prenotification plans (e.g., book-of-the-month clubs)—and goes well beyond what existing laws, such as the Restore Online Shoppers' Confidence Act ("ROSCA"),[5] Telemarketing Sales Rule ("TSR"),[6] or Regulation E,[7] require. The now-capacious Rule creates potential civil penalty liability for: any misrepresentation of material fact made in connection with the marketing of a product or service that has a negative option feature (§ 425.3); failure to disclose all material terms before obtaining billing information in connection with a negative option (§ 425.4); failure to obtain express informed consent before charging in connection with a negative option (§ 425.5); and failure to provide a simple mechanism for cancelling a negative option (§ 425.6). The Rule also preempts inconsistent state laws (§ 425.7).

I respectfully dissent, for three reasons. First, this rulemaking did not follow the FTC Act's Section 18 requirements for rulemaking because: (1) the Rule is much broader than the "area of inquiry" proposed by the advance notice of proposed rulemaking ("ANPR"); (2) the Rule fails to define with specificity acts or practices that are unfair or deceptive, improperly generalizing from narrow industry-specific complaints and evidence to the entire American economy; and (3) the Rule fails to demonstrate that the unfair or deceptive acts or practices related to negative option billing are "prevalent."[8] Second, the Rule's breadth incentivizes companies to avoid negative option features that honest businesses and consumers find valuable. Third, the Rule represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission's authority.

Such amendments could have provided greater clarity to businesses about the patchwork of federal laws pertaining to negative options and *lawfully* used our Section 18 rulemaking authority to fill potential gaps including, for example, cancellation requirements. Indeed, I am very concerned that consumers are sometimes misled by companies using deceptive negative option features. The Rule represents a missed opportunity to devote scarce staff resources to bringing enforcement actions related to negative option features using the clear tools that Congress gave us, rather than conducting an overbroad rulemaking that cost years of staff time to propose and finalize, but will likely not survive legal challenge.

Today's rulemaking did not need to end this way. Had political leadership at the Commission taken more time to engage with other Commissioners to refine and improve the Rule, my vote and statement would look very different. Instead, less than a month from November 5, the

on stewarding its resources effectively and in ways that restore our institutional legitimacy, not further undermine it. I dissent.

I.

The historical context surrounding Congress's enactment of rulemaking requirements in Section 18 of the FTC Act is important. Congress passed the Magnuson-Moss Warranty Act in 1975, which imposed exacting requirements and limitations on rulemaking regarding unfair or deceptive acts or practices.[10] In the 1970s, the Commission tried to use its rulemaking and unfairness authority aggressively—for example, "to ban all advertising directed to children on the grounds that it was 'immoral, unscrupulous, and unethical' and based on generalized public policies to protect children."[11] In response, Congress refused to fund the Commission, shutting it down for several days.[12] Even this harsh rebuff did not completely cool Congressional ire with the "National Nanny" (as the Washington Post—no bastion of conservative thought—facetiously dubbed the FTC) and it remained closed for days.

Moss procedures were enacted.[17] That, apparently, was too much time and procedure for the Majority. In 2021, during the pendency of this rulemaking, the Commission made changes to its rules of practice,[18] over objections from the Commissioners in the Minority, to limit the efficacy of Section 18's procedural safeguards and compress rulemaking timeframes.[19] Among other things, the Commission revised the Rules of Practice so as to remove selection of the Presiding Officer from an independent judge and assign that role to the Chair; strip the Presiding Officer of significant control over the hearing process; and narrow opportunities for the public to help determine which factual issues are in dispute.[20]

regular appearance before elections[22]), and it has been in the spotlight for some time, including at the White House[23] and now on the campaign trail.[24]

But elevating political goals comes at a high price, harms policy efforts that might otherwise benefit consumers, and undermines the Commission's legitimacy. Publicly appearing to refuse to keep an open mind on a final rule or to prejudge complex policy questions, along with an apparent unwillingness to reconsider various aspects of a rulemaking may create PR buzz for the campaign trail and score political points. But that posture creates real legal risk for the Rule. Statements from the White House[25] and related statements from the Chair[26] concerning this rule—

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[22] *See generally* Betsy Klein et al., *Biden Cracks Down on "Junk Fees" in New Economic Focus Ahead of Midterms*, CNN (Oct. 26, 2022), https://www.cnn.com/2022/10/26/politics/biden-bank-fees-speech/index.html.

[23] *See, e.g.*, *Biden-Harris Administration Announces Broad New Actions to Protect Consumers from Billions in Junk Fees*, The White House (Oct. 11, 2023) ("The FTC proposed a 'click to cancel' rule in March of 2023, that, if finalized as proposed, would require sellers to make it as easy for consumers to cancel their enrollment as it was to sign up. This rule would rescue consumers from seemingly never-ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to gym memberships."), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.

[24] *See, e.g.*, *A New Way Forward*, KamalaHarris.com, *supra* note 4.

[25] *See, e.g.*, President Biden (@POTUS), X.com (Aug. 12, 2024) ("We're making it easier to cancel subscriptions and memberships. You shouldn't have to navigate a maze just to cancel unwanted subscriptions and recurring payments. *The FTC is hard at work finalizing its 'Click to Cancel' rule that it proposed to make this process a requirement*.") (emphasis added), https://x.com/POTUS/status/1823037212885414107; *see also FACT SHEET: Biden-Harris Administration Launches New Effort to Crack Down on Everyday Headaches and Hassles That Waste Americans' Time and Money*, The White House (Aug. 12, 2024) ("Today, President Biden and Vice President Harris are launching 'Time Is Money,' a new governmentwide effort to crack down on all the ways that corporations . . . add unnecessary headaches and hassles to people's days and degrade their quality of life. . . . The Federal Trade Commission (FTC) has proposed a rule that, if finalized as proposed, would require companies to make it as easy to cancel a subscription or service as it was to sign up for one. The agency is currently reviewing public comments about its proposal."), https://www.whitehouse.gov/briefing-room/statements-releases/2024/08/12/fact-sheet-biden-harris-administration-launches-new-effort-to-crack-down-on-everyday-headaches-and-hassles-that-waste-americans-time-and-money/.

[26] *See, e.g.*, Lina Khan (@linakhanFTC), X.com (Aug. 12, 2024) ("As @POTUS notes, @FTC's proposal would require that firms make it as easy to cancel a subscription as it is to sign up. Too often people have to jump through endless hoops—or end up stuck paying for services they don't want. *Our rule would end this tax on your time & money*.") (emphasis added), https://x.com/linakhanFTC/status/1823094653962289640. That Tweet came in response to the President unequivocally saying, "[w]e're making it easier to cancel subscriptions and memberships," and signaling the proposal would be finalized consistent with the NPRM. *See* President Biden (@POTUS), *supra* note 25. Other statements are similarly probative of apparent

Importantly, the ANPR did not contemplate broader regulation prohibiting all misrepresentations of material fact related to products that have negative option features. The ANPR tailored its inquiry by ". . . highlighting five basic Section 5 requirements that negative option marketing must follow to avoid deception": (1) disclosure of material terms of a negative option offer; (2) clear and conspicuous disclosures; (3) pre-purchase disclosures; (4) consent; (5) cancellation.[32] Absent from this list is anything about prohibiting all misrepresentations of material fact related to any product that happens to have a negative option feature. Similarly, when the ANPR stated that the Commission was seeking comment "to reduce consumer harm created by deceptive or unfair negative option marketing," it specified the Commission's interest pertained to "disclosures, consumer consent, and cancellation."[33]

requirement of a description of what the Commission aims to do is to elicit public comment to inform the Commission about its choices. Indeed, Section 18 requires an ANPR to invite interested parties to provide "suggestions or alternative methods for achieving such objectives."[38] Parties cannot possibly include alternative methods if the ANPR wholly fails to identify the objective, *i.e.*, regulating misrepresentations in marketing of products with negative option features.

It is telling that the ANPR here only elicited 17 comments,[39] while the NPRM (which made clear that the Commission was significantly expanding its focus) elicited *16,000* comments.[40] The narrowness of the ANPR meant that the Commission could not, consistent with Section 18, proceed to a much broader NPRM.[41] In choosing to interpret the ANPR (and the 17 comments it elicited) as sufficient predicate for the much-expanded NPRM, the Commission cut itself off from valuable public comments at important early stages (especially as to regulatory alternatives) and ignored the rulemaking guardrails that Congress carefully established to forestall nondelegation concerns that might otherwise exist.[42]

The second procedural failing lies in the Commission's failure to "prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices" as Section 18 requires.[43] "Because the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct."[44] Section 425.3 of the Rule fails Section 18's specificity requirements. Section 425.3 prohibits *any* misrepresentation of material fact made in connection with the sale or promotion of a product that has a negative option feature.

Unfairness explicitly requires a cost-benefit

in those limited cases are similar to the myriad contexts an economy-wide rule would inevitably apply to.

Indeed, the Rule is not limited to misrepresentations relating to *deceptive terms of negative option features* (or some other specific, deceptive conduct), but instead, applies broadly to *any* material fact. Nor does the Rule require that the consumer actually use the negative option feature; the mere *presence* of a negative option feature would render any misrepresentation of material fact subject to the Rule. Taken together, the Rule is nothing more than a back-door effort at obtaining civil penalties in any industry where negative option is a method to secure payment. The Rule's application to any misrepresentation therefore fails to meet Section 18's "specificity" requirement,[46] and will no doubt invite serious legal challenge on this basis.[47]

The Supreme Court's decision in *AMG*, which held the language of Section 13(b) does not authorize the Commission to obtain equitable monetary relief,[48] limited the Commission's ability to seek money for first-time violations of the FTC Act. The Commission is still able, however, to seek monetary remedies for violation of rules issued under Section 18.[49] Here, the Final Rule effectively transforms Section 5's broad prohibition on unfair or deceptive practices into a Section 18 rule, allowing the Commission to expand its ability to seek money. Indeed, because negative option features are widely used in a variety of industries, the Rule greatly expands that ability. While I generally support *legislation* that would grant the FTC authority under Section 13(b) to obtain court orders for redress or disgorgement (with whatever guardrails Congress deems fit), the Commission should not circumvent legislative prerogative via improper Section 18 rulemaking.

The third significant procedural flaw in this rulemaking is that the Commission failed to appropriately establish the "prevalence" of unfair and deceptive practices related to all negative option features for all products in all markets and all media (*i.e.*, with respect to the scope of this rule). According to Section 18, the Commission may issue an NPRM "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[50] Section 18 further provides:

> The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—
>
> (A) it has issued cease and desist orders regarding such acts or practices, or
>
> (B) any other information available to the Commission indicatesTc 0kfaio1n in

In the SBP, the Commission argues that it has satisfied this standard for its economy-wide rulemaking because it has issued more than 35 cases "challenging harmful negative option practices" and has received "tens of thousands of consumers complaints."[52] This evidence may well suggest that *some* unfair and deceptive acts related to negative option offers are indeed prevalent. But these statistics do not establish prevalence of misrepresentations of material fact related to products with negative option features, any more than the number of FTC cases and consumer complaints involving the Internet means that the entire Internet should be the subject of a Section 18 rulemaking prohibiting misrepresentations.

If similarity among complaints and cases only at the highest level of generality constitutes the "prevalence" sufficient to ground an economy-wide rulemaking, then a "prevalence" determination is in fact no meaningful guardrail on the Commission's conduct at all, creating precisely the type of non-delegation concerns that Section 18's guardrails were meant to prevent. Canons of "avoidance" warn us to avoid adopting interpretationsn0004 Tc 0.0179 Tw 9.6.11 -1.3[(precis)

likely to pervert business incentives. For example, businesses may avoid using negative option billing models, even when businesses and consumers could derive significant value from them.

One might argue that no shift in incentives will happen for *honest* businesses because the Rule only addresses *mis*representations of material fact. In other words, all an honest business needs to do to avoid civil penalties is to tell the truth about products and services that involve negative option billing. But what constitutes a misrepresentation can sometimes be in the eye of the beholder (that is, a Commissioner).[57] Even honest businesses will have reason to reconsider the use of negative option billing now that it means subjecting themselves to potential civil penalties for misreading Commission tea leaves.[58] And businesses will also need to factor in the compliance costs associated with implementing this Rule's disclosure, consent, and cancellation requirements—prescriptive requirements that are absent for other billing models or less prescriptive under existing

III.

This Rule is particularly disappointing because it represents two missed opportunities. In 2019, a bipartisan Commission unanimously voted in favor of issuing the ANPR, which was intended to (1) consolidate the requirements from various laws the FTC enforces, providing businesses who have to navigate this patchwork with greater clarity, thereby benefiting both consumers and businesses; and (2) explore whether a Section 18 rule should fill any gaps "when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible."[67] Today's final Rule could have stayed that prudent course rather than expanding in scope and complexity as it has under this Commission.