No. 26-40094

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District Of Texas (Kernodle, J.)
Case No. 6:25-cv-00009

PLAINTIFFS' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent organization, and no publicly held company has 10% or greater ownership of the organization.

Plaintiff Business Roundtable is a non-profit, tax-exempt organization incorporated in the District of Columbia. Business Roundtable has no parent organization, and no publicly held company has 10% or greater ownership of the organization.

Plaintiff American Investment Council is a non-profit, tax-exempt organization incorporated in the District of Columbia. American Investment Council has no parent organization, and no publicly held company has 10% or greater ownership of the organization.

Plaintiff Longview Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Longview Chamber has no parent organization, and no publicly held company has 10% or greater ownership of the organization.

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INTRODUCTION

The Hart-Scott-Rodino Act requires thousands of parties to mergers and acquisitions each year to file a "premerger notification" (the HSR Form) with the FTC and Department of Justice, and then to wait 30 days before closing. 15 U.S.C. § 18a. Congress's goal was to stop "midnight mergers"—companies merging quickly and secretly before the agencies could even learn about the transaction—"without unduly burdening business with unnecessary paperwork or delays." S. Rep. No. 94-803, at 65 (1976). For 50 years, the Form required essentially the same targeted information: enough to determine whether further scrutiny was warranted, but not so much that the burden of completing the Form would "impede consummation of the vast majority of mergers and acquisitions" that are obviously lawful. *Id.* at 66. By all accounts, that version of the Form did its job. As recently as August 2024, even the FTC proclaimed it "a success" that "ha[d] minimized the number of post-merger challenges the enforcement agencies have had to pursue." Dkt. 75 (Op.) at 23-24 (Ex. A).[1]

[1] "Dkt." refers to filings on the district-court docket. Plaintiffs attach certain filings from the proceedings below as exhibits to this brief.

Only a few months later, however, the FTC decided to massively expand the HSR Form, adding 20 brand-new categories of required documents and information. *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024). By the FTC's own lowball estimate, those changes *more than triple* the average time and expense of completing the Form for thousands of transactions each year. Yet the agency has no evidence of any real problem with the prior Form, let alone one requiring that magnitude of change. The Commission never identified even a *single* transaction it believes was missed due to the prior Form.

After full briefing and oral argument, the district court concluded in a thorough opinion that the FTC's unprecedented overhaul of the HSR Form exceeded the limits Congress placed on its authority and reflected arbitrary and capricious decisionmaking several times over. Nothing in the FTC's stay motion even begins to show that this considered decision was erroneous. Instead, the Commission mostly tries to avoid the merits altogether, challenging on evidentiary grounds the way that plaintiffs' declarations established associational standing. But as the court explained, those arguments run counter to well-settled rules for establishing standing in this Circuit—hardly grounds for issuing an emergency stay.

Nor can the FTC show that the other stay factors support this Court's emergency intervention. The agency claims that it will suffer irreparable harm from a return to the longstanding HSR Form while this appeal proceeds. But the district court concluded—even after extending deference to the FTC—that the agency never plausibly explained how receiving all of the new information the revised Form mandates would help it to "detect illegal mergers more effectively than" it did under "the prior Form." Op. 22, 27. The FTC tried to fix something that was not broken; undoing that needless "fix" will not break anything in turn. It would instead force all HSR filers to continue bearing the unjustified and undisputed costs of an unlawful Form during the FTC's appeal.

BACKGROUND

A. Legal And Factual Background

1. To "balanc[e]" the "need to detect and prevent illegal mergers and acquisitions prior to consummation" with the imperative to avoid "unduly burdening business," S. Rep. No. 94-803, at 65, Congress divided the HSR process into two steps: the initial screen and (if warranted) a "Second Request." The screen relies on the "notification" that parties to every reportable transaction must file. The FTC may specify the "documentary material and information" that must be submitted in that "notification."

15 U.S.C. § 18a(d)(1). But Congress placed limits on that authority: the Commission may require only "such documentary material and information . . . as is necessary and appropriate to enable the [FTC and DOJ] to determine whether [the proposed] acquisition may, if consummated, violate the antitrust laws." *Id.* Then, if an agency determines during the 30-day waiting period that a transaction requires further scrutiny, it may issue a much broader Second Request. 15 U.S.C. § 18a(e).

Historically, only 3% of deals receive a Second Request, and 92% do not even trigger a preliminary investigation to determine whether a Second Request might be warranted. *See* Op. 25; *see also* Dkt. 44 at 26-27. The two-step process thus ensures that only the handful of transactions that pose a potential concern—based on the agencies' review of the parties' "notification"—must suffer the heavy costs and delays associated with full-blown premerger review.

2. The FTC published the original HSR Form in 1978, and it remained in effect with only minor tweaks for the next 46 years. *See* 89 Fed. Reg. at 89,257. As the district court explained, the business community, antitrust bar, and until recently even the antitrust agencies consistently lauded the Form as "highly effective" at enabling the government to reliably

identify potentially problematic transactions. *See* Op. 4 (citing such statements); *see also* Dkt. 27 at 23-26 (collecting others). If anything, "a significant criticism of" the HSR Form was that it was already "too burdensome and costly" to prepare. Op. 5. Indeed, in the one instance where Congress made any significant changes, it *loosened* the HSR Act's requirements. *Id.* (describing amendments in 2000).

3. In June 2023, the FTC "proposed dramatically expanding the Form by requiring thirty-four new categories of information." Op. 5. "Hundreds of commenters" "urg[ed] the FTC to withdraw or rewrite the proposed rule," *id.*, explaining that the proposal exceeded the agency's authority under the HSR Act; grossly underestimated the costs of expanding the Form; and ignored far less burdensome tools that the agencies could use to obtain the new information. The FTC nevertheless finalized the rule in October 2024. 89 Fed. Reg. at 89,394. "Although [it] pared back the categories of new information required by filers," the Rule still "substantially modified the Form, requiring approximately twenty" brand-new "categories of information and documents." Op. 6.[2]

[2] Describing each new and onerous addition to the Form would take most of this brief. Exhibit B excerpts plaintiffs' complaint, Dkt. 27, which provides details.

The FTC recognized the "significant and widespread costs" of the expanded Form. Op. 2. It estimated that the prior Form had taken 37 hours on average to complete. Op. 7. The new version, however, would now on average take 105 hours. 89 Fed. Reg. at 89,332. Even that number masked the severity of the change, as nearly half of filings—those in which the parties have identified any market overlap or supply relationship, even between affiliates—would now take 158 hours. *Id.* Thus, under the FTC's own estimate, the revised Form *more than quadruples* the burden on thousands of harmless (indeed, beneficial) transactions every year.

The Rule's main justification for saddling HSR filers with such substantial new burdens was that it would allow the agencies to detect more unlawful mergers by addressing purported "information deficiencies." 89 Fed. Reg. at 89,217, 89,251-89,252. But the Commission never squared this sudden need to close major gaps with its repeated recent descriptions of the prior Form as "highly effective" and "a success." Op. 4, 23-24. And despite being "repeatedly asked" to do so, the FTC has never "identif[ied] a single illegal merger in the forty-six-year history of the prior Form that" it believes would have been flagged by the new Form. Op. 22.

B. Procedural History

Plaintiffs filed this suit to challenge the Rule. The FTC first moved to dismiss or transfer this case to the District of Columbia on the ground that one of the plaintiffs, Longview Chamber, lacked standing. Dkt. 23. Plaintiffs amended their complaint, Dkt. 27, and then moved for summary judgment, Dkt. 44. As to standing, plaintiffs submitted declarations from their senior leaders. *See* Dkts. 44-1 (Ex. C), 44-2 (Ex. D), 44-3 (Ex. E), 44-4 (Ex. F). Each declaration details how specific members (identified by pseudonym to avoid disclosing confidential business plans and inviting unwarranted regulatory scrutiny) are harmed by the Rule, including by entering into HSR-reportable transactions since the Rule's adoption and thus incurring the Rule's higher costs.

On February 12, 2026, the district court granted summary judgment to plaintiffs and vacated the Rule. The court first held that plaintiffs had established associational standing with appropriate and substantively undisputed evidence. Op. 12. The court then held that the Rule violated the HSR Act and APA for at least three reasons. First, the FTC exceeded its statutory authority by requiring HSR filers to submit documents and information that "would impose substantially more costs . . . to compile and

produce than are justified by any benefit to the antitrust agencies' initial evaluation of the transaction." Op. 15. Second, the Rule failed to engage in a reasoned analysis of the benefits of its unprecedented expansion of the Form compared to its substantial costs. Op. 27-29. Finally, the Rule unjustifiably rejected less burdensome information-gathering alternatives already at the agencies' disposal. Op. 29-32.[3] The court concluded that the appropriate remedy was to vacate the Rule. Op. 32-34.

The district court stayed its order until February 19. Op. 34. The FTC asked that court for a stay pending appeal on February 17, which plaintiffs opposed and the court denied the next day. *See* Dkt. 76, 79. The FTC sought the same relief from this Court, which plaintiffs now oppose.

ARGUMENT

A stay pending appeal "is extraordinary relief for which defendants bear a heavy burden." *Plaquemines Parish* v. *Chevron USA, Inc.*, 84 F.4th 362, 373 (5th Cir. 2023). Courts consider (i) "whether the stay applicants have made a strong showing that they are likely to succeed on the merits"; (ii) "whether the applicants will be irreparably harmed absent a stay";

[3] The district court had no occasion to reach plaintiffs' additional statutory challenges to individual requirements of the Rule. *See* Dkt. 44 at 17-19.

(iii) "whether issuance of the stay will substantially injure the other parties"; and (iv) "where the public interest lies." *U.S. Navy Seals 1-26* v. *Biden*, 27 F.4th 336, 349-350 (5th Cir. 2022). Here, all four factors cut strongly against a stay.

I. THE FTC HAS NOT SHOWN THAT IT IS LIKELY TO SUCCEED ON THE MERITS.

The FTC has not shown that it is likely to prevail on appeal. The district court was right that plaintiffs have associational standing. And the court did not err in *any* of its independent grounds for vacating the Rule, much less all three.

A. The District Court Correctly Held That Plaintiffs Have Article III Standing.

In trying to move this case to the District of Columbia, the FTC argued below that only one plaintiff—the Longview Chamber—lacked standing because it had not shown that its members faced imminent harm from the Rule. The district court rejected that argument, Op. 11-13, and the FTC does not repeat it here for good reason. As the district court noted, "where a party is an object of the action" being challenged, typically "there is little question that the party has standing to challenge it." Op. 12 (internal quotation marks omitted). Here, the Longview Chamber President stated in her declaration

that, as of July 29, 2025, multiple members had "*already* engaged in HSR-reportable transactions" that year. *Id.* at 13 (quoting Dkt. 44-4 ¶ 5, Ex. F) (emphasis added). And still other members face at least a "substantial risk of future harm" from the Rule because they engage in HSR-reportable transactions as a "regular and consistent feature of their business model" and "plan to continue" a "similar level of HSR-reportable activity going forward." *Id.* at 12-13 (quoting Dkt. 44-4 ¶¶ 5-11, Ex. F).

The FTC thus no longer contends that the Longview Chamber's members will not be harmed by the Rule. Instead, the Commission presses two *evidentiary* objections to how all plaintiffs proved their standing at the summary-judgment stage. Those arguments run contrary to the law of this Circuit and long-recognized practice when associations sue on behalf of their members. The Commission cannot possibly make a "strong showing of probability of success" when its arguments require convincing this Court to depart from settled precedent and revolutionize associational-standing law in this Circuit.

1. The Commission contends (at 18) that, under *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 498-499 (2009), plaintiffs could not refer to their members using pseudonyms. But this Court has already rejected that

argument, holding that *Summers* requires an association to aver only "that there is a specific injured member," and "*does not require naming that member*." *National Infusion Center* v. *Becerra*, 116 F.4th 488, 497 n.5 (5th Cir. 2024) (emphasis added). *Summers* rejected a "statistical," "probabilistic" argument by a large organization that it surely had an affected member somewhere in its ranks. 555 U.S. at 497-499. That did not satisfy Article III, so the Court required associations to establish that they have at least one injured member. Whether that specific member is identified by real name or pseudonym was not relevant to the Court's decision.

The FTC notes (at 19-20) that *National Infusion Center* arose "on a motion to dismiss." But that makes no difference. *How* a plaintiff must establish the legal requirements of standing at each stage of the case is different from *what* those requirements are: the former changes as the case progresses (from allegations to sworn declarations), but the latter is constant (Article III injury-in-fact). Nothing about the use of a pseudonym inherently creates any factual dispute or issue of proof that is relevant to summary judgment. Nor are this Court's cases limited only to motions to dismiss; the Court has held that an association relying on pseudonyms had standing to

obtain a preliminary injunction. *See Speech First, Inc.* v. *Fenves*, 979 F.3d 319, 329, 331 (5th Cir. 2020).

2. The FTC also argues (at 15-18) that plaintiffs' declarations impermissibly relied on hearsay because the declarants "lacked personal knowledge" about their members' histories and practices of entering into HSR-reportable transactions. That is not only wrong, but radically so. Membership associations routinely establish their standing to bring suit on behalf of their members just the way plaintiffs did here. *See* Dkt. 62 at 3 n.1 (collecting cases). The FTC does not cite a single case holding that associations may not submit declarations that attest to the harms of their members.

First, as the district court pointed out, "each declarant expressly states that [his or her] declaration is based upon [his or her] personal knowledge and belief and/or upon [his or her] review of [the association's] business records." Op. 10 (citations omitted). So the FTC's claims (at 16-17) that "[n]one of the declarants purported to have reviewed any records" and that they "lacked personal knowledge" about the facts in their declarations are simply untrue.

Second, "each declaration sets forth information that is reasonably within the declarant's position or 'sphere of responsibility'" as a senior

association leader. Op. 10 (quoting *DIRECTV, Inc.* v. *Budden*, 420 F.3d 521, 530 (5th Cir. 2005)). A long-recognized purpose of associations like plaintiffs is to bring suit "on behalf of [their] members" without requiring those members' direct "participation." *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Thus, the declarants' "personal knowledge and competence to testify" about their members' harms "are reasonably inferred from their positions." *DIRECTV*, 420 F.3d at 530; *see Diamond Offshore Co.* v. *A&B Builders, Inc.*, 302 F.3d 531, 544 n.13 (5th Cir. 2002) (relying on declarant's "personal knowledge and his position" to reject "personal knowledge" and "hearsay" objections); *Council of Ins. Agents & Brokers* v. *Juarbe-Jimenez*, 443 F.3d 103, 111 n.10 (1st Cir. 2006) (same for trade-association leader). The district court relied on all three of these cases in rejecting the FTC's argument. Op. 10-11. The Commission's stay motion ignores them.

Finally, even if there were hearsay in plaintiffs' declarations, "the factual statements in a declaration at summary judgment" "'need only be *capable* of being presented in a form that would be admissible in evidence' at trial." Op. 9 (quoting *Maurer* v. *Independence Town*, 870 F.3d 380, 384 (5th Cir. 2017)) (emphasis added). Here, there was at least one "obvious way to

make th[e] testimony admissible": "for the unnamed members" described in the declarations to testify at trial themselves. Op. 10. The FTC complains (at 16) that it does not know the names of those witnesses, but that just rehashes its pseudonymity objection. As the district court held, there is "nothing to compel a conclusion" here that representatives of the pseudonymous members could not testify to the pertinent facts. *Id.* (quoting *Maurer*, 870 F.3d at 384). Indeed, the FTC has never offered any basis to doubt the truth of the facts in the declarations, nor could it. This case accordingly bears no resemblance to the ones cited by the FTC (at 17) involving hearsay statements on truly disputed factual issues by "unknown witnesses" who might never "emerge."

B. The District Court Correctly Held That The Rule Is Unlawful.

The district court held that the Rule violated the APA on three separate, independent grounds. The FTC cannot show a strong likelihood that this Court will reverse on any, let alone each.

1. The Rule exceeds the FTC's statutory authority.

First, the district court correctly concluded that the FTC exceeded its authority under the HSR Act, because the statute "prohibit[s]" the agency "from demanding certain documents or information from all HSR filers if

doing so would impose significant costs while doing comparatively little to enable the agency to determine whether to issue a Second Request." Op. 16.

a. The HSR Act allows the FTC to require in the initial "premerger notification" only "such documentary material and information relevant to a proposed acquisition *as is necessary and appropriate* to enable the [agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1) (emphasis added). As the district court held, that provision "requires that any benefits to the FTC in mandating additional information in the premerger notice 'reasonably outweigh' the costs." Op. 19 (quoting *Mexican Gulf Fishing Co.* v. *U.S. Dep't of Com.*, 60 F.4th 956, 965 (5th Cir. 2023)). That conclusion follows directly from *Mexican Gulf* and *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015), both of which construed identical "necessary and appropriate" language as "limit[ing] the authorization" to regulate and "at a minimum requir[ing] that [the rule's] benefits reasonably outweigh its costs." *Mexican Gulf*, 60 F.4th at 965.

The structure, purpose, and original FTC interpretation of the HSR Act all confirm the district court's reading. Dkt. 44 at 12-15. The whole point of the Act's two-step design is to ensure that the initial "notification" is just that—a notification, not an application—that is kept "as minimally

burdensome as possible without compromising the agencies' ability to investigate and interdict transactions." Op. 26 (citation omitted). Congress intended the real costs to arise only from the intrusive Second Request process—which is not constrained by the same "necessary and appropriate" language, 15 U.S.C. § 18a(e)(1)(A)—and thus remain limited to the tiny fraction of transactions that raise antitrust concerns at the first step.

b. In the Rule, the FTC rejected this limit on its authority to demand materials in the notification Form. It instead took the view that Congress gave it "broad discretion" to demand whatever it wanted in the Form. Op. 16-17; *see* 89 Fed. Reg. at 29,236. To the extent the FTC presses that argument here (at 21), it does so without analysis. Instead, the agency falls back on a one-sentence argument (at 24) that it *did* "extensively consider[] the costs and benefits of the Rule," despite disavowing any such obligation.

As the district court aptly responded, however, "[s]tating that a statutorily mandated factor was considered is not a substitute for considering it." Op. 27 (citation omitted). Nowhere in the Rule did the FTC ever purport to determine, let alone substantiate, that any of the 20 new categories of documents and information were beneficial enough to the first-step notification to be worth their exorbitant costs on all HSR filers. *See* Dkt. 44 at

15-17; Dkt. 62 at 11-13. Instead, the FTC decided to revamp the Form to add many brand-new requirements, and *then* occasionally tried "to minimize *where possible*" the costs of complying with all of those mandates. *E.g.*, 89 Fed. Reg. at 89,217 (emphasis added). That inverts Congress's command. The HSR Act requires the agency to determine *before* adding any new requirement to the Form that the benefits of doing so justify the cost *on all filers*.

On that point, the Rule offered only "vague and conclusory" explanations for why the agencies need the 20 new categories of information to spot potentially unlawful transactions—let alone badly enough to justify their "significant and widespread costs." Op. 2, 22-27. The FTC merely invoked its "experience and expertise" without providing any "specifics" or "evidence." *Id.* For example, the agency could not "identify a single illegal merger in the forty-six-year history of the prior Form that the Final Rule's new form would have prevented." Op. 22. Indeed, to the extent the FTC invoked anything resembling concrete evidence—a single study of hospital mergers, 89 Fed. Reg. at 89,221—that study actually demonstrated that "the prior Form worked as it should have," by triggering additional review of the transactions discussed. Op. 23.

The FTC generically insists (at 22-23) that agencies enjoy some deference in weighing costs and benefits. But the district court applied a deferential standard, *see* Op. 27 (invoking "substantial evidence" standard), and still concluded that the FTC's "conclusory," "unsubstantiated," "vague," and "lack[ing] specifics" analysis of the Rule's purported benefits, measured against its undisputedly substantial costs, rendered the Rule unlawful. Op. 24-25. The FTC is not asking this Court for deference to a reasonable judgment call based on relevant evidence; it is requesting (in an emergency posture) approval of a cost-benefit label that has no actual weighing of costs and benefits behind it.

The FTC also protests that agencies are entitled to make "predictive judgments" even in the absence of past harms. But that is not a license to disregard the APA or HSR Act, both of which required the FTC to "adequately substantiate[]" the existence of a "genuine problem" that could have remotely required such a massive expansion of the Form. *See Chamber of Com. of United States* v. *SEC*, 85 F.4th 760, 777-778 (5th Cir. 2023). An agency may make "reasonable predictive judgment[s] *based on the evidence it ha[s].*" *FCC* v. *Prometheus Radio Project*, 592 U.S. 414, 426-427 (2021) (emphasis added). It cannot simply ignore the record assembled by

commenters and make "predictions" not rooted in that record—which, again, reveals five decades of the prior Form's working well, permitting zero identified harmful mergers to slip through, and being praised even by the FTC itself until shortly before it finalized this Rule. Op. 24.

2. The Rule failed to reasonably analyze costs and benefits.

As an independent ground, the district court also found the Rule arbitrary and capricious because the FTC lacked any evidence to reasonably conclude that the Rule's benefits "bear a rational relationship" to its costs. Op. 28-29. In a footnote (at 21 n.3), the FTC claims that this APA issue is duplicative of the court's statutory holding. Not so. Plaintiffs separately argued below that the FTC's own (eye-popping) estimate of compliance costs "drastically underestimate[d]" those costs. Dkt. 44 at 19-23. The district court saw no need to consider that additional argument, Op. 20 n.1, but this Court would have to do so to reverse the judgment.

The FTC has no likelihood of success on that point either. As plaintiffs explained, the Commission's cost analysis relied entirely on an informal survey *of its own legal staff*. 89 Fed. Reg. at 89,332. Little wonder then that the Commission did not reconcile its estimate with the much higher estimates by commenters, or consider the Rule's full costs, including how it would extend

deal timelines and closings, harm small businesses, and hinder innovation and entrepreneurial activity. Dkt. 44 at 20-23. Each of those "serious flaw[s]" in the agency's cost analysis independently "render[s]" the Rule "unreasonable" under the APA. *Louisiana ex rel. Landry* v. *Biden*, 64 F.4th 674, 678 n.10 (5th Cir. 2023).

3. The FTC failed to justify its rejection of less burdensome alternatives.

Finally, the district court also correctly held that the FTC failed to "properly consider less burdensome alternatives offered in comments to the Final Rule"—another independent APA defect. Op. 29. Specifically, the FTC did not reasonably explain why increasing the use of Second Requests or voluntary requests during the initial 30-day period were not better alternatives than dramatically expanding the HSR Form for all filers. *See* Dkt. 44 at 27-30. The FTC claims (at 24-25) that it did explain its rejection of those alternatives. But the court's point was not that the agency said nothing; it was that what the agency did say was irrational. In particular, the FTC "fail[ed] to explain why imposing" the additional costs associated with early voluntary requests or Second Requests "on a small subset of filers" was "a *more* 'costly' alternative than tripling the costs of *every* HSR-reportable transaction for all filers." Op. 31 (emphases added).

II. THE FTC HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE INJURY DURING ITS APPEAL.

"Of the remaining three factors, irreparable injury matters most." *Alliance for Hippocratic Med.* v. *FDA*, 2023 WL 2913725, at *18 (5th Cir. Apr. 12, 2023). Success on this factor also requires "a strong showing," not merely "some possibility of irreparable injury." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). And "failure to show irreparable injury often decides the [stay] application." *Alliance*, 2023 WL 2913725, at *18.

The FTC has not shown that it will suffer *any* injury from returning to the time-tested prior Form during "the pendency of the appeal." *Texas* v. *Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (emphasis omitted). The Commission protests (at 26) that this would "prevent the Executive Branch from receiving" all the new information mandated by the Rule. But as discussed, the district court found that the FTC "*fail[ed] to substantiate* [its] assertions" that this new information would help the agencies "detect illegal mergers and save agency resources," especially compared to the excellent track record under the prior Form. Op. 2 (emphasis added). The FTC "bears the burden of proof" to establish irreparable harm, *Ruiz* v. *Estelle*, 666 F.2d 854, 855 n.4 (5th Cir. 1982), and it has offered nothing of substance to carry that burden. That alone is sufficient to deny a stay.

The Commission claims (at 25-26) that *Trump* v. *CASA, Inc.*, 606 U.S. 831 (2025), establishes that a government agency *always* suffers irreparable harm whenever a court vacates a rule the agency "believes" "is necessary." But *CASA* involved federal courts' statutory power to issue universal injunctions, and expressly reserved "the distinct question whether the [APA] authorizes federal courts to vacate federal agency action"—the remedy granted here. 606 U.S. at 847 n.10. Nothing in *CASA* stands for the remarkable proposition that the government is automatically irreparably harmed any time a court "prevent[s] the Executive Branch from" doing something, Mot. 26, however unsubstantiated the "need" for that something may be. *See Castanon-Nava* v. *DHS*, 161 F.4th 1048, 1063 (7th Cir. 2025).

The Commission argues (at 26) that a stay is warranted because there are certain provisions of the Rule that "plaintiffs did not dispute" or "to which plaintiffs never objected." But plaintiffs in fact argued that the *entire* Rule is unlawful because the FTC failed to recognize or abide by the key limits on its authority. Dkt. 62 at 25. In any event, to the extent there is supposedly uncontroversial information the FTC actually urgently needs during this appeal, it does not explain why it cannot take other action to obtain that information (such as issuing guidance to stop using out-of-date NAICS codes).

As for information the Commission is "mandated" under a 2022 statute to obtain, Mot. 26 (quoting 15 U.S.C. § 18b), the agency could claim "good cause" to promulgate an interim final rule immediately requiring that information. 5 U.S.C. § 553(b)(3)(B). But the Commission took over two years to comply with that "mandate[]" in the first place, and this appeal will presumably not take so long. Regardless, the FTC should not be permitted to leverage a minor provision or two in its vastly overbroad rulemaking into restoring the entire unlawful Rule for the pendency of this appeal.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FACTORS CUT STRONGLY AGAINST A STAY.

Finally, the Commission cannot show that the equities or public interest support a stay. The district court correctly found that the Rule is unlawful and unjustifiably imposes substantial costs on parties to mergers that pose no conceivable antitrust concern. There is *no* interest in requiring those parties—including but certainly not limited to plaintiffs' members—to continue bearing those excessive costs.

The Commission claims (at 27-28) that parties will face "uncertainty" absent a stay because they will "have to decide whether to begin preparing the old form instead of the new form." But there is no reason why keeping the new Form in place notwithstanding the ruling below would generate any more

uncertainty than allowing the old Form to take effect. More fundamentally, the FTC cannot invoke injuries to regulated parties that the agency is perfectly capable of solving itself by issuing timely guidance. Indeed, the FTC has already done so twice about this case over the past two weeks.[4] And in the unlikely event that this Court reverses and restores the new Form, the Commission can easily give parties a grace period for compliance—just as it did after adopting the Rule on October 10, 2024, with an effective date of February 10, 2025.

As for the Commission's objection (at 27) that some parties "have already incurred the time and expense of completing some or all of the new form," the district court correctly rejected that argument: the "existence of some costs to some parties"—costs that are already sunk—is not grounds to continue imposing far greater costs on *all* parties. Op. 34. In any event, the Rule did not change the old Form into an entirely new one; it *expanded* the old Form by "requiring approximately twenty … new categories of information and documents." Op. 6. So parties' recent efforts to complete the new Form will not be entirely wasted, and parties' future efforts to complete the old Form pending appeal will not be wasted at all.

[4] *See* https://www.ftc.gov/enforcement/premerger-notification-program.

Finally, the Commission's claim (at 28) that "any harms to plaintiffs are minimal" is hard to take seriously. The Rule itself acknowledged that the new Form will impose "roughly triple the costs to comply with the previous Form," Op. 20, and more than quadruple for half of all reportable transactions. Plaintiffs showed that their members have already incurred and will continue to incur those harms as they enter into HSR-reportable transactions. And the fact that plaintiffs did not seek a TRO or preliminary injunction at the outset does not somehow waive their ability to oppose a stay now that a federal court has thoroughly held that the Rule is unlawful several times over.

CONCLUSION

The Court should deny the FTC's motion for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,195 words.

This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2026, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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