

NOTE

Is There a Light at The End of the Dark-Pattern Tunnel?

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ABSTRACT

In the wake of the AMG Capital Management, LLC v. FTC Supreme Court decision which held that the Federal Trade Commission (“FTC”) does not have the authority to seek monetary relief and is limited to injunctive relief under section 13(b) of the Federal Trade Commission Act (“FTC Act”), many wonder how the FTC will be able to adequately police the marketplace. At the same time, the unfair and deceptive acts or practices that occur online have only continued to proliferate. These practices have become known as “dark patterns.” Dark patterns are online interfaces that have been designed to trick users into making decisions they would not have otherwise made and trap them in various unwanted subscription services, slap them with hidden fees, or saddle them with unwanted purchases. The current regulatory regime for policing these dark patterns is inefficient and inadequate because without the ability to seek monetary redress for consumers, the FTC will only be able to hold companies accountable for employing dark patterns through the use of consent decrees and other nonmonetary penalties. This Note argues that an

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FTC-promulgated rule defining and prohibiting the use of dark patterns will provide enormous benefit to consumers, regulators, and businesses alike. With more certainty and definition, businesses will be able to better comply with regulations. More certainty will also provide regulators with more efficient litigation and enforcement avenues, including monetary redress and civil penalties, and consumers could get a reprieve from being tricked or trapped by bad online actors. As reliance on the internet for commerce and basic life functions continues to increase, it is important that the FTC regulatory toolbox continues to expand with it.

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INTRODUCTION

When a sixty-three year old cancer patient, Mr. Stacy Blatt, chose to make a \$500 donation to President Donald J. Trump's reelection campaign, he had no idea that a few clicks would result in three thousand dollars in withdrawals from his bank account in less than thirty days.¹ Mr. Blatt was hardly alone—as other unsuspecting Trump campaign donors found similar unexpected charges on their bills.² Reports eventually revealed that the Trump campaign and WinRed, the for-profit company hired to handle donations for the campaign, engaged in an “intentional scheme” to raise money by automatically designating online donations as recurring, monthly contributions.³ To avoid these charges, donors had to locate the “fine-print” disclosure and “manually uncheck a box to opt out.”⁴ The New York Times noted that as the election grew closer, the Trump campaign initiated a new tactic by including a second prechecked box, known as a “money bomb,” which doubled an individual's political contribution.⁵ This scheme to rake in additional donations resulted in the Trump campaign and the Republican National Committee ultimately making refunds to 530,000 campaign donors worth over \$64.3 million.⁶

The Trump campaign's deceptive fundraising practices are just one example of vast “dark patterns” being deployed by businesses.⁷ Dr. Harry Brignull, a user interface expert who originally coined the term “dark patterns,” defines them as “a user interface carefully crafted to trick users into doing things they might not otherwise do, such as buying insurance with their purchase or signing up for recurring bills.”⁸ Dark patterns ultimately seek to “manipulate the con-

1 See Shane Goldmacher, *How Trump Steered Supporters into Unwitting Donations*, N.Y. TIMES (Aug. 7, 2021), <https://www.nytimes.com/2021/04/03/us/politics/trump-donations.html> [<https://perma.cc/46H6-64UL>].

2 See *id.*

3 *Id.* The campaign developed this scheme after it identified that Democrats were fundraising at significantly higher rates in September 2020, ahead of the November presidential election. See *id.*

4 *Id.*

5 *Id.*

6 See *id.* The scheme caused a significant number of fraud complaints to credit card companies and demands from donors for refunds. *Id.* While all campaigns make refunds for various reasons, President Biden's campaign and the democratic committees only made roughly 37,000 refunds, totaling \$5.6 million during the same window of time. *Id.*

7 See DECEPTIVE PATTERNS, <https://www.deceptive.design/> [<https://perma.cc/XVX9-WCWA>]. Dr. Brignull recently changed the name of this website from “darkpatterns.org” in an effort to be clearer and more inclusive. *About Us*, DECEPTIVE PATTERNS, <https://www.deceptive.design/about-us> [<https://perma.cc/75HT-2QBH>].

8 Harry Brignull, *Dark Patterns: Inside the Interfaces Designed to Trick You*, THE VERGE

sumer into doing something that is inconsistent with her preferences, in contrast to marketing efforts that are designed to alter those preferences.”⁹ Dark patterns come in various forms, such as a product or service that offers a “free-trial membership” that turns into a paid subscription service after the trial period ends without disclosing the automatic transition of the membership to the consumer.¹⁰

Federal and state regulators have become increasingly interested in the topic of dark patterns. In 2021, the Federal Trade Commission (“FTC”) hosted a workshop to explore how the deployment of dark patterns can affect consumers’ behavior and direct them to make decisions that they likely would not have made on their own.¹¹ In September 2022, the FTC released a staff report, “Bringing Dark Patterns to Light” (“2022 FTC Dark Pattern Staff Report”), which highlighted the increased use of dark patterns in the marketplace and emphasized the FTC’s commitment to taking action to combat dark patterns.¹² Additionally, in 2019, Senator Mark R. Warner of Virginia and Senator Deb Fischer of Nebraska first introduced the Deceptive Experiences To Online Users Reduction Act (“DETOUR”)¹³ to combat dark patterns.¹⁴ Senator Warner noted in the 2021 FTC workshop that he hoped DETOUR would become law, but that, in the interim, the FTC should begin enforcement against companies engaging in dark patterns by using its existing tools.¹⁵ On October 29, 2021, the FTC

(Aug. 29, 2013, 11:15 AM), <https://www.theverge.com/2013/8/29/4640308/dark-patterns-inside-the-interfaces-designed-to-trick-you> [<https://perma.cc/K678-8A8R>]; Sara Morrison, *Dark Patterns, the Tricks Websites Use to Make You Say Yes, Explained*, Vox (Apr. 1, 2021, 11:20 AM), <https://www.vox.com/recode/22351108/dark-patterns-ui-web-design-privacy> [<https://perma.cc/4773-26CT>].

⁹ Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 44 (2021).

¹⁰ See Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Age of Learning, Inc.*, No. 2:20-cv-7996, at *5–6 (C.D. Cal. Sept. 8, 2020) (defendant violated ROSCA when it offered a thirty-day trial period that converted into a subscription service for six or twelve months without previously disclosing this to the consumer and failing to provide a simple mechanism to halt the automatically renewing charges).

¹¹ See *Bringing Dark Patterns to Light: An FTC Workshop*, FTC (Apr. 29, 2021, 10:30 AM), <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop> [<https://perma.cc/E3TQ-7V5U>].

¹² See FTC, BRINGING DARK PATTERNS TO LIGHT: STAFF REPORT (2022).

¹³ S. 1084, 116th Cong. (2019).

¹⁴ See *id.* Senator Warner reintroduced DETOUR in the 117th Congress on behalf of himself, Senator Fischer, Senator Klobuchar, and Senator Thune. DETOUR Act, S. 1330, 117th Cong. (2021).

¹⁵ See Transcript of Bringing Dark Patterns to Light Workshop, FTC (Apr. 29, 2021), https://www.ftc.gov/system/files/documents/public_events/1586943/ftc_darkpatterns_workshop_transcript.pdf [<https://perma.cc/8GT4-4A7J>].

issued a press release¹⁶ and a new negative option marketing enforcement policy statement (“2021 Negative Option Policy Statement”)¹⁷ that stated its intent to target companies that use negative option features, also referred to as recurring subscription models, to “trick or trap” consumers into signing up for unwanted subscriptions.¹⁸ Regulation of dark patterns on a state-by-state basis has had limited success; in fact, California, Colorado, and Connecticut are the only states to have successfully passed legislation that specifically regulates dark patterns.¹⁹

Historically, one of the most promising legal frameworks for regulating dark pattern claims and providing redress to consumers was section 5 of the Federal Trade Commission Act (“FTC Act”),²⁰ which provides that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”²¹ For the past four decades, the FTC has successfully used section 5 to regulate dark patterns that are “unfair”²² and “deceptive.”²³ The 2021 Supreme Court decision *AMG Capital Management, LLC v. FTC* (“AMG”),²⁴ however, created a significant roadblock for the FTC to regulate dark patterns effectively under section 5 of the FTC Act because it limited the FTC’s ability to obtain consumer redress under section 13(b) of the FTC Act.²⁵ Specifically, the court unanimously ruled that the FTC cannot obtain equitable monetary relief, such as disgorgement or restitution, when it pursues district court litigation directly under section 13(b) of the FTC Act.²⁶ In light of the limitations imposed on the FTC by

16 Press Release, FTC, FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions (Oct. 29, 2021, 10:00 AM), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap?utm_source=GOvdelivery [<https://perma.cc/S624-R2DR>].

17 See FTC, ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING (2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf [<https://perma.cc/33FY-L5JP>].

18 See Press Release, FTC, *supra* note 16.

19 See Müge Fazlioglu, *US Federal Privacy Legislation Tracker*, INT’L ASS’N OF PRIV. PROS. (Dec. 2022), <https://iapp.org/resources/article/us-federal-privacy-legislation-tracker/> [<https://perma.cc/F5QG-W4E5>].

20 Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

21 *Id.* § 45(a)(1).

22 See, e.g., *FTC v. Bunzai Media Grp., Inc.*, No. CV 15-4527-GW(PLAX), 2015 WL 5305243 (C.D. Cal. Sept. 9, 2015); see also Stipulated Order for Permanent Injunction and Other Equitable Relief, *FTC v. JDI Dating, Ltd.*, No. 14-cv-08400 (N.D. Ill. Oct. 30, 2014).

23 See, e.g., *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); see also *FTC v. Lead-Click Media, LLC*, 838 F.3d 158 (2d Cir. 2016).

24 141 S. Ct. 1341 (2021).

25 15 U.S.C. § 45(a)(1); *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1344.

26 See *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1344.

AMG, the FTC has pursued a number of other avenues for obtaining redress for consumers as well as regulating and bringing enforcement actions against companies that deploy dark patterns,²⁷ such as using its authority under the Restore Online Shoppers' Confidence Act ("ROSCA").²⁸

This Note argues that in the wake of *AMG* and the FTC's new-found inability to obtain equitable monetary relief in section 5 cases, the FTC should use its authority under section 18 of the FTC Act to promulgate a rule regulating dark patterns so that it can seek redress for consumers as well as impose civil penalties on the bad actors who are illegally deploying dark patterns. This Note will demonstrate that promulgation of a trade regulation rule under section 18 will be more effective in regulating deceptive and unfair dark patterns than pursuit of individual adjudications under section 5 because a rule will automatically make the conduct illegal and will eliminate the need for the FTC to spend significant resources to prove in individual cases that a company engaged in a dark pattern. Alternatively, this Note proposes that if Congress is unwilling to enact comprehensive legislation that regulates the use of dark patterns, it should instead amend ROSCA to regulate dark patterns more broadly. Part I of this Note examines what dark patterns are as well as the current legal framework for regulating them. Part II explains why the current legal framework for regulating dark patterns is inadequate. Finally, Part III proposes a draft dark patterns rule that the FTC should promulgate under its section 18 rulemaking authority and applies the proposed rule to a hypothetical dark patterns case to demonstrate why the FTC could more effectively regulate dark patterns with a rule, especially in light of *AMG*. Alternatively, this Note recommends that Congress should amend ROSCA so that it regulates dark patterns that extend beyond negative option marketing.

I. BACKGROUND

This Part addresses what dark patterns are and provides examples of their prevalence on websites and other online platforms. This Part also examines how the FTC's authority to regulate dark patterns under section 5 of the FTC Act has been significantly diminished in

²⁷ See *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/WL6V-E75H>]; 15 U.S.C. §§ 8401–8404; see also *MoviePass, Inc.*, 192 F.T.C. 3000 (2021).

²⁸ 15 U.S.C. § 8404.

the wake of *AMG*, which limited the FTC's ability to remedy consumer harm. The FTC's authority to promulgate rules under section 18 of the FTC Act, however, is an important tool in the FTC's toolbox that it can use to regulate dark patterns, get monetary redress for consumers, and seek civil penalties. ROSCA presents another option for the FTC to use to regulate dark patterns. Furthermore, this section examines why state action in the dark patterns arena is insufficient to eradicate the practice.

A. *What Are Dark Patterns and How Are They Regulated?*

Dark patterns are user interfaces that have been designed to manipulate or trick consumers into taking actions they did not intend to take.²⁹ The term "dark patterns" was initially introduced by Dr. Brignull in a 2010 article that sought to crowdsource examples of these deceptive online practices that people experience in their everyday lives.³⁰

Dr. Brignull provided some examples of dark patterns to help elucidate how dark patterns are at work in everyday life, including airlines automatically adding insurance to your check-out basket and social media sites making it prohibitively difficult to turn on privacy settings.³¹ The 2022 FTC Dark Pattern Staff Report expands on Dr. Brignull's terminology and establishes its own categories to describe commonly deployed dark patterns: "Design Elements that Induce False Beliefs,"³² "Design Elements that Hide or Delay Disclosure of Material Information,"³³ "Design Elements that Lead to Unauthorized Charges,"³⁴ and "Design Elements that Obscure or Subvert Privacy Choices."³⁵

²⁹ Harry Brignull, *Dark Patterns: Dirty Tricks Designers Use to Make People Do Stuff*, 90 PERCENT OF EVERYTHING (July 8, 2010), <https://90percentofeverything.com/2010/07/08/dark-patterns-dirty-tricks-designers-use-to-make-people-do-stuff/> [<https://perma.cc/KQ5N-EVWD>].

³⁰ *Id.*

³¹ *Id.*

³² BRINGING DARK PATTERNS TO LIGHT: STAFF REPORT, *supra* note 12, at 4. "Design Elements that Induce False Beliefs" refers to dark patterns that "manipulate consumer choice by inducing false beliefs," such as making "claims that an item is almost sold out when there is actually ample supply." *Id.*

³³ *Id.* at 7. "Design Elements that Hide or Delay Disclosure of Material Information" describes dark patterns that hide material information from consumers by, for example, "burying key limitations of the product or service in dense Terms of Service documents" or "trick[ing] people into paying hidden fees." *Id.*

³⁴ *Id.* at 10. "Design Elements that Lead to Unauthorized Charges" describes dark patterns that trick consumers into "paying for goods or services that they did not want or intend to buy," either through single or recurring charges. *Id.*

³⁵ *Id.* at 15. "Design Elements that Obscure or Subvert Privacy Choices" refers to dark

Dark patterns can present themselves in a variety of forms.³⁶ For example, using Dr. Brignull’s terminology, Fabletics, a popular women’s athletic apparel brand, deployed several dark patterns when it rolled out its “VIP membership program.”³⁷ Fabletics used a combination of “hidden subscription,” “sneaking,” and “hidden costs” dark pattern types.³⁸ A “hidden subscription” dark pattern occurs when “[t]he user is unknowingly enrolled in a recurring subscription or payment plan without clear disclosure or their explicit consent. A “[s]neaking” dark pattern occurs when a “user is drawn into a transaction on false pretenses,” which may include material terms being hidden from consumers.³⁹ A “hidden costs” dark pattern occurs when a shopper is unaware of the full price of a good or service until the last window of the check-out screen because unknown hidden costs have been added to the total at the end of the buying process.⁴⁰ Using the terminology from the 2022 FTC Dark Pattern Staff Report, Fabletics utilized dark patterns that fell into the categories of “Design Elements that Hide or Delay Disclosure of Material Information” and “Design Elements that Lead to Unauthorized Charges.”⁴¹

Fabletics failed to adequately disclose to consumers that enrollment in the “VIP membership program” to get an advertised discount was actually enrollment in a subscription service.⁴² Some consumers

patterns that impact consumers’ privacy choices because the dark patterns may make consumers unaware of what privacy choices they have, such as the ability to reject data collection or “default settings that maximize data collection and sharing.” *Id.*

³⁶ See *Types of Deceptive Pattern*, DECEPTIVE PATTERNS, <https://www.deceptive.design/types> [<https://perma.cc/H4VW-56YU>]. The Deceptive Design website provides a helpful description of each type of dark pattern. See *id.* The website has a complete list of the types of dark patterns: (1) “[s]neaking,” where after putting something into your cart, you notice that the site has put an additional item, (2) “[h]ard to cancel,” where you subscribe to a service very easily but it is almost impossible to get out of, (3) “[h]idden costs,” where during the last step of the checking out process there are new charges (e.g., tax, delivery fee, service fee, etc.), (4) “[f]orced action,” where you believe you are engaging in one action but an “undesirable thing happens instead,” and (5) “[h]idden subscription,” where a free trial ends and a consumer’s credit card begins getting charged with no warning. *Id.*

³⁷ See *NAD Recommends JustFab Modify Advertising for VIP Membership Discount to Better Disclose Terms*, BBB NAT’L PROGRAMS (July 13, 2017), <https://bbbprograms.org/media-center/dd/nad-recommends-justfab-modify-advertising-for-vip-membership-discount-to-better-disclose-terms> [<https://perma.cc/76HR-3HAC>].

³⁸ See *Types of Deceptive Pattern*, *supra* note 36.

³⁹ *Id.*

⁴⁰ *Id.* “Hidden [C]ost” dark patterns are also often referred to as “drip pricing.” See, e.g., *Petition for Rulemaking by Institute for Policy Integrity*, 86 Fed. Reg. 73207 (Dec. 27, 2021). The FTC recently published a petition advocating for FTC action on drip pricing. *Id.*

⁴¹ See *Bringing Dark Patterns to Light: Staff Report*, *supra* note 12, at 7, 10.

⁴² See *NAD Recommends JustFab Modify Advertising for VIP Membership Discount to Better Disclose Terms*, *supra* note 37.

who signed up for the “VIP membership program” to get the discount unknowingly enrolled themselves in a subscription service that required them to select “shop or skip” (“make a purchase or ‘skip the month’”) by the fifth of each month or they would be charged a recurring \$49.95 fee.⁴³ The Fabletics advertising scheme constituted a dark pattern because the company failed to adequately inform consumers that, by signing up for the VIP program to get the advertised discount, they were making a financial commitment to be charged a substantial recurring monthly fee if they did not opt-out by a specific date.⁴⁴ The National Advertising Division (“NAD”) recommended that Fabletics make adjustments to its advertisements so that the material terms of the subscription service were prominently displayed next to the discount offer.⁴⁵

Another frequently employed dark pattern is pricing or “hidden costs.” Drip pricing occurs when a company advertises one price to consumers and then discloses other mandatory fees late in the buying process, which results in the consumer being forced to either pay a higher price than advertised or abandon the purchase altogether.⁴⁶ For example, the Pennsylvania Attorney General initiated an investigation into Marriot International, a global hospitality company, alleging that the company engaged in deceptive practices, specifically in the form of drip pricing, by hiding mandatory “resort fees” and other services fees from its advertised room rate.⁴⁷ In November 2021, Marriott International agreed to disclose mandatory resort fees when advertising room rates as part of a settlement with the Pennsylvania Attorney General.⁴⁸

Although the term “dark patterns” has become an increasingly popular way to describe these deceptive online tactics, most of the enforcement lawsuits and actions targeting these dark patterns do not

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ *Id.* NAD is a division of the Better Business Bureau that monitors national advertisers and reviews advertising based on challenges from business, consumer complaints, or on its own initiative. *Frequently Asked Questions*, NAT'L PROGRAMS, <https://bbbprograms.org/programs/all-programs/national-advertising-division/faqs#overview> [<https://perma.cc/76HD-NDCF>].

⁴⁶ See *Types of Deceptive Pattern*, *supra* note 36; see also Chris Baraniuk, *How 'Dark Patterns' Influence Travel Bookings*, BBC (Dec. 12, 2019), <https://www.bbc.com/worklife/article/20191211-the-fantasy-numbers-that-make-you-buy-things-online> [<https://perma.cc/2JG3-BH2E>]; Suzanne Rowan Kelleher, *Marriot Just Agreed to Disclose Resort Fees in Hotel Room Rates*, FORBES (Nov. 22, 2021, 9:33 AM), <https://www.forbes.com/sites/suzannerowankelleher/2021/11/22/marriott-disclose-resort-fees/?sh=2b4f322633b7> [<https://perma.cc/NYR9-3LM5>].

⁴⁷ Kelleher, *supra* note 46.

⁴⁸ *Id.*

typically utilize the term “dark patterns.”⁴⁹ Instead, the lawsuits more commonly refer to these practices as unfair or deceptive acts in violation of section 5 of the FTC Act, even though they target the same types of behaviors. The FTC, however, has begun to employ the term dark patterns in its complaints and orders. In September 2022, the FTC alleged that Credit Karma, a credit services company, deployed dark patterns when it misrepresented that consumers were “pre-approved” for certain credit cards and that they had an “excellent” chance of approval.⁵⁰ The FTC’s order mandates that the company pay three million dollars to consumers who were misled by these deceptive claims and “wasted time applying for these credit cards.”⁵¹ In December 2022, the FTC announced a landmark settlement with Epic Games, Inc. (“Epic”), creator of the video game Fortnite, in which Epic must pay a \$245 million monetary penalty to consumers for its use of illegal dark patterns in violation of section 5 of the FTC Act.⁵² The complaint alleged that Epic used dark patterns to manipulate players, including children, into making unwanted purchases through the use of “counterintuitive, inconsistent, and confusing button configuration.”⁵³ Additionally, the FTC alleged that many children were able to charge hundreds of dollars to their parents’ credit cards when purchasing “V-Bucks” because the game did not require parental consent until 2018.⁵⁴ The FTC also alleged that Epic retaliated against

⁴⁹ See *Transcript of Bringing Dark Patterns to Light Workshop*, *supra* note 15.

⁵⁰ See Press Release, FTC, FTC Takes Action to Stop Credit Karma from Tricking Consumers with Allegedly False “Pre-Approved” Credit Offers (Sept. 1, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-takes-action-stop-credit-karma-tricking-consumers-allegedly-false-pre-approved-credit-offers> [<https://perma.cc/HS8H-E4AF>]. Additionally, the FTC alleged that Credit Karma was aware that its “pre-approval” messaging resulted in consumers being more likely to click on offers that stated they had an “excellent” chance of approval. *Id.* The press release notes that “when user interfaces are designed, including with the aid of A/B testing, to trick consumers into taking actions in a company’s interest and that lead to consumer harm, such design tricks have been described as ‘dark patterns.’” *Id.*

⁵¹ *Id.*

⁵² See Press Release, FTC, Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges (Dec. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations> [<https://perma.cc/XB4R-ZA77>]. The FTC brought two separate settlements against Epic Games, Inc. *Id.* Epic will pay \$275 million for violating the Children’s Online Privacy Protection Act. *Id.* Additionally, Epic will be required to pay \$245 million to refund consumers for its use of illegal dark patterns. *Id.* According to the FTC website, this is the largest refund the FTC has ever secured in a gaming case and also the largest administrative order in history. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

consumers by locking their accounts when customers disputed these charges with their credit card companies.⁵⁵

As the internet has become even more expansive, the number of dark patterns deployed has only increased.⁵⁶ In an article published in November 2019, seven scholars studied roughly 11,000 shopping websites that often use dark patterns to influence consumer purchasing decisions and found “at least one instance of dark pattern[s]” on over 1,200 of the studied shopping websites.⁵⁷

The FTC has historically relied on section 5 of the FTC Act as a legal avenue to regulate dark patterns. Section 5 of the FTC Act states that “unfair or deceptive acts or practices in or affecting commerce, are . . . declared unlawful.”⁵⁸ Under section 5, the FTC can challenge an “unfair or deceptive . . . practice” by initiating an administrative adjudication.⁵⁹ When the FTC believes that the FTC Act has been violated, it has the authority to issue a complaint.⁶⁰ After a complaint is issued, a respondent may either settle the charges by signing a consent agreement or fight the charges in an adjudication conducted before an administrative law judge.⁶¹

1. *Deceptive Practices*

The FTC requires that an act or practice meet three elements to be considered deceptive: (1) there must be a representation or omission that will likely mislead a consumer, (2) the consumer must be acting reasonably under the circumstances, and (3) the representation or omission must be material.⁶² Although the term dark patterns had not been widely used by the FTC until its dark patterns workshop in 2021, the FTC has brought many section 5 enforcement actions

⁵⁵ *Id.*

⁵⁶ See Arunesh Mathur, Gunes Acar, Michael J. Friedman, Elena Lucherini, Jonathan Mayer, Marshini Chetty & Arvind Narayanan, *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 *PROC. ACM HUM.-COMPUT. INTERACTION*, at 1 (Nov. 2019).

⁵⁷ *Id.* at 11, 27. The scholars had two requirements in creating the list of shopping websites to analyze: “(1) the list must be representative of the most popular shopping websites globally, and (2) the list must consist of shopping websites in English so that we would have the means to analyze the data collected from the websites.” *Id.* at 6–7.

⁵⁸ 15 U.S.C. § 45(a)(1).

⁵⁹ See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27.

⁶⁰ 15 U.S.C. § 45(a)(1).

⁶¹ See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27.

⁶² JAMES C. MILLER III, *FTC POLICY STATEMENT ON DECEPTION* (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/5SED-F282>].

against companies engaging in deceptive practices that the FTC would likely classify as dark patterns. For example, in *FTC v. Commerce Planet, Inc.*,⁶³ the FTC alleged that the defendant website operator, OnlineSupplier, engaged in a deceptive practice when it advertised an “Online Auction Starter Kit” that gave consumers information about how to sell products and make money on eBay and other similar sites.⁶⁴ Specifically, the defendant stated in its advertisement that there was a free seven-day trial period, which included a free online auction kit, that consumers could order for \$7.95 (the cost of expedited shipping and handling).⁶⁵ Consumers were unaware, however, that by signing up for the “free trial,” they were signing up for an automatically recurring subscription service.⁶⁶ If consumers failed to affirmatively cancel their subscription, they were “automatically enrolled in the continuity program” and charged up to sixty dollars per month.⁶⁷ The court noted that several features of the website were deceptive.⁶⁸ Specifically, it noted that the word “FREE” was in bright red and there was only a small text disclosure “[b]elow the fold”⁶⁹ that stated that by ordering the Online Auction Starter kit, the consumer was consenting to the “Privacy Policy” and “Terms of Membership.”⁷⁰ The Privacy Policy and Terms of Membership were also hyperlinked in a darker blue color, and the actual terms were on a separate page.⁷¹ Furthermore, when consumers submitted their credit card information and selected “Ship My Kit!,” they were taken to a webpage that offered other services where the boxes were prechecked to “yes.”⁷² The consumer had to uncheck the boxes to opt-out of purchasing the additional services.⁷³ The court ultimately held that Online Supplier engaged in a deceptive practice and misled consumers because, among other things, the sign-up pages created the “net impression” that the defendant was offering a free trial and free auction kit, rather than an

⁶³ 878 F. Supp. 2d 1048, 1057–59 (C.D. Cal. 2012), *aff’d in part*, 642 F. App’x 680 (9th Cir. 2016), and *aff’d in part, vacated in part, remanded to*, 815 F.3d 593 (9th Cir. 2016) (addressing issues unrelated to the section 5 deceptive practice claims).

⁶⁴ *Com. Planet, Inc.*, 878 F. Supp. 2d at 1057.

⁶⁵ *See id.*

⁶⁶ *See id.* at 1063.

⁶⁷ *Id.* at 1057.

⁶⁸ *See id.* at 1058.

⁶⁹ *See id.* at 1064 n.4 (“The term ‘fold,’ originally a newspaper terminology, refers to the bottom edge of a web-page that is viewable on the computer screen without scrolling down.”).

⁷⁰ *Id.* at 1064.

⁷¹ *See id.* at 1064–65.

⁷² *See id.* at 1058.

⁷³ *See id.*

online subscription service with a monthly charge.⁷⁴ These website features constitute dark patterns because the user interfaces are designed to manipulate consumers. Applying Dr. Brignull's terms to this case, OnlineSupplier engaged in a "visual interference" dark pattern because consumers were misdirected by the big, bright red font that said "FREE."⁷⁵

2. *Unfair Practices*

Section 5 of the FTC Act also prohibits "unfair practices."⁷⁶ Unfair practices are industry practices that are inherently unfair to consumers, rather than specific claims that the company makes or fails to make.⁷⁷ For an act or practice to be "unfair" in violation of section 5, it must be: (1) "likely to cause substantial injury to consumers;" (2) "not reasonably avoidable;" and (3) "not outweighed by [any] countervailing benefits to consumers or to competition."⁷⁸

Unfair practices can take on many different forms. In *Commerce Planet*, the U.S. District Court for the Central District of California also concluded that OnlineSupplier engaged in an unfair practice in violation of section 5.⁷⁹ The court found that the FTC satisfied the "substantial injury" prong of the unfairness test because it provided evidence that thousands of consumers were misled into signing up for a recurring subscription service when they thought that they were ordering a free auction kit.⁸⁰ The court also found that the FTC satisfied the countervailing benefits prong in part because consumers failed to give their consent to the automatic enrollment, and "thus, the harm resulted from a practice for which they did not bargain."⁸¹ The court also found that the consumer injuries were not reasonably avoidable here because the webpages gave the "net impression" that consumers were signing up for a free auction kit rather than a recurring subscription model, and therefore, consumers did not have the ability to make a "free and informed choice."⁸² In this case, OnlineSupplier engaged in a "hidden subscription" dark pattern because the company did not obtain consent from consumers before enrolling them in an auto-re-

⁷⁴ See *id.* at 1078.

⁷⁵ See *id.*; *Types of Deceptive Pattern*, *supra* note 36.

⁷⁶ 15 U.S.C. § 45(a)(1).

⁷⁷ See *id.*

⁷⁸ *Id.* § 45(n).

⁷⁹ *Com. Planet, Inc.*, 878 F. Supp. 2d at 1055.

⁸⁰ *Id.* at 1078.

⁸¹ *Id.* at 1078–79.

⁸² *Id.* at 1079.

newal subscription plan that charged them a monthly subscription fee unless they affirmatively opted out.⁸³

Similarly, in *FTC v. Triangle Media Corp.*,⁸⁴ the FTC alleged that Triangle Media Corporation falsely offered consumers an opportunity to sign up for a “risk free” trial “for just the cost of shipping and handling.”⁸⁵ Instead of a “risk free” trial, Triangle Media charged consumers the full price and enrolled them in a subscription plan, without their knowledge or consent.⁸⁶ The court entered an order for a permanent injunction and monetary judgment against the company in part because the company engaged in unfair practices by failing to gain the consumer’s express consent to be charged.⁸⁷ Prior to *AMG*, section 5 of the FTC Act was an effective mechanism to regulate dark patterns, as demonstrated by the cases discussed above. In the wake of *AMG*, however, the FTC must consider alternatives that permit monetary redress for consumers and impose civil penalties on bad actors to effectively regulate dark patterns.

B. *It Is Time to Revive Magnuson-Moss Section 18 Rulemaking Authority*

In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (“Magnuson-Moss Act”), which created section 18 of the FTC Act and laid out procedures for the promulgation of trade regulation rules.⁸⁸ The Act lays out specific procedures that the FTC must follow in order to promulgate “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”⁸⁹ If there is a violation of a rule promulgated by the FTC under section 18 of the FTC Act, the FTC is empowered to seek civil penalties by filing actions for recovery in federal court and may seek consumer redress.⁹⁰ Kurt Walters, an emerging legal scholar, examined why this ostensibly powerful rulemaking tool has gone largely untouched by the FTC since the

⁸³ See *Types of Deceptive Pattern*, *supra* note 36 (hidden subscription occurs when a free trial ends and a consumer’s credit card begins getting charged with no warning).

⁸⁴ No. 18cv1388, 2018 WL 4051701 (S.D. Cal. Aug. 24, 2018).

⁸⁵ *Id.* at *1–2.

⁸⁶ See *id.* at *2–3.

⁸⁷ See *id.* at *9–10.

⁸⁸ See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193–98 (1975) (codified at 15 U.S.C. §§ 2301–2312).

⁸⁹ 15 U.S.C. § 57a(a)(1)(B).

⁹⁰ *Id.* §§ 45(m)(1)(A)–(B), 57b.

1970s.⁹¹ Among several historical reasons mentioned in Walters's article,⁹² Walters explained that this rulemaking power gained a reputation for being "cumbersome and onerous" and significantly more extensive than the notice-and-comment rulemaking procedures defined in the Administrative Procedure Act ("APA").⁹³ Specifically, the Magnuson-Moss Act requires, among other things, that the FTC publish an advance notice of proposed rulemaking and provide it to a committee in both the U.S. House of Representatives and the Senate.⁹⁴ It also mandates that the FTC publish a notice of proposed rulemaking that requires slightly more information than the standard APA procedures require.⁹⁵ Additionally, the FTC must allow interested persons to make presentations at an informal oral hearing and allow opportunity for cross-examination.⁹⁶ Walters's article debunks the myth that section 18 rulemaking is impossibly burdensome by presenting a clear roadmap of how to utilize section 18.⁹⁷ Additionally, Walters's explanation of how the FTC's removal of some of its self-imposed rules makes section 18 a strong tool in the FTC's toolbox that should no longer be ignored.⁹⁸

As Walters's article notes, the FTC has recently taken action to make the process of section 18 rulemaking significantly easier. On March 25, 2021, then-Acting Commissioner Slaughter announced a new FTC Rulemaking Group within the FTC's Office of the General Counsel.⁹⁹ Commissioner Slaughter noted that clear rules both create an easier path for businesses to comply with the law and "also lead to substantial market-wide deterrence due to significant civil penalties

⁹¹ See Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519, 521–22 (2022).

⁹² See *id.* at 528.

⁹³ See *id.* at 522.

⁹⁴ See *id.* at 532, 542.

⁹⁵ See *id.* at 542.

⁹⁶ See *id.* at 545.

⁹⁷ See generally *id.*

⁹⁸ See *id.* at 521–22; see also *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). One potential counterargument to note is that in *West Virginia v. EPA*, the Supreme Court limited the EPA's regulatory powers and called into question federal rulemaking authority for other agencies. *West Virginia v. EPA*, 142 S. Ct. at 2609. However, this decision should not interfere with the FTC's ability to make rules because rulemaking is a critical part of the FTC's core delegated mission. See *Revisions to Rules of Practice*, 86 Fed. Reg. 38,542, 38,551 (July 22, 2021) (codified at 16 C.F.R. pts. 0, 1).

⁹⁹ Press Release, FTC, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> [<https://perma.cc/J2Z6-U35R>].

for rulebreakers.”¹⁰⁰ Furthermore, on July 1, 2021, the FTC approved changes to its Rules of Practice, which “streamlined” section 18 rulemaking procedures.¹⁰¹ FTC Chair Lina M. Khan, along with then-Commissioner Rohit Chopra and Commissioner Slaughter, explained in a joint statement that the purpose of adopting these revised section 18 rulemaking procedures was to “realign Commission practice with our statutory requirements and remove those extraneous and onerous procedures that serve only to delay Commission business.”¹⁰² By removing this “[s]elf-imposed red tape,” the FTC will be able to reinvigorate section 18 rulemaking to combat unfair and deceptive practices.¹⁰³

C. *The Restore Online Shoppers Confidence Act Can Regulate Dark Patterns*

Another source of authority the FTC can use to regulate dark patterns is ROSCA. Congress passed ROSCA in 2010 to protect consumers from certain “aggressive sales tactics” on the internet and designated the FTC to enforce the Act.¹⁰⁴ A violation of ROSCA is treated as a violation of a rule under section 18 of the FTC Act, and violators may be subject to civil penalties.¹⁰⁵ The congressional findings and legislative history indicate that an investigation by the Senate Committee on Commerce, Science, and Transportation found significant evidence of sales tactics that “have undermined consumer confidence in the [i]nternet and thereby harmed the American economy.”¹⁰⁶ ROSCA was introduced as a result of the consumer concerns about online shopping and sales tactics that companies often deploy against consumers.¹⁰⁷

The FTC has relied on ROSCA to combat dark patterns but only in the form of negative option features, because ROSCA’s text cur-

¹⁰⁰ *Id.*

¹⁰¹ Revisions to Rules of Practice, 86 Fed. Reg. at 38,551 (“A fundamental part of that posture are the agency-promulgated rules of practice. Parts 0 and 1 of these rules shape Commission behavior and process for Section 18 rulemaking.”).

¹⁰² FTC, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER JOINED BY CHAIR LINA KHAN AND COMMISSIONER ROHIT CHOPRA REGARDING THE ADOPTION OF REVISED SECTION 18 RULEMAKING PROCEDURES 2 (2021), https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf [<https://perma.cc/LFA5-G76A>].

¹⁰³ *Id.* at 3.

¹⁰⁴ 15 U.S.C. §§ 8401–8404.

¹⁰⁵ 15 U.S.C. § 8404.

¹⁰⁶ 15 U.S.C §§ 8401–8404.

¹⁰⁷ S. REP. NO. 111-240, at. 2 (2010). .

rently *only* permits enforcement against negative option features.¹⁰⁸ ROSCA defines a negative option feature as any type of sales term or condition that allows a seller to interpret a customer's "silence or failure to take an affirmative action" as acceptance of an offer.¹⁰⁹ ROSCA prohibits, among other things, "any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the [i]nternet through a negative option feature" unless the person meets certain requirements.¹¹⁰ ROSCA requires the seller to (1) use text to "clearly and conspicuously disclose[] all material terms of the transaction before obtaining the consumer's billing information," (2) "obtain[] a consumer's express informed consent before charging the consumer[]" for the product or service, and (3) provide a "simple mechanism[]" for a consumer to stop recurring charges."¹¹¹ A violation of ROSCA is treated as a violation of a trade regulation rule under section 18 of the FTC Act.¹¹² When a rule promulgated under section 18 is violated, the FTC may seek civil penalties and a variety of remedies, including consumer redress, such as damages under section 19 of the FTC Act.¹¹³

Until recently, the FTC has only used ROSCA to go after negative option claims that fail to meet the required three elements above.¹¹⁴ For example, in *FTC v. NutraClick, LLC*,¹¹⁵ a supplement marketer entered into a settlement agreement with the FTC in response to the FTC's complaint that the company did not clearly disclose that consumers who ordered samples would be enrolled in a membership program that would bill them up to eighty dollars per

¹⁰⁸ *See id.*

¹⁰⁹ 16 C.F.R. § 310.2(u) (2015) (defines negative option feature as "in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer"); *see, e.g.*, Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52,393 (Oct. 2, 2019) (to be codified at 16 C.F.R. pt. 425).

¹¹⁰ 15 U.S.C §§ 8401–8404.

¹¹¹ *Id.* § 8403.

¹¹² *Id.* § 8404.

¹¹³ *Id.*

¹¹⁴ *See* Leonard L. Gordon, Shahin O. Rothermel, Helen M. Chen & Venable LLP, *Lights, Camera, Action! FTC Settlement Signals Novel Use of ROSCA*, VENABLE LLP (June 9, 2021), <https://www.allaboutadvertisinglaw.com/2021/06/lights-camera-action-ftc-settlement-signals-novel-use-of-rosca.html> [https://perma.cc/9FZF-WD28].

¹¹⁵ Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. NutraClick, LLC*, No. 20-cv-08612 (C.D. Cal. Sept. 21, 2020).

month unless they cancelled within an eighteen-day or thirty-four-day trial period.¹¹⁶

One of the main issues with ROSCA is that the statute fails to define in detail what a company is required to do to provide a “simple mechanism” for cancellation as required in § 8403(3).¹¹⁷ The FTC acknowledged this flaw when it noted that the law does not provide “specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures.”¹¹⁸ This lack of specificity in defining a simple cancellation mechanism places a burden on the FTC to prove that a company did in fact fail to have such a mechanism in place.

The FTC also signaled in a 2021 settlement with MoviePass that it wants to expand the scope of ROSCA.¹¹⁹ In *MoviePass, Inc.*,¹²⁰ the FTC debuted a novel enforcement tactic under ROSCA.¹²¹ The FTC alleged that MoviePass’s “failure to disclose a material term of the underlying service that was necessary to prevent deception” was a ROSCA violation.¹²² This is a significant departure from previous enforcement under ROSCA because previous enforcement has focused on the disclosures about the negative option feature, rather than the underlying service itself.¹²³ Here, the underlying service in MoviePass was the movie subscription service.¹²⁴ MoviePass promised its customers, who paid a monthly \$9.95 subscription fee, access to “[u]nlimited movies” and promised access to “ANY MOVIE ANY THEATER ANY DAY.”¹²⁵ Instead, the company deployed tactics to limit subscribers’ ability to benefit from their one movie per day by invalidating subscriber passwords and imposing a burdensome ticket verification system.¹²⁶ The FTC alleged that MoviePass, in addition to violating section 5 of the FTC Act by engaging in deceptive practices,

¹¹⁶ See *id.* at *5.

¹¹⁷ 15 U.S.C. § 8403(3).

¹¹⁸ Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52,393 (Oct. 2, 2019) (to be codified at 16 C.F.R. pt. 425).

¹¹⁹ See *MoviePass, Inc.*, 192 F.T.C. 3000 (2021).

¹²⁰ *Id.*

¹²¹ See *id.* at *5.

¹²² See ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING, *supra* note 17, at 5; see also *MoviePass*, 192 F.T.C. at *5.

¹²³ See Gordon, Rothermel, Chen & Venable LLP, *supra* note 114.

¹²⁴ See *MoviePass*, 192 F.T.C. at *5.

¹²⁵ Complaint, *MoviePass, Inc.*, 192 F.T.C. 3000, para. 9, at *2–3 (Oct. 1, 2021).

¹²⁶ See *id.* at *5, *8. The FTC alleged that MoviePass engaged in the following tactics to hinder subscriber ability to see one movie per day: MoviePass (1) “invalidated . . . passwords” by falsely claiming that there was “suspicious activity . . . on the affected subscribers’ accounts,” (2) launched a “ticket verification” program that made it difficult for subscribers to view movies,

violated ROSCA by failing to “disclose all material terms of the transaction” as required by 15 U.S.C § 8403.¹²⁷ This is the first time that the FTC has used ROSCA to challenge “undisclosed material terms” that do not specifically relate to the disclosure about the negative option feature but instead apply to the underlying service.¹²⁸ The FTC’s willingness to expand its interpretation of ROSCA in this novel way signals its strong desire to find new ways to seek enforcement actions without having to use section 5 of the FTC Act in the wake of *AMG*.

D. State Action on Regulating Dark Patterns Has Been Limited

California has been the leading state to enact broad privacy legislation that tackles dark patterns.¹²⁹ In 2018, California enacted the California Consumer Privacy Act (“CCPA”)¹³⁰ which was the first comprehensive privacy legislation in the United States.¹³¹ In the 2020 election, California voted in a ballot referendum to pass the California Privacy Rights Act of 2020 (“CPRA”)¹³² to amend the CCPA.¹³³ The CPRA, which became enforceable in January 2023, defines and prohibits the use of dark patterns when consumers consent to opt-in to the sale or sharing of their data.¹³⁴ Following California’s lead, Governor Polis of Colorado signed the Colorado Privacy Act (“CPA”)¹³⁵ in July 2021.¹³⁶ The CPA defines dark patterns and prohibits any “agreement obtained through dark patterns” as constituting consumer con-

and (3) employed “trip wires” that sought to block certain subscribers that, for example, “viewed more than three movies per month.” *Id.*

¹²⁷ *Id.* at *10.

¹²⁸ Gordon, Rothermel, Chen & Venable LLP, *supra* note 114.

¹²⁹ See Press Release, CAL. DEP’T OF JUST. OFF. OF THE ATT’Y GEN., Attorney General Becerra Announces Approval of Additional Regulations that Empower Data Privacy Under the California Consumer Privacy Act (Mar. 15, 2021) <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-approval-additional-regulations-empower-data> [<https://perma.cc/K7Q8-CAYE>]; Alan R. Friedman, Robin Wilcox & Austin Manes, *Comparing the 5 Comprehensive Privacy Laws Passed by US States*, KRAMER LEVIN (June 10, 2022) <https://www.kramerlevin.com/en/perspectives-search/comparing-the-5-comprehensive-privacy-laws-passed-by-us-states.html> [<https://perma.cc/3U5M-R6A7>].

¹³⁰ See CAL. CIV. CODE § 1798.100 (West 2022).

¹³¹ See *id.*; Attorney General Becerra Announces Approval of Additional Regulations that Empower Data Privacy Under the California Consumer Privacy Act, *supra* note 129.

¹³² CAL. CIV. CODE § 1798.100.

¹³³ See *id.*; Robin Wilcox & Austin Manes, *California Passes Prop 24 to Amend and Expand Consumers’ Privacy Rights*, KRAMER LEVIN (Nov. 12, 2020), <https://www.kramerlevin.com/en/perspectives-search/california-passes-prop-24-to-amend-and-expand-consumers-privacy-rights.html> [<https://perma.cc/D5X2-YZ3S>].

¹³⁴ See CAL. CIV. CODE § 1798.100.

¹³⁵ COLO. REV. STAT. §§ 6-1-1301 to -1313 (2023).

¹³⁶ *Id.*

sent to process the consumer's personal data.¹³⁷ Increased state initiative to pass comprehensive privacy legislation that would encompass dark patterns regulation, coupled with the numerous attempts at the federal level, signals the support that this policy initiative has from consumers and legislators alike. Connecticut also passed a law regulating dark patterns which establishes that "Consent" does not include an "agreement obtained through the use of dark patterns."¹³⁸ The law defines a "Dark Pattern" as "(A) . . . a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making or choice, and (B) includes, but is not limited to, any practice the FTC refers to as a 'dark pattern.'"¹³⁹ However, California, Connecticut, and Colorado are the only states that have enacted privacy legislation that tackle dark patterns explicitly.¹⁴⁰

II. ANALYSIS

The FTC's difficulty in getting monetary redress as a result of *AMG* presents serious roadblocks to the FTC's ability to regulate and bring enforcement actions against companies deploying dark patterns.¹⁴¹ This Part analyzes why section 5 of the FTC Act alone is no longer an adequate mechanism to regulate dark patterns through the introduction of a hypothetical dark patterns case.

A. *Section 5 of the FTC Act Is No Longer an Adequate Mechanism to Regulate Dark Patterns*

For the past four decades, the FTC has relied on section 13(b) of the FTC Act to seek monetary penalties and "secure billions of dollars"¹⁴² for consumers harmed by violations of the prohibition in section 5 of the FTC Act against "unfair or deceptive acts or practices."¹⁴³ Prior to *AMG*, if the FTC brought a case under section 5 of the FTC

¹³⁷ *Id.* § 6-1-1303 (2023).

¹³⁸ See Substitute S.B. No. 6, 2022 Leg., Reg. Sess., Pub. Act No. 22-15 (Conn. 2022).

¹³⁹ *Id.*

¹⁴⁰ See Fazlioglu, *supra* note 19; see also CAL. CIV. CODE § 1798.100 (West 2022).

¹⁴¹ See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021); Press Release, FTC, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021) <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us> [<https://perma.cc/Y3QM-UWUR>].

¹⁴² Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, *supra* note 141.

¹⁴³ 15 U.S.C. §§ 45(a)(1), 52(b); see Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, *supra* note 141.

Act, the FTC had to prove that the act was either deceptive or unfair.¹⁴⁴ If the FTC's lawsuit was successful, it had the opportunity to get monetary redress for consumers under section 13(b).¹⁴⁵ After *AMG*, however, if the FTC brings a lawsuit alleging that a dark pattern is deceptive or unfair under section 5 of the FTC Act, the FTC is only able to seek nonmonetary injunctive relief and will not be able to obtain any monetary redress for consumers.¹⁴⁶ The purpose of monetary redress is to both hold companies accountable for their illegal actions and to make consumers whole—to return both parties to the status they would have had but for the violation.¹⁴⁷ Given *AMG*'s limitation on the ability to seek monetary redress for consumers, pursuing enforcement under section 5 of the FTC Act is less effective because consumers will not be made whole by defendant companies unless the companies agree to compensate the harmed consumers themselves or the consumers are successful in separate litigation.¹⁴⁸

Even if Congress restores the FTC's section 13(b) authority to obtain monetary redress for section 5 violations, proving section 5 violations of either a deceptive or unfair act or practice can in some circumstances place a heavy burden on the FTC to develop a factual record to support its assertion.¹⁴⁹ Furthermore, often when the FTC alleges a section 5 violation against a company for engaging in an unfair or deceptive practice, the company enters into a settlement with the FTC.¹⁵⁰ This makes regulation of dark patterns more difficult be-

144 See MILLER, *supra* note 62; 15 U.S.C. § 45(n).

145 *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1345.

146 See *id.* at 1341.

147 See FTC OFF. OF ACTING CHAIRWOMAN REBECCA KELLY SLAUGHTER, OPENING STATEMENT OF ACTING CHAIRWOMAN REBECCA KELLY SLAUGHTER BEFORE THE UNITED STATES HOUSE COMMITTEE ON ENERGY AND COMMERCE SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE: THE URGENT NEED TO FIX SECTION 13(B) OF THE FTC ACT (2021).

148 See *id.* (“The significant direct harm to consumers from Congressional inaction is obvious enough. But there are additional indirect harms to consumers and to law-abiding businesses. The loss of 13(b) will result in emboldened defendants with little incentive to agree to return money to consumers or to provisions requiring them to change their behavior in meaningful ways. This will mean more litigation, at higher costs for taxpayers, resulting in less protection for consumers and more profit for lawbreakers, all at the expense of honest businesses trying to compete against companies that engage in unfair, deceptive, and anticompetitive conduct.”)

149 See Walters, *supra* note 91, at 575.

150 See, e.g., Stipulated Final Order for Permanent Injunction and Other Equitable Relief, *FTC v. NutraClick, LLC*, No. 20-cv-08612 (C.D. Cal. Sept. 30, 2020); Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Triangle Media Corporation, Jasper Rain Marketing LLC, and Brian Phillips, *FTC v. Triangle Media Corp.*, No. 18-cv- 01388 (S.D. Cal. May 30, 2019); Order Granting Joint Motion for Permanent Injunction and Other Equitable Relief as to Robert Koch, *FTC v. AAFE Products Corp.*, No. 17-cv-00575 (S.D. Cal. Sept. 6, 2017).

cause these settlements, often referred to as consent decrees, are not binding on third parties.¹⁵¹ Therefore, if another company deploys the same dark pattern that the FTC alleged was an unfair or deceptive act in a previous case that settled, rather than litigated to a final judgment, the FTC would not be able to point to binding authority that found that the specific conduct was an unfair or deceptive practice.¹⁵² Because the FTC is no longer able to get monetary redress for consumers under section 13(b)¹⁵³ for violations of section 5 of the FTC Act as a result of the *AMG* case, the FTC must pursue other avenues to seek monetary redress for consumers.¹⁵⁴

B. *Dark Pattern Hypothetical Case*

Consider the following hypothetical: Company A owns and operates an application (“app”) that facilitates its online coffee delivery service. During the COVID-19 pandemic, Company A noticed that consumers, although working from home, were still craving high-quality lattes and cappuccinos brewed by baristas but did not want to leave the house to get them in the morning. Company A also hired pastry chefs to bake fresh croissants each morning that were available for sale for five dollars in the app.

When a consumer opens Company A’s coffee app, they are presented with language in a pop-up box that reads “Coffee and pastries make me happy.” To remove the pop-up box, the consumer is given the option to either click the bright red button that reads “I AGREE” or a small, light green button that reads “No thanks, I don’t like pastries and coffee.” Unbeknownst to the consumer, if the consumer selects “I AGREE,” a five dollar croissant is automatically added to the check-out cart. When the consumer purchases coffee, she must look closely to see that there is a charge for a croissant in the

¹⁵¹ See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27. But see 15 U.S.C. § 45(m)(1)(B) (Notice of Penalty Office Authority provides the FTC with the authority to seek civil penalties if it can prove that a company knew the conduct it was engaging in was unfair or deceptive and the FTC had previously issued a written decision that the conduct is unfair, often referred to as a “Notice of Penalty Offense”).

¹⁵² *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27.

¹⁵³ 15 U.S.C. § 53(b).

¹⁵⁴ See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1341 (2021); see also Kathleen Benway & Robert H. Poole II, *Consumer Protection/FTC Advisory: Supreme Court Slashes FTC’s Favored Route to Consumer Redress and Disgorgement*, ALSTON & BIRD LLP (Apr. 27, 2021), <https://www.alston.com/en/insights/publications/2021/04/supreme-court-slashes-ftcs-favored-route/> [<https://perma.cc/7RJF-B35D>].

check-out basket. On the bottom of the app's homepage there is a disclosure in small, black font that says, "By selecting 'I AGREE' you are agreeing to purchase one croissant every time you order coffee on this application. Click here to opt out." Consumers generally navigate to the check-out page by selecting a shopping cart basket icon in the top right-hand corner of the app. Thousands of consumers utilized this service and unknowingly purchased a croissant in addition to the coffee they had intended to order, often more than once.

Using Dr. Brignull's terms, Company A has engaged in a "[s]neaking" dark pattern because the app automatically added a croissant into the consumer's basket without obtaining consent for the purchase of an additional item.¹⁵⁵ Because of the deceptive design, the consumer was unaware that by selecting "I AGREE" to the prompt asking about their pastry preferences they were agreeing to purchase a pastry; therefore, no consent existed.¹⁵⁶ Additionally, Company A also deployed a "[v]isual interference" dark pattern because it used bright red font to misdirect the consumer from declining the croissant.¹⁵⁷ Company A also engaged in the "[c]onfirmshaming" dark pattern because it guilted the consumer into choosing an option that it did not want by using the language "No thanks, I don't like coffee and pastries" to purposefully encourage the consumer to choose "I AGREE."¹⁵⁸ Now, imagine that the FTC has received customer complaints about Company A and has decided to file a complaint alleging that the company has violated section 5 by engaging in both unfair and deceptive practices. The analysis below considers the potential outcomes of the case if pursued under section 5.

1. *Company A Engaged in a Deceptive Practice*

An act or practice is deceptive if there is a material representation¹⁵⁹ or omission that is likely to mislead a consumer acting reasonably under the circumstances.¹⁶⁰ In this hypothetical case, the FTC would likely allege that the representation was likely to mislead a reasonable consumer. In *FTC v. Commerce Planet, Inc.*, the defendant engaged in a deceptive practice by misleading thousands of reasonable

¹⁵⁵ See *Types of Deceptive Pattern*, *supra* note 36.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (a representation is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product").

¹⁶⁰ See 15 U.S.C. § 45(a); *MILLER*, *supra* note 62.

consumers when it advertised a free seven-day trial but instead signed consumers up for a recurring subscription service.¹⁶¹ Similarly, here, Company A included a pop-up box, “Coffee and pastries make me happy,” on its app and then forced consumers to select either “I AGREE” in bright red letters or “No thanks, I don’t like coffee and pastries” in small font, but it did not disclose to consumers on the same pop-up window or the check-out page that by selecting “I AGREE,” the consumer was consenting to the purchase of a five dollar croissant with every coffee purchase.¹⁶² Company A would likely argue that its practice was not deceptive because the consumer should have reviewed the disclosure on the bottom of the app’s homepage prior to checking out. In *Commerce Planet*, the court found that the recurring subscription model disclosure located “below the fold” and the hyperlinked “Terms of Membership” were insufficient to make the practice not deceptive.¹⁶³ Here, Company A’s disclosure will likely also be found insufficient because it was displayed in small, black text at the bottom of the app, which the consumers did not have any reason to scroll to because the check-out cart icon was located on the top right-hand corner of the app.¹⁶⁴

The FTC would also likely argue that the disclosed information about the five dollar croissant was “material” because consumers were charged for an item that they did not want. In *Commerce Planet*, the court found that the misrepresentation about the free trial and free auction kit was material because the information was relevant to the cost of the product, which is an “important factor in a consumer’s decision.”¹⁶⁵ Here, the consumer was similarly not aware of the cost imposed by selecting “I AGREE” because that clicking action automatically added a five dollar croissant charge to every coffee order placed on the app, and the disclosure was placed at the bottom of the app.¹⁶⁶ Therefore, Company A would likely be held liable under section 5 of the FTC Act for engaging in a deceptive practice.

¹⁶¹ *FTC v. Com. Planet, Inc.*, 878 F. Supp. 2d 1048, 1055–57 (C.D. Cal. 2012), *aff’d in part*, 642 F. App’x 680 (9th Cir. 2016), *and aff’d in part, vacated in part, remanded to*, 815 F.3d 593 (9th Cir. 2016).

¹⁶² *See Com. Planet, Inc.*, 878 F. Supp. 2d at 1063–65.

¹⁶³ *Id.* at 1065.

¹⁶⁴ *See id.* at 1064.

¹⁶⁵ *Id.* at 1068.

¹⁶⁶ *Id.* at 1058, 1068.

2. *Company A Engaged in an Unfair Practice Under Section 5 of the FTC Act*

For an act or practice to be “unfair” in violation of section 5, it must be (1) “likely to cause substantial injury to consumers,” (2) not “reasonably avoidable,” and (3) “not outweighed by countervailing benefits to consumers or to competition.”¹⁶⁷ In this case, the FTC would likely allege that Company A engaged in an unfair practice by tricking consumers into purchasing an unwanted croissant with their coffee by sneaking the croissant into the check-out basket. To prove that an injury is substantial, the FTC does not need to prove that there was a large harm to one consumer, instead, the FTC can allege that a small harm was done to many consumers.¹⁶⁸ In *Commerce Planet*, the FTC argued and the court agreed that consumer injury had been substantial when the defendant misled thousands of consumers by advertising a free seven-day trial, minus the cost of shipping and handling, but instead the defendant enrolled the unknowing consumers into a recurring subscription model with a monthly charge of almost sixty dollars per month.¹⁶⁹ Here, Company A similarly deceived thousands of consumers by using a pop-up window that misled consumers by failing to adequately disclose that by selecting the “I AGREE” in bright red font, a five dollar croissant was added to the consumer’s basket without their knowledge.¹⁷⁰ Additionally, the FTC will likely be successful in its claim that the practice is not “outweighed by countervailing benefits to consumers or to competition.”¹⁷¹ Like in *Commerce Planet*, in which the court found that the practice had no countervailing benefit to consumers because, among other things, consumers had not given their consent to the automatic enrollment and therefore they did not benefit from the practice because they had not “bargain[ed]” for it, here too, a court would likely find that Company A did not provide any countervailing benefits to consumers because consumers were unaware that by selecting “I AGREE” to the statement “Coffee and pastries make me happy” they were agreeing to paying for an unwanted five dollar croissant.¹⁷²

¹⁶⁷ 15 U.S.C. § 45(n).

¹⁶⁸ See *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (“[A]lthough the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not ‘substantial.’” (quoting *Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986))).

¹⁶⁹ See *Com. Planet, Inc.*, 878 F. Supp. 2d at 1067.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 1078.

¹⁷² See *id.* (quoting *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010)).

Finally, Company A will likely unsuccessfully argue that its practice was not unfair because consumers could have reasonably avoided injury by removing the croissant from their basket before checking out. The *Commerce Planet* court held that the consumers' injury was not reasonably avoidable because the defendant's advertisements and webpages gave the net impression that consumers were signing up for a free trial period to receive a free auction kit rather than signing up for a subscription service, and therefore, the consumers did not have a "free and informed choice."¹⁷³ Likewise, Company A's consumers lacked a "free and informed choice" because they were not aware that by selecting "I AGREE" in response to the statement "Coffee and pastries make me happy," they were consenting to purchasing a five-dollar croissant.¹⁷⁴ Additionally, consumers could not have reasonably avoided the injury themselves because the disclosure, which alerted consumers that by selecting "I AGREE" they were consenting to purchase one croissant every time they placed an order for coffee, was located at the bottom of the app's webpage, which the Company A consumer would not see if they selected the check-out basket icon from the top right-hand corner of the app.

3. *FTC Results Under Section 5 of the FTC Act*

For the FTC to succeed in challenging Company A's practice, a significant amount of time and resources would need to be dedicated to this case to prove each element of the unfair claim, deceptive claim, or both. Furthermore, even if the FTC succeeded in proving that Company A violated section 5 of the FTC Act, the FTC would only have the authority to obtain a permanent injunction. There would be no possibility of consumer redress or civil penalties as a result of *AMG*.¹⁷⁵ Importantly, civil penalties are not available for first-time section 5 violations; instead, only when a company violates an order or a rule can it be subject to civil penalties.¹⁷⁶ Consumers harmed by Company A's deceptive and unfair practices would be unlikely to hire a lawyer and sue over small individual losses, and class actions face their own significant legal and practical difficulties. *AMG*, however, ensures that the FTC can win only nonmonetary injunctive relief.¹⁷⁷ One benefit of the FTC successfully getting a preliminary injunction

¹⁷³ *Id.* at 1079 (quoting *Neovi, Inc.*, 604 F.3d at 1158).

¹⁷⁴ *Id.* at 1064, 1079 (quoting *Neovi, Inc.*, 604 F.3d at 1158).

¹⁷⁵ See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1341 (2021); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 177 (2d Cir. 2016).

¹⁷⁶ 15 U.S.C. § 45(m).

¹⁷⁷ See *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1341.

against Company A is that the findings by the federal court would be persuasive to other courts and thus instructive to other companies, so the FTC in future cases could more easily prove that the particular practice is unfair or deceptive and other companies might be more readily deterred from doing anything similar.¹⁷⁸ Alternatively, if Company A enters into a consent decree (settlement) with the FTC agreeing to pay redress to consumers, the settlement would still instruct other companies but with less power because it would be less persuasive to other courts.¹⁷⁹

Either way, the FTC and the consumer are unable to get the outcome they want under the current enforcement regime. In a section 5 case “win” for the FTC in which it gets a permanent injunction, the consumer still suffers because they do not get any monetary redress.¹⁸⁰ If the FTC wants redress for consumers victimized by first-time violators, such as Company A, it must litigate the matter to final judgment, which includes adjudication by an Administrative Law Judge, appeals to the full Commission and U.S. Court of Appeals, and then the initiation of a new lawsuit to seek redress.¹⁸¹ In a settlement, the consumer is more likely able to get redress from Company A as part of the settlement.¹⁸² This would affect the FTC’s ability to bring enforcement actions against other companies engaged in a similar action because settlements are not binding on other parties.¹⁸³ As demonstrated by this hypothetical case, bringing a successful enforcement action under section 5 of the FTC Act to obtain redress for consumers or to impose civil penalties against companies who engage in dark patterns is no easy feat. In the wake of *AMG*, the FTC must find a new approach to effectively regulate dark patterns.

III. RECOMMENDATIONS

The use of dark patterns in modern society has remained unchecked for too long. This Note recommends in Part III.A that the best solution for bringing effective enforcement actions against companies engaged in dark patterns is for the FTC to promulgate a trade regulation rule under section 18 of the FTC Act which defines and

¹⁷⁸ See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27.

¹⁷⁹ See *id.*

¹⁸⁰ See *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1341.

¹⁸¹ See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 27.

¹⁸² See *id.*

¹⁸³ See *id.*

prohibits dark patterns. Part III.B recommends that Congress amend ROSCA to define simple cancellation mechanisms and add language beyond negative option marketing to regulate dark patterns more broadly.

A. *The FTC Should Promulgate a Section 18 Rule Regulating Dark Patterns*

The FTC is in the best position it has been since the early 1970s to use section 18 rulemaking to promulgate a rule that gives the FTC the power to regulate dark patterns.¹⁸⁴ Promulgating a dark pattern rule would allow the FTC to pursue unfair or deceptive conduct without having to rely on section 5 of the FTC Act,¹⁸⁵ wait for Congress to amend current statutes such as ROSCA,¹⁸⁶ or wait for Congress to pass comprehensive privacy legislation, which has been stalled for years.¹⁸⁷ Implementing a dark pattern rule would also lead to greater deterrence among bad actors because the FTC could seek civil penalties and get consumer redress for rule violations under section 18 without first having to go through the administrative adjudication process.¹⁸⁸ The heavy burden of the administrative adjudication process has made the FTC wary of pursuing action under section 5 of the FTC Act after *AMG* because the process to get redress for consumers could take years in litigation.¹⁸⁹ The implementation of a dark pattern rule would also create deterrence upfront because bad actors would know that a rule violation would allow easier litigation victories for the FTC against the bad actor in court, and the FTC, if successful in the case, could obtain civil penalties and redress for consumers.¹⁹⁰

Another reason to promulgate a dark pattern rule under section 18 is that it would provide more consistency to key stakeholders. Although there have been a handful of cases over the last several decades that have targeted companies engaging in dark patterns,¹⁹¹ the FTC has not been able to provide any sort of consistent rule to consumers, industry leaders, and other interested parties about what spe-

184 See Walters, *supra* note 91, at 519.

185 15 U.S.C. § 45(a)(1).

186 *Id.* §§ 8401–8405.

187 See Fazlioglu, *supra* note 19.

188 See 15 U.S.C. § 57b(a)–(b).

189 David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 MONT. L. REV. 159, 178 (2021).

190 See Walters, *supra* note 91, at 521–22.

191 See ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING, *supra* note 17, at 5 (providing examples of dark pattern cases brought for violation of ROSCA).

cific actions will constitute dark patterns.¹⁹² Implementing a rule defining exactly what dark patterns are would give business owners a consistent standard to measure up against and would likely lead to greater compliance. Promulgating a dark pattern rule under section 18 would also put the onus on the FTC to act, rather than waiting for Congress to develop legislation in this area. Finally, even if Congress decided to restore the FTC's ability to obtain consumer redress under section 13(b) of the FTC Act, promulgating a rule under section 18 is still favorable because it will eliminate the burden on the FTC to have to prove each element of an unfair or deceptive practice during every enforcement action.¹⁹³ It will give the FTC, America's consumer protection agency, the freedom and flexibility to design a rule that meets the challenges and needs of consumers, industry actors, and regulators alike.

Returning to the hypothetical case introduced in Part II, if the FTC enacted a dark pattern rule under section 18 it would be able to hold Company A liable, get redress for consumers, and obtain civil penalties.¹⁹⁴ Consider this draft rule text:

Trade Regulation Rule Against Dark Patterns

(1) Definitions.

- (a) *Dark pattern* means a user interface with a design element, feature, or other virtual component that, in the context of the user interface, could cause a substantial minority of reasonable consumers to take actions that they would not have taken if the material information had been presented in a clear and conspicuous way.

(2) Dark Patterns Prohibited.

- (a) It is unlawful to deploy a dark pattern.

(3) Examples of Dark Patterns.

- (a) Generally, dark patterns may include, but are not limited to:
- (i) a design, such as bright, bold font, to distract consumers from disclosure text in smaller, lighter-colored font or a background color that makes the font difficult to see against the background;

¹⁹² See Walters, *supra* note 91, at 521–22.

¹⁹³ See MILLER, *supra* note 62, at 6–7; 15 U.S.C. § 45(n) (identifying that the burden of proof lies with the FTC to prove an unfair or deceptive practice).

¹⁹⁴ 15 U.S.C. §§ 45(m)(1)(A)–(B), 57(a).

- (ii) failing to provide an easy way for the consumer to cancel membership to a negative option feature, also known as a recurring subscription model;
- (iii) using unsubstantiated scarcity claims that manipulate the consumer into choosing a particular option on the user interface such as claiming that their supply of a particular product or service is running out when, in reality, there is an ample supply;
- (iv) failing to disclose the terms of a negative option plan clearly and conspicuously by placing the terms on a separate, hyperlinked page, placing the terms in an inconspicuous spot on the webpage or platform that the consumer is unlikely to see, or using small font or text to provide the disclosure;
- (v) advertising a price for a product or service without disclosing nondeclinable additional fees or services in the advertised price; or
- (vi) failing to clearly and conspicuously obtain consent from a user to obtain personal data or making it difficult to adjust privacy settings.

When a company violates a trade regulation rule, it is significantly more efficient to pursue enforcement action because “[t]he agency will then only have to demonstrate a violation of a rule to prevail” as opposed to “engag[ing] in the factual development necessary to prove every element of deceptiveness or unfairness . . . [of] the specific conduct found in a particular case” under section 5.¹⁹⁵ Under this proposed rule against dark patterns, the conduct that Company A engaged in as described in Part II would be unlawful. Rather than having to prove that Company A’s specific conduct was unfair or deceptive under section 5, the FTC would be able to obtain civil penalties and monetary redress if it could prove that Company A deployed a “dark pattern” as defined and prohibited in the draft rule.¹⁹⁶

This proposed rule text creates a consistent and clear rule that is preferable to the patchwork of legislation that currently governs dark patterns. The current regulatory regime fails to adequately provide (1) consistency, (2) deterrence effects, or (3) compliance success.¹⁹⁷ This proposed rule also draws inspiration from language already uti-

¹⁹⁵ Walters, *supra* note 91, at 575.

¹⁹⁶ 15 U.S.C. §§ 45(m)(1)(A)–(B), 57(a).

¹⁹⁷ See Walters, *supra* note 91, at 525–26.

lized by federal and state lawmakers,¹⁹⁸ the FTC’s dark pattern workshop,¹⁹⁹ and Dr. Brignull’s terms from his website “deceptive.design” (formerly “darkpatterns.org”).²⁰⁰ If the FTC promulgates a trade regulation rule under section 18 of the FTC Act, there is no need to wait for Congress to act. Furthermore, the FTC’s expertise in consumer protection makes it the authority best suited to draft a comprehensive rule that prohibits dark patterns while balancing business interests.

B. Congress Should Amend ROSCA to Expand Enforcement Beyond Negative Option Plans

Although Congress did not utilize the term “dark pattern” when drafting ROSCA, the “[h]idden subscription” and “[h]ard to cancel” types of dark patterns coined by Dr. Brignull encapsulate the frustrated experience of consumers that ROSCA was enacted to combat.²⁰¹ Because Congress failed to define the term “simple mechanism” for cancellation in ROSCA, however, consumer advocates have argued that there is a loophole for companies to exploit and remain in compliance with the statute.²⁰² In its 2021 Negative Option Policy Statement, the FTC stated that to meet the “simple mechanism” standard, businesses

should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature. . . . [They also] should provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature.²⁰³

ROSCA in its current form is unable to effectively combat many dark patterns used in negative option marketing. The primary reason is the 2021 Negative Option Policy Statement is not binding,²⁰⁴ and the consent orders or settlements the FTC has entered into with various companies to resolve these disputes are binding only on the parties to

¹⁹⁸ See COLO. REV. STAT. §§ 6-1-1301 to -1313 (2023) (“‘Dark pattern’ means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.”).

¹⁹⁹ See *Bringing Dark Patterns to Light: An FTC Workshop*, *supra* note 11.

²⁰⁰ See DECEPTIVE PATTERNS, *supra* note 7.

²⁰¹ See *Types of Deceptive Pattern*, *supra* note 35.

²⁰² Yeganeh Torbati, *Federal Officials look to Crack Down on Deceptive Subscription Marketing Practices at Broad Range of Firms*, WASH. POST (June 2, 2021, 7:01AM), <https://www.washingtonpost.com/business/2021/06/02/automatic-renewals-ftc-subscriptions/> [<https://perma.cc/CPX3-KCTJ>].

²⁰³ See MILLER, *supra* note 62, at 14.

²⁰⁴ See *id.* at 1 n.1.

the settlements.²⁰⁵ The FTC’s novel application of ROSCA in *MoviePass, Inc.* and subsequent release of its 2021 Negative Option Policy Statement demonstrate the FTC’s increased interest in regulating negative option features.²⁰⁶ Furthermore, the broad reading of the statute in *MoviePass*—coupled with the lack of definition for “simple mechanisms”—signals that ROSCA is ripe for amendment.²⁰⁷

If Congress is unwilling or unable to adopt a new comprehensive piece of legislation on dark patterns, it could also amend ROSCA to protect consumers more broadly from all types of dark patterns by removing the requirement that services sold be through a negative option feature and add definitions for “simple mechanisms” and “dark patterns.”²⁰⁸ Specifically, Congress should amend ROSCA to further define “simple mechanisms” to close the loophole that consumer advocates have suggested erodes the enforcement power of this statute to tackle dark patterns. The language for each of these proposed definitions is drawn from the 2021 Negative Option Policy Statement,²⁰⁹ *deceptive.design*,²¹⁰ *DETOUR*,²¹¹ California and Colorado privacy legislation,²¹² and other scholars.²¹³

Specifically, the statute should be amended as follows:

- (a) *Simple mechanisms* are mechanisms that allow the consumer to opt-out of recurring charges through the same medium or platform on which the consumer opted into the charges and “are at least as easy to use as the method the consumer used to initiate the negative option feature.”²¹⁴

²⁰⁵ See, e.g., Stipulated Final Order for Permanent Injunction and Other Equitable Relief, *FTC v. NutraClick, LLC*, No. 20-cv-08612 (C.D. Cal. Sept. 30, 2020); see also Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Triangle Media Corporation, Jasper Rain Marketing LLC, and Brian Phillips, *FTC v. Triangle Media Corp.*, No. 18-cv-01388 (S.D. Cal. May 30, 2019).

²⁰⁶ See ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING, *supra* note 17.

²⁰⁷ See *id.* at 9 n.34.

²⁰⁸ 15 U.S.C. § 8403.

²⁰⁹ See ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING, *supra* note 17.

²¹⁰ See DECEPTIVE PATTERNS, *supra* note 7.

²¹¹ See *DETOUR Act*, S. 1084, 116th Cong. (2019).

²¹² See CAL. CIV. CODE § 1798.100 (West 2022); COLO. REV. STAT. §§ 6-1-1301 to -1313 (2023).

²¹³ See Walters, *supra* note 91, at 569–78; Luguri & Strahilevitz, *supra* note 9, at 44.

²¹⁴ See ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING, *supra* note 17, at 14.

- (b) *Consent* requires a consumer’s clear affirmative agreement, including through electronic platforms, and will not include any consent obtained through the use of a dark pattern.
- (c) *Dark pattern* means a user interface with a design element, feature, or other virtual component that, in the context of the user interface, could cause a substantial minority of reasonable consumers to take actions that they would not have taken if the material information had been presented in a clear and conspicuous way.

Section 8403 should be amended to read as follows:

Section 8403.

It shall be unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature²¹⁵ or use of any dark pattern²¹⁶ . . . unless the person—

- (1) provides text that clearly and conspicuously discloses all material terms of the transaction and underlying product or service before obtaining the consumer’s billing information;
- (2) obtains a consumer’s express informed consent before charging the consumer’s credit card . . . ; and
- (3) provides simple mechanisms . . . to stop recurring charges from being placed on the consumer’s credit card, debit card, bank account, or other financial account.²¹⁷

Including a definition for “simple mechanisms” will close the loophole in ROSCA—which failed to define what constituted a simple cancellation mechanism.²¹⁸ Additionally, the original statute failed to define the word “consent.”²¹⁹ Amending ROSCA to include a definition for consent would help clarify that any “consent” obtained through deployment of a dark pattern would not qualify as consent. Furthermore, amending ROSCA to add a definition for “dark pattern”²²⁰ and to require that all material terms of the underlying product or service be disclosed would allow ROSCA to be applied broadly

²¹⁵ See Telemarketing Sales Rule, 16 C.F.R. § 310.2(u) (2015) (defines negative option feature as “in an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer”).

²¹⁶ The definition of dark pattern would be incorporated through Brignull’s definition. DECEPTIVE PATTERNS, *supra* note 7.

²¹⁷ 15 U.S.C § 8403.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ *Id.*

to target any transaction that occurred through the internet that deployed a dark pattern, not just products or services offered through a negative option plan.²²¹ This change would incorporate the FTC's novel use of ROSCA in the *MoviePass, Inc.* case by amending the statute to reflect the FTC's position that ROSCA can regulate any unfair or deceptive underlying products or services that are sold through a negative option feature or any other dark pattern. If Congress neglects to reinstate the FTC's ability to get monetary redress under section 13(b) of the FTC Act, this amendment to ROSCA will provide the FTC with the power to get strong deterrence and robust monetary redress from any company that has unfair or deceptive products or services sold through the internet.

CONCLUSION

Ever-increasing consumer activity on the internet has led to a heightened need for regulation by the FTC. Current laws and FTC regulations are inadequate to address the dark patterns that have permeated online commerce.²²² In the wake of *AMG*, the FTC lost its ability to get redress for consumers without going through an entire administrative and federal adjudication process.²²³ Even if Congress were to restore the FTC's section 13(b) power, however, the FTC should still use section 18 rulemaking to enact a comprehensive rule that clearly defines dark patterns and provides the FTC with an enforcement mechanism that creates more clarity, consistency, and deterrence.²²⁴ Congress should also amend ROSCA to more broadly regulate dark patterns that go beyond the regulation of negative option marketing. Dark patterns ultimately harm consumers and can often have devastating consequences, as they did for Mr. Stacy Blatt, when the Trump campaign's deployment of a dark pattern led him to unknowingly have three thousand dollars withdrawn from his bank account. The FTC must act now to protect consumers from the manipulative and exploitative effects of dark patterns.

²²¹ See *Types of Deceptive Pattern*, *supra* note 36. This would specifically implicate the dark patterns defined as "Sneaking," in which a consumer tries to purchase something but during the process an additional item is included in the check-out basket, and "Hidden Costs," which occur when a consumer reaches the last part of the check-out process and discovers unexpected charges (e.g., delivery charges, tax) that have been added.

²²² See Walters, *supra* note 91; Luguri & Strahilevitz, *supra* note 9.

²²³ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1341 (2021).

²²⁴ See Walters, *supra* note 91, at 522.

