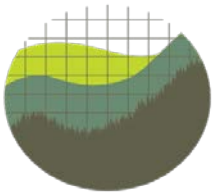

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

February 8, 2023

To: Federal Trade Commission

Subject: Advance Notice of Proposed Rulemaking on Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67,413 (Nov. 8, 2022) (FTC Matter No. R207011)

The Institute for Policy Integrity at New York University School of Law[1] (Policy Integrity) respectfully submits these comments to the Federal Trade Commission (FTC) in response to its advance notice of proposed rulemaking (ANPR) on addressing junk fees and hidden fees.[2]

Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. On October 20, 2022, the FTC voted to grant Policy Integrity's petition for rulemaking and issue the ANPR. The ANPR is aimed at regulating junk fees under 15 U.S.C. § 57a, which grants the FTC authority to promulgate trade-regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce. The ANPR also targets unfair and deceptive fee-disclosure practices related to junk fees and hidden fees.[3]

Commissioner Christine S. Wilson issued a dissenting statement in which she said that, "[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' and thereby could implicate the Major Questions Doctrine."[4] She then asked for "precedent [that] would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good and services identified in the ANPR[.]"[5]

This letter responds to Commissioner Wilson's concern and provides regulatory antecedents supporting the FTC's authority. When issuing a proposed rule, the FTC should highlight these antecedents and rebut the suggestion that such regulation triggers the major questions doctrine.[6]

Regulating Junk Fees, Hidden Fees, and Related Practices Would Not Violate the Major Questions Doctrine

Although Commissioner Wilson expressed concern that regulating junk fees, hidden fees, and related practices could implicate the major questions doctrine, Commissioner Wilson's dissent

[1] These comments do not purport to represent the views, if any, of New York University School of Law.
[2] Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67,413, 67,413 (Nov. 8, 2022) ("ANPR").
[3] *See id.* at 67,146–47 (describing practices such as "billing or charging consumers for fees, interest, goods, services, or programs without express and informed consent" and "misrepresenting or failing to disclose clearly and conspicuously whether fees, interest, charges, products, or services are optional or required").
[4] *Id.* at 67,423–24 (dissenting statement of Commissioner Christine S. Wilson).
[5] *Id.* at 67,423.
[6] *See* Richard L. Revesz & Max Sarinsky, Regulatory Antecedents and the Major Questions Doctrine (Nov. 29, 2022) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291030) (advising that agencies more extensively catalog regulatory antecedents at all stages of the rulemaking process).

does not provide a clear articulation of the major questions doctrine. Since the major questions doctrine was relied on by the Supreme Court last year, it has been the subject of considerable debate in both academic literature and the courts.[7] Accordingly, it is helpful to lay out the Supreme Court's articulation of the major questions doctrine in *West Virginia*, before assessing the doctrine's application here.

A. Under the major questions doctrine, "clear congressional authorization" is required only when an agency action is both unheralded and represents a transformative change in the agency's authority.

As the Supreme Court explained in *West Virginia v. EPA*, "a major questions case" is an "extraordinary" one in which an agency "'claim[s] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in its regulatory authority.'"[8] Agency action is "unheralded" when it is so novel as to be unlike anything the agency has done before.[9] And an agency action represents a transformative change in the agency's authority when the action brings about a "'fundamental revision of the statute, changing it from one sort of scheme of regulation' into an entirely different kind."[10] Only when an agency's action is both unheralded and represents a transformative change in the agency's authority does it represent an extraordinary case that triggers the major questions doctrine and thus the need for "clear congressional authorization" for the action.[11]

Commissioner Wilson's dissent appears to misunderstand the major questions doctrine in at least two key respects. First, Commissioner Wilson's dissent raises issues such as the impact on commerce, the number of affected consumers and companies, and the percentage of GDP covered by the ANPR.[12] In *West Virginia*, however, the Court did not rely on any of these metrics (or similar indicators of the challenged regulation's economic or political significance) in its major questions doctrine analysis.[13] Instead, as described above, the Court applied a two-part test that looks at whether the agency action is "unheralded" and represents a "transformative" change of the agency's authority. The Court's omission of these metrics is significant—these were the same factors that various litigants in *West Virginia* had urged the Court to adopt, that the Environmental Protection Agency had relied on when repealing the Clean Power Plan (the challenged regulation), and that a two-justice concurrence invoked.[14] The Court was thus well

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[7] *See* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. (forthcoming 2023); Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel T. Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (enclosed).

[8] 142 S. Ct. 2587, 2608, 2610 (2022) (alteration omitted) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[9] *See* Brunstein & Goodson, *supra* note 7 (manuscript at 25 n.178).

[10] *West Virginia*, 142 S. Ct. at 2596 (alteration omitted) (quoting MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 (1994)).

[11] *Id.* at 2609. In "ordinary" cases, unless Congress has spoken to the issue, courts defer to an agency's reasonable interpretation of statutes it implements. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[12] ANPR, 87 Fed. Reg. at 67,423.

[13] *See* Brunstein & Goodson, *supra* note 7 (manuscript at 35–39).

[14] *Id.* (manuscript at 29).

aware of these metrics as potential guideposts for the major questions doctrine but implicitly rejected them.[15]

Second, Commissioner Wilson's dissent erroneously suggests that an agency needs to point to "precedent" to "support the perspective that Congress has clearly empowered [it] to promulgate a rule."[16] In *West Virginia*, however, the Court considered the availability of regulatory antecedents in the first prong of the major questions inquiry to determine whether the agency action was "unheralded."[17] Only after concluding that there was a lack of regulatory precedents—making the Clean Power Plan "unheralded"—and applying the second prong of the major questions analysis[18] did the Court consider whether there was "clear congressional authorization" supporting that regulation.[19] In other words, the Court did not rely on regulatory antecedents to determine whether there was "clear congressional authorization"—rather, it looked to the existence of regulatory antecedents to assess whether the major questions doctrine was triggered in the first place.

Regulation of the types of practices identified in the ANPR would not breach either prong of the major questions analysis. First, FTC regulatory antecedents confirm that the Commission has in many prior instances regulated unfair and deceptive fee-disclosure practices similar to junk fees and hidden fees across the economy. These regulatory antecedents show that the FTC's present regulatory effort would not be unheralded. Second, Congress set up the FTC to identify and address unfair trade practices in or affecting interstate commerce. Addressing junk fees and hidden fees fits comfortably within that paradigm because it merely addresses unfair trade practices as that term has long been understood. In other words, the FTC's power over interstate commerce looks much the same under this proposed rule as it has in years past and this proposal marks no paradigm shift in its regulatory role. Regulations on junk fees and hidden fees would not represent a "transformative" change in the agency's authority. Therefore, FTC regulations on junk fees and hidden fees would not implicate the major questions doctrine.

B. Regulatory antecedents addressing similar unfair and deceptive fee-disclosure practices throughout the economy demonstrate that addressing junk fees and hidden fees would not be unheralded.

The first prong of *West Virginia*'s major questions framework considers whether the agency action is "unheralded"—meaning that the agency action is so novel as to be unlike anything the agency has done before.[20] An FTC regulation on junk fees, hidden fees, and related practices would be far from unheralded. In numerous prior rules under 15 U.S.C. § 57a, the FTC has imposed disclosure requirements targeting unfair and deceptive fee-disclosure practices that apply to a vast number of entities across numerous industries, similar to its present effort to regulate junk fees and hidden fees.

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[15] *Id.* (manuscript at 34).
[16] ANPR, 87 Fed. Reg. at 67,423.
[17] *West Virginia*, 142 S. Ct. at 2610–12.
[18] *Id.* at 2612–14.
[19] *Id.* at 2614–16.
[20] *See* Brunstein & Goodson, *supra* note 7 (manuscript at 25 n.178)

Several existing FTC regulations specifically require that regulated businesses offer items for sale at the advertised price—a form of price disclosure very similar to the types of regulation contemplated in the ANPR. One example is the Unavailability Rule or Raincheck Rule.[21] Among other requirements, this rule mandates that merchandise advertised at a stated price be conspicuously and readily available at or below the advertised price.[22] Much like a regulation on junk fees and hidden fees, this regulation ensures that the price a seller advertises up front is the price the buyer pays at the end of the buying process. The rule covers all retail food stores.[23] When the FTC promulgated this rule, it explained that "[f]ood is one of the Nation's largest industries" with "an estimated retail value of $76.05 billion."[24] The FTC noted that there were "approximately 282,300 retail foodstores in the United States" to which the regulation would apply.[25]

The Funeral Rule, which addresses unfair and deceptive practices in transactions between consumers and funeral service providers, provides another useful antecedent for a regulation on hidden fees.[26] The rule deems it an "unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services."[27] The rule further requires disclosure of prices on an itemized basis and ensures that consumers are permitted to purchase funeral services on an itemized basis.[28] Again, this rule operates similarly to regulation on junk fees and hidden fees since it requires the seller to advertise upfront the price that the consumer must ultimately pay at the end of the buying process, without any hidden fees. The types of regulations contemplated in ANPR would presumably operate in a similar manner.

Another antecedent for a regulation on hidden fees is the Negative Option Rule, which pertains to deceptive and unfair practices in negative option subscription plans (i.e. plans in which consumer silence constitutes acceptance, such as an automatically renewing subscription).[29] Among other requirements, this rule requires that all promotional material used to advertise a negative option plan disclose the "material terms" of the plan.[30] The rule enumerates seven of these material terms, including whether billing charges include postage and handling.[31] Like the FTC's present effort to require the disclosure of a product's full price upfront, this rule requires negative option plan advertisements to disclose to the buyer upfront more complete information regarding the price. The Negative Option Rule also covers a wide range of industries. When it promulgated the rule in 1973, the FTC explained that "[t]hese clubs sold an infinite variety of

[21] 16 C.F.R. pt. 424.
[22] *Id.*
[23] 16 C.F.R. pt. 424.
[24] Retail Food Store Advertising and Marketing Practices, 36 Fed. Reg. 8,777, 8,780 (May 13, 1971) (codified at 16 C.F.R. pt. 424).
[25] *Id.*
[26] 16 C.F.R. pt. 453
[27] 16 C.F.R. § 453.2(a).
[28] *Id.*
[29] 16 C.F.R. pt. 425. The FTC itself identified the Negative Option Rule as a regulatory antecedent for its present regulatory efforts. *See* Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67, 413, 67,414–15 (Nov. 8, 2022).
[30] 16 C.F.R. § 425.1.
[31] 16 C.F.R. § 425.1.(a)(1)(iv).

products, including flowers, wines, Bibles, dogs, dolls, handkerchiefs, and dresses." [32] It further noted that "such clubs sell merchandise amounting to many millions of dollars each year" and "[t]otal membership figures . . . [were estimated to be] 15 million persons."[33] In the trade book industry, annual revenue book clubs constituted 60–70 percent of the total industry revenue.[34]

Many of the FTC's prior regulations have also required sellers to disclose other material terms at the point of sale—much like a regulation addressing junk fees or hidden fees would. For example, through the Mail, Internet, or Telephone Order Merchandise Rule, the FTC requires sellers to disclose the shipping time at the time of purchase made via mail, telephone, or internet.[35] Like the contemplated rules on junk fees and hidden fees, this rule requires the seller to disclose important information upfront to the consumer. The rule was first designed to cover all "mail order sales," whereby "orders are solicited for goods which are to be ordered by mail," which covers a broad range of industries.[36] The means of solicitation could include "magazine and newspaper advertisements, catalogs, direct mail solicitations and telephone solicitations," and a variety of payment methods.[37] This rule covers sellers of goods, such as "books, records, wearing apparel, home furnishings, novelty items, magazines, and nursery items."[38] At the time that this rule was first promulgated in 1975, the FTC noted that there were "about 6,000 firms in the mail order industry with sales estimated at over 40 billion dollars annually."[39] The FTC then extended this rule to apply to telephone orders in 1993[40] and internet orders in 2014.[41] E-commerce today constitutes about 15% of commerce in the United States—a percentage that grew rapidly following the onset of the Covid-19 pandemic and has grown with nearly every passing year.[42]

Another example is the Cooling Off Rule, which pertains to unfair and deceptive practice in door-to-door sales.[43] The rule requires that sellers provide consumers with a receipt of the sale in the language in which the sale was conducted.[44] It also requires that the seller notify the consumers, orally and in writing, that they have the right to cancel their orders within three business days.[45] This rule is yet another example of the FTC regulating economy-wide to require sellers to disclose important information to buyers. The Cooling Off Rule covers "practically all

[32] Regulations Pertaining to the Use of Negative Option Plans, 38 Fed. Reg. 4,896, 4,898 (Feb. 22, 1973) (codified at 16 C.F.R. pt. 425).
[33] *Id.*
[34] *Id.*
[35] 16 C.F.R. pt. 435.
[36] Promulgation of Trade Regulation Rule Correction, 40 Fed. Reg. 51,582, 51,582 (Nov. 5, 1975) (codified at 16 C.F.R. § 435).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Trade Regulation Rule; Mail or Telephone Order Merchandise, 58 Fed. Reg. 49,096 (Sept. 21, 1993) (codified at 16 C.F.R. § 435).
[41] Mail or Telephone Order Merchandise Rule; Final Rule Adopting Final Amendments, Including Revising the Rule's Name to Mail, Internet, or Telephone Order Merchandise, 79 Fed. Reg. 55,615 (Sept. 17, 2014) (codified at 16 C.F.R. § 435).
[42] *See* U.S. Census Bureau, *E-Commerce Retail Sales as a Percent of Total Sales [ECOMPCTSA]*, FED. RESERVE BANK OF ST. LOUIS (las visited Jan. 5, 2023), https://fred.stlouisfed.org/series/ECOMPCTSA.
[43] 16 C.F.R. pt. 429.
[44] 16 C.F.R. § 429.1(a).
[45] 16 C.F.R. § 429.1(b).

direct sellers," meaning all door-to-door sales. The FTC noted, for example, that rule would include "route salesmen such as those who take orders for home delivery of milk, laundry, and drycleaning,"[46] and retailers of goods such as encyclopedias, pots and pans, baby furniture, vacuum cleaners, magazines, Bibles, and portrait plans."[47] The FTC also stated when it promulgated the rule that "[b]illions of dollars worth of goods are sold in the home each year and home selling provides jobs for millions of people."[48]

In addition to regulation, the FTC has issued policy statements and taken enforcement action against unfair and deceptive fee-disclosure practices similar to the contemplated effort to address junk fees and hidden fees.[49] The FTC's policy statements regarding enforcement, as well as its enforcement history against unfair and deceptive practices similar to junk fees and hidden fees, both support FTC's authority to regulate junk fees, hidden fees, and related practices. In particular, the FTC identified "Misleading Door Openers" as one of three deceptive advertising formats it would seek to address in its Enforcement Policy Statement on Deceptively Formatted Advertisements published in 2003.[50] Junk fees and hidden fees are akin to a misleading door opener, as both are interactions where "the first contact between the seller and a buyer occurs through a deceptive practice . . . even if the truth is subsequently made known to the purchaser."[51]

Regulation aimed at junk fees and hidden fees would also be consistent with FTC enforcement history. The FTC's enforcement history against misleading door openers includes: (1) prohibiting the practice of door-to-door salespersons posing as surveyors engaged in advertising research while they actually sought to sell encyclopedias;[52] (2) enforcing the Telemarketing Sales Rule against telemarketers "who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies";[53] (3) prohibiting a rental car company from using the trade name "Dollar-a-Day" to lure customers in for business at higher prices;[54] and (4) disciplining a debt-negotiation company for soliciting customer agreements with a misleading introductory promise that it settles all client debt for 40–60% of the amount owed.[55]

In these actions, the FTC required a wide range of sellers to disclose the complete price or other important contractual terms to the consumer upfront. Regulating junk fees, hidden fees, and

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[46] Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,934, 22,936 (Oct. 26, 1972) (codified at 16 C.F.R. pt. 429).

[47] *Id.*

[48] *Id.* (quoting Thomas B. Curtis, Vice President and General Counsel of Encyclopedia Britannica, Inc.).

[49] The FTC recognized these enforcement actions in the ANPR. *See* Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. at 67,414.

[50] FED. TRADE COMM'N, FTC ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 7 (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf (hereinafter Enforcement Policy Statement).

[51] *Id.* at 4.

[52] *See Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982).

[53] Enforcement Policy Statement, *supra* note 50, at 8 & n.29 (collecting examples of enforcement actions).

[54] *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

[55] *See FTC v. Connelly*, 2006 U.S. Dist. LEXIS 98263, at *49 (C.D. Cal. Dec. 20, 2006).

related practices identified in the ANPR would do just that—it would require that sellers disclose the full price to the buyer upfront. Accordingly, such a regulation would not be "unheralded" and thus would not trigger the first prong of the major questions analysis.[56]

C. FTC's regulation of junk fees and hidden fees would not represent a "transformative" change in the agency's authority to issue trade regulations.

The second prong of the *West Virginia* framework considers whether the regulation at issue represents a "transformative" change in the agency's authority or, stated somewhat differently, effects a "fundamental revision of the statute, changing it from one sort of scheme of regulation' into an entirely different kind."[57] In *West Virginia*, the Court emphasized that the Clean Power Plan represented a "paradigm" shift in EPA's authority, whereby EPA's "role" changed from "ensuring the efficient pollution performance of each individual regulated source" to "a very different kind of policy judgment: that it would be 'best' if coal made up a much smaller share of national generation."[58]

In contrast to the Clean Power Plan, an FTC regulation addressing junk fees and hidden fees would fall squarely within the agency's broad authority to address unfair trade practices and would not constitute a "transformative" change in the FTC's authority. Such an FTC regulation would therefore not violate the second prong of the major questions doctrine analysis under *West Virginia*.

Congress granted the FTC broad discretion to regulate deceptive, unfair, and anticompetitive trade practices.[59] Specifically, Congress granted the FTC broad power to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce"[60] "among the several States or with foreign nations."[61] Congress thus gave the FTC a broad mandate to identify and address unfair and deceptive trade practices on an ongoing basis. FTC's present action is perfectly aligned with its statutory mandate: the FTC is regulating an unfair and deceptive trade practice affecting commerce across the country. Accordingly, targeting junk fees and hidden fees would not effect a paradigm shift in the FTC's authority over American commerce because it falls squarely within the FTC's mission to address unfair and deceptive trade practices.

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[56] *See supra* note 7 and accompanying text.
[57] 142 S. Ct. 2587, 2596 (2022) (alteration omitted) (quoting MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 (1994)).
[58] *Id.* at 2612.
[59] 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations. . .from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").
[60] *Id.* § 57a(a).
[61] *Id*. § 44. "Commerce" "means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

In short, FTC regulations on junk fees and hidden do not represent a "'fundamental change' to [the] statutory scheme" set out in 15 U.S.C. § 57a, and therefore, do not violate the second prong of the major questions doctrine analysis under *West Virginia*.

D. Even if the major questions doctrine were implicated here, there is clear congressional authorization for this regulation.

In *West Virginia*, the Court, having determined the Clean Power Plan was both unheralded and represented a transformative change of EPA's authority and thus triggered the major questions doctrine, turned to determining whether EPA had authority to issue the Clean Power Plan. The Court explained that, "[g]iven these circumstances, [its] precedent counsels skepticism toward" the agency's action.[62] "To overcome that skepticism, the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner."[63] To determine whether there is clear congressional authorization, the Court in *West Virginia* considered statutory text, statutory context, and statutory history.[64]

Because the major questions doctrine is not triggered here, for the all the reasons discussed above, the FTC does not need to provide "clear congressional authorization" for regulating junk fees, hidden fees, and the other practices contemplated in the ANPR. Even if it did, however, the statutory terms of 15 U.S.C. § 57a provide clear congressional authorization for FTC regulation of those activities.

The ANPR identifies two sources of statutory authority for regulating junk fees and hidden fees under Section 5 of the Federal Trade Commission Act (FTCA): as a deceptive practice and as an unfair practice.[65] Regulations on junk fees and hidden fees fall squarely within both of these statutory authorities.[66]

To issue a Section 5(a) deceptive practices rule, the FTC must make three findings: "(1) there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material."[67] The use of junk fees, hidden fees, and related practices satisfies each of these elements. First, the use of junk fees and hidden fees involves incomplete representations and meaningful omissions regarding a product's full price. Second, the use of junk fees and hidden fees is likely to mislead consumers who are acting reasonably under the circumstances by

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[62] *West Virginia*, 142 S. Ct. at 2614.
[63] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[64] *Id.* (manuscript at 30-34).
[65] Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67,413, 67,413 (Nov. 8, 2022).
[66] For a more detailed analysis of the FTC's legal authority to issue regulations on junk fees and hidden fees under Section 5 of the FTCA as a deceptive practice and as an unfair practice, *see* Institute for Policy Integrity, Petition for Rulemaking Concerning Drip Pricing, at 10–21, https://policyintegrity.org/documents/Petition_for_Rulemaking_Concerning_Drip_Pricing.pdf.
[67] FTC v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009) (internal quotation marks and citation omitted). The FTC summarizes this standard in a similar way: "[C]ertain elements undergird all deception cases. First, there must be a representation, omission, or practice that is likely to mislead the consumer .... Second, we examine the practice from the perspective of a [reasonable] consumer ... Third, the representation, omission, or practice must be a material one ... likely to affect the consumer's conduct or decision with regard to a product or service[.]." Enforcement Policy Statement, *supra* note 50, at 1.

advertising an incomplete price for the relevant service or product. Third, misleading price representations and omitted fees are material pursuant to the FTC's 2003 Enforcement Policy Statement, which defined a misleading representation as material if it "is likely to affect consumers' choices or conduct regarding the advertised product or the advertisement, such as by leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise would not have interacted."[68]

The FTC also has the authority to regulate junk fees, hidden fees, and related practices as an unfair act or practice under Section 5(a) of the FTCA. Under Section 5(n) of the FTCA, an act or practice is unfair if it (1) "causes or is likely to cause substantial injury to consumers," (2) "which is not reasonably avoidable by consumers themselves," and is (3) "not outweighed by countervailing benefits to consumers or to competition."[69] First, the monetary costs and search costs that result from the use of junk fees and hidden fees significantly injure consumers.[70] Second, consumers cannot reasonably avoid the injury imposed because the use of junk fees and hidden fees takes advantage of cognitive biases and wastes consumer time.[71] Third, the injuries caused by the use of junk fees and hidden fees are clearly "not outweighed by countervailing benefits to consumers or to competition" given that there are societal benefits to those pricing schemes yet substantial societal costs.[72]

While statutory context and history are beyond the scope of this comment letter, they may offer further support for the fact that there is clear congressional authorization for the FTC's regulations for junk fees, hidden fees, and related practices.

Conclusion

To implicate the major questions doctrine, an agency action must be both unheralded and represent a transformative change in its regulatory authority. As many regulatory antecedents and the FTC's statutory mandate under 15 U.S.C. § 57(a) confirm, an FTC regulation on junk fees, hidden fees, and related practices would be neither unheralded nor represent a transformative change in the FTC's regulatory authority. Therefore, the regulations contemplated in the ANPR would not trigger the major questions doctrine. In issuing a proposed rule, the FTC

[68] Enforcement Policy Statement, *supra* note 50, at 10.
[69] 15 U.S.C. § 45(n).
[70] Inst. for Pol'y Integrity, Petition for Rulemaking Concerning Drip Pricing, at 15–16 (July 7, 2021).
[71] *Id*. at 16–20.
[72] *Id*. at 20–21.

should catalog relevant antecedents and expressly argue that the major questions doctrine does not apply.

Sincerely,

Natasha Brunstein
Max Sarinsky
Yidi Wu
Tianren Zhang

Enclosure: Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. (forthcoming 2023)