PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: **H&R BLOCK INC.,** a corporation, **HRB DIGITAL LLC,** a limited liability company, and **HRB TAX GROUP, INC.,** a corporation.	**DOCKET NO. 9427**

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INTRODUCTION

The trial will show that Complaint Counsel (Counsel) has insufficient factual basis under the FTC Act to challenge H&R Block's practices concerning its do-it-yourself (DIY) online tax-preparation products. Nor can Counsel fill the void by advancing expansive liability theories that lack any legal basis.

Counts I and II challenge H&R Block's requirements for consumers to downgrade from a higher-tier product to a lower-tier product that is less expensive because it covers a narrower range of tax situations. Consumers seeking to downgrade must contact customer service and must restart the tax interview—the process of answering questions necessary to prepare their tax returns. As consumers are able to upgrade without taking these steps, the Complaint claims it is "unfair" for H&R Block to require these steps only for downgrading consumers.

Counsel cannot establish any, much less all, of the prerequisites for finding unfairness under 15 U.S.C. § 45(n). *First*, the challenged downgrade practices do not cause "substantial injury" to consumers. *Id.* Counsel's own expert concedes a lack of evidence that these practices coerce consumers *to remain in a more expensive* product; Counsel also have no reliable evidence that these practices, which require minimal effort to complete, cause consumers who downgrade successfully *to lose time* in any material amount (and regardless, the mere loss of time alone is neither legally cognizable under the FTC Act nor the theory of injury alleged in the Complaint). *Second*, any such injury is "reasonably avoidable." *Id.* The evidence will show that H&R Block's website makes clear both what steps are required if downgrading becomes desirable and how to select the appropriate product in the first instance—in fact, only a negligible fraction of consumers end up filing their returns using a lower-tier product than the one they initially select. *Third*, any unavoidable injury is "outweighed by countervailing benefits to consumers." *Id.* Unlike when consumers upgrade to a higher-tier product, there is a risk that consumers downgrading to a lower-

tier product may select one that is not permissible for their tax situation and may fail to provide all necessary information [redacted]. Contacting customer service and restarting the interview questionnaire thus helps to ensure the accuracy of their returns, while imposing minimal if any costs. In all events, Counsel cannot satisfy their ultimate burden to establish unfairness under 15 U.S.C. § 45(a). It would defy both legal precedent and ordinary practice for the Commission to force a business to design its product line in a way that makes moving between different product tiers prior to purchase equally "seamless" regardless of the direction of the change.

Count III separately challenges H&R Block's advertisements for its free online tax product. Although some ads of course explain that the free product is free, they do not overemphasize this, and they contain clear disclaimers that it is available only for "simple returns." The Complaint claims these ads are "deceptive" because they misleadingly cause consumers to erroneously believe that all or most consumers may file free. And the Complaint hints at an alternative theory that the ads may misleadingly cause particular consumers to erroneously believe they satisfy the "simple returns" criteria when in fact they do not.

Counsel cannot establish deception under 15 U.S.C. § 45(a) for either theory. *First*, none of the challenged ads explicitly or implicitly represent that all or even most consumers can file free. To the contrary, the ads make clear that only those with "simple returns" can file free, and consumer-survey evidence confirms the common-sense conclusion that viewers understand eligibility is limited. The evidence will show that simple returns is a standard industry term, that H&R Block applies the term in a typical way, and that [redacted] of H&R Block's online customers file their returns for free because they have simple returns; in contrast, Counsel has no evidence that consumers were given the misimpression that a materially greater percentage would

be eligible to file free. This case is thus plainly distinguishable from *In re Intuit Inc.*, No. 9408 (F.T.C. Jan. 22, 2024), where the Commission found that ads for TurboTax so pervasively focused on the "free" message that they drowned out eligibility disclaimers and created the misimpression TurboTax was free for everyone. *Second*, none of the challenged ads explicitly or implicitly made a misleading representation about what qualifies as a "simple return." Most of the ads do not define the term at all, and the ads that do are concededly accurate, as is H&R Block's website. Thus, just like ads promoting financing for "well-qualified buyers," H&R Block's ads make a representation to viewers that a standard eligibility condition exists, but leave additional detail about the condition for a later stage in the product-selection process. That is not deceptive even if viewers of the ads in isolation made erroneous assumptions about whether they satisfied the eligibility condition; and in all events, Counsel has no reliable evidence that any reasonable consumers did so, because their own expert's survey questions are fundamentally flawed.

In short, this is a classic case of regulatory overreach. The claims all should be denied.

BACKGROUND

H&R Block is a tax-preparation company that assists consumers with their obligation to file yearly tax returns. The company offers several modes of assistance, including in-person help at a retail location, tax-prep software available for purchase in-store or by download, and online do-it-yourself (DIY) software on the company's website.

The core value of H&R Block's online DIY products is that they distill the Tax Code and official tax forms into a tax "interview," in which the consumer is presented with a series of bite-sized questions to gather all necessary tax information. [redacted] After a consumer completes the interview, the website translates the information into official government forms.

Customers can choose among four tiers (or "SKUs") of online DIY products. The lowest-tier product, "Free Online," is completely free. Every year, approximately [redacted] of the millions of people who file using H&R Block's online products don't pay a dime. The company also offers three paid products: "Deluxe," "Premium," and "Self-Employed." There are two main features that differentiate the products. *First*, each product is associated with a certain set of tax forms, with higher-tier products offering preparation of larger sets of forms. *Second*, consumers using the paid products also get additional features including storage, data-import functionality, and real-time help with their taxes from trained human agents and (as of 2024) an AI-powered agent.[1]

Consumers can start preparing their tax return in any online DIY product they choose. No matter which product they select, consumers need not pay for it unless they ultimately use it to file their returns. If a consumer provides information indicating a tax situation only available in a higher-tier product, the consumer is given an option to upgrade by clicking on a link that expands the tax interview accordingly. A consumer wishing to downgrade can do so by communicating with a live customer-service agent (either by phone or through an electronic chat system) or by interacting with an automated "IVR" phone system (subject to account verification). A downgrading consumer must restart the interview and reenter any information previously entered.

H&R Block advertises its online DIY products in a variety of mediums. Some of these ads highlight that the Free Online product costs nothing, and those ads include disclaimers that the product is available only for "simple returns." To use the online DIY products, consumers must visit H&R Block's website, where they are presented with additional information on tax situations included in Free Online and higher-tier products, including the precise tax forms covered.

[1] A fifth tier, **"**Plus Online," covers the tax forms and schedules available in Free Online and offers additional non-tax-form features.

ARGUMENT

I. H&R BLOCK'S DOWNGRADE PRACTICES ARE NOT "UNFAIR" UNDER THE FTC ACT

The Commission cannot deem a practice unfair "unless [it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). For the challenged downgrade practices, Counsel cannot meet their burden to establish any of these prerequisites, much less all of them. And regardless, they cannot satisfy their ultimate burden of establishing unfairness, because it is plainly reasonable and lawful for H&R Block to require consumers downgrading from a higher-tier product to contact customer service and restart their tax interviews.

A. The Downgrade Practices Do Not Cause Substantial Injury

Under the first § 45(n) prerequisite, Counsel must show that the challenged practices cause "substantial injury." Their showing will fail for three independent reasons.

1. Counsel has shifted the theory of injury without seeking leave to amend the Complaint

Counts I and II charge injury to a specific subset of consumers: those who wish to downgrade *but fail to do so because of* the purported burdens associated with contacting customer service and/or reentering their information. The Complaint exclusively alleges that the injury is the challenged practices "have coerced consumers into purchasing more expensive Online Products than they need or want." Compl. ¶¶ 7, 15, 34, 56, 58. The Complaint *never* alleges injury to the subset of consumers who *do* downgrade.

Despite the Complaint's express limitations, Counsel tried to switch theories during expert discovery. Dr. Benzarti's report is the core of Counsel's case regarding injury, and he solely relies upon the "lost time" attributable to the challenged downgrade practices. Indeed, he readily admits

he has no reliable evidence of the injury charged in the Complaint: consumers specifically coerced into *not* downgrading because of the time required (Benzarti 57)—and that is unsurprising, given the minimal burden involved, *infra* at Part I.A.3.

Counsel's unacknowledged attempt to amend the Complaint violates a regulation providing that opposed amendments are allowed only "by leave" of the ALJ or the Commission, after an appropriate "motion." 16 C.F.R. § 3.15(a)(1). An amendment to the "underlying theory" of a complaint must go to the Commission, while an ALJ may permit an amendment that merely "clarif[ies] the allegations of a complaint" or "add[s] examples of practices already challenged." *In re Health Rsch. Lab'ys, LLC*, No. 9397, 2021 WL 1816896, at *3 (F.T.C. Mar. 12, 2021) (citation omitted). Notably, amendment is appropriate "where discovery is still ongoing and trial some months distant," such that "Respondent would have adequate time to respond fully to the charges in the amended complaint." *Id.*

Counsel has not sought leave from the Commission (or even the ALJ) to amend the Complaint's basic theory of injury. Moreover, trial is just days away, H&R Block would be prejudiced by such a fundamental shift at this late date, and it does not consent to trying issues not raised in the Complaint. Accordingly, Counsel is limited to proving substantial injury by showing harm to consumers who *did not* downgrade *because of* the burdens associated with downgrading, and they admittedly lack such evidence.

2. "Lost time" to avoid paying a legitimate charge is not cognizable injury

Regardless, Counsel's improper focus on consumers who lost time rather than money does not support a cognizable injury. The concept of "substantial injury," which Congress codified in § 45(n), originated in the FTC's 1980 Unfairness Policy Statement. *See LabMD, Inc. v. FTC*, 894 F.3d 1221, 1228-29 (11th Cir. 2018). There, the Commission clarified that "in most cases a

substantial injury involves monetary harm" or "unwarranted health and safety risks." *LabMD, Inc. v. FTC*, 678 F. App'x 816, 820 (11th Cir. 2016) (quoting 1980 Policy Statement[2]). "Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair." *Id.*

H&R Block is not aware of any case in which lost time, standing alone, was held to constitute substantial injury. Rather, courts and the Commission have credited only lost time spent *remedying* the *monetary or safety harm* inflicted by an unfair practice. *See*, *e.g.*, *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) ("Consumers not only lost the use of funds withdrawn from their accounts, but they often spent a considerable amount of time and resources contesting the checks at their banks, protecting their accounts, and attempting to get their money back."); *In re LabMD, Inc.*, 162 F.T.C. 246, 332 (2016) ("economic harms… include[] monetary losses due to financial fraud and time and resources expended by consumers in resolving fraud-related disputes").

Moreover, courts have refused to treat as an unfair practice the need to incur reasonable expenditures to avoid otherwise-legitimate fees or requirements imposed by a business. For example, in *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152 (9th Cir. 2012), a consumer brought suit under California law, premised on Section 5 of the FTC Act, complaining of an annual fee charged by his credit-card provider. He refused to avoid the fee by contacting his provider to close the account, "citing the negative impact it would have on his credit score." *Id.* at 1169. The Court held that he had not been injured by the fee, because "mitigation" to avoid the fee need not be "convenient or costless." *Id.*

[2] *Available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

Here too, the mere time consumers spend navigating between H&R Block's lawful DIY products cannot establish substantial injury. The Complaint nowhere suggests that downgrading is necessary to remedy some other unlawful practice—for example, that H&R Block's higher-tier products themselves have unfair pricing or conditions, or that the company is deceiving consumers into using higher-tier products. Precisely the opposite: Count III alleges (wrongly) that H&R Block's advertising is tricking consumers into thinking they can use the *lowest-tier free* product. Accordingly, the FTC cannot insist that H&R Block must provide consumers with a "costless" or even "convenient" process to downgrade from an entirely lawful higher-tier product that they voluntarily chose and can freely abandon without paying anything. *Davis*, 691 F.3d at 1169.

3. Counsel have no competent evidence of substantial injury from the downgrade practices

In any case, Counsel cannot meet their evidentiary burden to show that any injury from lost time is "substantial." Although a practice may cause substantial injury by doing "small harm to a large number of people" or raising "a significant risk of concrete harm," *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010), the harm must be more than "trivial or merely speculative," *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). So even where lost time is analyzed as a *secondary injury*, courts emphasize that consumers were required to expend more than the "reasonable efforts" ordinarily incurred in commercial transactions. *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 939 (N.D. Cal. 2010). Here, Counsel's evidence of lost-time injury is speculative, and any such injury is trivial and well within what can reasonably be required before downgrading to a lower-tier tax-preparation product.

a. *Counsel's evidence of time lost contacting customer support does not support a substantial-injury finding*

For Count I, Counsel lack reliable evidence of a significant loss of time caused by the customer-service requirement. Even setting aside other flaws with Dr. Benzarti's testimony, he

himself concludes that, on average, downgraders spent [redacted] on the phone in total. (Benzarti 55-56.) Taking that figure on its own terms, it is a reasonable amount of time relative to the complex endeavor of preparing one's tax return.

Furthermore, Dr. Benzarti's "injury" estimates overstate the time for many consumers. He does not account for customers who downgraded via the "IVR" system, in which customers can downgrade by interacting with an automated system without ever talking to an agent, if they are able to verify their account information. (Schnell 54-56, Table 27.) From 2018 to 2023, some [redacted] downgraders spent an average of [redacted] using IVR to downgrade, (*id.*)—in fact, it took the FTC's investigator about 3 minutes, Compl. ¶ 22. That is an indisputably trivial amount of time.

Even worse, Dr. Benzarti baselessly treated *all* time spent actually talking or chatting with agents as "injury." Many consumers *prefer* the opportunity to speak with a live human being who can answer questions about downgrading (Keller 25 n.66), as confirmed by the fact that many consumers choose to speak with an agent despite IVR's availability (*see* Schnell ex. 5). Furthermore, H&R Block's agents bring concrete value to consumers, not only by humanizing the tax-preparation process but by explaining how a lower-tier product may not cover a consumer's tax situation. *Infra* at 14-15. Post-call surveys indicate that consumers' experiences with the agents during downgrading is overwhelmingly positive. (Keller 28.) If one excludes time spent talking or chatting and focuses only on time spent waiting to connect, time expended drops to an also-trivial average of [redacted] per downgrader.

Finally, Dr. Benzarti's "injury" averages are further skewed by particularly busy times with outlier waits. In 2024, the *median* time a consumer spent waiting to chat was [redacted], meaning that half of all consumers were connected in [redacted] *or less*. (Schnell 56, Table 25.)

The median time waiting to talk with an agent was also de minimis, at just [redacted]. (*Id.*, Table 26.)

b. *Counsel's evidence of time lost from restarting the tax interview does not support a substantial-injury finding*

For Count II, Counsel also lack reliable evidence of a significant loss of time caused by reentering tax information after downgrading. To estimate this time, Dr. Benzarti categorizes downgrading consumers as "fast downgraders" and "slow downgraders." For the former, he relies upon H&R Block's data on the time each consumer spent from the beginning of the interview to downgrading (in his opening report) and the time each consumer spent from downgrading to finishing the interview (in his rebuttal report); for the latter, he relies upon the IRS's Tax Compliance Burden survey. But none of these data sets provides an adequate basis for a non-speculative estimate.

The main problem with reliance on H&R Block's data is that consumers need not use the online DIY products during a continuous, uninterrupted period. They can step away from their computers for several minutes or days. Tellingly, the average time between starting tax prep and downgrading is [redacted], which Dr. Benzarti admits would be an absurd estimate of how much time any consumer spent entering information prior to downgrading. (Benzarti 13.) Relatedly, it is impossible to know how much information, if any, a consumer entered prior to downgrading: even if the software was initially opened hours or days earlier, a consumer may still downgrade without ever having answered a single question, as Dr. Benzarti likewise admits. (Benzarti 12.)

Dr. Benzarti's solution is to invoke data from the IRS's Tax Compliance Burden survey on the time it takes individuals to prepare their taxes. But that data, too, is not a reliable or accurate indicator of how long consumers spend reentering data in H&R Block's products. *First*, it does not reflect actual time spent reentering a subset of tax information; it is a rough, self-reported

estimate of the entirety of the time it takes to fill out all forms and submit them, rounded to the nearest hour. The estimate has been "3 hours" for non-business filers since 2016. (Benzarti 12.) *Second*, it includes data from everyone, including many people who did not use H&R Block's software at all and even people who filled out their forms manually, which the IRS notes is less efficient. *See* IRS Pub. 5743 at 3 (Rev. 4-2023). *Third*, it is an estimate of the time to prepare a *complete* return. But consumers using H&R Block's software can downgrade well before they had a complete return. (Benzarti 12.)

In short, each of Dr. Benzarti's data sets is an unreliable source for estimating how long a consumer would take to reenter information in H&R Block's products after downgrading. Combining data from three unreliable sources cannot conjure a reliable estimate. In Dr. Benzarti's initial report, he manufactures an arbitrary average of [redacted] per consumer. (Benzarti 14, Gerardi 31). In his rebuttal report, he acknowledged that H&R Block's post-downgrade data contained lower average times, which he factors into an alternative set of calculations. (Benzarti Rebuttal 9.) But that does not make this the "most conservative" approach (Benzarti 14), and it remains wholly speculative and unreliable.

Dr. Benzarti's estimates are especially outlandish in light of the *median* post-downgrade time, which was approximately [redacted] in *every year* from 2018 to 2024, excluding certain outlier data. (Schnell 57-58.) This means that *half* of consumers *necessarily spent about* [redacted] *or less* reentering any information after downgrading. Dr. Benzarti attacks Mr. Schnell's use of median data (Benzarti Rebuttal 7), but fails to provide any convincing reason why it makes more sense to use *averages* when data points can run into the [redacted] for consumers who obviously are not working in the software that entire time—a concededly "poor proxy" for time lost (Benzarti Rebuttal 5).

c. *Counsel's reliance on "psychological harm" leads to irrational results and is not cognizable injury*

Counsel further relies on Dr. Benzarti to create monetary harm from lost time notwithstanding that consumers spent nothing to downgrade. He first multiplies his (arbitrary) estimates of lost time together with statistics on hourly wages. (Benzarti 18-25.) And he then takes an even more baseless leap, arguing that consumers incur "psychological costs" from time spent downgrading because they hate working on taxes! (Benzarti 11, 25-55.) On this basis, he applies a multiplier to his estimates, concluding that the average downgrader suffers [redacted] in lost time and psychological harm from the challenged practices. (Benzarti 58.)[3]

His analysis is internally inconsistent because it is premised on a "rational taxpayer" (Benzarti 27) yet leads to the conclusion that consumers are acting irrationally. From 2018 to 2024, a consumer could save [redacted] by downgrading all the way from H&R Block's top-tier paid product to the free product. (Gerardi 22.) Most downgrading consumers would save far less—[redacted] (*id.*)—because they would be downgrading fewer tiers, depending on how high they started and how low they could go given their tax situation. It would be illogical for them to incur psychological "costs" from time spent downgrading that far outweighed the price savings. If anything, the fact that consumers are willing to downgrade to reap relatively modest price savings confirms that they view the associated time and effort as a trivial inconvenience.

In all events, the Commission and courts have made clear that the FTC Act does not reach this type of subjective injury. "[E]motional impact and other more subjective types of harm … will not ordinarily make a practice unfair." *LabMD, Inc*, 678 F. App'x at 820 (quoting 1980 Policy Statement). Although exceptions are possible in "extreme" cases, such as "abusive debt collection

[3] In his rebuttal report, Dr. Benzarti offers an alternative lower estimate of [redacted], if one finishes the math. (Benzarti Rebuttal 9.)

practices," *In re LabMD, Inc.*, No. 9357, 2016 WL 4913403, at *33 (F.T.C. Aug. 30, 2016) (citation omitted), a marginal increase in time incurred preparing tax returns hardly qualifies.

B. Any Injury From The Downgrade Practices Is Reasonably Avoidable

Under the second § 45(n) prerequisite, even if consumers suffered substantial injury from contacting customer service and restarting their interview, Counsel also must show that any such injury was not "reasonably avoidable." 15 U.S.C. § 45(n). Injury is reasonably avoidable if consumers have a "free and informed choice"—*i.e.*, they "have reason to anticipate the impending harm and the means to avoid it." *Davis*, 691 F.3d 1152, 1168. Counsel's evidence will fail on this front too, because any injury from the challenged downgrade practices is reasonably avoidable.

H&R Block makes clear on its website, which can also be easily found through a simple Google search, that downgrading requires calling customer service and starting over on the tax questionnaire. (Gerardi 12.) Any consumer who wants to avoid the risk of taking those (minimal) steps can simply start in the lowest-tier DIY product and upgrade only as their tax situation may require. Moreover, if a consumer prefers not to start in the lowest-tier product, then H&R Block's website also makes clear what tax forms and services each DIY product offers, so a consumer can start in the right product for their situation and avoid ever needing to downgrade. As Counsel's own expert acknowledges, the main selector page provides a basic overview of the main tax situations covered by each product. (Brignull 27.) Clicking below that overview on "compare filing options" provides more detail about the tax situations covered. (Brignull 28.) And if a consumer wants to ascertain precisely which forms a product covers, that information is available too, on the page dedicated to that product. (Brignull 31-32.) H&R Block's website thus provides consumers choosing among the online DIY products with clear information about each product's scope, and Counsel never even suggests that H&R Block misled consumers into starting in a *higher*-tier product that would require downgrading, *supra* at 8.

The data bears this out. [redacted] (*Id.*) It is thus patently clear that consumers can and do reasonably avoid the time incurred with downgrading by not selecting a higher-tier product than they actually want—and again, Counsel has no evidence that any of these consumers are instead being *coerced* into sticking with the higher-tier product *because* of the time needed to downgrade. *Supra* at 5-6.

C. Any Injury From The Downgrade Practices Is Outweighed By Countervailing Benefits To Consumers

Under the third § 45(n) prerequisite, Counsel must show that any unavoidable injury from the downgrade practices is "not outweighed by countervailing benefits to consumers." 15 U.S.C. § 45(n). Once more, Counsel's evidence will fall short, because these reasonable practices help consumers far more than they hurt them.

The customer-service requirement has the benefit of helping customers avoid futile or improper downgrades. As Counsel's own expert acknowledges, there "may be legitimate reasons for the customer to remain" in the current DIY product, including that they need tax forms not included in a lower-tier product or would benefit from access to assistance not included with the free product. (Watts 17.) Evidence at trial will show that the customer-service agents can work through a "logical set of criteria" addressing these issues. (Watts 17; Gerardi 9.) This helps consumers avoid downgrades that would need to be reversed to use appropriate tax forms and downgrades that result in the omission of necessary tax information. Even with the customer-service contact, the data shows that [redacted] (Benzarti Rebuttal 29); that figure would undoubtedly be higher absent the contact requirement.

In short, the contact requirement potentially saves consumers time and likely gives them confidence about their product choice—doubtless contributing to the positive reviews from consumers who spoke to agents, *supra* at 9.

Likewise, the requirement that a downgrading consumer restart the interview ensures that the proper information is included in the tax return. To begin, it is undisputed that H&R Block's interview-style approach to tax preparation benefits consumers. As Counsel's own expert concedes, compared to manual preparation of tax returns using paper or fillable electronic forms, "tax software is likely to substantially reduce filing costs in helping customers navigate the tax law: rather than having to painstakingly read the tax law and 1040 instructions, tax software customers simply need to answer questions related to their tax situation." (Benzarti 52.)

Critically, though, the interview-style approach has a built-in technological tradeoff. The underlying software runs on [redacted] (Schnell 18-20.) Thus, H&R Block cannot simply tweak its software to downgrade a consumer by removing only the information related to tax forms available only in the higher-tier product. (*Compare* Schnell 35-38, *with* Watts 51-55.)

Redesigning H&R Block's software to allow downgrading without restarting the interview, while ensuring accuracy [redacted], would "require exhaustive testing across all tax situations," amounting to "years of development," which would

have to be redone "any time there is a change to the tax code." (Schnell 7, 20.) And consumers, of course, would ultimately bear the costs of that more expensive software and any resulting errors. Requiring consumers who downgrade—again, [redacted] of all online filers, *supra* at 14—to simply restart the interview is far more cost-effective for them, especially given the minimal amount of time required to reenter any information that was previously provided and still relevant. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 255 (3d Cir. 2015) (recognizing that § 45(n) requires a "cost-benefit analysis," under which the benefits of the practices demanded by the FTC must be balanced against the resulting "cost to consumers that would arise from investment" by the business to engage in those practices).

Counsel thus errs in objecting that H&R Block makes it more difficult to downgrade than upgrade. Compl. ¶ 7. When a consumer upgrades, there is no risk that the tax forms in the new product cannot be used in their tax situation or that any of the information previously entered cannot be transferred. By contrast, when a consumer downgrades, both of those risks exist, and consumers thus benefit from contacting customer service and restarting their tax interview.

D. It Is Not "Unfair" For A Business To Have A Different Process To Downgrade Than To Upgrade

Finally, even if Counsel could satisfy the § 45(n) prerequisites, they cannot satisfy their ultimate burden to show unfairness under § 45(a). Under § 45(n)'s plain text, the factors are *necessary, but not sufficient*, to establish unfairness: the statute says the Commission "shall have no authority … to declare" a practice "unfair *unless*" the factors are satisfied, not that the practice *is* unfair *if* those factors are met. 15 U.S.C. § 45(n).

As the Eleventh Circuit has held, even if the § 45(n) prerequisites are met, the practice "must still be unfair under a well-established legal standard, whether grounded in statute, the

common law, or the Constitution." *LabMD*, 894 F.3d at 1229 n.24. Counsel can point to no such established legal standard proscribing H&R Block's downgrade practices.

Indeed, under any plausible standard for unfairness, these practices should easily survive. Contrary to the Complaint (¶ 15), for-profit businesses have no duty to make it "seamless" for consumers to obtain their cheapest products—or even as "seamless" as obtaining their pricier ones. Some analogies should make this obvious. Retailers across the country feature more profitable products while giving less profitable substitutes less prominent placement. Car-dealership salesmen will promptly agree to requests for the souped-up model while providing a litany of reasons why the consumer should reconsider buying the bare-bones model. While such practices may cause some consumers to buy more expensive products and others to spend time and effort obtaining cheaper products, such ubiquitous sales tactics cannot possibly be "unfair" under the FTC Act. Here, likewise, even assuming that H&R Block could easily apply the upgrade practices to downgrades without harming consumers, *the mere failure to extend more favorable treatment* is not remotely "unfair" as a legal matter.

II. H&R BLOCK'S ADVERTISING OF ITS FREE PRODUCT IS NOT DECEPTIVE UNDER THE FTC ACT

"In determining whether an advertisement is deceptive in violation of section 5 of the FTC Act, the Commission engages in a three-step inquiry, considering: (i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015). "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014). "An ad is misleading if at least a significant minority of

reasonable consumers are likely to take away the misleading claim." *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005).

Although the Complaint alleges that H&R Block's advertising and website are deceptive, the allegations are ambiguous as to the theory. The Complaint primarily objects that H&R Block promotes its product as free when in fact many filers are not eligible, implying that it is misleadingly causing consumers to erroneously believe that *all or most* filers are eligible to file free. The Complaint also alternatively suggests that the "simple returns" qualification is not sufficiently explained and particular consumers were surprised they in fact could not file free, implying that H&R Block is misleadingly causing consumers to erroneously believe that *they meet the eligibility criteria* for using the free product. Neither theory is factually and legally viable.

A. H&R Block's Advertising Does Not Create The Misleading Impression That All Or Even Most Consumers Can File for Free

In Count III, the Complaint alleges that H&R Block has "represented … that consumer can file their taxes for free using [its] Free Online Product," and that this representation is false or misleading because, "[i]n fact, in numerous instances," H&R Block "do[es] not permit consumers to file their taxes for free using [its] Free Online Product." Compl. ¶¶ 60-62; *accord id.*¶ 39. Although the Complaint never spells this out, the "fact" that "numerous" consumers cannot file free would only render H&R Block's advertising false or misleading if the advertising conveys the contrary impression that *all or at least most* consumers can file free.

Resolution of this theory thus turns entirely on the first prong of the deceptive-practices analysis: "what claims are conveyed in the ad." *POM Wonderful*, 777 F.3d at 490. "Claims can either be express or implied," *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016), and the Commission's practice "is to view the ad first and, if it is unable on its own to determine with

confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence," typically in the form of consumer surveys, *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 (7th Cir. 1992).

Here, none of the challenged advertisements or webpages *expressly* claim the Free Online product is available to *all or even most* consumers. Nor do they imply it. To the contrary, the three post-2020 ads challenged in the Complaint (¶¶ 36–39) included clear and conspicuous disclaimers that only "simple returns" can be filed free. In the football ad, "SIMPLE RETURNS FILE FREE" was emblazoned across the screen; and for the YouTube and HRBlock.com ads, the "simple returns" disclaimer was one of only *two* or *four* sentences displayed. Given that context, the qualifier was "sufficiently prominent and unambiguous" to "leave an accurate impression" that the free product is not available to all or even most consumers. *See Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *see also, e.g.*, *Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020) (noting customers' awareness that "disclaimers are often presented at the end of the ad toward the bottom of the screen"); *FTC v. DirecTV, Inc.*, 2018 WL 3911196, at *8 (N.D. Cal. Aug. 16, 2018) (holding that "[t]he text" used in a disclosure may be "smaller than most of the text in the advertisement"). Especially "for a complex product" like tax-preparation products, reasonable consumers "would understand the limitations of how information is presented." *DirecTV*, 2018 WL 3911196, at *15. They would understand that "simple returns" does not mean "all returns," *see Halverson v. Slater*, 129 F.3d 180, 186 n.9 (D.C. Cir. 1997) (reaffirming "the learning of common experience that when people say one thing they do not mean something else"), and that what qualifies as a "simple return" would be clarified further when selecting the Free Online product—particularly since qualified "free offers" have been "an entrenched part of the [tax-preparation] market" for many years, *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 48 (D.D.C. 2011).

The extrinsic evidence at trial will confirm H&R Block's advertising did not misleadingly convey the net impression that all or even most consumers could file free. The language of "simple returns" has long been an industry-standard term, and the IRS *itself* uses the term to describe returns covered by its Direct File software. (Hines 5-6.) It is true that the meaning of the term has changed over time, in response to changes in the Tax Code, and that the meaning may vary slightly by company. (Hines 6-7.) But there is no evidence H&R Block applies the term in unexpected ways; to the contrary, descriptions of the tax situations covered by the Free Online product are clearly identified on H&R Block's website, including granular detail regarding the IRS forms included, and online DIY filers *must* go to the website to use the product. *Supra* at 13. It thus would be absurd to find that "simple returns" is meaningless, let alone that it conveys the net impression "all returns" or even "most returns." Consider other ubiquitous advertising qualifications, such as financing offered only to "well-qualified buyers." The credit-score level that counts as "well-qualified" may vary by company, but no reasonable consumer thinks that the phrase implies "all buyers" or even "most buyers."

Indeed, consumer-survey evidence will confirm this common-sense conclusion. After viewing just one H&R Block advertisement, three-quarters of viewers could understand and remember that only consumers with simple returns were eligible to file free. (Simonson 37.) Furthermore, "simple returns" covers a substantial portion of consumers: from 2018 to 2024, [redacted] of consumers who filed using H&R Block's online DIY products filed free. (Schnell 41.) And Counsel offers no evidence that consumers believed, based on an H&R Block's advertising, that a *materially greater percentage* of taxpayers have "simple returns" or would be eligible to file free.

Despite all this, Counsel will try to analogize to a prior case against Intuit and its competing DIY product, TurboTax. *See In re Intuit Inc.*, No. 9408 (F.T.C. Jan. 22, 2024). While that case also concerned advertising of the free version of the product, the "net impression" left by the advertising was materially different. As the Commission's opinion recounts, the overwhelming message of Intuit's advertising was that TurboTax was "free." For instance, starting in 2018, Intuit ran ads in which *the only word spoken* was "free," over and over: by an auctioneer, game-show contestants, etc. *Id.* at 10-11. Although Intuit's advertisements contained fine-print disclaimers noting the simple-returns limitation, the Commission concluded that the "incessant repetition of the word 'free'" resulted in a "central, primary message" that "consumers could file their taxes for free with TurboTax." *Id.* at 5, 38. The Commission reasoned that Intuit's "simple returns" disclaimer was "particularly inadequate when considered in the context of the prominent, repeated 'free' claims." *Id.* at 45. Because the net impression was that any given consumer could file free, the Commission held the claim was "false for roughly two-thirds of consumers." *Id.* at 46.

H&R Block's advertising did not convey the same net impression. In contrast to Intuit's advertising, which hammered the word "free" into consumers' consciousness, evidence will show that H&R Block's advertisements highlighted other beneficial aspects of the product and that the "free" message was not so dominant that it drowned out the disclaimer of "simple returns." Dr. Simonson's consumer-perception survey provides good evidence. Only *one percent* of consumers who remembered seeing H&R Block's advertisements recalled the message that consumers could "file for free"—the company simply "is not associated in consumers' minds with that message." (Simonson 10.) (Counsel's expert, Ms. Butler, did not conduct any such perception survey.) This left room for H&R Block's disclaimer. As explained above, the large majority of consumers understand that "simple returns" is a limitation on who may file free. (Simonson 37.) In sum,

Counsel cannot meet its burden to show that reasonable consumers were left with the false net impression that all or even most consumers can file free using H&R Block's products.

B. H&R Block's Advertising Does Not Mislead Ineligible Consumers Into Believing They Are Qualified to File Free

The Complaint also alleges that "[w]hat constitutes a simple return … is not defined or explained in the advertisements," and that particular "[c]onsumers are often surprised and dismayed to discover they cannot file their taxes using Free Online." Compl. ¶¶ 39-40. These allegations hint at an alternative theory that H&R Block's advertising was deceptive, not because it gave the impression that all or most consumers could file free, but instead because it misled specifically ineligible consumers into believing that they were qualified to file free.

This potential alternative theory likewise founders on the threshold prong of "what claims are conveyed in the ad." *POM Wonderful*, 777 F.3d at 490. H&R Block's advertisements claimed that "simple returns" can file free, but they did not convey any misleading impression about what qualifies as a "simple return." As the Complaint emphasizes, most of the ads do not explain the term, and the few that do are concededly accurate, as is the website. There is thus no reason to think the advertisements would have any impact on reasonable consumers' perceptions about whether they, personally, would be able to file a "simple return." *See Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1277 (10th Cir. 2020) (holding disclaimer can "put consumers on notice that the complete details" are not included and may be found elsewhere). The record confirms this. Counsel has no evidence, for example, that any consumers reasonably received the impression that particular tax forms would be covered when they were not.

Although Counsel will proffer the results of Ms. Butler's consumer survey, it is fundamentally flawed. *First*, the results are unreliable: Ms. Butler failed to accurately categorize participants as ineligible to file free, and her survey stimuli and questions suffered from fatal

biases. (Simonson 57-61.) *Second*, she admitted the H&R Block advertisement she exhibited did not have a statistically significant effect on participants' views of their eligibility to file a "simple return," which means that the ad itself did not cause any misimpression. (Butler 57.) *Third*, she did not even rely on the questions regarding "simple returns" when forming her opinion that consumers would be deceived, so she has no basis to assert that H&R Block is misleading consumers about that term. (Butler 65.)

Ultimately, even if Ms. Butler's evidence were reliable, it is irrelevant. That some subset of consumers is inaccurate when making an off-the-cuff prediction of whether they meet certain criteria does not render false or misleading the company's *true* claim that it *uses* that criteria. Again, a consumer may not immediately know whether he or she is a "well-qualified buyer," but that does not render inaccurate the representation that the interest rate *is available* to well-qualified buyers. Ms. Butler's survey shows, at most, that taxpayers are not adept at predicting eligibility. This is unsurprising. Taxes are infamously complex and due only once a year. There is little reason to think that giving consumers data on the percentage of people who are eligible or noting specific tax forms will improve their ability to predict whether they have a simple return. (Simonson 32.) That consumers are not very effective at predicting how criteria will apply does not render false or misleading a company's true claim that it uses those criteria—especially when those criteria are an industry-standard term being applied in a typical manner.

III. THIS PROCEEDING IS UNCONSTITUTIONAL

This adjudication is unconstitutional. *First*, it resolves private rights outside of Article III courts. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2131-39 (2024). *Second*, it violates due process by fusing prosecutorial and adjudicatory functions and thereby creating potential bias. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). *Third*, the FTC is insulated from presidential removal despite wielding substantial executive power. *Seila Law LLC v. CFPB*, 591 U.S. 197, 213-20 (2020).

H&R Block preserves these issues for further review, recognizing this Court cannot invalidate the statutory structure of its own agency. *In re Howard Enterprises, Inc.*, 93 F.T.C. 909, 1979 WL 198936, at *25 (1979).

CONCLUSION

The claims all should be denied.

Dated: October 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of such filing to:

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