is safe and  
13 repaired for safety and, therefore, you should buy it, it's a  
14 good deal for you, even when, in fact, the car is not safe.

15 And it's our position that that practice, allowing the sale  
16 of unsafe used cars, violates an existing regulation that's been  
17 on the books for 33 years.

18 THE COURT: All right. But I guess I'm still a little  
19 confused. So tell me what the state of the world was prior to  
20 the consent orders in this case with respect to what used car  
21 dealers could say or not say about these kinds of vehicles.

22 MS. MEYER: The state of the law was the Used Car Rule  
23 that was promulgated in 1983.

24 THE COURT: No, no, not the law, the state of the  
25 world.

1 MS. MEYER: The state of the world?

2 THE COURT: In other words, let's dial back the hands  
3 of time prior to the six consent orders. What was happening in  
4 the marketplace?

5 MS. MEYER: Okay. What was happening in the  
6 marketplace was some dealers that are selling certified used  
7 cars were making sure that when they made representations that  
8 those cars were safe and repaired for safety were, in fact, safe  
9 and not subject to outstanding recalls.

10 THE COURT: And how were they doing that?

11 MS. MEYER: They would check with NHTSA as to what  
12 outstanding recalls there were or inspect the car and find out  
13 what's wrong with it, and then they would go ahead and fix it  
14 before putting it on the lot and offering it for sale as safe.

15 THE COURT: I'm sorry. The FTC's orders didn't say  
16 you couldn't do that anymore; right?

17 MS. MEYER: It doesn't prohibit a used car dealer from  
18 actually correctly representing that a car is safe when, in  
19 fact, it is safe.

20 What the -- so to get back to the real world, your Honor,  
21 there were dealers that were doing that, and then there were  
22 some unscrupulous dealers who, again in violation of the  
23 existing regulation, which I know you don't want me to talk  
24 about right now, but were nevertheless selling cars certified,  
25 which is the gold standard -- a certified used car, that says to

1 a consumer this is pretty much as good as new -- as safe and  
2 repaired for safety, even though those cars were demonstrably  
3 unsafe because they were subject to an open recall. So that was  
4 the state of the world.

5 THE COURT: Okay. And so then enter the FTC with  
6 respect to not the marketplace in general but with respect to  
7 particular violators.

8 MS. MEYER: Correct.

9 THE COURT: They start an adjudication.

10 MS. MEYER: Correct. They issued a complaint, and  
11 they said that certain car dealers -- and these are some of the  
12 largest used car dealers in the nation, including CarMax, your  
13 Honor, were engaged in unfair and deceptive practices because  
14 they were selling cars, advertising and marketing cars as  
15 certified, safe, repaired for safety when, in fact, they were  
16 subject to open recalls. So that was the initiation of the  
17 action.

18 THE COURT: Okay. And so the FTC is concerned about  
19 the representations that are being made in the marketplace  
20 concerning these cars, but again against the backdrop of no  
21 outstanding legislation that says you can't sell such a car;  
22 right? It's the advertising. I'm trying to home in on what the  
23 problem is.

24 MS. MEYER: I see what you're saying, yes.

25 THE COURT: The FTC cares that they're being

1 represented as certified safe when they have these outstanding  
2 recall problems.

3 MS. MEYER: Correct.

4 THE COURT: So it says with respect to the six or  
5 three and then three more what?

6 MS. MEYER: First, it issues a complaint. At the same  
7 time, it enters into a consent decree with the companies whereby  
8 it allows them to go ahead and continue that practice, as long  
9 as they disclose to the consumer that the car may be subject to  
10 an open recall. They can continue to go ahead and sell it as  
11 safe and repaired for safety.

12 THE COURT: Okay.

13 MS. MEYER: That's what the consent orders allowed.  
14 Then, your Honor, they had public comment on the proposed  
15 consent decree, 30 days of public comment, which they do under  
16 their own regulations. And my clients and a lot of other people  
17 commented and said this is not good, this is going to result in  
18 more consumers, this is worse than the status quo.

19 THE COURT: I want to talk about that, because I'm  
20 trying to understand if the status quo is improved or not. I'm  
21 not sure.

22 MS. MEYER: Right.

23 THE COURT: Because the status quo before was people  
24 selling cars and not saying anything. So it seems to me it's at  
25 least marginally better if they're saying they may be subject to



1 a recall, but maybe not. I don't know.

2 MS. MEYER: Well, let me address that, your Honor.  
3 All of my clients and pretty much every consumer group that  
4 commented on this rule said what you're doing is worse, because  
5 you're basically giving them permission to engage in a  
6 misrepresentation. On the one hand, you're saying it's safe and  
7 it's been repaired for safety, but on the other hand, because it  
8 hasn't been repaired for safety, you're saying it may be subject  
9 to a recall. That is a misrepresentation, because consumers  
10 rely on the representations made by the dealer at the time of  
11 the --

12 THE COURT: I understand. But that was the case in  
13 terms of the world before, and I'm not sure that your clients or  
14 anyone else really would have had a cause of action in the  
15 preexisting world to require the FTC to come in and regulate  
16 this practice; right?

17 MS. MEYER: It's already been regulated, your Honor.

18 THE COURT: No, I understand. You're suggesting that  
19 these consent orders are doing something, and they don't do  
20 enough, you say, and in fact, you say the problem is actually  
21 being caused, to some degree, by the consent orders because now  
22 they have given their imprimatur to this practice.

23 But the defendants do point out, and we will talk about  
24 this in terms of the motion to dismiss, that there is something  
25 of a concern about whether or not what's allegedly injuring your

1 clients and injuring the public is really caused by the FTC's  
2 involvement at all, because this was happening before.

3 Do you understand what I mean?

4 MS. MEYER: As we discuss, your Honor, it was  
5 happening before with respect to some dealers. But with respect  
6 to other dealers, they were being scrupulous and making sure  
7 that they honored their representations. They were not selling  
8 cars as safe and repaired for safety when they were subject to  
9 open recalls.

10 THE COURT: Right.

11 MS. MEYER: And the record shows, your Honor -- and  
12 this is a motion to dismiss. So we have these allegations in  
13 our complaint.

14 THE COURT: It has to be plausible, though. In other  
15 words, it has to be plausible that what the FTC has done in this  
16 case actually somehow is even impacting those dealers who  
17 previously would have fixed the cars but now are not going to  
18 and are doing so pursuant to the FTC's order when, in fact, I  
19 think these orders only apply to the six; right? They're not  
20 out --

21 MS. MEYER: On their face, your Honor, but we have  
22 submitted much evidence demonstrating that not only did the FTC  
23 itself consider the announcement of these consent decrees to be  
24 basically a policy that they wanted to have widespread effect  
25 among the entire industry -- that's what the head of the Bureau

1 of Consumer Protection said -- but also the record shows that  
2 dealers who, prior to the issuance of these consent decrees,  
3 were not selling unsafe cars because they were subject to  
4 outstanding recalls changed their practices to bring them in  
5 conformity with this rule. And that includes not only Auto  
6 Nation, which is one of the largest retailers of new cars, which  
7 also sells used cars, but Ford Motor Company, your Honor, which  
8 previously would not have sold a car that was subject to an  
9 outstanding recall as safe and repaired for safety, but the  
10 record shows and we allege that now that this rule has gone --  
11 these consent decrees have been issued, Ford Motor Company has  
12 decided to go back to the lowest common denominator practice and  
13 not repair these cars.

14 THE COURT: But it does so voluntarily. I mean, it's  
15 its choice. It could very well continue with the prior  
16 practice; right?

17 I'm trying to understand the degree to which the FTC's  
18 rules are actually creating the problem or it's the decision of  
19 these companies to follow the consent orders that don't even  
20 apply to them or stick to their own practices about this. And  
21 it matters because we have a causation issue that has been  
22 raised.

23 MS. MEYER: I understand, your Honor. Let me say in  
24 response to that, you yourself said in the *American Federation*  
25 case that you issued a couple of years ago that you recognize

1 that when a third party's conduct is involved, it's harder to  
2 show causation and redressability. But you also went on to say  
3 a category of cases where that is not a problem are cases where  
4 what the agency has done is authorized conduct that previously  
5 was illegal.

6 And that's precisely what we have here, your Honor. Our  
7 position is, Used Car Rule was in effect for 33 years on the  
8 books. It said a used car dealer commits an unfair and  
9 deceptive act and practice under the Federal Trade Commission  
10 Act if it sells -- if it misrepresents the mechanical condition  
11 of the car. And if you look at that Used Car Rule and the  
12 preambles which we cite extensively in our brief, the very  
13 purpose of that regulation was to prevent consumers and,  
14 particularly, poor consumers who buy used cars from being misled  
15 into buying an unsafe car. It actually talks about the reason  
16 for the rule is to prevent dealers from not disclosing hidden  
17 defects that could cause death, injury, and economic losses to  
18 consumers. So that's been on the books for 33 years.

19 And let me add to that, your Honor, the Federal Trade  
20 Commission Act itself, Section 45, specifically directs the  
21 Federal Trade Commission -- that's the word, it directs the  
22 Commission to prevent unfair and deceptive acts and practices.

23 So we have the Used Car Rule saying it is an unfair and  
24 deceptive act and practice to misrepresent the mechanical  
25 condition of the car. We have a statute that says the agency

1 must prevent such practices. And yet, here we are 33 years  
2 later, and the FTC has now given permission to some of the  
3 largest used car dealers in the nation to nevertheless  
4 misrepresent the mechanical condition of the car.

5 THE COURT: All right. So help me to understand,  
6 though, the sort of cause of action and the claim that you are  
7 bringing. Because again, I find your complaint a little hard to  
8 read in terms of -- so is this a single-count APA challenge  
9 claiming that there's arbitrary and capricious action on the  
10 part of the agency? Are you claiming the part of the APA that  
11 says "or otherwise in violation of the law, see e.g. the FTC  
12 Act"? It's not quite clear to me how you are setting this up at  
13 this point.

14 MS. MEYER: We basically have two administrative  
15 procedure claims, your Honor. The first is that the issuance of  
16 the consent decrees, the decisions embodied in those decrees  
17 violate the Used Car Rule.

18 THE COURT: And what is the decision embodied in the  
19 decree?

20 MS. MEYER: The decision to allow the used car dealers  
21 to sell cars as safe and repaired for safety when, in fact, they  
22 are not safe and have not been repaired for safety because they  
23 are subject to an open recall. So our first claim is that those  
24 decisions are not in accordance with law within the meaning of  
25 Section 706 of the APA.

1 THE COURT: All right.

2 MS. MEYER: Our second claim, your Honor, which is  
3 related, is that in essence what we have here is the  
4 announcement of a policy by the FTC that it's okay to go ahead  
5 and sell unsafe cars as safe, and that policy, again, is not in  
6 accordance with law because it violates the Used Car Rule and is  
7 also arbitrary and capricious and an abuse of discretion.

8 THE COURT: I'm not sure I appreciate the distinction  
9 between one and two.

10 MS. MEYER: There may not be that much of a  
11 distinction, your Honor, other than we are relying heavily on  
12 case law that says where an agency carves out of a settlement  
13 agreement an interpretation of the statute that is unlawful,  
14 that is subject to judicial review. That's the *International*  
15 *Union v. Brock* case, most recently discussed in the *Irritated* --  
16 what is it called? *Association of Irrigated Citizens v. EPA*,  
17 one of my favorite titles of a case, which recognized the  
18 *International Union v. Brock* case where Judge Wald issued an  
19 opinion saying if an agency, in the course of entering into a  
20 settlement agreement, announces a new interpretation of the law,  
21 if it's unlawful, it can be reviewed.

22 So there's a fine line there. So that's one line of cases  
23 we're relying on and then another line of cases we're relying on  
24 to say that it amounts to a policy, an illegal policy.

25 THE COURT: All right. So that sets the stage for

1 what it is that you are claiming. Let me hear from defense  
2 counsel, and then you can -- yes.

3 MS. MEYER: Can I just add one more thing in answer to  
4 your earlier question, Your Honor, about the "may" disclosure  
5 and why that doesn't cure the problem?

6 We also explain in our complaint at paragraph 64 that the  
7 Federal Trade Commission itself has a policy that it issued  
8 which states that these kinds of disclaimers do not do the  
9 trick. They do not undo the otherwise unfair and deceptive  
10 practice. And we also have a declaration from Michael Brooks,  
11 who is the chief counsel for the Center For Auto Safety,  
12 explaining in great detail why simply telling a consumer that  
13 something may be subject to a recall when you've otherwise  
14 pushed the car as safe and repaired for safety does not cure the  
15 unfair and deceptive practice.

16 And also, the used car trade regulation rule itself goes  
17 into this in great detail, because one of the concerns there was  
18 representations were being made about what great condition the  
19 car was in, but then there was a little disclosure that says "as  
20 is." And the FTC explained in the course of that regulation  
21 that that kind of a pseudo disclaimer does not overcome the  
22 unfair and deceptive act and practice.

23 THE COURT: All right. Thank you.

24 Ms. Melman?

25 MS. MELMAN: Thank you, your Honor.

1           Just in terms of setting the theme, your Honor had inquired  
2 about what the world was before and what the world was after.

3           THE COURT: Yes.

4           MS. MELMAN: I can speak to that, and then I would  
5 like to talk about kind of the procedural impediments to  
6 plaintiffs' ability to maintain this case.

7           Before the FTC's consent orders, there were some dealers --  
8 there's literally 10s of thousands of used car dealers -- who  
9 were touting that they were conducting thorough inspections.  
10 However, at the same time they were failing to disclose that  
11 there were unrepaired recalls.

12           This is a problem that is -- pertains to used car sales.  
13 Federal law which -- prohibiting the sale of cars with  
14 unrepaired recalls only applies to the sale of new cars. So  
15 that's where -- and that also applies to used cars that are sold  
16 by rental companies like Hertz and Avis that also have a sales  
17 branch. So that's where the FTC started.

18           THE COURT: So they were concerned or the agency was  
19 concerned about the state of the world that involved -- I'm  
20 repeating back what you're saying.

21           MS. MELMAN: The thorough 128-point inspections.

22           THE COURT: So a dealer would say we've thoroughly  
23 inspected, here is a used car, but as it turns out, that used  
24 car -- and the dealer is not saying this, and that's the  
25 problem -- that particular car that has been thoroughly



1 inspected has some sort of a recall on it, and they have not  
2 repaired that defect?

3 MS. MELMAN: That's correct, your Honor. The world --  
4 so the FTC issued a series of complaints alleging that this was  
5 a deceptive failure to disclose. The -- it does not involve the  
6 Used Car Rule, which deals primarily with warranties, but here,  
7 the FTC was concerned about a deceptive failure to disclose.  
8 And the classic remedy for that is disclosure.

9 And the FTC then entered into negotiated consent orders  
10 after issuing complaints against CarMax and five large used car  
11 dealer groups, and that requires dealers to disclose the  
12 possibility of recalls. And so that makes consumers safer.

13 THE COURT: So it's your contention that this is not  
14 about the Used Car Rule at all?

15 MS. MELMAN: Correct, it is not about the Used Car  
16 Rule. There's nothing in the consent orders that takes away  
17 from the Used Car Rule in any way. The Used Car Rule, which was  
18 amended in minor respect about the same time that the Commission  
19 issued its consent orders, stays in force. And it's -- the Used  
20 Car Rule applies to the sale of used cars. It doesn't impose  
21 any prohibitions or constraints on the FTC. And it appears that  
22 plaintiffs see that differently.

23 So going now to the -- so that's the state of the world. I  
24 would like to address some of the procedural impediments to  
25 plaintiffs' ability to maintain this case.

1           Congress set out in the FTC Act in Section 5a who could  
2 challenge an FTC adjudicative order and also where. The "who"  
3 does not include third parties like plaintiffs who merely don't  
4 like or agree with the terms of an adjudicative order but are  
5 not themselves subject to the order's constraints.

6           THE COURT: But is that really what's happening here?  
7 I mean, I understand there are channeling provisions that exist  
8 in various statutes, and apparently, there's one here. But is  
9 it your position that if the agency were to adopt a new policy  
10 in the context of an adjudicative order, that this channeling  
11 provision would preclude challenge except by the person to whom  
12 the order applies?

13           MS. MELMAN: Yes, your Honor.

14           THE COURT: So there is no vehicle?

15           MS. MELMAN: There is no vehicle for plaintiffs, as  
16 third parties, to challenge the Commission's adjudicative  
17 decision --

18           THE COURT: What about Judge Wald's opinion or -- I  
19 find that decision to be odd or that position to be odd, because  
20 it suggests there that the agency can undertake policymaking in  
21 the context of adjudication and that the -- that there is  
22 essentially no challenge for it. Because to the extent it  
23 happens as a consent decree or a settlement, the parties who are  
24 involved in it have no incentive to challenge it because they've  
25 agreed to the terms.

1 MS. MELMAN: Your Honor, the Commission was not  
2 undertaking policymaking here.

3 THE COURT: Well, that's the answer. Hold on one  
4 second. That's the answer.

5 The question that I was asking is, assuming there's policy-  
6 making going on, surely your position isn't that it's  
7 necessarily channeled into this -- to the D.C. Circuit through  
8 this procedure, that really this is only about challenges to the  
9 terms of the consent decree that don't involve some sort of  
10 broader policy implications; right?

11 MS. MELMAN: Well, I disagree with your Honor that if  
12 there's policymaking going on, that nonetheless plaintiffs could  
13 challenge that. But my main point is that there's not policy-  
14 making going on here. What the Commission was dealing with was  
15 six specific allegations of deception. It negotiated a consent  
16 order, and that is not policymaking.

17 The fact that businesses may look to that consent order or  
18 even an adjudicated order and use that to govern their own  
19 conduct, well, that doesn't entitle the entire world to  
20 challenge it. If so, it would create chaos.

21 THE COURT: Well, there might be other reasons why the  
22 world doesn't have -- I mean, standing is a separate issue.

23 I'm just trying to understand what Congress intended when  
24 it created the review provision --

25 MS. MEYER: Provision, yes.

1 THE COURT: -- that you point to.

2 MS. MELMAN: And that is discussed in great detail,  
3 Your Honor, in the *Consumer Federation* case, does a -- the Court  
4 of Appeals does a very careful review of the legislative history  
5 of the FTC Act. And initially, at the time when that provision,  
6 5(c) of the FTC Act, was proposed, there was a sharp debate in  
7 Congress as to whether third parties could challenge an FTC  
8 adjudicative decision. And this came up two times during the  
9 legislative process. Ultimately, it was decided that third  
10 parties would not be allowed to do that. So that's addressed in  
11 the *Consumer Federation* decision.

12 THE COURT: So there is no judicial review for any  
13 such order, right, because --

14 MS. MELMAN: That's correct, because it is --

15 THE COURT: No, no. What I'm suggesting is, the  
16 reality of the circumstance that when you have an adjudicative  
17 order that results in a consent settlement, you know, that is a  
18 part of a consent settlement, to the extent that the party or  
19 the person who is required by the order to cease and desist from  
20 using any method of competition or practice is in on the  
21 settlement because this is a consent order --

22 MS. MELMAN: Right.

23 THE COURT: -- then your suggestion is that Congress  
24 has provided no opportunity effectively for reviewing such an  
25 order. And typically, the courts are loathe to find that to be

1 the case, that there has to be some realistic method of  
2 challenge if, for example, that order is blatantly  
3 unconstitutional or blatantly, you know, conflicting with a  
4 statute.

5 That's not this case. How you get to conflict in this case  
6 is a little convoluted. But let's assume that, for the purpose  
7 of the hypothetical I'm putting forward right now, the agency  
8 brings its complaints challenging this practice, and in  
9 settlement of that, they permit these six to do something that  
10 is blatantly in violation of the statute.

11 MS. MELMAN: There are some decisions, I acknowledge  
12 that, there are some decisions that are narrowly restricted to a  
13 situation where the conduct that's required by the order is  
14 actually unlawful; whereas, prior to that, the conduct was  
15 lawful. That's certainly not this case.

16 THE COURT: No, I understand. But in that case is it  
17 your position too bad, so sad, because the parties to the  
18 consent decree don't care since they are, obviously, agreeing to  
19 the terms of the settlement agreement, so they're not going to  
20 be the ones to bring it pursuant to this channeling provision?

21 And so let's say someone was genuinely injured by a  
22 settlement agreement between the FTC and car dealers or whoever  
23 else that was patently unlawful. It's unclear to me that  
24 Congress would have intended no challenge in the district court  
25 pursuant to this channeling order, and that's what I'm trying to

1 flesh out.

2 MS. MELMAN: Congress did not -- there's nothing to  
3 indicate that Congress addressed that particular set of facts.

4 But even given that, the --

5 THE COURT: Can I just say, on its face -- you see me  
6 looking down at the statute.

7 MS. MELMAN: Right.

8 THE COURT: On its face, this appears to me to really  
9 just be about a circumstance in which the FTC orders a person,  
10 partnership, or corporation to cease and desist from using any  
11 method or competition or act or practice. And that person is  
12 mad, and so they say I'm sorry, I would like to challenge this.

13 And so they've provided -- by "they," I mean Congress --  
14 the only vehicle by which you can challenge such an order of the  
15 FTC as the person who is affected. And of course, if the person  
16 who is affected doesn't want to challenge, some other person  
17 can't come in and bring a challenge pursuant to this kind of  
18 channeling scheme.

19 MS. MELMAN: Well, it's not just those who are angry.  
20 It's those who are, quote, subject to the order, in other words,  
21 those who are subject to the constraints of the order.  
22 Plaintiffs are not -- plainly not subject to the constraints of  
23 the Commission's order. It doesn't apply to them.

24 THE COURT: Yes, I understand that. But you're  
25 suggesting that as a result of this statutory provision being in

1 the books, plaintiffs have no ability to claim that a policy or  
2 practice of the agency that is being exhibited, in their view,  
3 through the agency's settlement practices with these various  
4 people, you're saying that they can't bring a separate district  
5 court APA challenge related to that.

6 MS. MELMAN: That's correct, your Honor.

7 THE COURT: And I'm not sure that I understand that,  
8 because this statute doesn't seem to preclude that kind of a  
9 challenge. This is talking about who can challenge the order  
10 because you're upset, in a sense. You're required by the order  
11 to do something, to cease or desist from using any method of  
12 competition, and under those circumstances, you, person who is  
13 required by the order to do something, can bring a lawsuit or  
14 you have to bring your lawsuit in the circuit. That's what this  
15 says.

16 MS. MELMAN: And the *TRAC* decision holds that such  
17 provision cuts off all jurisdiction in the district court.

18 THE COURT: But only with respect to a similar  
19 challenge. If I have a challenge about the -- let me just --  
20 and we can move on from this. But what if the agency is using  
21 its settlement authority to discriminate against someone  
22 somehow, patently discriminatory, that they are reaching  
23 settlements with certain groups versus others on discriminatory  
24 grounds or whatnot and we have plaintiffs who can allege  
25 credibly that they're being harmed in some way by that practice?

1           Just because they're the ones who are not required to do  
2 anything under the particular settlement, it seems to me,  
3 they're not necessarily precluded from bringing their  
4 unconstitutional agency action claim. It has to do with what  
5 the claim that is being made is about, I think.

6           MS. MELMAN: Your Honor, do you have in mind a  
7 situation where the Commission is violating, for example, the  
8 age discrimination in employment?

9           THE COURT: It could be anything. My point is that  
10 it's not the case -- and the reason why I happen to know this is  
11 because I just wrote about this in a case, the *American*  
12 *Federation of Government Employees v. Trump* case. There was a  
13 whole section on channeling discretion, because there was a  
14 statute in that case that dealt with a similar thing. And the  
15 government was arguing this district court lawsuit is precluded  
16 because the statute has a channeling provision, it's supposed to  
17 go to the agency and then to the circuit court.

18           And there are a set of criteria and factors that one is  
19 supposed to be looking at to determine whether or not a statute  
20 really is of the nature that Congress intended all of the  
21 claims, no matter what they are, to go through this process or  
22 whether there's still some room for district court adjudication.

23           And in that case I found -- I disagreed with the government  
24 that the channeling statute at issue in that case meant that the  
25 district court claims couldn't go forward. But I applied the



1 factors, and there were things like what -- did Congress really  
2 intend for claims of this nature to be funneled into this  
3 system.

4 And so I'm trying to do the same thing in this exchange,  
5 but it feels to me like it matters whether the kind of claim at  
6 issue is similar to the one that Congress is saying has to go to  
7 the circuit court.

8 And so if there's a discrimination claim -- I've just made  
9 it up -- that one is bringing based on the practices that the  
10 FTC is exhibiting in its settlement practices with various  
11 companies or its charging practices in adjudication that are  
12 ultimately resulting in, say, the plaintiffs in a discriminatory  
13 adjudication, it's unclear to me that just because the  
14 plaintiffs weren't parties pursuant to the channeling statute,  
15 they're walled off from any ability to bring that kind of claim.

16 MS. MELMAN: Your Honor, the Commission's objection to  
17 plaintiffs' position here doesn't rest just on the channeling  
18 statute. It also rests on the fact that they clearly don't have  
19 Article III standing.

20 THE COURT: Okay. Why not?

21 MS. MELMAN: Well, just looking at the elements,  
22 clearly, going to the third one, redressability is absent.  
23 They're seeking to overturn the Commission's consent orders.  
24 That would leave -- if their concern is the safety of consumers  
25 and the injuries to which plaintiffs and their members are

1 subject, certainly, the -- certainly, consumers are left worse  
2 off if the court were to overturn the consent orders. So that  
3 does not work.

4 THE COURT: Well, they suggest not so. They say it  
5 would be better if you had actually said nothing, because now it  
6 appears as though the FTC is endorsing this practice that they  
7 find to be violative of the statute, that some car companies  
8 have even changed what was, in the plaintiffs' perspective, a  
9 better way to approach this. They've stopped repairing the  
10 vehicles and have now glommed onto this language that plaintiff  
11 thinks is still deceptive.

12 MS. MELMAN: And that is all speculative. They are  
13 basing it on a New York Times article and not a serious study or  
14 survey. There are literally 10s of thousands of used car  
15 dealers. They're basing it on a New York Times article that is  
16 nearly two years old.

17 THE COURT: I understand. But we're at the motion to  
18 dismiss stage. They don't need the evidence today, do they,  
19 with respect to standing?

20 This came up in one of my prior cases as well. I'm drawing  
21 on my experience here. The D.C. Circuit has made clear that  
22 there's actually a difference in terms of the stage of the  
23 litigation as to what it is the plaintiff has to do.

24 MS. MELMAN: Right. But it still has to come forward  
25 with facts that are viable. This is simply speculative and not

1 based on any serious study of the market.

2 The same article also reports that many dealers have  
3 maintained their prior practice of not selling used cars,  
4 certified used cars with unrepaired recalls.

5 So this is really completely speculative. I don't think  
6 that standing can be based on such speculation, nor can this be  
7 viewed logically as any endorsement by the Federal Trade  
8 Commission of such practices. The consent orders are tailored  
9 to the practices of six specific -- well, CarMax and then five  
10 specific dealer groups and requires disclosure. It certainly is  
11 not a stamp of approval on any violation or any violation of the  
12 Used Car Rule, which stands on its own beside the settlements.

13 THE COURT: Let me ask if it matters. I'm trying to  
14 understand your speculation argument. What if we took the  
15 speculation completely out of it so that we had a New York Times  
16 article that said on the day after these consent orders were  
17 ratified, all used car manufacturers said no more repairs, yea,  
18 we're just going to put in this language, everybody changed  
19 their practice.

20 Would the plaintiffs have standing then?

21 MS. MELMAN: No.

22 THE COURT: Why not?

23 MS. MELMAN: They still would not have standing.

24 Well, there's no redressability. The relief that they seek is  
25 overturning the consent orders and leaving consumers -- leaving

1 consumers with nothing. And so the only -- in their view, the  
2 only way that they would achieve anything would be if the  
3 Commission were to institute a new law enforcement proceeding,  
4 and if it were to prevail and if it were to prevail on appeal,  
5 there's a whole sequence of events that may never happen.

6 So what they seek here, overturning the consent orders,  
7 doesn't accomplish their goal at all. There's no --

8 THE COURT: So if the consent orders are overturned,  
9 we're back to the pre-FTC --

10 MS. MELMAN: Where consumers are completely  
11 unprotected, your Honor.

12 THE COURT: And some people might just voluntarily say  
13 or some of the dealers might voluntarily have the kinds of  
14 disclosures that have been overturned, some might say nothing?

15 MS. MELMAN: Right. Dealers may decide that in terms  
16 of their competitive posture with respect to other dealers, that  
17 they want to adhere to the consent orders, and that way, they  
18 can advertise and advertise truthfully, and consumers can rely  
19 on that.

20 THE COURT: So in your view, this really isn't about  
21 the FTC's order; it's about the decisionmaking processes of  
22 these individual dealers?

23 MS. MELMAN: Yes. It's --

24 THE COURT: That's what's causing the problem?

25 MS. MELMAN: There are 10s of thousands of dealers who

1 could react in all different ways, and that could change over  
2 time.

3 The Commission negotiated a consent order that is clearly  
4 within its lane. Its mission is to prevent deception. It has  
5 no means of -- public law allows the sale of these vehicles.  
6 And the Commission -- it's really a legislative fight. The  
7 Commission, within its lane, within its mission, did what it  
8 could to make sure that consumers were armed with the facts that  
9 they need to protect themselves and to make good purchasing  
10 decisions.

11 THE COURT: Let me have you switch to the last two of  
12 your motion to dismiss arguments. One is committed to agency  
13 discretion by law. What exactly are you suggesting is committed  
14 to agency discretion such that it's not reviewable, assuming, of  
15 course, that I have the ability, this isn't channeled or  
16 whatever, and they have standing?

17 MS. MELMAN: Right. The Commission's enforcement  
18 discretion to decide when to bring a case, whether to --

19 THE COURT: They're not challenging that. They're not  
20 challenging that. So that's not on the table; right?

21 MS. MELMAN: The Commission can decide whether to  
22 proceed by adjudication or by rule. That's addressed by the  
23 D.C. Circuit in the *Palm* case. And the fact that other industry  
24 participants may react to an adjudicative decision in a certain  
25 way doesn't mean -- doesn't turn it into a rule. The Commission

1 here --

2 THE COURT: No, I understand that. I'm not talking  
3 about its rule versus decision. I'm talking about what is being  
4 committed to agency discretion. You're not arguing, or maybe  
5 you are, that once the agency decides adjudicative decision  
6 versus rule, anything they do in the context of an adjudication  
7 is unreviewable agency action, are you?

8 MS. MELMAN: Well, I'm arguing that the Commission was  
9 exercising its discretion here. It's required to make a  
10 determination of the public interest, which it did here. It  
11 issued a very detailed analysis of the --

12 THE COURT: I understand. But it issues a detailed  
13 analysis precisely because if there's a challenge they need to  
14 be able to defend their actions.

15 MS. MELMAN: Right.

16 THE COURT: So you're not suggesting that the agency's  
17 conduct in the context of an adjudication is unreviewable.  
18 There's something else, apparently, that's going on here that  
19 makes you think that something is committed to agency discretion  
20 by law, and I'm trying to understand what --

21 MS. MELMAN: Unless the agency actually does something  
22 that's a violation of the law, it is unreviewable.

23 THE COURT: Okay. That's not how it works; right?  
24 The question is whether the agency can do absolutely anything  
25 that it wants because there are no standards by which the court

1 can review the agency's action. That's the essence of the  
2 committed to agency discretion --

3 MS. MELMAN: There are no standards here that provide  
4 an avenue for judicial review of the Commission's prosecutorial  
5 discretion. The decision to enter into a settlement is a  
6 prosecutorial decision.

7 THE COURT: But that's not being challenged. It has  
8 to line up with what is actually being challenged. So what  
9 they're saying is that it violated the law for the agency to  
10 permit certain car companies to act in this fashion, for them to  
11 include as a term in the settlement agreement that you can have  
12 this kind of disclaimer in your sales practices.

13 In order for that to be committed to agency discretion by  
14 law such that the plaintiffs are not permitted under the APA to  
15 raise that kind of claim, you would have to establish that there  
16 is no basis for the court to evaluate the terms of a settlement  
17 agreement in the context of adjudication, for example, which the  
18 D.C. Circuit has said, indirectly in this case but another one  
19 of my cases called *Watervale*, where the D.C. Circuit evaluated  
20 security agreements that were made between the agency and  
21 private parties and easily held, according to the D.C. Circuit,  
22 that those are reviewable.

23 MS. MELMAN: Because the agency had violated the law,  
24 as I recall.

25 THE COURT: They were reviewable because there were

1 standards by which the court could determine whether those terms  
2 and agreements were consistent with the law. It didn't have to  
3 do with a threshold determination about whether the agency had  
4 violated the law. In that case the agency said look, we get to  
5 decide -- I think it was the Coast Guard or somebody. We get to  
6 decide by statute when we embargo ships and when we let them go.  
7 If you look in the statute, it says the secretary has the  
8 discretion to do that. And what we've decided is we're not  
9 going to let them go unless they conform to certain  
10 requirements, and we're going to execute these security  
11 agreements with each of the ships that we've embargoed, and  
12 we're going to require them to do X, Y, and Z.

13 The shipmaster was upset with this. We don't want to have  
14 to do X, Y, and Z. And so they brought a lawsuit.

15 And one of the agency's arguments was this is totally in  
16 our discretion. If you look at the statute, it says we, as the  
17 secretary, decide when the ship gets to go. So court, you can't  
18 review this because it's committed to agency discretion by law.  
19 There's no circumstances, there are no terms that you can look  
20 to to say we've exercised our discretion inappropriately.

21 The D.C. Circuit in like a paragraph said not so, that that  
22 is not -- this is a reviewable exercise of agency discretion.

23 And so what I'm trying to do is understand why today's case  
24 with respect to this argument is any different, that the agency  
25 is exercising its discretion, yes, to set up terms of a



1 settlement agreement. It has the authority to do that. But I  
2 don't know that it's unreviewable agency discretion from the  
3 standpoint of this APA provision.

4 MS. MELMAN: Well, I'm not familiar with the  
5 legislative scheme that your Honor is discussing, but certainly,  
6 the FTC has very broad authority to prohibit deception. And the  
7 Commission exercised that authority here by requiring a  
8 disclosure that's very consistent with the past -- with the case  
9 law interpreting the FTC Act. There's nothing unusual about  
10 that.

11 And with respect to the allegation that this somehow  
12 violated the Used Car -- the Used Car Rule, that simply is not  
13 correct, and I'm not sure where plaintiffs get that. But the  
14 Used Car Rule prohibits a misstatement of mechanical condition,  
15 and there's nothing in the consent order that creates some type  
16 of safe harbor that allows dealers, the dealers who are subject  
17 to the consent orders to in other ways violate the Used Car  
18 Rule.

19 THE COURT: All right. That gets into your fourth  
20 point, which I understood to be -- or maybe my clerk and I  
21 looked at it as four separate points. But you've been talking  
22 about agency action as a rule, and plaintiffs, the sort of  
23 background principle that would enable them to bring a viable  
24 APA claim is that looking at these consent orders, the agency is  
25 establishing some sort of a policy or, they call it, an

1 interpretive rule or whatever.

2 Why aren't they right about that, that the agency is --

3 MS. MELMAN: It's -- an interpretive rule means that  
4 the agency is interpreting something, for example in the recent  
5 *Soundboard* case that went to the D.C. Circuit. The agency here  
6 is not interpreting anything. This is a negotiated consent  
7 order, and the FTC and the six respondents agreed on the terms.  
8 It's not an interpretation.

9 THE COURT: Did they agree individually? Are these  
10 separate orders that are issued in each case?

11 MS. MELMAN: These are all -- there were six separate  
12 complaints, and there's six separate orders.

13 THE COURT: Is the language that is being challenged  
14 by the plaintiffs, in other words what they're permitted to do  
15 that the plaintiffs say is problematic, is that the same in all  
16 six orders?

17 MS. MELMAN: The complaints are somewhat different  
18 because the practices are -- were somewhat different. The  
19 actual requirements of the order and the prohibitions of the  
20 order are identical, I believe.

21 THE COURT: All right.

22 MS. MELMAN: That still doesn't make it a rule,  
23 because -- just because others in the industry will look to that  
24 to change their behavior. Their lawyers will look at it and  
25 advise them well, this is where the FTC is going on this issue.

1 That's all speculative. But that doesn't turn it. A rule is a  
2 statement of a general prescription that applies to the industry  
3 as a whole.

4 THE COURT: So other car dealers don't have to follow  
5 this; right? If you're not the six, you can do or not do what  
6 you were doing before?

7 MS. MELMAN: Correct; correct. It doesn't apply to  
8 them.

9 THE COURT: It doesn't bind anybody else?

10 MS. MELMAN: It doesn't bind them. If the six  
11 respondents here violate the order, then they're subject to  
12 penalties, but that doesn't mean that other dealers are bound by  
13 it.

14 THE COURT: All right. Is there anything else that  
15 you want to say at this point before I bring the plaintiffs  
16 back?

17 MS. MELMAN: I think I've raised all my points.

18 THE COURT: All right. Thank you.

19 MS. MELMAN: Thank you, your Honor.

20 THE COURT: Ms. Meyer.

21 MS. MEYER: Thank you, your Honor.

22 A couple points I would like to make in response to some  
23 things the government said. One is the offhand dismissal of the  
24 Used Car Rule as not really meaning anything and not prohibiting  
25 anything. This probably explains why they did what they did,

1 because in fact the Used Car Rule does prohibit the sale of a --  
2 the misrepresentation of the mechanical condition of the car.  
3 This is a regulation that's been on the books since 1984. You  
4 can find it at 16 C.F.R. Section 455.1(a)(1).

5 THE COURT: And why is it that you believe that they  
6 are authorizing that in this context?

7 MS. MEYER: Because they are allowing used car dealers  
8 to sell cars as safe, repaired for safety, and subject to a  
9 rigorous safety inspection even when those cars and the dealer  
10 knows those cars are subject to an open recall.

11 THE COURT: But that was happening before. That had  
12 nothing to do with the FTC's order. That was the state of the  
13 world even before the FTC got here. So if there was a Used Car  
14 Rule violation, it is, based on what you just said, independent  
15 of the FTC's order today.

16 MS. MEYER: No, because the FTC has now authorized  
17 that behavior. In other words, we talked before, the world view  
18 was some dealers were complying with their obligations under the  
19 Used Car Rule, some dealers weren't. Then the FTC came in 33  
20 years later and, through these six identical consent decrees  
21 against the largest sellers of used cars in this country, gave  
22 them permission to misrepresent the mechanical condition of the  
23 car, your Honor. They have authorized them to market these cars  
24 as safe and repaired for safety when they are not safe.

25 THE COURT: What's so interesting to me is how two

1 sets of people looking at identical facts can interpret them  
2 differently. The FTC says we entered this arena not to address  
3 any Used Car Rule violation, in fact that wasn't even on our  
4 radar screen, even though plaintiffs appear to indicate that  
5 that was the problem that was being addressed.

6 The FTC, and to some extent agencies, have discretion and  
7 are entitled to deference with regard to what it is that they  
8 say is the problem and then they're trying to remedy it. The  
9 FTC says the problem is not a misrepresentation of the  
10 mechanical condition of the car, because in fact saying a car is  
11 safe or whatever isn't representing anything about the  
12 mechanical condition of the car necessarily.

13 MS. MEYER: Yes, it is, your Honor.

14 THE COURT: Well, it's saying -- it's not  
15 misrepresenting a specific condition with respect to the car,  
16 which is what the Used Car Rule appears to suggest.

17 Let me just say, this is their interpretation, right,  
18 that -- and I don't know whether you have done research into the  
19 extent to which the Used Car Rule was employed by the agency  
20 prior to now to address the problem that you say was happening,  
21 which is people just saying a used car is safe or whatever.

22 Did they use the Used Car Rule to suggest that these people  
23 were violating the law?

24 MS. MEYER: It's not clear, your Honor, but I can tell  
25 from the argument made this morning that they completely

1 disregard that rule that's been on the books.

2 THE COURT: Right. But that indicates that they who  
3 wrote the rule don't think it's applicable to this situation.  
4 That's not what they were talking about, they say, in regard to  
5 the Used Car Rule.

6 MS. MEYER: Well, they may be saying that now as a  
7 post hoc rationalization. But there's nothing in their  
8 complaint, the Federal Register notices to the public, the  
9 response to comments, the final consent decree that explains how  
10 what they're doing can possibly be reconciled with the existing  
11 regulation that's been on the books for 33 years.

12 THE COURT: Right. But it's a regulation that you say  
13 is applicable. What I'm trying to understand is, is there a  
14 world in which prior to the FTC's order the FTC was pointing to  
15 the Used Car Rule and approaching dealers who were saying my car  
16 has a 21-point inspection and my car is safe and indicating that  
17 they were in violation of the Used Car Rule?

18 MS. MEYER: That, I don't know, your Honor. I  
19 certainly would hope so. And let me say --

20 THE COURT: No, let me just finish.

21 MS. MEYER: Okay.

22 THE COURT: So in that world in terms of the way in  
23 which the FTC maybe perceives the Used Car Rule, the problem  
24 that they identified with regard to car dealers in terms of what  
25 we're talking about here today was that these people were

1 failing to disclose unrepaired recalls, that that was the  
2 problem.

3 Now, whether or not that simultaneously violates the Used  
4 Car Rule, says the FTC, was not on their radar screen, because  
5 they weren't focused on -- you know, regulatory schemes are very  
6 complex, and they deal with all sorts of things.

7 And a creative plaintiff can always look at some section  
8 and say it's supposed to apply to today's problem when that's  
9 not even what the agency is focused on. According to defense  
10 counsel, what they were focused on was the failure to disclose  
11 an unrepaired recall, and that's why they issued their  
12 complaints to say you have not disclosed unrepaired recalls  
13 under these circumstances, and then they issued settlement  
14 agreements to address that issue by making sure that those  
15 recalls were disclosed. The agency sees it in a very kind of  
16 narrow sense.

17 And I understand your point, but just in response to your  
18 suggestion that they pooh-pooh the Used Car Rule, they say that  
19 was never even on the table with respect to today's issues.

20 MS. MEYER: But it should have been. That's the  
21 point, your Honor. How can you have a -- it's a trade  
22 regulation rule that applies to the entire used car industry.  
23 And it's not just an aside. It is the number 1 first provision  
24 of the rule. It says it is a deceptive act or practice for any  
25 used vehicle dealer, when that dealer sells or offers for sale a

1 used vehicle in or affecting commerce, quote, to misrepresent  
2 the mechanical condition of the used vehicle. It is the number  
3 one provision of a regulation that's been on the books for 33  
4 years.

5 THE COURT: And you're saying you don't know whether  
6 the failure to disclose counts as a misrepresentation for the  
7 purpose of this statute? One could argue that it doesn't, and  
8 so to the extent they were concerned about failing to disclose,  
9 that that's actually a different act of the dealer.

10 MS. MEYER: Your Honor, they sanction in these six  
11 decisions the practice of telling consumers that the car has  
12 been, quote, repaired for safety. That is a representation  
13 about the mechanical condition of the car, your Honor. If that  
14 car is, in fact, subject to an outstanding recall that renders  
15 it unsafe, for the dealer to say to a consumer this car has been  
16 repaired for safety, that is a misrepresentation about the  
17 mechanical condition of the car, your Honor. They cannot  
18 reconcile these two things.

19 THE COURT: All right. So the FTC says to you -- has  
20 done something that is inconsistent with what they say is an  
21 inapplicable set of regulations. I think the biggest hurdle for  
22 the plaintiffs is to explain why you have the ability to bring  
23 this lawsuit, from a standing perspective. Just because an  
24 agency has done something that someone can identify as being  
25 inconsistent with its regulations or a statute or patently



1 illegal doesn't give the individual the right to bring a  
2 lawsuit.

3 So why is it that you can overcome the standing concerns  
4 that have been raised?

5 MS. MEYER: Okay. First of all, to begin, I want to  
6 explain to your Honor that there are various provisions of the  
7 Federal Trade Commission Act. The Section 45, which is what the  
8 agency relies on for saying that only challenges to enforcement  
9 actions can be brought in the D.C. Circuit, applies to the  
10 issuance of cease and desist orders.

11 That's not what we have here. In fact, a different section  
12 of the statute, Section 57a(a), says that the Commission may  
13 prescribe interpretive rules and general statements of policy.  
14 Challenges to those interpretative rules and general statements  
15 of policy do not go to the D.C. Circuit or any court of appeals.  
16 They go to the district court, as the *Soundboard* case that the  
17 FTC counsel just mentioned makes clear.

18 And let me also, your Honor, when I was preparing for this  
19 argument, I found a recent Supreme Court case that also makes  
20 this very clear about how to read statutes that provide for some  
21 actions to go to one court and other actions to go to the  
22 district court. And that's the *National Association of*  
23 *Manufacturers v. Department of Defense* case that was just  
24 decided this year, 138 Supreme Court 617, by Justice Sotomayor,  
25 a case under the Clean Water Act where she parses all of that

1 out.

2 That's what we have here. We're not challenging a consent  
3 decree. We agree that we are not the -- my clients are not the  
4 subject of the consent decree. We're saying that what they have  
5 done here is carve out an exception to the Used Car Rule that's  
6 been on the books, again, for 33 years and is now --

7 THE COURT: But they don't purport to do so. So we  
8 will get to that in a moment, that is, whether or not they  
9 actually are creating the policy that you indicate that they  
10 are. But even if they are doing that, why do you have standing  
11 to bring --

12 MS. MEYER: Again, we're on a motion to dismiss here,  
13 your Honor.

14 THE COURT: Understood.

15 MS. MEYER: Okay. We have standing -- again, I have  
16 to get back to the Used Car Rule. The Used Car Rule was  
17 designed to protect consumers from the risk of injury, death,  
18 and economic loss from buying a car where the mechanical  
19 condition has been misrepresented. So that was the whole  
20 purpose of that statute, that rule. So for all of these years,  
21 the FTC through that rule is protecting consumers.

22 What they've done now is taken away that protection by  
23 allowing used car dealers to sell used cars that they represent  
24 are repaired for safety when, in fact, they're subject to an  
25 outstanding safety recall that can immediately cause death,

1 injury, and economic loss the minute the consumer leaves the  
2 lot.

3 THE COURT: They can, but we know from D.C. Circuit  
4 case law that standing is pretty restrictive in terms of  
5 plaintiffs' ability to establish plausibly that they will do so,  
6 because you have to have an imminent injury. You have to have a  
7 nonspeculative injury, et cetera.

8 So what allegations do you have in your complaint that  
9 helps you to deal with that aspect of this?

10 MS. MEYER: What I was starting with, your Honor, is  
11 the fact that the agency itself, when it issued that rule,  
12 determined that consumers are presently subject to those kinds  
13 of injuries, and that was what the Used Car Rule was designed to  
14 prevent.

15 So what we have alleged in our complaint and we have  
16 further augmented through declarations, your Honor, is that the  
17 consumer groups who are the plaintiffs in this case have 10s of  
18 thousands of members who will be buying used cars in the future  
19 and will, as a result of this authorization that has now been  
20 received by the used car dealers from the FTC, be lulled into  
21 buying cars that they believe are safe and have been repaired  
22 for safety when, in fact, they are not safe and have not been  
23 repaired for safety and, in fact, can cause great harm to these  
24 consumers the minute they leave the lot.

25 THE COURT: Aren't you in trouble with respect to this

1 argument insofar as the FTC has not required any car dealer to  
2 say anything? The FTC is simply indicating that if you are  
3 going to represent your car in this way, then you six need to  
4 include this information subject to the, you know, lack of  
5 conforming to the agreement that we have reached in the context  
6 of this adjudication.

7 What I am suggesting is that really the harm that you seem  
8 to be focused on appears to be traceable not to the FTC's order  
9 but to the determinations of the individual car dealers as to  
10 what it is they're planning to do.

11 MS. MEYER: No, your Honor, because again -- and I  
12 thought you made this pretty clear in the *American Federation of*  
13 *Employees v.* -- I forget who the defendant was in that case, but  
14 in which you said an exception to the duty to the problem of  
15 finding causation or redressability when there's a third-party  
16 actor involved is when the agency has authorized previously  
17 unlawful conduct. And that is precisely what we allege here.  
18 They are allowing them, these dealers, and now it's being  
19 followed by other dealers --

20 THE COURT: But that's the issue. Perhaps not in this  
21 other case that you're focused on, and I will find it, but they  
22 have -- to the extent they've authorized it, it's only with  
23 respect to these six. There's a choice being made by any other  
24 dealers to follow the model that has been set up in these  
25 circumstances. The agency has not applied its rule to anybody

1 else. The agency hasn't said so.

2 When you're talking about an actual rule that is of general  
3 applicability, then maybe I understand your point. When the  
4 rule authorizes conduct that is otherwise unlawful, then  
5 everyone to whom the rule applies, which is everyone in the  
6 industry, is subject to doing the kind of thing that's going to  
7 harm the plaintiff.

8 Here, you have an intervening determination by each  
9 individual dealer as to whether or not they're going to follow  
10 the FTC's authorization.

11 MS. MEYER: Well, certainly with respect to the six,  
12 they're going to follow it because they're allowed to follow it.  
13 And we're talking about some of the largest sellers of used cars  
14 in the country, your Honor, including CarMax.

15 THE COURT: Right. But then to get to causation,  
16 don't you have to prove that your people are going to be injured  
17 by cars from the six if those are the only ones to whom the  
18 authorization has been directed?

19 MS. MEYER: And we have put in standing allegations  
20 and in the declaration particularly of Michael Brooks, Your  
21 Honor, who was the chief counsel at the Center for Auto Safety  
22 and has worked in this field for 20 years, a statement -- and  
23 again, this is a motion to dismiss -- saying that these used car  
24 dealers and now other used car dealers will, in fact, be selling  
25 cars that are subject to outstanding recalls and not -- and

1 representing those cars as repaired for safety and safe when, in  
2 fact, they're not. And therefore --

3 THE COURT: In numbers greater than existed before the  
4 FTC ever said anything?

5 MS. MEYER: Yes, that's right, your Honor. If you  
6 look at Michael Brooks's declaration, which is Exhibit V to our  
7 opposition to the motion to dismiss, and you look at paragraphs  
8 14 and 15, you will see that he makes it very clear that as a  
9 result of the FTC rule, used car dealers will be doing this.

10 THE COURT: How do you deal with plaintiffs' -- excuse  
11 me, with the defendant's argument about redressability that, to  
12 the extent that the relief that you're seeking in this case is  
13 invalidation of these orders, which at least with respect to the  
14 six may say defendants have made matters better for consumers,  
15 you're going to be -- you're asking me to invalidate the orders.  
16 And so then we're back to the original state of affairs.

17 How does that solve the problem of people being injured by  
18 cars that are being misrepresented as soon as they leave the  
19 lot?

20 MS. MEYER: It solves some of the problem, because it  
21 would prevent -- plaintiffs prevailing in this case would mean  
22 that the consent decisions would be set aside, and therefore,  
23 the authorization by the Federal Trade Commission to allow  
24 dealers to sell cars as repaired for safety when they're subject  
25 to an outstanding recall would no longer exist. And therefore,

1 consumers would no longer -- either those dealers will fix those  
2 cars before they sell them, or they won't make the  
3 misrepresentation anymore.

4 THE COURT: Maybe, maybe, but again, we're all  
5 determined -- focusing in that moment on what the dealers  
6 decide. I overturn the orders, and it could be that some of the  
7 dealers stay with the very orders that you say are problematic.

8 MS. MEYER: But your Honor, as long as the plaintiffs  
9 get some relief, that is all that's required under the --

10 THE COURT: But I don't understand how you get any  
11 relief necessarily. It all depends on what the dealers decide  
12 to do as a result of the invalidation of the order.

13 MS. MEYER: Well, again, your Honor, if the  
14 authorization is set aside, the Used Car Rule kicks back in,  
15 because the Used Car Rule, again, prohibits dealers from  
16 misrepresenting the mechanical condition of the car, and we will  
17 assume that some dealers, as they were before these consent  
18 decisions were issued, will actually comply with the law, which  
19 is what they were doing, your Honor.

20 THE COURT: I understand. But you haven't established  
21 that the prior world was such in which the Used Car Rule was  
22 governing dealer conduct in this regard. And in fact,  
23 apparently, it wasn't working, because the FTC says we need to  
24 get involved here, because notwithstanding the Used Car Rule  
25 people are still misrepresenting in the sense that they are

1 saying safe and effective and they're not disclosing.

2 So I don't understand how you are better off in any way for  
3 the Court's invalidation of these orders.

4 MS. MEYER: Because, your Honor, as I explained and as  
5 the record shows, some dealers, including Ford, Auto Nation,  
6 were, in fact, not selling cars as repaired for safety when they  
7 were subject to open recalls. Now, whether that's because they  
8 were complying with the Used Car Rule, I mean, that was the  
9 state of affairs. I assume that's why they were doing it. But  
10 they were doing it, and now they're not doing it.

11 THE COURT: I understand. But just entertain for a  
12 second that the Court's authority extends only to the  
13 invalidation of the existing orders. It sounds to me like you  
14 want the Court to say FTC, you are not allowed to authorize  
15 people to do this or we have to have some rule that -- FTC, you  
16 have to issue a rule that affirmatively rescinds this disclosure  
17 requirement so that people don't continue to follow it.

18 Because conceivably, I could rescind these orders, and  
19 given the state of the world that existed prior to the orders  
20 existing, right, the same car dealers could do exactly the same  
21 thing today as they did when the orders were in place.

22 Ford doesn't have to go back to repairing the cars; right?  
23 The cat is out of the bag. The FTC has said as of today you may  
24 cure this problem, right -- even assuming this is a rule that  
25 applies to everybody, you can cure this problem by including



1 this language.

2 So now the Court says FTC, your orders are invalid. What  
3 does that mean? It means the dealers can continue to put that  
4 language in, to not put any language in, to repair if they want  
5 to, to not repair.

6 I don't understand how -- you're suggesting that just by  
7 invalidating the orders, we will have a world in which no dealer  
8 says what you say is problematic.

9 MS. MEYER: I'm not suggesting no dealer, your Honor.  
10 We don't have to show complete relief. We just have to show  
11 some relief, your Honor.

12 THE COURT: But how do you show some --

13 MS. MEYER: If you issue a decision, your Honor, and  
14 you say that these decisions are unlawful because they violate  
15 the Used Car Rule which prohibits the sale of a car where the  
16 dealer has misrepresented the mechanical condition of the car,  
17 that will be the state of affairs, and dealers will know that  
18 that is the law. They cannot misrepresent the mechanical  
19 condition of the car.

20 Now, the fact that the FTC, for whatever reason all these  
21 years, has chosen not to enforce the Used Car Rule, I don't know  
22 about that. But what they can't do is affirmatively allow,  
23 permit dealers from here on out to disregard a trade regulation  
24 rule that's on the books and represent that a car has been  
25 repaired for safety, your Honor, when, in fact, it hasn't, which

1 again blatantly violates the regulation that says they cannot  
2 misrepresent the mechanical condition of the car.

3 On redressability, your Honor, I want to mention because I  
4 know my client feels very strongly about this, there are many  
5 unfair and deceptive acts and practices laws that all the states  
6 have. And the states -- we have this in our brief. The states  
7 defer to the FTC as to what is an unfair and deceptive practice.

8 So right now you have a situation where, through these  
9 consent decisions, the FTC has authorized the sale of cars that  
10 are unsafe as safe and repaired for safety, even though that  
11 violates the Used Car Rule, and the state agencies that enforce  
12 the state unfair practices laws are going to defer to that  
13 decision.

14 Whereas, if you set that aside, the states, in addition to  
15 the FTC, can enforce their own laws against used car dealers who  
16 continue to misrepresent the mechanical condition of the car and  
17 say that a car is safe when, in fact, it's not.

18 THE COURT: I keep struggling with your representation  
19 that the FTC has, quote unquote, authorized, that they have  
20 endorsed, that they have a policy, that they've created some  
21 sort of interpretive rule. I don't understand why that's the  
22 case.

23 They've issued things, settlement agreements in the context  
24 of particular adjudications that bind only the people who are  
25 named in those agreements. Anybody else can continue to do

1 whatever they want. Presumably, the FTC could reach a different  
2 agreement with someone else who was doing something similar and  
3 change the language and say you have to say X or Y, because each  
4 of those agreements were individually negotiated and are  
5 settlement agreements.

6 So why do you suggest that this is some kind of an  
7 interpretive rule or policy or something that could be subject  
8 to an APA claim in this way?

9 MS. MEYER: Because, your Honor, what the FTC is  
10 authorizing here, in our view, is a blatant violation of an  
11 existing rule. The head of the Consumer Protection Bureau,  
12 Jessica Rich, at the time these decisions were entered into  
13 announced in a press release that the agency intended these  
14 decisions to have widespread effect and that she -- they hope  
15 that the industry will at large follow these decisions.

16 THE COURT: But they don't have to. They're not  
17 binding.

18 MS. MEYER: They don't have to -- they're not bound,  
19 your Honor, but as a practical matter and from a competitive  
20 standpoint, why would they spend the time and money repairing  
21 these cars if they can get away with the same practices that  
22 have been authorized by their competitors who can undercut them?

23 THE COURT: I understand. But when we evaluate  
24 whether or not something is a rule, you say in your brief that  
25 the interpretive rule is a rule that is issued by the agency,

1 quote, to advise the public of the agency's construction of the  
2 statutes and rules which it administrates -- excuse me,  
3 administers. I don't see these as doing any such thing.

4 MS. MEYER: Your Honor, I guess we're back to the Used  
5 Car Rule again, your Honor. Again, when the agency has a trade  
6 regulation rule on the books that says it is an unfair and  
7 deceptive practice to misrepresent the mechanical condition --

8 THE COURT: No, I understand the merits of your  
9 argument. I understand why you think there's a violation. What  
10 I'm asking you is, do you have any case that finds that the  
11 agency has developed a rule or a policy in the context of a  
12 consent decree? Ordinarily, when the agency wants to interpret  
13 something and advise the public, they issue a rule.

14 MS. MEYER: Well, that's the line of cases we rely on,  
15 the *International Union v. Brock* case.

16 THE COURT: Those cases don't involve the same  
17 scenario where the agency is being challenged under the APA for  
18 having developed a policy or a rule in the context of consent  
19 decree settlements.

20 MS. MEYER: Yes, your Honor, we think it does, because  
21 it amounts to -- again, you have a rule on the books that says  
22 one thing. The agency now has entered into these consent  
23 decisions which announce something very different. It's okay,  
24 it's now okay to misrepresent the mechanical condition of the  
25 car.

1           THE COURT: Only for you guys. People settle  
2 litigation --

3           MS. MEYER: Okay, Your Honor. I --

4           THE COURT: -- for all sorts of reasons in all sorts  
5 of circumstances that fall short, and ordinarily, one would even  
6 hypothesize that a settlement is something that's not going to  
7 be perfect for both sides.

8           So it is conceivable that the government has brought cases  
9 against various people, and although in their ideal world they  
10 wanted the consent decree statement or the disclosure statement  
11 to list out all of the recalls that exist with respect to the  
12 cars, in settling with the car dealers who were at issue, they  
13 agreed to this language.

14           That may or may not -- and I think may not -- establish a  
15 policy of the agency with respect to the Used Car Rule or  
16 anything else. It's in the context of a settlement. They come  
17 to terms that may not be ideal. And it doesn't bind anybody  
18 else.

19           So why is that conceivably the subject of an APA-type  
20 challenge indicating that the agency has interpreted something  
21 or is setting a rule that is now carving out an exception to the  
22 Used Car Rule?

23           MS. MEYER: Well, again, your Honor, because, A, they  
24 have announced this in the context of entering into these  
25 decisions with some of the largest used car dealers in the

1 country. B, they announced that they wanted it to have  
2 widespread effect. C, in fact, the dealer association informed  
3 the FTC -- and we have this in our brief, your Honor, as well --  
4 that it would advise the dealer members of the trade association  
5 to now comply with this practice, and --

6 THE COURT: I understand. It's so peculiar to me how  
7 two different sides could look at the same thing so differently.  
8 I conceive of the agency, just for the purpose of our  
9 discussion, as having said we want this to have widespread  
10 effect because we think this actually helps consumers, because  
11 the prior world was a world in which car manufacturers or used  
12 car dealers could do whatever they wanted with respect to  
13 selling cars that had unrecalled repairs and whatever.

14 MS. MEYER: Which is not true, your Honor, because of  
15 the Used Car Rule. That is not true.

16 THE COURT: But if they were not enforcing the Used  
17 Car Rule, the reality was that there were cars leaving the lot  
18 every day that were certified as safe and 21-point inspection  
19 where no disclosure was being made.

20 MS. MEYER: In violation of the Used Car Rule --

21 THE COURT: Fine.

22 MS. MEYER: -- and there were cars, your Honor, that  
23 were being sold not with those misrepresentations because  
24 those --

25 THE COURT: Understood. But it's a peculiar thing for

1 a consumer protection agency to suggest that the solution is not  
2 to have some sort of action that makes the agency enforce the  
3 Used Car Rule in this context, but to complain that the agency  
4 has done something with respect to disclosing potential defects  
5 of a car. It may not be the 100 percent solution, but at least  
6 it was something toward trying to give consumers more  
7 information.

8 And so it's very strange to me that the plaintiffs have  
9 taken the position that they're going to sue the agency around  
10 that solution that they were trying to create for consumer  
11 protection rather than -- I suppose if there was a problem with  
12 the Used Car Rule and it wasn't being used to prevent these cars  
13 from leaving the lot at all, then they should have been bringing  
14 that lawsuit, but that's not what's today.

15 MS. MEYER: That's a lawsuit they can't bring under  
16 *Hafler v. GM*, your Honor.

17 THE COURT: They should have gone to their congressman  
18 and said --

19 MS. MEYER: They did.

20 THE COURT: But not every problem has a remedy that  
21 can be pursued in federal court. And unless the agency is  
22 making a rule or a policy that is arbitrary and capricious, that  
23 applies to everybody, that is subject to an APA kind of  
24 challenge in this way, I don't know that the plaintiffs are  
25 permitted to do this.

1 MS. MEYER: Well, your Honor, let me emphasize again,  
2 we're on a motion to dismiss here, and I believe that we have  
3 put in enough in our complaint and in our declarations in  
4 response to the 12(b)(1) motion to dismiss that alleges that  
5 that is precisely what has happened here, that through the  
6 issuance of these decisions the agency has basically informed  
7 the entire industry through a policy that it may now go ahead  
8 and misrepresent the mechanical condition of the car and say  
9 that it's been repaired for safety when it has not, as long as  
10 they say it may be subject to a recall.

11 We have put in a declaration from an expert on this. We  
12 have said that this is what is happening. Dealers have changed  
13 their practices. This was the agency's intent. All of this is  
14 in our allegations, your Honor. The trade association for the  
15 dealers has informed its dealers that that's what's going to  
16 happen.

17 We would like to see the administrative record, your Honor,  
18 on that, because we think it will further illuminate our  
19 allegations and prove that we're correct that that's precisely  
20 what is going on here, that they are using consent decrees as a  
21 way of issuing a policy that from now on authorizes used car  
22 dealers to tell consumers of used cars -- and by and large, your  
23 Honor, these are poor people who don't have a lot of money.  
24 They save up their money to go buy a used car. They go on the  
25 lot. And the dealer says certified, safe --



1 THE COURT: Which it was saying before.

2 MS. MEYER: Some were, some weren't.

3 THE COURT: Yes. But to the extent that some were,  
4 now they also pursuant to the FTC's order have to suggest that  
5 the consumer look into the possibility of recalls with respect  
6 to this --

7 MS. MEYER: And again, your Honor, motion to dismiss.  
8 We have alleged that that "may" disclaimer is meaningless  
9 pursuant to the FTC's own policy guide.

10 THE COURT: And the consumer advocate's position is  
11 that it's better to have no disclaimer --

12 MS. MEYER: Absolutely, your Honor.

13 THE COURT: -- than the "may" disclaimer?

14 MS. MEYER: Absolutely, your Honor. That's the other  
15 thing that I wanted to mention. Thank you.

16 Every single consumer group that commented -- they had  
17 comment on this, which I think shows that it's more on the  
18 policy side of the ledger --

19 THE COURT: I think they did that pursuant to their  
20 own regulations about consent decrees.

21 MS. MEYER: Yes, your Honor.

22 THE COURT: But that's not necessarily because it's  
23 creating a rule. That's just a separate regime to deal with  
24 consent decrees.

25 MS. MEYER: All I'm saying, your Honor, is that it

1 created an administrative record which shows that every single  
2 consumer and consumer group that commented on this rule said  
3 this is terrible, this is going to be worse, this is going to  
4 lull consumers even more into believing that these cars are safe  
5 when, in fact, the consumer could be killed the moment they  
6 leave the lot. They said no, don't do it, this is terrible,  
7 this is not what you should be doing. And they went ahead and  
8 ignored all of those comments and went forward.

9 And again, your Honor, I just want to stress, we're on a  
10 motion to dismiss. I think that we have certainly made  
11 sufficient allegations, both in our complaint and in the  
12 supplementary materials that we have filed in support of our  
13 opposition, to get to the next stage.

14 THE COURT: All right. Thank you.

15 MS. MEYER: Thank you.

16 THE COURT: Ms. Melman, I will let you have the last  
17 word.

18 MS. MELMAN: Your Honor, I will be very brief, because  
19 I think we've covered all the issues quite well.

20 I'm going to say, it strikes me as very -- for plaintiffs  
21 to say that the Commission has allowed or authorized anything, I  
22 think without getting into nonpublic material, we can assume  
23 that the Commission, given its mission, given its desire to  
24 protect consumers, that it thought that its best shot was not  
25 the Used Car Rule but using Section 5 in alleging violations of

1 Section 5 because there were -- it involved a half truth, a  
2 deceptive failure to disclose, not a clear out-and-out  
3 misrepresentation.

4 THE COURT: What is your response to plaintiffs' last  
5 point, which was okay, so the Commission was carefully weighing  
6 the various options, the things it could do, the circumstances,  
7 and every single consumer protection group, she says, came  
8 during the notice and comment period and said this is a  
9 disaster, this is worse than not saying anything, we would  
10 rather have the current state of affairs because at least some  
11 companies are actually making the repairs, and that by doing  
12 this you will be authorizing the misleading of consumers? What  
13 was the agency's response to the outcry from consumer protection  
14 groups?

15 MS. MELMAN: Well, the agency responded to each and  
16 every one of those letters that were written. Most of them were  
17 very cryptic. It looked like it was just some type of a  
18 campaign to submit letters to the Commission. But the  
19 Commission did respond to each and every one.

20 THE COURT: And was its response tailored toward what  
21 was actually in the consumer's best interest? Because it seems  
22 like today here, maybe because I was making the argument for  
23 you, but that the agency has indicated that it was trying to  
24 deal with unfair and deceptive practices by targeting lack of  
25 disclosure and that this was a way to force car companies, the

1 six involved here, to disclose, and that that is actually  
2 protecting consumers.

3 MS. MELMAN: Yes.

4 THE COURT: How do we reconcile that with the consumer  
5 protection groups' indication that the particular language that  
6 exists in the context of these consent decrees is actually worse  
7 in terms of consumer protection than nothing?

8 MS. MELMAN: Well, I think, first of all, nothing that  
9 they presented to the Commission looked at all like a serious  
10 study of the industry. These were very cryptic comments.

11 The real solution to this is legislative. There have been  
12 fights in Congress, and I think everybody, both the Commission  
13 and the consumer groups, agree that that is where the best  
14 solution lies.

15 But the Commission, in the exercise of its discretion and  
16 using the -- acting within the powers delegated to it by  
17 Congress, decided that its best shot was not the -- was not the  
18 Used Car Rule, but an adjudicative proceeding that immediately  
19 put into place, without the need for extended litigation, a way  
20 to deal with the problem and to put into consumers' hands the  
21 information that they need to make wise purchasing decisions.

22 THE COURT: What about the representation that a  
23 spokesperson said that they intended -- the FTC intended this to  
24 have widespread effect? Why isn't that indicative of a  
25 statement that the FTC viewed these six consent orders as now

1 the sort of policy of the agency?

2 MS. MELMAN: Well, it's -- the Commission was  
3 hoping -- or I think it was Jessica Rich, the director of the  
4 Bureau of Consumer Protection, was hoping that other dealers --  
5 and there's 10s of thousands -- would follow suit and provide  
6 these disclosures to consumers.

7 THE COURT: Even though the consumer group said the  
8 disclosures were problematic as worded?

9 MS. MELMAN: Well, the -- that's what the consumer  
10 groups believe, because what they really wanted was a -- what  
11 they really wanted was a prohibition, and -- a prohibition on  
12 the sale of used cars with unrepaired recalls. And the  
13 Commission, obviously, didn't think that was -- that it could  
14 use its enforcement authority to accomplish that, that the  
15 agency --

16 THE COURT: That's not within the Commission's  
17 purview, in any event.

18 MS. MELMAN: The agency had to act within its lane and  
19 had to deal with this as a deception problem. So it -- instead  
20 of extended litigation, it put into place a solution hoping that  
21 other dealerships who might be failing to disclose unrepaired  
22 recalls would follow suit. I don't think the Commission can be  
23 faulted for this in any way.

24 THE COURT: All right.

25 MS. MELMAN: Thank you, your Honor.

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THE COURT: Thank you. I will take the motion under advisement.

(Proceedings adjourned at 12:27 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick

February 17, 2020

SIGNATURE OF COURT REPORTER

DATE