UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

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 misrecelor3Nesceloro.730.004ade

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]

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 '(s)-1e it5aTw (: (e))4 (nt1.91 Td[(P)m)-2 (e4 ('(

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).

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

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-

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.

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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 a-12 (m)-6 (en)-4 c]T6 (e)4 (ns)-1 ( )-10 (a)4 (nd)]TJ[(e)1h(e)4 (ns4 (ow)

devoid of evidentiary support.

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