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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of **FACEBOOK, Inc.,** ***a corporation.***	**Docket No. C-4365**

COMPLAINT COUNSEL'S REPLY TO LEGAL ISSUES RAISED IN RESPONDENT META PLATFORMS, INC.'S RESPONSE TO THE ORDER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT MODIFY THE ORDER AND ENTER THE PROPOSED NEW ORDER

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INTRODUCTION

Nothing in Meta's response to the Commission's Order to Show Cause (OTSC) provides a basis for vacating the OTSC. Meta's contention that the Commission lacks legal authority to reopen its April 27, 2020, administrative order ("Order") rests on a flawed understanding of the Order, the Commission's Rules, and Section 5(b) of the FTC Act. Contrary to Meta's assertions, no law requires Meta's consent for these proceedings. It is well within the Commission's 5(b) authority to consider potential modifications. Moreover, the D.C. District Court already ruled against Meta on its arguments that the Commission lacks jurisdiction over the Order, and that res judicata bars any modifications. Similarly, the district court also rejected Meta's various constitutional challenges to these proceedings.

Meta's remaining arguments are based largely on speculation and supposition. For instance, Meta contends the Commission has not met the conditions for reopening the Order under Section 5(b) because the OTSC and Preliminary Findings of Fact (PFOF) do not establish changed conditions or public interest sufficient to warrant modification. Meta's contentions mischaracterize the OTSC and assume extratextual requirements for modification that are not grounded in the statute. Consistent with Section 5(b), the OTSC and PFOF offer more than sufficient grounds for modification as demonstrated below. Moreover, Meta's contention that the Commission's actions will undermine its ability to secure consent orders with other parties and dissuade parties from complying with the terms of their own FTC orders is little more than baseless hyperbole.

For all these reasons, and those explained more fully below, Meta's arguments should be dismissed, and the Commission should proceed with this OTSC proceeding.

I. An Order Modification Would Be Fully Within the Commission's Legal Authority.

Meta contends the Commission lacks legal authority for its actions. Meta is wrong for multiple reasons. First, neither Section 5(b) of the FTC Act nor the Commission Rules require the Commission to obtain Meta's consent to initiate a modification proceeding. Second, contrary to Meta's assertions, the 2020 Order at issue is an administrative order the Commission issued in *In the Matter of Facebook, Inc.*, Docket C-4365 (F.T.C.) – not "relief authorized by a district court" as Meta asserts. (Apr. 1, 2024, Response of Meta Platforms, Inc. (f/k/a Facebook, Inc.) to the Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed Order ("Meta Resp.") at 29.) Third, the FTC Act provides multiple avenues by which the Commission may seek to ensure compliance with its orders, including through reopening for modification. Lastly, Meta is estopped from pursuing its arguments that the Commission lacks jurisdiction over the Order, and that res judicata bars any modifications.

A. Nothing in Section 5(b) Requires Meta's Consent for the Commission to Reopen the Proceeding for a Potential Order Modification.

Meta contends the Commission lacks legal authority to modify the Order without Meta's consent. This argument is meritless. The Commission's authority to modify its own orders comes from 15 U.S.C. § 45(b), which states "the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . ." 15 U.S.C. § 45(b).[1] The order that is the subject of this modification proceeding is, without question, one "issued by [the Commission]" under this section. *See* Order

[1] Except where otherwise noted, in all quotations, emphases have been added, and internal alteration marks, citations, and footnotes have been omitted.

at 1.

Pursuant to its statute, the Commission further delineated the procedures for modification in Rule 3.72(b). That Rule states: "Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective . . . should be altered, modified, or set aside in whole or in part, the Commission will, except as provided in § 2.51, serve upon each person subject to such decision . . . an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary." 16 C.F.R. § 3.72(b)(1). As part of the 2019 settlement, Meta consented to reopening and modification of the 2012 administrative consent order under this provision. *See* Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief in *United States v. Facebook, Inc.*, Case No. 19-cv-2184 (D.D.C. Apr. 23, 2020) ("Stipulated Order") at 4 (Part II) (citing Rule 3.72(b)).

Contrary to Meta's contention, neither Section 5(b) nor Rule 3.72 suggest the Commission must first get Meta's consent to initiate an order modification proceeding. Consistent with this fact, the Commission has previously recognized that Section 5(b) grants it "clear authority to reopen and modify its own orders under its Rules of Practice establishing standards for so doing . . . ." *In the Matter of Nat'l Housewares, Inc.* 84 F.T.C. 1566, 1974 FTC LEXIS 20, at *11 (FTC Dec. 3, 1974) (rejecting respondents' argument that a consent order cannot be reopened without the consent of all parties); *see also In the Matter of ITT Continental Baking Co.*, 81 F.T.C. 1021, 1972 FTC LEXIS 268 at *1 (FTC Aug. 1, 1972) (rejecting respondent's argument that the Commission lacks authority to alter a consent order without the consent of the other party and observing that the Commission has authority to reopen and extend a consent order where appropriate, "just as a court may so extend the terms of an antitrust

consent decree where good cause is shown").

Apparently recognizing the clear language of Section 5(b) does not support its argument, Meta contends the current proceeding runs afoul of Commission Rule 2.32(c), which "requires that 'every' consent order resolving an administrative complaint 'shall provide' that respondents agree that their consent orders can be modified 'in the same manner provided by statute.'" (Meta Resp. at 20.) Meta argues that because the Order did not contain this language, Meta has not consented to modification pursuant to the statute, and therefore any modification without its consent is improper. (*Id*. at 21-22.)

Meta's argument, however, necessarily fails for two reasons. First, Rule 2.32(c) only applies by its own terms to "agreement[s] in settlement of a Commission complaint." 16 C.F.R. § 2.32. Moreover, Rule § 2.32 applies only to administrative proceedings, and thus the term "Commission complaint" applies only to administrative complaints. Here, as Meta acknowledges, the 2020 Order was not part of relief resolving an administrative complaint (Meta Resp. at 21); the order resolving the Commission's complaint in this case is the original 2012 administrative consent order. That order contained the standard Rule 2.23 language. *See* 2011 Agreement Containing Consent Order in *In the Matter of Facebook, Inc.*, FTC Docket C-4365, at ¶6 ("When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders."). The 2020 Order that is the subject of this proceeding is a modification of the Commission's original 2012 consent order. Accordingly, the 2020 modification did not contain the same Rule 2.32(c) language because it was not "in settlement of a Commission complaint." 16 C.F.R. § 2.32(c). Because the present proceeding concerns a modification of a modification

of the 2012 consent order, it is governed by Rule 3.72(b).[2]

Second, Meta was undisputedly aware of the Commission's statutory authority to modify its orders, as both the Stipulated Order and the Order itself reference possible modifications and specifically cite authorities governing such procedures. Further, as the D.C. District Court recently observed, the parties drafted the consent order "against a statutory backdrop" of Section 5(b), by which "the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . ." *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 10 (D.D.C. Nov. 27, 2023) (citing 15 U.S.C. 45(b)).[3]

Courts have made clear statutory provisions are "necessarily implicit in every order

[2] That Parts II and III of the Order reference Meta's ability to seek modification to address subsequent "developments that affect compliance, . . . such as technological changes," reflects only that, at the time the parties negotiated the original 2012 administrative consent order and 2020 modification, Meta succeeded in making explicit, for these provisions, its already extant right as respondent to seek modifications as provided by the Commission rules. *See* 16 C.F.R. § 2.51 (regarding requests by respondents subject to Commission order to reopen and seek modification). As Meta acknowledges, this language gives Meta "a right it has regardless." (Meta Resp. at 26.)

[3] Meta cites *Amfac Resorts, LLC v Dep't of Interior,* 142 F. Supp. 2d 54 (D.D.C. 2001), to support its argument that a statutory provision should be implied as a contract term only if central to the bargained-for-exchange or enforceability of the contract as a whole. (Meta Resp. at 24.) *Amfac Resorts* can be distinguished. In that case, the court was considering whether the plaintiff concessioners had a contractual right to preferential renewal in their concession contracts with a government agency. A statute directed that the agency not grant preferential concession contract renewal rights (though a prior version stated the agency would "give preference" to concessioners that satisfactorily performed their obligations under prior contracts), and none of the contracts at issue expressly granted such rights. *Amfac Resorts*, 142 F. Supp. 2d at 73-74. In those circumstances, the court found that a preferential renewal right was not an implied contract term. *Id.* at 74. Here, in contrast, the Stipulated Order makes explicit reference to the Commission's authority to modify its own orders, and a contemplated order modification pursuant to Commission Rule 3.72(b) was a significant part of the parties' settlement.

issued under the authority of the [FTC] Act, just as if the order set them out in extenso." *FTC v. Ruberoid Co.*, 343 U.S. 470, 476 (1952); *see Dolcin Corp. v. FTC*, 219 F.2d 742, 750 (D.C. Cir. 1954).[4] The Commission's Section 5(b) statutory authority is no different. Indeed, the express terms of the Order reflect the fact that the parties contemplated potential administrative modifications in the future that would not involve a district court. *See, e.g.*, Order, Parts II and III (referencing Meta's ability to seek modifications pursuant to Section 5(b) and Rule 2.51(b)).

Moreover, neither the Stipulated Order nor 2020 Order limited the Commission's statutory authority to modify its own orders. In the district court, Meta contended that a lack of language in the Order expressly reaffirming the FTC's modification authority reflected "an implicit understanding" that the Order was part of the Stipulated Order and could only be modified by the district court. The court, however, rejected this argument. *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 10-11 (D.D.C. Nov. 27, 2023) (declining to "construe silence as a waiver of the FTC's statutory rights"); s*ee also George Banta Co., Inc., Banta Div. v. NLRB*, 686 F.2d 10, 20 (D.C. Cir. 1982) (reasoning that "the waiver of statutory rights must be demonstrated by an express statement in the contract to that effect," and "even explicit language will not be read expansively").

Meta also contends that, by initiating these proceedings, the Commission is asserting an "unlimited, unilateral right to modify a contract [that] would render the contract illusory and valueless." (Meta Resp. at 24.) This argument misses the point. That Commission consent orders are often treated as contracts for interpretation purposes does not mean the Commission

[4] *Cf. United States v. Swift & Co.*, 286 U.S. 104, 114 (1932) (acknowledging a court's power to modify a consent decree to adapt to changed conditions and noting that even if the decree itself does not by its terms reserve this modification power, such power would remain inherent in the court's jurisdiction).

is, with respect to the Order, merely a private party to a contract. Here, Section 5(b) specifically vests the Commission with authority to modify its orders as appropriate. *See Elmo Co. v. FTC*, 389 F.2d 550, 552 (D.C. Cir. 1967) (unlike a private party, the Commission is "a body charged with the protection of the public interest," and may reopen a prior order if it demonstrates reasonable grounds to believe the public interest would be served by the reopening).[5] The Commission's show cause proceeding is a permissible exercise of the Commission's legal authority. Meta's contention that the Commission must first obtain its consent for reopening and modification therefore fails.

B. Section 5(b) Applies to the 2020 Administrative Order.

Meta's argument that Section 5(b) does not extend to an administrative order "reviewed and approved by a federal district court" (Meta Resp. at 29) is likewise without merit. Contrary to Meta's characterization, the Order does not constitute "relief authorized by a district court" (*id.*), but the Commission's modification of the 2012 administrative consent order by consent of the parties. *See* Order at 1.

In fact, in denying Meta's motion to enjoin these proceedings, D.C. District Court Judge Timothy J. Kelly found the terms of the Commission's 2020 administrative order (i.e., the Order

[5] Meta's reliance on cases purportedly rejecting the premise of an "assumed" right for the government to "unilaterally" modify its agreements is inapposite. (Meta Resp. at 24.) In *City of Detroit v. Detroit Citizens' St. Ry. Co*., 184 U.S. 368, (1902), the Court found the operative statutory provisions and city ordinances constituted binding agreements between the city and railway companies that provided toll rates and fares should be established by the parties' agreement. *City of Detroit*, 184 U.S. at 384. Similarly, in *Murray v Charleston*, 96 U.S. 432, 445 (1877), the Court considered the specific question of whether city taxes assessed against shares that a resident held in city stock impaired the resident's contract with the city. *Murray*, 96 U.S. at 445. Both cases concerned contracts between a city and private citizen that created binding obligations on the city (as to railway rate-setting and stockholder payments respectively). Neither involved a government agency specifically authorized to reopen and modify its own administrative orders as needed to protect the public interest.

now the subject of this modification proceeding) were not part of the Court's Stipulated Order. *See United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 6 (D.D.C. Nov. 27, 2023) ("the obligations imposed on Defendant reflected in that attachment [A to the Stipulated Order] were not ordered by the Court or made part of the Stipulated Order – they were imposed later, when the FTC issued its 2020 administrative order"). *See also Kokkonen v. Guardian Life Ins. Co of Am.*, 511 U.S. 375, 381 (1994) ("[a] judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order").[6] The Commission's 5(b) modification authority therefore applies.

C. The Commission's Proposed Order Modification Proceeding Is a Proper Exercise of Its Section 5(b) Authority.

Meta next contends the OTSC is "an unlawful attempt at order enforcement" when the Commission "has no authority to enforce its own orders or to adjudicate whether they have been violated . . . ." (Meta Resp. at 30.) Again, this argument misses the mark.

Meta is correct the law generally recognizes a distinction between order enforcement and order modification. *See Pigford v Veneman*, 292 F.3d 918, 923 (D.C. Cir. 2002). That said, the FTC Act provides multiple avenues by which the Commission may seek to ensure compliance with its administrative orders. For example, when the Commission has reason to believe a respondent violated an administrative order, it may seek civil penalties by referring a complaint to the U.S. Department of Justice to file in federal district court. 15 U.S.C. § 45(l). However, the Commission may also "reopen and alter, modify, or set aside, in whole in in part, any"

[6] Meta also argues Section 5(b) does not apply because Meta "could not have filed a petition for review of the Order." (Meta Resp. at 30.) This observation is both misleading and without consequence. As part of the settlement terms to which Meta agreed, both the Order and Stipulated Order state that Meta "waive[d] all rights to appeal or otherwise challenge or contest the validity" of the order. *See* Order at 1 ¶4; Stipulated Order at 2 ¶7.

administrative order whenever it is of the "opinion" that "conditions of fact or of law have so changed as to require such action or if the public interest shall so require." 15 U.S.C. § 45(b). These enforcement tools are not mutually exclusive. In some instances, the FTC has conducted both judicial and administrative proceedings in connection with the same administrative order. *See, e.g.*, *United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1450 (9th Cir. 1985); *see also Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988) (holding it does not offend due process to seek both administrative and judicial relief).

Here, the OTSC initiated a Commission proceeding to determine whether modifying the Order is necessary to serve the public interest and address changed conditions. Therefore, the Commission is not attempting to "usurp" the district court's enforcement role and "circumvent Congressional or judicial guardrails" (Meta Resp. at 32), but rather exercising its statutory authority to consider potential modifications to the Order.

D. Reopening for Potential Modification of the Order Is Properly Within the Commission's Jurisdiction.

In addition to the arguments above, Meta reasserts its failed argument that the Commission cannot modify its own Order because that order is "an integrated part of the Stipulated Order" over which the D.C. District Court "expressly retained" exclusive jurisdiction. (Meta Resp. at 33.) Because the D.C. District Court already ruled against Meta on this very issue, collateral estoppel precludes Meta from re-litigating the issue here.

Collateral estoppel (also known as issue preclusion) bars re-litigation of an issue previously decided in a judicial or administrative proceeding, provided the losing party had a full and fair opportunity to litigate the issue in the earlier proceeding. *See, e.g., Allen v. McCurry*,

449 U.S. 90, 96 (1980); *Mermelstein v. Elder*, 262 B.R. 799, 806 (C.D. Cal. 2001).[7] Federal court final judgments are entitled to preclusive effect in administrative proceedings if they meet the legal standard for preclusion. *See, e.g.*, *In the Matter of Anthony C. Snell & Charles E. Lecroy*, File No. 3-12359, 2007 SEC LEXIS 904, at *40 (SEC May 3, 2007) (citing *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 45-51 (3d Cir. 1981)); *In the Matter of Connie S. Farris*, File No. 3-12401, 2006 SEC LEXIS 2575, at *10-11 (SEC Nov. 7, 2006) ("The Commission has consistently applied the doctrine of collateral estoppel to prevent respondents from relitigating factual findings and conclusions previously determined again in a Commission administrative proceeding.") (citing *Michael J. Markowski*, 74 S.E.C. Docket 1537, 1542 (Mar. 20, 2001), *pet. denied*, No. 01-1181 (D.C. Cir. 2002) (unpublished)).[8]

For collateral estoppel to apply: (1) the issue must have been necessarily decided in the previous proceeding and must be identical to the one that is sought to be re-litigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom issue preclusion is asserted was a party or in privity with a party at the first proceeding. *E.g.*, *Germann v. Dep't of Labor*, 206 Fed. Appx. 662, 664 (9th Cir. 2006); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006).

Here, each element for collateral estoppel has been met. First, the identical issue formed the basis of Meta's request for injunctive relief from the court – specifically, whether the district court retained exclusive jurisdiction over the Order. The issue was therefore necessarily decided

[7] *See also, e.g.*, *SEC v. Rand*, 805 Fed. Appx. 871, 875 (11th Cir. 2020); *In re St. Laurent v. Ambrose,* 991 F.2d 672, 675 (11th Cir. 1993).

[8] *See also In the Matter of Gary M. Kornman*, File No. 3-12716, 2009 SEC LEXIS 367, at *28 (SEC Feb. 13, 2009) (collateral estoppel prevents relitigating the factual findings or the legal conclusions of an underlying federal district court criminal proceeding in a follow-on administrative proceeding).

– and plainly rejected – by the court last year.[9] Specifically, Judge Kelly stated, "[T]he question is whether Attachment A [the Commission's 2020 modification of its original 2012 consent order] was 'made part' of the Stipulated Order such that the Court retained enforcement jurisdiction over the FTC's 2020 administrative order. The answer is no." *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 9, 17 (D.D.C. Nov. 27, 2023) (denying Meta's motion to enforce the Stipulated Order and enjoin the FTC's administrative reopening proceeding).[10]

Second, the earlier court proceeding ended with a final judgment on the merits, as evinced by Meta's filing of an appeal. (Meta Resp. at 34.) The fact that the decision is currently on appeal does not affect its estoppel effect. *See, e.g.*, *Hantz Fin. Servs. v. Am. Int'l Specialty Lines Ins. Co.*, 664 Fed. Appx. 452, 459 (6th Cir. 2016); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007) ("[A] final judgment retains its collateral estoppel effect, if any, while pending appeal."); *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) ("[T]he pendency of an appeal has no effect on the finality or binding effect of a trial court's holding." (citing *Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort*, 191 U.S. 499 (1903))).

As for the third collateral estoppel element, here Meta – the party against whom issue preclusion is asserted – was the moving party in the earlier proceeding. Although the

[9] Recognizing the district court found no such integration, Meta asserts the court erred. (Meta Resp. at 33.) However, Meta's only avenue for such a challenge is in the Court of Appeals.

[10] In so ruling, the district court also dismissed Meta's argument – which Meta repeats in its OTSC response at 37-38 – that a single reference to "this Court" at the outset of the Order means the Commission's Order was subsumed within the Stipulated Order over which the district court has exclusive jurisdiction. *See United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 11-12 (D.D.C. Nov. 27, 2023) (calling it "a curious phrase" and noting the possibility of "a scrivener's error," yet further observing the phrase read in context "strongly suggests that it refers to the body entering the order, the FTC," and holding that "whatever the phrase was supposed to mean, it does not mean this Court. Thus, the phrase does not suggest that Attachment A was part of the Stipulated Order.").

Commission was represented by counsel from the U.S. Department of Justice in those proceedings, this is of no consequence because Meta is the party against whom the court decision has preclusive effect, and Meta had a full and fair opportunity to litigate the issue in the earlier proceeding. *See FTC v. Garvey*, 383 F.3d 891, 897 (9th Cir. 2004).

Even if collateral estoppel were not applicable, which it clearly is, the district court's reasons for rejecting Meta's argument are sound. Specifically, as the district court observed, the Stipulated Order directed Meta to "consent to" the Commission's reopening of its administrative proceedings and modification of its 2012 administrative order with Attachment A,[11] but "the Court did not order [Meta] to comply with the terms of Attachment A, nor order the FTC to do anything." *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 9 (D.D.C. Nov. 27, 2023). To the contrary, the district court correctly found the "obligations imposed on [Meta] reflected in . . . [A]ttachment [A] were not ordered by the Court or made part of the Stipulated Order – they were imposed later, when the FTC issued its 2020 administrative order." *Id.* at 6. "For that reason, the FTC's proposed changes to its administrative order do not fall within the Court's jurisdiction over the construction, modification or enforcement of the Stipulated Order." *Id.*[12] *See Pigford v. Vilsack*, 777 F.3d 509, 514 (D.C. Cir. 2015) (even where a consent decree retains jurisdiction in the district court to enforce its terms, the court lacks "free-ranging 'ancillary'

[11] Specifically, the Stipulated Order required that Meta "consent to (i) reopening of the proceeding in FTC Docket No. C-4365; (ii) waiver of its rights under the show cause procedures set forth in Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(b); and (iii) modifying the Decision and Order in *In re Facebook, Inc.*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012), with the Decision and Order set forth in Attachment A." Stipulated Order at 4, Part II.

[12] *See also United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 9 (D.D.C. Nov. 27, 2023) ("[A]lthough the Court retained jurisdiction in this matter for purposes of construction, modification, and enforcement of the Stipulated Order, that jurisdiction does not extend to Attachment A, or the FTC's 2020 administrative order.").

jurisdiction" and is limited by the agreement's explicit terms).

E. Res Judicata Does Not Apply to the Commission's Potential Modification of Its Own Administrative Order.

Meta next argues the Order cannot be modified because it was "a final order entered to resolve a district court complaint and thus is entitled to res judicata effect." (Meta Resp. at 42.) This is simply wrong. Unsurprisingly, the D.C. District Court squarely rejected this argument when denying Meta's motion for injunctive relief last year. Meta is therefore legally precluded from attempting to raise the issue again here in the hope the Commission might reach a different result. *See In the Matter of Connie S. Farris*, 2006 SEC LEXIS 2575, at *10-11 ("The Commission has consistently applied the doctrine of collateral estoppel to prevent respondents from relitigating factual findings and conclusions previously determined again in a Commission administrative proceeding." (citing *Michael J. Markowski*, 74 S.E.C. Docket 1537, 1542 (Mar. 20, 2001), *pet. denied*, No. 01-1181 (D.C. Cir. 2002) (unpublished)). That the issue is presently on appeal makes no difference. *See Pharmacia*, 170 F.3d at 1381 ("[T]he pendency of an appeal has no effect on the finality or binding effect of a trial court's holding.") *(citing Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort*, 191 U.S. 499 (1903)).

As Judge Kelly explained, the 2020 Order is a modification of the Commission's original 2012 administrative consent order which the Commission issued on its own, after Judge Kelly entered the Stipulated Order. Tellingly, the district court settlement required Meta to consent to the modified order but did not require the Commission to enter it. *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK, at 9 (D.D.C. Nov. 27, 2023). Thus, the Order is <u>not</u> part of the Stipulated Order that Judge Kelly entered to resolve the government's 2019 complaint; the Stipulated Order reflects only Meta's agreement to consent to the Order in a Commission proceeding. *Id.* at 6, 9, 17. Indeed, Judge Kelly's ruling clearly rejected Meta's argument on

this very point. *Id.* at 12 n.3 ("Nor are the terms of the FTC's 2020 administrative order a 'final judgment' with res judicata effect; they were not ordered by the Court at all."). Therefore, Meta is collaterally estopped from now raising this same unsuccessful argument before the Commission. *See, e.g., Allen*, 449 U.S. at 96 ; *Mermelstein*, 262 B.R. at 806.

Again, even if collateral estoppel did not apply, which it does, the district court's reasoning is sound. The Stipulated Order obviously has res judicata effect. However, res judicata flowing from the district court's order does not extend to the content of the 2020 Order because the court never ordered Meta to abide by its terms; it is thus not a final district court judgment on that issue. Therefore, res judicata does not bar this proceeding.

Lastly, Meta contends modification of the 2020 Order in these administrative proceedings would violate Article III of the U.S. Constitution because this action would constitute a "unilateral modification of a final judgment entered by a federal district court." (Meta Resp. at 44.) But again, the Commission is not seeking to alter or reopen the Stipulated Order in D.C. District Court. Rather, the Commission is considering whether modifications to its own administrative order – which the Commission issued independently, not the district court – would be appropriate in light of developments post-dating its issuance.

II. The Commission's OTSC Satisfies the Conditions for Modifying an Order.

Section 5(b) of the FTC Act provides the Commission authority to modify a consent decree "after notice and opportunity for hearing" and upon the triggering of one of three conditions: (1) "whenever in the opinion of the Commission *conditions of fact* … have so changed as to require such action"; (2) "whenever in the opinion of the Commission *conditions … of law* have so changed as to require such action"; or (3) "if the public interest shall so require." 15 U.S.C. § 45(b) (emphasis added). The Commission need only have "reasonable grounds" to find one triggering condition exists to exercise its authority to modify. *Elmo Co. v.*

FTC, 389 F.2d 550, 552 (D.C. Cir. 1967); *see also FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 249 (1972) (stating Commission order must only establish "rational connection between the facts found and the choice made"); *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 612 (6th Cir. 2017) (same).

The Commission's OTSC more than meets the threshold for modification. The OTSC sets forth 1,164 paragraphs of detailed facts establishing good cause to believe both changed conditions of fact and the public interest require modification of the 2020 Order. These facts, drawn from Meta's own statements and the findings of the independent third-party Assessor, demonstrate Meta failed to comply with core provisions of the 2020 Order, specifically, by failing to implement and maintain a privacy program protecting consumers' information as required under Part VII and by misrepresenting to consumers its privacy practices as prohibited by Part I. These facts provide compelling reason, and therefore certainly the requisite "reasonable grounds", for the Commission to exercise its authority to modify the 2020 Order.

A. The OTSC Alleges Order Violations Warranting Modification.

Meta attempts to avoid this straightforward application of Section 5(b)'s requirements to the well-supported allegations in the OTSC by mischaracterizing the OTSC and fabricating extratextual requirements for modification. None of these arguments has any merit. For instance, Meta argues, despite the numerous serious deficiencies identified, "the Commission's OTSC and supporting factual findings do not actually assert… Meta violated Part VII of the Order."[13] (Meta Resp. at 54.) Meta engages in mere word play to arrive at this misleading

[13] Of course, the Commission need not find these deficiencies violate the 2020 Order in order to modify it. The Commission may modify the order to better achieve its purpose if these deficiencies, while not order violations, show that the order is not working as effectively as it could. (*See* pgs. 27-31 *infra.*)

conclusion. For example, Meta points out the OTSC charges Meta with "fail[ing] to establish and implement an *effective* privacy program," though the 2020 Order does not use the word "effective" in specifying the mandated privacy program. (*Id.*)

However, the OTSC uses the term "effective" not as a technical term of art, but instead to describe a privacy program that complied with all the relevant provisions of the 2020 Order. Specifically, "effective" means "successful in producing a desired or intended result."[14] Part VII of the 2020 Order requires Meta to implement a privacy program that "protects the privacy, confidentiality, and Integrity" of Covered Information.[15] Part VII specifies the necessary, but not sufficient,[16] measures Meta must, at a minimum, implement within 180 days of the entry of the Order "[t]o satisfy this requirement." As detailed in the OTSC, numerous deficiencies demonstrate Meta failed to implement all these measures, and certainly not by the specified 180-day deadline. Thus, Meta's privacy program failed to achieve "the desired or intended result" of complying with Part VII of the 2020 Order. Therefore, by asserting Meta did not have an "effective" privacy program, the OTSC does, in fact, charge Meta with violating Part VII.

For example, as detailed in the OTSC, Meta failed to comply with Part VII.E. The 2020 Order requires Meta to perform an assessment to identify privacy risks in each area of its operation. *See* 2020 Order at Part VII.D. Part VII.E then requires Meta to "[d]esign, implement,

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[14] Oxford Languages, https://languages.oup.com/google-dictionary-en/.

[15] The Order defines Covered Information to mean information from or about an individual consumer. Order at 3, Definition D.

[16] This is the meaning of the phrase "at a minimum," which qualifies the measures listed in Part VII.A through J. *See, e.g., Matter of Plunkett*, 82 F.3d 738 (7th Cir. 1996) (noting "'[m]inimum' is an important qualifier" connoting "a necessary but not a sufficient condition"). Meta urges an atextual interpretation in arguing that it achieved a fully compliant privacy program by implementing these necessary but not sufficient measures. (Meta Resp. at 55.) The Commission need not reach this issue because the OTSC shows Meta failed to implement even these minimum measures.

maintain, and document safeguards that control" for the privacy risks identified by the assessment. The Assessor evaluated Meta's risk assessment and resulting safeguards for its initial assessment report, and in its June 2021, Report identified numerous deficiencies demonstrating Meta failed to comply with Part VII.E. These deficiencies include [redacted] Thus, contrary to Meta's claim, the OTSC clearly asserts Meta violated Part VII of the Order.

Meta's attempt to support its flawed argument by citing *LabMD, Inc. v. FTC,* 894 F.3d 1221, 1237 (11th Cir. 2018) simply fails. *LabMD* held that requiring the respondent to maintain a "reasonably designed" information security program was too vague to enforce. *Id.* at 1236. Meta now claims the term "effective" is defective for the same reason. However, *LabMD* is inapposite.[17] As explained above, the Order does not simply require Meta to have an effective

[17] Nor did *LabMD* reach the right result. Generally, courts do not set aside injunctions "unless they are so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo*

privacy program but specifies numerous minimum requirements that must be part of such a program. Thus, unlike *LabMD*, the 2020 Order's standard is not too vague to enforce because, by definition, Meta failed to maintain an effective privacy program when it failed to satisfy the clearly delineated minimum requirements in the Order.

In addition, Meta argues the OTSC's allegations regarding Messenger Kids and Expired Apps[18] do not constitute order violations because they were inadvertent. (Meta Resp. at 60-63.) However, "it matters not with what intent the defendant did the prohibited act… An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently." *McComb v. Jacksonville Paper*, 336 U.S. 187, 191 (1949); *see also FTC v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010) ("[A]bsence of willfulness is not a defense… the only issue is compliance."); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC is not, however, required to prove intent to deceive."; Section 5 and TSR violations); *Kraft, Inc.*, 114 F.T.C. 40, 122 (1991) ("Evidence of intent to deceive is not required to find

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Cattle Co., 967 F.2d 1280, 1297 (9th Cir.1992). Accordingly, numerous courts have recognized equally broad language as providing a sufficiently meaningful standard. *See, e.g., FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (finding defendant could reasonably identify cybersecurity practices that could be considered "unfair" under Section 5 of the FTC Act); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 560 (2d Cir. 1984) ("But absolute precision is not possible in certain FTC orders, and we have upheld reasonable basis provisions formulated in substantially identical terms.") (citing cases); *cf. Wright v. City of Roanoke Redevelopment & Hous. Auth.,* 479 U.S. 418, 431-32 (1987) (finding statutory language providing for "reasonable" allowance for utilities is "sufficiently specific and definite to qualify as enforceable rights" under § 1983).

[18] As explained in the OTSC, from April 2018 through June 2020, Meta made express statements that Expired Apps would not continue to obtain a user's nonpublic information. (OTSC at 10-11.) Also, from December 2017 to July 2019, Meta made express statements that Messenger Kids would enable users to communicate with only parent-approved contacts. *Id.* These statements were false because Meta failed to implement code necessary to prevent Expired Apps and Messenger Kids from sharing covered information contrary to Meta's express statements. (*Id.*) Thus, Meta's false statements violate the prohibition against misrepresentations in Part I of the 2012 Order and Part I of the 2020 Order, as well as Section 5, COPPA, and the COPPA Rule. (*Id.*)

liability."; Sections 5 and 12 violations).

Meta also attempts to minimize its Messenger Kids and Expired Apps violations by: characterizing them as routine coding errors, when, in fact, these coding errors occurred under the porous oversight of a deficient privacy program; speculating that consumers were likely not harmed; and citing the 2019 settlement's waiver of claims (i.e., the right to bring an enforcement action) against the portion of violations that predate that settlement. (Meta Resp. at 59-65.) None of this, however, explains why the Commission could not consider these order violations – not in isolation, but in combination with the many deficiencies in Meta's privacy program, as part of Meta's full history of non-compliance – in determining whether modification would better effectuate the purpose of the Order. *See Elmo Co. v. FTC*, 389 F.2d 550, 552 (D.C. Cir. 1967) (Commission may look to "[e]xperience under the cease and desist order" as basis for modifying order) (quoting *Mohr v. FTC*, 272 F.2d 401, 405-06 (9th Cir. 1959)). (*See also* pgs. 28-31 *infra.*) Moreover, even if the Messenger Kids and Expired Apps misrepresentations do not rise to the level of order violations, they clearly involve the same "central theme" that led to the 2012 and 2020 Orders – Meta's misrepresenting its privacy practices. *In the Matter of Nat'l Housewares, Inc., et al.*, 84 F.T.C. 1566, 1974 WL 175859, at *3 (1974) (finding allegations supporting modification "substantially similar" to allegations underlying original complaint because they shared "central theme"). Commission precedent requires nothing more for them to serve as a basis for modifying the 2020 Order. *Id.*

B. Section 5(b) Does Not Require Ongoing Violations to Modify an Order.

In addition, Meta argues the violations alleged in the OTSC have ceased and therefore cannot satisfy Section 5(b)'s requirement that violations be ongoing for the Commission to modify based on changed conditions of fact. However, Section 5(b) contains no such "ongoing violations" requirement. Focusing on Section 5(b)'s language "conditions of fact… have so

changed", Meta argues the present perfect tense means only ongoing violations, and not ceased violations, can justify order modification based on changed conditions of fact. However, Meta is grammatically and logically incorrect. While the present perfect tense may include "a past action that comes up to and touches the present," when the tense is used in a federal statute, it necessarily also includes action that occurred at "a time in the indefinite past," such as a violation that has ceased. *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("Use of this tense evinces Congress's intent to include *any* previous admission for lawful permanent residence within the ambit of Section 212(h), including admission in the indefinite past.") (quoted source omitted; italics in original). Moreover, Meta's interpretation of the statute would allow wrongdoers to violate the Commission's orders without fear of modification because each time the Commission opened a show cause proceeding, the respondent could simply stop the alleged behavior and the proceedings would have to terminate.

Meta also argues the "ongoing violations" requirement is implied by the reference to cease and desist orders elsewhere in Section 5(b) because "[a]n order to cease and desist necessarily assumes ongoing conduct that must be stopped." (Meta Resp. at 48.) That is simply not true. Courts have long held that Section 5 authorizes cease and desist orders based on violations that are no longer ongoing, if there is a likelihood of future violations. *See TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981) (recognizing FTC may issue cease and desist order as long as "there exists some cognizable danger of recurrent violation") (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). Thus, Meta provides no justification for inserting a restrictive "ongoing violation" requirement that does not exist in Section 5(b).

On its face, Section 5(b) clearly allows modification based on the changed circumstances caused by Meta's violations. Prior to Meta's violations, the Commission thought it faced a

company capable and willing to protect consumers' information by complying with the 2020 Order. Indeed, the Commission would not have given up its claims and entered into this agreement if it believed otherwise. (*See* pgs. 23-25 *infra.*) That state of affairs radically changed when Meta committed violations that went to the heart of the 2020 Order. Meta's violations changed the "conditions of fact" relied on by the Commission in entering the 2020 Order, and Section 5(b) expressly allows the Commission to take that into account in considering appropriate modifications.

C. Order Violations Qualify as Changed Conditions of Fact.

Meta further argues, as a matter of law, no order violations can ever constitute changed "conditions of fact". (Meta Resp. at 52-54.) To support this position, Meta misleadingly claims the Commission has adopted this categorial proposition in two Commission cases. First, Meta cites *ITT Cont'l Baking Co.*, 81 F.T.C. 1021 (1972), for the proposition that "[t]he Commission itself has previously rejected the argument that an order violation can be 'a sufficient basis for modification of the order.'" (Meta Resp. at 52.) The respondent in that case opposed a proposed extension of the term of its antitrust consent order by challenging complaint counsel's factual allegations that concentration in the relevant market showed "the need for, and public interest in" the extended term. The Commission referred the matter to a hearing examiner, and in doing so, rejected the complaint counsel's position the respondent's order violations were "a sufficient basis for modification of the order" without a need for an evidentiary hearing on the changed market conditions respondent claimed made the order unnecessary. *ITT Cont'l Baking*, 81 F.T.C. 1021. Thus, the Commission did not categorically reject all order violations as a basis for modification; rather, it simply determined violations of an antitrust consent order cannot justify the extension of the order's term if market conditions show the order is no longer necessary to address the concerns that precipitated the order in the first place. Here, Meta does not even

allege a change in market conditions, only that it has now complied. However, even if it were true that Meta belatedly has come into compliance, that compliance was and always will be untimely and completed only after the threat of Commission action.

Meta also quotes *Am. Dental Ass'n* for the proposition that "order modification is not appropriate 'where substantial questions exist about a respondent's compliance with the very provision sought to be modified.'" (Meta Resp. at 52-53 (quoting *In re Am. Dental Ass'n*, 111 F.T.C. 735, 1988 WL 1025509, at *3 (Oct. 4, 1988)).) Again, Meta excludes critical context. In *Am. Dental Ass'n*, Commission staff investigated the respondent's advertising rules that regulated specialty announcements for its member dentists. Staff initiated an investigation based on concerns these rules violated a Commission order prohibiting respondent from restricting its members from certain types of advertising. During this investigation, the respondent sought to modify the order to exclude its problematic rules from the injunction. The quote Meta lifts from *Am. Dental Ass'n* stands for the unremarkable proposition that a respondent cannot foreclose a Commission investigation by modifying away a possible violation. *See In the Matter of Union Carbide Corp.*, 108 F.T.C. 184, 1986 WL 722149, at *2 (1986) ("The Commission believes, as a matter of policy, that generally it should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify."). Like *ITT Cont'l Baking*, *Am. Dental Ass'n* provides absolutely no support for Meta's claim that the Commission has endorsed a categorical rejection of order violations as a basis for modification.

In sharp contrast, federal court cases interpreting provisions of Federal Rule of Civil Procedure 60(b) analogous to Section 5(b) of the FTC Act have recognized "[u]nder well established law, substantial violation of a court order constitutes a significant change in factual

circumstances" to support order modification. *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016) (citing cases from the Third, Fourth, Sixth, and Tenth Circuits); *see also Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 404 F.3d 821, 834 (4th Cir. 2005) (finding defendants' violations to constitute "an unanticipated change of circumstance that warranted modifying the Consent Decree"); *State of Wash. v. Moniz*, No. 2:08-CV-5085-RMP, 2015 WL 7575067, at *1, *10 (E.D. Wash. Aug. 13, 2015) ("DOE's history of delay and noncompliance" with consent decree supported modification imposing additional requirements on DOE) (discussing *Washington v. Moniz*, No. 2:08-CV-5085-RMP, 2015 WL 12643792 (E.D. Wash. May 11, 2015)); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1082-84 (E.D. Mo. 2007) (modifying original order to add "enhanced compliance-monitoring provisions" in light of defendant's violations), *aff'd*, 580 F.3d 769 (8th Cir. 2009); *FTC v. Fin. Res. Unlimited, Inc.*, 03 C 8864, 2006 WL 1157612 (N.D. Ill. Apr. 25, 2006) ("In light of Defendant's contemptuous behavior and direct violations of the November 2004 Final Order, the circumstances in this case have changed such that modification of the November 2004 consent decree as to Defendant is necessary."). These cases further recognize order violations, like other changes in factual circumstances, could signal the order is not achieving its intended purpose. Courts have authority under Rule 60(b) to modify their orders in light of those factual changes, and the Commission does as well under Section 5(b) and Commission Rule 3.72.

D. Meta's Order Violations Were Not Reasonably Foreseeable.

Additionally, Meta argues its order violations cannot constitute changed "conditions of fact" because "the possibility of such violations was foreseen by the parties." (Meta Resp. at 49.) The Commission has held that changed "conditions of fact" do not warrant a modification if

the changes were "reasonably foreseeable" to the party seeking the modification.[19] However, Meta's failure to materially comply with core provisions of the 2020 Order was not "reasonably foreseeable." First, Meta is a well-resourced company that committed to complying after extensively negotiating the Order language and had more than sufficient time to do so.[20] Second, the Commission would never agree to an order it believed a respondent would not comply with. As the Fourth Circuit observed: "If the parties had actually anticipated the Local Defendants would be so far behind on their obligations at this stage in the proceedings, the Consent Decree would never have been executed. The Plaintiffs would not have given up their claims in exchange for an agreement that they anticipated would not be followed, and the Local Defendants would not have subjected themselves to the district court's contempt powers by agreeing to do something they knew they would not be able to do." *Thompson v. U.S. Dep't of*

[19] The Commission has also short-handed this standard as "unforeseeable." *See, e.g.*, *In re New England Motor Rate Bureau, Inc.*, 114 F.T.C. 536, 538 (1991); *In re Culligan, Inc.*, 113 F.T.C. 367, 1990 WL 10012596, at *2 (1990). However, Commission precedent makes clear that the Commission examines reasonable foreseeability, not theoretical foreseeability. For instance, in *In re Culligan*, the Commission held that the respondent's loss of market share was "unforeseeable" and modified the antitrust consent order to relieve the respondent of the requirement to divest certain of its stores. 1990 WL 10012596, at *2. The Commission could not have based this finding on theoretical foreseeability because a loss of market share is theoretically foreseeable for any business. However, a loss of market share could be "unforeseeable" in the sense it may not be reasonably foreseeable given the facts about the market available at the time the consent order was entered. *See also In re the Stop & Shop Companies, Inc.*, 123 F.T.C. 1721, 1725 (1997) ("Reopening is not required for changes in circumstances that were reasonably foreseeable at the time the consent order was entered."). The Commission's articulation of the standard accords with the Supreme Court's observation that a respondent could seek modification to exclude certain business arrangements from an FTC cease-and-desist order if that theoretically foreseeable possibility actually materialized. *See Atl. Ref. Co. v. FTC*, 381 U.S. 357, 377 (1965).

[20] The 2020 Order provides 180 days for Meta to implement the mandated privacy program. However, Meta effectively had 460 days because of delays in the district court proceeding. The Commission and Meta signed the 2019 Settlement on July 23, 2019, but the district court did not enter the stipulated order until April 23, 2020. The Commission entered the 2020 Order on April 27, 2020.

Hous. & Urb. Dev., 404 F.3d 821, 828-29 (4th Cir. 2005); *see also David C. v. Leavitt*, 242 F.3d 1206, 1213 (10th Cir. 2001) ("[I]t would defy logic for Appellees to agree to include the four-year Termination Provision in the Agreement if they actually foresaw that Utah would not be in substantial compliance with the terms of the Agreement at the end of the four-year period.").

None of Meta's arguments to the contrary is persuasive. Meta argues the Commission must have anticipated certain violations, such as those involving Expired Apps, because those violations were coding errors, and coding errors are always "inevitable."[21] (Meta Resp. at 51.) Meta paints too broadly here. The Expired Apps violations were not generic coding errors; rather, they exemplify a type of privacy risk a compliant privacy program was intended to control and mitigate. Such errors were not anticipated because the Commission fully expected Meta to have implemented a compliant privacy program.

Meta also points out the Commission knew about Meta's unauthorized sharing of data through its investigation into Cambridge Analytica, and those violations led in part to the 2020 Order. (Meta Resp. at 52.) However, that fact does nothing to explain why the Commission should have expected Meta to violate its commitment not to engage in such misconduct again. In addition, Meta points to the Commission's July 2019 press release in which it stated the 2020 Order would "punish future violations." *Id.* However, the general availability of sanctions for order violations certainly does not mean that violations are "foreseeable" – otherwise, no court would modify an order based on a defendant's violations, and that is not what numerous courts

[21] Meta also argues that a separate "coding error" violation involving Messenger Kids cannot constitute a reasonably unforeseeable changed circumstance warranting modification because it occurred prior to the 2020 Order, and the Commission actually knew about the violation prior to entering that order. However, the Commission can consider the Messenger Kids violation in determining whether the "public interest" justifies modification because that separate basis for modification does not require a showing of changed circumstances. (*See* pgs. 29-33 *infra.*)

have held. (*See* pgs. 22-23 *supra.*)

Finally, Meta points to the 2020 Order itself as evidence the Commission anticipated Meta's violations. Meta claims the gaps and weaknesses identified by the Assessor were "specifically foreseen, expected, and addressed" in Part VIII.D of the Order, which charged the Assessor with identifying such gaps and weaknesses, and in Part X.A(5)(c), which required the Independent Privacy Committee to review "any material issues raised" by the Assessor. (Meta Resp. at 54.) These provisions, however, were intended both to deter problems and have them fixed as quickly as possible if they arose, not to justify the existence of the problems. Moreover, even if these provisions contemplated gaps and weaknesses, they certainly did not contemplate "the degree of … non-compliance" demonstrated by Meta's failure to implement key provisions of the 2020 Order. *Thompson*, 404 F.3d at 829; *see also FTC v. Neovi, Inc.*, No. 06-CV-1952 JLS (JMA), 2015 WL 13375566, at *7 (S.D. Cal. Sept. 9, 2015) ("[I]t is unfathomable that the *extent* of Contempt Defendants' noncompliance was anticipated at the time of the Final Order.") (emphasis added), *aff'd sub nom.*, *FTC v. Villwock*, 718 F. App'x 527 (9th Cir. 2017); *Washington v. Moniz*, No. 2:08-CV-5085-RMP, 2015 WL 12643792, at *21-*23 (E.D. Wash. May 11, 2015) (finding movant did not anticipate "the extent to which DOE has failed to comply with the schedule in the Consent Decree" despite provisions referencing possible delays to schedule).

More importantly, the OTSC cites Meta's violations of Part VII of the 2020 Order, which requires Meta to have a fully compliant privacy program within a specific timeframe. As explained above (*see* pgs. 16-17 *supra*), at a minimum, Part VII required Meta to complete all the listed requirements, including the full implementation of safeguards that control for privacy risks, by a date certain – "within 180 days of the effective date of this Order." There is no

language in Part VII that contemplates Meta would have anything short of full compliance with the requirements listed by the stated deadline. Nor do Parts VIII.D and X.A(5)(c) cited by Meta state otherwise. Those provisions contemplate the Assessor will identify gaps and weaknesses in Meta's privacy program and Meta's Independent Privacy Committee will respond to the identified gaps and weaknesses, but the Order makes clear that Meta must nonetheless have a program in place that effectively protects Covered Information consistent with Part VII by the 180-day deadline. *See* Order at Part VIII.C (defining the assessments referenced in VIII.D and X.A(5)(c) as starting "180 days *after the Privacy Program has been put in place*") (emphasis added). Thus, nothing in the 2020 Order contemplated Meta's failure to comply with Part VII as described in the OTSC.

E. Public Interest Also Supports Modification.

Even if Meta's order violations were not a change in "conditions of fact," Section 5(b) provides the Commission a separate "public interest" basis to modify the 2020 Order. 15 U.S.C. § 45(b); *see In the Matter of Union Carbide Corp.*, 108 F.T.C. 184 (1986) ("Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires."). A party seeking modification on public interest grounds need only demonstrate "some affirmative need" for the modification. *Union Carbide*, 108 F.T.C. at 184.

Meta's arguments to the contrary serve only to distract from a plain reading of Section 5(b). For instance, Meta asserts the Commission cannot rely on the "public interest" to make a modification unless Meta "consented to the FTC's proposed modification." (Meta Resp. at 66.) This assertion is belied by the statutory text, which authorizes modification whenever "in the opinion of the Commission . . . the public interest shall so require." 15 U.S.C. § 45(b). Nothing in the statute suggests that Meta may overrule the public interest by withholding its consent.

The D.C. Circuit reached substantially the same conclusion over half a century ago. In *Elmo v. FTC*, a company contested the reopening and modification of an administrative order, arguing that, to modify an order, the agency had to demonstrate a "greater" public interest "than [was] necessary to bring a complaint" under the FTC Act. 389 F.2d at 552. Rejecting that argument, the Court held that the Commission "makes a sufficient showing to re-open a prior order if it shows reasonable grounds to believe that the public interest at the present time would be served by the re-opening." *Id*. The standard applied by *Elmo* conspicuously does not require the respondent's consent for reopening.

Meta also suggests the Commission may only use the public interest rationale to correct an order's "ineptness of expression" in cases enjoining a respondent's deceptive practices. (Meta Resp. at 67-68 (quoting *Elmo Co. v. FTC*, 389 F.2d at 552).) None of the cases Meta cites limits the Commission's authority in that manner. Once again, Meta's argument runs headlong into the plain language of Section 5(b), which empowers the Commission to "alter, modify, or set aside, in whole or in part, any" administrative order based on public interest. 15 U.S.C. § 45(b). Under ordinary rules of grammar, when a list of verbs is followed by a modifying clause, the modifier "normally applies to the entire series." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). Moreover, the fact that the modifier is "separated from antecedents by a comma is evidence that [it] is supposed to apply to all the antecedents instead of only to the immediately preceding one." *Id.* at 1170; *cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (adopting a narrower reading of "modify" under a statute specifying only a "few particular exigent circumstances" allowing for modification).

In fact, consistent with the broad language of Section 5(b), the Commission has described its authority to modify a consent order in the public interest in equally broad terms, namely, to

"ensure that the purpose of the original order has been effectuated." *In re: ITT Continental Baking Co*., 81 F.T.C. 1021, 1972 WL 128875, at *1 (Aug. 1, 1972). Cases interpreting the Commission's authority to modify in the public interest have confirmed this view. *See, e.g., Elmo Co. v. F.T.C.*, 389 F.2d 550 (D.C. Cir. 1967) (holding the Commission's modification of consent order by imposing additional restrictions satisfies the public interest in effectuating consent order's purpose of preventing respondent's deceptive advertising claims); *Mohr v. F.T.C.*, 272 F.2d 401 (9th Cir. 1959) (affirming the Commission's decision to modify its order to more effectively prevent respondent's deceptive practices; "The Commission was entitled to change its mind, if that is what it has done, as to the kind of a cease and desist order which was necessary to protect the public interest."). Analogous cases interpreting a court's authority to modify its orders under Rule 60(b) have also held similarly. *See, e.g., United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251–52 (1968) (finding that if court antitrust decree fails to "achieve its 'principal objects,'" court may modify decree to "prescribe other, and if necessary more definitive, means to achieve the result."); *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011) (stating *United Shoe* recognized "modification in such a case—where there were no factual or legal changes other than recognition of the fact that the initial remedy had failed—may be warranted if the moving party proves its claim."); *Sizzler Fam. Steak Houses v. W. Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1539 (11th Cir. 1986) (allowing modification "to impose more stringent requirements on the defendant when 'the original purposes of the injunction are not being fulfilled in any material respect.'"); *King-Seeley Thermos Co. v. Aladdin Indus., Inc*., 418 F.2d 31, 35 (2d Cir. 1969) ("While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of

experience indicates that the decree is not properly adapted to accomplishing its purposes.").

Meta next contends the Commission can claim no public interest in modifying the 2020 Order to better effectuate its purpose because "[c]onsent decrees have no objectives." (Meta Resp. at 67.) That is patently false. The Supreme Court as well as lower courts have repeatedly referenced a consent decree's purpose in evaluating a proposed modification. *See, e.g., Rufo v. Inmates of Suffolk Cnty. Jail,* 502 U.S. 367, 387 (1992) (referencing "the basic purpose of the [consent] decree" in determining whether modification is appropriate); *Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020) (articulating purpose of consent decree between homeless and city as "stopping the criminalization of homelessness"); *FTC v. Trudeau*, 662 F.3d 947, 952 (7th Cir. 2011) (articulating consent order's purpose as "protect[ing] consumers from [Trudeau's] deceptive practices and [] compensate[ing] those already allegedly deceived."). Meta cites *United States v. Armour & Co*., 402 U.S. 673 (1971), to support its contention a consent order cannot be modified to better effectuate the order's purpose. (Meta Resp. at 67.) However, that understanding of *Armour* is entirely at odds with the Court's holding. The government in that case brought an action to enforce a consent decree, not modify it. In doing so, the Court specifically acknowledged one of the Commission's bases for modifying the 2020 Order. Specifically, the Court noted that, instead of bringing an enforcement action, the government could have brought an action to modify the original consent decree "on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint." *Id.* at 681; *see also id.* at 674-75.

Here, the 2020 Order provisions, and the Commission allegations that led to that Order, unambiguously demonstrate the Order's purpose, to protect consumers from unfair and deceptive privacy practices. The 2020 Order attempts to effectuate its purpose by among other things

requiring Meta to establish a privacy program that protects consumers' information (*see* Order at Part VII) and prohibiting Meta from misrepresenting its privacy practices (*see* Order at Part I). Experience under the 2020 Order has demonstrated the Order failed to achieve these goals. The OTSC cites findings from the Assessor and Meta's own statements that amply demonstrate that failing. Accordingly, the Commission's consideration of whether to impose additional obligations and clarifications relating to Meta's privacy program and privacy practices falls well within Section 5(b)'s public interest requirement.[22] *See Elmo Co. v. FTC,* 389 F.2d 550 (D.C. Cir. 1967); *Mohr v. FTC*, 272 F.2d 401 (9th Cir. 1959).

III. Meta's Constitutional Challenges Lack Merit.

Meta also raises a host of constitutional challenges to the Commission's modification proceeding, all of which the D.C. District Court rejected in *Meta Platforms, Inc. v. FTC*, No. CV 23-3562 (RDM), 2024 WL 1121424, at *21 (D.D.C. Mar. 15, 2024) (rejecting Meta's arguments as "exceedingly weak"). Unlike the district court's decision in *United States v. Facebook, Inc.*, 1:19-cv-02184-TJK (D.D.C. Nov. 27, 2023) discussed above, collateral estoppel does not apply here because the district court's decision is not a final judgment.[23] However, Supreme Court precedent and other consistent authority foreclosing Meta's arguments compel the same result reached by the district court.

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[22] For the reasons explained here, the OTSC also fulfills the requirements of Rule 3.72(b) to state "the changes it proposes to make" and "the reasons they are deemed necessary." Meta states in passing that Rule 3.72(b) requires a greater level of detail but provides no reasoning or authority in support. (Meta Resp. at 71.)

[23] (*See* pgs. 9-12 *supra.*) The district court issued its decision denying Meta's request for a preliminary injunction premised on its constitutional claims. The court also denied without prejudice the FTC's motion to dismiss. While it found the FTC's arguments carry "overwhelming" force, it denied the FTC's motion to leave open the possibility the pending Supreme Court case *SEC v. Jarkesy*, 143 S. Ct. 2688 (2023), may have "some bearing on this case…[a]lthough that case involves a different agency, with distinct authorities." *Meta Platforms,* 2024 WL 1121424, at *46.

A. The Commission's Modification Procedures Comport with Due Process.

With little more than passing references, Meta suggests the Commission will purportedly: (1) shift the burden of proof onto Meta and require it to disprove the need for a modification, (Meta Resp. at 73); (2) deprive it of a right to a fair hearing, (*id.* at 74-75); and (3) refuse to allow discovery, (*id*. at 73). Meta's complaints are inaccurate, overblown, and premature.

At the outset, Meta's facial challenges rely on the false premise the Commission categorically refuses to apply its adjudicative procedures to reopening proceedings, as they are not "formal administrative trial[s]." (Meta Resp. at 74.) The FTC's Rules of Practice state, where an order to show cause and an answer thereto "raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge." 16 C.F.R. § 3.72(b)(2). Further, unless the Commission provides otherwise, hearings "shall be conducted" in accordance with the FTC's Rules of Practice for adjudicative proceedings, *id.*, including placing the burden of proof on FTC staff, *id.* § 3.43; allowing for a hearing, *id.* §§ 3.41, 3.43; and affording relevant discovery, *id.* § 3.31. Consistent with these rules, the Commission's OTSC expressly states that it will "determine what process is appropriate to resolve any issues" after Meta "files an answer." *See* OTSC at 1. Similarly, the Commission's subsequent order directing Complaint Counsel to file this Reply states that, after resolving the threshold legal issues raised by Meta's Response, "the Commission will determine whether to refer the matter to an ALJ for discovery and further evidentiary proceedings, as appropriate." May 8, 2024, Order at 3.

Meta's contention the Commission is straying from its ordinary practice is also belied by the record. The Commission issued its OTSC, which shifted the burden of *production* onto Meta by providing an opportunity to file an answer, but not the burden of *proof* with respect to the requested modification. *See* 16 C.F.R. § 3.43 ("Counsel representing the Commission… shall

have the burden of proof…"); *In the Matter of U.S. Pioneer Elecs. Corp.*, 115 F.T.C. 446, 452 (1992) (party seeking modification has burden of proof); *cf. Matter of Battaglia*, 653 F.2d 419, 422 (9th Cir. 1981) (government-movant's *prima facie* showing "shifts the burden of production to the [non-moving party], but always leaves the burden of proof with the government."; contempt proceeding under 28 U.S.C. § 1826); *Wyatt ex rel. Rawlins v. Sawyer*, 80 F. Supp. 2d 1275 (M.D. Ala. 1999) (after non-movant facing order to show cause in contempt proceeding meets "burden of production," movant bears "ultimate burden of proof"). Meta's single supporting citation, a 2020 FAQ page on the FTC website speaking in layman's terms, says nothing that even suggests the Commission is varying its usual practice by shifting the burden of proof to Meta. (Meta Resp. at 73 n.178.) To the contrary, the Commission has stated that, if Meta chooses not to file an answer, it "may be deemed to have consented to the proposed order modifications." *See* OTSC at 13. Construing a failure to respond as a waiver does not offend due process. *See Ritz v. O'Donnell*, 566 F.2d 731, 735 (D.C. Cir. 1977).

Nor does it offend due process to determine the precise reopening procedures based on how Meta answers the show cause order. In fact, courts frequently recognize that due process is "flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Indeed, the due process requirements for a fair hearing turn on whether there are factual issues in dispute. *See, e.g., Codd v. Velger*, 429 U.S. 624, 627 (1977); *Goldberg v. Kelly*, 397 U.S. 254, 268 n. 15 (1970). Also, the need for discovery turns on the particular disputes between the parties. *See McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

Meta's unfounded, anticipatory complaints do not raise due process issues, and therefore constitutional challenges based on those complaints should be rejected.

B. The Constitution Does Not Prohibit the Commission's Dual Prosecutorial and Adjudicative Roles.

Meta asserts the Commission plays a dual role as prosecutor and judge in this matter, and that this dual role violates due process. (Meta Resp. at 75.) However, the Supreme Court rejected this very argument. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("[T]he combination of investigative and adjudicative functions does not, without more, constitute a due process violation."); *see also In re Zdravkovich*, 634 F.3d 574, 579 (D.C. Cir. 2011); *FTC v. Cinderella Career & Finishing Sch., Inc*., 404 F.2d 1308, 1315 (D.C. Cir. 1968) (upholding combination of functions in FTC case). Meta has not shown or plausibly alleged the Commission's combination of functions results in biased adjudication. "Courts have long recognized a 'presumption of honesty and integrity in those serving as adjudicators.'" *Professional Air Traffic Controllers Org. v. Fed. Labor Relations Auth*., 685 F.2d 547, 573 (D.C. Cir. 1982) (quoting *Withrow*, 421 U.S. at 47).

Arguments that agency adjudicators are biased thus carry a "difficult burden of persuasion" to overcome that presumption. *Withrow*, 421 U.S. at 47. To do so, Meta must make a "strong showing" that the Commission is not acting in good faith. *Pro. Air Traffic Controllers Org. v. Fed. Labor Rels. Auth*., 685 F.2d at 573 (quoting *Withrow*, 421 U.S. at 47). The presumption is not overcome by the mere fact an agency official has been involved in both investigation and adjudication of a matter, without "more evidence of bias or the risk of bias or prejudgment." *Withrow*, 421 U.S. at 53-54. The sort of bias or prejudice that might warrant a Fifth Amendment claim in an administrative proceeding could arise where the "adjudicator has a pecuniary interest in the outcome" or where "he has been the target of personal abuse or criticism from the party before him." *Id*. at 47. However, where an agency official "approve[s] the filing of charges . . . instituting enforcement proceedings," it would not offend due process for that

official "to participate in the ensuing hearings." *Id*. at 56; *see also FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948) (holding that FTC did not violate due process when it adjudicated a matter against a particular respondent after opining in reports and congressional testimony that the conduct at issue constituted an unfair practice).

Here, Meta accuses the Commission of prejudgment, pointing to various aspects of the OTSC and the Commission's alleged refusal to meet informally with Meta before issuing the OTSC. (Meta Resp. at 76-77.) Meta's arguments relating to the OTSC distort the nature and role of the document. The FTC Act permits the Commission to modify its prior orders only "after notice and opportunity for hearing." 15 U.S.C. § 45(b). In accordance with the statute and due process, the OTSC gives notice to Meta about what the Commission is considering (modifying the 2020 Order), why (the Commission's preliminary understanding of the facts), and how (describing the proposed modifications). The OTSC also gives Meta the opportunity to be heard before the Commission acts. Providing notice and an opportunity to be heard obviously does not violate due process; it is due process. There is no evidence in the OTSC the Commissioners' minds are "irrevocably closed" to whatever evidence or arguments Meta might present. *Cement Inst*., 333 U.S. at 701. The "preliminary" factual findings are exactly that—preliminary—because the Commission is waiting to hear Meta's side of the story before it makes any final factual findings. That the factual discussion in the OTSC is lengthy is unremarkable in light of the detailed nature of the independent assessment and of the voluminous information that Meta provided to the FTC. (*See, e.g.,* OTSC Exhibits 4-11). Moreover, "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). To hold, as Meta would, that an agency shows prejudgment when its

notice provides too much information would create a strange incentive for agencies to be vague, undermining the very due process principles Meta contends are lacking. As for Meta's complaint it did not have the opportunity to meet with Commissioners or senior staff before the OTSC was issued (Meta Resp. at 77), tellingly Meta cites to no regulatory, statutory, or constitutional requirement that Commissioners or senior staff must meet informally with an entity before the Commission initiates a proceeding against it. The statute requires "notice and opportunity for hearing," which the OTSC provided.

Meta also alleges systemic bias based on a sentence in the Ninth Circuit decision in *Axon* stating that "FTC does not appear to dispute . . . that [it] has not lost a single [administrative] case in the past quarter-century." (Meta Resp. at 76 (quoting *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021)).) As a preliminary matter, the "narrow question presented" to the Ninth Circuit in *Axon* was "whether the district court has jurisdiction to hear Axon's constitutional challenge to the FTC's structure." 986 F.3d at 1176. The merits of Axon's claim, or lack thereof, were not before the court. Thus, the Ninth Circuit's dictum has no bearing on this case.

More importantly, an isolated assertion about an adjudicator's history of past rulings is not sufficient to allege a plausible due process claim or to make a sufficient showing to overcome the presumption of good faith. Courts have repeatedly rejected similar assertions against other adjudicators. *See, e.g., Singh v. Garland*, 20 F.4th 1049, 1054-55 (5th Cir. 2021) ("An [immigration judge's] 'denial rate' is no more than a crude summation of the IJ's prior rulings. This raw statistic cannot of itself show bias in a particular case."); *James R. v. Kijakazi*, No. CV 22-05030 (GC), 2023 WL 6389097, at *5 (D.N.J. Sept. 30, 2023) (rejecting due process claim based on Social Security ALJ's "apparently high general rate of denying social security

benefits" because "poor statistics in other cases are not sufficient for the Court to find bias"); *Hall v. Kane*, No. C 05-4426 MMC (PR), 2008 WL 5391196, at *4 (N.D. Cal. Dec. 23, 2008) ("[E]ven statistical data as to the rate of denial in other prisoners' cases will not suffice to establish that the Board automatically denies parole, or that the Board otherwise improperly made its determination in petitioner's case, as parole may have been properly denied after the Board's individualized assessment of each of those cases."). Even in an individual case, the alleged "statistical one-sidedness" of an adjudicator's rulings "simply cannot be used to support an inference of judicial bias." *So. Pac. Commc'n Co. v AT&T Co*., 740 F.2d 980, 995 (D.C. Cir. 1984); *In re IBM Corp*., 618 F.2d 923, 930 (2nd Cir. 1980) (similar).

Further, Meta's claim of systemic bias overlooks the fact that the Commission has dismissed administrative complaints and complaint counts. *See, e.g., McWane, Inc. v. FTC,* 783 F.3d 814, 822-23 & n.7 (11th Cir. 2015); *In re R.R. Donnelley & Sons Co*., 120 F.T.C. 36, 136 (1995). The most comprehensive analysis of the Commission's decision-making, prepared by former Commissioner Maureen Ohlhausen and published in a peer-reviewed economics journal, found no evidence of systemic bias. *See* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp*, 12 J. Comp. L. & Econ. 623, 624, 651 (2016), https://perma.cc/3JK9-4B7Y. As a point of comparison, more than 90% of federal criminal cases are resolved with guilty pleas, and fewer than 1% of federal criminal defendants go to trial and are acquitted. John Gramlich, *Only 2% of federal criminal defendants went to trial in 2018, and most who did were found guilty*, Pew Research Center (June 11, 2019), https://perma.cc/KM6Q-ZYDB. That is not because federal judges are biased against criminal defendants, but because, among other factors, the government does not bring cases without strong evidence of illegality.

Finally, the cases relied on by Meta are distinguishable. *Williams v. Pennsylvania*, 579 U.S. 1 (2016), and *In re Murchison*, 349 U.S. 133 (1955), involved criminal proceedings, not civil administrative proceedings. As the D.C. Circuit has recognized, "due process requirements are more stringent" in criminal cases. "In non-criminal proceedings, [] an overlap of functions does not always violate due process." *Wildberger v. Am. Fed'n of Gov't Emps., AFL-CIO*, 86 F.3d 1188, 1195 (D.C. Cir. 1996). The *Withrow* Court itself explained that *Murchison* "has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." *Withrow*, 421 U.S. at 53. *Williams* does not disturb the general principle recognized in *Withrow* that an agency can constitutionally perform both prosecutorial and adjudicative functions. Indeed, *Williams* cited *Withrow* without comment. *Williams*, 579 U.S. at 4, 9, 14.

Meta's allegations of specific bias also lack credibility. (Meta Resp. at 78.) Meta asserts the Commissioners who authorized the show cause order already have proposed the remedy via a proposed revised administrative order. This fact, however, is not bias, but an unremarkable part of the process, i.e., to describe a particular remedy appropriate to the alleged misconduct, and to provide a putative respondent with transparency about the potential remedies that the Commission may seek. Meta trumpets the Commission's purported "defiance" of the district dourt's order and the FTC's Rules of Practice, but this argument relies on the false assertion the Commission's administrative proceeding is unlawful, which it is not for reasons addressed above. Meta's claim the Commission's Chair "pre-judged information collection issues implicated by" the OTSC, (Meta Resp. at 78), likewise is meritless. To support its argument, Meta quotes a 2019 law review article co-authored by Chair Khan while she was an academic law fellow to accuse her of "call[ing] for imposing on Meta 'special duties of care,

confidentiality and loyalty' akin to fiduciary duties based on Meta's 'particularly stark . . . inadequacies' in handling data from users." (Meta Resp. at 78 (quoting Lina M. Kahn & David E. Pozen, A Skeptical View of Information Fiduciaries, 133 Harv. L. Rev. 497, 501 n. 14 (2019)).) However, Meta cites the quoted language completely out of context. Neither quote concerns Meta's privacy program or privacy practices at issue in this proceeding. The article evaluates Professor Jack Balkin's information-fiduciary framework, and both quotes address his proposal to treat online platforms as "information fiduciaries." The article uses the first quoted phrase to describe Professor Balkin's proposal as imposing "special duties of care, confidentiality, and loyalty" on online platforms. Kahn & Pozen, 133 Harv. L. Rev. at 500. The article uses the second quoted phrase "particularly stark… inadequacies" to refer, not to Facebook's inadequacies, but to the inadequacies of Professor Balkin's proposal. *Id.* at 501 n.14 ("Facebook also happens to offer a particularly stark case study in the *inadequacies of the information-fiduciary framework*.") (emphasis added). Moreover, Chair Kahn could not have prejudged the facts in this matter in 2019 because the vast majority of those facts only became known after the Assessor's July 2021 report. (*See* OTSC at 4.)[24] Moreover, to prevail on a claim that a specific adjudicator be disqualified based on bias, Meta must prove "a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). Meta has not shown this standard is met here, nor could it—especially considering the Commission has merely initiated a process by which it will determine whether and how to modify its order. A district court recently rejected similar bias

[24] The FTC became aware of a few of the alleged facts earlier, but not until 2019 or 2020. (*See* PFOF ¶¶ 1095, 1153, 1164.) At that time, those facts were not public and Chair Kahn had yet to join the agency.

arguments by Meta in another FTC case, cautioning that courts must "tread carefully" before "disqualify[ing] every administrator who has opinions on the correct course of his agency's future action." *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 62 (D.D.C. 2022). Accordingly, Meta's due process arguments fail.

C. Meta's Article II Removal Challenge Fails.

1. *Humphrey's Executor* Bars Meta's Article II Arguments.

Meta's challenge to the FTC Act's restrictions on the President's removal power over FTC commissioners "is clearly foreclosed by Supreme Court precedent." *FTC v. Precision Patient Outcomes, Inc.*, No. 22-CV-07307-VC, 2023 WL 3242835, at *1 (N.D. Cal. May 3, 2023). *See also FTC v. Kochava Inc.*, ---F. Supp. 3d ---, 2023 WL 3249809, at *12 (D. Idaho May 4, 2023); *FTC v. Roomster Corp.*, 654 F. Supp. 3d 244, 260 (S.D.N.Y. 2023). The Supreme Court upheld the Commissioners' removal restrictions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Then, as now, the President could remove FTC commissioners for only "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. The Court "found it 'plain' the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies," and held that the "'coercive influence' of the removal power would 'threaten the independence of the commission.'" *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) (quoting *Humphrey's Executor*, 295 U.S. at 630) (alterations omitted). Since the Court's 1935 *Humphrey's Executor* decision, "removal restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, . . . , the Interstate Commerce Commission, . . . , and the Consumer Product Safety Commission[.]" *Morrison*, 487 U.S. at 724-25 (Scalia, J., dissenting).

Meta invites the Commission to set aside *Humphrey's Executor* because the Commission's executive enforcement powers have expanded since 1935. (Meta Resp. at 80.)

However, *Humphrey's Executor* "remain[s] binding precedent until [the Supreme Court] see[s] fit to reconsider [it], regardless of whether subsequent cases have raised doubts about [its] continuing vitality." *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam) (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998)); *see In re Aiken Cnty*., 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("*Humphrey's Executor* is an entrenched Supreme Court precedent, protected by stare decisis."); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 741 (D.C. Cir. 1987) (applying *Humphrey's Executor* even though it was "at least arguable that the Supreme Court might be persuaded to alter its current position").

Moreover, in recent cases addressing the President's removal power, the Supreme Court has repeatedly declined to overrule *Humphrey's Executor*. In *Seila Law LLC v. CFPB*, for instance, the Court decided to leave *Humphrey's Executor* in place, even after acknowledging that some of that decision's reasoning—that the Commission exercised quasi-legislative or quasi-judicial power and not executive power—"has not withstood the test of time." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2198 n.2 (2020); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (noting that in *Seila Law*, "[w]e did 'not revisit our prior decisions allowing certain limitations on the President's removal power'") (quoting *Seila Law*, 140 S. Ct. at 2192). The Court also implicitly reaffirmed *Humphrey's Executor* in discussing the remedy in *Seila Law*. Although the Court ultimately chose to remedy the CFPB Director's unconstitutional removal protections by severing them from the statute and making the Director removable at will by the President, the Court noted that Congress was not foreclosed "from pursuing alternative responses to the problem – for example, converting the CFPB into a multimember agency," *Seila Law*, 140 S. Ct. at 2211 – in other words, into an agency more like the FTC. Further, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 496 (2010), the Court invalidated

"novel" and "rigorous" removal restrictions for certain inferior officers who could be removed only by SEC commissioners, but noted the constitutional defect could be remedied by making the inferior officers removable at will by the commissioners while leaving the SEC commissioners removable for inefficiency, neglect of duty or malfeasance in office—the same protection applicable to FTC commissioners.

Meta also suggests that *Humphrey's Executor* is undermined by the fact that the current Commissioners all have served for five or fewer years, and the three current Commissioners are from one political party. (Meta Resp. at 81.) This argument must be rejected for several reasons. First, since Meta filed its Response, the Commission now has a full slate of three Democratic and two Republican Commissioners. Second, the happenstance of which seats are filled or vacant at any time or the exact tenure of particular Commissioners is irrelevant to a constitutional analysis. Congress specifically designed the Commission so Commissioners would serve staggered seven-year terms, which "enabled the agency to accumulate technical expertise and avoid a 'complete change' in leadership 'at any one time.'" *Seila Law*, 140 S. Ct. at 2199 (quoting *Humphrey's Executor*, 295 U.S. at 624). Congress sensibly and unremarkably predicted there would be times when seats would be vacant since events such as deaths, illnesses, and resignations can occur anytime, and it takes time for the President to nominate and the Senate to confirm new Commissioners. Foreseeing this eventuality, Congress authorized the Commission to keep operating during those times. *See An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes*, ch. 311, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 41). This system has been a feature of the FTC Act since 1914, and nothing in *Humphrey's Executor* suggests the case turned on the contrary, unrealistic expectation that every seat would always be filled at every moment. *Cf. McIntosh v.*

Dep't of Def., 53 F.4th 630, 641 (Fed. Cir. 2022) (rejecting constitutional challenge based on a multimember board's lack of a quorum because that "is a temporary circumstance, not a structural defect") (quoting *Rodriguez v. Dep't of Veterans Affs*., 8 F.4th 1290, 1309 (Fed. Cir. 2021)).

Second, Meta's characterization of the current Commission as "lack[ing] tenure" and "relatively inexperienced" is incorrect. (Meta Resp. at 81.) Although Commissioners Holyoak and Ferguson have only just begun their respective tenures, Commissioner Slaughter has served for over 6 years, Chair Khan for nearly 3 years, and Commissioner Bedoya for over 2 years. Moreover, all five Commissioners have significant experience with competition and consumer protection beyond their service as Commissioners.[25] Thus, even if tenure were an issue, which it is not, Meta's argument is unavailing.

2. Meta Is Not Entitled to Relief Without Showing Prejudicial Harm.

Even if the Commissioners' removal protections were unconstitutional, which again they are not, Meta faces no constitutional injury because those removal protections have no effect on the administrative proceedings from which Meta seeks relief. Meta has not suggested the Commissioners were improperly nominated for, and appointed to, their positions. Thus, "there is no basis for concluding that [the Commissioners] lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1788. Nor has Meta adequately alleged or shown the challenged removal provision "cause[d] harm" by prejudicing the President's control over the Commissioners in a way that harms Meta. *Id*. at 1789. Meta has not shown, for instance, the President has sought to remove the current Commissioners or disagrees with the Commission's proposal to modify the 2020 Administrative Order. *See id*. Meta's failure to make such a

[25] *See* FTC, Commissioners, https://www.ftc.gov/about-ftc/commissioners-staff/commissioners.

showing is dispositive because the party alleging a removal violation is entitled to relief "only when the President's inability to fire an agency head affected the complained-of decision." *Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (rejecting removal claim where plaintiff failed to establish "(1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor") (citing *Collins*, 141 S. Ct. at 1801), *cert. granted*, 143 S. Ct. 978 (2023), *and cert. denied*, 143 S. Ct. 981 (2023).

A showing of harm is required regardless of whether the challenger tries to characterize the relief it seeks as voiding past agency actions or preventing ongoing or future actions. For example, in *CFPB v. Law Offices of Crystal Moroney, P.C.*, the CFPB sought to enforce a civil investigative demand (CID) for production of documents as part of an ongoing investigation into whether Moroney's law office was violating debt collection laws. 63 F.4th 174, 178, 185 (2d Cir. 2023), *cert. denied*, 2024 WL 2709347 (May 28, 2024). Moroney tried to distinguish *Collins* on the ground the relief she sought was prospective (protection from having to produce documents) and not retrospective (voiding the issued CID). The Second Circuit rejected this argument because "the Supreme Court's reasoning that an officer's actions are valid so long as she was validly appointed applies with equal force regardless of the relief sought by the party challenging the officer's actions." *Id.* at 180–81. The Fifth and Sixth Circuits have rejected similar arguments for similar reasons. *Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 631-32; *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023). Thus, regardless of how Meta frames the relief it seeks, it still must show harm under *Collins*, which it has completely failed to do. Accordingly, Meta's Article II arguments fail.

D. The Commission's Authority to Choose Between Administrative and Judicial Remedies Does Not Implicate or Violate Article I's Nondelegation Doctrine.

Meta's nondelegation claim also fails because the FTC's decision in an individual case to proceed administratively or in court exercises its executive, not legislative, power. Thus, that choice does not implicate the nondelegation doctrine. Moreover, even if the decision were an exercise of legislative power, it was guided by intelligible principles in the FTC Act.

Article I of the Constitution vests the federal government's legislative powers in Congress, and Congress may not delegate those powers to an executive agency absent an intelligible principle to guide the exercise of discretion. U.S. Const. art. I, § 1; *see, e.g., Mistretta v. United States*, 488 U.S. 361, 372 (1989). "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (quoting *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928)), *superseded by statute on other grounds as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). In contrast, it has long been established that "enforcement power," which includes the "discretionary power to seek judicial relief" by filing a lawsuit, is an exercise of executive authority. *Id.* at 138. Further, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

The Commission does not "make law" when it chooses between an administrative and judicial forum, any more than an Executive Branch makes law by choosing to bring a criminal prosecution rather than a civil suit, or by choosing whether to pursue civil penalties or equitable relief. Decisions about what violations to assert, what penalties to seek, and in which forum to proceed are quintessentially executive actions that are the very definition of enforcing the laws. *See United States v. Batchelder*, 442 U.S. 114, 125-26 (1979) (finding no violation of

nondelegation doctrine in authorizing prosecutor to choose among statutes that impose different penalties for essentially the same conduct); *cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch.").

The Fifth Circuit decision on which Meta relies, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023), is not persuasive. *Jarkesy* conflated (1) Congress's legislative power to determine the range of enforcement mechanisms that should be available to the agency in particular categories of cases with (2) the executive power to choose among permissible enforcement mechanisms in individual cases. Thus, the decision is inconsistent with Supreme Court precedent. *Jarkesy* is also distinguishable because the Fifth Circuit's determination the SEC was exercising legislative power relied heavily on the fact that the Congress gave the SEC "the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings *with a jury trial*, and which are not." *See id.* at 461 (emphasis added). That is not at issue here. The Commission's OTSC involves only potential changes to its own administrative order: a remedy similar to injunctive relief. Tellingly, even if the Commission had sought that relief in court, Meta would have no right to a jury. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999).

Further, even if the choice between administrative and judicial enforcement were a legislative act (which it is not), the Commission's authority would still pass constitutional muster because Congress limited the Commission's discretion to make that choice with a sufficiently intelligible principle. The "intelligible principle" standard is not a demanding one. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion). "[A] delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries

of his authority.'" *Id.* (cleaned up). "The Supreme Court has underscored that the general policy and boundaries of a delegation need not be tested in isolation," as "the statutory language may derive content from the purpose of the Act, its factual background and the statutory context." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008) (cleaned up).

In the FTC Act, Congress set out both a general policy and the boundaries of the Commission's authority. As relevant here, the FTC Act outlaws "unfair or deceptive acts or practices in or affecting commerce" and directs the Commission to "prevent" persons and entities from engaging in them. 15 U.S.C. § 45(a)(1)-(2). An "unfair" act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers." *Id.* § 45(n). Although the term "deceptive" is not specifically defined in the statute, deception is a well-enough understood term recognized by courts for decades. *See FTC v. Zaappaaz, LLC*, No. 4:20-cv-2717, 2023 WL 5020618, at *8 (S.D. Tex. June 9, 2023) (rejecting argument that Congress failed to provide intelligible principle when it failed to define "deceptive," "given that the word deceptive has been defined in many contexts and does not need further definition"). Therefore, the statute does not need further definition to provide an intelligible principle. Congress also identified in the FTC Act the mechanisms the Commission is allowed to use and the specific circumstances under which the Commission may use each of them. *See generally AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 72-73, 76-77 (2021).

As to the Commission process involved here, the Commission can modify its previous orders only if, "in the opinion of the Commission[,] conditions of fact or of law have so changed as to require such action or if the public interest shall so require." 15 U.S.C. § 45(b). The change in conditions prong prevents the Commission from modifying orders where nothing has

changed since the original order, or if there are changes that do not rise to the degree or nature that would "require" an order to be modified to protect consumers from unfair or deceptive acts.

The "public interest" is similarly informed by the statute's purpose -- protecting consumers from unfair or deceptive practices -- and thus limits the Commission's ability to act outside of those parameters. *See Mohr v. FTC*, 272 F.2d 401, 405-06 (9th Cir. 1959) (recognizing "public interest in terminating deceptive practices" and upholding the Commission's modification of a prior administrative order where experience under the prior order showed modification was necessary to "stop the deception"); *see also Elmo*, 389 F.2d at 552 (citing *Mohr* approvingly). The Supreme Court has repeatedly "found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citation omitted). The public interest is "not a concept without ascertainable criteria," *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932), or "so indefinite as to confer an unlimited power," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *see also id.* at 225-26 (rejecting nondelegation argument); *United States v. Diggins*, 36 F.4th 302, 319 n.19 (1st Cir. 2022) (holding that a criminal statute authorizing prosecutions in the "public interest" "indisputably satisfies the lax 'intelligible principle' standard under our precedents and those of the Supreme Court") (quoting *United States v. Parks*, 698 F.3d 1, 7 (1st Cir. 2012)), *cert. denied*, 143 S. Ct. 383 (2022). Because Congress provided ample guidance to the Commission on how to enforce the FTC Act, Meta's nondelegation argument fails.

E. The Commission's Adjudication of Public Rights Is Consistent with Article III.

Meta asserts the claims raised in the Commission's OTSC must be litigated in an Article III court. (Meta Resp. at 85.) That is simply incorrect. To determine whether an adjudication

involves an exercise of judicial power, the Supreme Court distinguishes between "public rights" and "private rights" and has "given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts." *Id.* at 1373 (citation omitted). Public rights are those "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

The administrative proceedings at issue here clearly involve public rights. The proceedings are between the government and Meta, a party "subject to its authority," *id*., and they are inextricably connected to the government's regulation of unfair and deceptive business practices that harm consumers. *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 n.7 (10th Cir. 2005) (explaining that the FTC's action "was not a private or common law fraud action designed to remedy a singular harm, but a government action brought to deter deceptive acts and practices aimed at the public"); *FTC v. Neora LLC*, No. 3:20-cv-01979-M, 2022 WL 3213540, at * 3 (N.D. Tex. Aug. 8, 2022) (explaining that, in seeking injunctive relief, "the FTC is operating in a sovereign capacity for the protection and furtherance of public rights and interests, namely to protect the public from . . . 'unfair or deceptive acts or practices,' as authorized by the FTC Act."); *cf. Simpson v. Off. of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (holding that, in instituting cease-and-desist proceedings, the Office of Thrift Supervision "served a public purpose of the sort Congress envisioned in providing for administrative adjudication").

Like the Occupational Safety and Health (OSH) Act at issue in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), the FTC Act aims to

"prevent" unfair and deceptive acts and practices before they actually harm consumers. 15 U.S.C. § 45(a)(2); *see Atlas Roofing*, 430 U.S. at 445. To achieve this goal, the FTC created new statutory duties and remedies that did not exist at common law. For example, "[t]o prove a deceptive act or practice in violation of Section 5(a) of the FTC Act, [15 U.S.C. § 45(a)], the FTC must show: (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and that (3), the representation, omission, or practice is material." *FTC v. Cantkier*, 767 F. Supp. 2d 147, 151 (D.D.C. 2011). "Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a §5 violation." *Freecom Commc'ns*, 401 F.3d at 1203 n.7. "Otherwise, the law would preclude the FTC from taking preemptive action against those responsible for deceptive acts or practices, contrary to §5's prophylactic purpose." *Id*. at 1203 (citation omitted). The FTC Act entrusted to an expert agency, the Commission, the task of investigating and adjudicating these violations. Like the agency adjudication of similar OSH Act violations the Supreme Court upheld in *Atlas Roofing*, the Commission's modification proceeding under the FTC Act comports with Article III. *See Atlas Roofing*, 430 U.S. at 445, 450.

Meta asserts this matter involves private rights because it implicates Meta's property rights. (Meta Resp. at 86.) However, the mere possibility a case might affect a private party's property rights does not mean that case must be adjudicated by an Article III court or by a jury. "Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985). Adopting Meta's position would require the Commission to overturn decades of Supreme Court precedent upholding agency adjudication of cases determining liabilities of companies and individuals that necessarily

implicated their private property rights. *Atlas Roofing*, for example, involved agency adjudication of OSHA citations against companies that were required to pay monetary penalties and to change their business practices to abate safety hazards. 430 U.S. at 447- 48; *see also, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) (allowing CFTC to adjudicate debit balance claims between commodity futures brokers and customers, which involved "private rights" "assumed to be at the 'core' of matters normally reserved to Article III courts"); *Crowell*, 285 U.S. at 51-53 (replacing injured longshore workers' traditional negligence cause of action against employers with an administrative workers' compensation system requiring employers to pay compensation to injured workers). Thus, Meta's Article III argument is foreclosed as a matter of law.

F. The Seventh Amendment Does Not Apply Where, as Here, Only Injunctive Relief Is Sought.

The so-called public rights doctrine states "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989); *In re Tex. Gen. Petroleum Corp.*, 52 F.3d 1330, 1336 (5th Cir. 1995) ("Whether an Article III court is necessary involves the same inquiry as whether a litigant has a Seventh Amendment right to a jury trial."). Thus, because Meta's Article III argument fails under the public rights doctrine, its Seventh Amendment claim necessarily fails as well.

Even if the public rights doctrine were not dispositive, which it is, Meta's Seventh Amendment arguments would still fail. Meta asserts it has a right to a jury trial because the FTC's statutory scheme "provides for the potential future imposition of civil penalties," citing 15 U.S.C. § 45(l). (Meta Resp. at 87.) However, these modification proceeding do not involve civil

penalties, only potential prospective changes to Meta's conduct. Such changes, if they occur, are unambiguously injunctive in nature, and thus, do not implicate the Seventh Amendment's right to a jury. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) ("[i]t is settled law that the Seventh Amendment does not apply" to "suits seeking only injunctive relief.") (citing *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433 (1830)). Meta cites no authority for the proposition that jury trial rights can attach based on speculation about remedies that might or might not be sought in a future proceeding, in a different forum, based on future violations that may or may not occur.

Meta's breach of contract theory fails for similar reasons. (Meta Resp. at 87.) Specifically, Meta's contract analogy is inapt because the Commission is not bringing a breach of contract claim; it is proposing to modify its 2020 order pursuant to its authority under the FTC Act. *See* 15 U.S.C. § 45(b). That authority does not require a breach, or even an underlying agreement by the parties, for the Commission to modify the order. *Id.* (*See also* pgs. 27-29 *supra.*)

IV. [Deferred]

Pursuant to the Commission's May 8, 2024, Order, Complaint Counsel does not, at this juncture, address the arguments concerning remedy that Meta raised in Part IV of its Response to the Show Cause Order, and reserves all rights to respond accordingly at such later date as the Commission deems appropriate.[26]

V. Considering Whether to Modify the Order Is Consistent with the FTC's Mission.

Finally, Meta makes two policy arguments. First, it asserts an Order modification will

[26] The May 8, 2024, order stated the Commission will determine the appropriate course for addressing the remedy issues after it resolves Meta's threshold legal arguments on the issues discussed in this brief.

harm the agency because it will make it more difficult for the FTC to obtain settlement agreements in the future. Second, Meta contends the Commission's actions will discourage other parties from complying with their own FTC consent orders requiring them to establish privacy programs and cooperate with their third-party assessors. As discussed below, both arguments ignore the facts specific to Meta that distinguish it from most other respondents.

A. The Commission May Properly Evaluate the Ongoing Effectiveness of Its Orders.

Meta contends the Commission's potential, proposed modification "threatens to upend" a consent-order framework "built on the premise that the orders will be safeguarded by a 'strong public interest' in 'repose and finality,' subject to change only in the 'most extraordinary circumstances.'" (Meta Resp. at 117.) It further contends the issues are "especially acute" when the proposed modification follows a change in the Commission's political composition. (*Id.* at 118.) These concerns are misguided. In asserting a modification in this case will make it more difficult for the Commission to secure consent decrees with third-party assessor provisions from other parties (*Id*. at 117, 128), for example, Meta necessarily disregards the fact that – unlike almost every other company under FTC order – if the OTSC is found to be true, Meta will be a three-time repeat offender that has already been sued for violating an FTC order and whose order will need to be modified for a second time.

The finality principles Meta cites do not apply in the same measure to agency action "when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). In providing that the Commission "may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part," its orders "whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require," 15 U.S.C. 45(b), Congress

clearly did not intend to import general finality principles into FTC administrative orders without exception. The FTC Act "specifically allows the Commission to modify its order after it has become final." *Int'l Union of Mine, Mill & Smelter Workers, Locs. No. 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 342 (1945); *see Louisiana-Pac. Corp.*, 754 F.2d at 1447 n.1.

As courts have recognized, unlike a private party, the Commission is "a body charged with the protection of the public interest." *Elmo Co. v. FTC*, 389 F.2d 550, 552 (D.C. Cir. 1967). Thus, the Commission can use its "[e]xperience under [a] cease and desist order" to determine the current terms are not enough. *Id*. For example, the public interest may require modifying an order so that it is "clear and explicit" in all its terms; "[o]therwise it is ineffective in correcting the abuses with which it is intended to deal . . . ." *Mohr v. FTC*, 272 F.2d 401, 404-05 (9th Cir. 1959) (finding that where an administrative order gave rise to "confusion and controversary, . . . a clarification thereof would be in the public interest," and that "ineptness of expression in the original order would not stand in the way of reopening the proceeding and modifying the order," but "would in fact dictate that the order be clarified").[27] A modification may also be appropriate "as a remedial measure to ensure that the purpose of the original order has been effectuated." *In the Matter of ITT Continental Baking Co.*, Docket 7880, 1972 FTC LEXIS 268, at *3 (FTC Aug. 1, 1972).

In *Mohr*, the Ninth Circuit found the public interest in terminating deceptive practices also supported the reopening and modification of the Commission's order to prevent such

[27] *See also In the Matter of Nat'l Housewares, Inc.*, Docket 8733, 1974 FTC LEXIS 20, at *10 (F.T.C. Dec. 3, 1974) ("The most forthright manner of dealing with the apparent problem of an ineptness of expression in the original order would be through a reopening and modification, in effect, a clarification of the original order.").

practices. *Mohr*, 752 F.2d at 405. Even if the modification results in an order that differs in substance from the original, that would not necessarily be contrary to policy. *See Elmo Co.*, 389 F.2d at 552 ("The Commission was entitled to change its mind, if that is what it has done, as to the kind of a cease and desist order which was necessary to protect the public interest."). *Cf. Mattox v. FTC*, 752 F.2d 116, 123-24 (5th Cir. 1985) ("The fact that the agency has from time to time changed its interpretation does not lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis.") (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

B. General Compliance Principles Do Not Excuse Meta's Failure to Establish an Effective Privacy Program Within the Order's Timeframe.

Lastly, Meta contends the Commission's actions "will make it more difficult for companies to develop and implement effective compliance programs" and "deter" them from doing anything more than "the absolute minimum" going forward. (Meta Resp. at 121.) This is little more than hyperbolic speculation and should be dismissed as such.[28]

Contrary to Meta's assertion, the OTSC does not rest solely on the sheer number of gaps and weaknesses the Assessor identified in the first six months, nor does it evince an intent to penalize Meta for not being perfect in purportedly going "above and beyond." (*Id*.) The OTSC instead draws from the findings of a third-party assessor regarding the significance of gaps and weaknesses in Meta's privacy program and their relevance to the program's overall

[28] Similarly, Meta's claim it is now being penalized for its "extensive cooperation" with the Assessor is disingenuous. (Meta Resp. at 121.) The Order expressly obligates Meta to work with the Assessor to provide such cooperation. *See* Order at 13, Part VII.E.-F.

effectiveness. *See, e.g.*, [redacted]

The Order requires Meta to "establish and implement, and thereafter maintain a comprehensive privacy program . . . that protects the privacy, confidentiality, and integrity of the Covered Information collected, used, or shared" by Meta. (Order at 8, Part VII.)[29] The mere existence of gaps and weaknesses is not inconsistent with a program that satisfies this requirement. Indeed, as Meta points out, the detection of gaps and weaknesses may indicate a program is working as intended, insofar as it identifies flaws and corrects them accordingly. (Meta Resp. at 122.) However, where, as here, the gaps and weaknesses taken together compromise a program's ability to effectively protect Covered Information, it is appropriate for the Commission to consider whether modifications are needed to ensure the Order, as written, properly protects consumers.

Citing reports it submitted from Dr. Soltes and Mr. Thompson, Meta contends the initially identified gaps and weaknesses are "to be expected" for a compliance program at a

[29] The Order defines Covered Information to mean information from or about an individual consumer. Order at 3, Definition D.

company as large and complex as Meta, especially when it is still "in the infancy stages." (Meta Resp. at 125.) Again, this argument misses the mark. The Order required Meta to have an effective program in place as of 180 days of the Order's effective date. Put another way – the Order did not ask Meta to begin developing a program in the first 180 days, then continue working on it over the remaining time left in this 20-year order. Rather, the Order requires Meta to have an effective program in place within 180 days, and to maintain the program throughout the 20-year life of the Order. In fact, because the D.C. District Court did not enter the parties' Stipulated Order until late April 2020 – months after the parties reached their July 2019 settlement[30] – Meta was effectively granted a nine-month extension to develop and establish its program.

Moreover, Meta has been subject to FTC order privacy program requirements since 2012. By their plain terms, both the 2012 consent order and the current Order obligated Meta to develop a program appropriate to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the Covered Information. Thus, Meta should not have been starting from scratch and was not being called upon to do the impossible. That Meta elected to "comprehensively redesign" its existing program "from the ground up" (Meta Resp. at 127) to address the Order's requirements is understandable but does not excuse Meta's failure to establish the requisite baseline program within the Order's contemplated timeframe.

[30] The 2019 settlement, which the parties signed on July 23, 2019, included the same form and substance of what would eventually be issued as the Commission's modified administrative order containing the mandated privacy program and assessment provisions. However, because the district court first had to address amicus briefs and motions to intervene filed by third-party privacy organizations and advocacy groups regarding the 2019 settlement, it did not enter the Stipulated Order until April 23, 2020.

CONCLUSION

For all the foregoing reasons, Complaint Counsel respectfully asks that the Commission deny Meta's request to vacate the OTSC. The Commission should instead proceed in this matter by setting a scheduling order that allows the parties time to (i) negotiate any stipulations that would narrow the factual disputes and (ii) submit their respective positions regarding appropriate procedures for resolving the remaining issues (e.g., whether through an evidentiary hearing or referral to an ALJ).

Dated: June 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on June 7, 2024, I caused a true and correct copy of the foregoing *Complaint Counsel's Reply to Legal Issues Raised in Respondent Meta Platforms, Inc.'s Response to the Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed New Order* to be filed and served as follows:

One electronic copy via the Administrative E-Filing System and one electronic courtesy copy to the Office of the Secretary via email to ElectronicFilings@ftc.gov.

One electronic courtesy copy to the Office of the Administrative Law Judge via email to OALJ@ftc.gov.

One paper copy via first-class mail, postage pre-paid, and one electronic copy via email to Counsel for Respondent:

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