PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Lina M. Khan, Chair** **Rebecca Kelly Slaughter** **Alvaro M. Bedoya** **Melissa Holyoak** **Andrew Ferguson**

In the Matter of: **Rule Concerning Recurring Subscriptions and Other Negative Option Programs**	**Matter No. P064202**

DECISION AND ORDER DENYING PETITION FOR STAY OF FINAL RULE PENDING JUDICIAL REVIEW

Before the Commission is a request from four Petitioners to stay pending judicial review the Commission's final amendments to the trade regulation "Rule Concerning Use of Prenotification 'Negative Option Plans,'" retitled the "Rule Concerning Recurring Subscriptions and Other Negative Option Programs." Final Rule, Negative Option Rule ("Amendments"), 89 Fed. Reg. 90476 (Nov. 15, 2024) (amending 16 C.F.R. pt. 425).[1] Absent a stay, the Amendments will become effective on January 14, 2025, but with a deferred compliance deadline of May 14, 2025, for most of the requirements. 89 Fed. Reg. at 90476. For the reasons outlined below, we deny the Petition to Stay.

Negative option programs involve terms or conditions allowing a seller to interpret a customer's silence, or failure to take affirmative action, as acceptance of an offer and agreement to incur recurring charges for a product or service. Many modern-day subscription services are negative option programs, and familiar examples include content streaming services, gym memberships, or other "free-to-pay" plans in which consumers are automatically billed for a product after a trial period. Negative option programs can provide important benefits to both sellers and consumers, but they are also easily exploitable. In many cases consumers unwittingly

[1] The Petitioners are the Electronic Security Association, Inc., the Interactive Advertising Bureau, NCTA – the Internet & Television Association, the Michigan Press Association, the National Federation of Independent Business, Inc., Custom Communications, Inc. d/b/a/ Custom Alarm, the Chamber of Commerce of the United States of America, and the Georgia Chamber of Commerce.

end up paying money over extended periods for services they are not actually using. And some sellers make it difficult for consumers to cancel these services.

The Commission promulgated the Negative Option Rule, 16 C.F.R. Part 425, in 1973 to require marketers to make clear and conspicuous disclosures and promptly honor cancellation requests for certain types of negative option programs. These programs have also been the subject of dozens of federal and state enforcement actions against marketers who failed to disclose critical information about the recurring charges, failed to obtain informed consent, imposed unduly complicated barriers to cancellation, or made overt misrepresentations. Despite these efforts, the Commission has continued to receive thousands of complaints about negative options programs from consumers every year. And as negative option programs continue to proliferate, studies have shown that more than half of Americans have been enrolled in a recurring subscription plan they do not want. The Commission accordingly commenced proceedings in 2019 to amend the Negative Option Rule, and earlier this year promulgated the Amendments to address and prevent widespread misconduct in connection with negative option programs.

The Commission promulgated the Amendments pursuant to its authority under Section 18 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 57a. The Amendments, which apply to all negative option programs offered by entities within the Commission's jurisdiction, require sellers to: (1) provide important information before obtaining consumers' billing information and charging consumers, 16 C.F.R. § 425.4; (2) obtain consumers' unambiguous, affirmative consent to the negative option feature before charging the consumer, 16 C.F.R. § 425.5; and (3) provide consumers with simple cancellation measures to halt all recurring charges, 16 C.F.R. § 425.6. The Amendments also prohibit misrepresentations of any material fact while marketing goods or services in connection with negative option features. 16 C.F.R. § 425.3.

After the Commission announced the Amendments, Petitioners filed petitions for review in the United States Courts of Appeals for the Fifth, Sixth, Eighth, and Eleventh Circuits challenging the Commission's final amendments to the Amendments.[2] Following a lottery pursuant to 28 U.S.C. § 2112, these petitions were consolidated in the Eighth Circuit on November 21, 2024. *See* Consolidation Order, MCP No. 192, https://tinyurl.com/yfzvky82. Petitioners have also sought a stay of the Amendments from the Eighth Circuit pending judicial review. *See* Motion for Stay, *Custom Commc'ns, Inc. v. FTC*, No. 24-3137 (8th Cir. Dec. 5, 2024).

On October 25, 2024, Petitioners filed with the Commission a Petition to Stay the Amendments pending judicial review pursuant to 5 U.S.C. § 705 ("Pet."). Petitioners challenge

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[2] *Electronic Sec. Ass'n, Interactive Advertising Bureau, and NCTA-The Internet & Television Ass'n v. FTC*, No. 24-60542 (5th Cir. 2024); *Michigan Press Ass'n and National Federation of Independent Business, Inc., v. FTC*, No. 24-3912 (6th Cir. 2024); *Custom Commc'ns, Inc. d/b/a Custom Alarm v. FTC*, No. 24-3137 (8th Cir. 2024); *The Chamber of Commerce of the United States of America and the Georgia Chamber v. FTC*, No. 24-13436 (11th Cir. 2024).

the Amendments as (1) arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; (2) unsupported by substantial evidence and otherwise in excess of Commission's statutory rulemaking authority under 15 U.S.C. § 57a(e)(3); and (3) unconstitutional.

The Administrative Procedure Act ("APA") authorizes the Commission to "postpone the effective date" of a rule pending judicial review when "justice so requires." 5 U.S.C. § 705. Under the traditional standard governing stays pending appeal, we consider (1) whether Petitioners have "made a strong showing that [they are] likely to succeed on the merits"; (2) whether Petitioners "will be irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation and quotation marks omitted). The final two factors merge when the government is the nonmoving party. *Id.* at 435. As explained below, we conclude: (1) Petitioners have failed to make a strong showing that they are likely to succeed on the merits; (2) Petitioners' claims of irreparable harm are overstated and mischaracterize the substance and effect of the Amendments; and (3) any harms to Petitioners are outweighed by the public interest in timely enforcement of the Amendments, which prevent widespread unfair and deceptive marketing practices that are causing ongoing financial injury to American consumers.[3]

A. Likelihood of Success on Appeal

1. The FTC's Authority

Petitioners first argue that the Commission lacked statutory authority to promulgate the Amendments. We find that Petitioners' arguments lack merit and fail to demonstrate a likelihood of success on appeal.

***Specificity*:** Contrary to Petitioners' argument that the Amendments are not the "sort of specific trade rule that [Section 18] permits," Pet. 3 (cleaned up), the Amendments fall within the Commission's statutory authority to "prescribe … rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(B).[4]

The Amendments satisfy the statute's specificity requirement by identifying specific conduct that constitutes an unfair or deceptive act or practice. The Amendments' prohibitions are limited to the specific context of conduct "[i]n connection with promoting or offering for sale any good or service with a Negative Option Feature." 16 C.F.R. § 425.3. The specific conduct the Amendments define as unfair or deceptive acts or practices includes making material misrepresentations, failing to make certain necessary disclosures, failing to obtain consumers' consent to the negative option feature, and failing to provide a simple mechanism for

[3] For purposes of this analysis, we assume that Petitioners have standing under Article III to challenge the Amendments, though they have made no such showing.
[4] Such rules "may include requirements prescribed for the purpose of preventing such acts or practices." *Id*.

cancellation. *See id.* §§ 425.3-425.6; *see also* 89 Fed. Reg. at 90485. The Amendments further define key terms, *see* 16 C.F.R. § 425.2, highlight specific examples of information that must be provided to consumers, *see id.* § 425.4(1)-(4), and advise regulated entities of how they may comply with certain provisions, *see id.* § 425.5(c). The Commission's Statement of Basis and Purpose ("SBP") adds further explanation that offers regulated entities guidance on how the Commission will interpret the Amendments' various provisions. *See, e.g.*, 89 Fed. Reg. at 90508 (explaining the "same medium" requirement). And while Petitioners complain that the Amendments "govern[] all negative option contracts in all industries and sectors of the economy," Pet. 4, the FTC Act does not require that the Commission limit its rules to any particular sector. Here, as the FTC Act permits, the Commission has chosen to address specific conduct that happens to recur across many industries. In short, the Commission finds that the Amendments are not impermissibly ambiguous; rather, they properly define as "unfair or deceptive" specific acts or practices in a specific context.[5]

Prevalence: Petitioners next argue that the Commission "failed to establish that the problems it identified with respect to negative option plans are 'prevalent.'" Pet. 4. Assuming that this argument is subject to judicial review,[6] the Commission complied with all statutory requirements. Section 18 of the FTC Act provides that the Commission may 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." 15 U.S.C. § 57a(b)(3). The Commission satisfied this requirement in the NPRM by identifying dozens of "recent FTC cases" as well as "thousands of complaints" received "each year related to negative option marketing" and concluding that "[t]hese cases and the high volume of ongoing complaints suggests there is prevalent, unabated consumer harm in the marketplace." Negative Option Rule, 88 Fed. Reg. 24716, 24719 (April 24, 2023). The Commission further noted that "commenters identified evidence of ongoing, widespread deceptive practices." *Id.* at 24720.

The Commission also complied with Section 18's requirement that "[t]he Commission's statement of basis and purpose … shall include … a statement as the prevalence of the acts or practices treated by the rule." 15 U.S.C.§ 57a(d)(1). The Commission's statement of basis and purpose expressly included a "Statement Regarding Prevalence of the Acts and Practices Treated by the Rule." 89 Fed. Reg. at 90481. In that statement, the Commission described "three categories" of evidence in the record that "show[] a widespread pattern of unfair or deceptive conduct in the negative option marketplace": (1) "State, private, and Federal actions"; (2) "consumer complaints and comments"; and (3) "studies." 89 Fed. Reg. at 90481. The

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[5] The Commission further notes that Congress permitted the Commission to proscribe unfair or deceptive practices "in or affecting commerce," a broad delegation that indicates Congress intended for the Commission to regulate across the national economy. *See* 15 U.S.C. § 57a(a)(1)(B). As a further indication of its intent, Congress "empowered and directed" the Commission "to prevent persons, partnerships, or corporations … from using … unfair or deceptive acts or practices in or affecting commerce," and carved out only specific industries and entities from the Commission's reach. 15 U.S.C. § 45(a)(2); *see also id.* § 44 (defining "commerce" and "corporation" as used in the FTC Act).

[6] *But see* 15 U.S.C. § 57a(e)(5)(C).

Commission's statement satisfied Rule 18(d)(1), and Petitioners' characterization of the evidence underlying the Amendments as "[a] small number of cherry-picked cases," Pet. 4, is inaccurate and ignores much of content of the Commission's SBP. *See id.* at 90481-84; *infra* pp. 8, 11 (further summarizing the evidence supporting the Rule).

Relevance of State laws: Petitioners are incorrect that the existence of other, more limited laws governing negative option programs implies that the Commission lacks "authority to promulgate such a sweeping, economy-wide rule." Pet. 4. Section 18 rulemaking exists to clarify and define conduct that is already unlawful, including under acts of Congress; it provides notice to both consumers and regulated entities of how the Commission will enforce the FTC Act and it streamlines litigation by supplying rules of decision. As the Commission's SBP explains, "[t]he existing patchwork of laws and regulations" contains gaps that make law enforcement actions more difficult. *See* 89 Fed. Reg. at 90479. Nor is there any indication in the text of the statutes that Petitioners cite suggesting that Congress intended to implicitly limit the Commission's rulemaking authority.

Major Questions Doctrine: Finally, Petitioners' argument that the major questions doctrine restricts the Commission's authority over negative option programs is incorrect. *See* Pet. 5. That doctrine limits agencies from "discover[ing] in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority," especially when that "newfound power" arises from "vague language of an ancillary provision." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (internal quotation omitted; second alteration in original). None of that describes the situation here.

The Commission is not exercising a "newfound" or "unheralded power" in promulgating the Amendments. *Id.* To the contrary, the Commission has often issued or amended rules under Section 18, some of which apply across a wide range of industries. *See, e.g.*, 43 Fed. Reg. 59614 (Dec. 21, 1978) (Franchise Rule); 79 Fed. Reg. 55619 (Sept. 17, 2014) (amendments to Mail, Internet, or Telephone Order Merchandise Rule). The Commission's issuance of the Amendments is thus fully consistent with longstanding practice. Indeed, there is not even anything new about the Commission's issuance of regulations governing negative option programs on an economy-wide basis. The Commission first promulgated a rule defining certain acts or practices related to negative option programs as unfair or deceptive in 1973, based on its authority under Section 6(g) of the FTC Act. *See* 38 Fed. Reg. 4896 (Feb. 22, 1973). When Congress added Section 18 to the FTC Act and required the Commission to satisfy additional procedural requirements when it made rules to define unfair or deceptive acts or practices, the new law expressly specified that the new statutory rulemaking procedure would not affect the validity of pre-existing rules. *See* Pub. L. 93–637, title II, § 202(c)(1), 88 Stat. 2198 (1975). Congress thus knew and agreed that the Commission's authority to regulate unfair or deceptive acts or practices in or affecting commerce included the authority to regulate negative option programs. Far from marking a "transformative expansion" in the Commission's "regulatory authority," *West Virginia*, 597 U.S. at 724, the Amendments are a straightforward continuation of decades-long Commission practice.

Nor is the Commission relying on the "vague language of an ancillary provision" to promulgate the Amendments. *Id.* Congress has "empowered and directed" the Commission to prevent the use of unfair or deceptive acts or practices across the entire national economy, subject to only limited, enumerated exceptions. 15 U.S.C. § 45(a)(2). To carry out that mandate, Congress in 1975 added Section 18 to the FTC Act, authorizing the Commission to "prescribe … rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a.[7] And in 1980, Congress expressly recognized that this broad grant of authority may have a significant impact on the national economy; that year, Congress enacted Section 22 of the FTC Act, which contemplates that amendments to Commission rules may "have an annual effect on the national economy of $100,000,000 or more," 15 U.S.C. 57b-3(a)(1)(A). Rather than relying on "vague language of an ancillary provision" to promulgate the Amendments, *West Virginia*, 597 U.S. at 724, the Commission is instead relying on express rulemaking authority to carry out a core provision of its substantive mandate, and Congress recognized that such authority may have significant economic effects. The major questions doctrine thus does not undercut the Commission's authority here.

2. Procedural Requirements

Petitioners next argue that the Commission did not comply with certain procedural statutory requirements.[8] Pet. 6. We find Petitioners are unlikely to succeed on the merits of either of these arguments.

Preliminary Regulatory Analysis: Petitioners are incorrect that the Commission was required to prepare a preliminary regulatory analysis accompanying the NPRM. Pet. 6. Although Section 22 generally requires the Commission to issue a preliminary regulatory analysis in any case in which it publishes an NPRM, the statute defines the term "rule" to exclude "any amendment to a rule" unless the Commission (1) estimates that the amendment will have an annual effect on the national economy of $100 million or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers.[9] When it issued the NPRM, the Commission preliminarily determined that none of these conditions were satisfied. 88 Fed. Reg. at 24731 . Accordingly, a preliminary regulatory analysis under Section 22 was not required, although the Commission nonetheless requested comments on the economic effect of the proposed amendments.

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[7] Before 1975, the Commission was authorized to prescribe rules concerning unfair or deceptive acts or practices under Section 6(g) of the FTC Act, 15 U.S.C. § 46(g).

[8] Petitioners also reiterate their argument that the Commission "failed to comply with the Act's substantive requirements that any rules adopted under Section 18 be specific and apply only to a substantiated 'prevalent' practice." Pet. 7 The Commission finds Petitioners are unlikely to succeed on the merits of these arguments for the reasons explained above.

[9] There are other exceptions to the meaning of "rule" in Section 22 not relevant here. *See* 15 U.S.C. § 57b-3(a)(1).

Following the issuance of the NPRM, several commenters (including some of the Petitioners) argued that the proposed amendments would have an annual effect on the national economy of $100 million or more. Following an informal hearing conducted under Section 18(c), the presiding officer issued a recommended decision concluding that the proposed amendments would have a $100 million annual effect on the national economy. 89 Fed. Reg. at 90481; *Recommended Decision by Presiding Officer* at 6 (Apr. 12, 2024), https://www.regulations.gov/comment/FTC-2024-0001-0042. In light of that determination, the Commission included a final regulatory analysis under Section 22 in the final rule. 89 Fed. Reg. at 90517. Petitioners appear to be suggesting that the Commission should have gone back to square one and reissued the NPRM with a preliminary regulatory analysis, but they cite no authority for that proposition. We conclude that an amended NPRM at that advanced stage of the rulemaking proceeding was not required. In any event, Petitioners have not shown how they were harmed by the absence of a preliminary regulatory analysis in the NPRM, especially given that they had an opportunity to submit comments and present evidence on the economic effects of the Amendments at the informal hearing.

Informal hearing: Petitioners also err in claiming that the informal hearing that preceded the Amendments was inadequate and did not meet statutory and regulatory requirements. Pet. 6. The FTC Act requires an informal hearing and sets forth limited criteria for that hearing. *See* 15 U.S.C. § 57a(c). The Commission's rules of practice further specify the procedures for such hearings. *See* 16 C.F.R. §§ 1.11-1.13. Petitioners do not identify any specific statutory or regulatory provision that the Commission violated. Instead, they argue that the "Commission improperly excluded multiple 'disputed issues of material fact'" and improperly "appl[ied] a novel and incorrect summary judgment standard." Pet. 6. The Commission acted in accordance with caselaw when limiting disputed issues of material facts, and it applied a summary judgment standard that was rooted in precedent. *See* 88 Fed Reg. at 85527 (Dec. 8, 2023). In any event, any error was harmless because the Commission allowed interested persons to request that the presiding officer designate disputed issues of material fact, *id.* at 85528 n. 30, and the presiding officer did so at the request of interested parties, *see* 89 Fed. Reg. at 90481.

3. Arbitrary and Capricious/Substantial Evidence

We find no merit to Petitioners' contentions that the Amendments are arbitrary and capricious, 5 U.S.C. § 706(2)(A), and unsupported by substantial evidence, 15 U.S.C. § 57a(e)(3)(a). Pet. 7-10. Petitioners' arguments overlook the extensive reasoning and evidence the Commission provided in support of the Amendments.

Judicial review under the arbitrary-and-capricious standard is "deferential, and a court may not substitute its judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414,

423 (2021).[10] Likewise, the substantial evidence standard requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (citation omitted). "[T]he threshold for such evidentiary sufficiency is not high": it requires "more than a mere scintilla" of supporting evidence. *Id.* (citation omitted).

None of Petitioners' arguments—alone or in combination—comes close to meeting the demanding threshold to overturn an agency rule as arbitrary and capricious or lacking substantial evidence.

Burdens on Companies and Consumers. First, Petitioners claim that the Commission failed to "[c]onsider" Petitioners' concerns regarding the purported burdens the Amendments may inflict on companies and consumers. Pet. 7. In fact, the Commission thoroughly responded to Petitioners' concerns and modified the Amendments' scope accordingly.

Petitioners take issue with the Amendments' requirement that sellers provide consumers with cancellation mechanisms that are "at least as easy to use as the mechanism the consumer used to consent to the Negative Option Feature." 16 C.F.R. § 425.6(b). Petitioners assert—incorrectly—that this provision would prohibit sellers from responding to a cancellation request by offering consumers a better deal or providing truthful disclosures about the adverse consequences of cancellation. Pet. 7-8. In fact, the Amendments *preserve* sellers' ability to attempt to "save" a negative-option plan by (1) "confirm[ing] consumers' intent or appris[ing] consumers of any negative consequences of cancellation," and by (2) making "valuable concessions (e.g., lower prices) to consumers." 89 Fed. Reg. at 90512. *See also id.* at 90506 (explaining that sellers may ask consumers to verify their identity and confirm their intent to cancel). Sellers may continue to provide this "necessary and valuable information about cancellation," so long as they do not otherwise "erect unreasonable and unnecessary barriers" when consumers attempt to cancel. *Id.* at 90512.

Next, Petitioners take issue with the requirements that sellers disclose all material terms (16 C.F.R. § 425.4) and obtain consumers' "unambiguously affirmative consent to the Negative Option Feature" (16 C.F.R. § 425.5). Petitioners assert that the disclosures would cause "consumer fatigue" and that the consent requirement would impose (unspecified) "opportunity costs." Pet. 8. But the Commission credited thousands of public comments stressing that it was "critically important" consumers understand what they are signing up for, and detailing how sellers frequently make disclosures in "small print" or "too late" in the sale process. 89 Fed. Reg. at 90496. The Commission found that requiring "material" disclosures—*i.e.*, information "likely to affect a person's choice of, or conduct regarding, goods or services"—is "necessary to prevent deception" and within the Commission's rulemaking authority. *Id.* at 90497. Likewise, the

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[10] "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm. Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Commission found a "need for clear, unambiguous, affirmative consent to a negative option feature," relying on the Commission's own law enforcement experience, the experiences of state enforcers, and public comments. *Id.* at 90500. Industry commenters had proposed eliminating the consent requirement entirely, but the Commission disagreed, finding that consumers need protection from "unknowingly enrolling in negative option programs." *Id.* at 90503.

Contrary to Petitioners' assertion that the Commission ignored their comments (Pet. 8), the Commission substantially reduced the scope of the Amendments to minimize burdens to businesses. The Commission ultimately did not adopt its proposals to (1) prohibit sellers from attempting to "save" a transaction in response to a cancellation request without consumers' advance consent, and (2) require sellers to provide annual reminders of the negative option feature. 89. Fed. Reg. at 90476, 90511-90514. The Commission also streamlined certain disclosure requirements to prevent them from "crowding out" other important information and made accommodations to allow "space-constrained disclosures" where more detailed ones would be infeasible. *Id.* at 90498-90499. Likewise, the Commission narrowed the affirmative consent requirement so that it is limited to the negative option feature and does not govern other facets of the transaction. *Id.* at 90502-90503. *See also id.* at 90518, 90534-90535 (describing ways in which the Commission modified the rule "to reduce costs or burdens for small entities").

Scope. Petitioners suggest that the Commission should have issued a rule limited to certain industries or specific harmful practices (Pet. 8), but the Commission credited abundant evidence—including federal and state law enforcement actions, consumer complaints, and empirical studies—showing that harms associated with negative option programs were prevalent across economic sectors and that marketers were (1) making overt misrepresentations, (2) failing to disclose important information, (3) failing to obtain informed consent, and (4) failing to provide simple cancellation methods. 89 Fed. Reg. 90481-90484. The Commission then described with specificity the manner in which these four types of practices harm consumers. *Id.* at 90484. Accordingly, the Commission adopted amendments reasonably tailored to remediate those specific harms. *See* 16 C.F.R. §§ 425.3-425.6.

Petitioners falsely represent that the Commission "fail[ed] to explain or justify" why the Amendments apply to "bundled goods and services," all material misrepresentations, and "business-to-business contracts." Pet. 8-9. The Commission provided detailed justifications explaining why the Amendments apply in each of those contexts. *See* 89 Fed. Reg. at 90510 (bundled goods and services); *id.* at 90492-90495 (material misrepresentations); *id.* at 90484, 90488-90490 (business-to-business contracts). Petitioners do not object to any specific aspect of the Commission's reasoning, beyond their incorrect assertion that the Commission failed to address these issues.

Alternatives. Petitioners next assert that the Commission failed to consider alternatives and should have limited the Amendments to "only fraudulent negative option programs in certain industries." Pet. 9. But, as just discussed, the Commission found evidence of a far more pervasive problem that requires a broader solution. For example, a seller may not have fraudulent intent when failing to disclose material terms or imposing onerous cancellation measures, but

consumers will be injured all the same. In fact, intent is not an element of an FTC Act violation. *See FTC v. World Travel Vacation Brokers*, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988).

Indeed, the Commission provided a section-by-section analysis responding to all of the proposed alternatives raised by commenters and explaining why the Commission did or did not adopt them. 89 Fed. Reg. at 90486-90515. In response to the comments, the Commission declined to adopt certain of its proposed amendments and made changes to others, thus demonstrating that it fully considered alternatives. *See, e.g.*, *id.* at 90515-90517.

Justifications in Light of Existing Law. Contrary to Petitioners' arguments (Pet. 9-10), the Commission thoroughly explained why the Amendments were necessary despite the existence of other federal and state laws. Similar to the Amendments, the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. §§ 8401-8405, requires disclosures of material terms, express written consent, and simple cancellation mechanisms for recurring charges in a negative option program. But ROSCA "does not prescribe specific steps marketers must follow to comply with these provisions and is limited to online transactions"; the statute does not protect those consumers who, for example, sign up for a gym membership in person. 89 Fed. Reg. at 90478; *see id.* at 90522 (describing public comments illustrating the difficulties of cancelling gym memberships).

As for state laws, the Commission explained that while some states have laws relating to negative option programs, others do not; and regardless, courts long have held that the FTC Act's protections may coexist with state consumer protection laws. 89 Fed. Reg. at 90514-90515. Indeed, "[b]y definition, a section 18 trade regulation rule addresses conduct that is *already* prohibited"; the rules add value by "promot[ing] clarity and confidence in the marketplace and provid[ing] for more effective remedies" than otherwise would exist. *Id.* at 90493 (emphasis added). Congress did not preclude the Commission from adopting rules that overlap with state law. Moreover, a bipartisan coalition of 26 state attorneys general filed a public comment supporting many of the proposed Amendments, and even advocated for certain rule provisions broader than those the Commission ultimately adopted. *Id.* at 90482 n.65, 90491, 90496-90497, 90506-90507, 90509-90511.

Interaction with Existing Laws. Finally, there is no merit to Petitioners' claim that the Commission failed to explain how sellers can simultaneously comply with the Amendments and with other laws applicable to negative option programs. Pet. 10. Although Petitioners baldly assert that there are "significant differences and inconsistencies," *id.*, between the Amendments and the Television Viewer Protection Act ("TVPA"), 47 U.S.C. § 562, which governs cable TV operators, the Petition identifies no such differences or inconsistencies, nor did Petitioners identify any in their comments. In public comments, Petitioner NCTA acknowledged that the proposed Amendments regulated the "very same practices" as the TVPA, and did not suggest that the TVPA's requirements were inconsistent. 89 Fed. Reg. at 90526 n.586; *see* Supplementary Submission of NCTA – The Internet and Television Association, No. FTC-2023-0073-0008 at 11, 14 n.37 (Dec. 22, 2023).

Nor are there inconsistencies between the Amendments and ROSCA, which requires that internet transactions involving negative option features "provide[] simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's … financial account." 15 U.S.C. § 8403(3). *See* Pet. 10. Petitioners attack the Amendments for providing that a "simple" mechanism is one that allows consumers to cancel using "the same medium the consumer used to consent to the Negative Option Feature"—for example, consumers who signed up online must be able to cancel online, without having "to interact with a live or virtual representative." 16 C.F.R. § 425.6(c). Petitioners call this requirement "highly prescriptive," Pet. 10, but do not identify any way in which it conflicts with ROSCA.

In any event, the Commission supported this requirement with abundant evidence. Based on thousands of comments and decades of enforcement experience by the Commission and state attorneys general, the Commission found that "asymmetrical enrollment and cancellation experiences, such as requiring telephone cancellation when consumers can easily sign up online without speaking with an agent, are unfair." 89 Fed Reg. at 90510; *see also id.* at 90506-90508 & n.424. Such practices have led to "unreasonable hold times, unreasonable verification requirements, and aggressive … tactics" by phone agents to try to prevent cancellation. *Id.* at 90510. *See id.* at 90511 n.444 (summarizing enforcement actions involving marketers who imposed roadblocks to phone cancellation, including "long hold times, frequent disconnects, endless loops," and "unavailable or uncooperative agents"); *see also id.* at 90504 n.361, *id.* at 90505 n.373, *id.* at 90507 n.401, *id.* at 90508-90509 nn.424-425, *id.* at 90511 n.447 (summarizing comments from consumers recounting the burdens they faced while spending hours on the phone trying to cancel recurring subscriptions they signed up for online). Moreover, the Commission found—again, based on public comments and enforcement experience—that when consumers sign up for a recurring subscription online, they interpret the seller as providing an implied assurance that consumers can cancel online without the added hassle of a phone call or conversation with a live agent or chatbot. *Id.* at 90510. Petitioners do not explain why these findings are unreasonable or lack substantial evidence.

4. Constitutionality of the Rulemaking

Finally, we find no merit in Petitioners' argument that the Amendments are unconstitutional.

The First Amendment: Petitioners are unlikely to succeed on their claim that the Amendments violate the First Amendment. Petitioners argue that the Amendments impose improper restraints on communications, require overbroad and unjustified compelled disclosures, and chill truthful and lawful speech. Pet. 11-12. The Commission finds that the Amendments do not impose any of these harms.[11]

[11] Petitioners cite *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985), Pet. 11, but the standard from *Zauderer* applies only to speech "that is not false or deceptive and does not concern unlawful activities." *Id.* Here, the Amendments prohibit only unfair or deceptive speech that is unlawful under Section 5 of the FTC Act.

First, Petitioners attack the prohibition on communications containing "information that … detracts from … the ability of consumers to read, hear, see, or otherwise understand" the mandatory disclosures required by the Amendments. But Petitioners' argument—that "[w]hat counts as 'detract[ing] from' is easily manipulable and difficult to ascertain in advance," Pet. 11—ignores the Commission's SBP. There, the Commission explained that this provision "is consistent with longstanding Commission precedent that consent can be subverted" by "practices used to manipulate users into making choices they would not otherwise have made." 89 Fed. Reg. at 90499 & n.310. That precedent provides added clarity to the Amendment's meaning. *See, e.g.*, *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (collecting cases to support the general proposition that "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures"). In any event, the Commission finds that the phrase "detracts from" is neither so overbroad nor vague as to violate the First Amendment.

Second, Petitioners contend that "the Commission has failed to identify real harms that the Rule's disclosure requirements will prevent," Pet. 11—again ignoring the Commission's SBP. The Commission recounted various comments, including from law enforcement, explaining why the Amendments' disclosures were necessary. *See* 89 Fed. Reg. at 90496. It also cited multiple examples of cases featuring harm that resulted from the unfair or deceptive acts or practice that the Amendments prohibit. *See id.* at 90477 & nn. 10-11. These examples defeat Petitioners' contention that the harms addressed are "purely hypothetical." Pet. 11 (quoting *Nat'l Inst. Of Family & Life Advocates v. Becerra*, 585 U.S. 755, 776-78 (2018)).

Third, the Commission finds no basis for Petitioners' contention that the cancellation provision of the Amendments will chill truthful and lawful speech by "prevent[ing] companies from providing important information to customers at the time of cancellation." Pet. 12. Nothing about the Amendments' requirement that regulated entities allow cancellation through the "same medium" as the original consent prevents a seller from providing additional, truthful information to consumers that it deems important. For instance, if a seller wishes to offer an option to pause or freeze a subscription, it may do so as long as the company also offers an option to cancel through the same medium as the original consent. *Cf., e.g.*, 89 Fed. Reg. at 90527 (acknowledging that "pause/freeze capabilities are indeed beneficial to consumers"); *see also supra* p. 8 (explaining that the Amendments preserve a seller's right to inform consumers about the consequences of cancellation). Petitioners do not explain how the Amendments would prevent the provision of important, truthful information to consumers.

The FTC's Structure**:** Petitioners briefly argue that the FTC is unconstitutionally structured and that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld removal restrictions on the Commissioners, should be overruled. But only the Supreme Court can overrule *Humphrey's Executor*, and it has repeatedly declined to do so in recent years. This argument cannot justify a stay of the Amendments. The Commission notes that courts have recently rejected constitutional attacks on the Commission's structure, holding that *Humphrey's Executor* remains binding law. *See, e.g.*, *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023). The Commission also notes that Petitioners have not demonstrated any harm that arises

from the Commission's structure. *See Collins v. Yellen*, 594 U.S. 220, 246-48 (2021) (requiring a showing of harm).

B. Irreparable Harm and Balance of Equities

Irreparable harm. To merit a stay, Petitioners must show not only a likelihood of success, but also irreparable harm that "is certain and great and of such imminence that there is a clear and present need for equitable relief." *Morehouse Enters., LLC v. ATF*, 78 F.4th 1011, 1017 (8th Cir. 2023) (quoting *Dakotans for Health v. Noem*, 52 F.4th 381, 392 (8th Cir. 2022)). Generalized allegations regarding compliance burdens do not suffice, as challengers could make such a showing about virtually any rule. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976). Instead, movants must "quantify, or clearly explain" their injuries and demonstrate that the asserted harms are "actual and not theoretical." *Morehouse Enters.*, 78 F.4th at 1018 (quoting *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986)).

Here, the Commission granted an extended, 180-day compliance window (through May 2025) for most of the Amendments, to accommodate the potential need for businesses to "implement or modify systems, software, or procedures." 89 Fed. Reg. at 90516. Moreover, the only operative provision that becomes effective on January 14, 2025, merely prohibits sellers from making material misrepresentations—conduct that has been forbidden by the FTC Act for decades and that would require no additional compliance costs. *See* 89 Fed. Reg. at 90476 (explaining that the effective date for 16 C.F.R. §§ 425.4-425.6 is May 14, 2025). Given this context, we find that Petitioners' claims regarding irreparable harm are overstated and outweighed by the public interest in ensuring timely enforcement of the Amendments, which prevent widespread abuses that long have harmed consumers.

First, Petitioners claim a First Amendment injury, asserting that the Amendments prevent them from "sharing [e] important information with the customer at the time of cancellation." Pet. 13. But, as discussed, Petitioners' First Amendment claims are unlikely to succeed. *Supra* pp. 11-12. The Amendments in fact *preserve* sellers' ability to disclose information and make offers to consumers in response to cancellation requests—so long as sellers do not otherwise impose unreasonable barriers to cancellation. *Supra* pp. 8, 12.

Second, Petitioners claim that businesses will suffer injuries to reputation and goodwill with consumers, who Petitioners contend will be "confuse[d], frustrate[d], and annoy[ed]" about receiving factual disclosures and requests for consent to be charged, and or about having their subscriptions "cancelled inadvertently." Pet. 13-14.[12] These predictions rest on pure speculation

[12] Section 5 of the FTC Act and ROSCA already require marketers to disclose all material terms of a negative option transaction. 89 Fed. Reg. at 90497. The Amendments require four specific disclosures to appear immediately adjacent to the means of recording the consumer's consent: (1) that consumers will be charged and, if applicable, that those charges will occur on a recurring basis unless the consumer takes steps to stop them; (2) each deadline by which the consumer

devoid of evidentiary support. Petitioners cannot satisfy their "burden to show irreparable harm" through "uncorroborated claim[s]" that they will suffer loss of "goodwill and reputation." *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1020 (8th Cir. 2020). *See also H&R Block, Inc. v. Block, Inc.*, 58 F.4th 939, 952 (8th Cir. 2023) (holding that "speculative" concerns about "potential negative publicity and loss of intangible assets, such as reputation and goodwill" are "inadequate to demonstrate a clear and present need to equitable relief") (cleaned up). In fact, the rulemaking record signals that the Amendments are more likely to *improve* goodwill by protecting customers from misleading disclosures and omissions, non-consensual enrollment in recurring billing programs, and subscriptions that are unduly burdensome to cancel.

Third, Petitioners' assertions about compliance costs (Pet. 14) do not alone warrant a stay, particularly given the extended, 180-day runway for compliance with most of the Amendments. As the Commission has explained, many businesses will already have a head start on compliance, since they must comply with other federal and state laws and regulations relevant to negative option practices, and since the Amendments are consistent with existing FTC guidance on how to avoid deception when marketing negative option programs. 89 Fed. Reg. at 90516-90517.[13] For example, apart from the Amendments, Section 5 of the FTC Act independently requires marketers to (1) clearly and conspicuously "disclose the material terms of a negative option offer," including costs and how to cancel; (2) "obtain consumers' consent to such offers"; and (3) honor cancellation requests without "imped[ing] the effective operation of promised cancellation procedures." 89 Fed. Reg. at 90478. Thus, for businesses that were already complying with the law, the Amendments are unlikely to require wholesale changes.

Public interest. In any event, Petitioners' interest in minimizing compliance costs does not outweigh the public interest in preventing injury to consumers during the time when a potential stay would be in effect. *See Nken*, 556 U.S. at 426. Each year, the Commission receives tens of thousands of complaints from consumers injured by "recurring payments for products and services they never intended to purchase nor wanted to continue buying." 89 Fed. Reg. at 90477. Those complaints, as well as the history of federal and state enforcement in this area, show that consumers are often unknowingly enrolled in recurring bill programs, denied refunds, forced to pay to return goods they never ordered, subjected to cancellation procedures more difficult than the procedures they used to authorize the recurring charges, and inundated with upsell attempts before finally being allowed to cancel. *Id.* at 90481-90484. According to studies, more than half of American consumers have been enrolled in recurring subscription plans they did not want, and which have taken consumers an average of three months to cancel. *Id.* at 90483. These harms are so pervasive that an entire industry has emerged in which firms charge consumers a fee to identify and cancel their unwanted subscriptions. *Id.* at 90482.

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must act to stop the charges; (3) the amount and frequency of charges; and (4) information necessary for consumers to locate the simple mechanism for cancellation. 16 C.F.R. § 425.4.

[13] Even if the Amendments *were* stayed, businesses would likely still need to undertake costs in determining how to change their business practices should the rule be upheld on judicial review.

Petitioners are therefore wrong that a stay would cause only "minor inconvenience" to the public. Pet. 15. Even if a stay were in place for a short time, American consumers will widely suffer ongoing financial injury in the form of recurring charges that are unauthorized, unwanted, and unreasonably difficult to cancel. Consumers' interests in avoiding these unfair and deceptive practices outweigh sellers' interests in avoiding compliance with the Amendments, which largely confirm and clarify their preexisting obligations.

C. Conclusion

Petitioners have not shown a likelihood of success or irreparable injury, and the balance of hardships and public interest factors weigh against a stay. Accordingly

IT IS HEREBY ORDERED THAT the Joint Petition for Stay filed by the Electronic Security Association, Inc., the Interactive Advertising Bureau, NCTA – the Internet & Television Association, the Michigan Press Association, the National Federation of Independent Business, Inc., Custom Communications, Inc. d/b/a/ Custom Alarm, the Chamber of Commerce of the United States of America, and the Georgia Chamber of Commerce is **DENIED**.

By the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor
Secretary

SEAL:
ISSUED: December 13, 2024