Nos. 24-3137 (lead), 24-3388, 24-3415, 24-3442, 24-3469

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IN RE: MCP NO. 192, NEGATIVE OPTION RULE

CUSTOM COMMUNICATIONS, INC., D/B/A CUSTOM ALARM, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Rule of the Federal Trade Commission (RIN 3084—AB60)

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO MOTION FOR STAY PENDING DISPOSITION OF PETITIONS FOR REVIEW

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INTRODUCTION

Petitioners' request for a stay of the Federal Trade Commission's amended Negative Option Rule ("Rule") should be denied. Petitioners fail to show that their challenge to the Rule is likely to succeed or that they will suffer irreparable injury absent a stay. Moreover, any harm to petitioners is outweighed by the public interest in prompt implementation of the Rule, which will prevent unfair and deceptive practices causing ongoing financial harm to consumers.

The Commission amended the Rule to address widespread abuse of "negative option" features, which allow a seller to interpret a consumer's silence or failure to take affirmative action as acceptance of an offer and agreement to recurring charges for goods or services. Familiar examples include gym memberships, streaming services, and "free" trials that convert to automatically billed subscriptions after a cancellation period. Although negative option programs can benefit sellers and consumers, many consumers are enrolled unwittingly and can go months or years without discovering how much money they are losing through recurring charges. And once consumers discover the charges and try to cancel, they often face insuperable obstacles from

sellers who force them to endure multiple phone calls, long hold times, and countless automated help menus. Because of these obstacles, many consumers are stuck paying for subscriptions they no longer want.

The amended Rule does not restrict the use of negative option programs but instead imposes four common-sense requirements to prevent abuse. First, sellers may not make material misrepresentations. Second, sellers must disclose important information, including how much and when a consumer will be charged and how to cancel recurring charges. Third, sellers must obtain the consumer's express, informed consent to the negative option feature. Finally, sellers must provide a cancellation mechanism at least as easy to use as the method the consumer used to enroll, *e.g.*, a consumer who signed up online must be able to cancel online without having to call and speak to a live agent. This provision is known as the "click-to-cancel" requirement.

None of petitioners' attacks on the Rule have merit. The FTC has express authority to prescribe rules that define conduct that is unfair or deceptive and impose prophylactic requirements to prevent such conduct. 15 U.S.C. § 57a(a)(1)(B). The Commission properly exercised

those authorities, followed all procedural requirements, and reasonably justified the Rule's requirements and scope. The First Amendment does not prevent the Commission from prohibiting deceptive commercial speech or imposing reasonable disclosure and consent requirements. Furthermore, petitioners' claims of irreparable injury are speculative, overstate likely compliance costs, and ignore the ongoing harm to consumers if the Rule's implementation is delayed.

BACKGROUND

A. The FTC's Rulemaking Authority

The FTC Act prohibits "unfair or deceptive acts or practices" and "empower[s] and direct[s]" the Commission to prevent them. 15 U.S.C. § 45(a)(2). The Commission may define unfair or deceptive acts or practices through case-by-case adjudication, *id.* § 45(b), or rulemaking. Courts have recognized that rulemaking may be "fairer to regulated parties" than adjudication because it provides clear guidance and allows public participation in the decision-making process. *Nat'l Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 681-82 (D.C. Cir. 1973).

In 1975, Congress enacted Section 18 of the FTC Act, which preserved existing rules and confirmed the Commission's authority to prescribe "rules which define with specificity acts or practices which are

unfair or deceptive," including "requirements … for the purpose of preventing such acts or practices." 15 U.S.C. § 57a(a)(1)(B); Pub. L. 93-637, § 202(c), 88 Stat. 2198 (1975). Congress also established special rulemaking procedures beyond those the Administrative Procedure Act ("APA") ordinarily requires. Among other things, the Commission must give interested persons an opportunity for an informal hearing, and the final rule must include a statement of basis and purpose ("SBP") describing the prevalence of the unfair or deceptive acts or practices. *See* 15 U.S.C. § 57a(b)(1), (c), (d)(1).

Contrary to petitioners' contention (Mot.6), Congress did not intend Section 18 to "effectively prohibit" rulemakings. Congress saw rulemaking as "an important power by which the Commission can fairly and efficiently pursue its statutory mission." H.R. Rep. No. 93-1606 at 31 (1974). Congress found that the Commission would be "hampered as an effective force in promoting fair and free competition" if forced to rely exclusively on case-specific enforcement. H.R. Rep. No. 93-1107 at 29 (1974). Section 18 thus effects a "broad delegation of discretionary authority to the FTC to define unfair practices" by rule. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 969 (D.C. Cir. 1985). The Commission has

used Section 18 over the years to issue or amend numerous rules, including several that apply across industries and economic sectors.[1]

B. The Negative Option Rule Amendments

The Commission first issued the Negative Option Rule in 1973 and reaffirmed and amended it in 1998. Since then, negative option features have proliferated, often with adverse effects on consumers. Studies show that more than half of Americans have been unwittingly enrolled in recurring subscriptions; such charges take three months to cancel on average. App.13. Each year, the Commission receives tens of thousands of complaints about marketers across industries who failed to obtain informed consent or disclose important information about recurring charges, created unduly onerous barriers to cancellation, and made overt misrepresentations. App.11-14. These violations have generated dozens of FTC and state enforcement actions. App.14.

In light of these problems, the Commission in 2019 initiated the process of amending the Rule, explaining that "[t]he existing patchwork

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[1] *E.g.*, Mail, Internet, or Telephone Order Merchandise Rule, 16 C.F.R. Pt. 435; Cooling Off Rule, 16 C.F.R. Pt. 429; Franchise Rule, 16 C.F.R. Pt. 436; Holder-in-Due-Course Rule, 16 C.F.R. Pt. 433; Credit Practices Rule, 16 C.F.R. Pt. 444.

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of laws and regulations does not provide industry and consumers with a consistent legal framework across different media and types of plans." 84 Fed. Reg. 52393, 52396 (Oct. 2, 2019). In 2023, the Commission issued a notice of proposed rulemaking ("NPRM") and received 16,000 public comments. App.10. In early 2024, a neutral presiding officer conducted three informal hearings at which interested parties, including petitioners Interactive Advertising Bureau and NCTA, made written and oral submissions regarding disputed factual questions. *See* App.83-90.

After considering the comments and evidence from the informal hearings, the Commission issued the final Rule, which revised and narrowed the proposal. 89 Fed. Reg. 90476 (Nov. 15, 2024). The Rule contains four core provisions that are separate and severable and apply "[i]n connection with promoting or offering for sale any good or service with a Negative Option Feature." App.68-69.

- Section 425.3 bars sellers from misrepresenting material facts, including the terms of the negative option feature, cost, and other information about the good or service.

- Section 425.4 requires sellers to clearly and conspicuously disclose all material terms of the transaction, including the recurring nature of the charges, the amount and frequency of the charges, the deadlines for consumers to prevent or stop the charges, and how to cancel the charges.
- Section 425.5 requires sellers to obtain the consumer's express, informed consent to the negative option feature. The consent must be unambiguous and separate from the rest of the transaction.
- Section 425.6 requires sellers to provide "a simple mechanism" that allows consumers to cancel the negative option feature and immediately stop all recurring charges. The cancellation mechanism "must be at least as easy to use as the mechanism the consumer used to consent to the Negative Option Feature," and must allow consumers to cancel "through the same medium the consumer used to consent." If a consumer consented in person, the seller must provide consumers with either a phone number or an electronic medium to cancel.

The Rule becomes effective on January 19, 2025.[2] To accommodate the potential need of businesses to "implement or modify systems, software, or procedures," the Commission set a compliance date of May 14, 2025, for most of the new provisions. App.46. The only operative provision with a January compliance date is the prohibition on material misrepresentations; because the FTC Act already forbids material misrepresentations, the prohibition will impose no additional compliance costs. *Id.* On December 13, 2024, the Commission denied petitioners' request to stay the Rule pending review. *See* FTC Att.A.

ARGUMENT

To obtain a stay, petitioners must show (1) they are likely to succeed on the merits, (2) they will suffer irreparable injury absent a stay, and a stay will not substantially injure (3) other parties or (4) the public interest. *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986). The first factor is the most significant. *Missouri v. Biden*, 112 F.4th 531, 536 (8th Cir. 2024). In addition, a stay is warranted only

[2] The Federal Register states that the Rule becomes effective January 14, but under 5 U.S.C. § 801(a)(3)(A), it may not take effect until 60 days after the Commission submitted it to Congress, which occurred on November 20, 2024.

when the movants' "irreparable" injury is "certain and great," *Packard Elevator*, 782 F.2d at 115, and exceeds the harm consumers and the public would likely suffer if a stay were granted, *see Missouri*, 112 F.4th at 538. Petitioners have not carried their burden under this stringent standard.

I. PETITIONERS ARE UNLIKELY TO SUCCEED.

Petitioners raise a hodgepodge of undeveloped arguments, none of which establishes the requisite "strong showing that [petitioners are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (cleaned up).

A. The Commission Had Authority under Section 18 to Amend the Rule.

Section 18 of the FTC Act authorizes the FTC 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). The amended Rule accordingly describes a specific category of contracts—those with "Negative Option Features"—and specifies certain conduct related to such contracts that is unfair or deceptive.

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1. Petitioners' argument that the Rule fails the specificity requirement is wrong and unsupported by authority. Petitioners contend that the Rule "wraps together over *one billion* recurring subscriptions" in various industries that "have nothing in common *except that they continue until the customer cancels*." Mot.13 (second emphasis added). The last clause shows the error in petitioners' argument. These contracts *do* have something in common: They all contain negative option features that allow sellers to keep charging consumers, month after month, until consumers affirmatively cancel. Petitioners' suggestion that rules must be limited to particular industries or fewer transactions is completely atextual—nothing in Section 18 imposes such constraints. *See supra* 5 n.1 (listing industry-neutral FTC Rules).

2. Petitioners' complaint that the requirement to disclose "material terms" is "amorphous" (Mot.13) is unsupported and meritless. Materiality requirements are commonplace in agency regulations; a well-known example is SEC Rule 10b-5, which makes material misstatements or omissions unlawful in connection with securities transactions. 17 C.F.R. § 240.10b-5. Here, in response to comments from

industry, the Commission defined "material" to mean "likely to affect a person's choice of, or conduct regarding, goods or services" and explained that this definition is "consistent with established law." App.22; *see* App.27 & n.298; *see also* App.8 (explaining that the FTC Act already requires marketers to "disclose the material terms of a negative option offer"). That different kinds of information may be material for different kinds of transactions does not make the materiality standard amorphous or vague.

3. Petitioners are also wrong that the prohibition on misrepresentations of "*any* material fact" simply restates the statute's ban on deceptive acts or practices. Mot.13. First, the prohibition does not encompass *all* deceptive acts or practices—it is limited to misrepresentations, a particular kind of deceptive conduct. Second, it is limited to material misrepresentations "[i]n connection with promoting or offering for sale any good or service with a Negative Option Feature." App.68. With those limitations, the prohibition is neither "amorphous" nor non-specific.

4. Petitioners' arguments regarding prevalence, Mot.14, ignore both statutory language and the Commission's findings. Section 18

provides that the SBP must include "a statement as to the prevalence of the acts or practices treated by the rule." 15 U.S.C. § 57a(d)(1)(A).[3] The Commission included such a statement. *See* App.11-14. Regardless, petitioners cannot challenge the prevalence finding because the "contents and adequacy" of the SBP are not "subject to judicial review in any respect." 15 U.S.C. § 57a(e)(5)(c).

In any case, the Commission documented a widespread pattern of unfair or deceptive conduct relating to negative options based on (1) "State, private, and Federal actions"; (2) "consumer complaints and comments"; and (3) "studies." App.11. That plainly satisfies the requirement. Nothing in Section 18 requires the Commission to separately address prevalence for each industry that a rule covers.

5. Petitioners err in suggesting that the amended Rule conflicts with other federal laws. Mot.15. Those statutes set a floor of conduct

[3] Section 18 separately provides that the Commission may issue an NPRM only where it has "reason to believe" that the conduct addressed in the proposed rule is prevalent. 15 U.S.C. § 57a(b)(3). The Commission satisfied the requirement by identifying in the NPRM dozens of "recent FTC cases" as well as "thousands of complaints" received "each year related to negative option marketing." 88 Fed. Reg. 24716, 24719 (Apr. 4, 2023).

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that Congress decided must be prohibited, but they do not *authorize* any conduct that the Rule prohibits. At most, the FTC Act and the Rule overlap with other statutes that address negative options in certain contexts, but it is well-established that where two statutory schemes apply to "the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Petitioners are also wrong that the Rule "is broader and more prescriptive than any statute enacted by Congress." Mot.16. The Rule defines with specificity conduct that is already unlawful—and subject to FTC adjudication—under section 5 of the FTC Act. *See* 15 U.S.C. § 45.

6. The major questions doctrine does not apply here. That doctrine counsels hesitation when an agency purports to "discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority," especially when the "newfound power" arises from "vague language of an ancillary provision." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (cleaned up). In such cases, the agency must "point to clear congressional authorization for the power it claims." *Id.* at 744.

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Here, Congress authorized the FTC to issue rules defining unfair or deceptive acts or practices. 15 U.S.C. § 57a(a)(1)(B). Section 18 is not "vague," "ancillary," or "newfound." *West Virginia*, 597 U.S. at 724. It is a core part of the Commission's mandate, pursuant to which—over decades—the Commission has issued or amended numerous rules, including several that apply across industries. *See supra* 5 n.1. Indeed, when Congress enacted Section 18, the Commission already had a rule regulating some negative option plans, and Congress preserved such existing rules. *See* 88 Stat. 2198. Furthermore, Section 22 of the FTC Act recognizes that amendments to Section 18 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). Congress could not have been clearer both in authorizing the Commission to define unfair or deceptive acts or practices by rule and in recognizing that such rules might have significant economic effects.

Nor does Section 18 violate the nondelegation doctrine. Mot.17. The Supreme Court has "held, time and again, that a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to

exercise the delegated authority is directed to conform." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (cleaned up). That standard is "not demanding." *Id.* at 146. Here, Congress has limited the Commission's rulemaking authority to addressing acts or practices that are "unfair or deceptive," and these guideposts easily satisfy the "intelligible principle" standard.[4]

B. The Commission Complied with Procedural Requirements.

Petitioners are also unlikely to prevail on their claims that the Commission contravened FTC Act procedural requirements.

1. In focusing on the requirements for a "rule" in Section 22 of the FTC Act (Mot.18-19), petitioners overlook an important statutory exception. To be sure, Section 22 provides that an NPRM for a proposed "rule" must include a preliminary regulatory analysis containing, *inter alia*, a preliminary cost-benefit analysis. 15 U.S.C. § 57b-3(b)(1). But Section 22 also provides that a "rule" "does not include any amendment to a rule" unless—among other things—the Commission "estimates that the amendment will have an annual effect on the national economy of

[4] Section 5(n) of the FTC Act establishes standards for determining when an act or practice is "unfair." *See* 15 U.S.C. § 45(n).

$100 million or more." *Id.* § 57b-3(a)(1)(A). This rulemaking involved an amendment, and when it issued the NPRM, the Commission "preliminarily determined that the proposed amendments to the Rule w[ould] not have such effects on the national economy" and that none of the other conditions for making an amendment a "rule" applied. 88 Fed. Reg. at 24731. Accordingly, the Commission was not required to prepare a preliminary regulatory analysis. Nonetheless, it requested comment on the economic effects of the rule. *Id.*

Several parties, including some of the petitioners, submitted comments arguing that the proposed amendments would have an annual effect of more than $100 million. They requested an informal hearing, and the presiding officer agreed with their position. App.88. In light of the comments and that decision, the Commission revisited its analysis and included a final regulatory analysis with the final Rule. App.47-64; *see also* 15 U.S.C. § 57b-3(b)(2). Thus, petitioners had ample opportunity to comment on the Rule's economic effects and to present evidence at the informal hearing, and they took those opportunities. Petitioners cite nothing to support their suggestion that the

Commission was required to restart the entire rulemaking process simply to supply a preliminary regulatory analysis.

2. Petitioners' complaints about the informal hearing process, Mot.18, likewise lack merit. The process here was streamlined compared to past rulemakings because the Commission revised its rules in 2021 to reform processes that had become costly and wasteful. *See* 86 Fed. Reg. 38542, 38544 (July 22, 2021) (amending 16 C.F.R. § 1.13). The amendments were designed to "modernize the procedures governing rulemaking …, provide for efficient conduct of rulemaking proceedings, and … better reflect the requirements of the FTC Act." *Id.* Petitioners do not contend that these amendments violated the FTC Act.

Petitioners' complaint that the Commission "refused to consider" certain issues makes no sense. Mot.18. The Commission does not officiate informal hearings; a neutral presiding officer does. 15 U.S.C. § 57a(c)(1)(B). At the informal hearing, interested persons may present their position and, "if the Commission determines that there are disputed issues of material fact it is necessary to resolve," they may submit rebuttals and conduct cross-examination. 15 U.S.C. § 57a(c)(2)(B). In this case, the Commission did not designate any

disputed issues, but the presiding officer did at the request of interested parties, including some petitioners. App.11. Petitioners have not identified any required procedure that was not followed.

C. The Amendments Are Not Arbitrary and Capricious.

Petitioners' arbitrary-and-capricious claims (Mot.19-22) are also unlikely to succeed because the Commission addressed each issue that petitioners claim was ignored. The arbitrary-and-capricious standard is "deferential," and "simply ensures that the agency has acted within a zone of reasonableness and, in particular, reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). The Commission's detailed explanation of the basis for the Rule, spanning 61 pages of the Federal Register, satisfies this standard.

1. Contrary to petitioners' contentions (Mot.19), the Commission explained why an economy-wide rule addressing negative option features was necessary. Evidence showed that abuses of negative option programs are prevalent across diverse industries and sectors. App.11-14. Because the same kind of harms can occur in any industry,

the amended Rule properly addresses such abuses in an "industry-neutral fashion." App.13-14, 24-25.

2. The Commission did not "ignore" that small businesses may offer subscription services to larger businesses. Mot.19. It declined to exempt business-to-business ("B2B") transactions given evidence that marketers target small-and-medium sized businesses with deceptive and predatory negative option practices. App.19. But the Commission emphasized that "sophisticated business consumers" will retain the "ability … to individually negotiate B2B agreement terms," including cancellation methods. *Id.*

3. Regarding "simple cancellation" requirements, the Commission considered and responded to the comments it received, which were overwhelmingly supportive. App.34-42. It addressed petitioners' concerns (Mot.20) in confirming that the Rule allows sellers to respond to a cancellation request by (1) imposing "reasonable verification, authentication, or confirmation procedures"; (2) "appris[ing] consumers of any negative consequences of cancellation"; and (3) offering "valuable concessions (*e.g.*, lower prices) to consumers." App.36, 42.

Petitioners seize on the Commission's estimate that an average online cancellation should take less than a minute (Mot.20), but they ignore the Commission's caveat that this estimate "is not intended to set a standard." App.50 & n.545. The Rule merely requires that cancellation be as simple as was sign-up, not that cancellation be completable in a particular timeframe. The Commission also addressed bundled services (Mot.20), explaining that the Rule does not require sellers to employ the "exact same" mechanism for enrollment and cancellation. App.40. A seller may cancel individual services even if consumers had signed up for a bundle, so long as there is reasonable symmetry between the enrollment and cancellation process in terms of "time, burden, expense, and ease of use." *Id.*

4. The Commission also explained the need for the requirement that sellers obtain separate informed consent to the negative option feature. This provision ensures that consumers do not "miss[] the negative option feature," and is justified by the "imperative" need for consumers to "unequivocally understand [that] they are agreeing to enrollment in a negative option program and demonstrate their agreement." App.29, 33.

Petitioners misstate the Commission's decision to abandon a proposed requirement that sellers obtain "unambiguously affirmative consent to the rest of the transaction" as holding that *any contracts* that seek "*two* consents" would be unnecessary and confusing. Mot.21; *see* App.29-33. The Commission embraced no such principle: Of course, consumers routinely enter contracts that require them to initial or sign next to multiple key terms without issue. The Commission rejected an *additional* requirement that consumers unambiguously consent to "the rest of the transaction" beyond consents already in a contract. App.32. The Commission's decision to drop that requirement while retaining a separate consent requirement for the negative option was reasonable, especially given evidence showing that most Americans have been enrolled in recurring charges without informed consent. *See supra* 5.

5. Finally, the Commission explained why it was prohibiting material misrepresentations (§ 425.3) and requiring material disclosures (§ 425.4). App.8, 14-15, 21-27. Although the amended Rule identifies specific forbidden misrepresentations and required disclosures, its coverage is not limited to them. Because materiality will "vary depending on the transaction's terms," limiting the Rule to

specific claims would create a "leaky sieve," leaving harmful conduct unaddressed. App.15. As discussed above, the concept of materiality is widely used in statutes and regulations and easily understood, even though different types of information may be material to different transactions.

D. The Rule Comports with the First Amendment.

Petitioners are also unlikely to prevail on their First Amendment claim. Petitioners' cited case (Mot.22) establishes that commercial speech is protected by the First Amendment only when it "is not false or deceptive and does not concern unlawful activities." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Id.* Here, the Rule targets only conduct that the Commission has determined to be unfair or deceptive, and therefore unlawful under the FTC Act.

Petitioners' arguments that the Rule will restrain lawful speech are based on mischaracterizations and overreadings of the Rule. There is nothing "malleable" or "nebulous" (Mot.23) about prohibiting information that "interferes with, detracts from, contradicts, or

otherwise undermines" consumers' ability to understand the Rule's required disclosures. Mot.22. (quoting § 425.4(b)(3)). As the Commission explained in the SBP, 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." App.29 & n.310. The Rule does not prohibit sellers from providing information outside the context of the required disclosure.

Nor is there any merit to petitioners' suggestion (Mot.23) that the Rule "directly prohibit[s] companies from speaking with customers that wish to cancel" or "prevent[s] companies from understanding customers' reasons for cancelling and providing useful information or offering better prices or more suitable plans." Nothing in the Rule prevents sellers from communicating with consumers, and the Commission expressly agreed, after considering public comments, that sellers may offer consumers incentives to maintain their negative option program or inform consumers about the consequences of cancellation. *See* App.42, 57.

Finally, petitioners acknowledge (Mot.24) that mandatory truthful disclosures do not conflict with the First Amendment when they

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"remedy a harm that is potentially real, not purely hypothetical" and "extend no broader than reasonably necessary." *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 776 (2018) (cleaned up). The SBP documents the harms that the Rule's disclosures address, along with cases involving those very harms and comments from law enforcement explaining why the disclosures are necessary. *See* App.7 & nn.10-11; App.26.

II. PETITIONERS' IRREPARABLE HARM CLAIMS ARE SPECULATIVE AND OUTWEIGHED BY THE PUBLIC INTEREST IN PREVENTING HARM TO CONSUMERS.

Petitioners also fail to show that the Rule would cause 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) (cleaned up). To the extent that petitioners would suffer any harm if the Rule takes effect, they have not shown that it "exceeds the … likely harm" that consumers will suffer if the Rule is stayed. *Missouri*, 112 F.4th at 538 (cleaned up).

Petitioners' claims of First Amendment injury (Mot.25) fail because, as shown above (at 22-24), the Rule does not infringe any free-speech rights. Petitioners also assert that the Rule will result in

consumer confusion and lost goodwill (Mot.26-27), but those claims are speculative and thus "inadequate to demonstrate a clear and present need for equitable relief." *H&R Block, Inc. v. Block, Inc.*, 58 F.4th 939, 952 (8th Cir. 2023) (cleaned up). Furthermore, the credibility of petitioners' assertions is undermined by the fact that most of the 14 declarations they submitted contain identical rote assertions, *e.g.*, that consumers "will become confused and frustrated" and that this "is not how business is usually done." App.151, 182, 206, 236, 271, 299, 333-34, 357, 389, 415, 432, 469. Such boilerplate should be viewed with extreme skepticism and does not refute the evidence—based on economic studies and years of consumer complaints and enforcement actions—demonstrating that consumers will benefit from consent, disclosure, and simple-cancellation requirements.

Petitioners also assert that they will incur compliance costs if the Rule goes into effect, but "ordinary compliance costs are typically insufficient" to warrant a stay. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (collecting cases). That is particularly true here. First, sellers already must comply with the FTC Act, and many of the Rule's requirements and prohibitions simply codify

requirements implicit in the Act's prohibition on unfair and deceptive acts and practices. As the SBP explained, FTC guidance and case law make clear that material misrepresentations are prohibited and that marketers must clearly and conspicuously disclose material terms of a negative option offer before purchase, obtain consumer consent, and honor cancellation requests. App.8. Many businesses are also subject to other federal and state laws that address negative-option practices. App. 46-47. Businesses already complying with the law thus will have "a significant head start on their compliance efforts," App.47, and the Rule likely will not require wholesale changes. Furthermore, the Commission has already granted an extended 180-day runway for compliance with most of the Rule's provisions (except for the prohibition on misrepresentations).

In any event, petitioners' interests in avoiding compliance costs do not trump the public's interest in avoiding financial injury from deceptive and unfair negative-option programs. The Commission cited evidence that many consumers are unknowingly enrolled in recurring-bill programs, denied refunds for goods they never ordered, subjected to onerous cancellation requirements, and inundated with upsell attempts

before being allowed to cancel. App.11-14. These harms are so pervasive that an entire industry has emerged in which firms charge consumers a fee to identify and cancel unwanted subscriptions. App.12. Petitioners are therefore wrong to claim "the public would not be harmed by a stay." Mot.29. The public equities far outweigh petitioners' private interests.

III. ANY RELIEF SHOULD BE LIMITED.

If the Court were to determine that a stay is warranted, it should be limited to petitioner Custom Communications, Inc. and the specific businesses that submitted declarations claiming injury. Article III permits a court to grant relief only insofar as it remedies "the inadequacy that produced [a plaintiff's] injury." *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (quotation omitted). Reinforcing that limitation is the traditional principle that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *California v. Yamasaki*, 442 U.S. 682, 702 (1979). These principles apply equally to a stay of the Rule's effective date, which under the APA must be limited "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705; *see Labrador v. Poe,* 144 S. Ct. 921, 923, 925-28 (2024)

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(Gorsuch, J., concurring) (discussing the significant legal and practical problems with nonparty relief generally and universal injunctions specifically).

For this reason, any stay this Court issues should be limited to parties that have established their standing to sue. That is the approach taken by two recent decisions that stayed another FTC rule pending judicial review. *See Ryan LLC v. FTC*, No. 3:24-cv-00986-E, 2024 WL 3297524, at *16 (N.D. Tex. July 3, 2024) ("limit[ing] the scope of the [preliminary] injunctive relief" to named parties); *Props. of the Villages, Inc. v. FTC*, No. 5:24-cv-316, 2024 WL 3870380, at *11 (M.D. Fla. Aug. 15, 2024) (same).

Although Custom Communications appears to have standing, the other petitioners are associations that "lack[] associational standing to sue on behalf of unnamed members." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022). The associational petitioners have submitted declarations from some members, but have not identified their full membership, demonstrated their authority to litigate on behalf of unnamed members, or established that their members agree to be bound by any judgment. For these reasons, any

relief should be limited—at most—to Custom Communications and the members of associational petitioners that submitted declarations.

Any relief also should account for the Rule's severability provision. *See* App.69 (§ 425.9). The Court should stay only those provisions of the Rule for which it finds petitioners have demonstrated each of the preliminary injunction factors; any shortcoming in that showing as to any provision means that such provision should not be stayed.

CONCLUSION

This Court should deny the motion for a stay.

Respectfully submitted,

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December 20, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing response complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 5,183 words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

December 20, 2024

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CERTIFICATE OF SERVICE

I certify that on December 20, 2024, I served the foregoing response on counsel of record using the Court's electronic case filing system. All counsel of record are registered ECF filers.

Dated: December 20, 2024

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FTC ATTACHMENT A

Federal Trade Commission, Decision and Order Denying Petition for Stay of Final Rule Pending Judicial Review (Dec. 13, 2024)

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

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[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.

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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).

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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,

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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

[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).

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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]

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[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

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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

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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.

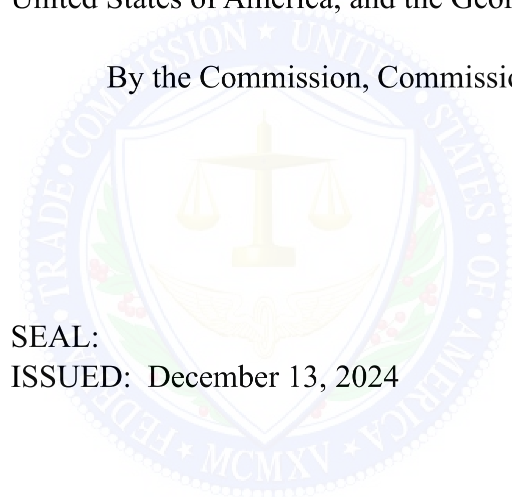
Petitioners are therefore wrong that a stay would cause only "minor inconvenience" to the public. Pet. 15. Even if a stay were in place for a short time, American consumers will widely suffer ongoing financial injury in the form of recurring charges that are unauthorized, unwanted, and unreasonably difficult 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

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