FEDERAL TRADE COMMISSION

IN THE MATTER OF NEGATIVE OPTION RULE	Project No. P064202

JOINT PETITION FOR STAY OF ELECTRONIC SECURITY ASSOCIATION, INC., INTERACTIVE ADVERTISING BUREAU, NCTA – THE INTERNET & TELEVISION ASSOCIATION, MICHIGAN PRESS ASSOCIATION, 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

RELIEF REQUESTED BY NOVEMBER 1, 2024

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. Petitioners' Challenges Are Likely To Succeed On The Merits 2

A. The FTC Lacks Authority To Promulgate The Rule 3

B. The FTC Failed To Satisfy The Statutory Requirements For A Rulemaking 6

C. The Rule Is Arbitrary And Capricious And Lacks Substantial Evidence 7

D. The Rule Violates The Constitution 10

1. The Rule Violates The First Amendment 10

2. The FTC Is Unconstitutionally Structured 12

II. The Irreparable Harm And Balance Of Equities Factors Warrant A Stay 12

CONCLUSION 15

INTRODUCTION

The undersigned organizations ("Petitioners") respectfully request that the Federal Trade Commission ("FTC" or "Commission") stay the effectiveness of the FTC's Rule Concerning Recurring Subscriptions and Other Negative Option Programs ("Rule"), No. P064202, to allow for judicial review. *Accord* Fed. R. App. Proc. 18(a)(1); 16 C.F.R. § 4.2(d). The Rule was issued on October 16, 2024. Petitioners filed petitions for review of the Rule in the U.S. Courts of Appeals for the Fifth, Sixth, Eighth, and Eleventh Circuits on October 22, 2024, and the Rule should not take effect pending judicial review.

Section 705 of the Administrative Procedure Act permits an agency to "postpone the effective date of action taken by it, pending judicial review," when "justice so requires." 5 U.S.C. § 705. The Commission recently exercised that authority to stay the Combating Auto Retail Scams Trade Regulation ("CARS") Rule due to the "uncertainty" it would cause and the "unnecessary changes" companies believed they would have to make to comply with the CARS Rule.[1]

For those same reasons, and because a court is likely to set aside the Rule, the FTC should stay the Rule, the bulk of which is scheduled to take effect 180 days from Federal Register publication, until the completion of judicial review. The Rule is unlikely to withstand judicial review because, among other things, it is: in excess of the Commission's statutory authority, 15 U.S.C. § 57a(e)(3), 5 U.S.C. § 706; arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, *id.* § 701 *et seq.*; unsupported by substantial evidence, 15 U.S.C. § 57a(e)(3)(A); based on determinations that "precluded disclosure of disputed material facts which w[ere] necessary for fair determination . . . of the rulemaking

[1] FTC, *Order Postponing Effective Date of Final Rule Pending Judicial Review*, https://www.ftc.gov/system/files/ftc_gov/pdf/P204800CARSExtensionOrder.pdf (Jan. 18, 2024).

proceeding taken as a whole," *id.* § 57a(e)(3)(B)(ii); and in violation of the U.S. Constitution and otherwise contrary to law, *id.* § 57a(e)(3), 5 U.S.C. § 706. Without a stay pending judicial review, companies in all industries and across all sectors of the economy will immediately suffer irreparable harm from unrecoverable costs of compliance, burdens on their free speech rights when communicating with customers, and confusion regarding how to comply with the Rule's overbroad, one-size-fits-all requirements. Consumers likewise will be confused and harmed by the Rule's complex requirements, and companies will lose their goodwill if forced to comply with the Rule's unlawful requirements.

To avoid those irreparable harms and the interim regulatory uncertainty, and in light of the balance of the equities, the Commission should stay the effective date of the Rule until the completion of judicial review. Petitioners further respectfully request that the Commission rule on this request by Friday, November 1, 2024, to allow petitioners to seek a judicial stay if needed, and to give the Court of Appeals that will hear these petitions time to adjudicate that request before the Rule takes effect. If the Commission takes no action on this request by that date, Petitioners will deem the request denied.

ARGUMENT

I. Petitioners' Challenges Are Likely To Succeed On The Merits

The Rule is unlikely to withstand judicial review for multiple reasons. Most fundamentally, the FTC lacks authority to promulgate the Rule because the FTC's governing statute has no provisions authorizing the Rule and because Congress has enacted multiple, more limited and tailored statutes that specifically govern negative option plans. Moreover, the Commission violated several important statutory limitations on its rulemaking authority and related procedural requirements in the Magnuson-Moss Act, which modified the FTC Act, when it promulgated the

Rule. The Rule is also unlikely to withstand judicial review because it is arbitrary and capricious, unsupported by substantial evidence, and violates the First Amendment's right to free speech, and because the FTC is unconstitutionally structured.

A. The FTC Lacks Authority To Promulgate The Rule

The entire Rule is unlikely to survive petitioners' challenges because the FTC lacks authority to promulgate the Rule. The Rule is sweeping, encompassing all manner of subscription agreements, which the Rule blithely refers to as "negative option" plans or marketing, across all economic sectors and marketed through all channels of communication. Rule §§ 425.1, 425.2. The Rule covers, by the FTC's own estimate, over a billion paid subscriptions in the United States. Rule at 175. Yet the FTC has conceded that there are "no [statutory] provisions that specifically address negative option marketing" in such a broad manner. *See* Notice of Proposed Rulemaking, *Negative Option Rule*, 88 Fed. Reg. 24716, 24717 (FTC Apr. 24, 2023); Rule at 10. The only legal basis the Commission invokes is its general authority to enact rules that "define with *specificity* acts or practices which are unfair or deceptive" and that are "*prevalent*" under Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1), (b)(3). *See* Rule at 4, 16 n.39. That general language, which Congress adopted to rein in the FTC's rulemaking authority, cannot support the Rule for multiple reasons.

First, the Rule is far from the sort of "specifi[c]" "trade rule" that the statute permits. 15 U.S.C. § 57a(a)(1)(B). Instead, each provision of the Rule contains overly broad and ambiguous terms and mandates including, for example: the disclosure requirement of "all Material terms," regardless of whether they directly relate to the negative option feature; the requirement for a separate consent to negative option features; the ban on misrepresentations of any material fact about a negative option transaction *and* about the underlying good or service; and the required

provision of "simple" cancellation mechanisms that are in the "same medium" and "as easy to use as" sign-up mechanisms. *E.g.*, Rule §§ 425.2(e), 425.3, 425.4(a), 425.5(a)(1), 425.6(b), (c). Worse, the Rule governs all negative option contracts in all industries and sectors of the economy—the opposite of a "specifi[c]" regulation. *See* Rule § 425.1.

Second, the FTC has failed to establish that the problems it identified with respect to negative option plans are "prevalent," 15 U.S.C. § 57a(b)(3), (d), in *any* industry—much less across *all* industries. To establish prevalence, the Commission relied on only a smattering of cases in different contexts and reports from State Attorneys General, without analyzing how any of these cases related to each other or established any widespread pattern. Rule at 7–8. A small number of cherry-picked cases does not establish that any unfairness or deception from negative option plans is so widespread as to be "prevalent."

Third, the FTC's lack of authority to promulgate such a sweeping, economy-wide rule is confirmed by the fact that Congress has enacted multiple laws that govern negative option plans, and each is far more limited than this Rule. In particular, each of the following statutes already provides discrete requirements for negative option marketing in certain industries or for all industries across only specific media: the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8403; the Unordered Merchandise Statute, 39 U.S.C. § 3009; the Electronic Fund Transfer Act, 15 U.S.C. § 1693c; the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108; the Television Viewer Protection Act ("TVPA"), 47 U.S.C. § 562; and the Infrastructure Investment and Jobs Act of 2021, Pub. L. 117-58, § 60504(a)-(b), 135 Stat. 429, 1244 (2021). The FTC cannot render all those statutes superfluous by promulgating a more prescriptive, one-size-fits-all Rule. *See Pulsifer v. United States*, 601 U.S. 124, 143 (2024).

Indeed, Congress's narrower statutes confirm that there is nothing inherently unfair or deceptive about contracts to provide goods or services until the customer cancels; they are a convenient and familiar arrangement in the economy. At minimum, to the extent certain *applications* of those contracts are unfair or deceptive, Congress has already addressed those applications through legislation, and the FTC is already authorized to enforce several of those statutes against impermissible negative option features. The FTC has never adequately explained why the statutes that Congress passed to regulate negative options are insufficient to prevent unfair or deceptive acts or practices. They only confirm that the FTC lacks authority to promulgate the Rule.

If there were any doubt about the absence of statutory authority here (and there isn't), it is resolved by the major questions doctrine and similar legal principles. The FTC's limited authority to promulgate "specifi[c]" regulations regarding unfair or deceptive acts or practices certainly contains no express grant of power to adopt the Rule. Congress has decided that more narrow statutes are appropriate, and the FTC cannot use a "long-extant" authority, derived from "vague language" in the FTC Act, to impose a broader, "transformative" set of regulations on all negative option contracts in all industries. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022).[2] Nor can the FTC federalize an area of traditional state regulation and severely disrupt the "usual constitutional balance of federal and state powers" without a clearer statement from Congress. *Bond v. United States*, 572 U.S. 844, 858 (2014) (internal quotation marks omitted).

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[2] If FTC does have such authority, it would only confirm that Section 18 lacks any intelligible principle and thus violates the nondelegation doctrine. *See Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.).

B. The FTC Failed To Satisfy The Statutory Requirements For A Rulemaking

Congress enacted the Magnuson-Moss Act for FTC rulemaking to authorize the agency to adopt only regulations that are targeted to a specific, widespread need and not unduly burdensome or unclear. A court is likely to vacate the Rule because the FTC exceeded this authority and failed to adhere to statutory requirements for rulemaking.

First, the Commission failed entirely to perform the required preliminary regulatory analysis in the NPRM pursuant to FTC Act Section 22. *See* 15 U.S.C. § 57b-3(b)(1). The NPRM asserted that the Commission did not "have sufficient empirical data" to perform a preliminary regulatory analysis, 88 Fed. Reg. 24,731, but that analysis was not optional. The Commission was *required* to perform the preliminary regulatory analysis because, as the presiding officer in the informal hearing found, *see* Recommended Decision, FTC No. P064202 (Apr. 12, 2024), the Rule will have annual effects on the national economy of $100 million or more. Rule at 154–161. Including a final regulatory analysis when promulgating the Rule does not cure this failure. 15 U.S.C. § 57b-3(b)(2)(E).

Second, the Commission's informal hearing was inadequate under 15 U.S.C. § 57a(b)(1)(C). In particular, the Commission improperly excluded multiple "disputed issues of material fact" by construing all the disputed issues raised by interested parties as "legislative facts" (*i.e.*, policy issues) and not "specific facts," and applying a novel and incorrect summary judgment standard.[3] Both of those arbitrary decisions fly in the face of the plain text, structure, and purpose of the informal hearing requirement. The Commission's rulings limiting cross-examination or

[3] Despite the Commission's improper decision that there were no disputed issues of material fact, the presiding officer of the informal hearing designated two issues: one related to the impact of the Rule on the economy and the other regarding disclosure and recordkeeping costs.

rebuttal submissions precluded the disclosure of disputed material facts necessary for a fair determination of the rulemaking proceeding. *See id.* § 57a(e)(3)(B).

Third, as explained above, the FTC 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.

C. The Rule Is Arbitrary And Capricious And Lacks Substantial Evidence

The Rule is also unlikely to withstand judicial review because it is arbitrary and capricious and unsupported by substantial evidence. Agency rules are "arbitrary and capricious" where "the agency has relied on factors that 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). And a Rule is unsupported by substantial evidence if the record lacks "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522 (1981). Here, the Commission has committed each of those errors.

Failure to Consider Substantial Burdens on Companies and Consumers. The Commission has failed to adequately justify or offer substantial evidence to support the Rule's requirements regarding cancellation, consent mechanisms, and disclosures. Among other things, the requirements for cancellation mechanisms "as easy to use as" and in the "same medium" as the sign-up mechanism will impede companies from providing their customers with additional, truthful information or better offers that could lower their prices or afford them other benefits. For example, when a consumer tries to cancel only one service in a bundle of services, the cancellation

typically will affect the price and terms of the other services in the bundle. But the requirement for a simple cancellation mechanism that is as easy to use as, and in the same medium as, the sign-up mechanism could impede many providers from truthfully explaining such effects to the consumer—including the possibility that other services would be canceled as well, that the price of other services in the discounted bundle would increase, or that the provider would offer a better price if the consumer retained the service. *See, e.g.*, Interactive Advertising Bureau Comment 16–17 (IAB Comment). That is a significant detriment to consumers, yet the Commission's cursory dismissal of this scenario and burdens is arbitrary and capricious. The Commission also has failed to address burdens that both companies and their customers will incur from compliance with the Rule's disclosure and consent requirements, including consumer fatigue from excessive disclosures and lost opportunity costs from overly complex consent mechanisms. And the Commission has failed to address substantial burdens that small businesses will face when complying with these complex regulations. All those failures are arbitrary and capricious. *See Chamber of Commerce v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023).

Scope. The Commission has failed to explain or justify the scope of the Rule, let alone offer substantial evidence to support the Rule's economy-wide scope. Most critically, the Commission fails to justify such a sweeping, one-size-fits-all rule for all the practices it calls negative option plans across all industries, rather than a narrower and more tailored rule in line with its statutory authority and existing statutes, and targeted to specific, harmful practices. *Accord Ryan LLC v. FTC*, No. 3:24-cv-00986, 2024 WL 3879954, at *13 (N.D. Tex. Aug. 20, 2024) (finding that the Commission's "handful of studies" did not support a "categorical ban" on non-competes). The Commission also fails to justify several aspects of the Rule, such as the cancellation requirement's application to bundled goods or services, the misrepresentation ban's

application to facts unrelated to the negative option feature, or why the Rule applies to business-to-business contracts—including contracts between small businesses and large commercial customers. The Commission's failure to explain or justify that overbreadth is arbitrary and capricious. *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17–18 (D.C. Cir. 2015).

Alternatives. The Commission also fails to explain why other certain obvious alternatives are not sufficient to regulate negative option plans—such as a more targeted Rule that regulates only fraudulent negative option plans in certain industries. *See Ryan LLC*, 2024 WL 3879954 at *13–*14. The Rule has a terse discussion of two alternatives—not pursuing the rulemaking or limiting the Rule to only in-person or mail marketing—but then quickly rejects both as not covering a significant amount of conduct that the Commission would like to regulate. But again, the Rule ignores obvious alternatives such as targeting the most egregious problems (*e.g.*, fraud) and particular industries with a history of prevalent unfair or deceptive negative option features.

Justification in light of existing law. The Commission has not explained or justified the need for the Rule in light of extensive federal and state regulations already in place; nor has the Commission explained how the costs of navigating yet another layer of regulations are outweighed by the benefits of the Rule. *See* NCTA Supplementary Submission; PDMI Comment at 2; News Media Alliance Comment at 10–11. As detailed above, Congress has already provided the Commission with the means to enforce multiple statutes, such as ROSCA, that already regulate certain negative option plans. Multiple states also have statutes that govern negative option plans. *See* IAB Comment at 8. Given those federal and state laws, the Commission has failed to explain why the Rule is necessary—and worse, the Commission has failed to detail with specificity the unfair or deceptive acts or practices that existing statutes do not cover but that the Commission

believes to be so prevalent as to warrant the Rule. *See Ohio v. EPA*, 144 S. Ct. 2040, 2054–55 (2024) ("Awareness is not itself an explanation."); Rule at 185 n.587.

Interaction with existing law. The Rule is also arbitrary and capricious because the Commission did not explain how the Rule can be reconciled with the many existing federal and state laws that already govern negative option plans. For example, the disclosure requirements in the Rule are in many respects different from, and more extensive than, the TVPA. Although the Commission noted that the TVPA already regulates the very same practices as the Rule, Rule at 184–85 n.586, the Commission failed to recognize the significant differences and inconsistencies in the two regulatory schemes. And the highly prescriptive cancellation requirements in the Rule are inconsistent with the flexible "simple mechanisms" statutory cancellation regulation in ROSCA, 15 U.S.C. § 8403, by imposing a standard for cancellation mechanisms for each medium (over the internet, telephone, in-person) and prohibiting companies from having a customer service agent speak to a customer seeking to cancel service in most situations. The Commission did not clarify how the Rule avoids those problems, even though the "cumulative effect" of related rulemakings is "unquestionably an important aspect of the problem" that the Commission must consider. *All. For Hippocratic Med. v. FDA*, 78 F.4th 210, 246 (5th Cir.), *vacated on other grounds*, 144 S. Ct. 367 (2024).

D. The Rule Violates The Constitution

1. The Rule Violates The First Amendment

A court is also likely to vacate the Rule because it violates the First Amendment. The Rule regulates companies' speech—which is protected by the First Amendment even if it "does no more than propose a commercial transaction." *Va. State Bd. of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quotation marks omitted). Commercial speech "that is

not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). At least three provisions of the Rule fail this test.

Restraints on communications. Section 425.4's prohibition of communication that detracts from the mandatory disclosure runs afoul of the First Amendment because of that provision's extreme breadth and the chilling effect on truthful speech. What counts as "detract[ing] from" is easily manipulable and difficult to ascertain in advance, chilling protected speech. That is not proportionate or tailored to any interest the Commission thinks it has—indeed, the Commission has not even tried to identify a substantial interest in this speech prohibition. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

Overbroad and unjustified compelled disclosures. The Rule's extensive and burdensome disclosure requirements also run afoul of the First Amendment's right not to speak. Even commercial disclosure requirements cannot be "unjustified or unduly burdensome"; they must be designed to "remedy a harm that is potentially real[,] not purely hypothetical" and must "extend no broader than reasonably necessary." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 776–78 (2018) (internal quotations and citations omitted). Here, the Commission has failed to identify real harms that the Rule's disclosure requirements will prevent. And the disclosure requirements—mandating that companies disclose all "material terms," regardless of their relation to a negative option feature, in a "clear and conspicuous manner" that is set off from other text—are patently overbroad and unduly burdensome.

Chilling truthful and lawful speech. The Rule's requirement for a "simple" cancellation mechanism that is as easy to use as the customer's sign-up mechanism and that effectively limits the company from sharing important information with the customer at the time of cancellation also severely burdens companies' First Amendment rights. The Rule requires the seller to provide a cancellation mechanism through the "same medium" as the original consent, Rule at 122, and estimates that a compliant mechanism will take "no more than 30 seconds to one minute," Rule at 164. These artificial constraints are unrealistic for many types of services and will prevent companies from providing important information to customers at the time of cancellation. Companies have a protected First Amendment right to speak with their customers, especially at the time of a cancellation, and the Rule directly burdens that speech without sufficient justification. *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 762. At minimum, the Rule will chill companies from engaging in this speech out of fear that the FTC will interpret the "simple" cancellation requirement to preclude such speech. This, too, is a First Amendment violation.

2. The FTC Is Unconstitutionally Structured

The Commission also has no authority to adopt the Rule because the Commission's structure violates the Constitution. Since the Supreme Court upheld the constitutionality of the FTC Act's removal limits, *see Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Commission has acquired significant Executive Power that warrants overruling that case. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 216 n.2, 231 (2020); *id.* at 239 (Thomas, J., concurring).

II. The Irreparable Harm And Balance Of Equities Factors Warrant A Stay

In the absence of a stay, businesses subject to the Rule face significant and irreparable harms. Irreparable harm exists where "there is no adequate remedy at law." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (internal quotation marks omitted). Financial losses are

irreparable "where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation" or "where the loss threatens the very existence of the movant's business." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016) (internal quotation marks omitted); *see also Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023); *Georgia v. President of the United States*, 46 F.4th 1283, 1302 (11th Cir. 2022); *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996). As such, the "nonrecoverable costs of complying with a putatively invalid regulation typically constitutes irreparable harm." *Rest. L. Ctr. v. DOL*, 66 F.4th 593, 597 (5th Cir. 2023).

The Rule inflicts three kinds of irreparable harm. *First*, the Rule violates the First Amendment rights of covered entities. The loss of companies' "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As discussed, the prohibition on communication that "detracts" from required disclosures (as contained in both the disclosure and consent provisions) is a severe limitation on speech, and the requirement for a cancellation mechanism "as easy to use as" the sign-up mechanism that effectively limits companies from sharing important information with the customer at the time of cancellation will prohibit and chill a substantial amount of lawful speech—all of which violates the First Amendment. Subjecting all companies and entire industries to this unconstitutional regulation "even briefly" would inflict an irreparable injury. *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984).

Second, the Rule will cause harm to companies' customer goodwill. For example, the requirement to obtain "separate" consent to the negative option feature will confuse, frustrate, and annoy customers. The requirement for a "simple" cancellation mechanism that is "as easy to use as" the sign-up mechanism will likewise cause companies to suffer reputational injuries if

customers' important services, such as security services, are cancelled inadvertently, without a full understanding of the consequences of cancellation, or by third parties without authorization to cancel. And the requirement for excessive disclosures will irritate the customers of many businesses while unnecessarily complicating otherwise easy transactions for smaller businesses, like lawn care companies. The harm to companies from losing customer goodwill will be irreparable.

Third, the Rule will harm companies by causing them to incur massive new and unrecoverable costs of compliance. Companies must redesign their advertising, design and engineer new customer enrollment and cancellation processes across all media, make corresponding changes to their apps, websites, and telephone and in-person procedures, implement new training and staffing protocols, obtain legal review, and implement new recordkeeping systems—to name just a few of the many burdens that companies will incur. Because all of those changes will take time, companies will need to begin incurring these costs well ahead of the Rule's effective date in order to ensure compliance. And those costs will be compounded because of the Rule's often vague and ambiguous requirements—such as the requirement to offer an in-person cancellation method "where practical" or the ban on statements that "detract from" required disclosures and consent. If the Rule is not stayed, companies will be forced to incur substantial costs in trying to determine how to simultaneously comply with those vague requirements and with other existing federal and state laws and regulations. *See* Recommended Decision, *supra*; NCTA, Supplementary Submission, at 10–11. And those costs will be unrecoverable due to the Commission's sovereign immunity and thus constitute irreparable harm. *See Wages & White Lion Invs., LLC v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994); *Georgia*, 46 F.4th at 1302.

A stay would do no harm to the Commission other than to briefly delay a Rule it adopted five years after the advance notice of proposed rulemaking. Rule at 15 n.38. This is a minor inconvenience and cannot outweigh the substantial costs and other harms that the regulated parties face due to the sweeping nature of the Rule. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). The stay is in the public interest for similar reasons: while the Commission claims that its Rule will ultimately benefit the public, that is contested and inconsistent with the record evidence in the FTC's proceeding. But the substantial costs and burdens this Rule will impose on the regulated entities are readily identifiable. *See id.* Given that the enforcement of this Rule would inflict harms on the parties, the costs imposed have been underestimated, and the benefits have been overestimated, the public interest favors resolving this crucial dispute before allowing this sweeping new regulation to take effect. Moreover, the many federal and state laws that already govern negative option plans will continue to protect against any actual consumer harm that may be caused by misuses of negative option plans while the litigation proceeds.

There is, in short, no reason *not* to pause implementation of this transformative, economy-wide Rule that categorically deems "deceptive" a convenient and familiar commercial arrangement many consumers value and that will dramatically affect the ways American businesses and their customers interact with each other.

CONCLUSION

The above-described errors in the Rule and the resulting harms are not exhaustive, but they amply show why the Rule should be stayed until the completion of judicial review. Accordingly, we respectfully request that the Commission stay the effective date of the Rule pending judicial review.

Dated: October 25, 2024

Respectfully submitted

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