As of: February 08, 2024
Received: February 07, 2024
Status: Posted
Posted: February 08, 2024
Tracking No. lsc-b1qe-tnmc
Comments Due: February 07, 2024
Submission Type: Web

PUBLIC SUBMISSION

Docket: FTC-2023-0064
Trade Regulation Rule on Unfair or Deceptive Fees

Comment On: FTC-2023-0064-0001
Trade Regulation Rule on Unfair or Deceptive Fees

Document: FTC-2023-0064-3238
Comment from Gibson, Dunn & Crutcher LLP

Submitter Information

Email: lweinberger@gibsondunn.com
Organization: Gibson, Dunn & Crutcher LLP

General Comment

Comments and Memorandum of Law Regarding the Federal Trade Commission's Proposed Trade Regulation Rule on Unfair or Deceptive Fees

---

Attachments

Gibson Dunn FTC Comment Letter

The attachment is restricted to restrict all because it contains personally identifiable information data

Gibson Dunn FTC Comment Letter_Redacted

Before the
UNITED STATES
FEDERAL TRADE COMMISSION

Trade Regulation Rule on Unfair or Deceptive Fees

COMMENTS AND MEMORANDUM OF LAW REGARDING
THE FEDERAL TRADE COMMISSION'S
<u>PROPOSED TRADE REGULATION RULE ON UNFAIR OR DECEPTIVE FEES</u>

Helgi C. Walker
Lucas C. Townsend
Lael D. Weinberger*
Joshua Zuckerman
GIBSON, DUNN & CRUTCHER LLP
[redacted]
Washington, DC [redacted]

Branton Nestor
GIBSON, DUNN & CRUTCHER LLP
[redacted]
Irvine, CA [redacted]

February 7, 2024

* Admitted only in California; supervised by Principals of the Firm.

TABLE OF CONTENTS

INTRODUCTION

The Federal Trade Commission's Proposed Rule published on November 9, 2023, is an overbroad and fundamentally misguided attempt to regulate the way prices are set and communicated throughout the entire economy. The Commission claims that the Proposed Rule would end "unfair" and "deceptive" practices in which businesses add fees to advertised prices, but in fact the Proposed Rule would sweep in an enormous range of ordinary and non-deceptive practices and saddle businesses with an expensive regulatory burden. The Proposed Rule would at best provide only negligible and speculative benefits to consumers, and more likely would harm consumers by restricting choice and depriving consumers of many beneficial fee arrangements.

In addition to being overbroad and overburdensome, the Proposed Rule exceeds the Commission's statutory and constitutional authority. The Proposed Rule does not comply with the Magnuson-Moss Act's requirements for a Commission rulemaking—including the requirement that the Commission demonstrate that the full range of prohibited conduct is prevalent. The Commission then fails to demonstrate that deceptive fees are an economy-wide problem, much less that covered fee-disclosure practices are inherently unfair or deceptive and against the interests of consumers. The Proposed Rule compounds these failings with a deficient cost-benefit analysis that rests on demonstrably unrealistic assumptions. These unlawful features of the Proposed Rule have constitutional dimensions, because the rule as proposed would violate First Amendment free speech protections. The Proposed Rule also implicates the major questions doctrine and the nondelegation doctrine, both of which require a more limited reading of the Commission's regulatory authority. And any final rule would be tainted by structural constitutional violations in the Commission itself and its rulemaking process.

As explained more fully below, the Commission should withdraw the Proposed Rule in its entirety. If the Commission proceeds with a more limited version of this rule—such as a version of the rule limited to specific industries or excluding dynamic pricing—then the Commission must give notice of a new proposal and allow interested persons an opportunity to comment on the revised proposal. Finally, if the Commission proceeds with any version of this rule, the Commission should, at a minimum, set the effective date at least one year after publication, to allow businesses sufficient time to comply.

BACKGROUND

In 2022, the Commission published an advance notice of proposed rulemaking on the subject of "Unfair or Deceptive Fees." ANPR, Commission Matter No. R207011, 87 Fed. Reg. 67413 (Nov. 8, 2022). The ANPR claimed to identify a widespread problem with two kinds of fees: "junk fees" that add little or no value to a given product or service, and "hidden fees" that are unfairly and deceptively concealed from the consumer in the marketplace. The ANPR initiated a period for public comment. Now, with the Proposed Rule, the Commission says it has considered the roughly 12,000 comments and concluded that the solution is a vast, economy-wide rule governing how prices should be structured and presented to consumers.

Under the Proposed Rule, a business's communication advertising the price of a good or service would be deemed unfair and deceptive unless the business "Clearly and Conspicuously" displays the "Total Price" for the good or service. 88 Fed. Reg. 77420, 77484 (Nov. 9, 2023) (proposed § 464.2). The Proposed Rule defines "Total Price" as the "maximum total of all fees or charges a consumer must pay for a good or service," but expressly exempts shipping charges and taxes from the required communication. *Id*. (proposed § 464.1(g)). Similarly, businesses would be required to "Clearly and Conspicuously" disclose the nature and purpose of any amount paid by the consumer that is not included in the "Total Price." *Id*. (proposed § 464.3). And businesses would be prohibited from "misrepresent[ing] the nature and purpose of any amount a consumer may pay, including . . . the identity of any good or service for which fees are charged." *Id*. As proposed, the rule would apply to all businesses across all industries in the economy, and states would be free to apply *additional* requirements on top of those imposed by the Proposed Rule. *Id*. (proposed § 464.4).

In short, the Proposed Rule would restructure the way prices are set and communicated across the economy.

DISCUSSION

The Commission's Proposed Rule, if adopted, would violate the Administrative Procedure Act. As discussed in Part I, the Proposed Rule lacks statutory authorization under the Magnuson-Moss Act, exceeds Section 5 of the Federal Trade Commission Act, and violates the major questions and nondelegation doctrines. Part II explains that the Proposed Rule is arbitrary and capricious because the Commission fails to justify the rule's economy-wide scope, ignores reasonable and more effective alternatives, and fails to consider confusion the Proposed Rule would cause. Part III shows that the Proposed Rule's cost-benefit analysis is deficient because it relies on exaggerated benefits while underestimating or ignoring significant costs. Part IV explains that the Proposed Rule would violate the First Amendment as a content-based regulation of speech, an impermissible mandate of compelled speech, and an unconstitutional regulation of commercial speech. Finally, Part V explains that the Commission's structure violates the Constitution and would render any final rule a nullity.

I. The Commission Lacks Statutory Authority To Adopt The Proposed Rule

The Commission lacks statutory authorization to promulgate the Proposed Rule. Under the Administrative Procedure Act, agency action must be held unlawful and set aside if it is "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)–(D). "[L]ike other federal agencies," the Commission "literally has no power to act . . . unless and until Congress confers power upon it." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (omission in original) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *see, e.g.*, *SEC v. Sloan*, 436 U.S. 103, 116–17 (1978). The Commission, like other federal agencies, must be especially scrupulous when it claims to discover "'unheralded' regulatory power over a 'significant portion of the American economy'" in vague statutory provisions. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). An agency may not "bring about an enormous and transformative expansion" of its "regulatory authority without clear congressional authorization." *Utility Air*, 573 U.S. at 324.

The Proposed Rule lacks statutory authorization, and is in excess of statutory right, for at least four reasons:

(1) the Commission failed to comply with the Magnuson-Moss Act's stringent requirements for a rulemaking;

(2) the Proposed Rule would require measures that are unnecessary to address any "unfair or deceptive acts or practices" within the meaning of Section 5 of the FTC Act, 15 U.S.C. § 45(a)(2);

(3) the Proposed Rule violates the major questions doctrine because it would regulate an issue of major economic significance without clear congressional authorization; and

(4) the statutory delegation—to the extent it permits the authority asserted here—violates the nondelegation doctrine because Congress cannot delegate rulemaking authority to the Commission to regulate (much less proscribe) pricing decisions for all businesses.

For any of these reasons, the Proposed Rule should be withdrawn.

A. The Commission Has Not Complied With The Magnuson-Moss Act

The Commission has not complied with the requirements for a rulemaking established by the Magnuson-Moss Act, 15 U.S.C. § 57a. The Magnuson-Moss Act "impose[s] upon the Commission rulemaking procedures and judicial review provisions stricter than those contained in the Administrative Procedure Act." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 n.9 (D.C. Cir. 1985). In particular, the Magnuson-Moss Act requires the Commission (1) to notify Congress prior to publishing a Notice of Proposed Rulemaking, (2) to make several specific findings when promulgating regulations, (3) to include several specific statements when promulgating regulations, and (4) to hold a hearing before an administrative law judge (ALJ) when there are disputed issues of material fact. The Proposed Rule fails each of these requirements.

1. Failure To Provide Congressional Notice

The Commission failed to provide statutorily required notice to Congress before announcing the Proposed Rule. Under the Magnuson-Moss Act, the Commission must give notice to specified congressional committees "30 days *before* the publication of a notice of proposed rulemaking." 15 U.S.C. § 57a(b)(2)(C) (emphasis added). Specifically, notice must go "to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives." *Id.* These notice requirements are an important component of the Magnuson-Moss Act. They enhance congressional oversight of the Commission and help Congress to ensure that the Commission exercises its power in a manner consistent with and appropriate under the Commission's statutory charge of combatting unfair or deceptive acts or practices. They also provide the Senate with an opportunity to advise and consent on any pending nominees for Commissioner *before* the agency proposes any major rules. That is especially important where, as here, the Commission has only a mere quorum without the requisite bipartisan balance. *See* 15 U.S.C. § 41 ("Not more than three of the Commissioners shall be members of the same political party.").

Here, there is no indication that the Commission provided Congress with the notice required by the Magnuson-Moss Act—that is, a copy of the Proposed Rule, sent to the relevant congressional committees for review 30 days before the publication of the proposed rulemaking. A failure by the Commission to comply with the Magnuson-Moss Act's congressional notice requirement would deprive Congress of the early review opportunity that the Magnuson-Moss Act was designed to provide. That review opportunity was supposed to curb extensive claims of authority by the Commission.

2. Failure To Make Prevalence Determination

The Commission independently failed to make the necessary determination that "the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*." 15 U.S.C. § 57a(b)(3) (emphasis added). When a proposed rule attempts to regulate all businesses throughout the entire economy, its extraordinary breadth demands an extraordinary showing of prevalence. Here, the Proposed Rule would apply not just to fixed fees, but also to dynamic fees—a category that includes fees that vary based on the subtotal or on consumer decisions that cannot be known in advance without steps taken during the ordering and purchasing process. But the Commission has not shown the prevalence of dynamic fees that are communicated in unfair or deceptive ways.

For starters, the Commission has not demonstrated that the means of disclosing and collecting consumer fees are unfair and deceptive across all industries. Instead, the Commission has, at most, attempted to show that the unfair or deceptive use of fees is prevalent only in three distinct and non-representative industries—short-term lodging, live-event ticketing, and restaurants. *See also infra* at Part III.A (explaining why the Commission's focus on these non-representative industries is insufficient). Indeed, elsewhere, the Commission expressly assumes that 90% of the other firms in the economy (that is, outside the three industries it focused upon) *already* comply with the Proposed Rule. 88 Fed. Reg. at 77449. That assumption, if correct, significantly undermines the supposed prevalence of alleged unfair or deceptive practices. The Proposed Rule discusses no evidence that unfair or deceptive pricing practices are prevalent across all industries and economic sectors, much less in specific industries such as travel ticketing, financial services, retail, leisure, non-hotel rentals, personal care, or prepared food and grocery delivery platforms. The Proposed Rule also fails to consider that some industries rely on third-party marketplaces (where third-party sellers set item prices) or dynamic pricing (where pricing depends on consumer choices expressed during the ordering process and/or subject to change prior to checkout). In both of these common contexts, it is infeasible to disclose a single "Total Price" before the consumer finalizes the shopping cart. Nor does the Commission cite any cease-and-desist orders against companies that use these common practices. The Commission must consider these highly relevant contexts in formulating any rule, and must account for the substantial costs and burdens that the Proposed Rule would place on these industries.

Although the Commission cites some assorted settlements and stipulated orders, plus a couple of injunctions from select industries, those few examples are inapposite. They involve instances where companies affirmatively misrepresented the cost of goods and services. For example, the Commission cites a case where a funeral home listed inaccurate prices and where a lender purportedly lied about having "no hidden fees" but actually imposed thousands of dollars of hidden fees. 88 Fed. Reg. at 77435–36. These anecdotal examples—most of which were not adjudicated and did not result in any finding that the subject practices were deceptive—do not constitute evidence that dishonest pricing practices are *prevalent* across the entire economy. The

Commission does not demonstrate that these assorted instances of alleged dishonesty indicate a national, economy-wide problem.

Even assuming agency enforcement actions may be a means of proving prevalence, the paucity of enforcement actions of any sort, and a complete absence of enforcement actions for numerous sectors of the economy, is a notable departure from the evidence needed to support a prevalence finding. *See* ANPR Junk Fees, Commissioner Wilson Dissent, at 1–3 (Oct. 20, 2022); *see also Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 855 (9th Cir. 2017) (noting that "isolated examples" of a misleading trade practice did not make out a case for prevalence without cease-and-desist orders or other evidence that the problem is "widespread"). The absence of final enforcement activity and judicial precedent suggests either that the practices are not prevalent, or that the practices are not unfair or deceptive.

The Commission's failure to substantiate the necessary prevalence determination required by the Magnuson-Moss Act is particularly significant given the multi-industry, economy-wide nature of the Proposed Rule. The Proposed Rule sweeps in the entire economy without adequately establishing prevalence for the many diverse areas of the national economy.

3. Failure To Include Required Statements

The Proposed Rule also fails to include statements required by the Magnuson-Moss Act designed to provide the public with critical information about the proposal. The Magnuson-Moss Act requires the Commission to "include . . . a statement as to the manner and context in which such [proscribed] acts . . . are unfair or deceptive," 15 U.S.C. § 57a(d)(1), and "define with specificity" the "acts or practices which are unfair or deceptive," *id.* § 57a(a)(1)(B). The Proposed Rule does not include such a statement for the broad scope of the rule it would establish. Instead, the Proposed Rule identifies only three industry-specific contexts in which it contends that failure to disclose "Total Price" is unfair or deceptive: live ticketing, hotels, and restaurants. The Proposed Rule extrapolates its findings in these nonrepresentative industries to the entire economy. The Proposed Rule does not include a statement that explains how failure to disclose Total Price is unfair or deceptive outside of these industries. It is implausible that whatever confusion there might be about a previously undisclosed restaurant "service charge," 88 Fed. Reg. at 77426, leads to similar surprise about a fee prior to checkout in unrelated industries such as personal care, financial services, non-hotel rentals, retail, or delivery logistics. And within these unrelated industries, the Proposed Rule paints with an overbroad brush. The Proposed Rule is not accompanied by a statement that "define[s] with specificity" the acts and practices that are allegedly "unfair or deceptive," as the Magnuson-Moss Act requires. 15 U.S.C. § 57a(a)(1)(B).

The Magnuson-Moss Act also requires the Commission to "include . . . a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." 15 U.S.C. § 57a(d)(1). The Proposed Rule punts on this question: "The Commission seeks comment and information regarding the estimated number and the nature of small business entities for which the proposed rule would have a significant economic impact." 88 Fed. Reg. at 77479. But it is the *Commission's* burden, not the public's, to create an administrative record to justify the proposed rule. There is no actual analysis of how the Proposed Rule would affect small businesses. The Proposed Rule, in short, lacks several of the necessary statements and crucial analysis required by the Magnuson-Moss Act. Given the Proposed Rule's failure to provide these necessary statements, together with the Commission's failure to provide the evidentiary and policy analysis required for such statements, the Commission should withdraw the Proposed Rule to remedy these Magnuson-Moss Act violations.

4. Informal Adjudication Process Flaws

The Commission cannot adequately remedy the Proposed Rule's defects with an informal hearing because the Commission's informal hearing procedures are structurally unconstitutional.

Under the Magnuson-Moss Act, the Commission must hold an informal hearing when undertaking a rulemaking regulating unfair or deceptive acts or practices. 15 U.S.C. § 57a(b)(1). The hearing must allow any "interested person" to present his position and to present rebuttals and cross-examination if there are disputed issues of material fact. *Id.* § 57a(c)(2). The Commission has pledged that it will provide an opportunity for the hearing. *See* 88 Fed. Reg. at 77420 ("The Commission will provide an opportunity for an informal hearing if an interested person requests to present their position orally.").

Here, an informal hearing is needed to fill in the gaps and resolve the contested factual issues. The disputed issues of material fact relate to some of the most important legal claims in the rulemaking. Among others, there are factual questions relating to (1) whether the practices are "deceptive" or "unfair," (2) whether such unfair or deceptive practices are "prevalent," and (3) the extent to which the Proposed Rule's substantial costs outweigh the relatively marginal benefits, given disputes over what costs the Rule would impose, what benefits it would present, and how those costs and benefits would be reflected in various industries.

Unfortunately, the Commission lacks a constitutional means to perform the informal adjudication required to resolve these contested factual issues. Section 57a(c) says that the hearing shall be conducted "by hearing officers," and 16 C.F.R. § 1.13 defines the officer's duties. These duties include the power to issue orders, take testimony and evidence under oath, and make final recommendations to the Commission. Under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), these duties are exercised by inferior officers. It follows that hearing officers must be appointed by the Head of the Department, which is the full Commission. *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010). But they are not. Under the Commission's current regulations, 16 C.F.R. §§ 0.8, 1.13, the hearing officer is appointed by the Chair alone, in violation of the Appointments Clause.

Independently, the Commission's Administrative Law Judges lack the accountability that Article II of the Constitution requires. ALJs and other inferior officers must be accountable to the Executive—and the Supreme Court has held that "dual for-cause limitations on . . . removal" for inferior officers impermissibly "contravene the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. But under the Commission's current structure, the Commissioners are removable only for cause by the President, *see* 15 U.S.C. § 41, and the Commission's ALJs are only removable by the Commission "for good cause," 5 U.S.C. § 7521(a). As a result, the Commission's ALJs are doubly insulated from accountability to the Executive. The Supreme Court has explained that, with this kind of double insulation, "[t]he President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Free Enter. Fund*, 561 U.S. at 496. The Commission cannot cure this defect by borrowing other agencies' ALJs whose offices suffer the same constitutional defects. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (holding SEC ALJ removal restrictions unconstitutional).

Accordingly, these independent structural constitutional violations not only prevent the Commission from resolving factual issues under its regulations, but also would render any final rule constitutionally infirm. That is because the final rule would rest on testimony and evidence taken by a government employee who lacked both the authority to exercise significant federal power and constitutional accountability for the exercise of that power. The Commission therefore cannot proceed with a rulemaking that requires an informal hearing that cannot be performed in a constitutional manner. But if the Commission nevertheless proceeds with an informal hearing despite this structural unconstitutionality, then for reasons discussed *infra*, the Commission should permit the presentation of expert testimony at the hearing showing that the Proposed Rule reflects fundamental errors in economic analysis and assumptions.

B. The Proposed Rule Would Prohibit Or Unduly Burden Many Practices That Are Beneficial To Consumers

In addition to these serious statutory objections, the Proposed Rule is flawed because the proscribed practices are not "unfair" or "deceptive" under Section 5 of the FTC Act. The Commission cannot regulate the disclosure and collection of consumer fees under its asserted rationale if they are not "unfair or deceptive." 15 U.S.C. § 45(a). Here, the Proposed Rule would burden or prohibit many common practices that are *beneficial* to consumers, contrary to the FTC Act. The Proposed Rule fails to show that all of the practices that will be regulated or prohibited are unfair or deceptive.

1. Consumer-Benefiting Industries Will Be Affected By The Proposed Rule To The Detriment Of Consumers

The Proposed Rule will have far-reaching effects on several industries. To illustrate, consider as a case study the effects on delivery platforms. Delivery platforms facilitate the ordering and delivery of goods, including prepared foods and grocery items. At its most basic, the standard business model for delivery platforms involves at least two categories of pricing. First, there is the price for the underlying good or service—say, for example, a sandwich. Second, there is a price for the services involved in facilitating the delivery of goods from the seller to the buyer—for instance, arranging for the preparation and delivery of a sandwich from a restaurant to a consumer. The end consumer pays for both the goods and services—the sandwich and the facilitation of its delivery from the restaurant to the consumer.

The prices of the underlying product and of the logistics are set separately. The cost of the sandwich in the prior example is typically fixed by the restaurant based on the costs of goods and of labor. By contrast, the costs of facilitating delivery vary but often are based on how far the consumer is from the restaurant, the size of the order, and effort involved.

Standard practice with these delivery platforms is to charge both a delivery fee and a service fee. The *delivery fee* is often an incremental flat fee (e.g., $2.99, $4.99) that may vary based on factors related to a particular seller, such as the distance of the consumer who seeks delivery of goods from the seller. The *service fee* is typically a fixed percentage of a consumer's final order subtotal. Unlike the delivery fee, the service fee percentage does not vary seller by seller. As such, larger orders—which may require more effort and time to fulfill—unsurprisingly will cost more to facilitate. Because the dollar amount of any service fee cannot be known before the consumer selects all of the items that they order, the dollar amount of the service fee cannot be disclosed until the cart is finalized, which is consistent with consumer expectations related to such an order-specific, scaling fee. The Proposed Rule could be interpreted to require that the "Total Price" of facilitating delivery be displayed once menu item prices are disclosed to consumers. But the total costs of facilitating delivery cannot be known until all goods have been selected and a consumer finalizes their cart. This makes it impossible to disclose a "Total Price" as soon as menu items are advertised.

Or the Proposed Rule could be construed to require businesses to bundle item prices set by restaurants, on the one hand, with the costs of facilitating delivery set by the delivery platforms, on the other hand. These prices have been displayed separately. Bundling would confuse consumers for years. Bundling would also provide consumers with less information and transparency because it would make it impossible for consumers to tell who is charging what.

Worse, if all fees have to be calculated upfront, there is a risk that delivery platforms will impose only a flat fee structure. To do so, the delivery platforms likely would have to scale the upfront fees to the average cost of delivery rather than the individual cost of delivery. The result would be that consumers who purchase cheaper goods and services will effectively be forced to subsidize those who purchase more expensive goods and services.

In the context of delivery platforms, the Proposed Rule works to solve a problem that does not exist: consumers understand delivery platforms well. This is because the costs are disclosed in context and at multiple stages before purchase, are not hidden, and are clearly and accurately explained. Research demonstrates that consumers of prepared food and grocery delivery platforms are savvy and understand the pricing structures in that industry, as illustrated by repeated purchases in contexts that fully disclose total costs before purchase. *E.g.*, Bloomberg Second Measure (Jan. 8, 2024), https://shorturl.at/xFJ47 (explaining that app growth was driven in significant part by repeat customers). Moreover, consumers in this industry invest very little time in creating an order prior to checkout and face little to no switching costs to alternative sources. If a consumer thinks the end cost is too high on one platform there is no need to complete the order. The consumer could switch to a different platform, opt to pick up, go to the restaurant and dine in, or cook at home. *Id.* (noting that most customers use multiple platforms and choose among them for the best options and prices).

Delivery platforms are multi-sided platforms, connecting multiple actors: consumers, stores, and delivery providers. The pricing structures of these platforms address the needs of multiple market players. Not only are prices for delivery services set differently from the prices for the underlying product (such as the sandwich in our example above), but the separation of prices from fees on delivery platforms provide opportunities for businesses to market themselves in creative ways. Small businesses, for instance, may decide to offer promotions by covering a delivery fee to encourage consumers to try their products. Discounts on the fees can help smaller businesses compete with more well-known brands. For example, small restaurants on delivery platforms often contract to offer consumers a $0 delivery fee for ordering from their restaurants to compete with larger merchants. But presenting a single all-in fee would make it harder for consumers to recognize that there is a discount or promotion being applied.[1] In this way, requiring businesses to announce a single "Total Price" may lead to a reduction in choice for both consumers and businesses alike.

Imposing an economy-wide, uniform pricing structure could also increase costs. These harmful effects would fall hardest on consumers who purchase smaller orders and may be more cost-sensitive or less able to pay more for the service. As noted above, the Proposed Rule could require delivery platforms to collect flat fees only. The losers will be cost-sensitive consumers who will have to pay more on smaller orders. Meanwhile those consumers ordering more will pay less on a single, flat-fee model. Many services may thus become effectively unavailable to cost-sensitive consumers. As these consumers exit the market, costs for those cost-sensitive or low-dollar purchasers who remain will rise even further. *See* Donnelly McDowell & Andrew Stivers, *The War on So-Called "Junk Fees": Who's Fighting and What's at Stake?*, CPI Antitrust Chronicle, at 7 (Apr. 2023) (noting that "a blanket prohibition could detrimentally impact consumers and the marketplace by raising prices for all irrespective of how a consumer uses a product or service"). The problems with a one-size-fits-all, economy-wide rule are particularly

[1] Suppose that Restaurant A offers a $12 sandwich plus a $3 delivery fee, while Restaurant B offers a $15 sandwich with free delivery. Perhaps Restaurant B's sandwich uses higher quality (and thus more expensive) ingredients. With the promotion, a consumer might be inclined to try Restaurant B's gourmet sandwich. But if all are required to display Total Price, a consumer may have a harder time distinguishing two sandwiches that appear to sell for an identical $15 each.

noticeable in the context of delivery platforms, which legitimately rely on dynamic pricing that adjusts based on the attributes of a consumer's order (such as costs of items purchased).

The case of delivery platforms demonstrates that the Proposed Rule threatens to harm consumers. Consumers benefit from the conveniences provided by delivery platforms. The Proposed Rule threatens to reduce their pro-consumer function.

2. The Proscribed Practices Are Not "Unfair"

An act is "unfair" only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Here, the Proposed Rule has failed to establish that the methods of disclosing and collecting consumer fees are "unfair" in the full set of practices captured by the Rule. The Proposed Rule identifies potentially unfair practices in select industries—short-term lodging, live-event ticketing, and restaurants. *See, e.g.*, Proposed Rule at Part II. But the Proposed Rule has not established that the methods of disclosing and collecting consumer fees are unfair across all industries or economic sectors. For example, the Proposed Rule has not established unfairness in the context of the delivery platforms described above (Part I.B.1). Nor has it established that methods of disclosing and collecting fees is widespread in other industries that legitimately rely on dynamic pricing (where pricing depends upon choices or preferences consumers make during the order process). Likewise, the Proposed Rule has not shown that the disclosure and collection of consumer fees are unfair within many other industries, such as personal care, financial services, non-hotel rentals, retail, or travel ticketing. *Compare* Proposed Rule at Part II *with* Chamber of Commerce ANPR Letter, at 7–8 (Feb. 8, 2023). Conversely, the Proposed Rule would itself cause results that will burden consumers. In important industries, the Proposed Rule will not only fail to remedy unfairness—it will produce a less fair and less transparent marketplace for consumers. Those features of the marketplace that the Proposed Rule would eliminate in fact provide "benefits to consumers or to competition," 15 U.S.C. § 45(n), that the Proposed Rule has failed to consider.

With respect to delivery platforms (as described above), the prices of goods and services are available at multiple stages before purchase, are not hidden, and are clearly and accurately explained. *See also infra* at Part III.D (explaining why proposed "Total Price" requirement would undermine consumer experiences and increase costs). Flexibility within these parameters benefits consumers. Consider an online retailer offering a promotion where the buyer can get additional discounts by buying larger quantities of a product—the seller may want to use up obsolete inventory while the buyer benefits from lower prices. The promotion may be advertised upfront but the exact total price for goods may be impossible to provide until the total quantity of purchases is known. So long as the pricing is clearly disclosed, it should not matter that price is not communicated as the "Total Price" definition requires.

Such pricing practices are hardly unfair or harmful. To the contrary, these practices often enhance consumer choice and lower prices for cost-sensitive consumers by fairly allocating more costs to those who purchase higher value items or orders. These pricing practices also can help consumers get better deals. Additionally, on delivery platforms as well as many online marketplace contexts, consumers have low switching costs. Many online marketplaces are easily accessible and highly competitive—further undermining any conclusion that dynamic pricing practices are unfair in this and many other contexts where fees may vary with consumer choices during the order process.

An economy-wide, uniform rule is the wrong way to respond to any unfair practices identified in the specific industries the Commission considered. Different industries have different pricing structures that reflect consumer needs and expectations, as well as the extent to which prices are fixed. For example, the Proposed Rule does not distinguish between fees that are fixed (determinable up front) versus fees that vary based on consumer choice and the attributes of orders (dynamic). Dynamic fees can be more equitable than an upfront single fee, especially for cost-sensitive consumers, and can enable consumers to vary their order choices to achieve individual cost goals. But the Proposed Rule may inhibit the use of such fees—they simply don't fit easily within the "Total Price" disclosure requirement. The Proposed Rule is ambiguous about how and when such a fee must be disclosed when the fee itself cannot be calculated upfront (for instance, if the fee depends on the final price that a consumer spends on a basket of the underlying goods, the quantity of goods to be obtained will not be known until the consumer is ready to finalize a purchase).

The Commission has failed to establish that all these practices captured by the Proposed Rule are "unfair." The Proposed Rule should therefore be withdrawn or, at minimum, re-proposed in a narrower, industry-specific form with new notice and opportunity for the public to comment on the narrower proposal.

3. The Proscribed Practices Are Not "Deceptive"

An act is "deceptive under section 5 (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012) (internal quotation marks omitted). Again, the Commission identifies potentially deceptive practices in select industries—short-term lodging, live-event ticketing, and restaurants. *See, e.g.*, Proposed Rule at Part II. But the Commission has failed to present any reliable evidence of prevalent deceptive pricing practices across any other industries or economic sectors. For example, the NRPM does not discuss many kinds of online marketplaces or dynamic pricing models at all. In fact, industries that rely on those practices do so because customers value the savings and pricing transparency prevalent in those industries. The

Commission independently has failed to establish that dynamic fees are inherently deceptive, or that deceptive fees are prevalent, within any specific industries aside from *perhaps* live-event ticketing, restaurants, and short-term lodging. Nor has it attempted to demonstrate that consumers in other industries (aside from ticketing, restaurants, and short-term lodging) are misled by not having a single "Total Price" upfront before they have ordered items that necessarily inform the final price of delivery and especially when online switching costs are often very low or virtually non-existent. *Compare* Proposed Rule at Part II *with* Chamber of Commerce ANPR Letter, at 6–7.

Consider again the example of delivery platforms. As discussed above, many consumers are repeat users of delivery platforms, suggesting that they cannot be surprised, confused, or deceived by the fee structures common among these platforms. Moreover, consumers dealing with delivery platforms can easily and quickly switch from one platform to another or to other delivery or in-person options. These low barriers to switching distinguish that industry from any of the examples provided in the Proposed Rule. The Proposed Rule would therefore risk encompassing nondeceptive business practices. *See, e.g.*, Chamber of Commerce ANPR Letter, at 6–7. The Commission has also provided no evidence that consumers find details about how fees are allocated or a specific breakdown of fees to be material. *See* Proposed Rule at Part II.

There are good reasons why an economy-wide, uniform rule is improper for combatting allegedly deceptive practices here. The costs of implementing the Proposed Rule would vary between industries and would be more disruptive in industries that use dynamic fees to fairly and equitably price their services based on consumer preferences, or that include a large proportion of small businesses (such as restaurants). Consumer expectations also vary across industries and sectors of the economy. Consumers are familiar with and thus anticipate the unavoidable fees in certain industries (like many online marketplaces) and are less likely to be deceived because these fees are predictable. Additionally, to the extent the Proposed Rule applies to pricing models that Congress and other agencies have approved, the Commission cannot make those practices unlawful under Section 5. *See infra* at Part II.D. The Rule should therefore be withdrawn, or at least re-proposed in a narrower, industry-specific form with new notice and opportunity for the public to comment on the narrower proposal.

C. The Rulemaking Violates The Major Questions Doctrine

The Proposed Rule asserts vast and unprecedented power over pricing practices throughout the American economy—and violates the major questions doctrine. The major questions doctrine requires the Commission to identify a "clear congressional authorization" before asserting authority where "the history and the breadth of the authority that [the] agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721–26; *see, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 595 U.S. 109, 117–18 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355, 2604 (2023); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2487 (2021); *see also, e.g.*, *Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 844 (5th Cir. 2023); *Louisiana v. Biden*, 55 F.4th 1017, 1031 (5th Cir. 2022). Here, the major questions doctrine applies. The Proposed Rule has major economic significance, but the Commission has failed to identify a clear congressional authorization for the novel and extensive authority that it asserts.

1. The Major Questions Doctrine Applies

The Proposed Rule implicates the major-questions doctrine because the Proposed Rule has major "economic and political significance." *West Virginia*, 597 U.S. at 721; *see also* Wilson Dissent from ANPR, at 1 (describing the Proposed Rule as "sweeping in its breadth"), *id*. at 2 ("[g]iven the potential scope of this rule, it appears likely to be exercising a claim of authority that concerns an issue of 'vast economic and political significance'" that "implicate[s]" the Major Questions Doctrine). The Proposed Rule (as the Commission acknowledges) regulates broad swaths of the national economy, including payday loans, automobile financing, telecommunications, restaurants, live entertainment, hospitality, higher education, funeral services, car rentals, cruises, insurance, membership programs, and discounting programs. This extreme breadth will have major economic and political significance. Pricing strategies have a significant effect on the national economy, and the Proposed Rule would have significant effects on a wide array of pricing strategies. Indeed, strategies for the amount and presentation of prices encompass essentially every aspect of consumer-facing economic activity, which the Chamber of Commerce estimates involves 68% of the U.S. gross domestic product. The Proposed Rule—which imposes an economy-wide effort to rework pricing practices present in countless day-to-day consumer transactions—presents a question of major significance. *See, e.g.*, *Biden*, 143 S. Ct. at 2365 (major question where agency sought to free 43 million borrowers from student loan obligations of $430 billion); *West Virginia*, 597 U.S. at 714 (major question where agency sought to work an "aggressive" transformation in domestic energy industry).

Additionally, the Proposed Rule is far broader than the "history and the breadth" of the agency's past asserted authority. *West Virginia*, 597 U.S. at 721. The Proposed Rule attempts to "regulate pricing practices across a wide range of sectors and products, implicating significant political and economic questions." Chamber of Commerce ANPR Letter, at 3. But the Commission has "never before claimed the authority to undertake such pricing regulation." *Id.* at 3; *see also, e.g.*, *West Virginia*, 597 U.S. at 724 (finding major question where agency asserts newfound powers in old statutes against backdrop of agency failing to previously invoke such powers); *Nat'l Fed'n*, 595 U.S. at 119–20 (same); *Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979) (noting that the FTC Act limits the Commission to regulating "with specificity" rather than broadly and beyond documented instances of unfair or deceptive practices).

Other "hallmarks" of the major questions doctrine provide additional reason to doubt that Congress delegated such broad authority to the agency. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296–97 (4th Cir. 2023). The asserted authority raises federalism concerns. The Proposed Rule extends federal power over day-to-day commercial transactions that often have little or no connection to interstate commerce or traditional federal interests. Along the way, the Proposed Rule preempts state laws that are inconsistent with its provisions—but also says that any state regulation that is *more protective* of consumers can coexist with the Proposed Rule. The net result is a complicated new mix of state and federal regulatory burdens on all kinds of state and local economic activity. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corp. of Engineers*, 531 U.S. 159, 172–73 (2001). The Commission's asserted authority also does not fit well with the "distinct regulatory scheme" that is already in place. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–146 (2000). Many statutes and regulations address pricing practices on a sector-by-sector basis, with rules that are tailored to the circumstances of the particular business sector. The Proposed Rule would significantly change the existing regulatory landscape. This potential change raises an "inference" that the Commission's new and novel reading is overreaching. *N.C. Coastal Fisheries*, 76 F.4th at 297. Finally, the Commission's asserted authority raises additional "constitutional" concerns—including concerns arising from the nondelegation doctrine, the First Amendment, and the unconstitutional structure of the Commission, as explained further below. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021).

2. The Proposed Rule Lacks Clear Congressional Authorization

Congress has not provided clear authorization for the Proposed Rule. The Commission bases its authority for the Proposed Rule on Section 5 of the FTC Act. Section 5 allows the Commission to regulate "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1)–(2). But this statutory language is insufficient to authorize the Proposed Rule.

First, the statutory language—which is vague and expansive—is insufficient to provide a clear authorization. Under the major questions doctrine, "expansive, vaguely worded [phrases]"—like unfair and deceptive, for example—are "not akin to clear congressional authorization." *N.C. Carolina Coastal Fisheries*, 76 F.4th at 297, 302 (collecting examples, including *West Virginia*, 597 U.S. at 723–24); *see also, e.g.*, *Train v. Colo. Pub. Int. Rsch. Grp. Inc.*, 426 U.S. 1, 24 (1976) ("radioactive materials"—no authority to regulate nuclear materials regulated under Atomic Energy Act); *Utility Air*, 573 U.S. at 315–16 ("air pollutant"—no authority to regulate greenhouse gases); *Brown & Williamson*, 529 U.S. at 159–60 ("drug"—no authority to regulate tobacco products).

Second, when Congress has addressed pricing practices in the past, it has done so on a sector-by-sector or industry-specific basis. *See, e.g.*, Chamber of Commerce ANPR Letter, at 4 (collecting laws). Congress has also granted the Commission narrow, targeted authority to regulate particular deceptive or unfair pricing practices. *See id.* (collecting Commission-specific delegations); *see also Katharine Gibbs Sch. (Inc.)*, 612 F.2d at 662. There is, in other words, a "'distinct regulatory scheme'" that is "already in place," and targeted congressional authorizations that have so far declined to grant the Commission the power it seeks. *See N. Carolina Coastal Fisheries*, 76 F.4th at 297 (quoting *Brown & Williamson*, 529 U.S. at 143–46). Some members of Congress have introduced legislation very similar to the Proposed Rule. *See* Blumenthal Statement on Junk Fees Prevention Act (June 15, 2023), https://tinyurl.com/4x5snwnh. But those bills have not passed. Congress has not yet made the necessary policy decision to deal with this major issue.

In sum, the Commission has failed to identify a clear congressional authorization for the Proposed Rule. Until Congress provides such a clear congressional authorization, a decision of "'such magnitude and consequence'" must "'rest with Congress itself.'" *Biden*, 143 S. Ct. at 2374 (quoting *West Virginia*, 597 U.S. at 735).

D. The Rulemaking Violates The Nondelegation Doctrine

The nondelegation doctrine reflects the principle that Article I of the Constitution vests all federal lawmaking power in Congress, and Congress cannot delegate that power to Executive Branch agencies, such as the Commission. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *see also A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935). The principle is inherent in the Constitution's separation of powers, which safeguards individual liberty. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014). The Proposed Rule violates the nondelegation doctrine under both the contemporary intelligible principles test and under the history and tradition of the Constitution.

1. Intelligible Principle Test

Section 5 of the FTC Act lacks an intelligible principle and therefore violates the nondelegation doctrine. Under the "intelligible principle" test, a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). Section 5, if construed to allow the Commission to regulate all means of disclosing and collecting consumer fees for all businesses, lacks an intelligible principle. The power would be broad, the delegation open-ended. Taking these characteristics together, the statute lacks a sufficiently intelligible principle. *See id.* At minimum, the significant nondelegation concerns that the Proposed Rule raises require construing Section 5 narrowly to avoid the constitutional issue. *See, e.g.*, *Mistretta*, 488 U.S. at 373 n.7 (explaining that the nondelegation doctrine favors "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); *see also, e.g.*, *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (applying the nondelegation canon to narrowly read a statutory delegation); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974) (same); *cf. Nat'l Fed'n*, 595 U.S. at 117–20 (applying the major questions doctrine to narrowly read a statutory delegation). The Proposed Rule therefore violates the intelligible principle test.

2. History And Tradition Test

Section 5 independently violates the nondelegation doctrine because it is inconsistent with the historical and traditional nondelegation doctrine—which reflects the original meaning of the federal Constitution. Under the "history-and-tradition test," there are several "important guiding principles" that govern whether a delegation is constitutional: (1) "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to fill up the details," (2) "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding," and (3) "Congress may assign the executive and judicial branches certain non-legislative responsibilities," in particular those matters where "discretion is to be exercised over matters already within the scope of executive power." *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.) (cleaned up); *see also id.* at 2131 (Alito, J., concurring) (expressing support for reconsidering the intelligible principles test); *see also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (expressing interest in Justice Gorsuch's *Gundy* opinion). Section 5, if construed to allow the Commission to regulate all means of disclosing and collecting consumer fees, fails this history-and-tradition test and therefore violates the nondelegation doctrine.

The first condition for a constitutional delegation—that Congress make the policy decision—is not satisfied. If the FTC Act delegates to the Commission the power to determine what conduct is "unfair or deceptive" in pricing models economy-wide, then Congress has given away the power to make the policy decisions. But it is precisely those policy decisions that Congress must make. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting). They constitute the kind of "'important subject'" that is rightly the province of the legislature's own policymaking. *Id*. at 2136 (quoting *Wayman*, 23 U.S. at 43). This is in contrast to those subjects of "'less interest,'" where it would suffice for the legislature to make "'a general provision'" for policy, leaving to an agency power to "'fill up the details.'" *Id*. (quoting *Wayman*, 23 U.S. at 43). As noted above, some members of Congress have proposed legislation similar to the Proposed Rule, but it has not passed. *See supra* at Part I.C.2. Congress has not yet made the necessary fundamental policy decision over this major issue.

The second guideline—that Congress may leave factfinding to agencies, after Congress has set policy—has not been satisfied. Determining whether conduct is "unfair" or "deceptive" turns on factfinding. But determining what conduct is "unfair" or "deceptive" also requires policy judgments that Congress must make in prescribing the "rule governing private conduct." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Cargo of Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813)).

The third guideline—that Congress may leave non-legislative responsibilities to agencies or courts—is not satisfied. Although "no separation-of-powers problem may arise" if the delegation vests the Executive Branch with "discretion . . . over matters already within the scope of executive power" (e.g., "foreign-affairs-related" matters), there is little argument that formulating policy on what constitutes "unfair or deceptive" practices lies within the traditional domain of executive power. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (relying on *Brig Aurora*, 11 U.S. at 388, and *Wayman*, 23 U.S. at 43) (internal quotation marks omitted). The Proposed Rule therefore violates the history and tradition of the nondelegation doctrine.

II. The Proposed Rule Is Arbitrary and Capricious

Under the Administrative Procedure Act, a reviewing court is directed to hold unlawful and set aside agency action that is "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). Agency rules are "arbitrary and capricious" where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The extraordinarily broad Proposed Rule would be arbitrary and capricious under the APA. The Commission fails to justify the breadth of the Proposed Rule; the Commission ignores obvious and viable alternatives; the Commission fails to adequately calculate and justify the costs of the Proposed Rule; and the Commission fails to consider the potential confusion and disruption that will be produced by the expansive rule and the corresponding growth of the Commission's own regulatory role.

A. Unjustified Overbreadth

The Proposed Rule is overbroad. It imposes a one-size-fits-all directive on all industries and businesses. As the Commission itself acknowledges, "all firms will be affected to some degree." 88 Fed. Reg. at 77448. Regardless of the business, and irrespective of the standard practices in the industry, the rule sets a requirement for how prices must be communicated: The "Total Price," including all mandatory fees, must be displayed upfront once one mandatory cost is disclosed. *Id.* at 77484 (proposed § 464.1(g)). As explained above, this mandate ignores the fact that many industries have pricing models where the cost of a good or service will depend on decisions yet to be made by the consumer, like choice of supplier, time required, distance to be traveled or time to prepare/create, items purchased, and the underlying cost of the material inputs to products packaged with multiple services. If interpreted to require bundling of the goods and services into a single Total Price, the Proposed Rule similarly ignores the fact that many industries simultaneously sell goods and services (e.g., prepared food and grocery delivery platforms). In those industries, the display of Total Price would confuse consumers who rely on separate price displays to evaluate whether the goods and services *both separately and together* provide good value, are reasonably priced, and are priced within their budgets.

Overbroad regulatory action is arbitrary and capricious where the regulator has failed to adequately explain or justify the rule. *See, e.g.*, *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17–18 (D.C. Cir. 2015) (holding that overbroad regulatory action was arbitrary and capricious); *Texas v. Becerra*, 2023 WL 2754350, at *25 (N.D. Tex. Mar. 31, 2023) (similar). The Commission makes no effort to justify its universal, one-size-fits-all rule affecting businesses across every sector of the economy. Instead, the Commission focuses disproportionately on a handful of discrete industries—lodging, live-performance ticketing, and dining. For these industries, the Commission says (with varying levels of specificity) that hidden or nonobvious fees have created problems for consumers, and cites unsystematic, unverified anecdotes provided by commenters. *See* 88 Fed. Reg. at 77422 nn.8–12. But fees imposed by ticket sellers, hotels, and restaurants do not support regulating other industries. Transactions with ticket sellers, hotels, and restaurants can be time-intensive transactions with high switching costs at the point of purchase. These examples sharply contrast with other industries, including online marketplaces for fungible products and services, where consumers spend minutes at most ordering and have readily available alternatives to order or obtain the goods or services sought if they are unsatisfied with the prices displayed before purchasing. The anecdotal accounts of confusion about costs that appeared in the comments do not support regulating pricing in these marketplaces either. The Proposed Rule offers nothing to justify the leap from studies of individual industries to its decision to cover the entire economy with a single, undifferentiated rule.

B. Ignored Alternatives

The Commission's failure to comply with the Magnuson-Moss Act renders any rule unlawful. But even if this significant defect could be ignored (it cannot), the Commission has failed to consider reasonable alternatives to the Proposed Rule. An agency's failure to consider "'significant and viable and obvious alternatives'" is arbitrary and capricious. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (citation omitted). Here, and setting aside the legal problems described above, the Commission does not explain why it has ignored obvious, viable, and narrower alternatives. The alternatives could have avoided some of the most egregiously disruptive features of the current Proposed Rule. Consider two obvious alternatives.

1. Limit The "Total Price" To Fees or Charges That Can Be Calculated Upfront

The Commission could have tailored the rule to require only the disclosure in the form of a "Total Price" of those fees that can be calculated upfront. This could be accomplished by excluding from "Total Price" dynamic fees that depend on the subtotal or on decisions made by the consumer prior to a cart being finalized. The Commission's failure to consider this sensible option would be arbitrary and capricious.

The Commission has recognized that it may need to propose exclusions where the "Total Price cannot practically be determined." 88 Fed. Reg. at 77439. The Commission also has noted that "there may be unintended consequences of the proposed rule on some industries." *Id.* at 77441 n.247. Dynamic fees are precisely the kind of fees for which a "Total Price cannot practically be determined" in advance. Dynamic fees can and do work in a pro-consumer way in many industries by allowing fulfillment to scale with the size of a purchase and result in lower fees for more cost-conscious consumers making smaller purchases within defined budgets. *See supra* at Part I.B.1.

Indeed, this is one of the reasons that shipping costs are often undesirable to specify upfront. Fixing the shipping cost upfront eliminates the ability to charge more or less depending on the weight of the package or the distance it has to travel. It is not generally in the interests of consumers to require local consumers to subsidize shipment to those further away. Nor is it in the interests of cost-conscious consumers to be required to subsidize the shipping costs of other consumers with larger orders. Dynamic pricing on the shipping allows the relevant fees to match expenses appropriately and benefits consumers.

2. Exclude Specific Multi-Sided Marketplaces

The Commission could have exempted online marketplaces where prices for the goods or services are set separately from the fees charged to provide these underlying products. As it is, the Proposed Rule's "Total Price" requirement could reduce rather than enhance transparency for consumers and significantly reduce the choices available to consumers within these marketplaces.

In many online marketplaces, consumers benefit when they can distinguish between costs that are generated by the independent or third-party sellers and costs that come from the operator of the marketplace or platform. The ability to draw this distinction makes it easier for consumers to compare item prices across online marketplaces. This in turn helps consumers decide which marketplace they prefer because they can judge the allocation of costs between the independent seller and the marketplace operator. The Proposed Rule would make it harder to provide this kind of information to consumers. Because the Proposed Rule does not specifically address such marketplaces, its definition of Total Price is ambiguous as to whether it requires combining the item prices set by independent sellers and the fees imposed by marketplace operators into a single "Total Price." If the ambiguity is construed to require this combination of prices and fees, it would become harder, if not impossible, for consumers to know what the entities are charging for their respective goods or services.

Similarly, consumers benefit from the ability to comparison shop among sellers on the same marketplace. For example, a given marketplace operator may set fees based on factors such as the distance of the seller from the consumer such that ordering from some sellers will be cheaper than ordering from others. By having these fees disclosed separate from other item prices, cost-conscious consumers can differentiate sources of value. And they can make trade-offs between the sellers available to them based on the differentiated costs of fulfilling an order through a particular merchant (e.g., distance).

Delivery platforms offer a prime example of how the failure to exempt certain industries would harm marketplace participants. These platforms typically charge delivery fees and service fees that are calculated based on factors like the distance of the delivery and the size of the order (*see supra* at Part I.B.1). The service fee is typically a fixed percentage of a consumer's final order subtotal. (Unlike the delivery fee, this percentage does not vary by seller.) Larger orders—which may require more effort and time to fulfill—unsurprisingly will cost more. Because the dollar amount of any service fee cannot be known before the consumer selects all of the items that they order, the dollar amount of the service fee must be disclosed once the cart is finalized, which is consistent with consumer expectations related to such an order-specific, scaling fee. But the Proposed Rule could be interpreted as prohibiting this method of calculating service fees because it may be read as mandating that the fee be disclosed upfront, or maybe even bundled with the cost of the underlying product.

The Commission does not justify its failure to exclude such marketplaces. Because this alternative is a major feature of online commerce, this was an obvious consideration. The Commission's failure to consider this alternative regulation is arbitrary and capricious.

C. Duplication And Confusion

The Proposed Rule would create duplication and redundancy in regulation, generating confusion in the regulatory system.

The Proposed Rule overlaps with "several existing regulations [and statutes] relating to advertising and disclosures enforced by the Commission and . . . other expert agencies." Wilson Dissent from ANPR, at 2–3. These include the Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. § 463, *et seq.*, the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, and its implementing Regulation Z, 12 C.F.R. §§ 226, 1026, *et seq.*, the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(1)-(2), the Funeral Rule, 16 C.F.R. § 453.2(a), the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8402(a)(1)-(2), and the Rule Concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. § 425.1. As the titles suggest, these existing regulations and statutes generally regulate on a narrow, sector-by-sector basis. Wilson Dissent from ANPR, at 2–3. But the Proposed Rule—which regulates the entire economy—would have substantial overlap with these tailored, sector-specific statutory and regulatory rules. An "economy-wide rule" like that proposed by the Commission will "be redundant, confusing, and potentially conflicting with existing sectoral rules" that already regulate pricing in "insurance, consumer finance, broadband, and telecommunication services." Chamber of Commerce ANPR Letter, at 9. This potential for overlap with existing regulations, and corresponding regulatory confusion, is an "important aspect of the problem." *State Farm*, 463 U.S. at 43.

The Commission has failed to adequately consider the possibility that its Proposed Rule would create regulatory disruption or confusion. The Commission has certainly failed to justify the Proposed Rule's economy-wide scope in light of its potential to produce such problems.

Relatedly, the Proposed Rule could disrupt the regulatory system by dramatically increasing the regulatory authority of the Commission. The Proposed Rule is "sweeping in its breadth" and, "if adopted, could impact billions or even trillions of dollars in commerce, as well as millions of consumers and companies." Wilson Dissent from ANPR, at 1. The Commission "has never before claimed the authority to undertake such pricing regulation." Chamber of Commerce ANPR Letter, at 3. By introducing a new, economy-wide rule of pricing regulation, the Commission would displace existing sectoral pricing rules and substantially disrupt the regulatory environment. *See, e.g.*, 12 C.F.R. § 1026.24 (implementing the Truth in Lending Act with disclosure requirements that may not align with the Proposed Rule); *see also* Comment from Iowa Bankers Association, FTC-2023-0064-1425 (describing potential conflicts between existing financial regulations and the Proposed Rule). The Commission has failed to adequately consider the effects that its expanded regulatory reach will have on the economy, and has failed to justify its Proposed Rule in light of the substantial regulatory disruption it is likely to cause.

III. The Proposed Rule's Cost-Benefit Analysis Is Arbitrary And Capricious

Courts have recognized that errors in evaluating the costs and benefits of an agency action can render that agency action arbitrary and capricious. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d

1144, 1148 (D.C. Cir. 2011). Such errors occur where an agency "inconsistently and opportunistically frame[s] the costs and benefits of the rule; fail[s] adequately to quantify the certain costs or to explain why those costs could not be quantified; neglect[s] to support its predictive judgments; contradict[s] itself; and fail[s] to respond to substantial problems raised by commenters." *Id.* (finding agency action arbitrary and capricious for failing to account for relevant costs and burdens). The Commission has exaggerated the benefits of the Proposed Rule while grossly underestimating its costs. The Commission makes at least three errors in reasoning that would cause the Proposed Rule, if adopted, to violate the APA.

First, the Commission fails to appreciate that the Proposed Rule will obviously have different effects on different industries, depending on the nature of the goods and services sold by the industries, the elasticity of demand, and numerous other variables. But the Commission only attempted industry-specific analyses in three cases, inappropriately grouping together all other industries and applying a generic formula that fits none of them well. *Infra* at Part III.B.

Second, the Commission makes no effort to quantify several important costs and often contradicts its own reasoning. The Commission underestimates or downplays costs to businesses, ignores costs to labor, and overlooks that the Proposed Rule might harm the very consumers it seeks to help. *Infra* at Part III.C.

Third, the Commission exaggerates the benefits of the Proposed Rule. The Commission overvalues the time that consumers might save from reduced product searches, and it inaccurately presumes that businesses would benefit from uniform regulation. *Infra* at Part IV.C.

The Commission concedes that "total costs of the proposed rule are uncertain" and that it is "unable to quantify economy-wide benefits." 88 Fed. Reg. at 77448. It acknowledges that there is a "lack of reliable information on how . . . fees affect search and decision-making at the economy level." *Id.* The Commission admits that it cannot "quantify the net social benefits of the proposed rule at the economy level." 88 Fed. Reg. at 77452. Put differently, the Commission lacks data, cannot estimate costs, and cannot estimate benefits. These analytical failures are fatal to a cost-benefit analysis.

A. The Commission Unreasonably Focuses Its Analysis On Non-Representative Industries

The Proposed Rule's cost-benefit analysis largely depends on a study of three industries (live-event ticketing, hotels, and restaurants) that are not representative of the economy as a whole and are cherry-picked. The Commission focuses on three industries where it believes dynamic fees are "commonplace" and which it believes involve time-intensive transactions with high search and switching costs (hotels and tickets) or transactions that effectively cannot be rescinded at the time dynamic fees are prominently displayed for the first time (restaurants). 88 Fed. Reg. at 77442. The Commission then devotes most of its cost-benefit analysis to a study of those three industries. 88 Fed. Reg. at 77453–77. Tellingly, the Commission acknowledges that these industries are non-representative of the economy as a whole. *See, e.g.*, 88 Fed. Reg. at 77454 ("The live-event ticketing industry is unique relative to other industries."). The Commission does not extrapolate its data from these three non-representative industries to the economy as a whole—nor could it do so.

In fact, the Commission lacks sufficient information to determine how the Proposed Rule will affect firms in every other industry. The "proposed rule is sector-neutral and economy-wide, [so] all firms will be affected to some degree." 88 Fed. Reg. at 77448. There are 5.1 million businesses outside the three industries analyzed by the Proposed Rule, and the Commission assumes without evidence that 90% of them already comply with the Proposed Rule. *Id.* The Proposed Rule purports to analyze costs and benefits to the remaining 10% of firms, but its costs analysis relies on arbitrary assumptions about the difficulty of compliance. And the Proposed Rule does not even attempt an explicit analysis of benefits, but rather merely calculates the level of benefits consumers would have to receive in order for the costs to break even. *See id.* at 77448 ("The degree to which the proposed rule generates benefits for all industries in the economy is unclear, due to a lack of reliable information on how these fees affect search and decision-making at the economy level and the way in which pricing and search costs vary across industries.").

The Proposed Rule does not conduct any quantitative analysis of potential benefits to consumers exclusive of the three specific industries studied. Instead, it "determine[s] the break-even level of benefits the proposed rule must generate in order to outweigh the quantified costs we estimate and, thus, generate a net positive benefit to society." 88 Fed. Reg. at 77448; *see also id.* at 77443, 77477. In other words, the Proposed Rule (poorly) estimates the costs of the Rule, concedes that it cannot estimate benefits across all industries, and then arrives at a result in which an attempted projection of "likely" benefits conveniently exceeds estimated costs. *Id.* at 77448.

The detailed analyses of three non-representative industries does not salvage the Commission's failure to conduct a cost-benefit analysis of every other industry. Even if those three industries were representative of the economy as a whole, the Proposed Rule analyses are deeply flawed and highly speculative.

With respect to the online-ticketing industry, the Proposed Rule struggles to estimate how many tickets are sold in the United States, relying on a series of assumptions and extrapolations from one company's data, despite not knowing the company's market share. 88 Fed. Reg. at 77454–55. The Commission then considers the costs to ticketing companies, *id.* at 77456–58, but does not consider the costs to the event venues or the individual resellers of tickets who use the companies' platforms. If the display of Total Price does in fact deter consumers from purchasing goods and services, consumers will purchase fewer tickets, harming the ordinary Americans who use online marketplaces to resell their tickets, as well as event venues, which will see decreased sales of food, drinks, and merchandise if fewer consumers attend ticketed events.

The Proposed Rule's analysis of the hotel industry is no better. Among other flaws, the Proposed Rule fails to consider that hotels might respond to the Proposed Rule by making amenities such as wi-fi, pool and gym access, and parking pay-per-use rather than all-inclusive. These changes would be expensive for hotels to administer and could result in a decrease in consumer surplus if consumers fail to affirmatively opt-in to these purchases. The Proposed Rule also uses the results of "an experiment in the *ticketing* industry" to estimate "the average reduction in listings viewed under upfront pricing" in the hotel industry, and then uses those results to estimate consumer savings from the Proposed Rule. 88 Fed. Reg. at 77462 (emphasis added).

The Proposed Rule similarly makes critical errors when analyzing the restaurant industry. The analysis focuses on mandatory service fees and credit-card surcharges, 88 Fed. Reg. at 77471–72, and "assume[s]" without evidence that restaurants with mandatory service fees "will choose a return to the traditional tipping model in response to the proposed rule," *id.* at 77472. The Proposed Rule frames this as a benefit to consumers, but any benefit might be offset by the costs to employees from decreased tips. Indeed, the Proposed Rule acknowledges that "[t]his shift could generate a net benefit or a net cost to society, as well as transfers to or from restaurant workers" and that the Commission "lack[s] the data to quantitatively or qualitatively determine the welfare effect of the equilibrium shift." *Id.* at 77475. The Commission admits that it cannot even quantify the "primary benefit in the restaurant industry," namely, "the reduction or elimination of deadweight loss." *Id.* at 77472. Most importantly, the Commission mentions only in passing that "the average cost for a restaurant firm to redesign its menu" is an astonishing $4,818. *Id.* at 77473.

These costs would devastate countless small restaurants, many of which have narrow profit margins and are still recovering from years of lost revenue during the pandemic. The Commission does not estimate how many small restaurants can afford to spend nearly $5,000 to redesign their menus.

B. The Commission Fails To Consider Or Underestimates The Costs Of The Proposed Rule

The Commission also makes errors, both of fact and of calculation, in its cost estimates. Additionally, the Commission neglects several of the significant costs it will inflict upon American businesses. The Commission fails to grapple with the possibility that the Proposed Rule, by mandating higher advertised prices or less efficient pricing models, will decrease sales volume and income, even as the costs of compliance will likely be higher than the Commission estimates. Finally, the Commission fails to consider the costs to consumers.

1. Errors In The Commission's Cost Calculations

The Commission's estimates of economy-wide compliance costs are based on arbitrary and unreasonable assumptions yielding unrealistically low compliance costs. Several of the tables in the NPRM contain errors in their calculations or in their factual assumptions. We reproduce the Commission's Tables 2, 3, and 4 below, incorporating more realistic and reasonable assumptions.

Table 2 presents a modified version of the Commission's estimates of economy-wide compliance costs, incorporating sector-specific compliance costs for live-event ticketing (Table 6), short-term lodging (Table 10), and restaurants (Table 13). We take the results of these latter three tables as given.

a. Errors Of Calculation

As an initial matter, Table 2 contains errors: both the one-time and annual costs for the high-end estimates appear to be too low, based on the calculations implied in the Commission's tables. The one-time costs should be $4,828,709,438 (about $5 million higher than reflected in the NPRM). The correct figure should be exactly twice the low-end cost estimate, because the only difference is that the hours all double. Similarly, the recurring (annual) costs appear to be about $460,000 too low. Because the underlying calculations to reach the Commission's figures cannot be determined, we use the corrected calculations in the Corrected Table 2. There also appear to be two versions of Table 2, with slightly different values of total present value costs for live-event ticketing, short-term lodging, and restaurants; we use the values from the first version of the table. *See* 88 Fed. Reg. at 77451.

b. Errors In Assumptions

We turn now to the Commission's assumptions. First, as explained above, the Commission assumes that 90% of firms (exclusive of live-event ticketing, short-term lodging, and restaurants) are already in compliance. However, the Commission has no basis for this assumption and in fact concedes that this number may be as low as 50%. *See* 88 Fed. Reg. at 77453. The Commission calculates that this would require at least 59.09 minutes saved per consumer per year in order to exceed quantified compliance costs. We use the 50% assumption in our sensitivity analysis (again, which the Commission has conceded may be the case).

Second, the Commission relies on Bureau of Labor Statistics estimates of average hourly wages for data scientists, web developers, and lawyers. This appears to assume that firms maintain in-house teams. However, this is likely not the case. Rather, it is reasonable to assume that most firms will need to hire outside counsel, consulting data scientists, and consulting web developers. These billing rates are substantially higher than average salaries indicate, since they need to cover overhead and other expenses. For example, according to the American Bar Association, the average billing rate for lawyers in 2022 was \$306. Similarly, according to ZipRecruiter, a data scientist contractor salary is \$59 per hour.

The Commission also has no basis for its assumptions of the number of hours lawyers, data scientists, and web developers would spend. However, we leave these assumptions unchanged.

Incorporating these assumptions yields a total high-end cost estimate of between \$96 and \$110 billion, depending on the discount rate—nearly ten times larger than the Commission's estimate of between \$12 and \$13 billion.

Table 2 – Economy-Wide Compliance Costs

	Firms that Already Comply with Proposed Rule	Firms that Do Not Already Comply with Proposed Rule	
Number of Firms			
Assumed Fraction of Firms in Compliance (Exclusive of Live-Event Ticketing, Short-Terr Lodging, Restaurants)	50%		50%
Number of Firms Exclusive of Live-Event Ticketing, Short-Term Lodging, and Restaurants	2,811,247		2,811,247
Number of Firms Inclusive of Live-Event Ticketing, Short-Term Lodging, and Restaurants	3,073,437		3,067,176
Wages			
Hourly Wage Rate Data Scientist	$59.00		$59.00
Hourly Wage Rate Web Developer	$42.11		$42.11
Hourly Wage Lawyer to Review Compliance	$306.00		$306.00
One-time Hours for Regulatory Familiarization or Compliance		**Low-end Estimate**	**High-end Estimate**
Lawyer Hours	1	5	10
Purchase Process Adjustment Hours	0	40	80
Data Analyst Hours	0	40	80
Recurring (Annual) Hours for Compliance			
Lawyer Hours	0	0	10
One-Time Costs	$860,241,429	$15,671,012,490	$31,342,024,979
Recurring (Annual) Costs	$0	$0	$8,602,414,290
Total Present Value Costs (Annual + One-Time)			
Total @ 7% Discount Rate	$860,241,429	$15,671,012,490	$91,761,783,194
Total @ 3% Discount Rate	$860,241,429	$15,671,012,490	$104,722,363,759
Live-Event Ticketing, Short-Term Lodging, and Restaurants			
Total Present Value Costs (Annual + One Time) for Live-Event Ticketing, Short-Term Lodging, and Restaurants			
Total @ 7% Discount Rate	$47,785,835	$1,555,015,731	$3,692,879,269
Total @ 3% Discount Rate	$47,785,835	$1,555,015,731	$4,065,459,392
Grand Total (All Firms)			
Total @ 7% Discount Rate		$18,134,055,485	$96,362,689,727
Total @ 3% Discount Rate		$18,134,055,485	$109,695,850,415

Corrected Table 2

Table 3 then calculates these values on an annualized basis. Incorporating the two changes in assumptions above yields a high-end estimate of per-firm compliance costs between $4,158 and

$4,431. This is more than twice the Commission's estimate. Moreover, this assumes that costs can be amortized across ten years, which may not be the case if firms are liquidity-constrained. The high-end upfront cost estimate—for firms exclusive of live-event ticketing, short-term lodging, and restaurants—is a staggering $11,149 under these assumptions. This would be calamitous for many small businesses. Even under the Commission's model, this upfront cost is $8,588 per firm exclusive of live-event ticketing, short-term lodging, and restaurants (10 hours of lawyer time at $78.74 plus 80 hours each of data scientist and web developer time at $55.40 and $42.11, respectively).

Table 3 – Per Firm Annualized Costs

	Firms that Already Comply with Proposed Rule	Firms that Do Not Already Comply with Proposed Rule	
All Industries		**Low-End**	**High-End**
Annualized Compliance Cost per Firm @ 7% Discount Rate		$800	$4,431
Annualized Compliance Cost per Firm @ 3% Discount Rate		$658	$4,158
One-Time Cost (Firms Already in Compliance)	$306		

Corrected Table 3

In Table 4, the Commission calculates the break-even amount of time that consumers would need to save annually in order for these compliance costs to be justified. The Commission assumes that people value their time at $24.40, based on the mean hourly wage ($29.76), and an assumption that people value their time at 82% of their wage. The full sentence from which this latter statistic stems reads as follows: "*For evaluating transportation spending*, the evidence suggests that this valuation is now perhaps 82% in the United States." Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Surv. 1, 198–203 (2015) (emphasis added).

Hamermesh goes on to state: "There are many activities besides commuting time for which we would like to know how consumers value an hour spent. . . . Regrettably essentially no research has been conducted in any other area." *Id.* In other words, this estimate is for a much narrower scope than it is used for here by the Commission. Moreover, even assuming this use is valid here, the estimates of the value of time in the transportation context range from 55% to 115%, quite a wide range reflecting the vast uncertainty inherent in this exercise.

The Commission also takes the mean hourly wage ($29.76) rather than the median hourly wage ($22.26). *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics (May 2022), https://www.bls.gov/oes/current/oes_nat.htm. The mean wage is driven by a few outliers earning outsized salaries (those individuals who, incidentally, are least likely to be price sensitive to service fees). The median, which captures the wage of the individual in the center of the distribution, is a more appropriate choice.[2] Using the median wage and maintaining the 82% assumption to be conservative, we arrive at a value of $18.25 an hour. Incorporating these edits takes the high end break-even time savings to between 163.62 and 174.57 minutes—

[2] The Commission itself has acknowledged that median wages can be "more representative" because "they do not include outliers that can distort the mean." Agency Information Collection Activities, 84 Fed. Reg. 32170-02, 32172 n.6 (July 5, 2019). *Cf.* 16 C.F.R. § 255.2(e)(4)(iv) (noting in another context that the mean is susceptible to being affected by outliers). Note also that other agencies have made the same point. "Generally, the Department [of Labor] uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations." Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218-01, 62266 n.549 (Oct. 13, 2022). In another context, the Federal Communications Commission provided guidelines for data aggregation: "[R]eporting the median is generally preferred over reporting the mean (average) because the mean may be skewed by unrepresentatively high or low outliers." Disruptions to Communications, 86 Fed. Reg. 22796-01, 22822 (Apr. 29, 2021). *Cf.* Food Labeling; Serving Sizes, 58 Fed. Reg. 2229-01, 2245 (Jan. 6, 1993) ("the mean is often influenced by 'outliers'").

nearly three hours. It strains credulity that this rule would save every consumer 59 minutes per year, much less three hours.

Table 4 – Break-Even Analysis

Break-Even Benefit Per Consumer ($)	Low-End Estimate	High-End Estimate
Full Economy		
Total @ 7% Discount Rate	$9.99	$53.11
Total @ 3% Discount Rate	$8.23	$49.78
Break-Even Time Savings Per Consumer (Minutes)		
Full Economy		
Total @ 7% Discount Rate	32.85	174.57
Total @ 3% Discount Rate	27.05	163.62

Corrected Table 4

2. Costs To Businesses

Businesses are likely to suffer costs from depressed sales revenue and costs of compliance. The Proposed Rule does not adequately analyze either category of costs to businesses.

a. Depressed sales revenue.

Data suggest that dynamic fees increase sales revenue. *See, e.g.*, Josh Zumbrun, *Who's to Blame for All Those Hidden Fees? We Are* (Wall Street Journal, June 16, 2023), http://tinyurl.com/yky9f785. Dynamic fees do so because consumers believe that dynamic fees are "more transparent and that they can calculate the total cost by themselves." *Id.* (citing Raj Chetty, Adam Looney, and Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 American Economic Review 1145 (2009)). Consumers may also suffer from cognitive biases and fail to realize that Total Price reflects the costs commonplace for a particular service. While the Commission believes that Total Price will make pricing more transparent, it is possible instead that Total Price makes goods and services seem more expensive (even though they are not) and deters consumers from making purchases they would otherwise make. This in turn could chill efficient and economically desirable transactions if consumers suffer from cognitive biases that prevent them from accurately perceiving the cost of goods and services. The Commission acknowledges this in its analysis of the restaurant industry: "[A] restaurant including mandatory service charges in its prices would look more expensive than most of its competitors that have optional tips and so lose out on customers to its competitors." 88 Fed. Reg. at 77472. Additionally, one study found that consumers are likely to purchase better products as a result of partitioned-pricing, at least in the ticketing industry, so "disclosing fees upfront reduces both the quantity and quality of purchases." Tom Blake, et al., *Price Salience and Product Choice*, 40 Marketing Science 619 (2021). The Commission similarly notes that "when optional surcharges are dripped, individuals are more likely to select a more expensive option." 88 Fed. Reg. at 77446. In short, the Proposed Rule could very well lead to a significant loss of revenue to businesses, and businesses may try to recover these losses by passing costs onto consumers. The Commission ignores this costly possibility.

The Commission erroneously disclaims the possibility of losses to producer surplus. According to the Proposed Rule, "the added search cost [to consumers] to acquire price information reduces consumer surplus with no countervailing increase of producer surplus." 88 Fed. Reg. at 77445. But these search costs do result in producer surplus; otherwise, producers would not use dynamic fees. The Commission later contradicts itself by conceding that dynamic fees lead consumers to purchase more expensive products, *id.* at 77446, and when consumers purchase more expensive products, "there is a transfer of surplus from consumers to sellers," *id.* at 77446 n.258.

b. Costs of compliance.

The Commission also underestimates the costs that businesses will incur to comply with the Proposed Rule.

i. Disclosure burden. The Proposed Rule "alter[s] when and how . . . businesses disclose Total Price." 88 Fed. Reg. at 77478. It also requires various other details of policies regarding fees to be disclosed, mandating that businesses "disclose the nature and purpose of any amount . . . excluded from the Total Price, including the refundability of such fees." 88 Fed. Reg. at 77478 (citing proposed § 464.3(b)). The Proposed Rule underestimates these costs.

First, the Commission claims, with no supporting evidence, that "the substantial majority" of businesses already provide these required disclosures "as a matter of good business practice." *Id.* Second, again without supporting evidence, the Commission speculates that noncompliant sellers would face an average of just 90 minutes to become compliant: 30 minutes of attorney review and 60 minutes to update a website and price display. This compliance would not be as simple as updating prices. A business would have to identify noncompliant advertisements and webpages. That would require having knowledgeable employees or outside compliance professionals analyze every single price display, whether physical or digital. A business would then have to replace these noncompliant displays. As the Commission concedes, advertisements and menus would then need to be reprinted, often externally. Even the smallest businesses likely would need more than 60 minutes to redesign advertisements and menus, travel to a printer, physically replace all noncompliant displays, and update their websites. For large businesses, the time investments could be astronomical. Some may need to hire graphic designers to make advertisements look appealing and web designers or software engineers to rebuild entire websites. The largest businesses would need dozens, if not hundreds, of employees to replace thousands of noncompliant print advertisements and webpages. This could involve traveling around the country to replace tens of thousands of billboards, subway advertisements, and the like. That would take thousands of hours, not 60 minutes.

ii. Announcing "Total Price." To comply with the requirement of displaying "Total Price," businesses will have to revise, redesign, and reprint or republish materials communicating pricing information. Modifying all of a business's price displays is a significant undertaking. Even the Commission estimates that restaurants will face an average of $4,818 in costs to redesign their menus—hardly a minor expense. *See* 88 Fed. Reg. at 77473.

Affected businesses will have to reprint noncompliant physical advertisements and edit or reshoot noncompliant audiovisual advertisements. Digital platforms will have to update the user interface and/or text of potentially thousands of different web and mobile-application pages. Similarly, businesses will have to revise and reprint any noncompliant displays of prices such as menus, price tags, and websites. The redesign of websites and applications (and thousands of different branches and subpages within them) could be especially costly if technical issues necessitate reconstructing entire pages, sitemaps, and functionalities; according to the Commission, web developers earn on average $42.11 per hour. 88 Fed. Reg. at 77450. If many businesses have to revise their websites and advertisements simultaneously, this could produce a surge in demand for professionals such as web designers, leading in turn to shortages of qualified providers and upward pressure on their wages—meaning that the estimated rates are likely unrealistically low.

The Commission must believe that noncompliant advertising and offers are common, or else the Proposed Rule would have little impact. If they are indeed common, the cost of correction could be immense. The Proposed Rule rests on the dubious assumption that non-labor costs to correct disclosure requirements would be trivial because businesses already have "equipment and office supplies." 88 Fed. Reg. at 77478 (emphasis omitted). But few small businesses actually have the in-house capabilities to print large advertisements, and even if they do, the costs of ink and other materials could be considerable.

iii. Recalculating prices. In the process of complying with the Proposed Rule's "Total Price" mandate, many businesses will have "to re-optimize prices of goods and services." *Id*. at 77448. To re-optimize their prices, businesses will first have to determine what their new prices should be. The determination will prove costly. The Commission assumes that businesses will use 40–80 hours of data scientist time to re-optimize prices but ignores that many businesses either cannot afford data scientists or do not realize that they would benefit from data scientists' help. Firms that do hire data scientists will spend $2,216–$4,432, according to the Commission's methodology, based on their estimate that data scientists earn on average $55.40 per hour. 88 Fed. Reg. at 77450. This is hardly an insignificant cost. Similar to the dynamics for web designers, the Proposed Rule could lead to a nationwide surge in demand for data scientists, driving up their rates. Firms that do not hire data scientists risk creating suboptimal prices that would reduce producer surplus if set too low (and reduce consumer surplus if set too high).

iv. Compliance review. The Commission also severely underestimates the costs businesses will incur in ensuring that their pricing is compliant with the Proposed Rule. The Proposed Rule "applies to all firms in the economy and may result in all firms conducting a compliance review," which the Commission "prox[ies] with one hour of attorney time." 88 Fed. Reg. at 77478. But many businesses, especially small or immigrant-owned businesses, will be unaware of the Proposed Rule and will struggle with the costs of hiring an attorney to review it. Costs will be especially high for "firms not presently compliant" if, as the Commission estimates, they will require "a low end of 5 hours . . . of lawyer time to determine what is necessary to comply with the proposed rule." *Id.* at 77448. These firms might inadvertently fail to comply and subsequently might bear the brunt of enforcement actions or other litigation.

The Commission's analysis of ongoing compliance costs is inappropriately speculative. After "one-time transition costs," many businesses will have to "reevaluate their pricing policies to ensure continued compliance." 88 Fed. Reg. at 77449. The Commission then sweeps these costs aside, claiming (without any reasoning or supporting evidence) that businesses will "require an average of 10 hours of lawyer time for annual compliance checks." *Id.* Again, small businesses frequently cannot afford 10 hours of lawyer time per year. Lawyers supposedly cost $78.40 an hour, *id.* at 77478 (and as noted above, this is a significant underestimation that fails to distinguish between a lawyer's hourly wage and his hourly billing rate), meaning that ongoing compliance will cost the average business an astonishing $784 annually. Of course, many businesses might have to pay data scientists and web developers on an ongoing basis, too.[3] Additionally, businesses that hire quality, experienced, private-sector attorneys will pay several times the nationwide average wage (which includes the lower wages of inexperienced, nonprofit, or public-sector attorneys), and large businesses will inevitably hire multiple attorneys.

3. Costs To Consumers

The Commission essentially ignores all costs to consumers. It does not contemplate that the Proposed Rule could reduce consumer surplus. Instead, the Commission claims that "prices

[3] Although the Proposed Rule focuses on search costs, it fails to consider the search costs to businesses of finding lawyers, data scientists, and web developers. There is a limited supply of these professionals, and they often offer unique services that vary immensely in price and quality. The Commission does not consider that businesses can often take hours to identify, contact, and negotiate with these professionals—the attendant search costs here vastly exceed these costs to consumers of buying interchangeable tickets or selecting a hotel for a short trip. The disparity of the cost versus the benefit is likely to be starker in the many industries the Proposed Rule seeks to regulate, without any analysis, where switching and search costs are nearly non-existent for consumers.

are likely to adjust" to the benefit of consumers: "consumer welfare would increase, and producer profits would decrease by the same amount." 88 Fed. Reg. at 77448. If that is true, the Proposed Rule would create a zero-sum game, and benefits would not exceed costs, in which case this rulemaking amounts to nothing more than an effort to favor some economic actors over others, rather than an attempt to increase overall utility. *Contra id.* ("It seems likely" that "the benefits from reduced search time will exceed quantified compliance costs."). There is no guarantee that consumers will win this zero-sum game. Although prices might adjust, businesses—especially the ones that can afford to hire data scientists—probably will be forced to pass at least some compliance costs onto consumers (many to stay in business), effectively negating any benefits to consumers from the Proposed Rule.

First, the Proposed Rule also overlooks that as businesses advertise a higher Total Price, some consumers will not make purchases that they would have otherwise made as a result of cognitive biases. *Supra* at Part III.B.1. For many consumers, these biases will impede economically rational purchases to the detriment of both consumers and businesses; "consumers accustomed to dripped ticketing fees may initially under-consume when shopping for tickets with upfront all-in pricing." 88 Fed. Reg. at 77448. The Commission speculates that the "cost of such inefficiencies would be temporary and decrease as consumers adjust to the all-in pricing required by the proposed rule," but it provides no evidence for this self-serving prediction that the lower sales would be temporary, especially in the many industries where it concedes to having no data to support this assumption at all. The deadweight loss created by the Proposed Rule very well could endure.

Second, because (as explained above) the Proposed Rule focuses on the hotel and ticketing industries, it fails to recognize that price-sensitive consumers may be hurt by the "Total Price" requirement. In industries where costs and prices change quickly, it might not make sense to have a "Total Price" upfront, because the fees may be calculated based on the price of the underlying product. Consumers in these industries might be hurt by an upfront "Total Price" disclosure because, if the price of the good(s) drops before the consumer places the order, the fee would correspondingly be lower if the fee is calculated at the end of the transaction rather than at the beginning. For example, suppose the consumer has a promotional offer that reduces the overall subtotal for an order that is not calculated until checkout. But under the Proposed Rule, the seller must present "the maximum total of all fees" upfront. Given that the discounts would be harder or perhaps impossible to present upfront, the consumer may inaccurately overestimate the cost of the fees and abandon the order. Maybe such price fluctuations are random and any gains or losses to consumers equalize over a long enough time. But the Proposed Rule provides no reason to think that this is the case—no reason to think that any of these possibilities have been considered.

Third, Consumers would similarly suffer if firms replace dynamic fee structures, which allocate costs based on the choices of individual consumers, with a one-size-fits-all flat fee. Firms that need to maintain consistent revenue and cannot modify the underlying price of the goods (for example, due to contractual requirements with suppliers) will likely move from a dynamic fee (e.g., one that scales with a consumer's purchasing decision) to a flat fee, which means consumers who purchase cheaper goods and services, often cost-conscious and/or lower-income consumers, will effectively subsidize those who purchase more expensive goods and services. For example, a shift to flat service fees at restaurants would provide a windfall for those placing expensive orders and a burden on those with smaller orders. Similarly, flat financial services fees that would treat alike those with large transactions and small transactions would have to find the average by charging the former less and the latter more. The losers in all of these situations are low-income and cost-conscious consumers.

Fourth, the Proposed Rule overlooks the effects of cost-spreading by proposing a one-size-fits-all approach. The Proposed Rule would impede businesses' capacity to spread costs across consumers to account for variability in individual preferences. Standardized experiences limit consumer choice to situations where they present no added cost to the seller. This could mean that online marketplaces limit service areas, limit order sizes, and perhaps even categorically limit types of merchants to promote a more even pricing experience.

4. Costs To Third Parties

a. Costs to workers.

The Commission largely ignores the costs that the Proposed Rule might inflict on workers. A restaurant that spends $4,818 to comply with the Proposed Rule, 88 Fed. Reg. at 77473, might very well have to fire a busboy to recoup the $4,818. That other consumers might save a few minutes per year in search costs for online goods will come as cold comfort to the fired busboy and other primarily low-income Americans who find themselves jobless because of the Proposed Rule.

The Proposed Rule's effects on the labor market are quite foreseeable, but the Commission ignores them outside the narrow context of tips for restaurant workers. Even that examination is flawed. The Commission has "assumed that the proposed rule would lead any restaurants that have adopted mandatory service charges in lieu of tipping to return to the traditional tipping model." 88 Fed. Reg. at 77475. That, in turn, could "generate a net benefit or a net cost to society"—but the Commission does not claim to know which. *Id*. The return to the tipping model could harm waitstaff because, as the Commission acknowledges, women and minorities tend to receive lower tips. *Id.* Additionally, because "tips and mandatory service fees are distinct under tax and labor laws," *id.* at 77472, a return to tipping could harm waitstaff because tipping counts as income against the minimum wage, whereas mandatory service fees do not. The Commission also neglects the possibility that restaurants that collected mandatory service fees will not return to the tipping model that they have previously rejected and will instead simply raise their prices. Higher prices may be inevitable in jurisdictions that have prohibited tip credits to the minimum wage; a return to tipping would require restaurants to increase the wages of waitstaff by charging consumers more. These same effects may be even more dramatic in other industries that the Proposed Rule purports to cover but does not analyze at all. For instance, workers that fulfill delivery orders facilitated by delivery platforms may see fewer, less frequent orders and therefore, decreased earnings.

b. Costs to state and local governments.

The Commission ignores the Proposed Rule's foreseeable effect on state coffers. Many state and local governments collect a significant portion of their revenue from sales tax. If the Proposed Rule leads to a decrease in sales, *supra* at Part III.B.1, governments will collect fewer sales taxes, which in turn will require governments to either borrow more money at high interest rates, raise taxes, or eliminate services.

c. Costs to the supply chain.

The Proposed Rule likely will reduce demand for certain goods as a result of higher upfront prices, 88 Fed. Reg. at 77447, but not necessarily because consumers are understanding the costs for the first time. It may well be that consumers are confused by what appear to be new higher costs and reduce spending based on confusion about what is priced in as familiar industries redo their pricing based on the "Total Price" mandate. This could harm sellers, their employees, and workers who rely on such orders, as discussed at length above, but it may also harm other businesses in the supply chain for these goods including manufacturers, packagers, shippers, and warehouses—and their employees or independent business partners.

5. Deadweight Loss

The Commission concedes that there will be less demand for certain goods when consumers "learn the total price up front." 88 Fed. Reg. at 77447. But the Commission claims that the economic harms of reduced demand "would likely be mitigated" by increased consumer surplus. However, the Proposed Rule would not simply transfer producer surplus to consumers, as the Commission claims. Instead, reduced demand means less profit for businesses, so the Proposed Rule would reduce overall welfare if the increase in consumer surplus is smaller than the decrease in producer surplus.

Several factors could lead to a decrease in total welfare. Businesses could set inefficiently high prices as they struggle to re-optimize prices. That would lead to further reductions in consumer demand and the total quantity of goods sold, to the detriment of both consumers and producers. Alternatively, businesses might seek to cut costs in reaction to the expenses inflicted by the Proposed Rule. This could come in the form of a reduction in the quality of goods and services, leading to a loss of consumer surplus and a long-run loss of producers' surplus as business reputation suffers.

The Commission ignores these factors, instead arguing that the current system of dynamic fees leads to "overconsumption." 88 Fed. Reg. at 77447. The Proposed Rule cites only economic theory for this hypothesis and does not set forth any tangible evidence outside the three non-representative industries. If it is true that dynamic fees lead to "overconsumption," a lack of dynamic fees might lead to underconsumption and a loss of consumer and producer surplus. But the Proposed Rule fails to acknowledge this harmful possibility or to provide any evidence to support its economy-wide assumptions about overconsumption.

C. The Commission Exaggerates The Benefits Of The Proposed Rule Benefits To Consumers And Firms

1. Benefits To Consumers

Although the Commission never actually quantifies the exact benefits of the Proposed Rule, it claims that the Proposed Rule will have net benefits if the annual per-consumer benefit is $6.65. 88 Fed. Reg. at 77452–53. It is unlikely that consumers will realize an average annual benefit of $6.65. If the actual benefits are less than this—which is likely—the Proposed Rule cannot justify the considerable disruption of business operations and immense costs to firms.

The $6.65 figure is flawed for several reasons. The figure purports to measure the "break-even benefit per consumer in terms of minutes saved as the result of the proposed rule." 88 Fed. Reg. at 77453. The Commission arrived at this figure by "divid[ing] the estimates of annualized costs by the number of U.S. adults to find the average consumer benefit per year for 10 years required to exceed quantified compliance costs." *Id.* at 77452. But many American adults will not save any time as a result of the Proposed Rule because they do not purchase goods and services from industries that use dynamic fees. A large proportion of consumers, for instance, are unlikely to purchase tickets for live events or rooms at hotels that apply resort fees. Once these adults are excluded from the analysis, the per person value will have to be more than $6.65 to make the Proposed Rule cost justified.

The Commission values saved time at an astonishing $24.40 per hour. 88 Fed. Reg. at 77452–53. The Commission made this determination by calculating the average hourly wage ($29.76) and multiplying by .82, citing research that "suggests that individuals . . . value their non-work time at 82% of hourly earnings." *Id.* at 77456. That result is inaccurate.

The Commission's decision to value consumers' time as a fixed percentage of hourly wages is arbitrary and capricious for several reasons. Consider the following flaws in the Commission's valuation: (a) it does not consider that Americans who earn no wages, such as retirees and stay-at-home parents, may value their time at less than 82% of the average hourly wage; (b) it does not consider that consumers who enjoy shopping may not believe that they incur costs from looking; (c) it treats consumer valuation of their own time as the proper valuation, without considering whether consumers might overvalue their own time; (d) it assumes a linear relationship between a consumer's valuation of his own time and the consumer's salary, ignoring the diminishing marginal returns from higher wages; under the Commission's logic, a consumer who earns $1 million a year would value his free time as worth twice as much as one who earns $500,000 a year; (e) it assumes that lower-income consumers value their time less, when in reality, they might value their time more, depending on their circumstances—for instance, where they have little free time because they work multiple jobs, have childcare responsibilities, or depend on slow public transport; (f) it ignores that the wage distribution is skewed right, so the high wages of a few consumers artificially inflate the $24.40 figure; (g) it overlooks that higher-income consumers, who purportedly value their time more, are more likely to purchase expensive goods and services, but the Commission does not analyze whether these high-end sellers are more or less likely to impose dynamic fees; if the latter, the total consumer benefits from the rule would decrease considerably; (h) it assumes that a consumer's valuation of free time is a function of income, when in reality, it is more likely to be a function of wealth because wealthier consumers have a higher opportunity cost to searching for products; they can afford to spend this time doing expensive activities; and (i) it fails to consider that consumers shopping in certain industries might experience greater search costs from decreased fee transparency (as discussed above) and the inability to efficiently compare.

The Commission also claims that consumers will realize an "unquantified" benefit in the form of "reduced frustration and consumer stress." 88 Fed. Reg. at 77447. That may well be offset (at least in part) by increased frustration and business stress from compliance and changing operations.

Additionally, the Commission's concerns about search costs, 88 Fed. Reg. at 77445–46, are overblown. Search costs and other transactional investments by consumers are likely very low in most industries. They are especially likely to be low when the time per transaction is minimal, where readily available alternatives are immediately available, or where sellers are offering fungible goods rather than the unique goods, services, or experiences offered by the three industries the Proposed Rule analyzes. Dynamic fees are more likely to arise in online shopping rather than in retail stores; thus, in many instances, if a consumer is dissatisfied with dynamic fees, he need only switch from browsing the web to visiting the store.

For example, many consumers who use delivery platforms use *multiple* delivery platforms. *See infra* at Part I.B.1. Consumers who use multiple delivery platforms face minimal search costs. They spend a few minutes at most shopping, and the majority of purchases are from repeat consumers already familiar with these marketplaces. They are unlikely to be searching for a platform without fees; these consumers anticipate the standard fees in the industry and are unlikely to be deceived by them.

2. Benefits To Businesses

The Commission speculates that the Proposed Rule "may also provide a benefit to firms in the form of harmonized, nationwide compliance requirements. In the absence of the proposed rule, individual states may pursue enforcement actions . . . . Such regulations could vary from State to State, and firms would incur greater costs to ensure simultaneous compliance with this patchwork of regulation." 88 Fed. Reg. at 77447. But the Commission does not cite any evidence that such a patchwork exists, and eliminating any patchwork would benefit only businesses that operate in multiple states. Additionally, the Proposed Rule itself permits a patchwork anyway, because the new federal standard the Proposed Rule would create does *not* preempt state laws that provide "greater . . . protection" than the Proposed Rule. *Id.* at 77484 (proposed § 464.4(b)). The Proposed Rule does not discuss, much less meaningfully consider, the possibility of promulgating a standard that expressly preempts different state-law standards—a feature that would at least create some uniformity for firms.

This result is the worst of all worlds for businesses. They will have to comply with both the Proposed Rule and state laws that provide more extensive limitations on fees, thereby increasing the financial burden of compliance, including obtaining legal advice and developing and implementing different solutions to regulatory requirements in different jurisdictions. Additionally, state enforcers will test the bounds of their authority and argue that their laws do not conflict with the Proposed Rule. Businesses (or the Commission) might disagree, and the resulting uncertainty will lead to additional legal risks and litigation costs to businesses.

IV. The Proposed Rule Would Violate The First Amendment

The Proposed Rule would regulate speech. The Proposed Rule would require businesses of all sorts to "disclos[e]" "Clearly and Conspicuously" the "Total Price." 88 Fed. Reg. at 77484 (proposed § 464.2). The Proposed Rule defines "Clearly and Conspicuously" to "mean[] a required disclosure that is difficult to miss (i.e., easily noticeable) and easily understandable." 88 Fed. Reg. at 77483 (proposed § 464.1(c)). Such a requirement is a regulation of communication and of speech. The Proposed Rule defines "Total Price" as "the maximum total of all fees or charges a consumer must pay for a good or service . . . , except that Shipping Charges and *Government Charges may be excluded*." 88 Fed. Reg. at 77484 (proposed § 464.1(g)) (emphasis added). These regulations on communication implicate several aspects of First Amendment doctrine. First, they constitute a content-based speech regulation. Second, they compel speech on the part of merchants. Third, they regulate commercial speech. On each count, the Proposed Rule would run afoul of the First Amendment—and it should therefore be withdrawn.

A. Content-Based Speech Regulation

The Proposed Rule would impose a content-based restriction on speech, implicating—and failing—strict scrutiny. Under the Proposed Rule, once any charge is disclosed, businesses would have to disclose all other fees or charges associated with a transaction to avoid being classed as an unfair and deceptive business practice by the Commission. But under the Proposed Rule, hiding the government's charges is perfectly fine and not unfair or deceptive. The concealment of government charges upfront is no trivial matter, because in many industries—the lodging industry, for example—consumers may be required to pay multiple government charges, separate from sales tax, on the purchase, and those charges need not be disclosed until the time of purchase. The Proposed Rule would require businesses to publicize the costs of private enterprise but permit them to conceal the costs of government—providing special treatment to the government and impermissibly leaving consumers in the dark.

The First Amendment does not allow the government to grant itself this sort of special treatment—nor does the First Amendment allow the government to require companies to keep consumers in the dark. Start with the prohibition on government self-favoritism. In *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), the Supreme Court held that Congress could not ban robocalls while making an exception for robocalls that are made to collect debts owed to the federal government. The exception was content-based because it "draws distinctions based on the message the speaker conveys." *Id.* at 2346 (plurality op.). The Court noted, "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets." *Id.* The same is true here. An advertisement that says "$9 ticket $1 tax" is legal. An advertisement that says "$8 ticket, $1 processing fee, $1 tax" could apparently be illegal.

The Proposed Rule's content-based regulation of speech is no trivial distinction among different kinds of economic activity. "The law here focuses on whether the caller is *speaking* about a particular topic." *Id.* at 2347. Rather, it would be a government-mandated attempt to keep consumers in the dark about applicable government charges. "Bans against truthful, non-misleading commercial speech rarely seek to protect consumers from either deception or overreach[], [and] usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J., joined by Kennedy and Ginsburg, JJ.). The First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," including where, as here, the "state attempts to deprive consumers of accurate information about their chosen products." *Id.* "In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," and to bury information that the government would rather that consumers not see, the government's asserted interest is "per se illegitimate"—and such an attempt to "keep[] would-be recipients of the speech in the dark" triggers (and fails) strict scrutiny. *Id.* at 518, 523 (Thomas, J., concurring). If anything, the Proposed Rule here should meet even more skeptical scrutiny, for here, the government seeks to keep people in the dark not for their own good, but to protect its own vested interests. Governmental self-insulation from public criticism and accountability is antithetical to the values embodied in the First Amendment.

Strict scrutiny would apply. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny."). We can assume here that tax collection is an important government interest, even one of the most important. We can similarly assume that a special dispensation for government authorities to avoid disclosing the charges (taxes and otherwise) they impose on consumers is a form of favoritism for government speech. And we can assume that the favoritism toward government speech in the Proposed Rule assists in raising of tax revenues (although, on the other hand, constantly reminding consumers that they pay sales tax might reduce popular support for taxation). But if advancing a governmental objective were all that was needed, the scrutiny would hardly qualify as strict. Mandating favoritism for the informational content that helps the government, while mandating communication that hurts businesses, is not narrowly tailored to accomplish the governmental objective. There are other means of raising government revenue without suppressing speech; providing special favoritism for government messages about the "Total Price" of a good or service is not the only means of advancing the government interest in taxation. If the government thinks that disclosing a tax upfront will lead to fewer people making purchases, resulting in a decline in revenue, the government could, for instance, marginally raise the tax rate. In any case, when there are alternative means of achieving a government objective that do not infringe on speech, the government cannot pass strict scrutiny. So far, this is essentially what the government was able to urge in favor of its self-serving rule in the robocall case—that government favoritism for government speech would help the government accomplish its goals more efficiently. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. at 2347. Yet this was insufficient to pass strict scrutiny.

Id.; *see also Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983). The Proposed Rule fails strict scrutiny because it is not narrowly tailored.

Additionally, the Proposed Rule is underinclusive. A "law's underinclusivity raises a red flag" and can reveal "that a law does not actually advance a compelling interest." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448–49 (2015). Thus, when a law prohibits some harmful speech while allowing other harmful speech to continue, the law is less likely to survive strict scrutiny. *Id.*

The Proposed Rule is underinclusive because it exempts deceptive or misleading taxes from inclusion in Total Price. If, as the Commission claims, consumers can be misled or deceived when fees are not disclosed until checkout, it follows that consumers could also be misled or deceived when taxes are not disclosed until checkout. For example, consumers know to expect fees when ordering certain online goods but might be unaware of obscure, industry- or jurisdiction-specific fees such as local hotel taxes, destination fees, state cigarette taxes, and September 11th airport-security fees. But rather than forcing businesses to include these government charges in Total Price, the Proposed Rule allows them to disclose these costs at checkout—thereby inflicting upon consumers the same alleged "surprise fees" that the Proposed Rule purports to seek to prevent. 88 Fed. Reg. at 77447.

B. Compelled Speech

The First Amendment prohibits compelled speech. Its protection applies to business as well as individuals. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). When the government compels commercial speech, heightened scrutiny applies. Such heightened scrutiny applies even when the compelled speech concerns prices rather than an ideological message. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797–98 (1988) ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.").

Section 464.2(a) and (b) and § 464.3(b) of the Proposed Rule, 88 Fed. Reg. at 77484, would unconstitutionally compel speech by requiring businesses to "Clearly and Conspicuously" display the "Total Price." How the price of goods and services is displayed is a message. It may be displayed as the "Total Price" or as the sum of various charges. By dictating the terms in which businesses communicate, the Commission would compel speech. Government compulsion of speech "offends the First Amendment." *303 Creative LLC*, 600 U.S. at 587.

C. Commercial Speech

The Proposed Rule would unlawfully restrict commercial speech and fail intermediate scrutiny. Communication about pricing is commercial speech, that is, "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–62 (1980). Commercial speech is protected by the First Amendment, even when that speech "does no more than propose a commercial transaction." *Va. State Bd. of Pharma. v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748, 762 (1976) (quotation marks omitted). A law that "regulate[s] the communication of prices rather than prices themselves . . . regulates speech." *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017).

Regulations of commercial speech are restrained by the First Amendment. "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985).

The Proposed Rule would regulate non-deceptive commercial speech because it would prohibit the display of "an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price." 88 Fed. Reg. at 77484 (proposed § 464.2(a)). But failure to "Clearly and Conspicuously" display the price as the single number the Proposed Rule calls the "Total Price" is not necessarily deceptive. So proposed § 464.2(a) would be an unlawful restriction on commercial speech unless it passes intermediate scrutiny. It cannot do so.

As discussed above, *supra* at Part II.B, narrower restrictions are possible. These include industry-specific regulations, focusing only on written or online advertisements, banning only specific types of alleged "hidden fees," or adopting a narrower definition of Clearly and Conspicuously.

Even assuming *arguendo* that failure to display pricing in the way that the Proposed Rule would call "Total Price" is deceptive under *some* circumstances, it is not deceptive under *all* circumstances. Thus, there is no substantial governmental interest in mandating that "Total Price" is *always* "Clearly and Conspicuously" displayed. Government "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive . . . restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

V. The Commission Is Unlawfully Structured Because The Commissioners Are Unconstitutionally Shielded From Removal

The Commission's proposal fails because the Commission is unlawfully structured. The Commission is unconstitutionally structured: the Commissioners are unconstitutionally shielded from removal. This is in addition to the fact that the Commission's ALJs are unconstitutionally appointed and unconstitutionally shielded from removal, as discussed above, Part I.A.4. These structural constitutional infirmities—which corrupt the rulemaking process undertaken by the Commission here—are sufficient reason to withdraw the Proposed Rule.

The Commissioners' removal protections violate Article II of the Constitution and the Constitution's separation of powers. Unlike other executive-branch officials, whom the President can generally remove "at will," *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010), the Commissioners have "for-cause" removal restrictions. In particular, even though Commissioners exercise substantial Executive power today, the President can remove the Commissioners only "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. Nearly 90 years ago, the Supreme Court held that these removal restrictions did not violate the President's Article II power to remove officers who exercise Executive power. *Humphrey's Executor v. United States*, 295 U.S. 602, 630–32 (1935). But the reasoning of that decision no longer applies, and the decision should be overturned. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 n.2 (2020) (explaining that *Humphrey's Executor* reasoning no longer applies); *see also id.* at 2211 (Thomas, J., concurring) (calling for *Humphrey's Executor* to be overturned).

The reasoning of *Humphrey's Executor* no longer applies. The Court in *Humphrey's Executor* reasoned that the Federal Trade Commission in 1935 exercised no Executive power. But the Commission has acquired significant Executive power in the decades since—including the power to file civil suits, and to investigate and pursue the enforcement of certain criminal laws. *See Seila Law*, 140 S. Ct. at 2200. Therefore, the original reasoning of *Humphrey's Executor* no longer applies to the Commission today. *See id.* at 2198 n.2 (explaining that the conclusion that the Commission did not exercise executive power has "not withstood the test of time").

Even if the Commission's powers had not materially changed, *Humphrey's Executor* was wrongly decided and should be overturned. The decision creates an "independent" branch of government outside the President's control. This fourth branch is inconsistent with the Constitution's three-branch structure. *See Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part and dissenting in part). The unconstitutional structure of the Commission would require setting aside any final rule. An "unconstitutional [removal] provision" can "inflict compensable harm." *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). Here, the nexus between the purported harm and the unconstitutional removal restriction would require setting aside the final agency action. *See id.*; *see also id.* at 1795 (Gorsuch, J., concurring). To the extent the Commissioners are unconstitutionally shielded from removal—and to the extent they undertake the Rulemaking while they have such unconstitutional insulations—the Commission has substantial reason for pause before pursuing a broad and aggressive regulatory action that is plagued by such substantial constitutional infirmities.

CONCLUSION

We respectfully submit that, for all the reasons identified, the Commission should not proceed with the Proposed Rule. If the Commission proceeds with a more limited version of this rule, limited to specific industries or excluding dynamic pricing, then the Commission must give notice of a new proposal and allow interested persons an opportunity to comment on the revised proposal. If the Commission does issue a final rule in substantially the same form as proposed, then at a minimum the Commission should set the effective date at least one year after publication. Businesses will require substantial time and resources to come into compliance. In some instances, menus, catalogs, signs, and physical advertisements will need to be reprinted. In other instances, software will need to be rewritten and platforms redesigned. In still other instances, video and audio advertisements will need to be recreated. On top of this, many businesses will need to retain pricing and economic consultants, and legal counsel will need to review new price advertising. All of this activity across the entire economy cannot reasonably be accomplished before a standard 30-day effective date. The Commission should allow an extended period of at least one year for any final rule to become effective.

February 7, 2024

Respectfully submitted,

/s/ Helgi C. Walker

Helgi C. Walker
Lucas C. Townsend
Lael D. Weinberger*
Joshua Zuckerman
GIBSON, DUNN & CRUTCHER LLP
[redacted]
Washington, DC [redacted]

Branton Nestor
GIBSON, DUNN & CRUTCHER LLP
[redacted]
Irvine, CA [redacted]

* Admitted only in California; supervised by Principals of the Firm.