

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 MILITARY OFFICERS ASSOCIATION OF AMERICA,
NATIONAL MILITARY FAMILY ASSOCIATION, MINORITY
VETERANS OF AMERICA, CHIEF WARRANT AND WARRANT
OFFICERS ASSOCIATION OF THE UNITED STATES COAST
GUARD, ENLISTED ASSOCIATION OF THE NATIONAL
GUARD OF THE UNITED STATES, AND CONNECTICUT
VETERANS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT FEDERAL TRADE COMMISSION**

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CERTIFICATE OF INTERESTED PERSONS

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

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

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Connecticut Veterans Legal Center
Enlisted Association of the National Guard of the United States
Military Officers Association of America
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National Guard of the United States, Military Officers Association of America, Minority Veterans of America, and National Military Family Association are non-profit organizations. Each *amicus* states that it has no parent corporation, and that no publicly held corporation holds an ownership interest of 10% or more in any *amicus*.

Dated: May 21, 2024

Respectfully submitted,

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INTEREST OF AMICI CURIAE¹

Amici are non-profit, non-partisan organizations that serve and advocate for millions of service members, veterans, and military families in every state. *Amici* understand deeply the financial issues facing American military families, including those challenges that arise when buying and financing a car. *Amici* also have a powerful interest in protecting the wellbeing of service members, veterans, and their families—including their financial wellbeing.

Amicus Military Officers Association of America (“MOAA”) is the nation’s largest and most influential association of military officers. As an independent, nonprofit, and politically nonpartisan organization, MOAA has 360,000 members from every branch of service, including active duty, National Guard, Reserve, retired, and former commissioned officers, and their families. MOAA advocates on behalf of service members of all ranks and branches of the uniformed services, their families, and survivors. MOAA is the leading voice on matters of

¹ All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No party, party’s counsel, or any person other than *amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

compensation and benefits for members of the military community, which includes strong consumer protections to ensure our community is safeguarded.

Amicus National Military Family Association (“NMFA”) is the leading nonprofit dedicated to serving all military families. Since 1969, NMFA has worked with families to identify and solve the unique challenges of military life through advocacy and programs. NMFA provides scholarships for military spouses, camps for military kids, and programs for military teens. The Association’s research creates a better understanding of the experience of today’s military families. NMFA serves the families of the currently serving, veteran, retired, wounded or fallen members of the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and Commissioned Corps of the USPHS and NOAA.

Amicus Minority Veterans of America (“MVA”) is a nationwide nonprofit organization with a mission to create belonging and advance equity and justice for our nation’s most marginalized and historically underserved veterans—the more than 10.2 million veterans who are women, people of color, LGBTQ-identifying, or who are non-religious or

religious minorities. MVA directly advises service members and veterans and advocates on their behalf before Congress, the Department of Defense, and the Department of Veterans Affairs on issues that affect them. MVA's central belief is that effectively supporting minority service members and veterans begins by recognizing that social and structural inequities lie at the heart of the problem. MVA's advocacy efforts therefore focus on systemic policy changes that will improve the lives of vulnerable service members and veteran populations. In furtherance of these goals, MVA has joined or submitted *amicus* briefs to the Supreme Court and other federal courts in cases that directly affect minority service members and veterans.

Amicus Chief Warrant and Warrant Officers Association of the United States Coast Guard ("CWOA"), established in 1929, is the only professional member organization exclusively for United States Coast Guard warrant officers. CWOA represents active, reserve, and retired Coast Guard warrant and chief warrant officers to the Congress, White House, Department of Homeland Security, and Coast Guard leadership. CWOA is dedicated and pledged to promoting warrant and chief

warrant officers' professional abilities, enhancing their value, loyalty, and devotion to the Coast Guard, and promoting its unity and morale.

Amicus Enlisted Association of the National Guard of the United States (“EANGUS”) is a nonprofit organization dedicated to representing the voice of enlisted persons in the National Guard.

EANGUS is committed to promoting the status, welfare, and professionalism of the Army and Air National Guard by supporting legislation that provides adequate staffing, compensation, benefits, entitlements, equipment, and installations for the National Guard.

EANGUS represents a constituency base of over 450,000 soldiers and airmen, their families, and tens of thousands of retired members in all fifty states, Guam, Puerto Rico, the District of Columbia, and the U.S. Virgin Islands.

Amicus Connecticut Veterans Legal Center (“CVLC”) is a nonprofit organization established in 2009 to provide legal representation at no cost to veterans. As a recovery-focused organization, CVLC primarily, but not exclusively, serves clients through a Medical-Legal Partnership model by partnering with Veterans Administration Hospitals (“the VA”) and other connected providers to provide holistic support for Veterans

alongside their clinicians. CVLC’s mission is to empower, support, and improve the lives of veterans by providing free legal assistance to help them overcome legal barriers to housing, healthcare, income, and recovery.

Amici submit this brief to highlight critical information about how unscrupulous car dealers take advantage of service members and veterans, harming American military families as a result. The rule at issue here—the Federal Trade Commission’s (“Commission”) final Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590 (Jan. 4, 2024) (to be codified at 16 CFR 463) (“Rule”) will ban most, if not all, of these unscrupulous practices, protecting all Americans—especially service members, veterans, and their families—from exploitation by automobile dealers.

One military veteran called out the National Automobile Dealers Association for “rallying the troops”² against the proposed Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012 (proposed July 13, 2022) (“Proposed Rule”). NADA is doing it again here, but the

² Shawn Northup, Comment Ltr. On Proposed Motor Vehicle Dealers Trade Regulation Rule (Sept. 9, 2022), <https://tinyurl.com/5e59uec2>.

amici they have rallied aren't in fact "troops," they are business interests that oppose well-reasoned consumer protections in an effort to ensure that they can continue to take advantage of hard-working Americans. The very protections they now oppose would protect Americans, including and especially the *actual* troops: American service members and military veterans.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Rule prohibits car dealers from lying to or otherwise exploiting customers, as follows: (1) it prohibits express or implied misrepresentations about certain information related to the sale of a motor vehicle, including whether a "Dealer or any of the Dealer's personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government . . . including the United States Department of Defense or its Military Departments;"³ (2) it requires certain affirmative disclosures concerning price, payment amounts, and the voluntary nature of "add-ons;"⁴ (3) it bans "add-ons" that do not provide an actual

³ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 694.

⁴ *Id.* at 694-95.

benefit to the customer;⁵ and (4) it requires dealers to maintain records concerning compliance with the Rule’s substantive provisions.⁶ If, as petitioners and their *amici* allege, a basic requirement of honest dealing constitutes a “sweeping”⁷ and burdensome change for dealerships, that fact alone is proof of the need for the Rule.

The Rule offers much-needed protections to every American who buys a car, but service members, veterans, and their families especially benefit. Service members are uniquely vulnerable to unscrupulous car dealers—they are often young or financially inexperienced, they have a guaranteed paycheck, and they are often limited to the area near a military installation with limited time or ability to comparison shop between dealers. Too often they fall prey both to scams that specifically target service members—misrepresenting military affiliation or deceiving consumers about the extent of Servicemembers Civil Relief Act protections—as well as to tricks and swindles that harm car buyers generally, such as payment packing or so-called yo-yo scams.

⁵ *Id.* at 695.

⁶ *Id.*

⁷ *Pet’rs’ Br.* 9.

The Rule also reflects the Commission’s considerable expertise and careful consideration of extensive comments both supporting and opposing the original proposal; it is well-reasoned, and petitioners’ arguments to the contrary are unavailing. In squarely addressing a stark need in the regulation of car dealerships, thereby shielding service members, veterans, and their families from the consequences of scams, the Rule protects military readiness and assists in the national defense, consistent with established Congressional priorities.

A commenter on the Proposed Rule said: “We are a military family that sacrifices a lot every day. Please help us protect our hard earned money.”⁸ The Rule is the Commission’s effort to do exactly that.

ARGUMENT

I. Service members are uniquely targeted by, and vulnerable to, scams by car dealers.

For many service members, “their first duty station is often in an area where a car is needed to get around or leave the base,”⁹ so it is unsurprising that “[a]uto debt shows a strong association with entry

⁸ Alyssa Spangle, Comment Ltr. On Proposed Motor Vehicle Dealers Trade Regulation Rule (Sept. 19, 2022), <https://tinyurl.com/3yp9wb22>.

⁹ Patrick Brick et al., Consumer Fin. Prot. Bureau, *Protecting Servicemembers from Costly Auto Loans and Wrongful Repossessions* (Jul. 18, 2022), <https://tinyurl.com/mrxs63ef>.

into active duty service.”¹⁰ Indeed, young service members are significantly more likely to have auto debt than their civilian counterparts¹¹—meaning they are much more likely to have been the victim of a dealer’s scams.

“Many servicemembers are young, first-time car buyers with limited knowledge of credit products and terms”¹² who have likely never made a purchase as large or complex as a car and are therefore more susceptible to scams than more experienced consumers. Young service members are particularly vulnerable to unscrupulous dealers because they have “an absolutely guaranteed paycheck”¹³ and are often highly motivated to purchase a car quickly, whether for family, other obligations, or pleasure. One Navy Legal Services attorney explained that with their paycheck, new service members “buy the cars as soon as

¹⁰ James V. Marrone & Susan P. Carter, Consumer Fin. Prot. Bureau, *Financially Fit? Comparing the Credit Records of Young Servicemembers and Civilians*, 28 (Jul. 2020), <https://tinyurl.com/mr3bnea3>.

¹¹ *Id.* at 29 (“At age 24, 50 to 60 percent of those who entered service have auto debt, compared to 29 percent of civilians.”).

¹² Patrick Brick et al., *supra* n. 9.

¹³ Debra O’Connor, *Watchdog: Military members at special risk for scams*, Twin Cities Pioneer Press (Nov. 10, 2012), <https://tinyurl.com/3kekrcs7>.

they get here... There's a beach. They can't pick up [dates] without a car."¹⁴

Dishonest and exploitative tactics targeting service members are so widespread and harmful that the Staff Judge Advocate's Regional Legal Assistance Officer for Marine Corps Installations East issued a memorandum "to shed some light on the sorts of practices that car dealers have perpetrated against military service members."¹⁵ That memo describes fifteen distinct scams he had encountered and notes his belief that they are "hardly isolated incidents; rather, they are the natural result of a sales force earning its compensation on commission and a large concentration of young, unsophisticated consumers."¹⁶

Available data bear out the pervasiveness of these scams against service members: a Department of Defense data call of military installation counselors found that 79% of military counselors had seen at least one client in the prior six-month period with an auto financing

¹⁴ Stephanie Mencimer, *Meet the Sleazebucket Car Dealers Who Prey on Our Troops*, Mother Jones (Jul/Aug. 2019), <https://tinyurl.com/3sh9b247>.

¹⁵ M.S. Archer, *Motor Vehicle Finance Scams Concerning U.S. Service Members* 1 (Nov. 22, 2009), <https://tinyurl.com/yr48kk2d>.

¹⁶ *Id.* at 5.

problem.¹⁷ Sixteen percent of counselors said that more than 20% of their clients were having such problems.¹⁸ Although each branch of the armed services has car buying and financing classes in their normal financial education curricula,¹⁹ the scams persist. Military leadership has called for government action to address the problem.²⁰

As one retired military officer explained, “dealers have even attempted to pull unethical tricks on me and my wife, even after they found that I was a military member, a combat veteran, that was serving

¹⁷ Consumers for Auto Reliability and Safety, Comment Ltr. On Federal Trade Commission Motor Vehicle Roundtables No. 2, 2 (Apr. 1, 2012), <https://tinyurl.com/y64r88ud>.

¹⁸ *Id.*

¹⁹ Letter from Clifford L. Stanley, Under Secretary of Defense, United States Dep’t of Def., to Michael S. Barr, Assistant Secretary for Financial Institutions, U.S. Treasury, 1 (Feb. 26, 2010) (on file with carconsumers.org), <https://tinyurl.com/5xa5fjpb>.

²⁰ *See, e.g.*, Letter from John M. McHugh, Secretary of the Army, to Christopher Dodd, United States Senator (May 12, 2010) (on file with carconsumers.org), <https://tinyurl.com/yrvnz8at> (“[W]e believe that greater government oversight of auto financing and sales for our Soldiers will help protect them and reduce unnecessary financial strain on our already overburdened Army Families.”); Letter from Michael B. Donley, Secretary of the Air Force, to Senator Christopher Dodd, United States Senator (May 13, 2010) (on file with carconsumers.org), <https://tinyurl.com/2vsdrfz7> (“we believe that greater Government oversight of automobile financing and sales for our Airmen will help protect them and reduce unnecessary financial strain on our already overburdened Air Force families.”).

this great nation.”²¹ That same officer “can’t list the number of times I have either seen, or have stepped in a situation, where car dealers have either attempted to take, or have successfully taken, advantage of a young military member or their family.”²²

II. The Rule protects service members, veterans, and military families from scams and other deceptive practices that car dealers use to specifically target these populations for exploitation.

Crooked car dealers specifically target service members, veterans, and their families in several ways. They misrepresent their affiliation with the Department of Defense or the United States Armed Forces, and misrepresent that vehicles are subject to repossession when they are in fact protected under the Servicemembers Civil Relief Act (“SCRA”). The Rule bans these practices.

The simplest scam car dealers can perpetrate against service members, veterans, and their families is to suggest that they are affiliated with or endorsed by the Department of Defense or a branch of the military. The Rule prohibits these misrepresentations—this will

²¹ Keith George, Comment Ltr. On Proposed Motor Vehicle Dealers Trade Regulation Rule (Sept. 20, 2022), <https://tinyurl.com/4sksb74s>.

²² *Id.*

still allow dealerships to, for instance, advertise their involvement in “charitable military event[s],”²³ but will curtail misrepresentations of a military relationship, which “are likely to affect consumers’ conduct.”²⁴

Existing law does not provide adequate protections from such scams. Take Navy service member William Kirkgaard: a man approached Kirkgaard, lying about being a former Marine, and eventually offering him a ride to a credit union where he claimed to work so that Kirkgaard could open an account.²⁵ Instead, he drove Kirkgaard about 14 miles to a car dealership, where Kirkgaard was essentially stranded without a way to return to his base.²⁶ There, he was asked “to sign some paperwork,” at which point the dealership informed him he had purchased a car—one with 78,000 miles that shook violently.²⁷ When he tried to return the car the next day, he was told that state law prohibited him from doing so—another lie—and Kirkgaard found

²³ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 623.

²⁴ *Id.*

²⁵ Mencimer, *supra* n. 14.

²⁶ *Id.* When confronted with complaints from service members, the man responded “Jesus, are you serious? . . . If he’s over 18 years of age and he’s willing to sign a contract . . . I don’t see how you can be forced.” *Id.*

²⁷ *Id.*

himself responsible for his \$7,900 purchase on a 15-percent loan.²⁸

Kirkgaard explained the situation in which the scam left him simply:

“I’m screwed.”²⁹ In addition to the prohibition on lying about military affiliation, this probably also violated at least the Rule’s prohibitions against misrepresenting whether terms or a transaction is for financing or a lease, misrepresenting when a transaction is final or binding, and one or more of the disclosure requirements.³⁰

The Rule also prohibits dealers from misrepresenting “[w]hether, or under what circumstances a Vehicle may be repossessed.”³¹ Under the SCRA, once a service member makes their first car payment, their vehicle cannot be repossessed while they are on active duty.³² Absent the Rule’s protection, dealers are able to, and do, represent that they

²⁸ *Id.*

²⁹ *Id.* This scam, which essentially amounts to kidnapping, was not an isolated event. One dealership lost its license after scattering business cards promising discounts around multiple military installations—employees from the dealer would pick up the unlucky service members who called the number on the card and drive them to a dealership four hours away, where “the hapless grunts were told they’d have to buy a vehicle in order to get back to base and not be declared AWOL.” *Id.*

³⁰ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 694.

³¹ *Id.*

³² 50 U.S.C. § 3952.

will repossess a vehicle protected under the SCRA even though they are legally barred from actually doing so. A misrepresentation about a dealer's intent or lawful ability to repossess an SCRA-protected vehicle will not only cause immense stress to a service member or their family, it "is likely to affect [service members'] conduct, including by impacting [their] conduct regarding which payments to prioritize while serving our country."³³ If a service member needs their vehicle to get between their home and duty station, but believes that it is subject to repossession, it would be rational for them to needlessly prioritize car payments, even ill-gotten ones, over other necessary spending. The Rule protects service members from that choice.

The Rule will also help address one unique disadvantage faced by service members when purchasing cars. By requiring a clear disclosure of "[w]hether, or under what circumstances, a Vehicle may be moved, including across State lines or out of the country,"³⁴ the Rule protects service members from purchasing a car only to later learn that they cannot take it with them to a new installation or overseas. As one

³³ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 624.

³⁴ *Id.*

Judge Advocate described, “I see a number of people who end up having to do what you would call ‘voluntary repossession’ on their car because they bought this car, they’re excited about it, and unfortunately, you know, the person who made them the loan didn’t say ‘Oh, by the way, if you go overseas, we’re not gonna let you take it with you.’”³⁵ While such restrictions are generally lawful and can serve important purposes, clear disclosures will help protect service members from this unfortunate bind.

III. The Rule protects service members and military families from scams that car dealers use to target even non-military consumers.

Dealers’ predatory and dishonest tactics can affect any customer shopping for a car—not just service members, veterans, and their families. All rely on dishonesty and mistreatment of customers, and the Rule makes clear that most, if not all, of the common scams on which unscrupulous car dealers rely are illegal. By protecting all consumers, the Rule benefits service members and military families.

³⁵ Hollister Petraeus, Director, Office of Servicemember Affairs, Consumer Fin. Prot. Bureau, Remarks at Fed. Trade Comm’n Roundtable: The Road Ahead: Selling, Financing & Leasing Motor Vehicles 11 (Aug. 2, 2011) <https://tinyurl.com/yucfszwb>.

These schemes take many forms. One, the so-called yo-yo scam, is used so frequently, including by dealers with predominantly military customers, that an attorney in the Legal Assistance Office of Texas's Fort Bliss issued an advisory explaining the scam and providing guidance on how to proceed after falling victim to it.³⁶ In a yo-yo scam, a dealer initially offers a very low interest rate on a loan financed directly through the dealership, then, a few days or weeks later, informs the customer that the original rate cannot be honored and offers a choice: accept a much higher interest rate or return the car, often holding hostage a consumer's down payment or trade-in vehicle.³⁷ As the advisory explains, dealerships "pull scams like this to make more money on their end. . . . The problem is these scams are not illegal. We call this behavior 'lawful, but awful.'"³⁸ As a result, the best advice the Legal Assistance Office could provide to Fort Bliss' 32,000 active-duty

³⁶ Capt. Brian Mauro, Fort Bliss Legal Assistance Off., *How to Avoid a Yo-Yo Scam* (Apr. 13, 2023), <https://tinyurl.com/mum929n7>.

³⁷ *Id.*

³⁸ *Id.*

service members and their 35,000 family members³⁹ is to “avoid”⁴⁰ yo-yo scams if possible.

The Rule will effectively put an end to this practice; it prohibits misrepresentations regarding a transaction’s finality and the return of a down payment or trade-in vehicle. “Under these provisions, if a consumer is under the impression that the transaction is final, and the dealer subsequently causes the consumer to return the vehicle to the lot because the transaction was not final, or the dealer takes or threatens to take possession of the vehicle but refuses to return the down payment or trade-in vehicle, the dealer has violated”⁴¹ the Rule. Rather than leaving consumers—including military consumers—to attempt simply to “avoid” a successful scheme perpetrated by sophisticated bad actors, the Rule prohibits the scheme and protects consumers from facing it in the first instance.

³⁹ See Dep’t of Def., *Military Installations: Fort Bliss Installation Details* (last visited May 16, 2024), <https://tinyurl.com/5bzaxj5d> (installation population estimates).

⁴⁰ *Id.*

⁴¹ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 619.

Payment packing is another favorite tactic of car dealers looking to increase their bottom line by deceiving and exploiting consumers.⁴² With payment packing, dealers both sneak add-ons into lengthy paperwork, increasing the total purchase price of a vehicle without the consumer being aware, and spring add-ons late in the process of purchasing and financing a vehicle, potentially misrepresenting that they are required with the purchase.⁴³

If car dealers do not simply lie and say that add-ons are required to secure financing, they may instead falsely push the products as valuable.⁴⁴ These pressures, combined with the dizzying array of potential add-ons,⁴⁵ can overwhelm or mislead even sophisticated and experienced consumers, let alone inexperienced buyers.⁴⁶ Consumers

⁴² Consumers for Auto Reliability and Safety Comment Ltr. On Federal Trade Commission Motor Vehicle Roundtables, *supra* n. 17, at 3 (military counselors participating in Department of Defense Data Call “cite loan packing and yo-yo financing as the most frequent auto lending abuses.”).

⁴³ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 595-96.

⁴⁴ *See, e.g.*, John W. Van Last et al., Nat’l Consumer L. Ctr., *Auto Add-Ons Add Up*, 7 (2017), <https://tinyurl.com/5cjhmsys> (window etching marketed as “detering theft”).

⁴⁵ *See id.* at 6-8 (discussing range of potential products).

⁴⁶ *See, e.g.* Mary W. Sullivan et al., Fed. Trade Comm’n, *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related*

who find themselves the victims of payment packing can end up owing thousands of dollars more than they expected—primarily, if not exclusively, for add-on products that provide limited benefit.⁴⁷

Hundreds of dollars for “VIN etching” on windows? Unnecessary; since VINs are stamped in multiple places in a vehicle, window etching is redundant unless a consumer anticipates needing to identify their vehicle solely from a detached window.⁴⁸ Nitrogen-filled tires for a few extra hundred dollars? They may lose pressure more slowly, but the difference is “minimal,” and the false confidence of nitrogen-filled tires may, dangerously, lead car owners to “check their tire pressure less often.”⁴⁹

Once again, the Rule will contribute to preventing this scam simply by prohibiting it. Dealers cannot misrepresent material information

Research, 17 (Jul. 2020), <https://tinyurl.com/2nr6w4zn> (“interviews identified sales of contract add-ons . . . as a portion of the car buying process that consumers often did not understand”).

⁴⁷ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 595-96.

⁴⁸ Benjamin Preston, *Just Say No to These Car Dealership Extras*, Consumer Reports (Apr. 30, 2024), <https://tinyurl.com/msd6zkva/>.

⁴⁹ *Id.*; Jeff S. Bartlett, *Should You Use Nitrogen in Your Car Tires?*, Consumer Reports (Aug. 14, 2023), <https://tinyurl.com/4ykp6hks>.

about add-ons,⁵⁰ and must affirmatively disclose that add-ons are not required.⁵¹ Nor can car dealers charge for add-ons that “provide no benefit” to consumers.⁵² No matter how many disclosures they make, car dealers can no longer pocket extra money by selling “nitrogen-filled” tires whose nitrogen content is no higher than regular air, nor can they raise a purchase price by including insurance that excludes the consumer from coverage or could otherwise never financially benefit the consumer.⁵³ The result of these protections is simple: instead of taking on thousands of dollars in extra debt for products they never wanted, consumers will have clearly identified opportunities to decide whether they want to purchase any given add-on product—and will not be offered expensive but totally worthless ones.

⁵⁰ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 694.

⁵¹ *Id.*

⁵² *Id.* at 695.

⁵³ *Id.*

IV. These scams have devastating impacts on individual service members and their families, thus undercutting military readiness.

The impact of these scams is devastating. One commenter described it simply: as “a young Marine stationed in a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years.”⁵⁴ He noted further that he knows of “many young military people who purchased vehicle[s] and we[re] instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges that they couldn’t refinance their vehicle . . . because the total financed amount was so much more than what the vehicle was worth.”⁵⁵ Another service member summed up scams targeting service members, and their devastating consequences: “Predatory practices like this are common near military installations, where people are most likely purchasing their first vehicle only to then pay 50% more than advertised. I appreciate and approve of the changes as a leader, my soldiers do not make a lot of money, so vehicle cost

⁵⁴ Rhett LaMunyon, Comment Ltr. on Proposed Motor Vehicle Dealers Trade Regulation Rule (Sept. 7, 2022), <https://tinyurl.com/msrre3p3>.

⁵⁵ *Id.*

shouldn't keep them from living a normal life.”⁵⁶ A military counselor explained “as a financial counselor for military service members and their families I see first hand the effects of predatory practices that dealers use to sell their products. From interest rates routinely in the high 20s low 30s to car payments over 1k dollars. The sale of useless warranties and add on fees also raise the price which hurts consumers. Now with market conditions they're taking full advantage and putting on additional dealer markups.”⁵⁷

These financial tolls cause substantial suffering and psychological harm to service members and their families. Survey data reveal that finances are the second-greatest cause of service member stress, “only behind work and career concerns, and ahead of deployments, health, life events, family relationships, and war/hostilities.”⁵⁸ Ironically, when these scams succeed, as they often do, a young service member finds themselves in excessive and potentially prohibitive debt—debt that dealers obtain dishonestly and exploitatively, but debt that carries

⁵⁶ Andrew Knight, Comment Ltr. on Proposed Motor Vehicle Dealers Trade Regulation Rule (July 25, 2022), <https://tinyurl.com/yckf7tdp>.

⁵⁷ Jose Sanchez, Comment Ltr. on Proposed Motor Vehicle Dealers Trade Regulation Rule (Aug. 30, 2022), <https://tinyurl.com/y72mkbr5>.

⁵⁸ Stanley Letter, *supra* n. 19, at 1.

potentially greater consequences for service members than it would for civilians. If a service member falls behind on payments, even on a crooked loan, “it can lead to adverse personnel actions such as a lost security clearance or discharge.”⁵⁹ Furthermore, service members may bear an *extra* legal obligation to repay as compared to civilians: under Article 134 of the Uniform Code of Military Justice, which prohibits disorder and neglect “to the prejudice of good order and discipline in the armed forces,”⁶⁰ dishonorable failure to pay a debt can be punished by a bad-conduct discharge, six months confinement, and forfeiture of pay.⁶¹ By protecting service members from taking on debt on the basis of deceptive or otherwise exploitative practices, or by at least better positioning service members to understand the monthly costs of a vehicle, the Rule helps keep service members from becoming trapped between crippling monthly payments and loss of advancement, losing their job, or facing potential court-martial for failure to make those payments.

⁵⁹ Brick et al., *supra* n.9.

⁶⁰ 10 U.S.C. § 934.

⁶¹ Dep’t of Def., *Manual for Courts-Martial United States Part IV* ¶ 96(d) (2024), <https://tinyurl.com/2s5z829e>.

The Rule’s protections for service members and their families also make a critical contribution to military readiness. Military leadership and Congress have long recognized that providing service members with strong consumer protections is a necessary component of a strong national defense. The SCRA’s repossession protections, for example, were meant to allow service members “to devote their entire energy to the defense needs of the Nation,”⁶² a priority shared by both Congress and military leadership.⁶³ It is therefore unsurprising that service members and their families sometimes enjoy greater protections from scams than non-military consumers.⁶⁴ The Rule—particularly its protections for service members—is not only consistent with that general statutory approach, but also furthers the expressly stated policy

⁶² 50 U.S.C. § 3902(1).

⁶³ *See also* McHugh Letter, *supra* n. 20 (“Soldiers who are distracted by financial issues at home are not fully focused on fighting the enemy, thereby decreasing mission readiness. Protection from unprincipled auto lending enables our Soldiers to concentrate on their primary mission—protecting our great Nation”); Donley Letter, *supra* n. 20 (“Airmen who are distracted by financial issues at home decreases readiness. Protection from unprincipled automobile lending enables our Airmen to concentrate on their primary mission – fly, fight and win in air, space, and cyberspace.”).

⁶⁴ *See also* 10 U.S.C. § 987 (“Military Lending Act”).

preference of Congress and military leadership to further the national defense by protecting service members from financial exploitation.

V. No regulatory gap is required for the Rule to pass muster, and even if the Court were to determine otherwise, the Rule fills a critical regulatory gap.

a. The Commission was not required to identify a “regulatory gap” as a prerequisite to enacting the Rule.

Among other unavailing arguments, petitioners appear to contend that no rational connection exists between an agency’s factual findings and a Rule unless the Rule fills a “regulatory gap.”⁶⁵ Petitioners provide no credible legal support for this theory. At best they point to two cases from outside this circuit, both of which arose in the distinct context of the Securities and Exchange Commission.⁶⁶ Unlike the Commission, the SEC “has a unique obligation to consider the effect of a new Rule upon ‘efficiency, competition, and capital formation,’”⁶⁷ and

⁶⁵ *Pet’rs’ Br.* 30-35, see also *Amicus Br. of Nat’l Indep. Automobile Dealers Ass’n, et al.* 20 (arguing Commission “disregarded” comments arguing that scams are not a pervasive problem).

⁶⁶ *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

⁶⁷ *Roundtable*, 647 F.3d at 1148 (citing the Securities Exchange Act at 15 U.S.C. §§ 78c(f); 78w(a)(2); 80a-2(c)).

both decisions turned, in part, on the SEC's failure to properly weigh those distinct statutory considerations.⁶⁸

Contrary to Petitioners' assertion, *American Equity* did not hold that the Administrative Procedure Act ("APA") necessarily requires an analysis of new disclosures compared to existing protections. To the contrary, the holding was limited to a specific requirement of the Securities Act, 15 U.S.C. § 77b(b), that the SEC consider "whether the action will promote efficiency, competition, and capital formation."⁶⁹

Similarly, although the D.C. Circuit invalidated the Rule at issue in *Roundtable* on several grounds, the *dicta* on which petitioners rely to conjure a regulatory gap requirement concerned the SEC's failure to consider the Rule's impact on efficiency.⁷⁰

The SEC's shortcoming in those cases, in other words, was not a failure to identify or fill a so-called regulatory gap; it was a failure to

⁶⁸ See, e.g. *Am. Equity*, 613 F.3d at 176-79 (discussing the SEC's failure to consider a Rule's effect on competition and efficiency).

⁶⁹ *Am. Equity*, 613 F.3d at 177 (rejecting SEC's argument that such provision did not apply).

⁷⁰ See *Roundtable*, 647 F.3d at 1154 ("Commission failed adequately to address whether . . . the Rule *would impose greater costs* upon investment companies by disrupting the structure of their governance") (emphasis added) (citing *Am. Equity*, 613 F.3d at 178-79 for discussion of failure to evaluate impacts on efficiency).

evaluate a Rule’s impact on a *specific* factor when a statute plainly instructed the SEC to do just that. There is no analogous requirement for the Commission here—neither a general principle of rulemaking nor requirement under the APA or the Federal Trade Commission Act that treats a “regulatory gap” as necessary for rulemaking. Petitioners and their *amici* have attempted to construct this requirement from whole cloth—and a borrowed cloth at that—by imposing requirements unique to the Securities Exchange Act against rulemaking by a federal agency under a wholly different statute. Absent an additional requirement from some specific statute or other source, the APA requires only that the Commission’s rulemaking be “rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute,”⁷¹ and the product of a “logical and rational”⁷² rulemaking process.⁷³ The Commission satisfied those requirements here.

⁷¹ *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

⁷² *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

⁷³ See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (recognizing that Administrative Procedure Act “sets forth the full

b. The Rule provides consumers, including military consumers, with critical protections that would not otherwise exist.

Even if the Court were to credit petitioners' baseless theory requiring a regulatory gap, such a gap plainly exists. As the Commission concluded in determining the Rule is needed, and as discussed above, unscrupulous car dealers regularly scam car buyers, including service members, veterans, and their families, causing substantial financial and psychological harm in the pursuit of increasing ill-gotten profits.⁷⁴ As *amici* have discussed, and as the Commission discussed in the Rule, existing protections are woefully insufficient to protect consumers generally, and service members, veterans, and their families in particular, from these scams.

Further, while various states have their own requirements related to disclosures and misrepresentations, the Rule provides necessary

extent of judicial authority to review agency action for procedural correctness”).

⁷⁴ See Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 594 (Commission receives more than 100,000 complaints annually related to “motor vehicle sales, financing, service and warranties, and rentals and leasing . . . experience shows that complaints are just the tip of the iceberg.”).

uniformity across jurisdictions.⁷⁵ State regulators themselves emphasized this conclusion: “[n]umerous state regulator commenters contended that the Proposed Rule would create a uniform baseline of protection that would *complement* State standards.”⁷⁶

Each of the requirements and prohibitions of the Rule would promote such interstate uniformity, which the Rule recognizes as likely to “produce the corollary benefit of increasing price competition among dealers, who will be able to compete on truthful, standard terms.”⁷⁷ Uniformity across states is particularly important for consumers who may consider purchase options in multiple states—for instance, service members or families stationed at installations near or crossing state lines. Providing such uniformity over a patchwork of state disclosure requirements and deception provisions—which, as the Commission

⁷⁵ *Id.* at 660.

⁷⁶ *Id.* at 659 (emphasis added); see also 18 State Attorneys General, Comment Ltr. on Proposed Motor Vehicle Dealers Trade Regulation Rule, 11 (Sept. 12, 2022), <https://tinyurl.com/up2n862v> (arguing that “the proposed Rule rightly sets a floor for conduct,” providing “a consistent baseline”).

⁷⁷ Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 632.

explains, do not currently use the “same definition[s],”⁷⁸ certainly fills a regulatory gap.

Because the “Rule defines with specificity certain unfair or deceptive acts or practices,”⁷⁹ it clarifies the scope of the Commission’s authority to address such practices (“UDAPs”) under 15 U.S.C. § 45(a). Dealers will have greater certainty of compliance by adhering to enumerated provisions than they would by analyzing individual practices against the full scope of authority defining UDAPs. Future Commission enforcement actions for violations of the Rule will only need to establish facts constituting enumerated prohibited conduct, rather than needing to demonstrate that a dealer’s conduct constituted a UDAP as established generally by the Federal Trade Commission Act and interpretive authorities. Simplifying enforcement will both increase the deterrent effect against non-compliance and allow the Commission to take action against violators more easily—an impactful change given that the Commission has needed to make a “significant commitment of . . . limited enforcement resources,”⁸⁰ to combat auto dealer scams.

⁷⁸ *Id.* at 631.

⁷⁹ *Id.* at 602.

⁸⁰ *Resp’t’s Br.* 48.

Moreover, while petitioners and several *amici* characterize the Rule's prohibitions as redundant,⁸¹ they concede the opposite, acknowledging that, while the Rule may occasionally overlap with existing provisions, it is not in fact identical to extant requirements.⁸²

Petitioners also claim that the Commission agrees that “virtually all the conduct targeted by the Rule is already illegal.”⁸³ Not so. While the Commission acknowledges that “some commenters stated that existing Federal and State efforts are sufficient,” it also notes that “misconduct has persisted despite prior law enforcement and other efforts.”⁸⁴ The current system of state laws has not prevented these egregious scams, whether because of a lack of uniformity, lax enforcement, or state laws

⁸¹ *Pet'rs' Br. 1, Amicus Br. of Chamber of Commerce 13.*

⁸² *See, e.g. Pet'rs' Br. 32* (characterizing offering price disclosure requirements as “redundant-but-not-identical” as compared to existing requirements).

⁸³ *Pet'rs' Br. 15.* The Rule concededly discusses the consequences *if* the Rule were duplicative of other requirements or prohibitions at least 13 times. *See, e.g. Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 624* (noting “the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct.”) These discussions do not accept that the Rule is duplicative of other authority, but merely discuss what the consequences would be *if* it were.

⁸⁴ *Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 600.*

not actually offering the same level of protection as the Rule.

Regardless of the reason, the continued prevalence of car sales scams is clear evidence of a regulatory gap. And the scams are ongoing and endless. Because the Rule fosters uniformity, provides clarity, creates new requirements, and expressly proscribes conduct that was, at least arguably, permitted before the Rule's enactment, it strains credulity to argue that the Rule does not fill a gap.

CONCLUSION

Service members and veterans uphold or have previously upheld Department of Defense “core values that everyone in uniform must live by: duty, integrity, ethics, honor, courage, and loyalty.”⁸⁵ Indeed, personnel subject to the Uniform Code of Military Justice may face punishment by court-martial for making false official statements.⁸⁶ In stark contrast, car dealers now seek to invalidate a regulation that would require them to deal honestly with consumers, including service members who could be disciplined—even court martialed and

⁸⁵ Dep't of Def., Mil. Leadership Diversity Comm'n, *Department of Defense Core Values*, 1 (December 2009), <https://tinyurl.com/mu5ahyy4> (internal quotations omitted).

⁸⁶ 10 U.S.C. § 907.

confined—if they engaged in the unscrupulous conduct that the Rule addresses. The Court should not abide this double standard.

As one active duty service member explained, “I have seen to[o] many of my fellow service members be misle[]d into committing to something they can’t afford... by shady dealerships . . . This is ruining young lives and wasting money most can’t afford to lose. It’s time for a change.”⁸⁷ The Commission has provided that change with its well-reasoned Rule, and this Court should conclude that the Rule is lawful.

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Respectfully submitted,

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⁸⁷ Anonymous, Comment Ltr. on Proposed Motor Vehicle Dealers Trade Regulation Rule (Aug. 18, 2022), <https://tinyurl.com/vdxefywa>.

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the CM/ECF system. For those counsel who were not served by the CM/ECF system, their co-counsel agreed to accept service on their behalf. All other parties and their counsel of record were served by the CM/ECF system.

/s/ Mark B. Samburg

Mark B. Samburg

CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,493 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 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 for Windows in 14-point Century Schoolbook font.

/s/ Mark B. Samburg

Mark Samburg

May 21, 2024