

No. 26-40094

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, ET AL.,
Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Defendants-Appellants.

On Petition for Review of a Final Rule of the
Federal Trade Commission

**UNOPPOSED EMERGENCY MOTION UNDER CIRCUIT RULE
27.3 FOR ADMINISTRATIVE STAY AND OPPOSED
EMERGENCY MOTION FOR STAY PENDING APPEAL**

LUCAS CROSLAW
General Counsel

H. THOMAS BYRON III
Deputy General Counsel

BENJAMIN F. AIKEN
Attorney

Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580
T: (202) 326-2151
baiken@ftc.gov

CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required under Fifth Circuit Rule 28.2.1 as appellants are all governmental parties.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
INTRODUCTION AND SUMMARY	1
STATEMENT.....	4
<i>Congress Enacted the HSR Act to Enable the Antitrust Agencies to Efficiently Determine Whether Reportable Transactions May Violate the Antitrust Laws</i>	4
<i>A Bipartisan Commission Unanimously Promulgates a Sorely Needed Update to the HSR Form</i>	7
<i>Four Nonprofit Associations with No Admissible Evidence of Standing Challenge the Rule, and the District Court Vacates It.</i>	10
STANDARD OF REVIEW.....	15
ARGUMENT	15
I. The Commission Is Likely to Succeed on the Merits.	15
II. The Commission Will Suffer Irreparable Harm Absent a Stay.	25
III. The Balance of Harms and Public Interest Favor a Stay.....	27
CONCLUSION	29
CERTIFICATE OF COMPLIANCE	30

INTRODUCTION AND SUMMARY

The Federal Trade Commission seeks a stay of the final judgment in this case pending appeal. Plaintiffs oppose a stay pending appeal and anticipate filing an opposition by February 23, 2026.

Plaintiffs *do not oppose* a brief administrative stay of the judgment until March 2, 2026, while the Court considers this motion for a stay pending appeal. Counsel for plaintiffs provided the following statement of their position:

“Despite the ongoing harms to their members and to all regulated parties that must file HSR forms under a rule that the district court has recognized is unlawful, Plaintiffs do not oppose an administrative stay until March 2 in order to ensure short-term clarity about which version of the form is in effect while this Court considers the Commission’s emergency motion for a stay pending appeal. Plaintiffs oppose any stay of the district court’s order beyond March 2.”

Because the district court decision will otherwise take effect tomorrow, Thursday, February 19, we respectfully request a ruling on the motion for an administrative stay before midnight tomorrow, February 19, 2026. If that motion is granted then we respectfully request a ruling on the motion for a stay pending appeal by midnight on March 2, 2026.

This case involves a challenge to the Commission’s recent bipartisan, multiyear effort to update the form that parties to certain large transactions must file before consummating their deal, pursuant to the Hart Scott Rodino Act (HSR Act), 15 U.S.C. § 18a. *See Premerger Notification; Reporting and Waiting Period Requirements*, 89 FR 89,216 (Nov. 12, 2024) (the “Rule”). Plaintiffs are four nonprofit associations who purport to seek relief on behalf of unnamed members. These associations’ only support for their standing indisputably relies on inadmissible hearsay about pseudonymous members. The district court ignored these obvious faults with plaintiffs’ evidence—and the many cases from federal courts of appeals that reject plaintiffs’ approach to standing—and allowed this manufactured dispute to proceed.

On the merits, the district court imposed upon the Commission a standard that finds no support in the caselaw, the APA, or the HSR Act. The Commission has unambiguous statutory authority to create—and thus, to update—the form that parties to certain large mergers and acquisitions must file before consummating their transactions so that the Commission and

Department of Justice (together, “the antitrust agencies”) may quickly and efficiently ensure that the proposed deal does not pose antitrust risks. The district court concluded that the Commission exceeded its clear statutory authority after flyspecking the Commission’s cost-benefit analysis and determining that the Commission must show that the old, outdated form that parties were previously using had failed to flag illegal mergers. No court has imposed that standard in the five decades since the form was first created and through its many updates and iterations, and no precedent or statute instructs a reviewing court to substitute its own judgment for that of the Executive Branch officials to whom Congress delegated authority to create an effective form.

For similar reasons, the district court erred by concluding that the Commission had violated the APA by not reasonably considering plaintiffs’ proposed alternatives. The Commission rationally explained in the Rule why these alternatives were inadequate, and the district court impermissibly substituted its judgement for the Commission’s.

Because the district court vacated the Rule, the antitrust agencies will be unable to receive information vital to their premerger antitrust risk assessment. Absent a stay from this Court, parties to these transactions will face substantial uncertainty as to which form to file, which in turn will likely cause delay for at least some significant transactions. This Court should stay the district court's vacatur pending appeal.

STATEMENT

Congress Enacted the HSR Act to Enable the Antitrust Agencies to Efficiently Determine Whether Reportable Transactions May Violate the Antitrust Laws

Congress passed the HSR Act in 1976 to allow the antitrust agencies to more effectively enforce the Clayton Act. While Congress intended the Clayton Act to be a bulwark against anticompetitive corporate consolidation, that statute proved difficult to enforce because the antitrust agencies were rarely able to block illegal mergers before they were consummated, and post-consummation enforcement was (and remains) lengthy, costly, and often ineffective, *see* 89 FR at 89,237.

The HSR Act addresses those problems by requiring parties to certain transactions to first notify the antitrust agencies of the transaction and to wait at least 15 or 30 days before consummating the deal, depending on the type of transaction. 15 U.S.C. § 18a(a)-(b). The Act applies only to the largest parties and transactions. In 2025, transactions were generally subject to HSR reporting if: (1) the transaction exceeded \$126.4 million, and (2) one party had sales or assets of \$252.9 million or more, while the other party had sales or assets of \$25.3 million or more. *See* 15 U.S.C. § 18a(a); *see also* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 FR 7,697 (Jan. 22, 2025) (setting 2025 thresholds).¹ Typically fewer than 20% of M&A transactions that occur each year are HSR-reportable. *See* 89 FR at 89,219.

Central to the HSR Act's statutory scheme is the form that parties must file to allow the antitrust agencies to review the merger during the brief statutory pre-consummation waiting period. Congress mandated that the FTC, with concurrence from DOJ's

¹ Absent an exemption, transactions over \$505.8 million were reportable no matter the size of the parties. 15 U.S.C. § 18a (a)(2); *see also* 90 FR 7,697. The various HSR thresholds are adjusted annually based on changes in gross national product. 15 U.S.C. § 18a(a).

Antitrust Division, “shall require” by rule that the premerger notification “be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate ... to determine whether such acquisition may, if consummated, violate the antitrust laws.” 15 U.S.C. § 18a(d)(1). This form is critical because the antitrust agencies face tight timeframes of 15-30 days to evaluate whether a transaction may violate the antitrust laws and decide whether to investigate. *See id.* § 18a(b)(1)(B). The agencies rely on the form to quickly screen reportable transactions and identify those that may violate the antitrust laws.

The FTC promulgated the first HSR form in 1978. *See* 43 FR 33450 (July 31, 1978). The Commission considered requiring more information in the initial form but opted for less in the 1978 final rule, while noting that it might revisit that decision based on experience. *See, e.g., id.* at 33,526. The Commission has revised the form many times via rulemaking to address discrete issues, 89 FR 89,249 n.248, but the form had not seen a substantial overhaul in the nearly five decades since its inception, *id.* at 89,217.

***A Bipartisan Commission Unanimously
Promulgates a Sorely Needed Update to the HSR
Form***

Because it was created in the corporate environment that existed 50 years ago, the form that existed before the Rule under review in this case “did not always ensure that the [antitrust agencies] had the information they needed to fulfill Congress’s intention.” 89 FR 89,408 (Concurring Statement of Commissioner Andrew N. Ferguson).² Among other things, the old form did not allow the agencies to keep up with trends in private investment (such as the role of private equity), changes in corporate structure and governance, acquisitions that create a risk of foreclosure (where a company limits competitors’ access to products or services), threats to new businesses and innovation, or serial acquisition strategies. *See id.* at 89,222-36. These shortcomings have made the antitrust agencies’ mandatory premerger screening “increasingly difficult.” *Id.* at 89,225. Indeed, the limited information in the outdated form often forced the agencies to seek additional information on a

² Then-Commissioner Ferguson was named Chairman of the Commission by President Trump on January 20, 2025.

voluntary basis from the merging firms or from third parties unconnected to the transaction—and to request, obtain, and review that information within the brief initial waiting period. *See id.* at 89,244. And in recent years, the form’s shortcomings have led to filers voluntarily withdrawing and refileing the form—thus delaying their transactions—“to give the [antitrust agencies] more time to conduct an initial premerger assessment.” 89 FR 89,244.

To close these gaps and ensure that the antitrust agencies “have access to documents that reflect pre-transaction assessments of business realities,” the FTC in 2023 issued a notice of proposed rulemaking (NPRM) to modernize the HSR form. *Premerger Notification; Reporting and Waiting Period Requirements*, 88 FR 42,178, 42,194 (June 29, 2023). Following the notice-and-comment period, a bipartisan Commission unanimously issued the Rule in November 2024. As Chairman Ferguson explained, the final rule “dramatically curtail[ed]” the scope of the proposed rule in part because of bipartisan input. 89 FR at 89,412. *Id.*

Many of the Rule’s reforms are commonsense and long overdue. For instance, the new Rule requires parties to provide

translations of any documents in a foreign language, identify whether they do business under a different name, and describe the principal categories of products and services they offer. *Id.* at 89,277. The Rule also implements the Merger Filing Fee Modernization Act of 2022, which mandates that the Commission require filers to disclose on the form whether they have “received a subsidy from a foreign entity of concern,” 15 U.S.C § 18b.

The Rule reflects the care the Commission took to minimize burdens by limiting the information the parties must provide depending on the nature of the transaction and the parties. *See id.* at 89,261. Accordingly, not every filing party has to provide every category of information. For instance, the Commission created an entire category of transactions that is exempt from most requirements because those transactions present little antitrust risk. *See* 89 FR at 89,217; *see also, e.g.*, 89,371-72 (certain transactions are not required to complete overlap or supply descriptions). And because the acquiring party (the buyer) will provide much of the relevant information and is likelier to present antitrust risk, the Commission did not require the acquired party

(the seller) to comply with all of the Rule's requirements. *See, e.g.*, 89 FR 89,264 (officers and directors requirement applies only to buyers and only if those officers and directors serve in similar roles in other entities in the same industry as the target); 89 FR at 89,293 (seller need not provide description of ownership structure). In short, the form aligns the information required with the antitrust risk associated with a given transaction. *Id.*

The Rule went into effect on February 10, 2025. 89 FR 89,216. Already, hundreds of parties have submitted the updated form. *Premerger Notification Program*, Federal Trade Commission (last accessed Feb. 15, 2026), <https://tinyurl.com/2nuydmam>.

Four Nonprofit Associations with No Admissible Evidence of Standing Challenge the Rule, and the District Court Vacates It.

Plaintiffs, three nationwide membership organizations and one local group (the Longview Chamber of Commerce), filed this lawsuit challenging the Rule on January 10, 2025. Dkt. 1. Plaintiffs later amended the complaint, Dkt. 23, to add limited information about five unidentified members of plaintiff Longview Chamber, three of whom joined the Longview Chamber after this case began.

Dkt. 27 at 11 (¶ 23); Dkt. 41 at 3-4 n.2. The Commission moved to dismiss or transfer the case and urged the district court to rule on that motion before the case proceeded to summary judgment. *See* Dkts. 30, 33, 52.

Although the Commission repeatedly insisted that summary judgment briefing would be premature until the Commission had obtained discovery to test plaintiffs' standing allegations, *see* Dkts. 33, 42, the district court allowed plaintiffs to move for summary judgment without giving the Commission any opportunity to pursue discovery, *see* Dkt. 43. Plaintiffs' motion for summary judgment, Dkt. 44, was accompanied by four declarations, on behalf of the presidents of the plaintiff associations. *See* Dkts. 44-1, 44-2, 44-3, & 44-4. Those declarations indicated that some unnamed, pseudonymous members of each association purportedly intended to complete HSR-reportable transactions in the foreseeable future or by the end of 2025. *See id.* These declarations were plaintiffs' only evidence in support of their standing, and none of them named any member of any of the plaintiff associations.

The Commission responded with a motion to deny or defer summary judgment under Federal Rule of Civil Procedure 56(d) because the Commission had not had the opportunity to seek discovery. *See* Dkt. 53. The district court did not rule on that motion until dismissing it as moot when it resolved the cross-motions for summary judgment. The Commission later filed an opposition to plaintiffs' motion for summary judgment and its own cross-motion for summary judgment. *See* Dkt. 57.

On February 12, the district court granted summary judgment to plaintiffs and vacated the Rule. *See* Dkt. 75. The district court recognized that plaintiffs were relying on inadmissible hearsay to establish their standing, but the court concluded that it could consider this evidence because "the unnamed members" described in the declarations could "testify at trial, as Plaintiffs propose[d]" in their opposition to the Commission's motion for summary judgment. *Id.* at 9-10. The court also concluded that plaintiffs could rely on declarations that identify their members only pseudonymously, without naming them. *Id.* at 14.

On the merits, the district court concluded that the Rule exceeded the Commission’s statutory authority to create a form that is “necessary and appropriate to enable” the antitrust agencies “to determine whether” the proposed transaction “may, if consummated, violate the antitrust laws.” Dkt. 75 at 16 (quoting 15 U.S.C. § 18a(d)(1)). In particular, the court determined that the Commission had failed to substantiate that the benefits of the Rule justified its costs. *Id.* at 19-26. The court faulted the Commission’s conclusion that the updated form was necessary and appropriate to allow it to detect potentially unlawful mergers, and imposed a requirement that the Commission identify a past illegal merger that the old form had not allowed the Commission to detect. *See id.* at 22.

The court next concluded that the Rule was arbitrary and capricious under the APA “for the same reason[s]” that the Rule allegedly exceeded the Commission’s statutory authority. *Id.* at 29. Finally, the court also determined that the Commission had violated the APA by “fail[ing] to properly consider less burdensome alternatives offered in comments to the Final Rule.” *Id.* at 29.

Rather than severing any offending provisions of the Rule, the district court vacated the entirety of the Rule. *Id.* at 33-34.

The district court stayed the applicability of its order for seven days “to allow the FTC time to seek emergency relief from” this Court. Dkt. 75 at 34. On February 17, 2026, the Commission sought a stay pending appeal from the district court as required by Federal Rule of Appellate Procedure 8(a)(1). *See* Dkt. 76. The court denied that motion today. Dkt. 79. After apprising both plaintiffs and the clerk of this Court of its intent to bring this motion, the Commission now seeks an administrative stay and a stay pending appeal.

Absent a stay, the district court’s judgment will take effect at midnight tomorrow night, February 19, 2026. As explained below, that would unleash uncertainty for mergers and acquisitions nationwide. Plaintiffs do not oppose an administrative stay through March 2, 2026, which would provide this Court with time to consider both this motion and plaintiffs’ anticipated opposition to a stay pending appeal.

STANDARD OF REVIEW

Courts consider four factors in evaluating a request for a stay pending appeal: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant will be irreparably harmed if the stay is not granted; (3) whether issuance of a stay will substantially harm the other parties; and (4) whether the granting of the stay serves the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). When the government is a party, its interests and the public interest overlap in the balancing of harms. *See Nken v. Holder*, 556 U.S. 418, 420 (2009).

ARGUMENT

I. The Commission Is Likely to Succeed on the Merits.

The Commission is likely to succeed on the merits of its appeal on, at minimum, the following issues:

First, plaintiffs lack standing because their only evidence of standing is hearsay, which “is not competent summary judgment evidence” unless the party offering the evidence can “show that the statement can be presented in an admissible form at trial.” *Miller*

v. Michaels Stores, Inc., 98 F.4th 211, 218 (5th Cir. 2024).

Plaintiffs’ only evidence of standing came from declarations from the presidents of member associations relaying information that their members had authorized them to disclose about those members’ planned transactions. *See* Dkts. 44-1, 44-2, 44-3, 44-4. None of the declarants purported to have reviewed any records verifying this information. Neither plaintiffs nor the district court disputed that plaintiffs were relying on hearsay to establish their standing. *See* Dkt. 75 at 9.

The district nonetheless concluded it could consider plaintiffs’ hearsay statements because “the unnamed members”—all of which appear to be corporate entities, not people—could “testify at trial, as Plaintiffs proposed” in their opposition to the Commission’s motion for summary judgment. *Op.* (Dkt. 75) at 9. Plaintiffs’ declarations did not identify these members, nor did they claim that those members’ officers or employees would be willing and competent to testify at trial.

The district court’s conclusion directly conflicts with the holdings of three appellate courts that have considered the issue.

See Jones v. UPS Ground Freight, 683 F.3d 1283, 1294 (11th Cir. 2012) (“The possibility that unknown witnesses will emerge to provide testimony on this point is insufficient to establish that the hearsay statement could be reduced to admissible evidence at trial.”); *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1272-73 (10th Cir. 2021) (reversing district court because “hearsay within an affidavit cannot be considered” at summary judgment, even when that affidavit says that the hearsay declarant will testify); *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1007-08 (6th Cir. 2017) (refusing to consider declarations offered at summary judgment because statements contained were “hearsay” and “therefore would be inadmissible at trial”).

The court’s conclusion also conflicts with the plain text of Rule 56, which provides that a “declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the ... declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c). Plaintiffs’ declarants lacked personal knowledge about the transactions they testified about in their declarations, set

out facts that would not be admissible (because they were hearsay), and were not competent to testify about the matters in their declarations.

Finally, the district court's conclusion would render meaningless the default rule that hearsay evidence is inadmissible at summary judgment. *See Miller*, 98 F.4th at 218; *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (per curiam). It is almost always the case that some other witness, such as the hearsay declarant, *could* hypothetically testify at trial. But Rule 56 requires that the declaration come from the witness who *will* testify—absent that, the court cannot be sure that the testimony in the declaration will match the testimony to be offered at trial. Neither plaintiffs nor the district court cited any case where a court rejected a hearsay objection to a declaration offered to support summary judgment based on nothing more than the proponent's attorneys' argument that the unnamed hearsay declarant could testify at trial.

Second, the Commission is likely to prevail on its argument that plaintiffs lack standing because their declarations rely on

assertions about unnamed members. The Supreme Court has squarely held that an association is “require[d]” to “nam[e] the affected members” unless “*all* the members of the organization are affected by the challenged activity.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009). Plaintiffs have not argued that all their members are affected by the HSR Rule, nor did the district court so conclude. Instead, the district court said that the FTC “misreads *Summers*” based on a decision of this Court holding that “*Summers* requires only that the plaintiff allege that there is a specific injured member. ... Alleging that a specific member exists does not require naming that member.” Op. 14 (quoting *Nat’l Infusion Ctr. v. Becerra*, 116 F.4th 488, 497 n.5 (5th Cir. 2024)).

But *National Infusion Center* was decided on a motion to dismiss, not a motion for summary judgment, where plaintiffs’ burden to establish standing is higher and requires proof by sufficient admissible evidence, not mere allegations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, by its own terms, *National Infusion Center* held only what plaintiffs must “alleg[e]” in a pleading, not demonstrate with evidence. 116 F.4th

at 497 n.5. And one of the cases that *National Infusion Center* relied on expressly recognized that “[t]he defendants’ argument that the persons allegedly injured must be identified by name might have some validity if this litigation were at the summary judgment stage.” *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006). Moreover, multiple courts of appeals have held that associations “lack associational standing to sue on behalf of unnamed members.” *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 521 (6th Cir. 2017).

And far from misreading *Summers*, the Commission’s position is faithful to that decision. The Court there did not hold that associations must “identify” or “describe” their members, or that they must demonstrate only that some unnamed affected member exists. The Court unambiguously held that associations are “require[d]” to “nam[e] the affected members.” 555 U.S. at 498. And lest there be any doubt, *Summers* relied on *FW/PBS, Inc. v.*

Dallas, 493 U.S. 215, 235 (1990), which the Court described as holding that an “affidavit provided by the [plaintiff] to establish standing would be insufficient because it did not *name the individuals* who were harmed by the challenged ... program.” *Summers*, 555 U.S. at 498 (emphasis added). *Summers* thus establishes that, at summary judgment, associational plaintiffs must name a harmed member. Plaintiffs here have not done so and thus have not carried their burden to establish their standing.

Third, the Commission is likely to succeed on its argument that it had statutory authority to promulgate the Rule, and that doing so was not arbitrary and capricious.³ Congress directed the Commission to create a form that “is necessary and appropriate” to allow the antitrust agencies “to determine whether” an HSR-reportable transaction “may, if consummated, violate the antitrust laws.” 15 U.S.C. § 18a. This is an unambiguously “capacious” standard that signals Congress’s intent to confer considerable

³ The district court determined that the Rule was the product of arbitrary and capricious decisionmaking for the “same reasons that” that the court believed “the necessary-and-appropriate provision does not authorize the Final Rule.” Op. at 29. The Commission therefore treats these two issues together.

discretion on the Commission, *Michigan v. EPA*, 576 U.S. 743, 752 (2015); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

Contrary to the district court's conclusion, Dkt. 75 at 22, nothing in the APA or the HSR Act requires the Commission to identify mergers that violated the Clayton Act but that the antitrust agencies did not identify during the HSR review period. Congress gave the Commission unambiguous statutory authority to update the HSR form, and the Rule reflects the Commission's judgment that the new requirements are necessary and appropriate to enable the antitrust agencies to determine whether the proposed transactions may, if consummated, violate the antitrust laws. Agencies may make "predictive judgement[s]" about the future, *Prometheus Radio Project*, 592 U.S. at 427, and may "promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of the enabling legislation," *Sid Peterson Mem'l Hosp. v. Thompson*, 274 F.3d 301, 313 (5th Cir. 2001). A missed merger inflicts serious harm on society through its harm to competition, and Congress did not require the Commission

to wait until society has suffered that harm before updating the HSR form.

Moreover, the Commission extensively documented the need for the Rule and the many reasons it believed the nearly 50-year-old form was outdated and inadequate to review modern mergers and acquisitions. *See* 89 FR at 89,220-36. The Commission “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). By extensively documenting the need for the Rule, the Commission carried this burden.

Finally, this case is nothing like the two cases the district court relied on as support for its exacting scrutiny of the Commission’s cost-benefit analysis. *See* Dkt. 75 at 16-26 (citing *Michigan or Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956 (5th Cir. 2023)). In those cases, the respective agency in question had given “cost no thought *at all*, because it

considered cost irrelevant,” *Michigan*, 576 U.S. at 750, or “failed to account for [a] crucial cost of compliance,” *Mexican Gulf Fishing*, 60 F.4th at 965 (cleaned up). Here, by contrast, the Commission extensively considered the costs and benefits of the Rule, including an entire section titled “Benefits and Costs of the Final Rule.” 89 FR 89,250-64. The thorough analysis in those sections more than satisfies the modest requirements of *Michigan* or *Mexican Gulf Fishing*.

Fourth, the Commission is likely to prevail on its argument that it reasonably considered proposed alternatives. As the district court recognized, “an agency must consider and explain its rejection” of “significant and viable and obvious alternatives.” Op. 30 (quoting *O Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013)). The Commission did so here, but the court nonetheless held that the Commission’s explanation failed because it did “not specify what information was lacking in the prior form that the Final Rule would now provide.” Op. 31. But the Commission spent *dozens* of pages documenting the information that the new form requires but the old form omitted, and how that information is

relevant to its premerger review in the modern economy. *See* 89 FR 89,270-330. And as before, neither the APA nor the HSR Act required the Commission to “show that a single illegal merger occurred due to ‘information deficiencies’ in the old Form.” Op. 31. The Commission also considered the exact alternatives that the district court faulted the Commission for not adopting. *Compare* Op. 29-30 *with* 89 FR 89,246. The Commission reasonably explained why it was rejecting those alternatives, which is all the APA requires. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008).

The great weight of precedent supports the Commission on each of these issues, demonstrating a likelihood of success on the merits.

II. The Commission Will Suffer Irreparable Harm Absent a Stay.

The district court’s vacatur “‘intrud[es]’ on ‘a coordinate branch of the Government’ and prevents the Government from enforcing its policies against nonparties.” *Trump v. CASA, Inc.*, 606 U.S. 831, 835 (2025) (quoting *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1306

(O'Connor, J., in chambers) (staying an injunction against an administrative regulation)); *see also Abbott v. Perez*, 585 U.S. 579, 603 (2018) (“[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.”). That alone establishes irreparable harm: The Commission has exhaustively detailed why it believes the information in the new form is necessary, and the district court’s vacatur will prevent the Executive Branch from receiving this information.

The vacatur will also prevent the Commission from receiving information the Commission is *mandated* to seek. The Rule implemented the 2022 Merger Fee Modernization Act, which provides that the Commission “shall require” HSR filers to report any subsidy from a “foreign entity of concern.” 15 U.S.C. § 18b. *See* 89 FR at 89,270. The district court’s vacatur prevents the Commission from receiving this crucial information until it can promulgate a new rule that carries out Congress’s mandate.

Similarly, the district court’s decision to vacate the Rule in its entirety—rather than sever any provisions that pose particular concerns—prevents the Commission from receiving information

that imposes minimal costs. For instance, the Rule includes the uncontroversial requirement that filers provide translations of documents in foreign languages. *Id.* at 89,273. The Rule also instructed filers to provide North American Industry Classification System (NAICS) codes from 2022, rather than the outdated codes from 2017. *Id.* at 89,321. The Commission will be denied this and other similarly relevant information that imposes insignificant costs on filers. These effects of the district court’s decision, together and separately, pose irreparable harms to the Commission—and the Department of Justice—that warrant a stay pending appeal.

III. The Balance of Harms and Public Interest Favor a Stay.

The balance of harms and public interest also favor a stay. Absent a stay, the district court’s decision will introduce substantial uncertainty and impose significant costs on private parties who plan to seek premerger review of their HSR-reportable transactions. Already, parties to impending transactions will have to decide whether to begin preparing the old form instead of the new form, even if they have already incurred the time and expense of completing some or all of the new form. And filers will face this

uncertainty even if the judgment takes effect while the appeal is pending. As documented above, the Commission has strong arguments, backed by binding authority, that make it likely the Commission will prevail on appeal. Given that possibility, parties to HSR-reportable transactions will have to weigh the risk that if they begin completing the old HSR form but the Rule is reinstated, they will need to complete the new form, potentially delaying any deal. This Court should stay the judgment pending appeal and provide all parties, and the marketplace, with certainty while the litigation proceeds.

By contrast, any harms to plaintiffs are minimal. Plaintiffs have yet to name a single member affected by this Rule and have suggested only that a handful of HSR-reportable transactions by some pseudonymous members are imminent. Indeed, any harms to plaintiffs are insubstantial enough that plaintiffs did not seek a temporary restraining order or preliminary injunction against the Rule, allowing it to remain in effect during this litigation. That, in turn, meant that the marketplace accepted the new form, and any entities planning mergers and acquisitions in the near future had

already planned to complete the new form. Weighed against the harm to the antitrust agencies, the public, and private non-parties, plaintiffs' harms are insubstantial. A stay is warranted for this reason too.

CONCLUSION

The district court's judgment should be stayed pending appeal.

February 18, 2026

Respectfully submitted,

LUCAS CROSLow
General Counsel

H. THOMAS BYRON III
Deputy General Counsel

/s/ Benjamin F. Aiken
BENJAMIN F. AIKEN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
baiken@ftc.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,166 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

I further certify that this emergency motion complies with the requirements of Fifth Circuit Rules 27.3 and 27.4 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel, advising of our intent to file it. Plaintiffs-appellees do not oppose the motion for an administrative stay through March 2, 2026, but do oppose the motion for a stay pending appeal and anticipate filing an opposition by February 23. I further certify that the facts supporting emergency consideration of this motion are true and complete.

February 18, 2026

/s/ Benjamin F. Aiken

Benjamin F. Aiken