Office of Commissioner
Andrew N. Ferguson

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Commissioner Andrew N. Ferguson
Concurring in Part and Dissenting in Part
United States v. Lyft
Matter Number 2223028

October 25, 2024

Today, the Department of Justice, on the referral of the Commission, filed a complaint and settlement with Lyft in the U.S. District Court for the Northern District of California.[1] Lyft operates a mobile ride-hailing platform that matches people seeking transportation with people providing it. The complaint accuses Lyft of running two deceptive advertising campaigns. It also demands civil penalties from Lyft pursuant to Section 5(m)(1)(B) of the Federal Trade Commission Act.[2]

In one advertisement campaign, Lyft allegedly made "earnings guarantees"—promises that potential drivers would earn a particular amount if they completed a set number of rides during a given time period. One advertisement, for example, said: "Complete 45 rides between 4 AM Friday … and 5 AM Monday … to earn at least $975 guaranteed." These advertisements were, at best, ambiguous about whether Lyft meant that the drivers would earn the guaranteed amount as a sort of bonus on top of whatever they earned from completing the rides, or whether Lyft was merely promising that it would pay drivers the difference of the guaranteed amount and whatever they earned from completing the rides. Many drivers reasonably interpreted these advertisements to promise a bonus. But in fact, Lyft meant only that it would pay the difference between the promised amount and the actual compensation earned for the rides. The complaint alleges that as Lyft implemented its interpretation, thousands upon thousands of drivers complained that they were being cheated. Lyft nevertheless continued to run the advertisements. Because these earnings-guarantee advertisements could be reasonably interpreted as promising a bonus, I agree with my colleagues in the majority that they were deceptive and concur in Count II of the complaint challenging these earnings guarantees.

In another marketing campaign, Lyft allegedly advertised that drivers could earn "up to" a certain amount per hour. The amount advertised varied by market and was a function of the amount drivers historically made in each market where Lyft ran the advertisements. In July 2021, for example, the complaint alleges that Lyft advertisements for the Miami market claimed that drivers could "earn up to $31/hour," and those for the San Francisco market claimed that drivers could "earn up to $44/hour." As the complaint alleges, the figures Lyft used for its "up to" advertisements were the eightieth percentile of earnings for that market. In other words, Lyft told drivers that they could earn up to what at least twenty percent of drivers in that market historically made. This is

[1] *United States v. Lyft*, Complaint ("Complaint") & Proposed Stipulated Order.
[2] 15 U.S.C. § 45(m)(1)(B).

hardly the use of an aberrant outlier to deceive potential drivers about their likely earnings. The Commission nevertheless condemns Lyft's advertisements as "deceptive" on the ground that advertisers must treat "up to" advertisements as meaning that a consumer is "likely to achieve" the promised performance.[3] Put differently, the Commission concludes that the phrase "up to" means "more likely than not" or "average," notwithstanding that it obviously means neither of those things. I therefore dissent as to Count I relating to Lyft's "up to" advertisements. Section 5 holds advertisers liable only for the reasonable interpretations of their advertisements. Interpreting the phrase "up to" in an earnings-based advertisement to require substantiation beyond one-fifth of all earners is not reasonable.

Finally, Counts III and IV seek civil penalties from Lyft under Section 5(m)(1)(B). Ordinarily, the Commission cannot obtain civil penalties for violations of Section 5's prohibition on unfair or deceptive acts and practices. But Section 5(m) authorizes us to pursue civil penalties in federal district court for such violations if we can satisfy two conditions. First, the Commission must identify a final, litigated cease-and-desist order in which we previously determined that the same act or practice of which the defendant is accused was unfair or deceptive.[4] Second, the Commission must show that the defendant had "actual knowledge that such act or practice is unfair or deceptive and is unlawful."[5] I do not believe that the Commission has satisfied the first condition and therefore dissent from Counts III and IV.

I

The Commission announced its framework for what qualified as a "deceptive … act" or "practice" forty years ago. In the 1983 Policy Statement on Deception,[6] we said that "the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[7] This test, which "undergird[s] all deception cases," consists of three elements.[8] "First, there must be a representation, omission or practice that is likely to mislead the consumer."[9] "Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances,"[10] i.e., we ask whether the interpretation of the statement that renders it misleading is reasonable or not. And "[t]hird, the representation, omission or practice must be a material one" such that it is "likely to affect the consumer's conduct or decision with regard to a product or service."[11] The U.S. courts of appeals have, by and large, adopted these three elements for deception cases.[12]

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[3] Complaint ¶¶ 22, 56, 57.
[4] *Id.* § 45(m)(1)(B).
[5] *Id.* § 45(m)(1)(B)(2).
[6] FTC Policy Statement on Deception ("Deception Policy Statement"), 103 F.T.C. 174 (1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception, *appended to In Re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).
[7] *Id.* at 176.
[8] *Id.* at *175.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] See, e.g., *FTC v. Pukke*, 53 F.4th 80, 104 (4th Cir. 2022); *FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630–31 (6th Cir. 2014); *FTC v. Lalonde*, 545 F. App'x 825, 837 (11th Cir. 2013); *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 700 (10th Cir. 2013) ("a practice is deceptive if it entails a material

The Commission has failed to plead adequately all three elements in Count I challenging Lyft's "up to" advertisements. Misrepresentation of how much Lyft drivers can expect to earn would of course be material to a driver's decision to drive for Lyft. But the Commission has failed to demonstrate that consumers acting reasonably were likely to be misled by these advertisements. The Policy Statement explains that "[t]he test is whether the consumer's interpretation or reaction is reasonable."[13] If a representation has more than one reasonable interpretation, "the seller is liable for the misleading interpretation."[14] But if the audience, "because of ignorance or miscomprehension," is "misled by even a scrupulously honest claim," the advertiser is not liable under Section 5.[15]

A

I have discussed before the Commission's changing views of "up to" claims.[16] For many years, the Commission treated such claims as substantiated if an "appreciable number" of consumers achieve the promised performance.[17] The Commission never said what constitutes an "appreciable number," but the plain meaning of the words suggested a noticeable, nonnegligible amount.[18]

That longstanding interpretation was reasonable. The literal meaning of the "up to" construction in this context is that it designates a ceiling of performance, that is, the maximum amount that one can hope to earn.[19] That distinguishes it from claims about "likely" earnings (what

misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances"); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992) .

[13] Deception Policy Statement at 177.

[14] *Id.* at 178.

[15] *Ibid.* (quoting *In re Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)).

[16] Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Arise Virtual Solutions, Inc.*, Matter No. 2223046 ("Ferguson Arise Concurrence") at 3 (Jul. 1, 2024).

[17] *Ibid.* (citing a long line of cases beginning in 1983).

[18] *Ibid.*

[19] Up to, Merriam-Webster.com, (last visited Sept. 19, 2024) ("used as a function word to indicate a limit or boundary"); *Durant v. Big Lots, Inc.*, No. 5:23-CV-561-GAP-PRL, 2024 WL 1826473, at *4 (M.D. Fla. Mar. 26, 2024) ("Reasonable consumers do not perceive 'up to' statements like those on this Product as a guarantee because their plain meaning clearly establishes a ceiling, not a floor.") (internal citations omitted); *Brodsky v. Aldi Inc.*, No. 20 C 7632, 2021 WL 4439304, at *5 (N.D. Ill. Sept. 28, 2021) ("Here, no reasonable consumer would understand the 'up to' language to be a guarantee. This language is not a promise that the cannister will make that amount, but just that it can under certain circumstances. Put another way, it is clearly a ceiling, not a floor."). See also *Fink v. Time Warner Cable*, 714 F.3d 739, 742 n.3 (2d Cir. 2013) ("the phrase 'up to' would lead a reasonable consumer to expect that speeds could be less than the advertised '3x faster' and '100x faster' speeds. Indeed, Plaintiffs themselves concede that a promise to provide 'up to' a certain speed is not a guarantee that that speed will be achieved.") (internal quotations omitted); *Sorin v. Folger Coffee Co.*, No. 20-80897-CV, 2021 WL 5545292, at *2 (S.D. Fla. Mar. 5, 2021) ("'Up to' a certain number of cups of coffee would lead a reasonable consumer to expect that the actual number of coffee cups produced could be less. 'Up to' is not a guarantee that the number of cups will be reached."); *Maloney v. Verizon Internet Servs., Inc.*, 413 F. App'x 997, 999 (9th Cir. 2011) (applying the "reasonable consumer" standard to hold that advertisement of internet speed "up to 3 Mbps," where 3 Mbps was not a guarantee, was not a "fraudulent business act or practice"); *Knowles v. Arris Int'l PLC*, No. 17-CV-01834-LHK, 2019 WL 3934781, at *14 (N.D. Cal. Aug. 20, 2019) ("Arris's statements on the SB6190 Modem box include the qualifier "up to,' such that no reasonable consumer would believe that Arris guarantees gigabit download speeds and 32 download channels.").

consumers are more likely to earn than not)[20] or "average" earnings (some measure of the central tendency of consumer earnings).[21] A claim that someone may earn "up to" some amount would be literally true so long as one person in history earned that amount. But a reasonable person would fairly interpret that phrase to mean that the advertised amount was not a complete aberration. A consumer can reasonably expect that an advertiser would share information with the consumer only if the information were relevant. The earnings of a lone, aberrant earner are not relevant to the run-of-the-mill consumer.

But the earnings of an appreciable number would be, because they would signal what an ambitious driver could accomplish with the application of greater effort or skill than the average driver. Some potential drivers, brimming with justified confidence in their abilities and work ethic, may believe that they will out-earn average drivers by outworking them. Such potential drivers will therefore be interested in knowing the higher end of potential earnings, rather than the average earnings, because they believe they can attain those earnings. This attitude is precisely the sort of can-do spirit by which millions and millions of people have achieved the American dream. Information on what an appreciable number of drivers earned at the higher end of the earnings range is therefore valuable information to consumers.

Since 2012, however, the Commission has maintained that advertisers using "up to" claims must be able to demonstrate that consumers are "likely to achieve" the promised performance.[22] The Commission did not promulgate this standard in a rule, which would have required us to find "substantial evidence" that using "up to" earnings claims substantiated by anything less than what 51 percent of earners historically made was both categorically deceptive and prevalent in the economy.[23] It instead announced the standard in a press release, and based the standard on a survey

[20] *United States v. Powell*, 761 F.2d 1227, 1233 (8th Cir. 1985) ("We believe the word ['likely'] should be read in its ordinary sense, as referring to something that is more likely to happen than not. If one asks whether a horse is likely to win a race, and the answer is yes, the person who asked the question naturally understands that the chances of the horse's winning are greater than those of its losing.").

[21] "Average" is "[a] familiar but elusive concept. Generally, an 'average' value purports to represent or to summarize the relevant features of a set of values; and in this sense the term would include the median and the mode. In a more limited sense an average compounds all the values of the set, e.g., in the case of the arithmetic or geometric means. In ordinary usage 'the average' is often understood to refer to the arithmetic mean." *Scalia v. Paragon Contractors Corp.*, 957 F.3d 1156, 1163 n.4 (10th Cir. 2020) (quoting Average, Oxford Dictionary of Statistical Terms (6th ed. 2003)).

[22] Press Release, FTC, FTC Report: Many Consumers Believe "Up To" Claims Promise Maximum Results ("2012 Press Release") ("the FTC's view [is] that advertisers using these claims should be able to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances").

[23] 15 U.S.C. § 57a(a)(1)(B) ("[T]he Commission may prescribe … rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title …"); *id* § 57a(b)(3) ("The Commission shall issue a notice of proposed rulemaking … only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make [such] a determination … only if—(A) it has issued cease and desist orders regarding such acts or practices, or (B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices."); *id.* § 57a(e)(3)(A) (providing that a reviewing court can "hold unlawful and set aside" such a rule if it finds the decision to promulgate the rule "is not supported by substantial evidence in the rulemaking record").

study it commissioned examining how consumers interpreted advertisements for home windows "proven to save up to 47% on your heating and cooling bills."[24]

The complaint's interpretation of "up to" as meaning "likely" is incorrect.[25] For one thing, its interpretation of "up to" as "likely" is categorically false. "Up to" in the English language denotes the limit or boundary on the described item.[26] Telling a consumer that he or she may earn "up to" a certain amount of money when nearly half of the relevant population has earned more than that amount would be untrue. A consumer could, in fact, earn substantially more than the "up to" amount. The Commission's conflation of "likely" and "up to" makes the latter phrase meaningless and deprives the hearer of potentially useful information distinct from likelihoods or averages. It is one thing to tell advertisers that Section 5 requires slightly more than literal truth when using a particular phrase in an advertisement. Commanding that someone tell a lie is a horse of a different color.

The Commission's approach is also inconsistent with the longstanding test for deception. The Section 5 analysis for an objectively true claim cannot be reduced to an empirical study—especially one as flawed as the 2012 survey. A study is helpful primarily in the ambiguous case where a claim could reasonably be interpreted in more than one direction, and one of those directions would be deceptive.[27] But I do not think any ambiguity exists here.

Courts have interpreted Section 5 to prohibit literally and demonstrably true claims as "deceptive" in some circumstances.[28] But the fact that a literally true statement may tend to deceive objectively reasonable consumers in some circumstances does not reduce the English language to an indeterminate muddle. Advertisers are "not liable for every interpretation or action by a consumer."[29] They are liable only for the consequences of a "reasonable … interpretation or reaction."[30] Although a well-designed survey could help establish the prevalence of an interpretation, whether an interpretation is reasonable is not in the first instance an empirical question. It turns first on what the ordinary meaning of words are, and whether the advertiser is using those words consistently with their ordinary meaning.[31] Section 5 does not require advertisers to hire researchers to investigate whether the words they want to use in fact mean what

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[24] Manoj Hastak & Dennis Murphy, *Effects of a Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Belief* ("2012 Report") (Submitted to the FTC, 2012), https://www.ftc.gov/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs.

[25] See, *e.g.*, Complaint ¶¶ 22, 27, 57.

[26] *Supra* n.16.

[27] Accord *Kraft, Inc. v. FTC*, 970 F.2d 311, 327 (7th Cir. 1992) (Manion, J., concurring) ("While the FTC has expertise, consumer surveys provide at least some *objective determination of what the purchaser thinks* and should be considered since, after all, the consumer is among those we are trying to protect."); *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 652–53 (1985) ("[W]e need not require the State to "conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead."); *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) ("It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.").

[28] *Am. Home Prod. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("The impression created by the advertising, not its literal truth or falsity, is the desideratum."); *Kraft*, 970 F.2d at 322 ("[E]ven literally true statements can have misleading implications ….").

[29] See Deception Policy Statement at 178.

[30] *Ibid*.

[31] See Deception Policy Statement at 183 ("The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers ….").

the dictionaries say they mean. It permits advertisers to follow the same rules of language on which all speakers rely to communicate, and to be understood.

Under the approach the Commission takes today, it could hold a company liable for using "a couple" to mean "two" so long as it produces a survey showing that some people interpret the phrase to mean more than two. The meaning of language is partially empirical, but the Commission cannot ignore social norms of correct usage. If English speakers generally believed that the *correct* use of "a couple" was as synonymous with "a few," for example, then I would begrudgingly accept that as the meaning of the phrase in contemporary English, even if I regretted the loss of precision in the evolution of the language. But the fact that a sizeable number of people use the word in a way that is socially accepted as incorrect cannot be a reason to hold advertisers to that incorrect meaning. And in a commercial context, we reasonably expect words to be used more in their formal, correct senses, especially words concerning measurable quantities.

The Commission does not need a survey to decide whether it is reasonable to read "up to" to mean "likely." Had Lyft relied on the performance of a few outlier earners to substantiate its "up to" claims, I would support this count, the literal meaning of "up to" in this context notwithstanding. As I have said before: "[P]art of the context for an 'up to' claim is where it appears, such as in an advertisement rather than a scientific journal. It seems intuitively dishonest for a company to advertise prominently over and over again that consumers 'can save up to $500' if only one consumer ever achieved those savings, while the overwhelming majority never cleared $100 in savings."[32] But Lyft was advertising the performance of one out of every five drivers, not statistical outliers. Twenty percent is a substantial proportion of any population. Telling a consumer that he or she may earn up to what twenty percent of others earn—meaning that twenty percent earned even more than that—is consistent with the ordinary meaning of the phrase "up to."

Weighing further in Lyft's favor here is that earnings on its platform are not a function of random chance. These were not advertisements for passive income from investments or for energy savings from mass-marketed windows. A Lyft driver's earnings are a function of the intensity of his or her effort and the quality of his or her customer service. Reasonable consumers in the twenty-first century would understand this fact, and therefore understand that an advertised "up to" earnings claim would be to some extent conditional and contingent. Consumers would also understand that they would be in control of many of the conditions dictating their hourly earnings—the hours during which they work (including whether those are peak hours when fares are higher), the neighborhoods in which they work, the amount of energy and effort they put into maintaining a clean and safe vehicle, and the manner in which they treat their customers. An "up to" earnings claim is a reasonable way to communicate how much particularly diligent and strategic workers could earn, and that information is valuable to consumers.

B

To the extent that the reasonable interpretation of "up to" is an empirical question, I do not think that the study the Commission issued when it began interpreting "up to" to mean "likely to

[32] Ferguson Arise Concurrence at 2.

achieve" is methodologically sound, nor does it support the Commission's interpretation. We should not rely on this sort of study in the future.

In the seminal window study, researchers split the participants into three groups and showed each group different versions of the window advertisement. One group saw the original version of the advertisement with the "up to 47%" energy savings claim; the second group saw a version of the advertisement that removed the "up to" language and instead stated that the windows were "proven to save 47%" on energy costs; and the third group saw a version with the original "up to" language but with a prominent disclaimer that "[t]he average Bristol Windows owner saves about 25% on heating and cooling bills." After showing participants the advertisement, researchers removed the advertisement from participants' sight, and asked participants a series of questions.

Version 1 (original ad – "up to") **Version 2 (no "up to")** **Version 3 ("up to" + disclosure)**

At first glance, the responses to some questions appear to support the Commission's conclusion. One such question was "What did the ad say or suggest about Bristol Windows?" Among participants who saw the original advertisement (Version 1), 36% percent said the advertisement suggested that consumers could expect to save 47%, without even mentioning an "up to" qualifier. Among those who saw the version with the disclosure (Version 3), only 27% said that. But due to the small sample size in the study, this difference was not statistically significant.[33] We therefore cannot draw any meaningful conclusions from it. Furthermore, even if the difference had been statistically significant, the best explanation is that some participants chose to focus on the information on average savings in Version 3's disclosure—information that was simply not present in the original advertisement—rather than on the "up to" information in Version 3. The results do not show less confusion over the "up to" claim.

[33] Window Study at 7 & n.2 ("In this table as well as in subsequent tables, a letter in parenthesis within a cell indicates that that cell percentage was significantly different (at $p<.05$, two-tailed test) from the corresponding cell percentage in the column designated by the letter.")

TABLE 1[2]
Select Responses to Q2
(Q2: What did the ad say or suggest about Bristol Windows?)

	"Up To" Version (n=114) (a)	"Non-Up To" Version (n=115) (b)	"Disclosure" Version (n=115) (c)
-- 47% off/ save 47%/ save 47% on bills	36.0%	47.8% (c)	27.0% (b)
-- save up to 47% on bills	21.9% (b)	3.5% (a, c)	24.3% (b)
-- average saving is 25%/ save 25% on bills	0% (c)	0% (c)	15.7% (a, b)

Other questions confirm that that there was no meaningful change in how participants remembered different versions of the advertisement. When asked "how many users of Bristol Windows can expect to save about 47% on their heating and cooling bills. Is it none, very few, some, about half, most, almost all, all, or don't know or not sure?", 48.2% of participants who saw the original advertisement (Version 1) chose "about half" or more (i.e. they answered one of about half, most, almost all, or all). That would seem to confirm the Commission's claim that most consumers take "up to" advertisements to imply "likely to achieve" or something similar. But, remarkably, among participants who saw Version 2 (the version with no "up to" qualifier"), only 40.9% said "about half" or more. And among those who saw Version 3, with the original "up to" language but a prominent disclosure above average savings, the number answering "about half" or more was still 46.1%. These nonsensical results—1) that, to the extent there was any effect,[34] participants treated "proven to save up to" as more, not less, categorical than "proven to save" and 2) that a prominent disclosure had virtually no effect—suggest that the study results shed no light on what reasonable consumers actually believe "up to" means.

TABLE 5
Select Responses to Q4b
(Q4b: Based on what the ad said or suggested, how many users of Bristol Windows can expect to save about 47% on their heating and cooling bills. Is it none, very few, some, about half, most, almost all, all, or don't know or not sure?)

	"Up To" Version (n=114) (a)	"Non-Up To" Version (n=115) (b)	"Disclosure" Version (n=115) (c)
-- All/ Almost all/ Most/ About half	48.2%	40.9%	46.1%
-- All/ Almost all/ Most	42.1%	38.3%	36.5%
-- All/ Almost all	28.1%	27.0%	21.7%

One likely reason for these results is the decision to remove the advertisement from view before asking participants the questions. Instead of being a study about the meaning of the advertisement, it becomes a study about how well consumers *remember* the advertisement.

[34] The Chair argues that the lack of a statistically significant difference between how consumers interpreted the "up to" ad (Version 1) and the other versions actually proves that consumers essentially treat "up to" claims as if the words "up to" were not there. Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, *In the Matter of Lyft, Inc.*, Commissioner File No. 2223028 ("Chair's Statement") at 8. The problem with her argument is that rather than proving that "up to" is deceptive, it proves that participants in the survey were inattentive, as demonstrated by the inefficacy of the explicit disclosure in Version 3.

Consider too that, unlike real consumers who are in the market for new windows, these study participants seem to have had no incentive to focus on or remember the savings that the advertisement promised. Of course, advertisements in the real world are often fleeting, something the Commission considers when an ad is misleading without voluminous or hidden disclaimers.[35] But the Commission cannot hold advertisers liable for the interpretations that consumers take away when they do not pay attention to straightforward and accurate advertisements.[36]

Indeed, one would expect a scientific study like this to try to control for effects such as disinterest and forgetfulness by using a control group that is shown a similar but indisputably non-deceptive advertisement conveying the same information.[37] All that an empirical survey can *prove* is the effect of the independent variable—what the experimenter varies between the control group and the experimental group. If an experimenter has no control group—e.g. if an experimenter simply shows one hundred people an advertisement and asks them for their reaction—the experimenter has no way of determining the extent to which the participants' responses are due to their preexisting beliefs, their disinterest or inattention, the demeanor of the researcher, the weather, or any other uncontrolled variable. When comparing against a control group that is identical to the experimental group in all but one way, by contrast, the experimenter can attribute any differences in results between the two groups to that independent variable. The choice of control determines what hypothesis the experiment tests, and if the hypothesis tested is not the one that the law cares about, then the survey is not useful evidence.

In the Window Study, neither Version 2 nor Version 3 of the window ad were appropriate control groups. If the hypothesis was that the words "up to" are confusing or misleading, the study should have compared the allegedly confusing phrase against alternative, clearer phrasing that conveys the same idea—that the 47% savings were experienced by a minority of customers. Instead, Version 2 made a different claim altogether (that use of the windows categorically results in 47% savings), and Version 3 kept the allegedly confusing phrase and introduced brand new information alongside it. The advertiser had no obligation to disclose the added information in Version 3—"the average Bristol Windows owner saves about 25% on heating and cooling bills"—information that provides answers to the very questions that the researchers then asked

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[35] *Kraft*, 970 F.2d at 315, 327 (affirming a Commission cease-and-desist order where a deceptive television ad was not cured by "confusing and inconspicuous" disclosures in a footnote); Deception Policy Statement at 180–81 ("Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation. Other practices of the company may direct consumers' attention away from the qualifying disclosures.… Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices. Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.").

[36] The analysis would be different if Lyft were accused of attempting to obscure or conceal the "up to" limitation on the earnings claim in a way that made it difficult for consumers to perceive the limitation. See Deception Policy Statement at 180 (announcing that an honest claim may nevertheless be deceptive if "practices of the company … direct[ed] consumers' attention away from the qualifying disclosures"). But the Commission levels no such accusation here.

[37] Federal Judicial Center, Reference Manual on Scientific Evidence at 399 (3d ed. 2011) ("[T]he choice of an appropriate control group requires some care and should influence the weight that the survey receives. In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.").

participants. Comparison of consumer reaction to the original ad with reaction to these other versions cannot reveal whether "up to" is a deceptive way to communicate the idea that the indicated performance was achieved by a minority of consumers, because the versions differ in ways other than how they phrase the claim that a minority of purchasers save the advertised amount. A better comparator would be, for example, a version of the advertisement that said: "Proven to save, in some but not most cases, 47% on heating and cooling bills." Such an advertisement would not be deceptive (if the claim were accurate, of course), and comparing how consumers read that phrase compared with the "up to" phrase would be far more illuminating than what the window study revealed.

The question we must ask in any deceptive advertising case is whether the words an advertiser uses tend to deceive a reasonable consumer. We can often answer that question without resorting to empirical studies. In any interpretive community, words have shared meanings. If they do not, our language becomes a prison of endless confusion. Because Lyft used the words "up to" in a way that reasonable consumers would expect an advertiser to use in these circumstances, I dissent from Count I.

II

A

To justify filing this action in district court and demanding civil penalties from Lyft, the Commission relies on Section 5(m)(1)(B) of the FTC Act. Ordinarily, the Commission may not obtain monetary relief for violations of Section 5's prohibition of unfair or deceptive acts or practices. Without more, the Commission has only two remedies for such violations: 1) to initiate an administrative proceeding against a person the Commission has reason to believe is engaged in a deceptive act or practice and, where appropriate, issue a cease-and-desist order against the person,[38] and 2) to petition a district court for injunctive relief enjoining ongoing or imminent violations of Section 5.[39] The Commission may then seek civil penalties and equitable relief,[40] or contempt sanctions,[41] for subsequent violations of these orders, but it may not obtain civil penalties in the first instance for violations of Section 5.

Section 5(m)(1)(B) contains an exception[42] to this general principle. The Commission may seek civil penalties from a defendant for a violation of Section 5 without first issuing a cease-and-desist order against that same defendant if (1) the Commission previously determined in a litigated cease-and-desist order against a different person that "such act or practice" in which the defendant is engaged was an unfair and deceptive act or practice, and (2) the defendant had actual knowledge

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[38] 15 U.S.C. § 45(b).
[39] *Id.* § 53(b).
[40] *Id.* § 45(*l*).
[41] *Spallone v. United States*, 493 U.S. 265, 276 ("[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." (quoting *Shillitani v. United States*, 384 U.S. 364, 368 (1966)).
[42] There are other exceptions, too. Section 19(a)(2) allows the Commission to seek consumer redress in district court after issuing a cease-and-desist order and where "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2). And Sections 5(m)(1)(A) and 19(a)(1) allow for monetary relief for violations of rules. *Id.* §§ 45(m)(1)(A), 57b(a)(1).

that "such act or practice" violates Section 5.[43] The Act provides that the court must try the "issues of fact … de novo," and may review the Commission's legal determinations in the underlying cease-and-desist orders."[44]

Congress added this exception to the FTC Act as part of the Magnuson Moss Warranty-Federal Trade Commission Improvement Act in 1975.[45] That same year, to help establish actual knowledge in future cases, the Commission began to create and mail *en masse* to businesses "Synops[es]" of Federal Trade Commission Determinations." Those synopses listed acts and practices that the Commission claimed it had previously determined in cease-and-desist orders to be unfair or deceptive. The purpose of these mass mailers was to satisfy Section 5(m)(1)(B)(2)'s actual-knowledge requirement, thereby opening up the Commission's path to obtain civil penalties from any of the mailers' recipients for future, similar unfair or deceptive acts or practices.

Between 1975 and 1983, the Commission issued at least 18 such synopses.[46] The Commission described the prohibited practices at varying levels of specificity. One synopsis listed, among other things, that it was an unfair or deceptive act or practice to "switch a customer to [a] higher priced product by refusing to show or to sell the advertised product."[47] But another included that it was an unfair or deceptive act or practice "to fail to invoice any fur product to show that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when that is the fact."[48] By 1978, the Commission had also begun listing in individual cease-and-desist orders a "Synopsis of Determinations for 15 U.S.C. 45(m)(1)(B)."[49] In the first such cease-and-desist order, for example, the Commission listed as "an unfair and deceptive act or practice" when one "misrepresent[s] the amount by which a fabric will shrink when it is washed."[50] These determinations were then folded into subsequent synopses, for purposes of mass mailing to businesses to satisfy Section 5(m)(1)(B)(2)'s actual-knowledge requirement.[51]

This practice eventually fell into desuetude.[52] The principle reason was likely that the Commission became heavily reliant on Section 13(b)'s provision authorizing a "permanent injunction" against Section 5 violations as the statutory hook to obtain monetary relief from Section 5 violators in the first instance.[53] Another was likely the Eighth Circuit's decision in *United*

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[43] *Id.* § 45(m)(1)(B); see also *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 77 (2021) (Section 5(m) "provid[es] [for] court-ordered monetary penalties against anyone who engages in conduct previously identified as prohibited in a final cease and desist order, but only if the violator acted with 'actual knowledge that such act or practice is unfair or deceptive.'").
[44] 15 U.S.C. § 45(m)(2).
[45] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).
[46] FTC, Notices of Penalty Offenses, Older Notices, https://www.ftc.gov/enforcement/penalty-offenses.
[47] FTC, Synopsis of Federal Trade Commission Decisions Concerning "Bait and Switch" Sales Practices (Sept. 23, 1975), https://www.ftc.gov/enforcement/penalty-offenses/bait-switch.
[48] FTC, Synopsis of Federal Trade Commission Decisions Concerning Labeling, Invoicing and Advertising of Fur Products (July 10, 1978).
[49] *In re Verrazzano Trading Corp.*, 91 F.T.C. 888 (1978).
[50] *Ibid.*
[51] E.g. FTC, Synopsis of Federal Trade Commission Decisions Concerning Wool Products (Oct. 18, 1979), https://www.ftc.gov/enforcement/penalty-offenses/wool (listing the determination from *Verrazzano* that it was unfair or deceptive to misrepresent the amount by which a fabric will shrink when it is washed).
[52] For one account of the history and future of this provision, see Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. Pa. L. Rev. 71 (2021).
[53] 15 U.S.C. § 53(b).

States v. Hopkins Dodge, Inc.[54] There, the Court of Appeals rejected the Commission's request for civil penalties under Section 5(m)(1)(B) on the ground that the previous cease-and-desist orders did not determine that "*such* practice (namely a practice in which appellees admittedly have engaged) [is] unfair or deceptive."[55] Three of the four cease-and-desist orders relied upon by the Commission did not contain any specific determinations that particular conduct was unfair or deceptive.[56] And the one that did was insufficiently similar to the conduct for which the Commission sought civil penalties to trigger Section 5(m)(1)(B).[57]

Between 1988, when *Hopkins Dodge* was decided, and 2021, the Commission only relied on Section 5(m)(1)(B) on two occasions.[58] But in 2021, the Supreme Court unanimously determined that the Commission and lower courts had misinterpreted Section 13(b)'s authorization for a "permanent injunction" against Section 5 violators to permit monetary relief.[59] The Commission responded by digging up the old Section 5(m)(1)(B) mass-mailer strategy. It once again compiled synopses of old cases, called them "Notices of Penalty Offenses" (NPOs), and mailed them *en masse* to any companies it thought it may want to sue in the future. The Commission has sent these letters to thousands of recipients.[60]

One of these mass-mailers was the "Notice of Penalty Offenses Concerning Money-Making Opportunities."[61] Lyft received this mailer, and the Commission now relies on it to establish Lyft's liability for civil penalties. The Commission says that the contents of this notice suffice to establish both the existence of cease-and-desist orders prohibiting the practice in which Lyft was engaged as well as Lyft's "actual knowledge" that its practices violated Section 5.[62]

B

The Commission has not satisfied Section 5(m)(1)(B)'s requirement that it have previously determined in a cease-and-desist order that "such act or practice" in which the defendant is engaged

[54] 849 F.2d 311 (8th Cir. 1988).
[55] *Id.* at 314.
[56] *Ibid.*
[57] *Ibid.*
[58] See Press Release, FTC, Sellers of Girls Gone Wild Videos to Pay $1.1 Million To Settle Charges of Unauthorized Shipping and Billing (July 30, 2004), https://www.ftc.gov/news-events/news/press-releases/2004/07/sellers-girls-gone-wild-videos-pay-11-million-settle-charges-unauthorized-shipping-billing; Press Release, FTC, Four National Retailers Agree to Pay Penalties Totaling $1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million.
[59] *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 75 (2021) ("Several considerations, taken together, convince us that § 13(b)'s 'permanent injunction' language does not authorize the Commission to obtain court-ordered monetary relief.").
[60] A list of these notices and their recipients can be found on the Commission's website. FTC, Notices of Penalty Offenses, https://www.ftc.gov/enforcement/penalty-offenses.
[61] FTC, Penalty Offenses Concerning Money-Making Opportunities, https://www.ftc.gov/enforcement/notices-penalty-offenses/penalty-offenses-concerning-money-making-opportunities; Press Release, FTC, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties.
[62] Complaint ¶¶ 47–52, 64–77.

violates Section 5.[63] "[S]uch" is an adjective meaning "of the type previously mentioned."[64] The statute therefore requires that the conduct at issue in the civil-penalty complaint be the same conduct determined in the previous cease-and-desist order to be illegal.[65] The Commission does not satisfy this requirement by relying on highly general statements of Section 5's prohibition on deception or unfairness in previous cease-and-desist orders as the predicate for civil penalties.[66] The conduct determined to be unlawful in the cease-and-desist order and the civil-penalty complaint must be the same, or substantially similar.

Although a predicate determination is an element of the Commission's civil-penalty claims, the Commission fails to identify any predicate cease-and-desist order in the complaint. That alone is sufficient to doom the complaint. In her statement, however, the Chair tries to rectify this obvious shortcoming by pointing to *In re Universal Electronics Corp.*[67] as the predicate determination for the "up to" count.[68] But this argument falls well short of the mark. There, the Commission found that an advertisement that sellers of radios and TV vacuum tubes "can earn up to $400 a month," together with other acts or practices, was deceptive.[69] But the decision says nothing at all about the level of substantiation that the FTC Act requires when making "up to" earnings claims. The Chair implies that a provision from the order—not the decision—serves that purpose.[70]

But relying on the order, rather than the underlying decision, is a category error. Section 5(m)(1)(B) requires the Commission to "determine[ ]" that a specific act or practice violates Section 5—that is, the Commission must issue a formal "conclusion" as to the unlawfulness of specific conduct.[71] Commission orders—as opposed to formal statements of reasons or basis—rarely contain such determinations. "[T]he typical FTC order goes well beyond defining the practices that the Commission has identified as unlawful in its decision," and "frequently prohibits conduct that is not unlawful in itself if the Commission believes that such conduct might enable a former lawmaker to accomplish unlawful ends."[72] This practice, known as "fencing in relief,"[73] has been around as long as the Commission.[74] Because "the terms of Commission orders do not

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[63] 15 U.S.C. 45(m)(1)(B).
[64] New Oxford American Dictionary 1738 (3d ed. 2010). Accord Such, Merriam-Webster.com, (last visited Oct. 24, 2024) ("of the character, quality, or extent previously indicated or implied" and "of the same class, type, or sort").
[65] *Hopkins Dodge,* 849 F.2d at 314–15.
[66] See David O. Bickart, Civil Penalties under Section 5(m) of the Federal Trade Commission Act, 44 U. Chi. L. Rev. 761, 781 (1977) ("Even though it is surely a section 5 violation to fail to tell the truth, the acceptance of such an open-ended admonition as a 'determination' that a failure to tell the truth is an unfair or deceptive practice would render the determination requirement nugatory.").
[67] 78 F.T.C. 265 (1971).
[68] Chair's Statement at 6 n.26.
[69] *Universal Elecs.*, 78 F.T.C. at 273–74.
[70] *Id.* at 294 ("It is ordered … that respondents … do cease and desist from … Representing, directly or by implication, that … Any stated sums of money are past earnings of investors or purchasers of respondents' products unless in fact the past earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.").
[71] *Hopkins Dodge*, 849 F.2d at 314.
[72] Bickart, *supra* n.66, at 779, 780.
[73] See *Telebrands Corp. v. FTC*, 457 F.3d 354, 357 n.5 (4th Cir. 2006).
[74] See, *e.g.*, *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957) ("[T]hose caught violating the Act must expect some fencing in."); *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 616 (6th Cir. 2017) ("Having violated the FTC Act,

often identify the practices that the Commission has determined to be unlawful, the Commission's determination must be gleaned from the formal findings and conclusions and from the 'statement of reasons or basis' which the Commission's rules require it to adopt in each decided case."[75] Nothing in the decision in *In re Universal Electronics Corp.*—or even the order, for that matter—contains the Commission's legal conclusion on what substantiation Section 5 requires for "up to" claims. That decision therefore cannot serve as a Section 5(m)(1)(B) predicate for the "up to" civil penalty count.

The predicate determination that the Chair identifies for the earnings-guarantee count, *In re Encyclopedia Britannica*,[76] is also inadequate. In that case, the Commission held that advertising earnings guarantees with a vague "if you meet our requirements" disclaimer was a deceptive and unfair practice.[77] The waiver failed to disclose relevant and stringent time limits and other requirements, and the guarantee was rarely paid.[78] But the Commission has not accused Lyft of using a vague disclaimer with unexpected and hidden terms.[79] It has accused Lyft of deploying ambiguous language to describe the type of earnings being guaranteed, which a huge number of consumers reasonably interpreted as the promise of a bonus instead of an earnings floor.[80] That has nothing to do with the conduct proscribed in *In re Encyclopedia Britannica.* In other words, "nowhere in [the decision on which the Commission relies] does the F.T.C. determine that *such* practice (namely a practice in which [the defendant has] engaged) is 'unfair or deceptive.'"[81]

The Chair concludes her statement by accusing me of not prioritizing the protection of workers from unfair and deceptive acts or practices.[82] That is not true. The Commission should protect workers as vigorously as it protects end-consumers and competition, and to the furthest extent the law allows. But protecting workers means winning important legal cases that create binding precedent and change business conduct, not issuing triumphant press releases. When the Commission poured massive resources into promulgating a patently unlawful rule banning employee noncompete agreements, the Commission generated plenty of fanfare. But the rule was swiftly struck down by the courts and no workers were protected.[83] Nor are workers protected when the Commission claims victory on dubious legal theories as it settles complaints for pennies on the dollar with businesses that are happy to pay the Commission to go away.

[respondents] must expect some fencing in, and the Commission may frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." (cleaned up)); *Arthur Murray Studio of Washington, Inc. v. FTC*, 458 F.2d 622, 625 (5th Cir. 1972) ("[T]he Commission has the authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose.").

[75] Bickart, *supra* n.66, at 781; 16 C.F.R. § 3.54(a) (2023).

[76] 87 F.T.C. 421 (1976).

[77] *Id.* at 444–50, 486–87.

[78] *Ibid*.

[79] The Complaint at various points states that Lyft "failed to disclose" "terms," "conditions," and "limitations" on the earnings guarantee, Complaint Counts II & IV, but the entirety of the accusations over Lyft's earnings guarantees turn on their ambiguity, not on the existence of hidden terms and conditions.

[80] Complaint at ¶¶ 30–46.

[81] *Hopkins Dodge*, 849 F.2d at 314.

[82] Chair's Statement at 8–9.

[83] *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024); *Properties of the Villages, Inc. v. FTC*, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).