

**Prepared Statement of Katherine Van Dyck
in Support of House Bill No. 636**

**Before The Pennsylvania House of Representatives Consumer Protection,
Technology, and Utilities Committee**

April 13, 2023

I. Introduction

Thank you, Chair Matzie, Chair Member Marshall, Representative Pisciotano, and all the committee members here today for the honor of testifying before this Consumer Protection, Technology and Utilities Committee about junk fees and the recently introduced House Bill No. 636, otherwise known as the “Pay What You See” bill, which is designed to stop them.

II. Background

The views presented in this Statement are informed by over a decade of experience that I have gained as an antitrust and consumer protection lawyer. I am senior legal counsel at the American Economic Liberties Project, an independent nonprofit research and advocacy organization that works to promote competition, combat monopolistic corporations, and advance economic liberty for all. Prior to joining Economic Liberties, I represented consumers, small businesses, and employees in false advertising, product defect, antitrust, and wage and hour class actions across the country. I have observed firsthand the power corporations exercise over our economy. Left to their own devices, companies will always put profit over transparency, safety, and competition on the merits, so clear legislation creating a strong incentive for compliance is critical to combatting that behavior.

III. Junk Fees Explained

Sellers have developed two tried and true methods—drip pricing and partitioned pricing—to conceal junk fees from consumers and lure them in with deceptively low prices. With the first tactic, *drip pricing*, an advertisement discloses only the baseline cost for a product to lure in buyers. Then, as the buyer proceeds through the online checkout process, the merchant tacks on what we call junk fees, additional costs with vague names like “resort fee”, “service fee”, “fulfillment fee”, “transaction fee”, “processing fee”, and “ancillary fee” that are ill defined and not clearly tied to any particular commodity or service. With the second tactic, *partitioned pricing*, the ad discloses the existence of additional fees but not the final price. For example, an advertisement will promise “\$25 plus fees” or “\$25 (+\$17 service fee).” As shown below, drip pricing and partitioned pricing create a confusing marketplace for buyers, and their existence structurally harms competition. They have enabled the proliferation of junk fees in transactions, so consumers cannot take advertised prices at face value or comparison shop with any efficiency.

Federal and state agencies have been investigating junk fees for at least a decade. In 2012, the FTC hosted a conference “to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing.”¹ In 2016, the Obama Administration’s National Economic Council published a paper examining the economic impact of “hidden fees” and

¹ Fed. Trade Comm’n, *The Economics of Drip Pricing* (May 21, 2012), available at <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing> (last visited Apr. 6, 2023).

pressing state and federal agencies to “enact rules that require any mandatory, or de facto mandatory fee be included *in any advertised price*.”² In 2019, the FTC held a workshop regarding junk fees in online ticket sales, and in a remarkable display of consensus, enforcers, economists, and ticket sellers agreed that legislation or regulations requiring “all-in” pricing for ticket sales, coupled with robust enforcement, was the best approach.³ The CFPB launched its own initiative related to junk fees in financial products last year.⁴ And the White House followed recently, with President’s Biden using his State of the Union to denounce them.⁵ The problem of junk fees is, in short, well documented.

The ubiquity of deceptive junk fees and deceptive pricing practices is not only a matter of protecting the individual buyer from deception, though. Threats to competition and to consumers include:

² Nat’l Econ. Council, *The Competition Initiative and Hidden Fees* (“*NEC Hidden Fees Report*”), at 15 (Dec. 2016) (emphasis added), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf (last visited Apr. 6, 2023).

³ Fed. Trade Comm’n, “*That’s the Ticket*” Workshop: Staff Perspective, at 4-5 (May 2020), available at https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf (last visited Apr. 6, 2023).

⁴ Consumer Fin. Prot. Bureau, *The Hidden Cost of Junk Fees* (Feb. 2, 2022), available at <https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/> (last visited Apr. 6, 2023).

⁵ The White House, *Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery* (“*Biden State of the Union*”) (Feb. 7, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.

(1) systematic transfers of wealth from low information consumers to more educated ones;⁶

(2) a consumer's increased willingness to pay junk fees that flows from a perception that abandoning a purchase after spending one's time in the purchasing process would result in some sort of loss;⁷

(3) consumer confusion around advertised prices that makes it harder for competitors with genuinely lower prices to compete with those who shroud their prices with hidden junk fees;⁸ and

(4) tacit collusion in the form of parallel decisions to make certain junk fees a standard part of the purchasing process.⁹

Clearly, combating the prevalence of junk fees and deceptive pricing practices is not only a matter of protecting the individual buyer from deception but also preserving competitive marketplaces overall.

⁶ See *NEC Hidden Fees Report*, *supra* note 2, at 9; Fed. Trade Comm'n, *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* ("FTC Drip Pricing Report"), at 15 (Dec. 2012), available at http://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf (last visited July 20, 2022) (noting evidence that "there are regressive welfare consequences of shrouding because the welfare losses are likely to be borne by consumers with low levels of economic literacy").

⁷ Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental evidence*, at 3 (Oct. 15, 2015), available at <https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf> (last visited July 20, 2022); *NEC Hidden Fees Report*, *supra* note 2, at 9. There are multiple behavioral explanations for this phenomenon. One is called the "endowment effect", which "can cause consumers to feel as if they own the good as soon as they initiate the buying transaction." *FTC Drip Pricing Report*, *supra* note 6, at 20. Another is "anchoring", whereby consumers "focus[] on the base price and adjust incompletely when the additional charges are revealed." *Id.* These "loss aversions" wipe out 22% of consumer surplus. *Id.*; Huck & Wallace at 1, 2.

⁸ *NEC Hidden Fees Report*, *supra* note 2, at 9.

⁹ *Id.*

If deceptive junk fees are allowed to persist, we will have markets that reward companies and sellers who put their entrepreneurial energies into finding clever ways to add unlisted fees, “optional” services, and other add-on costs to the final price of what they are selling.¹⁰ Honest businesspeople—who make investments and innovations to grow their companies, provide consumers with better and cheaper services, and expand their workforce—should be the ones to get ahead in a fair marketplace.

Unfortunately though, under the consumer protection laws that exist today, consumers are left with little recourse when saddled with junk fees. Courts frequently reject claims that drip pricing and partitioned pricing are deceptive, because the purchaser is advised of their existence before incurring a binding financial obligation.¹¹ The “Pay What You See” bill would eliminate this loophole by mandating

¹⁰ Heidhues, Paul, Botond Kőszegi, and Takeshi Murooka. *Exploitative innovation*. *American Economic Journal: Microeconomics* (Feb. 2016), available at <https://www.aeaweb.org/articles?id=10.1257/mic.20140138> (last visited Apr. 5, 2023)

¹¹ See, e.g., *Washington v. Hyatt Hotels Corp*, No. 19-cv-04724, 2020 U.S. Dist. LEXIS 101118, at *13 (N.D. Ill. June 9, 2020) (“a customer booking a room through Defendant’s website or app would have necessarily noticed a price discrepancy between the initial price quote and the final charges before committing to the transaction”); *id.* at *17 (the plaintiff “could have avoided paying the modest resort fees by, among other things, choosing a different hotel or opting for an Airbnb”); *Ford v. Hotwire, Inc.*, No. 07-cv-1312, 2008 U.S. Dist. LEXIS 108584, at *10 (S.D. Cal. Feb. 25, 2008) (“Nothing about Hotwire’s alleged [drip pricing] practices prevent consumers from independently researching hotels or making reservations by contacting the hotels directly.”).

what is known as “all-in pricing.” Its passage would (1) clarify that junk fees are unfair and deceptive, even when disclosed just before a buyer incurs a financial obligation; (2) protect buyers from predatory advertising that lures them into a purchase before they know their full cost; and (3) create a more competitive and transparent marketplace.

Economic Liberties fully supports the broad approach of HB 636. Yes, junk fees in certain industries – concert tickets, food delivery, hotels, and air travel – have received significant public attention.¹² But any attempt to narrowly address one specific deceptive pricing practice is likely to result in its replacement by another, similarly deceptive practice. For example, ad studies show that consumers consistently underestimate the total price of whatever they’re purchasing, so partitioned pricing has the same effect of drip pricing.¹³ Thus, allowing advertisers to use generic phrases like “plus fees” to partition the displayed price into the base cost and fees is insufficient. The decision to wrap the ban on junk fees into Pennsylvania’s existing Unfair Trade Practices and Consumer Protection Law also has the added benefit of subjecting the practice to a robust public and private enforcement

¹² *Biden State of the Union*, supra note 5; White House Council of Econ. Advisors, *How Junk Fees Distort Competition* (Mar. 21, 2023), available at <https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/> (last visited Apr. 6, 2023).

¹³ With partitioned pricing, an advertisement discloses the existence of additional fees but not the final price. For example, an advertisement will promise “\$25 plus fees” or “\$25 (+\$17 service fee)”. “Empirically, the effects of deceptive drip pricing and partitioned pricing are the same.” *FTC Drip Pricing Report*, supra note 6, at 13.

mechanism that has already been tested in the courts and allows for injunctive relief, restitution, civil penalties, and statutory damages.¹⁴

IV. Conclusion

Junk fees are a serious threat to the health of our economy. Whether implemented through drip or partitioned pricing, they are deceptive advertising practices that significantly distort the marketplace for competitors and consumers alike. Consumers cannot rely on advertised prices because the true cost of most goods and services is concealed, and comparison shopping has become a time-consuming and confusing process. The “all-in” rule created by HB 636 is a simple but effective approach to combat junk fees, ensure fair competition, and protect consumers. Thank you for addressing this problem in a serious and thoughtful manner.

¹⁴ 73 Pa. Stat. Ann. §§ 201-1, *et seq.*