IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The FTC's brief merely underscores how far its rulemaking departed from Congress's intent in enacting the HSR Act. The Congress that crafted the Act, as well as the subsequent Congresses that amended it, consistently strove to ensure that the Act would impose as little burden as possible on the vast majority of lawful and economically beneficial transactions to which it applies. The FTC has no such restraint. It does not dispute that the Rule's new requirements will severely burden *thousands* of perfectly lawful transactions every year, but cannot point to *any* actual evidence for why it needed those new requirements to identify the small percentage of transactions that warrant additional scrutiny—and even claims it does not need any such evidence at all. That approach flouts both the HSR Act and the APA.

The FTC first attempts to avoid this Court's review of the Rule altogether by again contesting the Longview Chamber's standing. Its arguments remain wrong. In a sworn declaration, the Longview Chamber explains how five specific members—businesses that plan to engage in M&A activity and thus are the very objects of the Rule—will be harmed by the Rule. Under settled law, that declaration is competent summary-judgment evidence, and the FTC's bare desire to know more about those members' plans or "probe" the declarant's "knowledge" does not remotely create a genuine issue of material fact as to the Longview Chamber's standing. Finally, the FTC's contention that it knows better than the Longview Chamber what is "germane" to its members' interests is baseless and flatly inconsistent with Fifth Circuit law.

The FTC's attempts to defend the Rule fare no better. Tellingly, it cannot justify the Rule's new requirements against the baseline of the preexisting Form, which by all accounts was working well. So the FTC urges the Court to assess the Rule in a vacuum, ignoring whether the Rule provides any regulatory benefit over the longstanding prior Form. The Court should reject that plea, because it cannot be squared with either the HSR Act's requirement that the Form demand

only "necessary and appropriate" information or the APA's requirement that agencies engage in reasoned decisionmaking to address genuine problems.

As to the HSR Act, the FTC continues to resist case law making clear it was required to conduct a cost-benefit analysis and, as a backup, claims that the Commission conducted a sufficient one anyway. But it cannot point to any instance in the Rule where the Commission performed the calculus that the HSR Act's text and structure require: whether the severe burdens imposed by the Rule's new requirements are justified by benefits to the Commission in identifying transactions that "may" violate the antitrust laws and thus warrant further investigation.

Finally, the FTC tries to defend the reasonableness of its decisionmaking, but it cannot identify any "genuine problem" that the Rule needed to solve, nor provide any "good reasons" for promulgating the Rule. The FTC failed to seriously examine the costs of the Rule, set forth no evidence that the Rule will generate meaningful benefit, and unreasonably rejected alternatives that would have placed far less of a burden on thousands of entirely lawful and procompetitive transactions. For all of these reasons, the Rule should be set aside.

ARGUMENT

I. THE FTC FAILS TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO THE LONGVIEW CHAMBER'S STANDING.

A. Plaintiffs' Declarations Are Competent Summary-Judgment Evidence.

The FTC first urges the Court (at 8-10) to ignore Plaintiffs' summary-judgment declarations because they contain "hearsay" and do not reflect the "personal knowledge" of the declarants. It is wrong on both counts. Unsurprisingly, plaintiff associations routinely establish standing by submitting declarations attesting to their members' harms, given that litigation brought by membership associations *by definition* does not "requir[e] the participation of individual

members," *UAW* v. *Brock*, 477 U.S. 274, 282 (1986).[1] The FTC's efforts to contest this well-established mode of proof is simply another attack on settled associational-standing principles.

In any event, the FTC's evidentiary arguments fail on their own terms. First, the declarations are competent summary-judgment evidence because the relevant facts asserted can be presented in admissible form. Factual statements in a declaration "need only be *capable* of being 'presented in a form that would be admissible in evidence.'" *Maurer* v. *Independence Town*, 870 F.3d 380, 384 (5th Cir. 2017) (quoting Fed. R. Civ. P. 56(c)(2)). Thus, a court at summary judgment "may consider the content or substance of otherwise inadmissible materials where the party submitting the evidence shows that it will be possible to put the information into an admissible form." *Lee* v. *Offshore Logistical & Transp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017) (citations and alterations omitted); *see Miller* v. *Michaels Stores, Inc.*, 98 F.4th 211, 218 (5th Cir. 2024) (hearsay statements are "competent summary judgment evidence" if they "can be presented in an admissible form at trial").[2] The FTC does not argue that the *facts* set forth in Plaintiffs' declarations would not "be admissible in evidence," Fed. R. Civ. P. 56(c)(2), because they obviously could be presented in a number of forms that "would likely be admitted at trial." *Maurer*, 870 F.3d at 384. The facts could be presented through testimony by the members

[1] *See, e.g.*, *Chamber of Com. of U.S.* v. *CFPB*, 691 F. Supp. 3d 730, 738 (E.D. Tex. 2023); *National Ass'n for Gun Rts., Inc.* v. *Garland*, 741 F. Supp. 3d 568, 588-591 (N.D. Tex. 2024); *Harrison County* v. *United States Army Corps of Eng'rs*, 651 F. Supp. 3d 843, 848-852 (S.D. Miss. 2023); *Federation of Ams. for Consumer Choice, Inc.* v. *United States Dep't of Lab.*, 2023 WL 5682411, at *12 (N.D. Tex. June 30, 2023), *report and recommendation adopted*, 2025 WL 1898668 (N.D. Tex. July 9, 2025); *see also, e.g.*, *Advocates for Highway & Auto Safety* v. *Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 592-593 (D.C. Cir. 2022); *Council of Ins. Agents & Brokers* v. *Juarbe-Jimenez*, 443 F.3d 103, 110 (1st Cir. 2006).

[2] The other cases upon which the FTC relies (at 8) either were decided before the 2010 amendment to Rule 56 clarifying that summary-judgment evidence need not be itself admissible, or erroneously rely on the pre-2010 standard. *See Maurer*, 870 F.3d at 384 n.1 (noting that "confusion about the 2010 change to Rule 56 remains common").

themselves. *See, e.g.*, *Hargiss* v. *Princeton Excess & Surplus Lines Ins. Co*., 2023 WL 11886895, at *4 (W.D. La. Dec. 8, 2023) (hearsay statements in affidavit held competent summary-judgment evidence when facts could be "admissible in evidence through the testimony" of the hearsay declarant). Or they could be admitted under the business records hearsay exception, Fed. R. Evid. 803(6), based on Plaintiffs' members' records of their relevant activities. *See Securities Indus. & Fin. Mkts. Ass'n* v. *CFTC*, 67 F. Supp. 3d 373, 404 n.15 (D.D.C. 2014) (statements in APA standing declarations came within state-of-mind hearsay exception, rendering declarations "capable of being converted into admissible evidence").[3]

The FTC's claim that the declarants lack "personal knowledge" has even less merit. The declarations expressly state they are "based upon [the declarant's] personal knowledge and belief and/or upon [the declarant's] review of business records." *See, e.g.*, Dkt. 44-4 ¶ 2. Courts routinely credit such declarations based on declarants' "personal knowledge or information made known to [them] in the course of [their] official duties," *Citizens for Resp. & Ethics in Wash.* v. *Leavitt*, 577 F. Supp. 2d 427, 433 (D.D.C. 2008), including declarations by association officers attesting to their members' injuries, *see Council of Ins. Agents & Brokers*, 443 F.3d at 111 n.10 (council president asserting members' injuries did not lack "personal knowledge" because "as stated, [declarant] was the President of the Council"). And because the FTC has no "reason" whatsoever to "doubt [the] veracity" of the declarants' sworn statements, it cannot seek discovery simply "to test [their] credibility." *Leavitt*, 577 F. Supp. 2d at 434; *see* Dkt. 59 at 8.

[3] Of course, there will be no trial in this APA case; summary judgment is the "mechanism for deciding, as a matter of law, whether the [Rule] is supported by the administrative record and otherwise consistent with the APA." *Texas* v. *United States Dep't of Homeland Sec.*, 2024 WL 5454617, at *5 (E.D. Tex. Aug. 26, 2024). For that reason, courts recognize (and the FTC ignores) that "the usual rules governing summary judgment do not apply" in APA cases, *Cowboy Sports Agency LLC* v. *Jallou*, 2023 WL 9383272, at *5 (N.D. Tex. Dec. 13, 2023) (citation omitted).

B. The Longview Chamber Has Demonstrated Standing To Challenge The Rule.

The FTC next contends (at 10-13) that the Longview Chamber's declaration is insufficient to establish standing, rehashing arguments that (i) the Longview Chamber's members' injuries are too speculative, (ii) the Longview Chamber must name its members, and (iii) this lawsuit is not germane to the Longview Chamber's purpose. None of these arguments raises a "genuine dispute as to any material fact" with respect to the Longview Chamber's standing. *Texas* v. *United States*, 50 F.4th 498, 522 (5th Cir. 2022).

1. The FTC fails to show that the asserted injury to the Longview Chamber's members is "speculative." FTC Br. 11. Where a party is an "object of the action . . . at issue," there is "little question" that it has standing to challenge it. *Diamond Alt. Energy, LLC* v. *EPA*, 145 S. Ct. 2121, 2134 (2025). Here, the Longview Chamber has shown that its members regularly engage in HSR-reportable transactions and are thus objects of the Rule, making their standing "easy to establish." *FDA* v. *Alliance for Hippocratic Med.*, 602 U.S. 367, 382 (2024). The declaration states that specified members "plan" or "expect" to enter into HSR-reportable transactions in the near future, including "at least one [transaction] by the end of 2025." Dkt. 44-4 ¶ 9; *see* ¶ 7. The declaration also details how these members "regularly engage[]" in such transactions as part of their "business model[s]." Dkt. 44-4 ¶¶ 7-11; *see* Pl. Br. 10-11.

The FTC claims (at 11) that these injuries are still too speculative, and that Plaintiffs must at least show that a member is in "active negotiations." The FTC cites no case supporting that requirement for parties directly regulated by a rule, and it is contrary to Fifth Circuit precedent approving regulated parties' showing of injury on comparable assertions. *See, e.g.*, *Ghedi* v. *Mayorkas*, 16 F.4th 456, 465 (5th Cir. 2021); *Consumers' Rsch.* v. *CPSC*, 592 F. Supp. 3d 568, 578 (E.D. Tex. 2022), *rev'd on other grounds*, 91 F.4th 342 (5th Cir. 2024); Pl. Br. 10-11 (collecting cases). Still, the FTC finds "reason for skepticism" based on the declaration's reliance

on evidence of the members' business models and historical HSR-reportable activity. That is backwards; such proof is precisely the type of evidence of "habitual" conduct that establishes a concrete, imminent injury, as it shows that the plaintiff will certainly engage in the regulated conduct, even if it cannot specify the exact date. *Ghedi*, 16 F.4th at 465; *Consumers' Rsch.*, 592 F. Supp. 3d at 578. The FTC also protests that the declaration was not "subject to cross-examination" and is "disputed," but does not state which facts it is disputing or on what grounds, aside from essentially (and baselessly) accusing Plaintiffs of perjury. *Cf. Leavitt*, 577 F. Supp. 2d at 434; *American Fam. Life Assur. Co.* v. *Biles*, 714 F.3d 887, 894-895 (5th Cir. 2013).

The FTC makes a last-ditch argument (at 11-12) that the Court "needs more detail" about the members' planned transactions because, in addition to challenging the Rule as a whole, Plaintiffs challenge certain of the Rule's individual requirements that apply to only certain filers. That is wrong too. Plaintiffs argue that the entire Rule is unlawful because it exceeds the FTC's statutory authority and is arbitrary and capricious. And the harm to all of Plaintiffs' members from the costs of preparing the new Form can only be redressed by vacatur of the Rule. Plaintiffs thus have standing to challenge the entire Rule, as their injury "would be redressed by vacatur of the rule on the basis of any of the grounds raised." *Texas Ass'n of Mfrs.* v. *CPSC*, 989 F.3d 368, 379-380 (5th Cir. 2021). The Fifth Circuit and other courts have rejected the notion that, in order to *argue* that individual requirements are unlawful in their own right, Plaintiffs must make a separate, additional showing of standing. *See id.*; *WildEarth Guardians* v. *Jewell*, 738 F.3d 298, 308 n.3 (D.C. Cir. 2013) (plaintiffs had standing to challenge entire rule where they sought "only one type of relief relevant here—the vacatur of the [agency action]" and "simply advance several arguments in support of that claim").

2. The FTC next argues (at 12) that, under *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), Plaintiffs must identify their affected members by name. But several courts (including another court in this district) have rejected that reading of *Summers*, explaining that *Summers* "only requires that the plaintiff allege that there is a specific [] member" who was harmed, and "does not require naming that member." *Nat'l Infusion Ctr. Ass'n* v. *Becerra*, 116 F.4th 488, 497 n.5 (5th Cir. 2024); *see Speech First, Inc.* v. *Fenves*, 979 F.3d 319, 329-338 (5th Cir. 2020); *Chamber of Com.*, 691 F. Supp. 3d at 739. As the Eleventh Circuit has explained, *Summers* merely "held that an organization [cannot] demonstrate standing simply by showing a statistical probability that some of its members would incur a concrete injury," but must put forth "specific facts . . . that one or more of [its] members would be directly affected." *American All. for Equal Rts.* v. *Fearless Fund Mgmt., LLC*, 103 F.4th 765, 773 (11th Cir. 2024) (quoting *Summers*, 555 U.S. at 497-98). *Summers* did not "impose[] a requirement that an organizational plaintiff identify affected members by their legal names." *Id.*[4] Here, the Longview Chamber has submitted a sworn declaration identifying multiple members affected by the Rule. It is thus "clear and not speculative that a member . . . will be adversely affected by" the Rule, and neither the FTC nor the Court needs "to know the identity of a particular member" to determine whether there is any genuine factual dispute about those members' injuries. *Mi Familia Vota*, 129 F.4th at 708.

[4] *See Mi Familia Vota* v. *Fontes*, 129 F.4th 691, 708 (9th Cir. 2025) (holding, on review of summary judgment and post-trial judgment, that "[a]s a general rule of representational standing, when it is clear and not speculative that a member of a group will be adversely affected by a challenged action and a defendant does not need to know the identity of a particular member to defend against an organization's claims, the organization does not have to identify particular injured members by name"); *Speech First, Inc.* v. *Shrum*, 92 F.4th 947, 951 (10th Cir. 2024) (noting Tenth Circuit's prior holding at summary judgment that "organizational standing is proper even when the qualifying member of the plaintiff organization is anonymous") (citing *American Humanist Ass'n, Inc.* v. *Douglas Cnty. Sch. Dist. RE-1*, 859 F.3d 1243, 1254 n.4 (10th Cir. 2017)).

The cases that the FTC cites (at 13), by contrast, do not address pseudonymous declarations at all and thus do not speak to the issue here. *See Georgia Republican Party* v. *SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018) (plaintiff failed to show any member "who has or will suffer harm"); *Tennessee Republican Party* v. *SEC*, 863 F.3d 507, 521 (6th Cir. 2017) (plaintiff failed to establish injury as to any identified member).

3. Finally, the FTC again challenges (at 13) the Longview Chamber's assertion that this suit is germane to its purposes, relying primarily on the Sixth Circuit's recent decision in *Dayton Area Chamber of Commerce* v. *Kennedy*, 147 F.4th 626 (2025). But the (flawed) analysis in *Dayton* cannot be squared with the Fifth Circuit's "undemanding" germaneness standard, which requires "mere pertinence between the litigation at issue and the organization's purpose." *Association of Am. Physicians & Surgeons, Inc.* v. *Texas Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quotations omitted). The Longview Chamber easily meets that standard here, given its purposes to "decrease" unjustified regulatory costs and "promote economic development and job creation" in the Longview region and the "interconnected economic region, which includes the Dallas, Houston, and Shreveport metropolitan areas." Dkt. 44-4 ¶¶ 3, 15-16.

In any event, even *Dayton* does not support the FTC's argument. The challenged program in that case applied "only to pharmaceutical managers," which the court found insufficiently tied to the Dayton Chamber's purpose of "promoting regional business." 147 F.4th at 634-635. Here, the Rule applies to *all* businesses that engage in HSR-reportable transactions. The FTC proclaims (at 13) that the Rule advances a "pro-business policy that supports economic growth," but the Longview Chamber's sworn statement asserts that the Rule would harm its members and the Longview Trade Area economy. Dkt. 44-4 ¶¶ 5, 13-16. It borders on the absurd for the FTC to claim that it knows better than the Longview Chamber what is in its members' best interests. And

the FTC's observation (at 13) that the Longview Chamber's declaration does not assert that the affected members reside in the Longview area does not even help under *Dayton*, which stated that the fact that the members have no "facilities in the Dayton area is not fatal to associational standing." 147 F.4th at 635. Here, the Longview Chamber's members transact with, provide services to, and invest in businesses with presence and operations in the Longview Trade Area. Dkt. 44-4 ¶¶ 7, 9, 11. There is thus undeniable "pertinence" between "the litigation at issue and the [Longview Chamber's] purpose." *Texas Med. Bd.*, 627 F.3d at 550 n.2; *see* Dkt. 44-4 ¶ 3.

II. THE HSR RULE EXCEEDS THE FTC'S STATUTORY AUTHORITY.

The FTC tellingly premises much of its brief on the notion that it need not justify the Rule by reference to the old Form, so the Court should simply consider the Rule in a vacuum. FTC Br. 14-15. Even the FTC's own authority shows that is wrong. When an agency adopts a new policy, it must not only show that "the new policy is permissible under the statute" and that "the agency believes it to be better," but *also* "that there are good reasons for" the change. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted); *see FDA* v. *Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 585 (2025). The FTC cannot provide "good reasons" for adopting the new Rule without explaining *why* it needed to overhaul half a century of practice under the prior Form—a question that can only be rationally answered by pointing to deficiencies in the status quo. Indeed, that failure also means the Rule is not "permissible under the statute": Contrary to the FTC's claim (at 15) that it was "obliged" to create the Form, the FTC already had a Form in place, and the HSR Act limits its authority to expand that Form to only additional information that is "necessary and appropriate" to conduct an effective initial screen. 15 U.S.C. § 18a(d)(1).

A. The Rule Misinterpreted The Scope Of The FTC's Authority.

The FTC argues that it acted within its statutory authority because (i) the HSR Act does not require it to conduct any cost-benefit analysis, and (ii) it conducted one anyway. Both

arguments are incorrect, and the FTC's failure to "properly construe[] [its] authority" renders the Rule unlawful. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-416 (1971).

1. The FTC argues (at 15-20) that the HSR Act did not require the Commission to weigh the benefits of the Rule against the costs and burdens the Rule would impose on M&A activity. According to the Commission, no such analysis was required because "the HSR Act says nothing about costs and benefits," but instead gives the Commission "broad discretion to assess what information would be needed to accomplish the statute's goals." *Id.* at 16-17. But as Plaintiffs explained (Br. 12-13), binding precedent makes clear that the phrase "necessary and appropriate" operates as a statutory "*limit*" on an agency's authority by requiring that the regulation's "benefits reasonably outweigh its costs." *Mexican Gulf Fishing Co.* v. *United States Dep't of Com.*, 60 F.4th 956, 965 (5th Cir. 2023) (emphasis added); *see Michigan* v. *EPA*, 576 U.S. 743, 752 (2015) ("[T]he phrase 'appropriate and necessary' requires at least some attention to cost.").

The FTC offers two responses. First, it argues (at 16) that the phrase "necessary and appropriate" is "capacious[]" and therefore grants it *more* "discretion." But the cases say the opposite: "[W]e stress that the adjectives *necessary* and *appropriate* limit the authorization contained in this provision." *Mexican Gulf Fishing*, 60 F.4th at 965. And *Michigan* referred to the "capaciousness" of that phrase as confirming all the factors that the agency *must consider*, not as giving the agency discretion to choose which factors it prefers to ignore. 576 U.S. at 752.

Next, the FTC tries (at 19) to distinguish these cases as limited to statutes governing an agency's "determination of *whether* to regulate," not *how* to regulate. That makes no sense. The FTC does not explain how the meaning of "necessary and appropriate" could change based on this purported distinction. And the distinction is baseless. Either way, the "central question is 'always, simply, whether the agency has stayed within the bounds of its statutory authority.'" *Purl* v. *United*

States Dep't of Health & Hum. Servs., 2025 WL 1708137, at *6 (N.D. Tex. June 18, 2025) (quoting *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013)). If anything, Congress imposed *more* constraints on the FTC by mandating that the agency act "subject to the limits imposed" by the statute, *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 395 (2024): It instructed the FTC to require only information "necessary and appropriate to enable" the agencies "to determine whether [an] acquisition may" pose an antitrust problem. 15 U.S.C. § 18a(d)(1).

The FTC fares no better when attempting (at 19-20) to rebut Plaintiffs' arguments based on the "structure, 'purpose,' and legislative history of the HSR Act." The FTC concedes (at 19) that the statute requires the Form to "be 'abbreviated and preliminary'" compared to a Second Request, but puzzlingly contends that the "only 'obvious inference' to draw" from that is that the Form must contain "sufficient information to make the initial screen effective." That is true, but ignores the key point that Congress *also* wanted to minimize that burden as much as possible—which is why it limited the Form to information that is "necessary," not just "sufficient," to the initial screen. And because Congress sought to avoid "unduly burdening business," it emphasized that, when "prescrib[ing] the content and form of reports," the FTC must "balance . . . the needs of effective enforcement of the law and the need to avoid burdensome notification requirements." S. Rep. No. 94-803, at 65-67 (1976).[5]

2. The FTC principally claims that, although it had no obligation to do so, the Commission did conduct a cost-benefit analysis. FTC Br. 17-20. But the FTC largely can only point to vague and conclusory statements in the Rule asserting that the Commission "*did* 'consider[] . . . the costs

[5] Along similar lines, the FTC references (at 20) the fact that the Commission considered requiring "far more information" in the original HSR Form. But consistent with Congress's intent, the FTC then *rejected* certain proposed categories of information as too "burdensome and unnecessary." *See Premerger Notification; Reporting and Waiting Period Requirements*, 43 Fed. Reg. 33,450, 33,526 (July 31, 1978).

and benefits of the final rule.'" *Id.* at 17 (quoting *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216, 89,236 (Nov. 12, 2024)); *see id.* ("The Commission also 'evaluated, on the one hand, the benefits . . . in making premerger review more efficient and effective . . . and on the other hand, the need to reduce unnecessary burden, costs, and delay on filers'"). But "[s]tating that a [statutorily mandated] factor was considered . . . is not a substitute for considering it." *Getty* v. *Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Courts "must make a searching and careful inquiry to determine if [the agency] actually did consider" the required factor, *id.* (quotations omitted), but there was no such consideration here.

When the FTC tries to point to a more specific cost-benefit analysis in the Rule, that analysis is plainly not the one Congress required. For example, the FTC quotes (at 18) its finding that, for reportable acquisitions, "the long-term benefits, both monetary and nonmonetary, well outweigh the incremental costs associated with the final rule." 89 Fed. Reg. at 89,259. That finding does not refer to the "benefits" of *the Rule*; it refers to the economic benefits of a given "*acquisition*" relative to its "HSR filing costs." *Id.* (emphasis added). In other words, the Commission believes parties will ultimately go through with transactions despite the costs. But the HSR Act requires the FTC to consider "the costs and benefits *associated with the regulation*." *Mexican Gulf Fishing*, 60 F.4th at 973. Here, that means weighing the Rule's substantial burdens on thousands of transactions each year against any improvement in the FTC's ability to identify transactions warranting further scrutiny. The FTC points to no such analysis in the Rule. Plaintiffs thus do not "simply disagree with the Commission's assessment of the relevant costs and benefits," FTC Br. at 18, but fundamentally dispute what the relevant costs and benefits are.

As Plaintiffs argued (Br. 15), the FTC's brief (and the Rule) confirm that the Commission simply adopted the requirements it wanted and then took "steps to reduce the burden" on filers,

89 Fed. Reg. at 89,266; *see* FTC Br. 20 (contending that it "did conclude that the benefits of the officers-and-directors requirement justified its costs" based solely on the fact that the Rule "significantly narrowed" the NPRM); *id.* at 18 n.7 (stating that the FTC analyzed the costs and benefits of certain individual requirements). But the fact that the Commission pulled back on some of the NPRM's most egregious provisions does nothing to show its work on the ones it retained. Rather, the Act requires the FTC to determine *ex ante* whether each additional requirement will improve the FTC's ability to conduct the initial screen to an extent that justifies the burdens imposed by that requirement. The Commission entirely failed to perform that analysis.

B. At A Minimum, Several New Requirements Exceed The FTC's Authority.

1. The FTC cannot show that the HSR Act authorizes the Rule's novel requirement that filers identify certain officers and directors. The FTC concedes (at 21-22) that the purpose of the requirement is to police interlocking directorates, which are separately prohibited by Section 8 of the Clayton Act and are not specific to mergers or acquisitions. Yet the FTC argues that the requirement is permissible because the HSR Act authorizes it to seek any information that might reveal a violation of any "antitrust laws." That argument ignores that the Act only authorizes the FTC to require—"consistent with the purposes of *this section*" (*i.e.*, the HSR Act)—information that may help it determine whether "a *proposed acquisition*" "may" "violate the antitrust laws." 15 U.S.C. § 18a(d)(1) (emphasis added). The officers-and-directors requirement is not "consistent with the purposes of" the HSR Act, which is to prescreen and block unlawful transactions before they occur, because interlocking directorates do not make the "acquisition" unlawful.

Initially trying to meet the Act's standard, the FTC first argues (at 21) that "common officers or directors at competing businesses" may in fact violate Section 7 of the Clayton Act (the primary provision making acquisitions unlawful) because they "may threaten competition." But an interlocking directorate does not render an acquisition unlawful as relevant under the HSR Act,

because Section 8 expressly *permits* acquisitions with interlocking directorates to be consummated. It is thus no surprise that the FTC cannot cite a single case where an interlock caused a Section 7 violation empowering the FTC to block (or unwind) a transaction.[6]

The FTC's actual justifications for the requirement plainly exceed the scope of the statute. The FTC contends (at 22) that the requirement "helps [it] determine if the acquisition would create a violation of Section 8." But Section 8 does not provide a basis for deeming a "proposed acquisition" unlawful and blocking its consummation. It simply requires the replacement of the offending directors, and even gives a one-year grace period for that to occur. *See* 15 U.S.C. § 19(b). This is not "confus[ing] the prohibition with the remedy," FTC Br. 22, because the two are intrinsically related: The HSR Act empowers the FTC to screen proposed acquisitions that would violate the antitrust laws if consummated and block them before that happens. The FTC cannot block transactions based on Section 8 if that provision expressly allows such transactions to take place. The FTC claims that the agencies can nonetheless "take premerger enforcement action to prevent illegal board interlocks." FTC Br. 22-23 (citing *In the matter of EQT Corp.*, Dkt. No. C-4799 (Oct. 10, 2023)). But that is distinct from whether the HSR Act authorizes it to demand information regarding interlocks through the premerger notification Form. And the single (unlitigated) example the FTC cites is the only case in the last 40 years in which the FTC has formally enforced Section 8, and even there it still did not deem the *acquisition* unlawful.

[6] The FTC compares director interlocks to "horizontal shareholding," but that comparison just shows why interlocks do *not* violate Section 7. FTC Br. 21. As this Court explained, if horizontal shareholding comes within "the text of Section 7," it is because "it is the[] alleged *acquisition and use of the stock*" to "bring about . . . a substantial lessening of competition that is unlawful." *Texas* v. *BlackRock, Inc.*, 2025 WL 2201071, at *11 (E.D. Tex. Aug. 1, 2025) (emphasis added). By contrast, anticompetitive effects of interlocking directorates do not flow from the acquisition itself.

Finally, the FTC claims (at 21-22) the requirement would help it police "violations of the HSR Act" by indicating whether the transaction was consummated before the waiting period expired. But the FTC has no explanation for how such "gun-jumping" is relevant to whether "the proposed acquisition" violates the antitrust laws. 15 U.S.C. § 18a(d)(1). So the FTC relies on the HSR Act provision authorizing it to prescribe other rules "as may be necessary and appropriate to carry out the purposes" of the Act. FTC Br. at 22 (quoting 15 U.S.C. § 18a(d)(2)(C)). The Commission did not rely on § 18a(d)(2)(C) in the Rule, however, so it cannot justify the requirement now with this "impermissible *post hoc* rationalization[]." *Data Mktg. P'ship, LP* v. *United States Dep't of Lab.*, 45 F.4th 846, 858 (5th Cir. 2022) (quotations omitted). And in any event, that provision does not expand the FTC's authority to craft the premerger notification form under § 18a(d)(1); otherwise, there would be no limit to what the FTC could demand. The FTC may adopt *other* rules policing procedural violations of the HSR Act, but it cannot do so through the premerger notification form that all filers must complete.

2. The FTC likewise fails to defend the Rule's novel requirement that filers submit narrative written "descriptions" of the transaction rationale, competitive overlaps, and supply relationships. The FTC argues (at 23) that this information would assist it in "detecting" unlawful transactions. That may be, but it improperly converts the HSR Act's notification regime into a preclearance regime, which Congress expressly rejected. *See* Pl. Br. 18-19. Simply put, requiring all filers to submit ultimate conclusions as to a transaction's competitive effects is flatly inconsistent with the Act's structure, which requires a "notification" followed by a waiting period to allow agencies to determine if they need additional information to investigate the transaction.

The FTC responds by claiming (at 23) that the Rule does not "require any substantive legal analysis" or require parties to "take positions on . . . the current and potential competitiveness of

their products." But the Rule itself belies those conclusory statements, and it is the "*contents* of the [Rule], not the agency's self-serving *label*," that matters. *American Hosp. Ass'n* v. *Becerra*, 738 F. Supp. 3d 780, 796 (N.D. Tex. 2024) (quotations omitted). The transaction-rationale requirement directs a party to "describe all strategic rationales for the transaction" "related to . . . competition for current or known planned products or services," 89 Fed. Reg. at 89,299, which plainly encompasses a position on the "competitiveness of their products." The FTC likewise argues (at 23) that the overlap and supply-relationship descriptions ask for only "factual information," but does not dispute that this information "goes to the core of . . . what the *agencies* must prove when seeking to challenge a transaction." Dkt. 44-19 (Wachtell Comment) at 14 (emphasis added). Congress expressly rejected such burden-shifting in adopting the HSR regime.

III. THE COMMISSION ENGAGED IN IRRATIONAL DECISIONMAKING.

A. The FTC Cannot Show That The Massive Costs The Rule Imposes On Every HSR Filer Are Justified By Relevant Benefits.

The FTC does not dispute that the APA requires it to substantiate a "genuine problem" the Rule is designed to address and to identify "benefits that bear a rational relationship to the costs imposed" by the Rule. *Chamber of Com. of U.S.* v. *SEC*, 85 F.4th 760, 777-778 (5th Cir. 2023) (quotation omitted). Even aside from the "necessary and appropriate" cost-benefit analysis required by the HSR Act, the Rule fails those basic requirements of reasoned agency decisionmaking, and the FTC's efforts to argue otherwise (or avoid the question) are unpersuasive.

1. The FTC unreasonably understated the costs of the Rule.

a. *Direct Costs.* The FTC cannot defend the Rule's irredeemably flawed methodology for calculating the direct costs of the Rule. The Commission asked just 15 of its own attorneys—whose experience was vaguely described as "recent" and "[c]ollectively" involving "each of the three types of HSR-reportable transactions"—for their best estimates of the costs of compliance

for thousands of transactions each year, across all sectors of the economy. 89 Fed. Reg. at 89,332. That insufficient methodology and glaring sampling bias is not cured, as the FTC suggests (at 25), by simply excluding attorneys involved with the Rule or HSR Form generally. And the FTC's argument (at 25) that the U.S. Chamber's survey (the Kothari Report) employed "the same methodology" is hard to take seriously. The U.S. Chamber did not survey government attorneys at the agency promulgating the Rule. It surveyed *70* in-house and external antitrust practitioners and extensively described their substantial experience with the HSR Form.[7] It does not take a statistician to recognize that the FTC's estimate was not reliable. *See Texas Corn Producers* v. *EPA*, 141 F.4th 687, 704 (5th Cir. 2025) (agency's failure to address the "Test Program's insufficient sample size" rendered action unreasonable).

The FTC contends (at 25-26) that the Court should nonetheless defer to its deficient "methodology" because agencies are entitled to rely on "staff experience and expertise." But the FTC's cases (at 26) each involved an agency's reliance on its staff's regulatory experience to inform the substance of new rules, not the staff's prior private-sector experience to estimate costs of compliance with new rules. *See National Mining Ass'n* v. *United Steel Workers*, 985 F.3d 1309, 1321-1322 (11th Cir. 2021) (upholding rule based on "the Agency's experience" with "the existing [regulatory] standard"); *Nasdaq Stock Mkt. LLC* v. *SEC*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) (upholding rule where the SEC "invoked its experience in overseeing the existing [regulations]"); *Sacora* v. *Thomas*, 628 F.3d 1059, 1068-1069 (9th Cir. 2010) (upholding policy where "BOP relied on 'Bureau experience'" with "placing prisoners in [residential re-entry centers]"). Agency staff

[7] *See* Dkt. 44-11 (Kothari Report) at 18 n.33; U.S. Chamber of Commerce, Antitrust Experts Reject FTC/DOJ Changes to Merger Process (Sept. 19, 2023), https://www.uschamber.com/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process (nearly 80% of participants had been involved with over 50 mergers and 59% had been involved with more than 100 deals).

may have specialized substantive expertise in enforcement of existing rules, but FTC attorneys have no such expertise with businesses' costs of compliance with antitrust regulations. In that context, "the agency must support its arguments more thoroughly than in those areas in which it has considerable expertise and knowledge." *Texas* v. *EPA*, 829 F.3d 405, 432 (5th Cir. 2016).

The FTC also puzzlingly claims (at 24-25) that even if its methodology was inadequate, Plaintiffs identified no "evidence in the record contradicting [its] estimate." That is plainly inaccurate. The Kothari Report—which undisputedly appears in the administrative record—estimated that the NPRM would have added an average of 241 hours per filing, Kothari Report 18-19, compared to the FTC's estimate of just 68 additional hours for the Final Rule's requirements, 89 Fed. Reg. at 89,332—which the FTC gave no opportunity to comment on. The FTC asserts (at 26 & n.10) that the vast difference simply reflects the "'significant modifications' the final rule made to the NPRM." But the Rule retains about 20 out of the 34 proposed additions, including some of the most time-intensive ones, *see* 89 Fed. Reg. at 89,264, so those modifications cannot possibly explain the 75% gap between the Kothari Report and the FTC survey.

Finally, the FTC's suggestion (at 26) that there is no "cognizable basis to challenge" a rule on the ground that its cost-benefit analysis contained "serious flaw[s]" is contrary to fundamental APA principles and Fifth Circuit precedent. Like any other agency decision, an unsubstantiated cost-benefit analysis necessarily renders an agency action unreasonable. *See Chamber of Com.*, 85 F.4th at 777 & n.22.

b. *Indirect Costs.* The FTC practically concedes that it failed to consider the indirect costs of the Rule. It argues (at 27) that it "cleared th[e] bar" under the APA because the Rule "say[s]

something" about indirect costs.[8] That is not the standard. The APA requires "reasoned consideration"; an agency's "bare acknowledgement" of a concern "do[es] not constitute adequate agency consideration of an important aspect of a problem." *Louisiana* v. *United States Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024); *see Mexican Gulf Fishing*, 60 F.4th at 971 (requiring "consideration of the relevant factors," including "any significant points" "raised by the public comments"). The APA requires agencies to be responsive, not merely to respond.

The FTC next contends (at 27) that it "expressly considered and discussed the points plaintiffs complain about." But commenters raised a wide variety of indirect costs, and the FTC simply dismissed them with a brief statement that it was "speculat[ive]" that the Rule would "deter or delay some deals," or that "delays . . . can influence pending mergers." 89 Fed. Reg. at 89,257. The FTC maintains (at 27) it was entitled to rely on its own "predictive judgment" based on available evidence over the commenters' "unsupported" assertions. But that "judgment" was not based on *any* evidence other than the FTC's own say-so. *See* 89 Fed. Reg. at 89,257. Nor were the public comments "unsupported." A wide range of industry members asserted that, based on their experience (and common sense), the substantially expanded requirements would inevitably increase financing costs and opportunity costs, jeopardize deal terms, and risk confidentiality breaches. *See* Pl. Br. 22 (collecting comments). And they supported their assertions with specific data. *See, e.g.*, Dkt. 44-15 (ICLA Comment) at 10 & n.22; Kothari Report at 24.

The FTC largely seeks to defend its deficient analysis by relying on *FCC* v. *Prometheus Radio Project*, 592 U.S. 414 (2021), but that decision does not help either. In *Prometheus*, the

[8] The FTC claims that a "rule is arbitrary and capricious *only 'if* the agency … *entirely failed* to consider an important aspect of the problem.'" FTC Br. 27 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added). But that is just one of several ways in which a rule might be held arbitrary and capricious.

agency had "considered the record evidence" and "repeatedly asked commenters to submit" additional evidence, but "no commenter produced [] evidence indicating that changing the rules was likely to" cause harm. *Id.* at 426-427. The Court held that, given the absence of countervailing data, the FCC had "made a reasonable predictive judgment based on the evidence it had." *Id.* Here, the FTC ignored or unreasonably dismissed the record evidence, then made a "predictive judgment" based on no evidence at all.

2. The FTC unreasonably overstated the Rule's benefits.

a. *Enhanced Detection of Unlawful Mergers*. The FTC again fails to explain how the Rule improves its ability to identify transactions warranting additional scrutiny. As with its statutory arguments, the FTC's first line of defense is that the old Form is "irrelevant" to its justifications of the new Rule, so that it need present "no evidence, and ma[ke] no findings, that the old form was faulty." FTC Br. 28-29. That alternative-reality argument is just as wrong here, if not worse. The prior version of the Form was in place for half a century. If that Form was working, there was no "genuine problem" for the FTC to solve, *Chamber of Com.*, 85 F.4th at 777, and the FTC cannot show that it had "good reasons" for promulgating the new Form, *Fox*, 556 U.S. at 515. Indeed, the FTC until recently had touted the prior Form as "a success," which should give pause as to why its position "is at unexplained odds with that of yesterday." *El Paso Elec. Co.* v. *FERC*, 76 F.4th 352, 364 (5th Cir. 2023); *cf. R.J. Reynolds Vapor* v. *FDA*, 65 F.4th 182, 192 (5th Cir. 2023) (requiring "a more detailed justification" to explain agency's "sudden turnabout").[9]

The FTC's attempts (at 29) to muster evidence that the Rule would assist its premerger-review process do not hold up. First, as the only concrete evidence purportedly showing any gaps in the prior Form, the FTC points to one study of hospital mergers. To begin with, that study

[9] *See* Dkt. 44-24 (2009 FTC Guide) at 2.

involved a discrete set of mergers within the hospital industry, so it says nothing about the overall adequacy of the Form, thus underscoring the Rule's "untailored approach." Brief for Am. Hospital Ass'n and Federation of Am. Hospitals as Amici Curiae (AHA Br.), Dkt. 49, at 16-18. And even the study itself "affirmatively *disclaims* a link between asserted anticompetitive behavior and gaps in the FTC's notification regime." *Id.* at 13-14. In fact, the study concluded that "agencies were *successful* (on average) in identifying in the preliminary phase of the investigation which mergers were most likely to be anticompetitive." Dkt. 44-10 (Chamber Comment) at 14 (emphasis added).

Second, the FTC cites research that firms "structur[e] their deals to avoid premerger review." FTC Br. 29 (quoting 89 Fed. Reg. at 89,219-89,220). That research concerns so-called "stealth acquisitions," which are structured to *evade* reporting thresholds entirely. Increasing information requirements for reportable transactions obviously does not address that problem.

Third, the FTC invokes (at 29) its general "experience" with the Form as supporting its belief that more information would be better. But it does not specify what that experience is or why it shows the Rule will materially help the FTC's initial screen. Indeed, it is hard to imagine what "experience" the FTC could even be referring to if it cannot identify a single instance in which gaps in the original Form allowed a suspected unlawful transaction to slip through. The FTC hyperbolically points (at 30) to the time and resources needed to prove *at trial* that a transaction was unlawful to claim that it would be "insane[]" and "impossible" to require it to identify any missed transactions, but no one suggested it had to meet that burden of proof in its Rule. In short, the FTC urges the Court to simply take it at its word that the Rule is justified. That is not how the APA works. *See National Ass'n of Regul. Util. Comm'rs* v. *United States Dep't of Energy*, 736 F.3d 517, 519 (D.C. Cir. 2013) (an agency "may not comply with [its] statutory obligation by 'concluding' that a conclusion is impossible").

Finally, the FTC cannot explain how the deluge of additional information can possibly improve antitrust enforcement given the FTC's admitted resource constraints. The FTC maintains (at 30) that the Rule would give its staff immediate access to all potentially relevant information, "instead of having to rely on voluntary submissions, the withdraw-and-refile process, or second requests." But that "benefit" applies only to the very small subset of transactions that might warrant such further review. The FTC fails to explain how its overall screening efforts will be improved by requiring agency staff to "review every form," FTC Br. 31, almost all of which are now loaded with unnecessary information, to avoid additional requests on just a few transactions.

b. *Saving Agency Time*. The FTC similarly cannot explain how the Rule saves agency time in a way that is consistent with the Act. It asserts (at 31-32) that the Rule will allow it to screen transactions faster by "requiring sufficient up-front information," thereby reducing "the number of staff hours spent collecting additional information from all sources." But as Plaintiffs pointed out (at 26-27), this rationale suffers from the same denominator problem discussed above: staff hours spent collecting additional information pertain to only a small percentage of filings. *See Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42,178, 42,196 (June 29, 2023). So limiting the burden associated with that small fraction of transactions does not rationally support demanding more information from every single filer.

The FTC further argues (at 31) that "a more efficient initial filing will lead to more targeted second requests." This argument is even more flawed than the first. The agency issues Second Requests for about 3% of filings per year. *See* Billman & Salop, *Merger Enforcement Statistics: 2001-2020*, 85 Antitrust L.J. 1, 10 (2023). It is irrational to require thousands of filers every year to spend weeks compiling information the agency does not need, and for agency staff to spend

time reviewing it all (or not doing so), just so it can issue more "targeted second requests" for a tiny percentage. The Act was structured exactly to avoid such indiscriminate burdens.

Finally, the FTC repeatedly claims (at 37) that the Rule "allowed" the agencies to resume the early termination process and "to grant early termination to over 200 transactions." But it fails to show that those early terminations had anything to do with the Rule. The early termination process was not suspended due to concerns with the prior Form, 89 Fed. Reg. at 89,221 n.22; between 2017 and 2020, over 75% of requests for early termination were granted, Wachtell Comment at 4. And the FTC points to no data indicating that the recent early terminations would not have been granted under the prior Form. If anything, the FTC's reasoning suggests the opposite: that the new Form would ensure that fewer transactions are erroneously granted early termination. *See* 89 Fed. Reg. at 89,396-89,397 (Statement of Chair Khan).

c. *Saving Third Parties' Time.* Nor can the FTC defend the Rule based on cost savings to third parties. Third-party requests arise in a small fraction of transactions, so this rationale suffers from the same indiscriminate burden problem as above. And third-party assistance is voluntary and thus only provided when the third party expects some benefit in doing so. The FTC dismisses this argument (at 32) as based on "presumption" and "policy preferences," but it has no response to how its reasoning is consistent with the Act's objective of minimizing burdens on M&A activity.

B. The FTC Does Not Justify Its Rejection Of Less Burdensome Alternatives.

1. The Commission failed to reasonably explain why it could not simply make more use of post-submission information requests (from third parties or filers) for the small minority of transactions warranting additional scrutiny rather than shifting the information burden to all filers upfront. The FTC contends (at 34-36) that it reasonably believed the Rule would avoid delays, including those associated with withdrawal and refiling. But the cure is worse than the disease.

Something like 4% of reported transactions are withdrawn and refiled.[10] Once again, it is fundamentally irrational to require all filing parties to spend additional weeks compiling and submitting a universe of information rather than seeking targeted information from a small fraction after submission. So the FTC falls back on its claim that it needs more information to know whether it needs more information. FTC Br. 35 (citing 89 Fed. Reg. at 89,249). But again, that circular reasoning is hard to credit when the FTC is unable or unwilling to show any actual gaps in the information it received under the prior Form. Finally, the FTC's argument (at 36) that it has less coercive authority over voluntary requests is not persuasive. The FTC has plenty of tools to ensure compliance with such requests, including the threat of Second Requests, CIDs, and the authority to issue regulations governing such additional requests. *See* Am. Compl. ¶ 210.

2. As to making more use of Second Requests, the FTC asserts (at 36-37) that they are not a "substitute" for the HSR Form, because the point of the Form is to determine whether Second Requests are necessary. That is a description, not an explanation. The FTC elsewhere contends (at 19 n.8) that the two are not comparable because the amount of information sought in a Second Request is "not in the same stratosphere" as that required by the Rule. But only 3% of transactions are subject to a Second Request, which means that, under the FTC's own estimates, the FTC could double the amount of Second Requests at the same incremental cost of the Rule. *See* Am. Compl. ¶ 214. That approach would at least minimize the burdens on obviously lawful transactions. And the "stratospher[ic]" burdens imposed by Second Requests are within the FTC's control—it could always choose to be more targeted. The FTC rejects those tradeoffs, maintaining (at 37) that "Congress made a deliberate decision that mergers exceeding certain thresholds warranted

[10] Between 2018 and 2022, 546 transactions were withdrawn and refiled, 89 Fed. Reg. at 89,244, and 12,509 transactions were reported, *see* FTC and DOJ, HSR Report, Annual Report to Congress for Fiscal Year 2023 at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf.

premerger review." But Congress structured the Act to minimize those burdens. The FTC's view that parties cannot protest the burdens of premerger review contravenes Congress's intent.

IV. THIS COURT SHOULD SET ASIDE THE RULE IN ITS ENTIRETY.

Ending like it began, the FTC concludes (at 38-39) by asking the Court to depart from binding precedent based on single-judge concurring opinions, this time by declining to provide universal relief for its APA violation. But in the Fifth Circuit, "universal vacatur" is the "required" remedy "for a successful APA challenge to a regulation." *Texas Med. Ass'n* v. *United States Dep't of Health & Hum. Servs.*, 110 F.4th 762, 779-780 (5th Cir. 2024) (quotations omitted). Vacatur does not merely block enforcement, but "unwinds the challenged agency action." *Data Mktg. P'ship*, 45 F.4th at 859 (quotations omitted). Accordingly, vacatur is "not party restricted," and a vacated rule "may not be applied to anyone." *Career Colleges & Sch. of Tex.* v. *United States Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024). Applying these principles, the Fifth Circuit has already rejected the government's effort to limit relief to Plaintiffs' members who have shown standing. *See id.*; *Texas Med. Ass'n*, 110 F.4th at 779.

Finally, the FTC asks (at 39-40) the Court to sever portions of the Rule that it concludes are invalid. But Plaintiffs have asserted that the entire Rule is unlawful as exceeding the agency's statutory authority or arbitrary and capricious. Should the Court agree, there is no room for a severability analysis. To the extent that the Court agrees only with Plaintiffs' claims that certain individual requirements are unlawful, *see* Am. Compl. ¶¶ 222-234, Plaintiffs do not dispute the application of the severability instructions set forth in the Rule, 89 Fed. Reg. at 89,330-89,331.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' cross-motion, and set aside the Rule under the APA.

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Respectfully submitted,

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