PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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 NEW ORDER

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EXECUTIVE SUMMARY[1]

Nearly five years ago, the Commission approved a comprehensive, exhaustively negotiated settlement with Meta. That settlement resolved a federal lawsuit seeking relief under Sections 13(b) and 45(*l*) that—at the Commission's request—was embodied in a Stipulated Order entered in federal district court (the "Stipulated Order"), including its Attachment A (the "Order").[2] The court approved the entry of the Order by the Commission on its docket.[3] As entered by the Commission, the Order starts by noting the district court's continuing jurisdiction and contains multiple provisions reflecting its inclusion as part of a federal court order.[4] As the Commission acknowledged at the time, the parties' agreement enabled the Commission to obtain relief that it could not have obtained through litigation, that no court or agency would have ordered, and that was only possible because Meta agreed to it.[5]

Now, a new Commission, long dissatisfied with the agreement reached by its predecessor, has invoked Section 5(b) to reopen and rewrite that agreement, as if from scratch, based on nothing more than its own policy preferences. Section 5(b) authorizes the Commission to "reopen and alter, modify, or set aside" certain orders where "conditions of fact or of law have

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[1] Unless otherwise noted, emphasis has been added to quotations, and internal quotations, brackets, citations, and footnotes have been omitted.

[2] *See* Compl., *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. July 24, 2019) (Dkt. No. 1) at ¶ 1 ("Compl."); Stip. Order, *United States v. Facebook, Inc*., No. 19-cv-02184 (D.D.C. Apr. 23, 2020) (Dkt. No. 35) at 1 ("Stip. Order"); Attachment A, *United States v. Facebook, Inc*., No. 19-cv-02184 (D.D.C. Apr. 23, 2020) (Dkt. No. 35, Attach. A) ("Attachment A" or "Order") at 1.

[3] *See* Stip. Order at 1.

[4] Order at 1; *id.* (Commission waiving its right to "appeal" the Order); *id.* at Part XV (authorizing use of civil discovery "without *further leave of court*").

[5] *See* Statement of Chairman Joe Simons and Comm'rs Noah Joshua Phillips and Christine S. Wilson, *In re Facebook, Inc.*, Fed. Trade Comm'n, at 4–5 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf ("July 2019 Statement") ("If the FTC had litigated this case, it is highly unlikely that any judge would have imposed a civil penalty even remotely close to this one.").

so changed as to require such action or if the public interest shall so require."[6] In the more than 85 years since Congress added this language, the Commission has never sought to rewrite a consent order to add new, material obligations without the respondent's explicit agreement, as it has proposed to do here. The Commission cannot do so. The Order to Show Cause ("OTSC")[7] is unprecedented because it is unlawful in numerous ways.

As an initial matter, the OTSC seeks to meet Section 5(b)'s standard by asserting that Meta failed to implement an "effective" Privacy Program under Part VII of the Order based on a June 2021 Assessment of its first six months,[8] and that coding errors ***that predate the Order*** somehow amounted to order violations and violations of Section 5 and the Children's Online Privacy Protection Act ("COPPA").[9] As discussed below and in greater detail in the Response to the Preliminary Findings of Fact ("PFOF Response"), those claims are legally invalid (they misstate and misapply Part VII's requirements) and factually flawed (they raise hundreds of individual and substantial issues of fact for resolution).[10] And the Commission points to no actual harm to users from any of its assertions. The Commission's conclusory assertions of violations are wrong, and the OTSC offers nothing else.

But the OTSC fails regardless of the inaccuracy of the Commission's factual findings.

First, the Commission cannot use Section 5(b) to modify the Order. Section 5(b) only allows the Commission to "alter, modify, or set aside" litigated orders.[11] According to longstanding precedent, fundamental principles of contract law, and the plain language of the

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[6] 15 U.S.C. § 45(b).

[7] *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. May 3, 2023) ("OTSC").

[8] *Id.* at 4, 11–12.

[9] *Id.* at 11–12.

[10] *See infra* Section II.A.

[11] 15 U.S.C. § 45(b); 16 C.F.R. § 2.32(c).

statute, Commission regulations, and the Order itself, Section 5(b) has no application to ***this*** Order—a consent order—which was approved by a federal district court to resolve a federal court complaint.[12]

Second, even where Section 5(b) does apply, it requires that intervening conditions have substantially changed or the public interest requires reopening.[13] Neither is met here. Under longstanding Commission precedent, even if its factual findings were accurate, they do not amount to changed conditions or reflect a public interest need to modify the Order.[14]

Third, the Commission's attempt to reopen the proceeding and rewrite the Order is unconstitutional. The Commission's abuse of the modification process as an "enforcement action" to deprive Meta of procedural protections is wholly inconsistent with due process.[15] Making things worse, the Commission has prejudged the matter in unprecedented ways. As prosecutor, the Commission has formally found that it "has good cause to believe"[16] that Meta violated its legal obligations; as judge, the Commission has determined that "changed conditions *demonstrat*[*e*] that additional modifications to the Order are *needed* to clarify and strengthen its requirements."[17] And there appears to be no precedent for the Commission making "preliminary" findings of fact—much less a "full record" consisting of such findings—in "support" of any administrative action it has ever taken.[18]

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[12] *See infra* Section I.A–B.

[13] *See* 15 U.S.C. § 45(b).

[14] *See infra* Section II.

[15] *See infra* Section III.A.

[16] OTSC at 1.

[17] *Id.* at 12.

[18] *Id.* at 1 n.1.

Finally, even if reopening were statutorily authorized and constitutionally tolerable, the Commission's proposed order ("Proposed Order")[19] is separately unlawful. The law requires that any modifications be narrow, specific, and suitably tailored to any change in circumstances.[20] The Proposed Order, with more than 800 separate changes, many of which the Commission has trumpeted as "new,"[21] fails each one of these requirements.[22] Just four years ago, the Commission made clear that it cannot "regulate by fiat," and the "extent to which Facebook, or any other company, should be able to collect, use, aggregate, and monetize data, is something Congress should evaluate" because the "100-year old" FTC Act does not give the Commission "free rein to impose these restrictions."[23] The FTC Act has not changed, and the Commission cannot rewrite it through enforcement.

As the Commission recently cautioned, to "import into Section 5 the legal standards we happen to prefer, rather than faithfully following the instructions that Congress and courts have given us, would reflect an agency gone rogue."[24] The Commission's proposed reopening is squarely foreclosed by the plain language of Section 5(b) and by decades of settled law.

For the reasons set forth herein, the Commission should not reopen the Order. In any event, at a minimum, hundreds of "substantial factual issues" preclude the entry of the Proposed

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[19] *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. May 3, 2023) ("Proposed Order").

[20] *See infra* Section IV.B.

[21] *See FTC Proposes Blanket Prohibition Preventing Facebook from Monitoring Youth Data*, Fed. Trade Comm'n (May 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-blanket-prohibition-preventing-facebook-monetizing-youth-data ("May 3 Press Release").

[22] *See generally* Proposed Order.

[23] July 2019 Statement at 6.

[24] Statement of Chair Lina M. Khan Joined By Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act, 2022 WL 16919447, at *2 (F.T.C. Nov. 10, 2022).

Order and require resolution.[25] In the event the Commission enters the Proposed Order, Meta respectfully requests that it should be stayed pending judicial review for all of the reasons stated herein.

Meta Complied with Part VII of the Order

The OTSC's primary predicate for its proposed reopening of the Order is its conclusory assertion that Meta did not "establish and implement an effective privacy program as mandated by Part VII," citing to nothing more than gaps and weaknesses identified by Meta's Assessor during its Initial Assessment of the Privacy Program's first six months.[26] For all these reasons, Meta has responded in granular detail to the PFOF, which spends 1,066 paragraphs inventing new requirements not contained in the Order, inaccurately describing the scope of Meta's Privacy Program, contorting the meaning of the Assessor-identified gaps, failing to acknowledge well-documented maturation and growth in the Program's safeguards since inception, and ***not once identifying any harm to Meta's users***.[27]

The Commission misstates the very language of Part VII that it purports to apply. Rather, Part VII requires that Meta implement a "***comprehensive privacy program*** . . . that protects the privacy, confidentiality, and Integrity" of Covered Information. And there is no ambiguity as to what this requires. In the very next sentence, Part VII states that "[t]o satisfy this requirement," Meta must implement a privacy program that includes the particular components set forth in Part VII.A–J. Citing the ***correct*** standard, the Assessor concluded that Meta's Privacy Program is "appropriately comprehensive," and that the "key foundational elements

[25] *See* 16 C.F.R. § 3.72(b)(2).

[26] OTSC at 4, 12.

[27] *See generally* Response to the PFOF ("Resp. to PFOF"), Sections IV–VI.

necessary for an effective program are now in place."[28] Rather than merely implement the comprehensive Privacy Program required under the Order, as the Assessor noted, Meta undertook "a more comprehensive and time-intensive approach by redesigning the program and the associated Safeguards from the ground up."[29] Part VIII.D(1) specifically charges the Assessor with "determin[ing] whether Respondent has implemented and maintained the Privacy Program required by Part VII.A-J." The Initial Assessment is clear that it did. The Assessor nowhere concluded that Meta failed to implement the required Privacy Program. Meta invested billions of dollars, stood up a brand new organization, developed innovative technologies, consulted with experts, hired hundreds of personnel, and developed [redacted] of safeguards organized around broad domains.[30] And it did so by the date set forth in the Order.

Gaps and Weaknesses Were Contemplated by the Order—and Show That Meta's Privacy Program Is Working as Intended

Ignoring the Assessor's unambiguous language and the unprecedented scale and investment of Meta's drive to protect its users' privacy interests, the OTSC relies on nothing more than the number of gaps and weaknesses identified by the Assessor based on the Privacy Program's first six months.[31] But gaps in a program of this magnitude (and in the first six months of a 20-year term) are not a basis to find that no effective program exists. As the PFOF Response demonstrates, and as the FTC undeniably is aware, Meta's Privacy Program is composed of [redacted] of policies and procedures, thousands of professionals' full-time efforts, millions of lines of code, and billions of dollars of investment.[32] For that reason, the

[28] Ex. 4 (2021 Assessment Report) at 3 ("2021 Assessment Report").

[29] *Id.* at 6.

[30] *See* M. Protti Decl. ¶ 5; 2021 Assessment Report at 3.

[31] OTSC at 4.

[32] Ex. D (2023 Assessment Report) at 5–8 ("2023 Assessment Report"); Resp. to PFOF, Section IV.D ¶¶ 421–23.

Order contemplates—expressly, and in multiple places—that the Assessor would necessarily find gaps and weaknesses and provides avenues for Meta to address them—as it has.[33] Nor are gaps and weaknesses alone (particularly those only existing during its first six months) evidence that a compliance program is ineffective—rather, they are the standard measures of how companies identify ways to continuously improve and mature their programs.[34] Here, the gaps were limited to a fraction of the [redacted] of safeguards comprising the Privacy Program during the Initial Assessment.[35] Indeed, the Assessor's probing and thorough review and analysis identified ***no gaps or weaknesses*** in [redacted] of the Privacy Program's safeguards.[36] And as a result of Meta's risk-based design, most of the gaps that the Assessor did identify related to edge cases or *de minimis* exceptions within safeguards that the Assessor otherwise concluded were overwhelmingly effective.[37] A few examples illustrate the OTSC's fundamental error:

- The OTSC asserts that the Initial Assessment showed Meta [redacted][38] But Part VII contains no requirements at all with respect to the [redacted], and certainly no requirements that Meta undertake any particular steps for investigating these potential incidents, or set any enforceable standards for when such steps are "timely."[39] Meta developed these processes and timelines on its own—going beyond the Order's requirements.[40] And, in any case, the OTSC hides the ball.

[33] *See, e.g.*, Order, Part VIII.D.(2)–(3) (requiring Assessor to "identify any gaps or weaknesses in the Privacy Program"); Order, Part X.A(5)(c) (requiring the Independent Privacy Committee to meet with the Assessor quarterly and review "any material issues" raised in the Assessments).

[34] *See* Expert Report of Larry D. Thompson, Section VI.B ¶¶ 92–93 ("Thompson Report").

[35] Resp. to PFOF, Section IV.A ¶ 22.

[36] *Id.*

[37] *Id.* at Section I.A.6.n ¶ 78.

[38] OTSC at 7.

[39] *See* Resp. to PFOF, Section I.A.6.n ¶ 77–78.

[40] *See id.* at Section I.A.6.m ¶ 73.

What the Assessor's testing during the Initial Assessment ***actually*** showed was that Meta met its own self-imposed standards well over [redacted] of the time.[41]

- Likewise, the OTSC faults Meta's [redacted] completed required trainings,[42] but the facts tell a different story. While the Order requires only that Meta provide a privacy training program for its "employees,"[43] Meta did not stop there—dramatically expanding its training to include interns and contingent workers in addition to full-time employees.[44] Even with this self-imposed greater standard, more than [redacted] of all such learners completed Meta's first annual privacy training by the conclusion of the Initial Assessment.[45] For its second annual privacy training, that number increased to [redacted].[46]

- More troubling, what the OTSC highlights as the [redacted][47] issue was, in fact, no Order issue at all. The Commission argues that Meta [redacted] of certain higher risk third-party developers.[48] Not so. Even if the Order could possibly be read to require heightened monitoring measures for certain categories of developers (which it cannot), the OTSC omits that Part VII.E.1.c of the Order gave Meta a *year* from October 2020 to undertake its monitoring obligations (i.e., six months ***after*** the Initial Assessment concluded).[49] As the most recent Assessment states, Meta [redacted][50] In other words, what the OTSC deems the [redacted] finding had no bearing on Meta's Order compliance, was addressed before any possibly relevant Order provision came due, and related in any case only to a tiny percentage [redacted] of relevant third parties.

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[41] *Id.* at Section I.A.6.n ¶ 78.

[42] OTSC at 8.

[43] Order at Part VII.G.

[44] *See* Resp. to PFOF, Sections I.A.6.j ¶ 62, IV.H ¶¶ 759–61.

[45] *See id.* at Sections I.A.3 ¶ 21, I.A.6.j ¶ 63, IV.H ¶¶ 762–70.

[46] *See id.* at Sections I.A.6.j ¶ 64, IV.H ¶¶ 814–57.

[47] OTSC at 6.

[48] *Id*.

[49] Order at Part VII.E.1.c (requiring safeguards for "[m]onitoring Covered Third Party compliance with Respondent's Platform Terms through measures including, but not limited to, ongoing manual reviews and automated scans, and regular assessments, audits, or other technical and operational testing at least ***once every twelve (12) months***").

[50] 2023 Assessment Report at 11.

That Meta's Privacy Program "protects the privacy, confidentiality, and Integrity" of Covered Information is best demonstrated by the fact that the Commission cites ***no actual harm to users*** resulting from any gaps—either individually or in the aggregate. The OTSC, in tallying gaps and weaknesses, does not draw any connection between them and any harm to users. A conclusory assertion of increased risk does not make it so. And unsubstantiated assumptions of unspecified, unquantified, and unrealized risks do not amount to an ineffective compliance program. Quite the opposite. At the same time the Commission was preparing its OTSC, its colleagues in the Department of Justice issued updated guidance for the "Evaluation of Corporate Compliance Programs," stating that "[o]ne hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment."[51] The Commission's position is simply out of step with the way in which compliance programs function as a general matter.

Most of the Gaps and Weaknesses Do Not Implicate Any Order Requirement

More fundamentally, as the above examples also demonstrate, the OTSC ignores that the vast majority of gaps related to functions and safeguards not specifically required by Part VII. In other words, the OTSC asserts that Meta has violated Part VII purportedly as a result of Assessor-identified gaps in Meta's own self-imposed processes.[52] These are processes that Meta developed to go above and beyond Part VII's requirements in an effort to develop an even more robust, more comprehensive, and more sustainable Privacy Program than the parties agreed to in 2019.[53] This is not a mystery. The Assessor clearly disclosed its approach in a section titled

[51] *Evaluation of Corporate Compliance Programs,* U.S. Dep't. of Justice, at 15 (Mar. 2023), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[52] OTSC at 12.

[53] *See* Resp. to PFOF, Section I.A.6.e ¶¶ 38–39.

"Assessment Methodology," explaining that its yardstick was not simply Part VII, but a broader Assessment "framework," incorporating privacy compliance best practices from third-party standard-setting organizations "as well as our collective professional experience on privacy program standards, and tailored . . . to [Meta's] unique size and complexity."[54] For that reason, the Assessor identified a gap or weakness whenever it identified a narrow exception from Meta's policies and procedures, or even simply an opportunity to improve Meta's Privacy Program processes. As described above, that review—even against this more demanding standard—identified no gaps or weaknesses in [redacted] of the Privacy Program's safeguards. And even as to the [redacted] of safeguards, [redacted] of the issues identified by the Assessor related ***exclusively*** to how Meta documented its processes and safeguards, not their operational effectiveness.[55] The Commission draws no connection between the gaps and weaknesses on the one hand and particular requirements of Part VII on the other. Nor could it. Meta established and implemented a Privacy Program that meets all of the requirements in Part VII.

The Gaps and Weaknesses on Which the OTSC Is Premised No Longer Exist

At this point, the findings from the Initial Assessment are stale and long since overtaken by events, including the most recent (and first full biennial) Assessment. In the years since the Initial Assessment, Meta has addressed each of the Assessor's findings from that Assessment through [redacted] management action plans ("MAPs") comprising [redacted] of individual milestones,[56] [redacted] of which were closed to the Assessor's satisfaction (i.e., marked as addressing and remediating the underlying findings and subject to ongoing testing) according to

[54] 2021 Assessment Report at 10.

[55] *See* Resp. to PFOF, Section I.A.3 ¶ 21.

[56] *See id*. at Section I.A.4 ¶ 22.

the Assessor's first full report released last summer.[57] The Assessor has since confirmed that Meta has addressed and remediated the remainder of the related findings through its MAPs, which remain subject to ongoing testing. That report makes clear that the gaps and weaknesses as detailed in June 2021 no longer exist, and have not for some time because Meta [redacted] addressed them.[58] The Assessor praised the continuous and notable improvement of the "effectiveness and maturity of" the Program [redacted][59] attributable to Meta going [redacted] to build [redacted][60] The Assessor found ***no gaps or weaknesses*** in the vast majority of Meta's Program safeguards, and concluded that its findings were "consistent with the maturation of the [Program] in light of Meta effectively addressing previous weaknesses."[61] Once again, this is precisely how compliance is supposed to work. And the Commission's decision to file the OTSC—mere hours before its Staff was scheduled to meet with the Assessor to preview these more recent findings—speaks volumes.

Gaps and Weaknesses Are Not Order Violations

Not surprisingly, the OTSC cites no basis for its view that such gaps constitute a violation of Part VII—no case law, no third-party sources, no guidance, nothing. And with good reason—it is flatly contrary to longstanding and established compliance practice, guidance, and authority, as explained in more detail in the accompanying declarations from Dr. Eugene Soltes, the

[57] *See* Ex. C (Letter from M. Protti to Federal Trade Commission (June 30, 2023)) at 2.

[58] 2023 Assessment Report at 13.

[59] *Id.* at 7–8.

[60] *Id.* at 13.

[61] *Id.* at 7.

McLean Family Professor of Business Administration at Harvard Business School, who advises the Department of Justice and other federal agencies on compliance programs;[62] and Larry Thompson, former Deputy Attorney General who has served as a corporate compliance monitor.[63]

As Professor Soltes explains, the most effective compliance programs are those in which companies, like Meta here, continuously monitor for risk, identify new areas for improvement, and evolve to make those improvements.[64] Particularly in a well-resourced, risk-based compliance program such as Meta's, the gaps identified through such "dynamic monitoring" indicate that the program is working as intended, enabling the company to improve and evolve over time.[65] Despite the Commission's suggestion to the contrary, "the basic count or frequency of a compliance program's gaps is not a useful indicator of how effective or ineffective the overall program is in achieving its goals."[66] Professor Soltes concludes—consistent with the Assessor's own view—that, as of July 2021, Meta "had established the foundations of a comprehensive and effective privacy compliance program" and has since evolved further.[67] The existence of the individual gaps identified by the Assessor, Professor Soltes adds, "is neither inconsistent with, nor undermines, th[is] basic observation."[68]

Former Deputy Attorney General Thompson underscores these same principles in his own expert analysis. It is "well-established," he notes, that good compliance programs

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[62] Expert Report of Professor Eugene F. Soltes at 1–2 ("Soltes Report").

[63] Thompson Report, Section II ¶¶ 3, 11.

[64] Soltes Report at 8–9.

[65] *Id*. at 9

[66] *Id.* at 10.

[67] *Id.* at 15.

[68] *Id*.

"improve, evolve, and mature *over time*."[69] Effective compliance programs should therefore expect to identify gaps and weaknesses through regular monitoring and testing. While these gaps represent opportunities for the company to improve its compliance program, their mere "existence . . . should not lead to a conclusion regarding [the] effectiveness" of that program.[70] On the contrary, third-party commentary makes clear that monitors should be particularly wary about "drawing or suggesting any early conclusions" based on their initial monitor reports.[71] If anything, it is the *absence* of gaps or weaknesses that should raise alarms regarding the adequacy of a company's program (or the depth of the monitor's review).[72] Drawing on DOJ guidance and his own experience as the DOJ-appointed Independent Compliance Monitor and Auditor for Volkswagen AG, Thompson observes that "the gaps and weaknesses identified in the Assessor's initial report are *precisely what is to be expected* for a company as large and complex as Meta," particularly considering that the Privacy Program is early in its development and the 20-year term of the Consent Order.[73] Thompson concludes that the Commission, having ignored basic principles governing the evaluation of corporate compliance programs, "has made *premature and inaccurate* conclusions" regarding the efficacy of the Privacy Program.[74]

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[69] Thompson Report, Section VI.B ¶ 89 (emphasis in original).

[70] *Id*. at Section IV.B.

[71] Thomas J. Perrelli, *The Life Cycle of a Monitorship*, Glob. Investigations Rev. (Apr. 25, 2022), https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/the-life-cycle-of-monitorship.

[72] *See* Thompson Report, Section VI.B ¶¶ 91–92; Soltes Report at 11.

[73] Thompson Report, Section VI.B ¶ 95 (emphasis in original).

[74] *Id*. at Section VI.B ¶¶ 99, 103 (emphasis in original).

Inadvertent and Promptly Remediated Technical Errors Provide No Cause to Reopen the 2020 Order

In comparison to the 1,066 paragraphs of Preliminary Findings of Fact the Commission lavishes on Meta's Privacy Program circa 2021, the Commission devotes less than 10% of its proposed findings to a handful of inadvertent coding errors occurring between 2018 and 2020 involving Meta's Messenger Kids product and a prophylactic safeguard that the Company voluntarily adopted to protect against potential abuse of users' data (the "90-Day Limitation").[75] That the Commission devotes so little time to these matters makes sense when viewed in context: Meta self-identified the errors, remediated the errors quickly, and timely disclosed the matters to the Commission and to users.[76] Additionally, the technical errors affected only limited users, for brief periods of time,[77] almost entirely prior to the issuance of the Order—in fact, the Messenger Kids technical errors were disclosed to the Commission before it even filed its complaint in 2019.[78]

Moreover, the errors were unlikely to mislead a reasonable consumer or be material to a user's adoption of the service. Meta is clear in its terms of service that coding and other technical errors can and will happen.[79] And reasonable consumers, the Commission, and experts recognize that software products will never be entirely bug free.[80] Good software development means identifying and promptly fixing problems—exactly what Meta did for the errors raised in

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[75] *See* PFOF ¶¶ 1067–164.

[76] *See generally* Resp. to PFOF, Sections II.A.5, IIA.6, III.A.5, III.A.6.

[77] *See id.* at Sections II.A.5 ¶¶ 148–51, III.A.5 ¶¶ 201–05, 213.

[78] *See* PFOF ¶¶ 1153, 1164.

[79] *See* Resp. to PFOF, Sections II.A.1 ¶¶ 110–11, III.A.2 ¶¶ 175–77.

[80] *Public Comment on NTIA Safety Working Group's "Coordinated Vulnerability Disclosure 'Early Stage' Template,"* Fed. Trade Comm'n, at 1–2 (Feb. 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-national-telecommunications-information-administration-regarding-safety-working/170215ntiacomment.pdf ("NTIA Statement"); *see also* Martens Report, Sections IV.C ¶ 63, V.A ¶¶ 117–24.

the Preliminary Findings of Fact.[81] For this reason, the technical errors did not render Meta's statements regarding the Messenger Kids product and the 90-Day Limitation misrepresentations in violation of Section of the FTC Act or the Order.

The Commission has known all of this information for years and taken no enforcement action.[82] It thoroughly investigated the Messenger Kids and 90-Day Limitation technical errors immediately after Meta's self-disclosures in 2019 and 2020.[83] Meta fully cooperated, producing tens of thousands of pages of documents, narrative responses to Commission requests, and making employees available for testimony.[84] And after receiving all of this material, the Commission effectively dropped its inquiries into the matters; Meta's last correspondence with the staff investigating these matters was in March 2022.[85]

Yet, more than a year after ceasing its inquiries into these matters without any indication of enforcement plans, the Commission has appended these inadvertent technical errors to the OTSC and Preliminary Findings of Fact, alleging that they constitute misrepresentations to Meta users in violation of Section 5 of the FTC Act, COPPA, the COPPA Rule, and the 2012 and 2020 Orders.[86] But as discussed immediately above, and set out in more detail in the Argument, Meta never misrepresented that it would not experience bugs in its products—and these specific bugs were of limited duration and impact, disclosed and remediated promptly—in the case of Messenger Kids, before the finalization of the 2020 order. The Commission's decision to raise these issues now is emblematic of the baselessness and unfairness of the Order to Show Cause

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[81] *See* Martens Report, Sections V.C.1 ¶ 136, V.C.2 ¶ 140, V.C.3 ¶ 146.

[82] *See* Resp. to PFOF, Section IV.A ¶ 22.

[83] *See id.* at Sections III.A.7–8 ¶¶ 217–30, II.A.6 ¶¶ 156–63.

[84] *See id*. at Sections III.A.8 ¶¶ 221–30 (Messenger Kids), II.A.6 ¶¶ 159–63 (90-Day Limitation).

[85] *See id.* at Sections III.A.8 ¶ 231 (Messenger Kids), II.A.6 ¶ 164 n.469 (90-Day Limitation).

[86] OTSC at 12; PFOF ¶¶ 1067–164.

process: the Commission has alleged that these inadvertent technical errors support good cause to modify the order as pretextual hooks for unprecedented, sweeping injunctive relief that bears no rational relation to these matters or the Order.

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Nothing in the OTSC or the Commission's factual findings amounts to a violation of any order, statute, or regulation. Even on their own terms, those findings are substantially inaccurate and misleading. At a minimum, they raise *hundreds* of individual and substantial issues of fact to be resolved.

The Commission Lacks Authority to Reopen the Order

Regardless of the lack of merit in its factual findings, the Commission simply—and for many separate reasons—does not have the legal authority to reopen the Order.

First, there is no precedent (and no statutory or legal basis) for the Commission to modify a consent order without the explicit agreement of its counterparty. The Commission has determined through formal rulemaking that Section 5(b) only allows for the modification of "Commission orders issued on a litigated or stipulated record," clearly distinguishing between such orders and consent orders.[87] Because Section 5(b) does not permit the Commission to modify consent orders, 16 C.F.R. § 2.32(c) requires settling respondents to specifically agree that the Commission can modify consent orders "in the same manner" as Section 5(b) provides for litigated orders. If the statute provided for modification of consent orders, the Commission would not have promulgated a rule that asks respondents to agree their consent orders can be modified "in the same manner provided by statute." But, as the Commission has previously

[87] 16 C.F.R. § 2.32(c).

acknowledged, the Order at issue here has no such provision,[88] and, to the contrary, specifies that only two narrow provisions (Parts II–III) are subject to future modification (by consent of the parties) that would be meaningless if the entire Order could be unilaterally modified. And any argument that the Commission can simply assume such authority ignores binding principles of contract law holding that the Commission cannot "unilaterally obliterate a part of the consideration—indeed an important part—by which it secured [the respondent's] assent to be bound,"[89] the plain text of both Section 5(b) and Rule 2.32(c), and the language the parties chose to use in the Order. Indeed, to hold otherwise could not be squared with controlling law. The Supreme Court has long held that it "is not reasonable to suppose" that a party would pay a substantial sum (in this case, $5 billion) to finally "resolve[]" all released claims,[90] and "leave to the [government] the absolute right completely to nullify the chief consideration" underlying the agreement.[91]

Second, the FTC lacks Congressional authority to alter, modify, or set aside an order approved by a federal district court. Section 5(b) is limited on its face to cease-and-desist orders issued to resolve administrative complaints—not orders obtained through litigation in federal court issued under the judicial authority of Sections 5(*l*) and 13(b). Section 5(b) applies only "[a]fter the expiration of the time allowed for filing a petition for review,"[92] meaning that the Commission could only reopen orders for which the respondent was "allowed" to file a petition

[88] Rule 2.32 applies to "[e]very agreement in settlement of a Commission complaint." As the government correctly argued (about the instant settlement with Meta), subpart C's consent order procedures are inapplicable because "there was no *administrative* complaint to settle; rather, the proposed settlement would resolve a complaint filed in *this* Court by the United States." FTC Surreply to EPIC, *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Jan. 24, 2020) (Dkt. No. 27) at 7 (emphasis in original).

[89] *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 346 (D.C. Cir. 1965).

[90] Stip. Order at 1.

[91] *Appleby v. Delaney*, 271 U.S. 403, 413 (1926).

[92] 15 U.S.C. § 45(b).

for review (i.e., not orders which could be ***appealed*** from the district court). But the Order—reviewed and approved by a district court—was not such an order. The Commission understood this at the time and memorialized its understanding in the Order. Unlike virtually every settlement, where the proposed respondent waives "all rights to seek judicial review," the Order provides that Meta "*and the Commission* waive all rights to appeal" the Order.[93] Both parties agreed and acknowledged that there was no right to file a petition for review.[94] The relevant rights subject to waiver were Meta's and the Commission's respective rights to appeal from the court's order. Section 5(b) therefore has no application to this Order.

Third, Section 5(b) cannot be used for order "enforcement," as the Commission proposes in the OTSC.[95] The OTSC purports to be an enforcement action, seeking to impose remedies based on the Commission's unsubstantiated belief "that Meta failed to establish and implement an effective privacy program as required under the 2020 order and also violated the 2012 order."[96] But no authority allows the Commission to adjudicate whether its orders have been violated. As the Commission just stated, its orders are "enforceable ***only*** by order of the district court."[97] The OTSC's attempt to graft such authority onto Section 5(b) would usurp the "enforcement responsibility of the courts."[98]

Fourth, the OTSC openly defies the exclusive jurisdiction of the United States District Court for the District of Columbia "for purposes of construction, modification, and enforcement

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[93] Order at 1.

[94] *Id*.

[95] *See* OTSC at 12.

[96] Mot. to Dismiss, *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562 (D.D.C. Dec. 13, 2023) (Dkt. No. 18) at 1.

[97] *In re Intuit Inc.*, 2024 WL 382358, at *56 (F.T.C. Jan. 22, 2024).

[98] *United States v. J. B. Williams Co.*, 498 F.2d 414, 422 (2d Cir. 1974).

of this Stipulated Order."[99] The court erred in denying Meta's Motion to Enforce the Stipulated Order,[100] and its ruling conflicts with its prior rulings, binding authority from the Supreme Court and D.C. Circuit, the parties' contemporaneous representations, and the consent decree's plain language. The Stipulated Order includes the Order annexed to it as Attachment A. The Commission presented the Stipulated Order (including Attachment A) to the court as a single, integrated document, and reiterated the court's jurisdiction by stating as Attachment A's very first finding that the "Court has jurisdiction over this matter."[101] "Court" means court and the Stipulated Order includes its attachment. The FTC knows this, and has admitted as much in formal correspondence. There is no other reason for the Commission to propose to delete its "finding" that the "Court has jurisdiction over this matter."[102] The Commission cannot line edit the court's jurisdiction away.

Fifth, the Commission cannot modify an Order that was entered "to resolve" a federal court complaint. The Commission brought suit in federal court in 2019 to obtain relief that only a federal district court could provide pursuant to statutes—15 U.S.C. § 45(*l*) and 15 U.S.C. § 53(b)—that allow only district courts to impose the remedies, both monetary and injunctive, requested by the FTC.[103] The court exercised its jurisdiction and entered the parties' Stipulated Order in final judgment of the government's complaint, binding Meta and the FTC alike.[104] Once it did so, res judicata applies. No one—including a federal agency—can take a final

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[99] Stip. Order at 5.

[100] *United States v. Facebook, Inc.*, 2023 WL 8190858, at *1 (D.D.C. Nov. 27, 2023), *appeal filed*, No. 23-5280 (D.C. Cir.).

[101] Order at 1.

[102] *Compare id.* (stating, in Finding 1, that the "Court has jurisdiction over this matter") *with* Proposed Order at 1 (deleting Finding 1 of the Order entirely).

[103] Compl. ¶¶ 193–94 (citing 15 U.S.C. §§ 45(*l*) and 53(b)).

[104] Stip. Order at 1.

district court judgment obtained as a litigant and rewrite it. Courts have routinely and uniformly rejected arguments to the contrary.[105]

The record here is clear that both parties agreed that the Order was incorporated into—and forms a part of—the Stipulated Order entered by the district court. Both Meta and the Commission specifically said so to the Court, to the public, and to each other, with the Commission representing unequivocally and in writing as recently as July 2022 that the court's Stipulated Order imposes and required Meta's compliance with the relief set forth in the Order. If the Commission now reverses course and takes the position that it retained the authority to unilaterally modify the Order itself, then there was no meeting of the minds and the parties should be returned to their respective positions as of July 2019.

Neither Condition for Reopening Is Met–Conditions of Fact Have Not Changed and No Public Interest Requires Reopening

To the extent Section 5(b) applies at all, the Commission would have to abandon decades of precedents to find any sufficient legal basis for reopening.

The Commission has thus long required that any reopening must be preceded by the detailed demonstration of "exceptional circumstances, new, changed or unforeseen at the time" the order was entered, or the reasons why the public interest would be served by the modification.[106] Mere conclusory assertions are insufficient. The OTSC does not even once mention the steep standard to reopen a Commission order. In fact, the Commission has recognized the "general presumption" against reopening of its orders where it is ***the Commission***

[105] *See infra* Section I.E.

[106] *In re Watson Pharms. Inc.*, No. C-4373, 2018 WL 6804369, at *3 (F.T.C. Dec. 17, 2018); *In re Removatron Int'l Corp.*, 114 F.T.C. 715, 717 (1991).

that seeks the reopening.[107] The OTSC makes no effort to meet this standard and cannot do so in any event.

The Commission's apparent belief that alleged order violations are "changed circumstances" is foreclosed by established law—both judicial and administrative—holding the opposite—that purported order violations "fall[] far short of the type of 'changed circumstance' that might warrant the amendment of a settlement agreement."[108] Commission precedent is clear: changed circumstances must be "unforeseeable,"[109] but the potential for order violations is ***always*** foreseeable and reflected in settlement negotiations. The Order is no different; Part XVI specifically discusses that very scenario.[110] Thus, even Order violations (which the Commission could not prove) would not constitute changed circumstances. The Commission's allegations about the 2019 Messenger Kids and 2020 90-Day Limitation coding errors are not changed circumstances either. For one thing, conduct predating the Order cannot, definitionally, constitute "changed circumstances" since the Order's entry. Indeed, Commissioner Bedoya's statement correctly states that any such changed circumstances must be "intervening."[111] But more fundamentally, the possibility of such violations—which Meta vigorously disputes—was not only foreseeable; it was specifically foreseen.[112] And, in any case, the facts on which the Commission relies are years old. Meta has long since addressed the Assessor's feedback from

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[107] *United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1447 n.1 (9th Cir. 1985).

[108] *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 9 (D.D.C. 2002).

[109] *Removatron*, 114 F.T.C. at 716 (citing cases).

[110] *See* Order at Part XVI.

[111] Statement of Comm'r Alvaro Bedoya, *In the Matter of Facebook, Inc.*, Fed. Trade Comm'n, at 1 (May 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023-05-02-Bedoya-Facebook-Order-Statement-FINAL.pdf ("Comm'r Bedoya Statement").

[112] Gov't Resp. to *Amici*, *United States v. Facebook, Inc.*, No. 19-cv-2184-TJK (D.D.C. Jan. 24, 2020) (Dkt. No. 28) at 11 ("Therefore, if the FTC were subsequently to discover any deceptive or unfair practices, whether that practice occurred before or after June 12, 2019, it could bring an action to address that issue.").

the Initial Assessment (in many cases, before the Initial Assessment even concluded) and remediated the Messenger Kids and 90-Day Limitation coding errors. As a matter of basic grammar, the Commission cannot say that facts "have so changed" when they are long outdated.

Nor can the Commission invoke the "public interest" to modify the Order. Under analogous case law under Federal Rule of Civil Procedure 60(b), the "public interest" standard applies only where order modifications are agreed to.[113] Where there is a disagreement, "a more stringent standard is necessarily in order" because unelected "officials must be constrained in some way from imposing their interpretation of the 'public interest' on unwilling parties."[114] In no case does the "public interest" standard allow the Commission to modify an order to "better achieve its objectives," as the OTSC purports to do,[115] because, according to controlling Supreme Court law, a consent decree has no objectives.[116] And only months ago, the Commission argued that the "proper relief" for a breach of a Commission order is not to modify the order but rather, "at most," to "simply order that [the breaching party] follow it."[117]

Regardless, the OTSC makes no attempt to explain why any of its proposed changes—let alone all of them—would serve any notion of public interest as the Commission has ever applied that phrase. The OTSC points to no user harm or even any meaningful risk of user harm. Similarly, the OTSC is based primarily on assertions that Meta failed to comply with Part VII, but the Commission's "general policy" has long been that the public interest is not served by

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[113] *United States v. Baroid Corp.*, 130 F. Supp. 2d 101, 103–04 (D.D.C. 2001).

[114] *Id*.

[115] OTSC at 12.

[116] *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971).

[117] Gov't Opp. to X Corp's Mot. for Protective Order, *United States v. Twitter, Inc.*, No. 3:22-cv-3070-TSH (N.D. Cal. Sept. 11, 2023) (Dkt. No. 41) at 21.

reopening an order "where substantial questions exist about a respondent's compliance with the very provision sought to be modified."[118]

But the public interest ***does*** require "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."[119] The Commission frequently invokes this strong public interest in finality when denying reopening requests by respondents; the Commission wholly disregards it here.

This Proceeding Is Unconstitutional[120]

The Commission's unprecedented proceeding is unconstitutional in numerous ways. To start, the Commission's abuse of its limited reopening authority is illegal and unconstitutional. The OTSC deprives Meta of its due process rights by seeking to impose onerous injunctive relief without affording any meaningful process. When the FTC has "reason to believe" that laws or orders have been violated and seeks to adjudicate those violations, it issues ***a complaint***.[121] When it does so, a respondent has rights to put the Commission to its burden of ***proving*** those charges, including through discovery and a hearing on both the ultimate issue of liability and on the appropriate remedy, if any.

Here, though, the Commission seeks to use its reopening authority to avoid proving its assertions—and it does so in violation of its rules and procedures, which dictate that "an individual or a company alleged to have violated laws administered by the Commission" is

[118] *In re Am. Dental Ass'n*, No. 9093, 111 F.T.C. 735 (1988).

[119] *Baldwin v. Iowa State Traveling Men's Assn*., 283 U.S. 522, 525 (1931).

[120] Meta files this response and answers the OTSC subject to the constitutional arguments and objections it has asserted in the litigation captioned *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562 (D.D.C.), and included herein.

[121] 15 U.S.C. § 45(b) ("Whenever the Commission shall have *reason to believe* that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce . . . it shall issue and serve upon such . . . corporation a complaint.").

entitled to formal, adjudicative proceedings.[122] The Commission's own procedures classify reopening proceedings as nonadjudicative for a reason.[123] They do not afford Meta the *right* to any hearing or the *opportunity* for a hearing on either the merits of the Commission's assertions that it violated its legal obligations or on the propriety of the changes in the Proposed Order. Given the sweeping, transformational changes in the Proposed Order, the Due Process clause requires much more.

The Commission's abuse of its rules compounds its unprecedented prejudgment and bias well beyond what any judicial precedent has allowed. This is not a case where the Commission has merely found "good cause" to allege facts in a complaint. The Commission has already formally determined that "changed conditions ***demonstrate*** that additional modifications to the Order are ***needed***."[124] That formal determination rests on preliminary ***findings*** of fact by the Commission.[125] We are aware of no instance in which the Commission has ever made "preliminary" findings of fact in "support" of ***any*** administrative action it has ever taken. Finding facts is a quintessential adjudicative function, meaning that the Commission has already exercised both prosecutorial and adjudicative roles simultaneously.[126] The Commission—an agency which has not lost a single administrative case this century—cannot fairly adjudicate facts it has already found or injunctive relief it has already determined is needed.

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[122] *See* FTC Procedures Manual, Federal Trade Commission, at 5 (2021) ("FTC Procedures Manual").

[123] *Id*.

[124] OTSC at 12.

[125] *Id*.

[126] *See In re Justs. of Sup. Ct. of Puerto Rico*, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.).

The Commission's Proposed Rewrite of the Order Dramatically Exceeds Its Authority

Even if the Commission's Section 5(b) authority applied here, it would not permit the Commission to rewrite the Order as it has proposed. Put simply, the Commission has never used Section 5(b) to propose such radical or extensive changes to an order—and with good reason.

Where it applies, Section 5(b) only allows the Commission to "alter, modify, or set aside" its orders.[127] Those terms cannot be bent to fit the Commission's policy preferences; they have established legal meaning referring to small, modest changes—not transformational changes that would result in an entirely new order.[128] The Commission cannot, through 800 separate changes and a swath of new provisions, purport to "modify" the parties' agreement.

Likewise, the Commission cannot use Section 5(b) to impose new injunctive relief. Section 5(b) provides the Commission with far less discretion and modification authority than Federal Rule of Civil Procedure 60(b) provides federal courts. Nonetheless, the D.C. Circuit has held that even with such broader authority, courts "may not, under the guise of modification, impose entirely new injunctive relief."[129]

That is precisely what the Commission seeks to do in the Proposed Order. Virtually none of its 800 changes "modify" provisions of the 2020 Order. The Commission's own press release touts them as "new." Those new provisions have no factual connection to the Commission's asserted facts—let alone the provisions of the 2020 Order. Citing *Salazar*, Commissioner Bedoya has already noted concerns that the Commission's proposed blanket prohibition on teen

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[127] 15 U.S.C. § 45(b).

[128] *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."); *United States v. Carter*, 421 F.3d 909, 913 (9th Cir. 2005) (holding that "alter" means "some degree of change or modification, but not a changed meaning").

[129] *Salazar by Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018).

data lacks any nexus to any asserted facts.[130] But the other changes suffer from the same fatal flaws.

In fact, as the Commission recognized in 2019, most of the changes would drastically exceed the Commission's remedial authority altogether, falling well beyond the narrower bounds of Section 5(b). For example, the Proposed Order's exponential expansion of Meta's Privacy Program to cover topics as far afield (and inherently ambiguous) as "economic harm," "reputational harm," "relationship harm," and "harm to an individual's autonomy" find no plausible link to *any* asserted facts, any Assessor findings, or anything in the Order.[131] Nor could they—nothing required the Privacy Program to cover those topics.[132] They merely reflect ways in which this Commission would have preferred that the Order read differently in light of its policy goals. Indeed, the Proposed Order includes many of the so-called "transparency" provisions called for by the Commissioners who dissented in 2019.[133] Nothing in the Order justifies these changes and nothing in Section 5(b) authorizes the Commission to take a mulligan.

Similarly, the Commission's proposed Part X—an "entirely new" provision—would prohibit Meta from introducing or changing any features until the Assessor confirms that any material gaps or weaknesses have been fully remediated. Setting aside the inherent vagueness and unworkability of this provision, it does not "modify" any provision of the 2020 Order or

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[130] Comm'r Bedoya Statement.

[131] *See* Proposed Order at Definition T (defining "privacy risks and harm").

[132] *See* Order at Part VII (Preamble) (requiring the Company to maintain a privacy program "that protects the privacy, confidentiality, and Integrity of the Covered Information").

[133] *See* Dissenting Statement of Comm'r Rohit Chopra, *In re Facebook, Inc*., Fed. Trade Comm'n, at 13–15 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf ("Comm'r Chopra Dissent"); Dissenting Statement of Comm'r Rebecca Kelly Slaughter, *In the Matter of FTC vs. Facebook*, Fed. Trade Comm'n, at 12–13 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf ("Comm'r Slaughter Dissent").

relate to anything in the OTSC. Indisputable facts show that, according to the Assessor, Meta prioritized addressing all of the Assessor's feedback [redacted][134] (even where it disagreed)—and has addressed virtually all of them to the Assessor's satisfaction, in many cases before the Initial Assessment was completed. These changes would "impose entirely new injunctive relief," which Section 5(b) does not and cannot permit. And Section X is another paradigmatic example of the Proposed Order's absence of any tailoring, let alone "suitable" tailoring. Its overbreadth would restrict Meta from making ***any*** product changes—even though the overwhelming majority of those changes have literally no privacy implications at all.

Likewise, the Proposed Order would add a requirement that Meta add to its Board of Directors an individual with experience at a "civil liberties . . . nonprofit."[135] As the Commission stated just four years ago, "Even assuming the FTC would prevail in litigation, a court would not give the Commission carte blanche to reorganize Facebook's governance structures and business operations as we deem fit."[136] That remains equally true today. The *only* thing that has changed is the Commission.

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The Commission's OTSC is unprecedented for a reason. It is unlawful at every step. At its core, the Commission simply wants a do-over—to add entirely new terms that were not and would not have been included in 2019. The law is clear that it cannot do so. The D.C. Circuit has held—in no uncertain terms—that any authority to ***modify*** an order cannot be stretched to add new terms.[137] "That practice would end run the demanding standards for obtaining

[134] 2023 Assessment Report at 13.

[135] Proposed Order at Definition M.

[136] July 2019 Statement at 6.

[137] *Salazar*, 896 F.3d at 498.

injunctive relief in the first instance, would deny the enjoined party the contractual bargain it struck in agreeing to the consent decree at the time of its entry, and would destroy the predictability and stability that final judgments are meant to provide."[138]

The Commission's efforts to do just that in this case would further erode public confidence in the Commission and impair its ability to obtain relief through consent orders and to monitor compliance through independent third parties. As former Deputy Attorney General Thompson explains at length, the Commission's attempt to rewrite the Order reflects a "punitive and adversarial approach" that will "tend[] to deter other companies from even agreeing to a monitorship or an independent third-party review" in the first place.[139] The "moral hazard" created by the Commission's proposed rewrite would therefore "limit the broader benefits" that monitorships and independent reviews "provide to the public, regulatory bodies, and the government."[140]

Reopening here would eviscerate reliance and trust in the consistency and predictability of the Commission and the finality and certainty of its orders. Nearly five years ago, two Commissioners dissented from the parties' settlement, arguing—unsuccessfully—that the public interest required more.[141] A new Chair has publicly embraced those arguments to support the very relief rejected by the Commission.[142] But Section 5(b) cannot plausibly or lawfully authorize a differently composed Commission to turn around and modify that order in the

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[138] *Id*.

[139] Thompson Report, Section VI.D ¶ 125.

[140] *Id.* at Section VI.D ¶ 129.

[141] *United States v. Facebook, Inc.*, 456 F. Supp. 3d 115, 125 (D.D.C. 2020) ("[E]ven some FTC Commissioners may disagree with that decision, but it does not follow that the Stipulated Order is not in the public interest.").

[142] Digit. Content Next, *F.T.C. Chair Lina Khan live at the 2024 DCN: Next Summit*, YouTube, at 23:30–26:00 (Feb. 9, 2024), https://www.youtube.com/live/Ov5zj46YmSw?si=Knkj32gFSqhURp7D.

absence of any legally cognizable changed circumstances, let alone to rewrite it.[143] If that were the case, then no order would ever be final and no rational party would agree to relief that "would apply as an initial matter, subject to later change at the Government's election."[144]

[143] *See In re Louisiana-Pac. Corp.*, 112 F.T.C. 547, 1989 WL 1126760, at *13 (Nov. 15, 1989) (holding that "public interest" cannot be invoked by a party to "rescind its consent to the order and argue again the issues that the consent agreement resolved").

[144] *United States v. Winstar Corp.*, 518 U.S. 839, 909–10 (1996) (plurality opinion).

BACKGROUND

A. The 2012 Order

On April 29, 2011, Meta agreed to settle administrative allegations that it engaged in unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *In re Facebook, Inc.*, Dkt. No. C-4365, File No. 092-3184 (F.T.C. Nov. 29, 2011) ("2011 Agreement").

On August 10, 2012, the FTC approved a final settlement with Facebook, which resolved these allegations, and which was reflected in an order entered by the FTC in its administrative proceeding against Meta on July 27, 2012. *See* Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. July 27, 2012) ("2012 Order"). Unlike the Order, the 2012 Order provided that the "Federal Trade Commission has jurisdiction of the subject matter of this proceeding." *Id.* at *2. The parties' agreement preceding the 2012 Order also expressly stated that the 2012 Order may be "altered, modified, or set aside" in the same manner as FTC orders "issued on a litigated or stipulated record." *Id.*

Meta did not admit—nor did the FTC seek to prove—any of the facts alleged in connection with the 2012 Order, other than jurisdictional facts. *Id*. at *1. As part of the final settlement, Meta nevertheless agreed to comply with the wide-ranging remedial measures set out in the 2012 Order, including a prohibition on misrepresentations with respect to the privacy or security of certain user information, and a requirement that Meta establish and maintain a comprehensive privacy program. *Id*. at *3–5. In addition, Part I of the 2012 Order included a prohibition against misrepresenting the extent to which Meta "maintains the privacy or security of covered information" in connection "with any product or service." *Id.* at *3. The 2012 Order did not impose on Meta any specific requirements with respect to the treatment of minor data, nor did the FTC allege any facts to suggest that Meta's conduct violated either COPPA, 15

U.S.C. § 6502, or the Children's Online Privacy Protection Rule ("COPPA Rule"), 16 C.F.R. Part 312. (2012 Order at *3.)

B. Extensive Negotiations Precede the Stipulated Order

On March 19, 2018, Meta announced it had launched an internal investigation into the potential misuse of user data by third-party developers. (Compl. ¶ 127.)[145] The same month, the FTC initiated its own investigation. (*See* Facebook, Inc. (n/k/a Meta Platforms, Inc.), Quarterly Report (Form 10-Q) (Apr. 26, 2018) at 49.)

The FTC's initiation of its investigation was the start of a 17-month process that involved "lengthy" and "hard-fought" negotiations among Meta, the FTC, and DOJ, including around 100 calls and meetings with the FTC enforcement staff and/or commissioners. *Facebook*, 456 F. Supp. 3d at 121; *see also* July 2019 Statement at 6; Consent Mot. at 6–7 (referring to "a lengthy investigation and period of negotiation"). Over the course of those negotiations, Meta, the Staff, the Commissioners, and DOJ engaged in detailed discussions regarding virtually every sentence in the Order.

C. Meta Discloses Two Technical Errors in Its Messenger Kids Product

On July 15, 2019, while those discussions were ongoing, Meta voluntarily disclosed to the FTC that it had discovered two technical errors in its Messenger Kids product. (Resp. to PFOF, Section III.A.8 ¶ 221.) The technical errors made it possible for Messenger Kids users—in extremely limited circumstances—to communicate with friends of their parent-approved contacts who were not themselves parent-approved contacts. (*Id.* at Sections III.A.5 ¶ 196, III.A.6 ¶ 208.) The errors were identified by Meta, remediated within hours of discovery, and impacted fewer than 10,000 known Messenger Kids users, amounting to approximately half of

[145] *See also Pursuing Forensic Audits to Investigate Cambridge Analytica Claims*, Meta (Mar. 19, 2018) https://about.fb.com/news/2018/03/forensic-audits-cambridge-analytica.

one percent of all Messenger Kids users at that time. (*Id.* at Sections III.A.5 ¶¶ 201, 204, III.A.6 ¶¶ 210–11, 213.) In addition to disclosing the errors to the FTC, Meta also proactively notified the parents of affected children. (*Id.* at Sections III.A.5 ¶ 206, III.A.6 ¶ 214.)

As described in more detail in the PFOF Response, Meta launched Messenger Kids in December 2017 as a COPPA-compliant messaging and video calling app built for children to connect with family and friends in a safe, parent-controlled environment. (*Id.* at Section III.A.1 ¶¶ 166–67.) One of the core features of the app is that parents control with whom their child can communicate. (*Id.* at Sections III.A.1 ¶ 170, III.A.3 ¶¶ 178, 182.) In June 2019, the Messenger Kids team learned that under certain specific and limited circumstances, a Messenger Kids user could create a group chat with their parent-approved contacts even if those contacts were not approved to connect with each other (the "Group Chat Technical Error"). (Resp. to PFOF, Section III.A.5 ¶ 196.) The Group Chat Technical Error inadvertently arose when: (1) a Messenger Kids user created a group chat from an *Android* device, *and* (2) that Messenger Kids user *simultaneously selected* more than one contact at the time same, *and* (3) one or more of those simultaneously selected contacts were not approved to connect with each other. (*Id.* at Section III.A.5 ¶ 197.) After Meta detected the Group Chat Technical Error on June 12, 2019, it remediated the issue in less than 24 hours by implementing a code change the morning of June 13, 2019. (*Id.* at Section III.A.5 ¶ 201.)

In July 2019, while investigating the Group Chat Technical Error, the Messenger Kids team internally discovered a technical error related to group video calls that occurred under limited circumstances. (*Id.* at Section III.A.6 ¶ 208.) This rare error (the "Video Call Technical Error") resulted in a parent-approved Messenger contact being able to add a non-parent-approved

individual to an ongoing one-to-one video call with a Messenger Kids user. (*Id.*) The Video Call Technical Error only occurred in specific circumstances: (1) an ongoing, (2) one-to-one, (3) video call between (4) the Messenger Kids user and (5) an approved Messenger user, (6) where the Messenger user chose to add a third party, (7) within a limited timeframe. (*Id.* at Section III.A.6 ¶ 209.) Upon internal detection of the Video Call Technical Error on July 2, 2019, Messenger Kids remediated the issue the same day. (Resp. to PFOF, Section III.A.6 ¶ 210.E.)

D. The 2019 Stipulated Order

On July 23, 2019, Meta, the Commission, and DOJ executed and announced a comprehensive agreement memorialized in a Stipulated Order to resolve, among other things, the claims to be set forth in a federal court complaint.[146] The following day, the FTC invoked the jurisdiction of the United States District Court for the District of Columbia ("District Court") by filing that Complaint together with the Department of Justice, seeking civil penalties, an injunction and other equitable relief. (Compl. ¶ 1.) The Complaint included five counts alleging violations of the 2012 Order and a claim that Meta violated Section 5 of the FTC Act in connection with its use of phone numbers provided by users for account authentication purposes. (*Id*. ¶¶ 155–90.) As the Complaint makes clear, *only* Article III courts have the authority to impose the relief sought, including both civil penalties and injunctive relief. (*Id*. ¶¶ 191–93.) Specifically, with respect to the injunctive relief, the Complaint "request[ed that the court], pursuant to 15 U.S.C. §§ 45(*l*) and 53(b), and pursuant to the Court's own equitable powers . . . [e]nter an injunction." (*Id*. ¶ 194.) Each of those statutory provisions authorizes courts, not the

[146] *See FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, Fed. Trade Comm'n (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook ("July 2019 Press Release").

Commission, to impose injunctive relief. *See* 15 U.S.C. § 45(*l*) (stating that in civil penalty actions, "United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate"); 15 U.S.C. § 53(b) (providing that "in proper cases" district courts may issue "a permanent injunction"). As in the 2012 Order, the Complaint did not set out any allegations regarding Meta's treatment of data from minors, nor did it otherwise allege violations of COPPA or the COPPA Rule.

The government also filed a Consent Motion for Entry of Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief. (Consent Mot. at 1.) In announcing the Stipulated Order, the FTC made clear that it would only "have the force of law when approved and signed by the district court judge." (July 2019 Press Release.) The Consent Motion stated that the parties had reached a settlement as to the Complaint's allegations and sought the entry of a Stipulated Order that required Meta to pay a $5 billion civil penalty and imposed new injunctive relief in the place of the 2012 Order. (Consent Mot. at 1.)

The injunctive relief to which the parties agreed was set out in Attachment A to the Stipulated Order. Under the Stipulated Order, Meta consented to the entry of Attachment A in the FTC's ongoing administrative proceeding. (Stip. Order at 4 ("IT IS FURTHER ORDERED that Defendant . . . shall 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; and (iii) modifying the Decision and Order in *In re Facebook, Inc.*, with the Decision and Order set forth in Attachment A.").)

In agreeing to the Stipulated Order, Meta did not admit or deny any of the allegations in the Complaint, and only admitted those facts "necessary to establish jurisdiction." (*Id.* at 2.) In addition, the Stipulated Order "resolve[d] all consumer-protection claims known by the FTC

prior to June 12, 2019, that [Meta], its officers, and directors violated Section 5 of the FTC Act." (*Id.* at 1–2.)

The Stipulated Order specified both that "[t]his Court has jurisdiction over the subject matter and all of the parties," and that "[t]his Court"—i.e., the District Court—"shall retain jurisdiction in this matter for purposes of construction, modification, and enforcement of this Stipulated Order." (*Id.* at 2, 5.) Similarly, Attachment A to the Stipulated Order provided that "this Court"—i.e., the District Court—"has jurisdiction over this matter." (Order at 1.) Attachment A to the Stipulated Order also included separate provisions in reliance on the District Court's ongoing jurisdiction. Part XV allows the FTC to obtain discovery from Meta under the Federal Rules of Civil Procedure "without further leave of court," and "the Commission waive[d] all rights to ***appeal*** or otherwise challenge or contest the validity of this Order." (*Id.* at 1, Part XV.)

Unlike the 2012 Order, the Stipulated Order did *not* provide that it could be "altered, modified, or set aside." (*See* 2011 Agreement (pursuant to which Meta agreed the 2012 Order could be modified).)

E. Attachment A to the 2019 Stipulated Order

The FTC described the Stipulated Order as imposing "unprecedented new restrictions on [Meta's] business operations," with then-Chair Simons noting that "[t]he magnitude of the $5 billion penalty and sweeping conduct relief are unprecedented in the history of the FTC." (*See* July 2019 Press Release.)[147]

[147] *See also Fact Sheet on 2019 Order with Facebook*, Fed. Trade Comm'n, at 1 (July 24, 2019), https://www.ftc.gov/system/files/attachments/press-releases/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook/2019_order_fact_sheet_facebook.pdf.

Attachment A to the Stipulated Order required 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 Part VII (Preamble).) Part VII explained that "[t]o satisfy this requirement," Meta must "at a minimum":

- ***Document the Privacy Program*** – "Document in writing the content, implementation, and maintenance of the Privacy Program" and provide that document to Meta's Principal Executive Officer and the Privacy Committee (*id.* at Part VII.A–B);
- ***Appoint Designated Compliance Officer(s)*** – "Designate a qualified employee or employees to coordinate and be responsible for the Privacy Program" (*id*. at Part VII.C);
- ***Conduct Privacy Risk Assessments*** – "Assess and document, at least once every twelve (12) months," as well as following Covered Incidents, "internal and external risks in each area of its operations . . . to the privacy, confidentiality, or Integrity of Covered Information that could result in the authorized access, collection, use, destruction, or disclosure of such information," referred to at Meta as a "Privacy Risk Assessment" (*id*. at Part VII.D);
- ***Design, Implement, and Maintain Certain Specified Safeguards*** – "Design, implement, maintain, and document Safeguards that control for the material internal and external risks" identified in Meta's Privacy Risk Assessment, as well as a limited set of specified Safeguards related to (1) Covered Third Parties who have access to covered information "for use in an independent, third-party consumer application or website"; (2) new or modified products, services, or practices, prior to implementation; (3) internal access controls in Meta's data warehouse; (4) sharing of Covered Information with Meta-owned affiliates; and (5) facial recognition (*id*. at Part VII.E);
- ***Create and Deliver the QPRR*** – Create a "Quarterly Privacy Review Report" with certain specified components to be delivered by the Designated Compliance Officer to Meta's Principal Executive Officer (*id*. at Part VII.E.2.c–e);
- ***Conduct Annual Safeguard Testing*** – "Assess, monitor, and test" the Privacy Program annually and following Covered Incidents, and update it based on the results (Order at Part VII.F);
- ***Establish Annual Privacy Training*** – "Establish regular privacy training programs for all employees on at least an annual basis" and update the training programs to address internal or external risks identified by and Safeguards implemented by Meta (*id*. at Part VII.G);

- ***Service-Provider Requirements*** – "Select and retain service providers capable of safeguarding Covered Information they receive from Respondent, and contractually require service providers to implement and maintain safeguards for Covered Information" (*id*. at Part VII.H);

- ***Third-Party Consultation*** – "Consult with, and seek appropriate guidance from, independent, third-party experts on data protection and privacy in the course of establishing, implementing, maintaining, and updating the Privacy Program" (*id*. at Part VII.I); and

- ***Evaluation and Adjustment of the Privacy Program*** – "Evaluate and adjust the Privacy Program in light of" certain identified events and any circumstances that "may have a material impact on the effectiveness of the Privacy Program" (*id*. at Part VII.J).

Notably, all of the provisions of Part VII that require ongoing implementation also require Meta to *update* its Privacy Program over time to address any identified issues (*id.* at Parts VII.B, VII.D, VII.E, VII.G, VII.H), and three of the provisions expressly anticipate and require Meta to continuously review the Program and update, modify, and adjust it (Order at Parts VII.F, VII.I, VII.J).

The Order further required assessments of Meta's compliance with Part VII by an independent Assessor, to be approved or removed only by the Privacy Committee, for 20 years following the implementation of the Order. (*Id.* at Part VIII.A.) The Order provided for an "initial Assessment" to cover the first 180 days after the Privacy Program was required to be in place, and subsequent full "biennial Assessments" to cover each two-year period thereafter. (*Id.* at Part VIII.C.)

The Order tasked the Assessor with assessing whether Meta has "*implemented and maintained* the Privacy Program required by Part VII.A–J." (*Id*. at Part VIII.D.1.) In addition, Part VIII also tasked the Assessor with evaluating the "effectiveness" of Meta's "implementation and maintenance of each subpart in Part VII" and identifying "gaps or weaknesses" in Meta's Program. (*Id*. at Part VIII.D.2–3.) Like Parts VII.F, VII.I, and VII.J, the Assessor's identification of any such issues served the purpose of helping Meta identify areas where it could

enhance the Privacy Program over the life of the Order—the Order contemplated that Meta would address "any material issues raised by the most recent Assessment or material unresolved issues from prior Assessments" throughout the 20-year period through "proposed remediation plans." (*Id*. at Part X.A.5.c.)

Like the 2012 Order, the Order also included at Part I a prohibition against misrepresenting the extent to which Meta "maintains the privacy or security of Covered Information" "in connection with any product or service." (Order at Part I.)

Then-Chair Simons similarly made clear that the FTC had obtained relief provided by the Order not only to address the allegations set forth in the related complaint, but also to account for the possibility of future violations and to encourage ongoing maturation over time, stating: "The relief is designed . . . to punish future violations" and "more importantly, *to change Facebook's entire privacy culture to decrease the likelihood of continued violations*." (July 2019 Press Release.)

F. The 2019 Order Provides the FTC with Relief through Settlement That It Could Not Have Obtained through Litigation

All stakeholders appeared to agree that the settlement enabled the FTC to obtain relief that it could not have achieved through litigation and that any judgment after trial would have been unlikely to include the same requirements to which Facebook ultimately agreed. The three commissioners who approved the settlement released a statement noting, "the relief we have secured today is substantially greater than what we realistically might have obtained by litigating, likely for years in court." (July 2019 Statement at 5.) With respect to the injunctive relief required under the Stipulated Order, the commissioners noted:

> The Order's innovative, far-reaching conduct relief—imposing affirmative obligations and corporate governance reforms—extends well beyond the typical relief historically awarded by the courts in consumer protection cases involving legitimate companies. Even assuming the FTC would prevail in litigation, a court

> would not give the Commission carte blanche to reorganize Facebook's governance structures and business operations as we deem fit. Instead, the court would impose the relief. Such relief would be limited to injunctive relief to remedy the specific proven violations and to prevent similar or related violations from occurring in the future. Thus, it is highly unlikely the Commission could have obtained this magnitude of injunctive relief if we had proceeded with litigation.

(*Id*. at 6.) The FTC's Associate Director for Enforcement confirmed that the FTC, through the settlement, "got a lot of relief that [it] couldn't otherwise have obtained."[148]

In connection with these statements, the three commissioners indicated that the FTC had considered, as part of the deliberations over the proposed settlement, whether the Order should "impose more limitations on data collection and use." (July 2019 Statement at 6.) However, the Commission recognized that the "FTC does not have the authority to regulate by fiat," and that the FTC Act "does not give [the FTC] free rein to impose" restrictions on the "extent to which Facebook, or any other company, should be able to collect, use, aggregate, and monetize data." (*Id.*)

In separate statements, the two dissenting commissioners noted specific, additional injunctive remedies that they would have preferred.

- Then-Commissioner Chopra noted that he would have imposed substantive restrictions on the Company's sharing and use of Covered Information, as well as clear standards for what constitutes an acceptable level of privacy risk to users. (Comm'r Chopra Dissent at 13.) As is relevant here, he also would have required "benchmarks for what constitutes effectiveness" of Meta's comprehensive privacy program, recognizing that the Order contains no such benchmarks. (*Id.*)
- Commissioner Slaughter, similarly, would have imposed restrictions on data sharing with third parties generally (Comm'r Slaughter Dissent at 12–14), as well as additional provisions that would have required the public release of more information about Facebook's "privacy practices" (*Id.* at 13–14).

[148] *FTC Press Conference on Facebook Settlement*, Fed. Trade Comm'n, at 26:20–27:06 (July 24, 2019), https://www.ftc.gov/media/71355; *see also Facebook*, 456 F. Supp. 3d at 123 ("[T]he United States . . . appears to acknowledge that it would have been unlikely to obtain more after a trial. The Court has no reason to doubt that judgment.").

Even so, Commissioner Slaughter concurred with the majority that many of the public calls for greater, more intensive restrictions on Facebook's "privacy and data practices . . . demanded outcomes that far exceed the FTC's power or legal authority." (*Id*. at 15.)

G. Entry of 2020 Order & Final Judgment

In announcing the Stipulated Order, the FTC made clear that it would only "have the force of law when approved and signed by the district court judge." (July 2019 Press Release.)

In an opinion dated April 23, 2020, the District Court granted the Consent Motion, and agreed to enter the Stipulated Order, including its Attachment A. *See Facebook*, 456 F. Supp. 3d at 126. In the order, the District Court held that the "proposed remedies in the Stipulated Order are reasonable in light of the allegations in the Complaint," and that "entering the Stipulated Order is in the public interest." *Id.* at 124. The District Court also noted that "*under the Stipulated Order it retains jurisdiction over this matter*, including to enforce its terms." *Id.* at 126.

On April 27, 2020, the FTC entered Attachment A to the Stipulated Order in agreed form in its administrative proceeding. Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020) at 1. In entering the order, the Commission did not cite to Section 5(b), relying instead on the federal court's approval and entry of the Stipulated Order. In announcing this step, the FTC explained that, "[p]ursuant to the 2019 settlement, the FTC could not amend its 2012 administrative order with Facebook with the updated consumer protections until the federal court entered its order" because it was ordered pursuant to the District Court's exclusive statutory authority to enter such relief under 15 U.S.C. §§ 45(*l*) and 53(b).[149]

[149] *FTC Gives Final Approval to Modify FTC's 2012 Privacy Order with Facebook with Provisions from 2019 Settlement*, Fed. Trade Comm'n (Apr. 28, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-

H. Meta Discloses the Expiration Check Coding Oversight

On June 29, 2020, Meta disclosed to the FTC that it had recently discovered—and fixed within three days of discovery—a coding oversight that impacted a check developed and introduced in April 2018 that was designed to block an app from obtaining certain data about users if, based on signals available to Meta, the user had not been active in the app for 90 days. (Resp. to PFOF, Sections II.A.5 ¶¶ 143–46, II.A.6 ¶ 156.)

As described in more detail in the PFOF Response, at the time the 90-day Limitation was developed, Meta maintained a service called Facebook Login, which allowed users to authenticate into third-party applications ("apps") using their Facebook account credentials. (*Id.* at Section II.A.1 ¶ 96.) In order to support this service, Meta permitted apps to access limited nonpublic categories of information from a user's Facebook account with the user's permission, e.g., allowing a user to share their birthday with the apps so that the user can see age-appropriate content in the app. (*Id*. at Section II.A.1 ¶¶ 98–99.)

In March 2018, in the immediate wake of the Cambridge Analytica story breaking, Facebook announced the 90-Day Limitation as one of several supplemental safeguards it was putting in place to help prevent unnecessary and potentially abusive collection of data through Facebook's developer platform. (*Id*. at Section II.A.2 ¶¶ 112, 116–18.) These safeguards built on more fundamental reforms that Facebook had put in place years earlier. (*Id*. at Section V.A ¶¶ 1069–77.) Specifically, in 2014, Facebook began rolling out changes to stop allowing apps to ask for information about a user's friend. (*Id.* at Section II.A.2 ¶ 114.) Also in 2014, Facebook began giving users granular control over what permissions they granted to an app—allowing

gives-final-approval-modify-ftcs-2012-privacy-order-facebook-provisions-2019-settlement ("April 2020 Press Release").

them to choose to share specific categories of data while denying permission to access others. (Resp. to PFOF, Sections II.A.1 ¶ 100, V.A ¶¶ 1069–77.)

Facebook promptly implemented the 90-Day Limitation in April 2018—and thereby substantially curtailed apps' access to user data. In nearly all cases, the technical implementation of the 90-Day Limitation worked as intended. However, due to an oversight in the coding of the feature (the "Expiration Check Coding Oversight"), the 90-Day Limitation was not extended to the limited circumstances where an app queried a user's data on behalf of another user. (*Id*. at Section II.A.4 ¶¶ 139–42.) In that scenario, the data queried would be returned even if the user to whom it belonged had not used the app within the prior 90 days. (*Id*. at Section II.A.4 ¶ 142.) However, even in that scenario, the app could only access data that the user had previously agreed to allow the app to access. (*Id*. at Section II.A.5 ¶ 148.) Additionally, because Meta has only limited signals about a user's activity in an app, Meta took the conservative and over-inclusive approach, choosing to err on the side of concluding that a user had not accessed the app, even though it is entirely possible that some users who Meta determined had been inactive for more than 90 days had actually used the app during that period.

Meta detected the Expiration Check Coding Oversight on June 16, 2020, voluntarily disclosed it to the Commission within two weeks, and disclosed it to the public on July 1, 2020. (*Id*. at Sections II.A.5 ¶ 143, II.A.6 ¶¶ 156–57.) The oversight did not result in a single item of data being shared with an app contrary to a single user's permissions. (*Id.* at Section II.A.5 ¶ 148.) Nor did Meta's review uncover any indication that the oversight was intentionally abused by app developers—Meta determined that app behavior stayed the same before and after the coding oversight was fixed. (Resp. to PFOF, Section II.A.5 ¶ 152.)

I. Meta's Implementation of the Comprehensive Privacy Program and the Initial Assessment

At the same time Meta was working to resolve the Expiration Check Coding Oversight, it was also working to build its Privacy Program. (*Id.* at Sections I.A ¶ 5, I.A.1 ¶¶ 6–7.) The publication of the Order on the FTC's website triggered a number of deadlines in the Order. (Order at Part XVI.) On April 28, 2020, Meta had 180 days—i.e., until October 25, 2020 or "Day 180"— to "establish and implement, and thereafter maintain a comprehensive privacy program (the 'Privacy Program')." (*Id.* at Part VII.) In addition, Meta was required to retain an Assessor who would conduct biennial assessments of the Privacy Program over the course of 20 years, in addition to an "initial Assessment" covering its first 180 days (from October 25, 2020 through April 22, 2021). (*Id.* at Part VIII.C.) Finally, the Order also gave Meta 180 days from publication of the Order to submit a "compliance report" that "describes in detail whether and how [Meta was] in compliance with each Part of [the] Order" ("Compliance Report"). (*Id.* at Part XIII.A.)

Meta complied with all these requirements, investing billions in designing and implementing a comprehensive Privacy Program, and facilitating rigorous oversight by the Assessor. (Resp. to PFOF, Sections I.A.1 ¶¶ 7–8, 12, I.A.2 ¶¶ 15–18, IV.D ¶¶ 421–23.) Consistent with the timelines set forth in the Order, Meta submitted the Compliance Report to the FTC and DOJ on October 24, 2020 (*see* Ex. 11 (Oct. 24, 2020 Compliance Report)), and the First Assessment Report to the FTC and DOJ on July 1, 2021 (*see* Ex. A (Letter from M. Protti to Federal Trade Commission (July 1, 2021))).

J. Meta Proactively and Extensively Cooperates with the FTC's Inquiries

Even with the short duration of time covered, the First Assessment Report was the subject of rigorous and intense oversight by the FTC Staff, and Meta's record of cooperation,

diligence, and responsiveness is similarly extensive. Between August 2021 and May 2022 (a period longer than the Assessment itself), Meta responded to 15 letters (representing more than 530 individual requests) relating to the Assessor's findings from the FTC under Part XV of Attachment A to the Stipulated Order. (*See* Exs. 5–8, 10, 14, 17, 30, 31, 51, 73, 76, 77.) Meta's responses included multiple depositions, hundreds of pages of narrative responses, and nearly 30,000 pages of underlying source material concerning its extensive efforts to design and implement a new privacy program. (*See generally* Exs. 5–86.) The entirety of this detailed record reflects Meta's compliance with the Order as it launched the Mandatory Privacy Program over the first six months of a 20-year term and its overall dedication to continuous improvement. (*Id*.) Meta did not hear further from the Commission on this matter for nearly a year after it completed its responses in May 2022.

At the same time Meta was cooperating with the FTC's investigation of the Assessor findings from the initial six-month period in which the Privacy Program was implemented, Meta was also extensively cooperating with ongoing FTC inquiries regarding the technical errors in the Messenger Kids product and the Expiration Check Coding Oversight. (Resp. to PFOF, Sections II.A.6 ¶¶ 158–62, III.A.8 ¶¶ 221–29.)

The Messenger Kids investigation was initiated by CID on October 8, 2019, three months after Meta proactively disclosed the technical errors to the Commission on July 15, 2019 and before the 2020 Order was finalized. (*Id.* at Section III.A.8 ¶¶ 221, 223.) Meta responded to the initial CID one month after receiving it and submitted a white paper in January 2020, at the request of the Staff. (*Id.* at Section III.A.8 ¶¶ 223, 224.) Over the course of 2020 and 2021, Meta produced thousands of pages of documents in response to a second CID and answered follow-up questions from the Staff. (*Id.* at Section III.A.8 ¶¶ 223–28.) On October 14, 2021,

Meta made Messenger Kids' former engineering director available for an investigational hearing. (*Id.* at Section III.A.8 ¶ 228.) Over the course of the investigation, Meta briefed the Staff on several Messenger Kids product launches to ensure that the FTC was not surprised by changes to the product. (*Id.* at Section III.A.8 ¶¶ 223–29.) Meta did not have any further substantive discussions with the FTC regarding this issue after 2021. (Resp. to PFOF, Section III.A.8 ¶ 230.) The Commission now asserts that it believes the technical errors constitute misrepresentations in violation of Part I of the 2012 Order, Section 5 of the FTC Act, COPPA, and the COPPA Rule. (OTSC at 12.)

Meta also fully cooperated with the Commission's questions regarding the Expiration Check Coding Oversight, beginning in June 2020 and continuing through early 2022. (Resp. to PFOF, at Section II.A.6 ¶¶ 158–64.) The FTC initiated an investigation into the Expiration Check Coding Oversight via a Part XV letter on June 30, 2020. (*Id.* at Section II.A.6 ¶ 159.) Meta responded to the Part XV letter on July 14, 2020, and continued to engage with the FTC over the ensuing months by submitting substantial custodial documents between July and December 2020. (*Id.* at Section II.A.6 ¶¶ 160.) Meta also engaged with the FTC on revisions to the Data Policy and Help Center article related to the check under investigation. (*Id.* at Section II.A.6 ¶ 161.) On September 30, 2021, Meta also provided a 30(b)(6) representative—Meta's Technical Program Manager responsible for implementing the 90-Day Limitation—for further testimony to the agency. (*Id.* at Section II.A.6 ¶ 163.) After briefly engaging with Meta in March 2022, here, too, the FTC went silent for nearly a year. (*Id.* at Section II.A.6 ¶ 164.) The Commission now alleges that it also believes the Expiration Check Coding Oversight rendered Meta's statements about the 90-Day Limitation misrepresentations in violation of Section 5 of

the FTC Act, Part I of the 2012 Order for the period prior to April 27, 2020, and Part I of the 2020 Order thereafter. (OTSC at 12.)

K. The FTC's Notice After Nearly a Year of Silence

Notwithstanding the extensive record of Meta's cooperation with the FTC's inquiries and a year of silence, on March 13, 2023, the FTC sent letters stating that the FTC was considering initiating a "proceeding" in which information Meta provided to the FTC in those matters may be disclosed. Following receipt of the letters, Meta reached out to the FTC multiple times to request an opportunity to discuss the FTC's concerns. Meta also asked the FTC to follow its typical process and allow for further engagement with senior staff and Commissioners prior to initiating any proceeding. The FTC refused to meet with Meta. It also refused to provide Meta with any information regarding the type of "proceeding" it was planning to initiate.

L. The FTC Initiates an "Enforcement Action" to Dramatically Rewrite the Order Immediately Before Review of the First Full Assessment

On May 3, 2023, slightly more than three years into the 20-year term of the Stipulated Order, the three-member Commission issued its OTSC, directing Meta to show cause why the FTC should not modify Attachment A to the Stipulated Order and enter a new Proposed Order. (*Id*. at 1.) The FTC purported to issue the OTSC pursuant to its reopening authority under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Rule of Practice 3.72(b), 16 C.F.R. 3.72(b). (*Id.*) The FTC also attached to the OTSC a Proposed Order that substantially rewrites Attachment A to the Stipulated Order.[150]

[150] On May 31, 2023, Meta filed a motion in the District Court to enforce the Stipulated Order. *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. May 31, 2023) (Dkt. No. 38). That motion was denied on November 27, 2023, and Meta filed its notice of appeal to the D.C. Circuit two days later. *See United States v. Facebook, Inc.*, No. 23-5280 (D.C. Cir. Nov. 29, 2023) (Dkt. No. 1).

Tellingly, the Commission commenced this proceeding—citing findings from the First Assessment—just hours before a meeting with the Assessor to preview the Assessor's findings from the first full biennial Assessment, which—as detailed *infra* at Section II.A.2.c—concluded that Meta made significant progress in continuing to mature its Privacy Program under the Order.

The OTSC states that the FTC's reopening is an "enforcement action" to address allegations that Meta failed to comply with its legal obligations. (*Id*. at 12.) Specifically, the OTSC alleges that the Commission has "reason to believe" that Meta (1) failed to implement an effective Privacy Program under Part VII of the Order; (2) made misrepresentations between 2017 and 2019 with respect to its Messenger Kids product that violated the *2012* Order, Section 5 of the FTC Act, COPPA, and the COPPA Rule; and (3) made misrepresentations between 2018 and 2020 with respect to the 90-Day Limitation that violated Section 5 of the FTC Act and both the 2012 Order and the Order. (*Id*. at 11–12.) The new proposed injunctive relief set out in the Proposed Order is expressly premised on Meta's purported noncompliance with the Order. (*Id*. at 12 ("Respondent's non-compliance constitutes changed conditions demonstrating that additional modifications to the [Order] are needed to clarify and strengthen its requirements, and thus provide enhanced protections for consumers. Therefore, given these circumstances, the Commission proposes modifying the Order.").)

ARGUMENT

I. THE FTC'S UNPRECEDENTED ATTEMPT TO UNILATERALLY REOPEN THE ORDER IS UNLAWFUL

The Commission's OTSC and Proposed Order are unprecedented. As far as we are aware, there is no case in the history of the FTC in which it has sought to modify a consent order through the reopening process to add new, material, affirmative obligations without the

respondent's express consent. There is good reason for the lack of any applicable precedent. The OTSC is unlawful and fatally defective for numerous reasons.

Once again, the Commission's own conduct here is telling. In 2019 and 2020, the Commission and its staff defended the terms of the settlement against criticism in court filings, press releases, speeches, editorials, and press conferences. Not once in these comments did the Commission mention (or even suggest) that it could simply change those terms. The Commission understood then what it ignores now. It cannot invoke Section 5(b)—contrary to its plain language and the Commission's long standing interpretation and application of that language—to reopen and modify the Orders under Section 5(b) in the manner proposed in the OTSC. The Commission cannot "claim[] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority . . . in the vague language of an ancillary provision of the Act." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

Meta paid a record-setting $5 billion civil penalty and consented to abide by negotiated terms in return for the Commission's agreement to resolve the dispute, and to "waive all rights to appeal or otherwise challenge or contest the validity of this Order." (Order at 1.) The Commission cannot now renege on that deal and breach the parties' agreement. *See, e.g.*, *Basic Rsch., LLC v. FTC*, 807 F. Supp. 2d 1078, 1095–96 (D. Utah. 2011) (sustaining claim that the FTC violated a settlement agreement); *United States v. Moreno-Membache*, 995 F.3d 249, 257 (D.C. Cir. 2021) (sustaining claim that the government violated a criminal plea agreement). "As the Supreme Court has said, 'the Government should turn square corners in dealing with the people.'" *GPA Midstream Ass'n v. DOT*, 67 F.4th 1188, 1202 (D.C. Cir. 2023) (quoting *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020)); *see also Niz-Chavez v. Garland*, 141 S.

Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

A. The Commission Cannot Modify the Order Without Meta's Consent

There is no precedent or legal basis for modification of a *consent* order without explicit agreement that the order is subject to modification. Neither the Order nor the Stipulated Order to which it was attached provides that the Commission can modify it unilaterally. Absent such consent, the Commission lacks any authority to do so.

1. Section 5(b) Does Not Allow the Commission to Modify a Consent Order

As a threshold matter, the OTSC ignores both statutory and regulatory language. 15 U.S.C. § 45(b) authorizes the Commission to issue cease and desist orders "upon" administrative hearings and to "alter, modify or set aside" orders "made or issued" by the Commission "under this section."

The Commission has determined—specifically and through formal rulemaking—that Section 5(b)'s modification language does not apply to consent orders. 16 C.F.R. § 2.32(c), the formal Commission rule that interprets Section 5(b), clearly refers to Section 5(b) and states that it provides only for the alteration, modification, or setting aside of "Commission orders ***issued on a litigated or stipulated record***." Because, as the rule confirms, there is no ***statutory*** authority to modify consent orders, the rule specifically 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***." 16 C.F.R. § 2.32(c).

Under controlling Supreme Court precedent, the Commission's regulation requiring agreement that consent orders can be modified "in the same manner" provided by statute would make "little sense" if consent orders could, themselves, be modified by statute. *See Nat'l Fed'n*

of Indep. Bus. v. Sebelius, 567 U.S. 519, 546 (2012). And there is no other explanation for why the Commission, when promulgating that regulation, specifically distinguishes between the two.[151] Put simply, if Section 5(b) provided for modification of consent orders, the Commission would not have promulgated a regulation requiring respondents to agree their consent orders can be modified "in the same manner" provided by statute. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 546 (rejecting argument that "assessable penalties are themselves taxes" where statute "requires assessable penalties to be assessed and collected 'in the same manner as taxes'"). Rather, Rule 2.32 is consistent with hornbook law that one party to a contract cannot modify it absent express agreement.[152] *See, e.g.*, *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1070 (11th Cir. 2020) ("[I]t is black-letter contract law that one party to an agreement cannot, without the other party's consent, unilaterally modify the agreement once it has been executed."); *Inova Health Care Servs. for Inova Fairfax Hosp. v. Omni Shoreham Corp.*, 2023 WL 5206142, at *9 n.10 (D.D.C. Aug. 14, 2023) (quoting *Johnson v. Mercedes-Benz, USA, LLC*, 182 F. Supp. 2d 58, 64 (D.D.C. 2002)) ("[A]s a general principle of contract law . . . a modification to a contract requires mutual consent of the parties.").

Here, the Order was not "issued on a litigated or stipulated record." And, consistent with the Order being part of the relief resolving a federal complaint—and not an administrative complaint—the Commission did not require Meta to consent to its modification "in the same manner" that Section 5(b) provides for litigated orders; as the government represented in 2020,

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[151] In fact, when initially promulgated, the rule distinguished between consent orders and "other orders." *See* 32 Fed. Reg. 8,444, 8,448 (June 13, 1967) ("The agreement shall also contain provisions . . . that the order . . . may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders."). In 1999, the Commission amended the rule to distinguish between consent orders and orders "issued on a litigated or stipulated record." 64 Fed. Reg. 46,267 (Aug. 25, 1999).

[152] Courts and the Commission have consistently held that Commission consent orders are contracts. *See, e.g.*, *Basic Rsch.*, 807 F. Supp. 2d at 1095–96; *see United States v. Bos. Sci. Corp.*, 167 F. Supp. 2d 424, 430 (D. Mass. 2001) (Commission order "is construed for enforcement purposes basically as a contract.").

Rule 2.32 has no application to the Order because there was "no *administrative* complaint to settle; rather, the proposed settlement would resolve a complaint filed in *this Court* by the United States" (emphasis in original).[153] Nor did Meta otherwise agree that the Commission can unilaterally modify the Order. The Commission's apparent belief that Section 5(b) allows it to modify a consent order violates the cardinal rule against a construction that would "render the regulation entirely superfluous." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007). Consistent with Section 5(b)'s scope, we are unaware of any instance in which the Commission has modified a consent order that the respondent did not expressly agree could be modified.[154] With good reason. Section 5(b) does not authorize it to do so.

The government (on behalf of the Commission) has raised two responses—both meritless.

The government has wrongly cited *Elmo Co. v. FTC* for the proposition that Section 5(b) reaches consent orders. In fact, it shows the opposite. *Elmo Co. v. FTC*, 389 F.2d 550, 551 (D.C. Cir. 1967). There, the consent order specifically permitted modification, and the D.C. Circuit made clear that "the consent order itself" was the source of the Commission's modification authority—not Section 5(b). *Id.*

The government has next claimed that "consent orders are as enforceable as adjudicated orders." Opp. of Plaintiff-Appellee at 17–18, *United States v. Facebook, Inc.*, No. 23-5280 (D.C. Cir. Feb. 5, 2024). But that is irrelevant to whether consent orders can be modified under

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[153] *See* FTC Surreply to EPIC, *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Jan. 24, 2020) (Dkt. No. 27) at 7.

[154] Where the Commission suggested it might have such authority, it ultimately rested on the express agreement of its counterparty. *See In re Nat'l Housewares, Inc.*, 84 F.T.C. 1566, 1974 WL 175859, at *3 (Dec. 3, 1974) ("Here, as in *Elmo*, the original Agreement Containing Consent Order states that the order entered 'may be altered, modified or set aside in the manner provided for other orders.'"); *In re ITT Cont'l Baking Co.*, 81 F.T.C. 1021, 1972 WL 128875, at *1 (Aug. 1, 1972) ("The parties' Agreement Containing the Consent Order in this matter states that the order entered 'may be altered, modified or set aside in the manner provided for other orders.'").

Section 5(b). The law is clear that order enforcement is distinct from order modification. *See Pigford v. Veneman*, 292 F.3d 918, 923–24 (D.C. Cir. 2002). In any event, as discussed *infra*, the Commission lacks authority to enforce any order (whether adjudicated or consensual).

Neither argument makes any effort to grapple with the Commission's longstanding, formal interpretation of Section 5(b) codified in Rule 2.32(c). That interpretation is fatal to the Commission's contrary application of Section 5(b) in the OTSC. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416–17 (2019) (interpretations through "delegated rulemaking power" outweigh "convenient litigating position[s]").

2. Even If It Applied, Section 5(b) Was Not Incorporated in the Order

Even if Section 5(b) could be stretched to reach consent orders, it was not "assumed" in the Order according to fundamental tenets of contract interpretation. Agreed FTC orders are construed "as contracts," *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975), because they give rise to "enforceable rights" against ***both parties***, backed by "consideration," that the Commission "may not unilaterally obliterate." *Elmo*, 348 F.2d at 345–46; *Basic Rsch.,* 807 F. Supp. 2d at 1095–96 (sustaining claim that FTC "breached" consent order). Unstated rights and obligations are not lightly assumed. *See, e.g.*, *Metz v. BAE Sys. Tech. Sols. & Servs., Inc.*, 979 F. Supp. 2d 26, 33 (D.D.C. 2013) ("Implied covenants are disfavored"). And whether statutory rights require express waiver, *see Facebook*, 2023 WL 8190858, at *5 (citing *George Banta Co., Inc., Banta Div. v. NLRB*, 686 F.2d 10, 20 (D.C. Cir. 1982)), is irrelevant for multiple reasons.

As an initial matter, under controlling law, courts routinely reject arguments that the government can simply and unilaterally modify its agreements unless they explicitly say so.[155] On the contrary, the Supreme Court has held that *assuming* such a modification right defies the basic principles of contract law. "A promise to pay," in this case, $5 billion, "with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1877); *see also City of Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U.S. 368, 384 (1902) (rejecting as "hardly . . . credible" the government's suggestion that its contract could be "subject to change from time to time" at its pleasure). The Commission's assertion of such a right here is untenable. The unlimited, unilateral right to modify a contract would render the contract illusory and valueless.

Moreover, the Supreme Court has held that a statutory provision "should be implied as a contract term only if the term is so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract." *Amfac Resorts, LLC v. Dep't of Interior*, 142 F. Supp. 2d 54, 73–74 (D.D.C. 2001) (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188–89 (1992)). There can be no serious argument that modification would be so central in an agreement to "resolve" the claims described in the Stipulated Order. (Stip. Order at 1–2.) On the contrary, "resolve . . . conveys certainty and finality." *Territory of Guam v. United States*, 141 S. Ct. 1608, 1614 (2021). And the express modification provision in the Stipulated Order—which assigns modification

[155] For that reason (among others), the two cases cited in the Government's briefing on Meta's Motion to Enforce for the proposition that the entire FTC Act is assumed in every order are irrelevant. Gov't Opp., *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Aug. 16, 2023) (Dkt. No. 49) at 12 n.6. Neither was a consent order; both were orders issued after litigated hearings. *See FTC v. Ruberoid Co*., 343 U.S. 470, 475–76 (1952); *Dolcin Corp. v. FTC*, 219 F.2d 742, 750 (D.C. Cir. 1954). As a result, neither provides any basis for the Commission to assert an implied modification right.

jurisdiction to the District Court—belies any suggestion that the right of unilateral modification could have been central to the parties' bargain.

Concluding that a statutory *modification* provision requires express waiver is inconsistent with Commission rules. The position that the Commission and its contractual counterparties must affirmatively *opt out* of Section 5(b) is inconsistent with Rule 2.32(c)'s requirement that they expressly *opt in*. If silence were sufficient for the Commission to modify a consent order, the Commission would not have promulgated a rule that requires respondents to make that explicit. In any event, that position is foreclosed by D.C. Circuit law. *See Elmo Div. of Drive-X Co.*, 348 F.2d at 345. Construing another Commission consent order, the D.C. Circuit held that the Commission could not proceed by complaint under Section 5(b)—*even where the consent order contained no express waiver of the right to file a complaint*—because it could not "unilaterally obliterate a part of the consideration—indeed an important part—by which it secured [Elmo's] assent to be bound by a [Commission] order." *Id.* at 346. The same is true here.

Regardless, the Order's plain language leaves no doubt that no unilateral modification right was "assumed" or implicit. As described below, it includes multiple provisions making clear that the Order carries the force of a federal district court order—stating that the "Court has jurisdiction over th[e] matter" (Order at 1), memorializing the Commission's waiver of the right to ***appeal***, and authorizing the Commission to take civil discovery "without further leave of court" (*id*. at Part XV). All of those atypical and bespoke terms are fundamentally inconsistent with the Commission's assertion of a unilateral modification right.

Further, Parts II–III of the Order provide that "Meta may seek modification . . . to address relevant developments that affect compliance with this Part, including, but not limited to

technological changes." If the Order were freely modifiable under Section 5(b) (which provides for either the Commission or the respondent to seek modification), those provisions—giving Meta rights to seek modification that it already enjoyed—would have been superfluous. *See Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 620 (D.C. Cir. 2023) (rejecting interpretation under which provision "serves no purpose"); *Martinsville Nylon Emps. Council Corp. v. NLRB*, 969 F.2d 1263, 1267 (D.C. Cir. 1992) (holding that "intensely interested parties . . . advised by specialized counsel . . . ought not be presumed to have included in their agreement a meaningless provision."). The fact that the sophisticated parties conducted months of negotiations over a $5 billion settlement agreement and specifically identified two provisions that would be subject to potential modification under particular circumstances precludes any argument that the entire agreement could be unilaterally rewritten.[156] *See Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 22 (D.D.C. 2017) ("It is well-settled that, when a legal text includes particular language in one section, but omits it in another section, courts may presume that the text's author acted ***intentionally*** and ***purposely*** in the disparate inclusion or exclusion.").

The Commission knows this, as reflected in the Proposed Order, which deletes the modification provision of Part III (Part IV in the Proposed Order), but not that of Part II. If, as the Commission appears to believe, the Order were subject to modification under Section 5(b), that change would be legally meaningless—removing language giving Meta a right it has regardless. The fact that the Commission proposes to delete one of two such provisions confirms

[156] The government has argued that Parts II–III—allowing the parties to ***agree*** to modify those provisions (and those provisions only)—show that the Order is modifiable by the Commission without court involvement. Opp. of Plaintiff-Appellee at 11, *United States v. Facebook, Inc.*, No. 23-5280 (D.C. Cir. Feb. 5, 2024). In fact, the District Court authorized the parties to agree to modify those provisions without further Court approval. *See EEOC v. Morgan Stanley & Co.*, 256 F.R.D. 124, 131 (S.D.N.Y. 2004).

that those provisions do matter, and the parties' express agreement to make two sections subject to future modification precludes any argument that others can be modified.

Indeed, where the parties agreed to potential modification by the Commission, they explicitly said so, further undermining any argument that such a modification right can simply be "assumed." Their 2011 Agreement specifically provided that the 2012 Order could be modified in the same manner provided by Section 5(b) for other Commission orders. (2011 Agreement at 2.) That allowed the Commission to, in its words, "issue a new order" in 2020. (Order at 1.) The absence of any such language in the Order or the Stipulated Order to which it is attached must be interpreted as intentional. *See, e.g.*, *Hoffman v. L&M Arts*, 838 F.3d 568, 582 (5th Cir. 2016) (holding that earlier agreement's "explicit requirement . . . suggests that the absence of" a similar term in later agreement "was intentional"); *Slaughter v. Nat'l R.R. Passenger Corp.*, 460 F. Supp. 3d 1, 10 (D.D.C. 2020) (holding that omission of clause in one contract that was included in other contracts between the parties "strongly suggests that such omission was intentional").

If there were any doubt whether the Order includes some unstated, "assumed" modification right, it must be resolved in Meta's favor as the enjoined party, *United States ex rel. Yelverton v. Fed. Ins. Co.*, 831 F.3d 585, 587 (D.C. Cir. 2016), and against the Commission as drafter, *see Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 82 n.6 (D.C. Cir. 1998). Particularly where the same parties made a modification right explicit in 2011, fundamental legal principles prevent the Commission from seeking to exploit any subsequent ambiguity or silence in language for which the Commission was responsible.

The Commission told the District Court and the public that the Order was perhaps the most carefully negotiated agreement in its history—with hundreds of discussions, meetings, and

calls over the course of nearly a year-and-a-half. *Facebook*, 456 F. Supp. 3d at 121; July 2019 Statement at 6. As the Commission would now have it, Meta agreed to a deal that allows its counterparty to modify it at will over the course of 20 years. If the parties had intended that result they would have said so—as they did in 2011, as the Commission requires of settling counterparties, and as hornbook contract law mandates. *See Winstar*, 518 U.S. at 909–10 ("Given that the parties went to considerable lengths in procuring necessary documents . . . , the Government's suggestion that the parties meant to say only that the regulatory treatment laid out in these documents would apply as an initial matter, subject to later change at the Government's election, is unconvincing.").

Meta agreed to pay $5 billion and waived its right to contest liability based *solely* on its willingness to accept the parties' agreement governing its future conduct in specific, circumscribed ways. Meta would never have agreed to pay $5 billion and to conform its conduct to stipulated terms if those terms could be used only as a baseline for exponentially *more* onerous and restrictive relief that would bind Meta for two decades. And the Commission's proposal to do so ignores the very nature of consent orders as creatures of contract, not legal precedents. "[C]onsent decrees have no force or effect in law and are thus of no precedential value." *In re Realcomp II Ltd.*, 2007 FTC LEXIS 200, at *303 (Dec. 10, 2007) (initial decision); *In re ECM BioFilms, Inc.*, 2015 FTC LEXIS 22, at *641–43 (Jan. 28, 2015) (initial decision) (same); *see United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 331 n.12 (1961) ("[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context."). Rewriting the parties' agreement after Meta waived the right to contest the original Complaint is a flagrant violation of due process. "Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due

Process Clause, the conditions upon which he has given that waiver must be respected." *Armour*, 402 U.S. at 682.

B. Section 5(b) Does Not Apply to an Order Approved by a District Court

Nor does the Commission's modification authority extend to orders approved by district courts. By its plain terms, Section 5(b) only applies to cease-and-desist orders issued by the Commission to resolve ***administrative*** complaints, not to relief authorized by a district court.

Section 5(b) is titled "Proceeding by Commission," and expressly discusses orders issued by the Commission through the administrative adjudication process, not through litigation in federal court. *See* 15 U.S.C. § 45(b). For example, the provision begins by authorizing the Commission to issue a complaint, set a hearing, and, "upon" such hearing, enter "an order requiring [the respondent] to cease and desist from using . . . such act or practice." 15 U.S.C. § 45(b). Section 5(c), in turn, allows a party subject to a Commission order issued under Section 5(b) to "obtain a review of such order in the court of appeals of the United States." 15 U.S.C. § 45(c). Nothing in Section 5(b) contemplates, let alone authorizes, the reopening of an order reviewed and approved by a federal district court, which definitionally cannot be the subject of a petition for review under Section 5(c).

The Commission also ignores the first half of the sentence invoked in the OTSC—that it may reopen an order only "[a]fter the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time." 15 U.S.C. § 45(b). The word "after" is read to create a condition precedent. *See, e.g.*, *Metro. Dev. Grp. at Cool Spring, LLC v. Cool Spring Rd., LLC*, 2022 WL 951995, at *8 (D. Md. Mar. 30, 2022). By its terms, this language limits the Commission's reopening authority under Section 5(b) to orders for which the respondent was "allowed" to file a petition for review of an order by the Commission. *See* 15

U.S.C. § 45(b). The Order was not such an order because it was specifically reviewed and approved by a federal district court in final judgment of a federal court complaint, meaning that any further proceedings would have required an ***appeal*** to the D.C. Circuit, not a ***petition for review*** of the Commission's action.

The Commission understood this distinction at the time. Virtually all Commission consent agreements, including the agreement preceding Meta's 2012 Order and two other agreements announced on the same day as the parties' 2019 agreement here, contain identical language that the proposed respondent waives "all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement." (2011 Consent Agreement at 3(C)); *see also* Agreements Containing Consent Orders as to Kogan and Nix, *In re Kogan and Nix*, File Nos. 182 3106, 182 3107 (F.T.C. July 24, 2019) at 1.) Recognizing that the "judicial review" language was inapplicable to an order approved by a federal district court, the Order provides, by contrast, that, "Respondent and the Commission waive all rights to ***appeal*** or otherwise challenge or contest the validity of this Order." (Order at 1.) In other words, the parties acknowledged that because Meta had no right to file a petition for review of a court-approved order (as opposed to a Commission order), the relevant rights subject to waiver were Meta's and the Commission's respective rights to *appeal* the Court's order.

The Order's own terms make clear that Meta could not have filed a petition for review of the Order. As a result, Section 5(b) does not and could not apply to it.

C. Section 5(b) Cannot Be Used for Order Enforcement

The OTSC is an unlawful attempt at order enforcement. But the law is clear that the Commission has no authority to enforce its own orders or to adjudicate whether they have been violated—as the Commission itself recently acknowledged. *See In re Intuit Inc.*, 2024 WL 382358, at *56 (F.T.C. Jan. 22, 2024) (confirming that Commission orders are "enforceable only

by order of the district court"). The Commission has cited no authority for the proposition that Section 5(b) allows it to enforce its orders or to adjudicate compliance.

As a starting point, there can be no serious question that the OTSC purports to enforce compliance with orders. The OTSC is expressly styled as an "enforcement action" (OTSC at 12), and the Commission represented as much to a federal district court, explaining that the OTSC is predicated on the Commission's belief "that Meta failed to establish and implement an effective privacy program ***as required under the 2020 order and also violated the 2012 order***." *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562 (D.D.C. Dec. 13, 2023) (Dkt. No. 18) at 1. That is also what the Commission has told Congress: "The FTC proposed changes to the agency's 2020 privacy order with Facebook, Inc. after alleging that the company has failed to fully comply with the order."[157] In recent public remarks, Chair Khan has confirmed the Order enforcement purpose of the OTSC.[158]

The Commission (by congressional design) lacks the authority to enforce its own orders and cannot determine whether they have been violated. ***Only*** a federal court may do so. This is not controversial. The Supreme Court has put it plainly: "The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval . . . is to adjudicate questions concerning the order's violation." *See FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948); *United States v. Daniel Chapter One*, 896 F. Supp. 2d 1, 14 (D.D.C. 2012) (same).

This follows from the history of the FTC Act. The 1938 amendments to the Act—by which Congress added the Section 5(b) language the FTC relies on in its OTSC—maintained the

[157] Fed. Trade Comm'n, FY 2025 Congressional Budget Justification – Budget Request (Mar. 11, 2024), at 27.

[158] *See* Digit. Content Next, *F.T.C. Chair Lina Khan live at the 2024 DCN: Next Summit*, YouTube, at 23:13–25:55 (Feb. 9, 2024), https://www.youtube.com/live/Ov5zj46YmSw?si=Knkj32gFSqhURp7D.

Act's historical distinction between order ***modification*** and ***enforcement***. The 1938 amendments preserved the FTC's authority to modify orders—but included a new Section 5(*l*), which authorized the FTC to seek civil penalties for order violations in district court, and authorized district courts to impose injunctive relief. *See* FTC Act Amendments of 1938, Pub. L. No. 75-447 52 Stat. 111 (1983). Reviewing this history, the Second Circuit concluded that Congress had "vested the FTC with power . . . to make orders," but not "to determine whether they have been violated." *J. B. Williams*, 498 F.2d at 422. That power falls exclusively within the "enforcement responsibility of the Courts." *Id.* (quoting *Morton Salt Co.*, 334 U.S. at 54); *see also* 15 U.S.C. § 45(*l*) (empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission"). When its own orders are at issue the Commission cannot be "judge as well as prosecutor." *J. B. Williams*, 498 F.2d at 429.

The Commission cannot usurp the "enforcement responsibility of the courts," or use Section 5(b) to circumvent Congressional or judicial guardrails by dressing alleged order violations as "changed circumstances" or invoking the public interest. The OTSC relies on its assertions of order "non-compliance," (OTSC at 12) as it argued in federal court. But the Supreme Court is clear: only district courts can "adjudicate questions concerning the order's violation." *Morton Salt Co.*, 334 U.S. at 54. The Commission cannot adjudicate whether its orders have been violated—let alone impose relief on that basis. Where it seeks order enforcement, the Commission "assume[s] the position of any other litigant, entitled to be heard, but not deferred to." *FTC v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 462 (6th Cir. 1988). This statutory distinction between enforcement and modification ensures that, with respect to

enforcement, the Commission does not impermissibly act as "judge as well as prosecutor." *J. B. Williams*, 498 F.2d at 429.

As the Commission recently held, its orders are "enforceable only by order of the district court." *Intuit*, 2024 WL 382358, at *56. The OTSC is plainly premised on assertions that Meta violated prior Commission orders, and Meta is entitled to have its compliance adjudicated in federal court. *See J. B. Williams*, 498 F.2d at 422.

D. The Court Has Exclusive Jurisdiction over the Order

The Commission cannot unilaterally reopen the Order. The Order is an integrated part of the Stipulated Order, a settled consent decree entered by a federal district court. The District Court expressly retained jurisdiction over the modification and enforcement of the Stipulated Order and its Attachment A, which the Commission later entered in its administrative proceeding. This jurisdictional authority is exclusive—and divests the Commission of any authority to modify the Order. The District Court erred in concluding otherwise.

It is settled law that where a court retains jurisdiction to enforce an order—like the District Court did here—that jurisdiction is exclusive. *See, e.g.*, *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) ("The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a [rival] court construing what the federal court meant in the judgment"); *see also United States v. ASCAP*, 442 F.2d 601, 603 (2d Cir. 1971) (holding that under retention of jurisdiction clause the district court retained exclusive jurisdiction over suits related to the consent judgment); *Ultimate Creations, Inc. v. McMahon*, 2006 WL 8443450, at *2 (D. Ariz. July 7, 2006) (retention provision "implies exclusivity"), *aff'd*, 300 F. App'x 528 (9th Cir. 2008). The District Court did not conclude otherwise in its decision on Meta's Motion to Enforce, nor did the government contest this basic proposition.

This is unsurprising, as the Commission itself has previously argued that the same jurisdictional grant in the Stipulated Order—for "purposes of construction, modification and enforcement"—conveyed exclusivity. *See* Brief of Defendant-Appellee United States, *Trudeau v. United States*, 2006 WL 422417, at *38 (Fed. Cir. Jan. 31, 2006) ("[W]hatever remedies Mr. Trudeau may possess for the FTC's alleged violation of the Stipulated Order must be pursued, if at all, in the court that entered and retained jurisdiction to enforce the Order.").

The operative question is whether the District Court's continuing and exclusive jurisdiction includes Attachment A. The District Court concluded that it has such jurisdiction with respect to the Stipulated Order—but erroneously found that the Stipulated Order does not include the injunctive relief to which the parties agreed, as set out in Attachment A to the Stipulated Order. *See United States v. Facebook, Inc.*, 2023 WL 8190858, at *6–7 (D.D.C. Nov. 27, 2023), *appeal filed*, No. 23-5280 (D.C. Cir.). This is wrong. Under clear precedent, litigants can reserve continuing jurisdiction in the district courts in either of two ways: by "clearly providing for retention of federal district court jurisdiction in their stipulations of dismissal, or by incorporating the full text of the settlement agreement into those stipulations." *Board of Trs. of Hotel and Rest. Emps. Local 25 v. Madison Hotel*, *Inc.*, 97 F.3d 1479, 1484 n.8 (D.C. Cir. 1996).

Here, the parties did both. The Stipulated Order on its face reserves continuing jurisdiction with the District Court over the entirety of the parties' agreement by providing that the Court "shall retain jurisdiction" (Stip. Order at 5), and by reiterating in Attachment A itself that "[t]his Court has jurisdiction over this matter" (Order at 1).[159] The parties also incorporated

[159] The fact that a Magistrate Judge in a different case, involving a different consent decree and different relief, reached a different conclusion says nothing about ***this*** Order. *See United States v. Twitter, Inc.*, No. 22-cv-03070 (N.D. Cal. Nov, 16, 2023) (Dkt. No. 63). Unlike in *Twitter*, this Order confirms the District Court's continuing jurisdiction. *Compare In re Twitter*, No. C-4316, at 1 (May 26, 2022) (stating that "The Commission has

the full text of Attachment A into the Stipulated Order. Nothing else was required to ensure the District Court's continuing jurisdiction. *Madison Hotel*, 97 F.3d at 1484 n.8; *see Kokkonen v. Guardian Life. Ins. Co. of America*, 511 U.S. 375, 381–82 (1994) ("[T]he court is authorized to embody the settlement contract in its dismissal order or, what has the same effect, retain jurisdiction over the settlement contract[] if the parties agree.").

Moreover, because the Stipulated Order is a consent decree, it is "a written reflection of the parties' bargain resolving their case, [and] should be interpreted as a contract." *Pigford v. Vilsack*, 777 F.3d 509, 514 (D.C. Cir. 2015); *see also ITT Cont'l Baking Co.*, 420 U.S. at 236–37; *United States v. W. Elec. Co.*, 894 F.2d 1387, 1390 (D.C. Cir. 1990); *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 339 (D.C. Cir. 2014) ("[T]he question for the lower court, when it interprets a consent decree incorporating a settlement agreement, is what a reasonable person in the position of the parties would have thought the language meant."). Fundamental principles of black-letter contract law demonstrate that Attachment A is part of the Stipulated Order.

This conclusion is supported by the plain text of the Order, the filing of Attachment A as an integrated part of the Stipulated Order, the representations of the parties at the time the Stipulated Order was entered, the Court's own statements upon entering the Order, and the parties' subsequent performance (including as reflected in communication from the FTC, taking the position that Attachment A is part of the Stipulated Order). Indeed, this is what one federal district court already has concluded. *See Brandtotal Ltd.*, 2021 WL 2354751, at *8 ("While the original 2012 version of the FTC order was issued unilaterally, the operative version issued on

jurisdiction"), *with* Order at 1 ("This Court has jurisdiction over this matter."). And, as discussed below, another judge in the same District, reviewing ***this*** Order, determined that it "reflects a stipulation between the FTC and Facebook in a judicial enforcement proceeding." *Facebook, Inc. v. Brandtotal Ltd*., 2021 WL 2354751, at *8 (N.D. Cal. June 9, 2021).

April 27, 2020 reflects a stipulation between the FTC and Facebook in a judicial enforcement proceeding.").

By its plain terms, the Stipulated Order provides that "this Court shall retain jurisdiction in this matter for purposes of construction, modification, and enforcement of this Stipulated Order." (Stip. Order at 5.) The District Court's expressly retained jurisdiction necessarily includes Attachment A to the Stipulated Order because the Stipulated Order and Attachment A were filed by the government—and entered by the District Court—as a single, integrated document. *See Levelle, Inc. v. Scottsdale Ins. Co.*, 539 F. Supp. 2d 373, 376 (D.D.C. 2008) (a contract includes documents "physically attached" to it); *see also* Restatement (Second) of Contracts § 132 cmt. c (1981) ("[I]t is sufficient . . . that the party to be charged physically attaches one document to the other" for purposes of the statute of frauds). Attachments "are an intrinsic part of the decree and are to be given the same effect as the main document." *Brill v. Wing*, 937 F. Supp. 170, 175–76 (N.D.N.Y. 1996). And even where documents are not "attached," when "a writing refers to another document, that other document . . . becomes constructively a part of the writing, and in that respect the two form a single instrument." 11 Williston on Contracts § 30:25 (4th ed.). Attachment A more than meets this standard.

The Order's incorporation into the Stipulated Order is confirmed by its plain language as well. Later entered by the Commission in the exact same form as entered by the District Court (including with the marking "Attachment A"), the Order provides that "***[t]his Court*** has jurisdiction over this matter." (Order at 1.) Because it is part of the Stipulated Order first entered by the District Court and filed on the District Court's own docket, it makes perfect sense that the District Court would refer to itself as "This Court."

Likewise, Part XV provides that the "Commission is also authorized to obtain discovery, ***without further leave of court***, using any of the procedures prescribed by [specified] Federal Rules of Civil Procedure." (*Id*. at Part XV.) This provision only makes sense if "court" means ***the District Court***, not the Commission authorizing itself to obtain additional discovery. Because the Federal Rules govern proceedings in "United States district courts," Fed. R. Civ. P. 1, the Commission could not grant itself the authority to conduct such discovery. And as the use of the word "further" confirms, the ***District Court*** granted those rights in Attachment A so that the Commission need not return for "further" permission to obtain civil discovery. *See In re Cendant Corp. Sec. Litig.*, 569 F. Supp. 2d 440, 447 (D.N.J. 2008) (defining "further" as "'additional'" and "'something beyond what has been said'" (citing Black's Law Dictionary 675 (6th ed. 1990))). Moreover, unless Attachment A were part of the Stipulated Order, it would make no sense for Attachment A to say on page 1 that "the Commission waive[s] all rights to appeal or otherwise challenge or contest the validity" of what would be its own order. (Order at 1.) The Commission cannot waive the "right" to appeal an administrative order, because it cannot appeal from its own administrative orders. *See* 15 U.S.C. § 45(c) (authorizing only respondents to Commission "cease and desist" orders to file a petition for review in the federal circuit courts).

By contrast, the assertion that "This Court" really means "Commission" is not credible. That argument would mean that the Commission—apparently for the very first time in its history and in defiance of controlling Supreme Court precedent[160]—referred to itself as "this Court" and did so both in a document that includes "Commission" as a defined term otherwise used consistently and on the same day that it released two other orders involving other respondents

[160] *See FTC v. Cement Inst.*, 333 U.S. 683, 703 n.12 (1948) ("The Commission is not a court.").

that stated that "[t]he Commission" has jurisdiction.[161] The far simpler explanation is that the parties intended "[t]his Court" to mean exactly what it says, in a filing with the District Court, which both required the District Court's approval prior to entry and that uses "Court" throughout to refer to the District Court.

Both parties told the District Court that the Stipulated Order includes Attachment A. The Commission invoked the District Court's jurisdiction by filing a civil complaint to obtain relief—including a $5 billion penalty—that only the District Court could award. (Compl. ¶¶ 193–94 (citing 15 U.S.C. §§ 45(*l*) and 53(b)).) In seeking the District Court's approval of the parties' settlement, the Commission treated the Stipulated Order and Attachment A as a single, integrated document, repeatedly noting that the Stipulated Order ***imposes*** the injunctive relief set forth in the Order. (*See* Consent Mot. at 1 ("[T]he Stipulated Order . . . imposes significant injunctive relief, primarily in the form of an amended administrative order that will be entered by the FTC."); *id.* at 4 ("The proposed settlement has two main components: a civil penalty award and injunctive relief imposing new compliance terms on Facebook.").) And Meta similarly maintained that "the proposed administrative decision and order [is] incorporated in the Stipulated Order." Surreply, *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Jan. 24, 2020) (Dkt. No. 29) at 7. With good reason—it would make no sense to break apart a document negotiated in a single settlement into two separate parts—one of which could be unilaterally rewritten by one party.[162]

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[161] Agreements Containing Consent Orders as to Kogan and Nix, *In re Kogan and Nix*, File Nos. 182 3106, 182 3107 (F.T.C. July 24, 2019) at 1.

[162] As the government explained to the District Court in 2019, the reason the parties included some relief in an attachment was because it was necessary to "reopen[] the FTC's earlier administrative proceeding . . . so the FTC can replace the 2012 Order with . . . Attachment A to the Stipulated Order." *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. July 24, 2019) (Dkt. No. 2) at 3 ("Consent Mot."). Meta otherwise would have been subject to conflicting requirements under the 2012 Order and the Stipulated Order.

Consistent with the plain language of the Stipulated Order and the representations of the parties, the District Court also determined, in entering the Stipulated Order, that it includes its Attachment A. With respect to the inclusion of Attachment A into a single, integrated Stipulated Order, the Court noted, in its opinion entering the Stipulated Order, that "[t]he United States has moved, with Facebook's consent, for the Court to enter ***a stipulated order that . . . imposes injunctive relief in the form of an amended administrative order*** to be entered by the FTC." *Facebook*, 456 F. Supp. 3d at 120. It also noted that "[t]he Stipulated Order spells out Facebook's ***obligations*** precisely, it defines key terms in detail, and it incorporates specific deadlines for completion of its ***obligations***." *Id.* at 123. Consistent with this view, the District Court stated that it "retains ***jurisdiction over this matter***, including to enforce its terms," and cautioned:

> In the event that the parties return to this Court because the United States alleges—once again—that Facebook has reneged on its promises and continued to violate the law ***or the terms of the amended administrative order***, the Court may not apply quite the same deference to the terms of a proposed resolution. As the D.C. Circuit has explained . . . when 'a district judge has administered a consent decree for some period of time,' and is therefore likely more familiar with the relevant context, 'the lack of an initial trial is, at least marginally, less of an inhibition' when weighing the appropriateness of a proposed remedy.

Id. at 126 (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995)).

The Commission knows this and has made admissions that vitiate any position to the contrary. The FTC and DOJ have issued joint requests under Part XV of Attachment A, stating that Attachment A's requirements are the Stipulated Order's requirements and treating the Stipulated Order and its Attachment A as one and the same:

> As you know, **the Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief entered by the United States District Court for the District of Columbia on April 23, 2020 (Dkt. No. 35) (the "Order")**, authorizes the Federal Trade Commission and the Department of Justice to use discovery devices to request certain documents and information . . . . In particular, the Order entitles the

> Commission and the Department to request documents and information **concerning Meta's compliance with the Order, including the Order's prohibition against misrepresentations concerning the extent to which Meta maintains the privacy or security of Covered Information, as that term is defined in the Order, and the Order's provisions concerning a mandated privacy program.** *Id.* at 4 and Attachment A, [Parts] I, VII and XV.

(Ex. 95 (June 30, 2022 FTC Demand Letter) at 1.) The Commission has thus made clear that Meta's compliance with the Court's Stipulated Order requires it to comply with Attachment A's provisions. *See Cemex Inc. v. Dep't of the Interior*, 560 F. Supp. 3d 268, 278–79 (D.D.C. 2021) (holding that "[u]nder the Restatement, courts may look to evidence of 'course of performance' for interpretative assistance even when the contractual language contains no ambiguity," and that where such evidence exists it is "considered the best indication of what [the parties] intended the writing to mean"). That the Order was wholly incorporated as part of the Stipulated Order was the Commission's consistent position before May 3, 2023. It is judicially estopped from contending otherwise now, having sought and obtained the relief granted by the Court with its entry of the Stipulated Order. *See County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 73 (D.D.C. 2008).

The Commission's one-page "Order Modifying Prior Decision and Order" entering Attachment A on its administrative docket confirms its incorporation into the Stipulated Order. Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020) at 1. In setting out the legal basis for the Commission's entry of Attachment A, the Order Modifying Prior Decision and Order does not refer to Section 5(b) even once, relying instead on the government's 2019 Complaint and the District Court's approval and entry of the Stipulated Order. *Id.* Indeed, the Commission Chair issued a statement at the time "regarding the [Federal Court's] approval," specifically noting that the District Court "highlight[ed]" and approved the "conduct relief included in this settlement." (April 2020 Press Release.) As the

FTC explained in 2020, it "entered a modified administrative order . . . formally adding approved amendments to its 2012 privacy order to include provisions that were incorporated into the FTC's 2019 settlement with the company."[163] Those "approved amendments" are the injunctive measures set out in Attachment A, which the District Court approved in the first instance. And the Order must be an integrated part of the Stipulated Order because the injunctive relief it sets out is relief that only a district court could issue. *See FTC v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 462 (6th Cir. 1988) (Commission initiates Section 5(*l*) action "seeking relief from the district court"). As discussed further below, Section 5(b) only granted the Commission administrative authority in the form of "cease and desist" orders. 15 U.S.C. § 45(b). Thus, the Complaint invoked two provisions of the Act—15 U.S.C. §§ 45(*l*) and 13(b)—that authorize ***district courts*** to issue broader, mandatory injunctive relief; absent consent, the Commission had no other option.

Likewise, the fact that the Commission included the Order's terms as part of the consent decree submitted to the District Court confirms its inclusion as part of the Stipulated Order. In its 2023 Opinion, the District Court erroneously applied a decision involving a voluntary stipulation of dismissal pursuant to a settlement between private parties, *see Kokkonen*, 511 U.S. at 376–77, to the Stipulated Order, which is a consent decree entered by a federal district court. Unlike a stipulation of dismissal, a consent decree has the force of a court order and can be approved only after the court has "satisf[ied] itself of the settlement's overall fairness to beneficiaries and consistency with the public interest." *In re Idaho Conservation League*, 811 F.3d 502, 515 (D.C. Cir. 2016). Indeed, in undertaking the requisite scrutiny of the consent

[163] *2020 Annual Highlights*, Fed. Trade Comm'n, at *24 (Apr. 2021), https://www.ftc.gov/system/files/attachments/printable-version/2020_annual_highlights_report.pdf.

decree in 2020, the District Court reasoned that the "injunctive relief in the amended administrative order" was "[a]s important" as the $5 billion civil penalty. *Facebook*, 456 F. Supp. 3d at 123. In its 2023 Opinion, the District Court again recognized that it "'approved' Attachment A insofar as it needed to satisfy itself of the settlement's overall fairness." *Facebook, Inc.*, 2023 WL 8190858, at *6. The District Court's review and approval of the Order confirms that it is an integral part of the Stipulated Order, and that its unilateral modification by the Commission would "deny [Meta] the benefit of its bargain." *Pigford*, 292 F.3d at 925.

The plain language of the Stipulated Order and Attachment A, the entirety of the 2019-2020 litigation record that led to the Order's entry, and the post-entry course of performance by the Commission leaves no doubt of the parties' agreement that the Stipulated Order incorporated Attachment A. If the Commission takes the position now that the terms of Attachment A were *not* incorporated into the Stipulated Order, and that *it* retained the authority to unilaterally modify Attachment A—a fundamental component of their settlement agreement—then there was no meeting of the minds and no binding, enforceable consent decree. That means that the parties must be returned to their positions immediately before the Stipulated Order was entered. *See Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007) ("[T]o establish a contract, there must be a 'meeting of the minds' with respect to the material terms.").

E. The Commission's Attempt to Unilaterally Modify a Final Court Judgment Violates Res Judicata

Regardless of whether the District Court retained jurisdiction—the Order cannot be modified. It was a final order entered to resolve a district court complaint and is thus entitled to res judicata effect.

The Stipulated Order makes clear that the Order was entered to "resolve" the government's 2019 Complaint. (Stip. Order at 1.) Under settled law, res judicata applies when

"a court of competent jurisdiction has entered a final judgment on the merits" to resolve a complaint, as the District Court did in 2020. *See RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 800 F. Supp. 2d 182, 189 (D.D.C. 2011); *Wise v. Glickman*, 257 F. Supp. 2d 123, 129 n.4 (D.D.C. 2003) ("Consent decrees generally are treated as final judgments on the merits and accorded res judicata effect."). No part of a final judgment can be modified—except under Rule 60(b) of the Federal Rules of Civil Procedure. *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (holding that review of a final judgment "is limited by the finality considerations underlying Rule 60(b)").

Indeed, this was the position the government, representing the Commission, took at the time the Stipulated Order was entered. The government argued to the District Court that the Stipulated Order would be subject to the "doctrine of res judicata," no different from any other federal court judgment. Gov't Response to Amici, *United States v. Facebook, Inc.*, No. 19-cv-02184-TJK (D.D.C. Jan. 24, 2020) (Dkt. No. 28) at 11–12. To argue otherwise would fly in the face of well-settled law. Courts have routinely rejected arguments that government entities may unilaterally modify rights determined by federal courts. A litigant—"whether a private or public entity—cannot dictate the meaning of the decree to the court or relieve itself of its obligations under the decree without the district court's approval." *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007); *see Morris v. Travisono*, 509 F.2d 1358, 1361 (1st Cir. 1975) (agency could not "unilaterally order the elimination of rights determined in federal courts simply because the consent decree was to be enforced through [administrative] machinery").

In responding to Meta's motion to enjoin this reopening proceeding before the District Court, the government did not dispute that final judgments may be modified only in

"extraordinary circumstances," or that Rule 60(b), as construed by the D.C. Circuit, prohibits the imposition of "entirely new injunctive relief" under the "guise of modification," as the Commission seeks to do through its Proposed Order. *See Salazar*, 896 F.3d at 498. The government simply asserted that these well-settled rules "do not apply to agency action." Gov't Opp., *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Aug. 16, 2023) (Dkt. No. 49) at 24. But the only case it cited to support its newfound position held that ***state administrative findings*** are not preclusive in federal courts. *See Astoria Fed. Svs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106 (1991). Here, the parties' settlement, including Attachment A, was entered by the Court, as the government told the Court in 2020, to "resolve a complaint filed in ***this Court*** by the United States"; there was no "***administrative*** complaint" or claim to resolve. Gov't Surreply, *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Jan. 24, 2020) (Dkt. No. 27) at 7–8 (emphases in original). Res judicata applies when "a court of competent jurisdiction has entered a final judgment on the merits" to resolve a complaint, which the Court did in 2020. *RSM Prod. Corp.*, 800 F. Supp. 2d at 189.

The Commission's unilateral modification of a final judgment entered by a federal district court would also violate Article III. "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not be unlawfully revised, overturned or refused faith and credit by another Department of Government." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Judgments issued by Article III courts are "subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). To hold otherwise would "subject all judicial action to superior" review by coequal branches of government—an outcome "subversive of the constitutional independence of the judicial branch of government." *Daylo v. Adm'r of Veterans' Affairs*, 501

F.2d 811, 816 (D.C. Cir. 1974). For that reason, "decisions of Article III courts" are not subject to reopening or review by Congress or "officials of the Executive Branch." *Bank Markazi v. Peterson*, 578 U.S. 212, 225–26 (2016).

II. THE COMMISSION OVERSTEPS THE NARROW CONDITIONS FOR REOPENING AN ORDER

Even if Section 5(b) applied here, neither of its conditions for reopening has been met. Section 5(b) only authorizes reopening a final order when "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 Commission makes no effort to apply this standard or meet the high burden of proof the Commission has long held it to require.

To start, reopening is only warranted under extraordinary circumstances. When seeking to reopen an order, the Commission bears the burden of proof, and that "burden is heavy." *Louisiana-Pac.*, 112 F.T.C. 547, 1989 WL 1126760 at *6. To meet that burden, the Commission requires "significant unanticipated changes in circumstances or considerations of the public interest [that] eliminate the need for the order or make continued application of the order inequitable or harmful." *Id.* at *4.

The Commission has regularly looked to cases construing federal courts' reopening authority under Federal Rule of Civil Procedure 60(b)[164] to discern the scope of its reopening authority under Section 5(b). *See, e.g.*, *Removatron*, 114 F.T.C. at 716; *see also In re Hoechst Celanese Corp.*, Dkt. No. 9216, 1990 WL 1037361, at *1 (F.T.C. May 14, 1990) ("Judicial constructions of the federal rule can be useful in interpreting the Commission's rules."); *In re Ash Grove Cement Co.*, 77 F.T.C. 1660, 1970 WL 117303, at *2 (Oct. 22, 1970) ("[W]hile the

[164] *See* Fed. R. Civ. P. 60(b)(5) (providing that "the court may relieve a party or its legal representative from a final judgment" where "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable").

Federal rules are not applicable, the standards developed by the courts in interpreting such rules are frequently informative and useful in applying the Commission's rules to specific situations."). Indeed, Commissioner Bedoya explicitly invoked the Rule 60(b) standard in his statement accompanying the OTSC. (*See* Comm'r Bedoya Statement.) Under that standard, because disturbing the "sanctity" of final orders is highly disfavored, a party seeking to modify a final order bears a substantial burden. *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). Modification "should be only sparingly used, and reserved for extraordinary circumstances." *PETA v. U.S. Dep't of Health & Hum. Servs.*, 901 F.3d 343, 355 (D.C. Cir. 2018).

Further, the party seeking to reopen a final order bears a substantial burden to prove that such extraordinary circumstances exist. The Commission has held that a request from a respondent must "demonstrate[] in detail the nature of the changed conditions and the reasons why these changes" warrant the modification, or "provide[] specific reasons why the public interest would be served by the requested modification." *In re DTE Energy Co.*, Dkt. No. C-4691, 2021 WL 5711344, at *2 (F.T.C. Nov. 23, 2021). The assertion that the Section 5(b) standard has been met cannot be conclusory. *In re Watson Pharms. Inc.*, Dkt. No. C-4373, 2018 WL 6804369, at *3 (F.T.C. Dec. 17, 2018). That burden is no lower where the Commission seeks to reopen its own orders. By amending Section 5(b) in 1980, Congress precluded the application of the "general presumption against the reopening of final agency orders" to reopening requests by *respondents. See Louisiana-Pac.*, 754 F.2d at 1447 n.1. But Congress left that general presumption untouched when the Commission initiates the reopening. *See id.*

Consistent with this demanding standard, the Commission has historically used its reopening authority sparingly—and nearly always to provide respondents ***relief*** from its orders.

Modifications on the Commission's own motion are extraordinarily rare. As the Commission itself put it, "[o]rders to show cause under Rule 3.72(b) are not common," citing as illustrative and representative examples of its "recent" use (1) "reopening an order to correct inaccuracies," and (2) "when the Commission determined to modify an order, but in a manner different from that requested" in a reopening petition filed by the respondent. *In re Dow Chem. Co.*, Dkt. No. C-4243, 2010 WL 2143901, at *3 (F.T.C. May 21, 2010). Indeed, in its federal court briefing, the Commission pointed to only one such order to show cause in the last half-century, a case in which the respondent *consented* to the proposed modification. *In re Kellogg Co.*, Dkt. No. C-4262, 2010 WL 2332719, at *1 (F.T.C. June 2, 2010).

Notwithstanding the high burden the Commission has historically required (and seldom sought to meet), the OTSC says nothing about how either changed circumstances or the public interest warrants reopening. It does not cite any precedent applying these terms, attempt to connect anything in the preliminary factual findings to either basis, or explain why either basis has been met. It states only that "the Commission has good cause to believe the public interest and changed conditions require" the reopening, and that alleged "non-compliance constitutes changed conditions." (OTSC at 12.) Such conclusory assertions are legally deficient and, as shown below, the Commission could not plausibly find that either basis for reopening has been satisfied.

A. Conditions of Fact Have Not Changed

Section 5(b) permits reopening when "conditions of fact or of law have so changed as to require such action." 15 U.S.C. § 45(b). The only such circumstances cited in the OTSC are the Commission's asserted order and legal violations. But as a matter of law, those are not and cannot be changed circumstances meriting reopening.

1. Section 5(b) Requires Continuing Conduct

As set forth in detail in the PFOF Response, the factual circumstances set forth in the OTSC and PFOF no longer exist; they have been remediated or otherwise addressed and thus cannot justify reopening under Section 5(b).

The Commission invokes these factual circumstances (which it treats as violations) as "changed conditions," but that phrase appears nowhere in the statute it purports to apply. Section 5(b) allows for reopening when "conditions of fact or law ***have so changed***." 15 U.S.C. § 45(b). That language—"have so changed"—can only apply to action that is continuing through the present. As the Commission knows:

> The present perfect is typically used to describe an action that started in the past and continues in the present. For example, the phrase "I have served as a federal judge since 2014" means that I started as a judge in 2014 and continue to be one today. It does not mean . . . that I was once a judge but stopped being one at some undefined time in the past. This is the most grammatically sensible reading.

FTC v. D-Link Sys., Inc., 2017 4150873, at *4 (N.D. Cal. Sept. 19, 2017). Only a year ago, the Commission reiterated that the present perfect tense "indicates an ongoing activity." Br. of FTC, *FTC v. Kochava, Inc.*, 2022 WL 20113180, at n.9 (D. Idaho Nov. 18, 2022). The meaning of "have so changed" in Section 5(b) is informed by the surrounding statutory context, which authorizes the Commission to demand that Meta "show cause why an order should not be entered . . . *to cease and desist from the violation of the law so charged in said complaint*." 15 U.S.C. § 45(b); *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("Statutory language . . . cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). An order to cease and desist necessarily assumes ongoing conduct that must be stopped. Conduct that has already ended cannot be ordered ceased.

None of the factual circumstances alleged by the Commission's "continue[] in the present" or reflect "an ongoing activity." *See* Br. of FTC, *Kochava*, 2022 WL 20113180, at n.9; *D-Link Sys.*, 2017 WL 4150873, at *4. As detailed in the PFOF Response, Meta "undertook intensive efforts to address," and did address the Assessor's findings through [redacted] management action plans comprising [redacted] of individual milestones. (M. Protti Decl. ¶ 12; Resp. to PFOF, Section I.A.4 ¶ 22.) Meta's MAPs have addressed and remediated the Assessor's findings from the initial Assessment to the Assessor's satisfaction, and are subject to ongoing testing. (*Id.*) Likewise, the Commission has already found that the coding errors have long since been addressed and remediated. The Commission's findings state that Meta "remediated" and "fixed" the Messenger Kids coding errors in July 2019, and addressed the 90-Day Limitation by July 2020. (PFOF ¶¶ 1093–97, 1120, 1153–54, 1164.) *See Eugene Dietzgen Co. v. FTC*, 142 F.2d 321, 331 (7th Cir. 1944) ("If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered.").

There is no basis to interpret the language of Section 5(b) to permit reopening for conduct that Meta proactively identified, disclosed to the Commission, and remediated years ago. Because none of the circumstances cited as "changed conditions" continue through the present or are ongoing, they cannot—as a matter of law—enable the Commission to conclude, as it must, that such conditions "have so changed."

2. The OTSC Points to No Unforeseeable Events

Regardless, the order and legal violations asserted in the OTSC fail for a separate reason: the possibility of such violations was foreseen by the parties. Citing cases applying Federal Rule of Civil Procedure 60(b), the Commission has held that modification of a final order requires "significant changes in circumstances," which "must be unforeseeable" at the time of the order's

entry. *Removatron*, 114 F.T.C. at 716 (citing cases); *see also In re Culligan, Inc.*, 113 F.T.C. 367, 1990 WL 10012596, at *2 (May 14, 1990) ("changed conditions must be unforeseeable"); *In re New England Motor Rate Bureau, Inc.*, 114 F.T.C. 536, 538 (1991) (same). By contrast, reopening is not warranted where the changed circumstances "were reasonably foreseeable at the time the consent order was entered." *In re Institut Merieux S.A.*, 117 F.T.C. 473, 479 (1994); *see also In re the Stop & Shop Companies, Inc.*, 123 F.T.C. 1721, 1725 (1997) (same).

Unforeseeability is a precondition to reopening because the Commission presumes that parties have already addressed in their agreements potential future events within their contemplation:

> Subsequent changes in factual circumstances, if falling within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations, clearly do not constitute the kind of changed conditions which are substantial and material enough to require modification of the order. To conclude otherwise would mean that a negotiated consent agreement could never operate with any finality to require compliance at a fixed future date—a result which would rob the consent procedure of much of its usefulness.

Phillips Petrol. Co., 78 F.T.C. 1573, 1971 WL 128558, at *2 (Mar. 4, 1971). Under these longstanding precedents, circumstances that the parties could have anticipated when negotiating their consent order cannot—as a matter of law—constitute a basis for modifying that order. This is true for any negotiated consent order, but it carries exceptional force here. The Commission is seeking to rewrite an order that it has held up to the public and a federal district court as perhaps the most extensively and painstakingly negotiated order in its history. (*See* July 2019 Press Release.) Put simply, the parties foresaw the possibility of each of the purportedly changed facts cited in the OTSC and negotiated their agreement accordingly. The OTSC cites no unforeseeable circumstances, and the Commission would have to undo decades of settled law to hold otherwise.

(a) Coding Errors Are Foreseeable Under Commission Precedent and, in the Case of Messenger Kids, Were Actually Known to the Commission When the Order Was Entered

The factual and procedural record prior to the court's entry of the 2020 Order reflects that the Messenger Kids technical errors and Expiration Check Coding Oversight were both foreseeable, and, in the case of Messenger Kids, actually known by the Commission. These technical errors thus do not amount to changed circumstances and cannot support reopening under Section 5(b).

The possibility of coding errors like the Messenger Kids technical errors and the Expiration Check Coding Oversight are, as a matter of Commission policy, "inevitable"—and thus are definitionally foreseeable.[165]

The Messenger Kids technical errors were, in fact, known to the Commission at the time the parties entered into the 2020 Order. The Commission's own Preliminary Findings of Fact demonstrates the Commission knew about the Messenger Kids technical errors before filing its 2019 complaint against Meta. (*Compare* PFOF ¶ 1164 ("Facebook notified the FTC of this vulnerability on July 15, 2019.") *with United States v. Facebook, Inc.*, Case No. 19-cv-2184 (Dkt. No. 1) (July 24, 2019).) Indeed, Commissioner Bedoya acknowledged as much in his statement accompanying the OTSC, explaining that "when the Commission determines how to modify an order, it must identify a nexus between the original order, the intervening violations, and the modified order" and that the technical errors do not appear to be intervening violations because they "were resolved before the Commission issued its 2020 Order." (Comm'r Bedoya Statement.)

[165] *See* NTIA Statement at 2.

While the specific facts of the Expiration Check Coding Oversight were not known to the FTC when the 2019 Complaint was filed, the fact that an error could occur that resulted in Meta unintentionally sharing Facebook user information with third parties beyond its intent was certainly contemplated by the parties at the time they negotiated the 2020 Order. The basis for the 2020 Order was in substantial part the revelations regarding the unauthorized sharing of data by Aleksandr Kogan with Cambridge Analytica.[166] The Commission explicitly contemplated the potential for sharing data with third-party developers beyond Meta's policies by including multiple provisions in the Order aimed at preventing such unintended sharing, and an obligation to report incidents that involve sharing of user information that violates Meta's policies. (Order at Part IX.) The Commission cannot reasonably argue that the facts underlying the Expiration Check Coding Incident amount to a changed circumstance that requires modification of the Order when the Order already accounts for the risk that the Expiration Check Coding Incident posed.

(b) Order Violations Are Not Changed Circumstances

Even if true (which it is not), the Commission's conclusory assertion that Meta violated the 2012 and 2020 orders also cannot constitute changed circumstances as a matter of law. The Commission itself has previously rejected the argument that an order violation can be "a sufficient basis for modification of the order." *ITT Cont'l*, 1972 WL 128875 at *1; *see also In re Am. Dental Ass'n*, 111 F.T.C. 735, 1988 WL 1025509, at *3 (Oct. 4, 1988) (explaining that order

[166] *See* July 2019 Press Release (describing a law enforcement action against Cambridge Analytica announced the same day as the Facebook settlement as a "related [] development" to allegations that Facebook took inadequate steps to deal with apps).

modification is not appropriate "where substantial questions exist about a respondent's compliance with the very provision sought to be modified").[167]

This is not a close call. Violations of an order "***fall[] far short*** of the type of 'changed circumstance' that might warrant the amendment of a settlement agreement." *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 9 (D.D.C. 2002). It would be nonsensical to hold otherwise, since, "in the negotiation of a settlement, the negotiation of incentives and penalties that will ensure the opposing parties' compliance is an omnipresent concern." *Id.* In case after case, courts have rejected arguments (including when made by the Commission) that order *violations* can be a basis for substantive order *modifications*. *See, e.g.*, *id.*; *FTC v. Garden of Life, Inc.*, 2012 WL 1898607, at *5–6 (S.D. Fla. May 25, 2012) (holding that alleged order noncompliance is "insufficient to constitute a significant change in factual circumstances"); *Cook v. Billington*, 2003 WL 24868169, at *4 (D.D.C. Sept. 8, 2003) (holding that "violation of the Settlement Agreement . . . does not constitute the type of 'changed circumstance' which justifies modification").

There can be no serious debate that the potential for order violations was specifically foreseen by both the Commission and Meta. The parties said so in their agreement; Part XVI expressly addresses that very possibility. And the Commission's press release touting the 2019 settlement—which remains on the Commission's website today—states that the relief in the Order was designed in part to address the possibility of "*future violations*." (July 2019 Press Release.)

[167] Indeed, Section 5(b) could not allow the Commission to modify an order based on its determination that an order has been violated because, as discussed *supra* Section I.C, no authority allows the Commission to adjudicate whether its orders have been violated. *See J. B. Williams*, 498 F.2d at 422.

With respect to Meta's Privacy Program, the fact that the OTSC relies on nothing more than "gaps and weaknesses" found by the Assessor further diminishes any argument of "changed circumstances." The possibility for such gaps and weaknesses was specifically foreseen, expected, and addressed in the Order. Part VIII.D of the Order charged the Assessor with identifying "gaps or weaknesses" in the Privacy Program. And the Commission anticipated that the Assessor would, in fact, find them. Why else would Part X.A(5)(c) require the Independent Privacy Committee to review "any material issues raised by the most recent Assessment or material unresolved issues from prior Assessments," and task Meta with addressing "any such issues raised in the Assessment"?

The record leaves no doubt—the Commission specifically contemplated the potential for future order violations in negotiating the 2020 Order, making that clear in both the Order itself and in its statements to the public. That is fatal to the OTSC's assertion that such violations (if proven) could warrant order modification. *See Stop & Shop*, 123 F.T.C. at 1725 (rejecting reopening for "changes in circumstances that were reasonably foreseeable at the time the consent order was entered.").

(c) In Any Event, Meta Has Not Violated Any Order

(i) *Meta Complied with Part VII*

On their face, the Commission's OTSC and supporting factual findings do not actually assert that Meta violated Part VII of the Order. Its assertion that Meta "failed to establish and implement an *effective* privacy program" is wrong as a matter of fact and law.

As described above, Commission consent orders must be construed as contracts. As a result, construction starts—and usually ends—with the document's plain language. *See Armour*, 402 U.S. at 682 ("[T]he scope of a consent decree must be discerned within its four corners, and

not by reference to what might satisfy the purposes of one of the parties to it.").

Part VII requires Meta to "establish, implement, and thereafter maintain a ***comprehensive*** privacy program . . . that ***protects*** the privacy, confidentiality and Integrity" of Covered Information. It then states that, "[t]o satisfy this requirement," Meta's Privacy Program must, "at a minimum," include the components set forth in Part VII's subparts. The Order could not be clearer that a Program that includes the components set forth in subsections A–J—and nothing more—is sufficient "[t]o satisfy" Part VII. As further described in the PFOF Response, Meta more than met these requirements and the OTSC does not claim otherwise. Indeed, neither the OTSC nor the PFOF contends that Meta failed to do anything required by any subsection of Part VII.

Rather, the OTSC asserts that Meta violated Part VII because it failed to maintain an "effective privacy program"—a phrase that does not appear in the Order. And it bases that assertion on the existence of gaps and weaknesses that the Order specifically contemplates and, in any case, relate to safeguards and processes that *are not required by Part VII* (or any other part of the Order). But the Commission cannot rewrite Part VII or add to its requirements by asserting that these gaps rendered the Privacy Program not "effective." Applying the principle that "the plain and unambiguous meaning of an instrument is controlling,"[168] *WMATA v. Mergentime Corp.*, 626 F.2d 959, 960–61 (D.C. Cir. 1980), the components set forth in Part VII.A–J are the ***only*** requirements that Meta must meet to satisfy Part VII. It is for that reason that Part VIII.D.2 requires the Assessor to "assess the effectiveness of Respondent's implementation and maintenance ***of each subpart in Part VII***." And not even that provision can

[168] If there were any ambiguity, courts must resolve them in favor of the enjoined party. *See Yelverton*, 831 F.3d at 587.

be read to impose an enforceable obligation ***on Meta*** to maintain an "effective privacy program" (OTSC at 12) divorced from Part VII's actual language.

Indeed, the OTSC's atextual interpretation of Part VII would render it impermissibly vague. The FTC may not maintain an enforcement action unless "a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *See, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995). Then-Commissioner Chopra argued at the time that the Order includes "no benchmarks for what constitutes effectiveness" with respect to Part VIII.D.2's requirement that the Assessor assess Meta's implementation of Part VII's subparts. (Comm'r Chopra Dissent at 13.) Nothing in the OTSC identifies—much less applies—any such benchmarks or standards, and the Commission cannot, years later, create them through enforcement. In fact, doing so would result in the precise scenario that led the Eleventh Circuit to vacate the Commission's order against LabMD. *See LabMD, Inc. v. FTC*, 894 F.3d 1221, 1237 (11th Cir. 2018). Part VII spans nearly five pages of the text, yet the OTSC points to no language or textual obligation that Meta allegedly violated—arguing only that the Privacy Program was not "effective" based on gaps and weaknesses in processes going beyond Part VII's requirements. Part VII of the Order means what it says. It does not and cannot be read now to require every "item the Commission thinks necessary." *Id.* That would make it impossible for Meta to determine what conduct would comply with Part VII. *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 367–68 (1962) (holding Commission orders must be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application"). Just as the FTC could not require LabMD to "overhaul and replace its data-security program to meet an indeterminable standard of reasonableness," *LabMD*, 894 F.3d at 1236, the Commission could not—and, as Part VII's text

makes clear, did not—require Meta to implement a Privacy Program to meet an indeterminable and unstated standard of effectiveness.[169]

Applying Part VII's ***actual*** language, the record is clear that Meta more than met its obligation to implement and maintain a "comprehensive privacy program . . . that protects the privacy, confidentiality, and integrity of the Covered Information." (Order at Part VII.) The Assessor itself expressly concluded:

> We believe the overall scope of the program and the structure of the [redacted] into which the program is organized is logical and ***appropriately comprehensive***. As a result, the key foundational elements necessary for an effective program are now in place . . . .

(2021 Assessment Report at 3.) And, as shown in the PFOF Response, it was correct to do so. The Program included each of the requirements set forth in Part VII.

And it did so effectively. Nowhere does the PFOF or the OTSC identify—let alone substantiate—any actual harm to any user arising from any of the issues identified in the Initial Assessment. The Commission cannot simultaneously argue that Meta's program was "ineffective" on the basis of the Assessor's initial findings and ignore that it has not cited any user harm resulting from any of those findings.

Of course, as expected and as required by the Order, the Assessor identified gaps and weaknesses—limited to only [redacted] of the [redacted] of safeguards in the Privacy Program. (Resp. to PFOF, Section I.A.3 ¶ 20.) In other words, the Assessor concluded that the vast majority—roughly [redacted]—of the program's safeguards had ***no*** gaps or weaknesses. (*Id.*)

[169] Likewise, reading an entirely new and different standard into Part VII would also violate the fair notice doctrine and implicate significant Due Process concerns. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.").

But, regardless, the Order specifically and intentionally contemplates that an effective, compliant Privacy Program will have gaps and weaknesses, even significant ones. The Order separately requires the Assessor to "assess the effectiveness of" Meta's implementation and maintenance of each subpart of Part VII and also to "identify any gaps or weaknesses in the Privacy Program." (Order at Part VIII.D.) Part X.A(5)(c), in turn, requires the Independent Privacy Committee to review "any material issues raised by the most recent Assessment or material unresolved issues from prior Assessments," and charges Meta with addressing "any such issues raised in the Assessment." And Meta did just that, addressing all of the Assessor's observations.

Notwithstanding that none of the facts cited in the PFOF amount to a violation, by relying only on the 2021 Assessment Report—and serving this Order to Show Cause weeks before it was scheduled to receive the 2023 Report—the Commission also ignores the current state of the program. As noted, Meta has addressed each of the Assessor's 2021 findings (and thus each gap and weakness catalogued in the PFOF) through [redacted] MAPs comprising [redacted] of individual milestones. (M. Protti Decl. ¶ 12; Resp. to PFOF, Section I.A.4 ¶ 22.) The gaps and weaknesses as described in the Initial Assessment (between October 2020 and April 2021) simply no longer exist. (*See id.*) And as a result of those management action plans, Meta's compliance program is stronger. Indeed, the Assessor concluded that its most recent findings were "consistent with the maturation of the [Program] in light of Meta effectively addressing previous weaknesses." (2023 Assessment Report at 7.)

Two industry-leading experts on compliance, Dr. Eugene Soltes and Larry Thompson, attest that this continuous process of identifying and remediating gaps is precisely how compliance is supposed to work. As discussed further below, *infra* at Section V.B.2, "strong, effective compliance programs are those in which the organization ***continually engages*** in

efforts to understand whether new areas of risk have emerged, which compliance processes are no longer effective (and which are most effective), and where opportunities for improvement exist." (Soltes Report at 8–9.) As such, "even mature compliance programs are expected to have gaps, which should be considered opportunities to improve and to foster positive change, rather than to conclude it is ineffective." (Thompson Report, Section VI.B ¶ 93.) In fact, "the gaps and weaknesses identified in the Assessor's initial report are *precisely what is to be expected* for a company as large and complex as Meta, in the infancy stages of developing its new privacy program." (*Id*. at Section VI.B ¶ 95 (emphasis in original); *see also* Soltes Report at 47–48.) The Commission provides no basis to deviate from these compliance norms or from the Assessor's own finding—with which both experts agree—that Meta had established the foundations of an effective and comprehensive privacy compliance program at the time of the Initial Report. (*See* Soltes Report at 14–15; Thompson Report, Section VI.A ¶¶ 37–38.)

(ii) *The Messenger Kids Coding Error Did Not Violate Any Order*

In its OTSC, the Commission makes only a conclusory assertion that Meta's representations about Messenger Kids violated Part I of the 2012 Order. This is wrong.

First, the Commission released Meta from precisely the claims it now attempts to make with respect to the technical errors. Pursuant to the Stipulated Order, the Commission and Meta stipulated to entry of the Order "to resolve *any and all claims* that Defendant, its officers, and directors, prior to June 12, 2019, violated the Commission's Decision and Order in *In re Facebook, Inc.*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012)." (Stip. Order at 1.) As then-Commissioner Chopra observed in his dissent from the proposed settlement agreement, "the Commission is releasing both all known Section 5 claims and any and all order violation claims, whether known or unknown." (Comm'r Chopra Dissent at 17.) Thus, the Commission can only

pursue claims under the 2012 Order for conduct that took place from June 12, 2019, until the date on which each of the Group Chat Technical Error and Video Call Technical Error was remediated.

Facebook identified the Group Chat Technical Error on June 12, 2019 and remediated it within 24 hours of discovery, on June 13, 2019. (Resp. to PFOF, Section III.A.5 ¶ 201.) The Video Call Technical Error was discovered on July 2 and remediated the same day that it was discovered. (*Id.* at Section III.A.6 ¶ 210.) Given this timing, an enforcement action would cover—at most—a ***single day*** of conduct for the Group Chat Technical Error, and ***20 days*** of conduct for the Video Call Technical Error.

Second, even if the Commission had not released these claims, they were not misrepresentations in violation of Part I of the 2012 Order. As the Commission concedes, the Messenger Kids coding errors were "inadvertent[]." (PFOF ¶ 1160.) Meta designed Messenger Kids to ensure that users communicated only with parent-approved contacts. (Resp. to PFOF, Section III.A.3 ¶ 182.) Based on the product's design and pre- and post-launch testing, Meta reasonably (and in good faith) represented to the public that kids using Messenger Kids would only be able to communicate with parent-approved contacts. (*Id*. at Section III.A.3 ¶¶ 179–95.) The two technical errors did not turn this statement into a misrepresentation that would constitute a violation of the 2012 Order. Additionally, at least one court of appeals has found unintentional errors to be fatal to a Commission demand for "sweeping prohibitions." *See, e.g.*, *Chrysler Corp. v. FTC*, 561 F.2d 357, 364 (D.C. Cir. 1977) ("Given respondent's concession that the violations were unintentional, [and] are not continuing, . . . we fail to see any rational justification for these sweeping prohibitions.").

A statement amounts to a *misrepresentation* only if it is likely to mislead a reasonable consumer under the circumstances or if it otherwise lacks a reasonable basis.[170] A reasonable consumer would not interpret Meta's statements about how Messenger Kids is designed to work as a *guarantee* that Messenger Kids would *never* experience a technical glitch. (*See* Martens Report, Section IV.C ¶¶ 63–65.) Indeed, the Messenger Kids' Terms of Service in operation during the relevant time also expressly warn users that the service may be susceptible to errors: "[W]e do our best to keep Messenger Kids safe and designed the Messenger Kids experience with safety front and center," but "cannot guarantee" the efficacy of these efforts.[171] *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) ("The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.").

Furthermore, Meta's representation did not lack a reasonable basis. Meta sought to ensure that kids could only communicate with approved contacts, and it specifically implemented a layered set of technical controls so that the product would operate in this manner. (Resp. to PFOF, Section III.A.3 ¶¶ 182–86.) Finding the statement that "parents approve all contacts" to be a misrepresentation because of complex glitches affecting a very small percentage of users would hold Meta to an impossible standard of perfection. (*See* NTIA Statement; Martens Report, Section V.A ¶ 117.) As explained in more detail in the accompanying report from David Martens, a software engineer with over 30 years' experience, there is an industry consensus that the occurrence of some software bugs is unavoidable.

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[170] *See* FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (Oct. 14, 1983), www.ftc.gov/bcp/policystmt/ad-decept.htm.

[171] *See Messenger Kids Terms of Service*, Facebook (Dec. 4, 2017), https://www.facebook.com/legal/messengerkids/terms.

(Martens Report, Section IV.C ¶¶ 63–65.) As Martens explains, software bugs are unavoidable in part because the software systems being designed are increasingly complex, preventing companies from preemptively identifying and eliminating bugs for the range of possible interactions a person could have with the software. (*Id*. at Section V.A ¶¶ 117–24.) Martens further explains that the two technical errors in Messenger Kids were each the product of complex system interactions that were not reasonably foreseeable. (*Id*. at Section V.C ¶¶ 137–47.) Notwithstanding the errors, Martens found that Meta's design of Messenger Kids and its prompt remediation measures when it detected the errors were indicative of a well-functioning software development program. (*Id*.)

(iii) *The Expiration Check Coding Oversight Did Not Violate Any Order*

Meta also did not make any misrepresentations regarding the 90-Day Limitation in violation of Part I of the Order.

As with Messenger Kids, Meta's Terms of Service in operation at the relevant time (and today) state that Meta cannot guarantee "error-free" products, or that products "will function without disruptions, delays, or imperfections."[172] Thus, far from misrepresenting the functionality of the 90-Day Limitation, Meta expressly warned users of the potential for coding oversights. And, as with the Messenger Kids technical errors, the Commission has similarly conceded that the 90-Day Limitation coding oversight was unintentional—"not something that the engineers would have known to test for" (PFOF ¶ 1109)—such that imposing new injunctive relief on this basis is inappropriate. *See Chrysler Corp.*, 561 F.2d at 364.

[172] *Terms of Service*, Facebook (July 31, 2019), http://web.archive.org/web/20200616003514/https://www.facebook.com/legal/terms/; *see also Terms of Service*, Facebook (July 26, 2022), https://www.facebook.com/legal/terms.

Further, there is no reason to believe that a consumer's decision to use Facebook (or Facebook Login specifically) would be affected by the fact that the 90-Day Limitation was not functioning as intended in limited circumstances. The Expiration Check Coding Oversight did not change the fact that developers could only access the information that the user had explicitly chosen to share with the developer. (*See* Resp. to PFOF, Section II.A.1 ¶ 100.) Additionally, the 90-Day Limitation was a prophylactic measure, and its sole purpose was to help prevent intentional abuse of the Facebook platform by app developers. (*See* Resp. to PFOF, Section II.A ¶ 95.) There is no evidence that the Coding Oversight led to any such abuse. To the extent that the Expiration Check Coding Oversight caused some user data to be incidentally accessed by apps beyond Meta's self-imposed 90-day time limit, the vast bulk of the data fell into static categories of data that typically do not change over time (e.g., birthday), such that the content of the data accessed would have been no different from what the user chose to share with the app on the first day they began using it. (Resp. to PFOF, Section II.A.5 ¶¶ 148–52.) As detailed in Martens' report, the Expired Apps coding oversight was the complex product of seven conditions existing in the software at the same time, which made the incident difficult to foresee. (Martens Report, Section IV.G.1.b ¶¶ 87–88.) The coding oversight did not, in Martens' assessment, indicate that Meta's software development had been inadequate. (*Id*. at Section V.C.1 ¶¶ 134–36.) On the contrary, Martens found that the prompt remediation of the coding oversight after detection illustrated Meta's appropriate software development practices. (*Id*.)

3. Couching the Coding Errors as New Statutory and Regulatory Violations Cannot Convert Them into Changed Circumstances

The Commission also alleges that the Messenger Kids technical errors constitute violations of Section 5 of the FTC Act, COPPA, and the COPPA Rule; and that the Expiration Check Coding Oversight constitutes a violation of Section 5 of the FTC Act. (OTSC at 12.) For

several reasons, these allegedly new violations of statutes and Commission rules are not changed circumstances that constitute good cause to modify the 2020 Order under FTC procedure or comparable judicial rules of procedure. First, "[i]mposing a new structural injunction based on new facts found to demonstrate a violation of a whole new statute—none of which were adjudicated within the original Consent Decree, let alone consensually agreed to" cannot, as a matter of law, serve as a basis to modify an existing consent order. *Salazar*, 896 F.3d at 498. Although the Commission knew of the Messenger Kids technical errors at the time it entered into the Stipulated Order (*see supra*), the Commission's allegations relating to these errors appear nowhere in the July 24, 2019, complaint in support of the 2020 Order—and Meta thus had no opportunity to contest or otherwise adjudicate them.[173]

Second, reopening the 2020 Order based on the Messenger Kids technical errors and Expiration Check Coding Oversight would contradict Commission precedent. The Commission has held that "the determining question [in whether to issue a new complaint or reopen an existing order] is whether the practices alleged in the Proposed Modified Complaint are substantially similar to those alleged in the original [] complaint." *Nat'l Housewares*, 1974 WL 175859 at *3; *see also Elmo Div. v. Dixon*, 348 F.2d at 345 (requiring the Commission to proceed by reopening rather than a new complaint where the alleged violations were substantially similar to the practices covered in the original consent order and the respondent agreed that the original consent order could be modified). With respect to the Messenger Kids technical errors, the 2019 complaint, which led to the entry of the Stipulated Order, makes no mention of the Messenger Kids product (launched in 2017) or Meta's processing of data that

[173] "[W]hen the Commission determines how to modify an order, it must identify a nexus between the original order, the intervening violations, and the modified order" but "the coding errors underlying . . . Messenger Kids . . . were resolved before the Commission issued its 2020 Order." (Comm'r Bedoya Statement.)

falls within the ambit of COPPA. Similarly, with respect to the Expiration Check Coding Oversight, although the 2019 complaint alleged Section 5 and 2012 Order violations relating to third parties, it did not discuss misrepresentations resulting from coding oversights in Meta's implementation of the 90-Day Limitation. The Commission's allegations in the OTSC regarding these errors are wholly new and unrelated to the allegations set out in its 2019 complaint—and thus cannot serve as a basis for reopening.

(a) In Any Event, Meta Has Not Violated Any Statute or Regulation

For the same reasons that Meta's statements regarding the Messenger Kids technical errors and Expiration Check Coding Oversight do not amount to violations of Part I of the Order, they also do not amount to violations of Section 5 of the FTC Act. The Commission also has nowhere specified how Meta's conduct with respect to Messenger Kids specifically violated COPPA or the COPPA Rule. The entirety of the Commission's COPPA and COPPA Rule allegations consists of "reason to believe Respondent's Messenger Kids product allowed children to communicate with contacts who were not approved by their parents, in contravention of Respondent's representations and notice to parents." (OTSC at 12.) In other words, the Commission collapses the COPPA and COPPA Rule allegation into a Section 5 misrepresentations claim for want of any specific alleged COPPA violation. Insofar as the Commission's asserted violations of COPPA and the COPPA Rule turn on an alleged misrepresentation by Meta about the adequacy of its Messenger Kids security features, such a claim fails for the same reason it would under Section 5: Meta made no statement likely to mislead a reasonable user. Further, the Commission has never taken action for misrepresentations under COPPA where a representation is true *except* in rare circumstances, such as those in which a software does not operate as intended.

B. No Public Interest Supports Reopening

The OTSC also invokes the "public interest" in support of reopening the Order. The "public interest" cannot be a basis to reopen the Order over Meta's objection and, even if it could, squarely cuts against reopening.

1. The Commission's Shifting Views of "Public Interest" Cannot Be a Basis to Reopen the Order

The Commission cannot invoke the "public interest" to impose changes to an order over the respondent's objection. Under Rule 60(b)'s analogous standard—which the Commission has repeatedly cited in Section 5(b) cases—the "public interest" standard applies only where the parties agree on the modifications. In the absence of such agreement, there must be changed factual or legal circumstances; the public interest is insufficient.

> If all parties to the agreement consent to the modification, a court need only review the modification to ensure that it is in the "public interest." This standard is necessarily deferential, as the expertise of the [agency] must be respected as long as all interested parties consent to the modification. In cases where there is a disagreement as to the proposed modification, however, a more stringent standard is necessarily in order. This is only logical, as the unelected . . . officials must be constrained in some way from imposing their interpretation of the "public interest" on unwilling parties. Thus, as the Supreme Court and the Court of Appeals have held, when parties disagree over proposed modifications to a consent decree, the party seeking modification of a final judgment or consent decree in an antitrust case must show that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.

Baroid, 130 F. Supp. 2d at 103–04. That is doubly true for Commission orders. It cannot be the case that "unelected" Commissioners—who are not even answerable to the President—can simply conjure changes to settled, final orders based on their interpretation and reinterpretation of the "public interest." Section 5(b) cannot plausibly (or legally) allow a differently composed Commission to invoke nothing more than its different interpretation of the public interest to modify a final order. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1031–32 (11th Cir. 2002) (holding that a consent order cannot be modified to require whatever the agency thinks "might be

necessary and appropriate"). On the contrary, the Commission "had the opportunity" to litigate its complaint " but chose not to do so," and cannot use Section 5(b) to seek a do-over. *In re Damon Corp.*, 101 F.T.C. 689, 1983 WL 486320, at *2 (Mar. 29, 1983).

2. The Public Interest Precludes Reopening the Order

Even if the "public interest" standard does apply, the OTSC has not established a public interest in favor of modification.

The OTSC rests on a conclusory determination that reopening is in the public interest, without indicating any basis for this determination. In its OTSC, the Commission states only that the "public interest" requires that its Order must be modified to "better achieve its objectives." (OTSC at 12.) Nowhere does it explain *what* public interest would be served by any of the 800 changes in the Proposed Order (let alone all of them), or *why* it believes that the public interest requires those changes.

In any event, the Commission's conclusory assertion that reopening is in the public interest runs counter to controlling law. Consent decrees have no objectives. A consent decree "cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Armour*, 402 U.S. at 681–82. And the Commission cannot rewrite the Order "as though its animating spirit" were the FTC Act. *United States v. Microsoft Corp.*, 147 F.3d 935, 946 (D.C. Cir. 1998). That is why the scope of a Commission order "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Basic Rsch.*, 807 F. Supp. 2d at 1094–95 (quoting *Armour*, 402 U.S. at 682).

In the rare cases where the Commission has invoked the "public interest" to reopen an order, it has done so where the original order suffered from some "ineptness of expression" such

that it was "not enough to stop the deception" that gave rise to the order in the first place. *Elmo Co. v. FTC*, 389 F.2d at 552; *Mohr v. FTC*, 272 F.2d 401, 405–06 (9th Cir. 1959); *see also Nat'l Housewares*, 1974 WL 175859 at *3 ("We feel the Order to Show Cause states a reason to believe that the original order has not corrected the deception and sales abuses originally alleged, and that such deception is continuing."). And even then, the Commission has done no more than necessary to correct that "ineptness of expression."

That is not the case here. This is not a matter where the underlying allegedly deceptive practice continued after the entry of the Order. The Commission's findings cite no deceptive practice that has begun since the Order was entered, and no continuation of any deceptive practice alleged in any prior complaint or proceeding. In bringing the OTSC, the Commission alleges violations of Section 5, COPPA, and the COPPA rule arising from coding errors that occurred well before the Order was entered. And, even if proven, the Commission's assertion that Meta has not met its obligations under Part VII of the Order does not amount to an underlying violation of Section 5(a). The Order was more than sufficient to stop any alleged deception. There is no "ineptness of expression" to cure, simply a desire by this Commission to re-trade the agreement struck by its predecessors. ***That***, by contrast, is flatly contrary to the public interest. *See Louisiana-Pac.*, 1989 WL 1126760 at *13 (holding that "public interest" cannot be invoked by a party to "rescind its consent to the order and argue again the issues that the consent agreement resolved").

Nor has the Commission identified (let alone detailed) any harm to users—or anyone else—as a result of any of its 1,164-paragraph PFOF, which followed an investigation in which Meta produced tens of thousands of pages of material, detailed narrative responses to dozens of interrogatories, and its most senior executives for depositions, all by May 2022. And the

Commission's conduct undermines any such claim. The Commission waited years before seeking to modify the Order for conduct long known to the FTC—including before it entered the Order in the first place. If the public interest truly required modification based on a report it received in July 2021 about the state of Meta's Privacy Program between October 2020 and April 2021, or coding errors that Meta disclosed in 2019 and 2020, the Commission would have taken action long before May 2023.

The Commission seems to simply infer a public interest based on nothing more than its unsupported assertions of violations. But for the reasons discussed above, that cannot be the case. The Commission has held that "it is not in the public interest to reopen an order where substantial questions exist about a respondent's compliance with the very provision sought to be modified." *Am. Dental*, 1988 WL 1025509 at *3. That is so for multiple reasons.

First, Section 5(b) could not allow the Commission to modify an order based on its own belief that an order has been violated because, as discussed above, the Commission cannot adjudicate whether its orders have been violated. *See supra* Point I.C.

Second, the Commission has ample ways to promote the public interest in ensuring compliance with its orders, including civil penalty actions under Section 5(*l*). As the Commission has argued and courts have held, the remedy for violation of an order is order ***enforcement***, not order ***modification***. Gov't Opp. to X Corp's Mot. for Protective Order, *United States v. Twitter, Inc.*, No. 3:22-cv-3070-TSH (N.D. Cal. Sept. 11, 2023) (Dkt. No. 41) at 21 ("[E]ven if the FTC had breached the parties' agreement as X Corp. suggests . . . then the proper relief, at most, would be to 'simply order the FTC to follow it.'"). The Commission has been equally clear: "the agency's remedy for most order violations is to file a civil penalty action in federal court." *Petition of Hoechst Marion Roussel Inc.*, 124 F.T.C. 649, 654 (1997).

Third, in any case, the Commission approved the Order (and all of its provisions) as being in the public interest ***even if there were a violation***. Part XVI specifies that in the event that Meta violates the Order, its term would be extended, but its substantive terms continue unmodified. In other words, the Commission ***already determined*** that if Meta were to violate the Order, the public interest would be best served not by changing any of its provisions, but by extending the time in which Meta is obligated to follow them. The Commission reiterated that again in its press release announcing the settlement, stating that it was negotiated with "future violations" in mind. The Commission cannot change course now.

The OTSC does not even attempt to pay lip service to countervailing interests that cut squarely against its threadbare assertion that reopening the Order would vindicate the public interest. It ignores entirely the "broad public interest in the finality of Commission orders." *DTE Energy Co.*, 2021 WL 5711344 at *2. The Commission has made clear time and again that strong public interest considerations support repose and finality. *See id*. As it must. According to controlling Supreme Court law, "public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Fed. Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981). The Commission repeatedly cites to this need for finality when it denies requests by respondents to modify orders, but disregards it in its effort to rewrite the Order in its sole discretion.

C. The OTSC Fails to Comply with Rule 3.72(b)

Even if the OTSC met the requirements of Section 5(b), it fails to comply with 16 C.F.R. § 3.72(b).

Rule 3.72(b) requires the Commission to not only include "the changes it proposes to make in the decision," but also to state "the reasons they are deemed necessary." 16 C.F.R. §

3.72(b)(1). The OTSC ignores this requirement. Nowhere in the OTSC or the PFOF does the Commission attempt to connect its factual findings with any change in the Proposed Order—let alone all 800 of them, as Rule 3.72(b) requires.

III. REOPENING VIOLATES META'S CONSTITUTIONAL RIGHTS

According to the Commission, it can impose sweeping, breathtaking changes to a consent order (and to Meta's business) through mere assertions that Meta violated its prior orders, Section 5 of the FTC Act, and COPPA, without ever having to assert them as formal allegations, let alone prove them. That is wrong. The Due Process Clause[174] does not permit the FTC to use its modification process to deprive Meta of the procedural protections it must be afforded. The Commission and this proceeding suffer from myriad structural constitutional defects, including claims which Meta has raised in federal court, and raises here for preservation purposes. *See* Compl., *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562 (D.D.C. Nov. 29, 2023) (Dkt. No. 1).

As the District Court has already determined, Meta's prior settlements have not waived any rights to raise its constitutional challenges to this proceeding. *See* Mem. Op., *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562 (D.D.C. Mar. 14, 2024) (Dkt. No. 31). With good reason. In 2012, Meta's waiver was limited to challenges to the 2012 Order, 2011 Agreement at 1; in 2020, it waived its right to challenge the validity of the 2020 Order, Order at 1. Neither waiver extends to this proceeding. And if there were any doubt, under controlling authority, "[a]n effective waiver of a constitutional right is the intentional relinquishment or abandonment

[174] The Proposed Order threatens core rights that are protected by the Due Process Clause, including Meta's rights to develop products, govern its corporate affairs, and innovate to better serve its users and advertisers. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (holding that a company has a property interest in its trade secrets and data, as well as "the products of [its] 'labour and invention'"). Indeed, Attachment A to the Stipulated Order, which the Commission purports to modify, is itself property that triggers Due Process. *See Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 352 (9th Cir. 1999) ("A judgment is property, so taking it away requires due process of law.").

of a known right," and "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). When construing a waiver of constitutional rights in a consent decree, "the conditions upon which [a party] has given that waiver must be respected, and the instrument must be construed as it is written." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

A. The FTC's Misuse of the Reopening Process Deprives Meta of Due Process

The OTSC proposes to radically remake the Order because the Commission "has reason to believe" that Meta violated particular provisions of the 2012 Order and the 2020 Order, as well as Section 5 of the FTC Act and COPPA. As the Commission just told Congress, the proposed changes are based on "alleg[ations] that the company has failed to fully comply with the [O]rder, misled parents about their ability to control with whom their childred communicated through its Messenger Kids app, and misrepresented the access it provided some app developers to private user data."[175]

When, as here, the Commission seeks to "enforc[e]" an order (OTSC at 12), the law (and Commission precedent) requires that it do so in federal district court. *See Intuit*, 2024 WL 382358, at *56. When it does so, it "assume[s] the position of any other litigant, entitled to be heard, but not deferred to." *Owens-Corning Fiberglas Corp.*, 853 F.2d at 462. And it must make its case pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence and meet its burden of proof as a plaintiff in an Article III court.

[175] Fed. Trade Comm'n, FY 2025 Congressional Budget Justification – Budget Request (Mar. 11, 2024), at 27.

When the Commission "has reason to believe" that a person violated the FTC Act, it files a complaint.[176] When it does so, the respondent has a right to put the Commission to its burden of *proving* those charges, *see* 16 C.F.R. § 3.43 ("Counsel representing the Commission . . . shall have the burden of proof."); it will be entitled to broad discovery as to all material that "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent," 16 C.F.R. § 3.31(c)(1); and it will receive a hearing on not only the ultimate issue of its liability, but the appropriate remedy, if any, 16 C.F.R. § 3.43. At that hearing, it "shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 C.F.R. § 3.41(c).[177]

But Section 5(b) affords virtually none of these protections and no such process. The Commission takes the position that, having issued its OTSC, Meta now bears the burden of proof.[178] While the respondent may "file an answer" to the OTSC, the Commission "in its discretion" determines whether "the pleadings do not raise issues of fact to be resolved." 16 C.F.R. § 3.72(b). If it determines there are no such factual issues, it can decide the matter or order a hearing "limited to the filing of briefs and may include oral argument when deemed necessary by the Commission." *Id*. Only if the Commission decides that "the pleadings raise

[176] 15 U.S.C. § 45(b) ("Whenever the Commission shall have *reason to believe* that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing.").

[177] As set out in Section III.B below, even these procedural protections would not be sufficient to remedy the Due Process concerns raised by the dual role of the Commissioners here as both the prosecutors who authorized the OTSC and the ultimate adjudicator of its merits.

[178] *See Frequently Asked Questions about the Proposed Changes to the 2020 Privacy Order with Meta/Facebook*, Fed. Trade Comm'n, at 1 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/FB-FAQ.pdf (Meta "will have the opportunity to explain why the FTC should not proceed as proposed, and to ask for further fact finding").

substantial factual issues" will it "direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge." *Id*. And even then, such hearings are limited to resolving whatever factual issues the Commission identifies—not the ultimate question of the propriety of the modifications. *Id*. The OTSC purports to deny any *right* to any hearing and any *opportunity* for a hearing on either the merits of the Commission's spurious assertion that Meta violated its legal obligations or on the propriety of the changes in the Proposed Order.

The Commission's use of its reopening authority to avoid *proving* that Meta violated any legal obligations perverts its own rules and procedures. According to the Commission, it determines compliance with the law "in an adjudicative proceeding."[179] But adjudicative proceedings are "commenced when an affirmative vote is taken by the Commission *to issue a complaint*," 16 C.F.R. § 3.11, and come with the panoply of procedural rights described above. Because they are not commenced by complaint, proceedings to reopen orders, by contrast, are listed as nonadjudicative in the Commission's procedures, which explain that such proceedings do "*not relate to the formal administrative trial (pursuant to Part 3 of the Rules of Practice) of an individual or a company alleged to have violated laws administrated by the Commission.*" (FTC Procedures Manual at 5.) In other words, reopening proceedings were neither designed nor intended to adjudicate alleged violations of law. And the gulf between the meager process afforded in a reopening proceeding and litigation in federal district court is even wider. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring) ("[T]he loss of a day in court in favor of one before an agency" is no "small thing.").

[179] *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n, at Part II.2.A (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

The Commission is seeking to exploit the nonadjudicative reopening process to avoid proving its alleged violations, while simultaneously denying Meta the formal, fundamental rights to defend itself, rights to which it is entitled. "A fundamental requirement of due process is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This means that notice and opportunity for hearing must be "appropriate to the nature of the case." *Mullane v. Cent'l Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). The Commission cannot plausibly show that its reopening process affords Meta rights that are commensurate with the sweeping and drastic changes it proposes.

B. This Proceeding Violates the Fifth Amendment's Due Process Clause

The Commission's abuse of its procedures in this matter compounds its inherent violations of due process. The FTC purports to exercise investigative, prosecutorial, and adjudicative powers in the same case—at the same time—taking steps it appears never to have taken in its history.

It is axiomatic that "[n]o man is allowed to be a judge in his own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 880 (2009). Due process requires "at a minimum, that the affected [person] must have a meaningful opportunity to present his case before a neutral decisionmaker." *Propert v. District of Columbia*, 948 F.2d 1327, 1333 (D.C. Cir. 1991). Even an "unacceptable risk of actual bias" violates due process. *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016).

The Supreme Court has squarely held that due process prohibits review by judges who previously decided to prosecute a case. *See id*. at 9 ("The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical

decision."); *In re Murchison*, 349 U.S. 133, 137 (1955) ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.").

The Commission's dual role as both prosecutor and judge in administrative proceedings violates due process. Under the FTC Act, the Commission (as prosecutor) initiates or reopens an administrative enforcement proceeding by voting to initiate it and (as judge) decides the matter, including through factual findings and legal determinations. This not only presents an "unacceptable *risk* of actual bias," *Williams*, 579 U.S. at 14, but in fact has resulted in a long history of biased adjudication by the Commission. As the United States Court of Appeals for the Ninth Circuit observed, "the FTC does not appear to dispute . . . that [it] has not lost a single [administrative] case in the past quarter-century." *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021), *rev'd*, 598 U.S. 175 (2023).

The manifestation of the risk of bias inherent in the Commission's unconstitutional dual role as prosecutor and judge is especially egregious here. As prosecutor, the Commission formally found in the OTSC that it "has good cause to believe" that Meta violated the requirements of the Order. As judge, the Commission found in the OTSC that "changed conditions *demonstrat*[*e*] that additional modifications to the Order are *needed* to clarify and strengthen its requirements." (OTSC at 12.) Those findings rest on the 1,164 paragraphs of "preliminary" findings of fact that the Commission already has made, which the OTSC refers to as "[t]he full record supporting the Commission's findings." (OTSC at 1 n.1.) We are aware of no precedent for the Commission making "preliminary" findings of fact—much less a "full record" consisting of such findings—in "support" of any administrative action it has ever taken. Indeed, these factual findings appear to be "preliminary" only in the sense that they were made *in advance of* the Commission's reopening of the proceeding against Meta.

In any event, alleging facts is a prosecutorial function, whereas "finding facts" (which the Commission has done here) is an adjudicative function. *In re Justices of Sup. Ct. of Puerto Rico*, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.). Thus, the OTSC represents a simultaneous exercise of prosecutorial and adjudicative roles, through which the Commission has prejudged the matter against Meta factually and legally before affording Meta any opportunity to be heard.

The prejudgment evidenced in the OTSC is corroborated by earlier indications that the Commission did not approach its decision to reopen this proceeding with an open mind. For example, the FTC unusually refused to afford Meta the opportunity to engage with senior staff and Commissioners prior to its reopening. Likewise, the Commission's prejudgment is also evidenced by its decision to file the OTSC just hours before its Staff was scheduled to meet with the Assessor to preview the findings from the first full, biennial Assessment.

Now, because Meta opposes entry by the Commission of the "proposed" order, the Commission will adjudicate the matter, and render a "final" decision on the matters *that it already has prejudged*, including through factual findings. Under these circumstances, the Commission's prejudgment goes far beyond the prejudgment at issue in the leading precedents.

For example, the Commission's factual findings and legal determinations in the OTSC represent much greater prejudgment than the "initial charge or determination of probable cause" in *Withrow v. Larkin*, 421 U.S. 35, 58 (1975), and *In re Zdravkovich*, 634 F.3d 574, 579 (D.C. Cir. 2011). The OTSC also entails much more specific and detailed prejudgment than what the Supreme Court upheld in *FTC v. Cement Institute*—in which the Commission had reported to Congress and the President that a pricing practice that the FTC had studied generally violated the Sherman Act, and subsequently issued an administrative complaint challenging specific instances of that pricing practice. *See* 333 U.S. 683, 702 (1948). Indeed, the OTSC embodies

considerably more prejudgment than the Supreme Court held to be unconstitutional in *Williams* or *Murchison*. *See Williams*, 579 U.S. at 14 (justice hearing death sentence appeal had, as prosecutor, authorized subordinates to seek death penalty in same case); *In re Murchison*, 349 U.S. at 137 (judge accused witnesses of contempt when testifying before him as "one-man grand jury" and subsequently convicted them). Where, as here, "evidence casts doubt on the partiality of the [agency], the combination of prosecutorial and adjudicatory functions in a single person" violates due process. *Wildberger v. Am. Fed'n of Gov't Emps., AFL-CIO*, 86 F.3D 1188, 1195 (D.C. Cir. 1996).

Moreover, there is evidence of actual bias as to Meta. The three Commissioners of the FTC, who authorized the issuance of and will adjudicate the OTSC, have already proposed the remedy. The Commission's pursuit of an administrative enforcement proceeding through its reopening authority in defiance of the District Court's jurisdiction and the Commission's own rules is itself evidence of bias against Meta. Further, prior to joining the Commission, the Chair criticized Meta in statements showing she had pre-judged information-collection issues implicated by the OTSC. For example, she called 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. *See* Lina M. Khan & David E. Pozen, A Skeptical View of Information Fiduciaries, 133 Harv. L. Rev. 497, 500, 501 n.14 (2019).

The evidence of bias here is overwhelming, far transgressing what due process can tolerate.

C. The FTC's Exercise of Executive Authority Violates Article II

Under Article II of the Constitution, "the 'executive Power'—all of it—is 'vested in a President.'" *Seila Law LLC v. C.F.P.B.*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const., art.

II § 1, cl. 1). The Constitution permits the President to delegate executive power subject to the President's "unrestricted" removal power. *Id.* at 2198.

The FTC Act grants the Commission robust enforcement powers, including the power to investigate potential violations, exercise prosecutorial discretion, and initiate administrative and judicial enforcement proceedings. *See, e.g.*, 15 U.S.C. §§ 45(b), 53(b). The Commission's prosecutorial powers, including those that the Commission is exercising against Meta in this proceeding, are executive powers. *See*, *e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 485 (2010); *Seila Law*, 140 S. Ct. at 2204. In *Free Enterprise Fund*, the Supreme Court held that Article II was violated by protecting against removal of the five-member PCAOB "empowered to take significant enforcement actions," including "initiat[ing] formal investigations and disciplinary proceedings" and engaging in the "daily exercise of prosecutorial discretion." 561 U.S. 477, 485, 504 (2010). In *Seila Law*, the Supreme Court reached the same conclusion as to the CFPB director, who "set enforcement priorities, initiate[d] prosecutions, and determine[d] what penalties to impose on private parties," yet was "insulat[ed] from removal" by the President. 140 S. Ct. at 2204; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1772 (2021) (holding that Article II was violated by insulating from removal an agency director with "broad investigative and enforcement authority"). These are the types of prosecutorial powers that the Commission is exercising against Meta in the OTSC.

While the Constitution permits the delegation of executive authority, the delegates must be subject to the President's "unrestricted" removal power. *Seila Law*, 140 S. Ct. at 2198. Here, however, the Commissioners are *not* removable at will by the President. Instead, they can be removed only for "inefficiency, neglect of duty, or malfeasance." 15 U.S.C. § 41.

The Commissioners are not protected from scrutiny by the decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that upheld the FTC Act's removal restriction as applied to the different Commission that existed 88 years ago. In *Seila Law*, the Supreme Court explained that in *Humphrey's Executor*, "the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" *Seila Law*, 140 S. Ct. at 2198 (quoting *Humphrey's Ex'r*, 295 U.S. at 628); *see also Humphrey's Ex'r*, 295 U.S. at 624 ("[The Commission's] duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."); *id.* at 625 ("[I]t was essential that the commission should not be open to the suspicion of partisan direction.").

The obsolete reasoning that "the FTC (as it existed in 1935) . . . exercis[ed] no part of the executive power" rested on characteristics that the current Commission lacks:

> The Court [in *Humphrey's Executor*] identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "nonpartisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."

Seila Law, 140 S. Ct. at 2198–99. In contrast, the Commission's executive powers have greatly expanded since 1935—including by the addition of the language in Section 5(b) of the FTC Act that the Commission (erroneously) invokes as the source of its authority to modify the 2020 Order, and the grant in Section 13(b) of the power to prosecute enforcement actions in federal court.

In further contrast with the agency characteristics on which *Humphrey's Executor* relied, the Commission that issued the OTSC had only three members, all from the same political party; and the current Commissioners lack the tenure that is supposed to be the source of their

expertise. *See Seila Law*, 140 S. Ct. at 2198–99; *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *Humphrey's Ex'r*, 295 U.S. at 624. Congress surely did not envision a Commission acting through three members of a single political party with a ***combined*** Commission tenure of less than eight years. And although the unbalanced, relatively inexperienced Commission that issued the OTSC likely was not envisioned by Congress, it is entirely consistent with the FTC Act and thus a feature of the unconstitutional agency structure. *See* 15 U.S.C. § 41 ("A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission."). That same statutory structure also has failed to deliver the benefits of the staggered seven-year terms assumed in *Humphrey's Executor*—accumulated expertise without abrupt membership changes—as illustrated by a Commission with only one member who took office before June 2021. We are aware of no case that has upheld the constitutionality of the modern-day Commission.

D. The FTC's Unfettered Authority to Assign Disputes to Administrative Adjudication Violates Article I

The power to decide to adjudicate a matter administratively, is "peculiarly within the authority of the legislative department." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) *cert. granted*, 143 S. Ct. 2688 (2023), *and cert. denied*, 143 S. Ct. 2690 (2023); *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (reasoning that the authority "to assign adjudication of public rights to entities other than Article III courts" is possessed by Congress). Indeed, the assignment of disputes to Article I tribunals, including agencies, rather than Article III courts "is completely within congressional control." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). To the extent that Congress "may delegate that power to executive officers," *id.*, "Congress must lay down by legislative act an *intelligible principle* to which the person or body

authorized to act is directed to conform," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

In the case of the FTC, Congress has not laid down any such intelligible principle. Indeed, the Commission has admitted as much. For example, in a recent brief to the Supreme Court, the Commission explained:

> Congress has provided two different avenues for the Commission to enforce the [FTC] Act: an administrative one in which the Commission acts as an adjudicative body, and a judicial one in which the Commission sues in federal district court and acts as a litigant. *The Commission has discretion to decide which* route is appropriate for any given matter.

Brief for the Commission, *AMG Cap. Mgmt., LLC v. FTC*, No 19-508 (U.S.), 2020 WL 7093938, at *3–4.

For the requisite "intelligible principle," the Commission recently argued that Congress supplied guidance by prohibiting "unfair or deceptive acts or practices in or affecting commerce" and by requiring the Commission to act in "the public interest." Commission Opp., *Meta Platforms, Inc. v. FTC*, No. 23-cv-03562 (D.D.C. Dec. 13, 2023) (Dkt. No. 18) at 21–23 (citing 15 U.S.C. §§ 45(a)(1)–(2), 45(b), 45(n)). But the specific statutory language on which the Commission relies here—Section 5(b)—authorizes reopening both where "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). Thus, the "public interest" and the prohibition against "unfair or deceptive" acts play no role—and thus supply no intelligible principle—when (including in the OTSC)[180] the Commission invokes *changed conditions*. The Commission cannot simply "cure [this] unlawful

[180] *See* OTSC at 12 ("Respondent's non-compliance constitutes *changed conditions* demonstrating that additional modifications to the Order are needed . . . .").

delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472.

In any event, by attributing the intelligible principle to an "isolated" statutory phrase such as "the interest of the public," the Commission commits a fundamental error against which the D.C. Circuit has expressly warned. *See Owens v. Republic of Sudan*, 531 F.3d 884, 889–90 (D.C. Cir. 2008). In *Owens*, the D.C. Circuit analyzed a case where the Federal Communications Commission pointed to a similar "public interest" phrase as providing an intelligible principle—namely, *NBC v. United States*, 319 U.S. 190, 225–26 (1943), which itself cites *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25 (1932). The D.C. Circuit concluded that reliance on the statutory phrase "in the public interest" was acceptable *in those cases* only because, looking beyond the isolated phrase, the underlying "statutory context" and "factual background" provided the "bounded discretion that the Constitution requires." *Owens*, 531 F.3d at 890–91. In other words, in identifying an "intelligible principle," the court cannot "confine [itself] to the isolated phrase in question, but [must] utilize all the tools of statutory construction." *Id.* at 889–90. The "isolated" phrase "the public interest" in Section 5(b) is facially deficient.

The Commission's claim that, in prohibiting unfair deceptive acts or practices in commerce, Congress presented "both a general policy and boundaries of the Commission's authority," Commission Opp., *Meta Platforms, Inc. v. FTC*, No. 23-cv-03562 (D.D.C. Dec. 13, 2023) (Dkt. No. 18) at 21, fares no better. Indeed, the Commission fails to identify *how* Congress' prohibition "cabin[s] the agency's discretion," as required under *Owens*, to proceed by administrative adjudication rather than before an Article III court. 531 F.3d at 889. Thus, at

bottom, the Commission's argument comes down to the facially deficient, isolated phrase of "the public interest."

More fundamentally, the Commission has argued that the statute gives it different "pathways" for different conduct. For example, the Commission contrasts Section 5(*l*), which allows the Commission to seek injunctive and equitable relief for order violations in federal court, and administrative modification under Section 5(b) by arguing that modification under Section 5(b) "does not require violation of the prior order." But, in this case, a "violation of the prior order" is exactly what the Commission alleges.[181] Before the District Court, the government asserted that when a Commission order is violated, it has the ***option*** of choosing between those two "pathways:" it may pursue a 5(*l*) action in federal court and it "also has the option" of reopening the prior order.[182] Order violations are the predicate for a Section 5(*l*) federal court action. But the Commission's view, set forth in the OTSC, is that order violations are also "changed conditions of fact," under Section 5(b) sufficient to reopen the allegedly violated order. So, according to the Commission, in these circumstances the FTC Act provides *different* pathways for *the same* circumstances. One involves litigating in federal court, the other involves administrative adjudication. And Section 5(b) provides no governing principle for the Commission to decide which one to select—let alone an intelligible one.

As the Fifth Circuit in *Jarkesy* recognized, such unfettered authority violates the Constitution. "If the intelligible principle standard means anything, it must mean that a total

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[181] Fed. Trade Comm'n, FY 2025 Congressional Budget Justification – Budget Request (Mar. 11, 2024), at 27.

[182] "When the Commission has reason to believe a defendant **violated an administrative order—as occurred in the instant case—**it may seek civil penalties by referring a complaint to the Department of Justice to file in federal district court. *Id.* § 45(*l*). **The Commission also has the option** to 'reopen and alter, modify, or set aside, in whole or in part, any' 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.' *Id.* § 45(b)." Mot. to Enforce Opp., *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Aug. 16, 2023) (Dkt. No. 49) at 6–7.

absence of guidance," as is present here, "is impermissible under the Constitution." *Jarkesy*, 34 F.4th at 462; *see also Gundy v. United States*, 139 S. Ct. 2116, 2123–24 (2019) (plurality) (grant by Congress of "plenary" legislative authority goes beyond the "permissible bounds" of delegation). As a result, the Commission's *choice* to issue the OTSC to implement its Proposed Order arises from an improper delegation of authority, and is unconstitutional under Article I.

E. The FTC's Adjudication of Private Rights Violates Article III

The U.S. Constitution requires "the judicial power of the United States" to be vested in Article III courts. *See Stern v. Marshall*, 564 U.S. 462, 469 (2011). Pursuant to this fundamental limitation, "cases involving 'private rights,' . . . may not" be removed from Article III courts, *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014), whereas Congress has "significant latitude to assign adjudication of *public* rights to entities other than Article III courts," *Oil States Energy Servs.*, 138 S. Ct. at 1373.

While the Supreme Court "has not definitively explained the distinction between public and private rights," *id.*, private rights have been described as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Stern*, 564 U.S. at 484; *accord Kuretski v. Comm'r*, 755 F.3d 929, 939 (D.C. Cir. 2014), and as "encompass[ing] the three absolute rights, life, liberty, and property," which are "not dependent upon the will of the government," *Axon Enter.*, 598 U.S. at 198 (Thomas, J., concurring). Under the pre-Founding common law, the right to property "consist[ed] in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land," and "to vindicate these rights when actually violated or attacked, the subjects of England [were] entitled, in the first place, to the regular administration and free course of justice in the courts of law." 1 William Blackstone, *Commentaries on the Laws of England 1765-1769* at 138, 143.

Here, the gravamen of the OTSC is that Meta has violated the Order, which memorializes the parties' agreement. That agreement was approved, and reduced to judgment, by an Article III court. The law could not be more clear: Meta possesses contract rights under the Order, *see, e.g.*, *Elmo*, 348 F.2d at 345–46; *Basic Rsch.*, 807 F. Supp. at 1096 ("The fact that the FTC has now filed an enforcement action does not divest Basic Research of the right to enforce the FTC's obligations under the contract."), and the Commission's action, in essence, seeks to forcibly adjudicate those rights as an alleged breach of a contract outside an Article III court, *see N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (contract rights "are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

While the Commission has recently argued that it is enforcing "public rights" as set forth in the FTC Act, Commission Opp., *Meta Platforms, Inc. v. FTC*, No. 23-cv-03562 (D.D.C. Dec. 13, 2023) (Dkt. No. 18) at 15, "Congress cannot convert any sort of action into a 'public right' simply by finding a public purpose for it and codifying it in federal statutory law," *Jarkesy*, 34 F.4th at 456–57. Similarly, the Supreme Court's decisions have "stressed that the government's involvement alone does not convert a suit about private rights into one about public rights." *Id.* at 458. The Commission's recent reliance on the Supreme Court's decision in *Atlas Roofing Co., Inc. v. O.S.H.A.*, does not change the equation. There, the Supreme Court was considering OSHA's creation of "new statutory dut[ies]" for employers concerning work safety. 430 U.S. 442, 445 (1977). In that scenario, the Court explained that Congress could "creat[e] a new cause of action, and remedies therefor [*sic*], *unknown to the common law*" and assign enforcement to an administrative body. *Id.* at 461. Here, in contrast, the Commission's efforts to adjudicate

Meta's contract rights *are* known to the common law and thus must be adjudicated in an Article III court.

F. This Proceeding Deprives Meta of Its Seventh Amendment Right to a Jury Trial

The Seventh Amendment requires that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. This right to a trial by jury is considered a "fundamental" component of our legal system, and "remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10 (1957). Indeed, because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized *with the utmost care*." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

In determining which suits are considered "[s]uits at common law," the Supreme Court has interpreted the phrase to include all actions akin to those that were understood at the time of the Seventh Amendment's adoption to be suits brought in the English law courts. *See Tull v. United States*, 481 U.S. 412, 417 (1987). "In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial." *Id.*

This proceeding entails administrative adjudication of issues involving Meta's property rights, including its contract rights under the Order, and is governed by a statutory scheme that provides for the potential future imposition of civil penalties. *See* 15 U.S.C. § 45(*l*). But the statutory and regulatory provisions governing this proceeding afford Meta no right to a trial by jury, and therefore violate Meta's rights under the Seventh Amendment. *See, e.g.*, *Jarkesy*, 34 F.4th at 452 ("[T]he [Supreme] Court has specifically held that . . . the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties.") (citing *Tull*, 481

U.S. at 418–24); *NACM-New England, Inc. v. Nat'l Ass'n of Credit Mgmt., Inc.*, 927 F.3d 1, 8 (1st Cir. 2019) ("[B]y entering the declaratory judgment on the breach of contract claim without a jury trial, the District Court violated [the defendant's] Seventh Amendment rights.").

IV. THE FAR-REACHING AND UNPRECEDENTED CHANGES TO THE ORDER DRAMATICALLY EXCEED THE COMMISSION'S AUTHORITY

Even setting aside each of the separate and independent obstacles to reopening the Order, the remedies set forth in the Proposed Order run far afoul of the Commission's remedial authority. The Proposed Order's 800+ changes would curtail Meta's development of new products, superintend its corporate governance, and impair Meta's ability to serve its users and advertisers. These radical and unprecedented provisions go well beyond those of any remotely comparable Commission order and are unlawful for multiple reasons.

A. The Proposed Order Exceeds the Commission's Statutory Authority to Grant Only Prohibitory, and Not Mandatory, Relief in Litigated Matters

"Administrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 117 (2022). This principle is an axiom of modern statutory interpretation.[183] In determining that authority, "statutory interpretation must begin with, and ultimately heed, what a statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023). And where, as here, "a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (citing *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946)); *see also, e.g.*, *Wisc. Cent. Ltd. v. United States*, 138

[183] Contrary case law, such as the Supreme Court questioning in 1966 whether "in fashioning a final decree the Commission exercises only the administrative functions delegated to it by the Act," *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.4 (1966) (quoting *FTC v. Eastman Kodak Co*., 274 U.S. 619, 623–24 (1927)), is long since obsolete.

S. Ct. 2067, 2070 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979) (reasoning that a court's "job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute")).

In Section 5(b) of the FTC Act, Congress granted the Commission administrative remedial authority solely in the form of "cease and desist" orders:

> If upon [a] hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [the FTC Act], it . . . shall issue . . . an order requiring [the respondent] to cease and desist from using such method of competition or such act or practice.

15 U.S.C. § 45(b). The words "cease" and "desist" each have a plain meaning that is purely prohibitory. *See, e.g.*, New Websterian Dictionary 160, 246 (1912) (defining the transitive verb "cease" as "to put a stop to; end" and defining "desist" as "to cease from").

In stark contrast, *the same Congress* in the Clayton Act explicitly granted the Commission the authority to issue orders that could both require the respondent to "cease and desist" from violations *and* mandate that the respondent take specified affirmative actions:

> If upon [a] hearing the commission . . . shall be of the opinion that [specified provisions of the Clayton Act] have been or are being violated, it . . . shall issue . . . an order requiring [the respondent] to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order.

Clayton Act § 11. Courts "usually presume differences in language like this convey differences in meaning," and this "presumption must bear particular strength when the same Congress passed both statutes to handle much the same task." *Wisc. Cent.*, 138 S. Ct. at 2071–72. Here, the Clayton Act shows that when the Sixty-Third Congress wished to authorize the Commission to issue orders requiring mandatory injunctive relief, "it knew exactly how to do so." *Bittner v. United States*, 598 U.S. 85, 95 (2023). Congress's decision to authorize only prohibitory administrative orders in the FTC Act buttresses the conclusion that "cease" and "desist" should

be given their plain, prohibitory meanings. And when later Congress amended the FTC Act, it gave ***federal courts*** specific authority to grant "mandatory injunctions" in particular circumstances, 15 U.S.C. § 45(*l*), another confirmation of the more limited scope of the Commission's authority under Section 5(b).

This conclusion is further supported by Supreme Court decisions describing Commission "cease and desist" orders as "fenc[ing] in" the respondent, *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959), and as a "road block," *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 429 (1957). Indeed, we are aware of no case in which the Supreme Court has upheld an order of the Commission other than a prohibitory "cease and desist" order. *See LabMD*, 894 F.3d at 1224 ("LabMD petitions this Court to vacate the order, arguing that the order is unenforceable because it does not direct LabMD to cease committing an unfair act or practice within the meaning of Section 5(a). We agree and accordingly vacate the order."). As the Chair recently stated, the Commission's "limited remedial authority" typically prevents it from doing more than telling someone it believes is violating the law to "stop doing it."[184]

To the extent that the lower court decisions deviating from this interpretation of the unambiguous language of Section 5(b) remain good law, they uphold only limited and minor departures in specific contexts. For example, in *Warner-Lambert Co. v. FTC*, the D.C. Circuit upheld a Commission order requiring that the respondent "cease and desist from disseminating any advertisement for Listerine unless it is clearly and conspicuously disclosed in each such advertisement, in the exact language below, that: '. . . Listerine will not help prevent colds or

[184] Stanford Inst. for Econ. Pol'y Rsch., *Is Antitrust Policy Good for Innovation? A Conversation with Lina Khan, Chair, Federal Trade Commission*, YouTube, at 39:43 (Nov. 2, 2023), https://www.youtube.com/watch?v=i3hgKaInBzE.

sore throats or lessen their severity.'" 562 F.2d 749, 753 (D.C. Cir. 1977). This type of corrective advertising requirement is a far cry from the wide-ranging, intrusive mandatory provisions of the Proposed Order. While the FTC has "wide discretion in determining the type of order that is necessary to cope with the unfair practices found," *Fanning v. FTC*, 821 F.3d 164, 174 (1st Cir. 2016) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965)), that discretion is "not unlimited," *Standard Oil Co. of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978) (noting several factors that determine the appropriate scope of an order). When imposing injunctive relief in the first instance, the FTC is limited to relief that bears a "reasonable relation" to the offending conduct and that is sufficiently specific in nature. *Am. Home Prod. Corp. v. FTC*, 695 F.2d 681, 704–05 (3d Cir. 1982) (holding that when seeking injunctive relief, "[t]he Commission must . . . adhere to two rules . . . . [T]here must be a reasonable relation between the violation and the order . . . [and] an order must be sufficiently clear and precise to be understood by the violator.").[185]

Even if it applied, the Proposed Order would fail the traditional sliding-rule test appellate courts apply to determine if an FTC order bears a reasonable relationship to alleged marketing misrepresentations.[186] "The FTC considers three factors in determining whether order coverage bears a reasonable relationship to the violation it is intended to remedy: '(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to

[185] This is consistent with limitations on injunctive relief more broadly. *See Neb. Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("We have long held that '[a]n injunction must be narrowly tailored to remedy the specific harm shown.'" (citing *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976))); *see also ALPO Petfoods, Inc. v. Ralston Purina Co*., 913 F.2d 958, 972 (D.C. Cir. 1990) (finding an injunction overbroad where it suppressed more speech than necessary to prevent harm to consumers); *Nat'l Ass'n of Chain Drug Stores v. U.S. Dept. of Health & Hum. Servs.*, 631 F. Supp. 2d 17, 21 (D.D.C. 2009) (finding an injunction overbroad where plaintiffs had not shown a harm in the absence of each proposed order provision).

[186] We are aware of no instances in which the FTC has applied this sliding rule test to misrepresentations related to data privacy or security.

other products; and (3) whether the respondent has a history of prior violations.'" *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006) (quoting *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994)). The OTSC did not and could not contend that any violation was serious or deliberate. The OTSC points to no user harm and no bad faith, and the Assessor specifically praised Meta's efforts and good faith in deciding to comprehensively redesign its privacy program to make it more sustainable in the long term. (2021 Assessment Report at 2.) Nor is factor (2) applicable here. The Order's Privacy Program requirements apply to Meta's core products regardless of whether they are modified. As to the third factor, Meta has never admitted, and the Commission has never sought to prove, that Meta committed any violation. *See Facebook*, 456 F. Supp. 3d at 124 ("[I]n evaluating the Stipulated Order's reasonableness, the Court may not even assume that Facebook violated the FTC Act or the 2012 Order in the first place."). And where the merits of those allegations have been litigated, they have been resolved in Meta's favor. *See District of Columbia v. Facebook, Inc.*, 2023 WL 4131594, at *4 (D.C. Super. Ct. June 1, 2023) (granting summary judgment and holding that "a reasonable consumer could not have been misled, materially or not, with the accurate disclosures by Facebook" as to certain disclosures regarding friend-sharing, integration partnerships, enforcement, and user privacy).

As described above, the 2019 settlement enabled the FTC to obtain relief in the Order that it could not have otherwise achieved through litigation—any judgment after trial would have been unlikely to include the same requirements to which Meta (then Facebook) ultimately agreed. If the Commission ***by its own account*** could not have obtained the relief in the Order through litigation, it defies common sense—and settled law—that it could use that relief as a floor to impose the dramatically more invasive relief set forth in the Proposed Order. *See Rosie*

D. by John D. v. Baker, 958 F.3d 51, 57 (1st Cir. 2020) ("[A]ny such modification cannot be used to sidestep the demanding requirement needed to get an injunction in the first place."). The Proposed Order is beyond the Commission's remedial authority and fails in its entirety.

B. The Proposed Order Far Exceeds Any Reasonable "Modification"

In a reopening proceeding under Section 5(b), the Commission lacks the full scope of the remedial authority it can exercise when issuing a cease-and-desist order anew. Both by statute and case law—judicial and administrative—the Commission's authority to modify an order is narrow and dramatically exceeded by the Proposed Order. As far as we are aware, the Commission has never used its reopening authority to impose such sweeping changes to a final order, and its efforts to do so here plainly exceed its statutory authority.

1. The Proposed Order Does Not "Modify" the Order

Section 5(b) allows the Commission only to "alter, modify, or set aside, in whole or in part" certain orders. Each of these terms has a specific and established meaning. *See Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 67–68 (D.C. Cir. 2023) ("The touchstone of statutory interpretation is always to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute.").

As its title ("Order to Show Cause Why the Commission Should Not ***Modify*** the Order and Enter the Proposed New Order") makes clear, by its own terms the OTSC only proposes to "modify" the Order. (OTSC at 1, 12–13.)

"Modify" is a legal term that has a well-established definition: "to make small changes." Modify, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) ("The word 'modify' . . . has a connotation of increment or limitation. Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."). Indeed, "the verb 'modify,' both by derivation and dictionary

meaning, connotes a limitation, not an extension, of that which is modified." *Best Foods, Inc. v. United States*, 158 F. Supp. 583, 589 (Cust. Ct. 1957).

In the OTSC, the Commission does not purport to invoke its authority to "alter" orders, and, having issued the OTSC, the Commission cannot subsequently change course and rely on such authority later. Nor would it matter. Courts have uniformly interpreted "alter" to encompass only slight amendments, not transformational changes. *See United States v. Hall*, 801 F.2d 356, 359 (8th Cir. 1986) ("The verb 'alter' is defined 'to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else.'") (quoting Webster's Third New International Dictionary (1971)); *United States v. Carter*, 421 F.3d 909, 913 (9th Cir. 2005) (finding alter means "some degree of change or modification, but not a changed meaning."); *see also* Merriam-Webster's Collegiate Dictionary (11th ed. 2020) (defining "alter" as "to make different without changing into something else").

The Commission appears to place undue emphasis on the phrase "in whole or in part," arguing that because it is set off by a comma, it modifies "modify" and "alter" in addition to "set aside." Gov't Opp., *United States v. Facebook, Inc.*, No. 19-cv-02184 (D.D.C. Aug. 16, 2023) (Dkt. No. 49) at 25. That is wrong for multiple reasons.

That reading ignores decades of Supreme Court precedent. "When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent,'" which "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 136 S.Ct. 958, 962–63 (2016). The Supreme Court "has applied the rule from [its] earliest decisions to [its] more

recent." *Id.* at 963. This rule clearly establishes that "in whole or in part" modifies only "set aside."

Next, the basic principle of statutory interpretation is to determine the most natural, sensible reading of the text. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). It would make no sense to "modify" something "in whole." That is irreconcilable with the very definition of the word "modify," which means "to change moderately." *MCI*, 512 U.S. at 225. Reading "in whole or in part" to enlarge the Commission's modification and alteration authority would be inconsistent with the ordinary meaning of these terms. It is far more sensible that the modifying clause applies only to the Commission's authority to "set aside" orders—it can vacate all or some of an administrative order—not to its authority to modify or alter orders.

And if there were any doubt, the Commission's own regulation implementing Section 5(b) confirms that "in whole or in part" applies only to "set aside," and not to "alter" or "modify." The single comma in Section 5(b) cannot sustain the weight the Commission places on it because the Commission ***eliminated it*** when promulgating Rule 3.72(b). That provision includes no comma between "set aside" and "in whole or in part," whereas "altered," "modified," and "set aside" are all separated by commas. *See* 16 C.F.R. § 3.72(b) ("altered, modified, or set aside in whole or in part").

The radical rewriting of the Stipulated Order proposed by the Commission—with 800 separate changes—would strain its reopening authority well beyond what it lawfully can bear. The Commission itself has touted its proposed changes as fundamental and sweeping, rather than incremental or limited. (*See* May 3 Press Release.) And, in any event, there is nothing "moderate" or incremental about the Proposed Order, with its hundreds of changes, fundamental transformation of existing requirements, and slew of entirely new (and legally untested)

requirements and prohibitions. *See supra* Section IV. The scope of these proposed changes would "destroy[] the identity of the thing changed"—here, the extensively negotiated provisions of the Order, which reflected a carefully considered mutual agreement between the two parties. *Smith v. United States*, 74 F.2d 941, 942 (5th Cir. 1935) (construing "alter").

2. The Proposed Order Unlawfully Imposes "New" Obligations That Are Not Tailored to the Assertedly Changed Circumstances

As discussed above, the Commission has frequently invoked case law under Federal Rule of Civil Procedure 60(b) to determine the scope of its modification authority under Section 5(b). The Proposed Order far surpasses its modification authority.

The law is clear that the Commission "may not, under the guise of modification, impose entirely new injunctive relief." *Salazar*, 896 F.3d at 498. Imposing new injunctive relief through modifications "would end run the demanding standards for obtaining injunctive relief in the first instance, would deny the enjoined party the contractual bargain it struck in agreeing to the consent decree at the time of its entry, and would destroy the predictability and stability that final judgments are meant to provide." *Id.*; *see also, e.g.*, *Pigford*, 292 F.3d at 925 ("Who would sign a consent decree if district courts"—or federal agencies—"had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?"); *Rosie D. by John D.*, 958 F.3d at 57 ("[A]ny . . . modification cannot be used to sidestep the demanding requirement needed to get an injunction in the first place.").

As Commissioner Bedoya observed, where—as here—the FTC seeks to modify an existing consent order, "it must identify a nexus between the original order, the intervening violations, and the modified order." (Comm'r Bedoya Statement.) But its obligations do not end there. Where "circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in

circumstances. A court should do no more." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992); *see also Salazar*, 896 F.3d at 498 (modifications to consent order "must be suitably tailored to the changed circumstances, and . . . should do no more than is necessary to resolve the problems created by the change in circumstances").

A suitably tailored modification "must preserve the essence of the parties' bargain," *Pigford*, 292 F.3d at 927, and not cross "the line between the permissible tautening of an injunction's terms and the impermissible imposition of a new injunction," *Salazar*, 896 F.3d at 498; *see also Am. Council of Blind v. Mnuchin*, 396 F. Supp. 3d 147, 177–78 (D.D.C. 2019), *aff'd*, 977 F.3d 1 (D.C. Cir. 2020) ("[A] proposed modification should not strive to rewrite [the order]. . . . [T]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances.").

This is consistent with the Commission's limited historical use of Section 5(b). The Commission has held that "reopening and modification, [is] in effect, *a clarification of the original order*." *Nat'l Housewares*, 1974 WL 175859 at *3. In responding to Meta's motion to enjoin this reopening proceeding before the District Court, the government cited only two cases in which the Commission modified orders absent consent. In one, the Commission "set[] aside" one particular provision. *Elmo Co.*, 389 F.2d at 551. In the other, the Commission "modified" a single clause. *Mohr*, 272 F.2d at 404.

As detailed in section II *supra*, few changes in the Proposed Order have any nexus to anything in the Order or any changed circumstances since its entry. This appears to be by design. In a press release accompanying the Order to Show Cause, the Commission underscored "***new*** protections for children and teens," (May 3 Press Release), and the Order to Show Cause describes the same provision (Part I) as well as the pause on new products and features (Part X)

as "***new***," (OTSC at 12–13). Indeed, it is difficult for the Commission to argue that the Proposed Order is a mere modification when it purports to restart the entire 20-year term of the Order, making it a wholly new order. The inclusion of these and other "new" provisions is fundamentally at odds with the requirements both that the modifications be tailored to the initial Order and intervening conduct, and that the changes be no broader than necessary to address the harms alleged. As a result, the Proposed Order is unlawful.

Further, the proposed changes are not suitably tailored because the asserted facts the Proposed Order purportedly seeks to address have been remediated. A cease-and-desist order is appropriate only "to prevent illegal practices in the future," *Ruberoid*, 343 U.S. at 473, not "to fasten liability . . . for past conduct," *FTC v. Cement Inst*., 333 U.S. 683, 706 (1948). The Commission cannot as a matter of law "issue a cease and desist order as punishment for past offenses," *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), and its remedial authority is at its nadir when addressing historical conduct. That is precisely what the Commission has proposed to do—issue a brand-new cease-and-desist order on the basis of conduct that has long since been addressed.

C. The Proposed Order Is Impermissibly Vague

Even if there was a valid basis for modification—which there is not—such modifications must be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *LabMD*, 894 F.3d at 1235 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 392). Indeed, the terms of the order should be "as specific as the circumstances will permit." *Colgate-Palmolive*, 380 U.S. at 393. Orders that fail to "state the reasons for its coercive provisions, state the provisions specifically, and describe the acts restrained or required in reasonable detail" are unenforceable. *LabMD*, 894 F.3d at 1235.

The Proposed Order compounds the impermissibility of the proposed modifications by implementing them through vague and ambiguous language (e.g., "relationship harm," "thwarted expectations") and by seeking to subject Meta to standards that are undefined and unworkable (e.g., an "effectively mitigates" standard). Courts have rejected such provisions as unenforceable. Indeed, the Proposed Order includes many provisions that are virtually identical to those struck down in full by the Eleventh Circuit in *LabMD*. *Compare id.* at 1239–40 (sections A–E), *with* Proposed Order at Parts VII.C–E, I, K.

D. The Changes in the Proposed Order Illustrate the Commission's Overreach

Several of the many proposed changes to the Order highlight the ways in which the Proposed Order would easily exceed the Commission's remedial authority. The remedies the Commission seeks to impose are tantamount to picking winners and losers in the marketplace. That seems to be the whole point, as the Chair has publicly claimed that these provisions are aimed squarely at Meta's underlying business model,[187] which is wholly contrary to the strong public interest in promoting innovation and competition. *See, e.g.*, *In re Nestle Holdings, Inc.*, Dkt. No. C-4082, 2005 WL 1786402, at *3 (F.T.C. July 15, 2005).

But the Commission cannot legislate through enforcement of its orders—much less legislate on major questions concerning private companies' collection, use, aggregation and monetization of data. (*See* July 2019 Statement at 6 ("The FTC does not have the authority to regulate by fiat. The extent to which Facebook, or any other company, should be able to collect, use, aggregate, and monetize data, is something Congress should evaluate in its consideration of

[187] On with Kara Swisher, *How Will Lina Khan and the FTC Tackle AI,* Spotify (May 15, 2023), https://open.spotify.com/episode/0qK7HJR5fla4ZE4OMXMNJu; Digit. Content Next, *F.T.C. Chair Lina Khan live at the 2024 DCN: Next Summit*, YouTube, at 23:35–25:56 (Feb. 9, 2024), https://www.youtube.com/live/Ov5zj46YmSw?si=Knkj32gFSqhURp7D.

federal privacy legislation. Our 100-year-old statute does not give us free rein to impose these restrictions.").) *See generally Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (an administrative agency lacks power to "effect a fundamental revision of [a] statute, changing it from one sort of scheme of regulation into an entirely different kind"). And the Chair understands this, as she recently reiterated this point, urging the benefits of Congress taking up legislation to determine the ability of any firm to collect or use particular "types of data."[188]

The Proposed Order's entirely new requirements overlook these limitations and suffer from a litany of legally fatal defects. They are unprecedented in the history of the Commission; reflect relief that the Commission has determined to exceed its authority; include provisions that the parties considered and rejected in their negotiations; lack any meaningful nexus to provisions in the Order or to the Commission's findings (let alone both, as the law requires); and, in any case, make no effort to be suitably tailored. Meta and the Commission spent more than a year negotiating every provision of the Order, including over what might actually be workable in practice. The Proposed Order—with its 800 separate changes and slew of new provisions—ignores settled law. Modification—even when warranted by changed circumstances—"is not a free pass to rewrite a consent decree." *Keepseagle v. Vilsack,* 118 F. Supp. 3d 98, 126–27 (D.D.C. 2015).

While Commissioner Bedoya has correctly noted concerns with the Proposed Order's new Part I, those same concerns apply with equal force to many of the more than 800 proposed changes, including those detailed below.

[188] Stanford Inst. for Econ. Pol'y Rsch., *Is Antitrust Policy Good for Innovation? A Conversation with Lina Khan, Chair, Federal Trade Commission*, YouTube, at 54:43 (Nov. 2, 2023), https://www.youtube.com/watch?v=i3hgKaInBzE.

1. Part I

Part I of the Proposed Order exemplifies the Commission's abuse of process to levy unprecedented and unjustified restrictions on Meta's business operations that bear no relationship to the Preliminary Findings of Fact or the 2012 or 2020 orders.

Part I is unprecedented in the history of Commission Orders. It would permanently enjoin Meta from "collecting, using, selling, licensing, transferring, sharing, disclosing, *or otherwise benefitting* from Covered Information from" users under the age of 18 other than limited exceptions for routine website operations, authentication, protecting users on the service, and ensuring legal or regulatory compliance. (Proposed Order at Part I.) Part I would expressly prohibit Meta from using data to develop and deliver services that are enjoyed not only by users, but numerous business customers, from mom-and-pops to nationwide household names, including: (1) building the social graph, which Meta employs to deliver many of its products and services, (2) developing algorithms and models, and (3) delivering relevant content, including ads. (*See id*.) While the Proposed Order purports to limit these prohibitions to the processing of data from individuals under the age of 18, the Order to Show Cause emphasizes that "under no circumstance would the Company be able to monetize that information or use it for its own commercial gain—whether for advertising, enriching its own data models and algorithms, or providing other benefits to the Company—even after the minor turns 18." (OTSC at 12.)

For all of these practical reasons why Part I is unprecedented and unreasonable, it is also unlawful. A court will reverse the Commission's imposition of a remedy if it "bears no reasonable relation to the unlawful practices found to exist," *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1499 (1st Cir. 1989) (quoting *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957)), or "the order's prohibitions are not sufficiently 'clear and precise in order that they may be understood by those against whom they are directed,'" *id*. (quoting *Colgate-Palmolive*, 380 U.S.

at 392). *See also Fanning*, 821 F.3d at 175. Part I is fatally defective in both respects: it bears no reasonable relation to the alleged unlawful practices and it is unclear.

Part I facially fails to bear any reasonable relation to the Order to Show Cause for two reasons. First, the Commission makes no effort in the Order to Show Cause to indicate which alleged unlawful practices support the imposition of Part I. The Commission's failure to demonstrate a reasonable relation to an alleged unlawful practice renders the proposed modifications deficient from the outset. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946) (reversing affirmance of Commission order where the Commission failed to make an administrative determination to support the proposed remedy).

Second, any effort to relate the allegations in the Order to Show Cause to Part I would prove futile. The only allegations in the Order to Show Cause that relate to children at all are those concerning the Messenger Kids technical errors. (*See* OTSC at 11.) However, these allegations bear no nexus to Part I, a point that Commissioner Bedoya rightly recognized in his statement following the Order to Show Cause. (*See* Comm'r Bedoya Statement.) First, the Messenger Kids technical errors only involved users of Messenger Kids, a product for individuals under the age of ***13***. (*See* PFOF ¶¶ 1137, 1139; Resp. to PFOF, Section III.A.1 ¶ 166.) Part I applies to individuals under the age of ***18***. Second, the Messenger Kids technical errors were, by the Commission's own admission, incidental oversights; and they resulted in unintended user interactions in very rare circumstances and were promptly remediated. (*See* PFOF ¶¶ 1153–55, 1164; Resp. to PFOF, Section III.A.5 ¶¶ 201–05 (providing the number of users impacted by each technical error, and explaining that both technical errors were remediated within one day of discovery).) While Meta rejects any allegation that any technical error constitutes a violation for which relief is appropriate, Part I, if imposed, would do nothing to

reduce the risk of future technical errors. Third, Part I prohibits Meta from monetizing information obtained from users under the age of 18, an issue wholly unrelated to technical coding errors. The OTSC does not include any allegations that Meta monetizes Messenger Kids data and, indeed, Messenger Kids has never had advertising and Meta has never made revenue from Messenger Kids.[189] No other allegation in the Order to Show Cause comes any closer to justifying the unprecedented requirement in Part I. The Order to Show Cause contains no other references to children, teens, or monetization of user data. (*See* Comm'r Bedoya Statement.)

For substantially the same reasons discussed above, none of the sliding scale factors appellate courts apply to determine if an FTC injunction bears a reasonable relationship to alleged marketing misrepresentations supports the imposition of Part I on the basis of the Messenger Kids technical errors. First, the technical errors were inadvertent, isolated accidents, and the Commission nowhere alleges that Meta deliberately caused them to occur. Moreover, because of Meta's layered security controls, the nature of the technical errors, and Meta's prompt remediation, the unexpected user experience only manifested in very rare circumstances, affecting approximately half of one percent of Messenger Kids users. *See* Resp. to PFOF, Section III.6 ¶ 213; *C.f. Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 394 (9th Cir. 1982) (finding that conduct was deliberate where it was not an "accident or isolated instance"); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992) (finding "serious" a deception that persisted for two and a half years). Second, the technical errors are unique to the design of Messenger Kids and its under age 13 audience and, therefore, any alleged misrepresentations are not readily transferable to Meta's other products targeted to users aged 13 and older. *C.f. Sears, Roebuck &*

[189] *See* Morgan Brown, *Giving Parents Even More Control in Messenger Kids*, Meta Newsroom (Feb. 4, 2020), https://about.fb.com/news/2020/02/messenger-kids-controls/ ("There continue to be no ads in Messenger Kids and no in-app purchases. And as the updated privacy policy reaffirms, we don't sell any of your or your child's information to anyone, and we never will.").

Co., 676 F.2d at 395 (finding it appropriate to transfer an order requirement from one product to another based on similarities between the consumers who might purchase the products, which are not present in the instant matter). Third, Meta has no history of violations of COPPA, the COPPA Rule, or the FTC Act with respect to its handling of data of users under age 18, and Meta neither admits nor denies that it has violated the FTC Act in connection with its 2012 and 2020 orders. In addition, the other sliding scale factors strongly demonstrate that Part I is not reasonably related to the alleged violations, which renders the third factor inconsequential. *See Telebrands*, 457 F.3d at 362 (declining to consider whether prior settlements with no admission of liability support imposition of broad fencing-in language where the other two factors were dispositive).

Finally, Commission orders must be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Henry Broch*, 368 U.S. at 367–68. Part I is fatally unclear because it pairs an outright prohibition on the use of information from users under the age of 18, with insufficiently clear and likely conflicting provisions on limited exceptions to permissible use. For example, Part I would permit Meta to use information from users under 18 to "operat[e]," "maintain[]" and "analyz[e]" its website or online service but it is expressly prohibited from applying the data to the algorithms and models, including the social graph, that are foundational to the operation and maintenance of the services. (Proposed Order at Part I.A.) As discussed *supra* this incoherent requirement would significantly impair Meta's provision of services to its users and advertisers. Similarly, Part I would permit Meta to use youth data to "protect[] the privacy, confidentiality, security, or Integrity of the website, online service, or its Youth users" but appears to make no accommodation for the need to use models and algorithms to drive these protective measures at Meta's scale or that such uses could be

viewed by the Commission as "enriching [Meta's] data on Youth Users" where it enhances Meta's ability to use the data to protect users. (*Id.*)

For all of these reasons, Part I is an unprecedented, unlawful, unworkable, and unilateral attempt to legislate new privacy requirements unmoored from Congressional authority.

2. Part X

Part X of the Proposed Order would impose extreme new obligations on Meta that are irredeemably vague and wholly divorced from the Order or any of the Commission's found facts.

Part X seeks to impose unprecedented commercial restrictions on Meta's ability to develop new and improved products by prohibiting Meta from "introducing any new or modified products, services, or features" unless "the Assessor's most recent Assessment . . . show[s] that Respondent's Mandated Privacy Program meets all the requirements of Part VIII, and the Assessor did not identify any material gaps or weaknesses in Respondent's Mandated Privacy Program." (*Id*. at Part X.A.) Where the most recent Assessment does show "material gaps or weaknesses," Meta "may not introduce any new or modified products, services, or features, until the Assessor provides written confirmation to the Commission that [Meta] has fully remediated all such material gaps and weaknesses." (*Id*. at Part X.B.)

The language of Part X is impermissibly vague. The Proposed Order introduces a new concept of "*material* gaps and weaknesses," but fails to define what "material" means in this or any other context. The Proposed Order sets forth no benchmarks for determining what is or is not "material," offers no recourse for any review of such a determination, and provides no procedural framework or timing obligations for the Assessor's validation of Meta's remediation efforts suggested in Part X.B. Accordingly, neither Meta nor the Assessor are left with any guidance as to the manner in which to operationalize this provision.

Part X bears no nexus to the Order or the Commission's findings and is, in fact, at cross purposes with them. Tying Part X's freeze on new and improved products to the existence of gaps and weaknesses undermines the language of the Order that contemplates the need for continuous improvement, as evidenced by provisions that provide processes through which Meta will address such gaps and weaknesses. (Order at Part VII.D, E, J.) And, in any case, Part X is unmoored from any changed facts. There is literally nothing in the Commission's findings that relate in any way to the prioritization or timing of Meta's remediation efforts. By linking product development to remediation, Part X seems to reflect a belief that Meta prioritized product creation over the development and continuous improvement of its Privacy Program. In fact, the record detailed in the PFOF Response reflects the opposite—that Meta prioritized addressing the Assessor's findings. Consistent with that record, the Assessor found that "Meta's leadership has committed to continue addressing all Assessor identified Gaps leveraging the MAPs process" (2023 Assessment Report at 6), and the Assessor's [redacted] (*id*. at 13). To the extent the Commission proposes this change to further incentivize remediation, the PFOF Response plainly refutes the need to do so.

Even if there were some nexus to either the Order or the Commission's findings, Part X does far "more than is necessary." *Salazar*, 896 F.3d at 498. On its face, Section X would prevent Meta from making ***any*** modification to ***any*** product, service, or feature—***even if that modification had no privacy implications whatsoever***. More than [redacted] of all Meta code changes have [redacted] at all. (2023 Assessment Report at 82.) But taken literally, Section X could be read to preclude Meta from moving any pixel, changing any color, or increasing any font size. And it would prevent Meta from introducing even ***privacy protective***

changes, unless protecting privacy is the "sole purpose" for the change (which itself creates an unworkable and inherently vague standard). (Proposed Order at X.C.) Section X's overbreadth is astonishing.

Even as to the distinct minority of modifications with privacy implications, Section X is overbroad. The so-called "freeze" is not even remotely tailored to any material gap. An issue, for example, in a Program safeguard only affecting Instagram would, as written, prevent Meta from improving features of WhatsApp. An issue with respect to monitoring developers would prevent Meta from launching a new feature that does not even allow users to share data with developers. That is the polar opposite of "suitabl[y] tailored." *See Salazar*, 896 F.3d at 498.

This lack of any tailoring is made worse by the fact that Part X takes dead aim at Meta's fundamental, constitutional rights, including its rights to develop products and innovate to better serve its users and customers—rights that are protected by the Due Process Clause. *See, e.g.*, *Ruckelshaus*, 467 U.S. at 1003 (holding that a company has a protected property interest in its trade secrets, its data, and "the products of [its] 'labour and invention'"). The Commission did not make ***any*** showing that would suffice to deprive Meta of such rights.

As former Deputy Attorney General Thompson writes, the new provision reflects misguided enforcement policy. Because the process of constant evolution and improvement takes time, Meta should be expected to regularly monitor, review, and test its compliance program to identify areas of improvement and adapt its programs to new and changing risks. (Thompson Report, Section VI.B ¶ 90.) As part of this process, gaps and weaknesses are expected and ultimately beneficial, as they mark areas to continually evolve the program to address changes in internal and external factors, laws and regulations, technology, and new and evolving risks. (*Id.* at Section VI.B ¶¶ 91, 93–94.) Indeed, the *absence* of gaps or weaknesses—

here, the pre-condition to lift the moratorium on new and improved products—may raise concerns regarding the adequacy of the monitorship of a privacy program. (*Id.* at Section VI.B ¶¶ 91–92.) Furthermore, a company's willingness to proactively self-identify and correct problems is a hallmark of a culture of compliance (*id.* at Section VI.A ¶ 73), while a provision that ties economic success to gaps and weaknesses would create a perverse incentive to stifle this kind of reporting. This is precisely why a monitor's role should remain neutral, rather than serve a punitive function. (*Id.* at Section VI.C ¶¶ 106–18.) A lack of trust from a punitive approach tends to disincentivize companies from implementing significant and foundational changes, in favor of short-term "safer" changes, which are less likely to yield findings or gaps. (*Id.* at Section VI.C ¶¶ 115–18.) Moreover, imposing this punitive framework sets a bad example that will deter other companies from ever agreeing to a monitorship. (Thompson Report, Section VI.D ¶¶ 125–28.) Should the Order be modified to include Part X, other companies will see the government's abandonment of the traditional approach and resist agreeing to a monitorship or from entering into similar settlement agreements. (*Id.* at Section VI.D ¶¶ 127–28.)

Part X would also radically transform the Assessor into a management function, implicating state corporate law and the fiduciary duties owed by those making decisions for the corporation. (*Id.* at Section VI.E ¶ 134.) By giving the Assessor the power to gatekeep the Company's launch of new or modified products, services, or features, the FTC is essentially making the Assessor its agent or deputy for regulatory enforcement responsibilities. (*Id.* at Section VI.E ¶ 144.) And by the same token, the FTC is essentially endowing the Assessor with management responsibilities that ultimately belong to Meta's Board of Directors and Senior Management—responsibilities that are accompanied by fiduciary duties to the Company and its

shareholders. (*Id.* at Section VI.E ¶ 145.) This is antithetical to the role of an independent assessor.

3. Part VIII

Another example of the Proposed Order's overreach is its extraordinary expansion from imposing a program that "protects the privacy, confidentiality, and Integrity of the Covered Information collected, used, or shared by Respondent" (Order at Part VII) to one that "effectively mitigates Privacy Risks and Harms." (Proposed Order at Part VIII.) That goes well beyond the Commission's modification authority. *United States v. Junction City Sch. Dist.*, 14 F.4th 658, 667 (8th Cir. 2021) ("In expanding the consent decrees . . . the district court impermissibly expanded the decrees to impose a new term outside the intended agreement of the parties.").

First, the term "Privacy Risks and Harms" is vague and unenforceable on its face. The Order already required Meta to create a Mandatory Privacy Program that "protects the privacy, confidentiality, and Integrity of the Covered Information collected, used, or shared by Respondent." (Order at Part VII.) The Proposed Order now seeks to prescriptively impose an additional requirement to "effectively mitigate" the "risk of harm caused, directly or indirectly, by the access to, or collection, use, retention, or destruction, of Covered Information, including, physical harm, emotional distress, or mental health harm, economic harm, reputational harm, relationship harm, discrimination, or harm to an individual's autonomy." (Proposed Order at Part VIII; *id.* at Definition T.)

In this context, these harms have no discernable definitions or even common understandings—let alone meanings that are sufficiently specific to be understood. *See Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) ("The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."). Where, as here, the proposed obligations and

requirements turn on language that "appears nowhere in any statute or regulation," their enforcement is even more dubious from a due process perspective. *Butcher v. Knudson*, 38 F.4th 1163, 1175 (9th Cir. 2022).

Second, none of these "harms" is in any way tied to anything in the Commission's preliminary findings.[190] The Commission preliminarily found 163 pages of facts—yet the words "discrimination," "emotion," "mental health," or "economic," among others, do not appear even once. Nor are any of these concepts traceable to anything in any of the Commission's prior allegations. The OTSC does not claim otherwise.[191] This exponential expansion of Meta's mandated program is simply a reflection of the Commission's policy preferences.

Third, a mandatory injunction requiring any company to "effectively mitigate Privacy Risks and Harms" would be unlawful under settled law. As discussed in detail in Point V.B *infra*, government agencies and respected third parties agree that not even the most effective compliance programs can mitigate ***every*** risk. That is exactly what Part VIII would require Meta to do. Just a few years ago, then-Commissioner Chopra argued against the Order because it

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[190] The Commission also seeks to expand the scope of several other definitions without a showing as to how the current definition in the Order is deficient or warrants expansion. For example, the Proposed Order would also expand the definition of Nonpublic User Information to go beyond "information . . . that is restricted by one or more Privacy Setting(s)" (Order at Definition K) to also include any information "otherwise not publicly available on a User's profile, timeline, or newsfeed" (Proposed Order at Definition P). But nowhere in the PFOF does the Commission connect a harm to the scope of Nonpublic User Information and the proposed expansion is therefore unnecessary to address any allegation. The Proposed Order would also expand the definition of "Affected Facial Recognition User" to include "any User whose biometric information has been collected by Respondent for any . . . purpose." (Proposed Order at Definition A). This limitless expansion bears no relation to any allegations in the PFOF and even if it did, the proposed addition's sweeping language is not tailored in any sense.

[191] To the extent that even some of these new "harms" have any link to anything in the Initial Assessment, the proposed expansion would ignore the Assessor's findings, not address them, and undermine Meta's efforts to continue to improve its privacy risk assessment processes. As part of its first Privacy Risk Assessment, Meta conducted a [redacted] (*See* PFOF ¶¶ 50–62.) Nothing in the Order required Meta to conduct this exercise, let alone consider any particular potential harms in doing so. Moreover, and in part to address the Assessor's feedback that this exercise is inherently subjective, Meta has since removed the [redacted]. (*See* Ex. 14 (Jan. 11 2022 resp. to Dec. 3, 2021 request 9) at 21–22; *see also* 2023 Assessment Report at 54–56.) The proposed expansion of the mandated Program would require Meta to reverse those efforts and reject the Assessor's findings.

provides ***the Assessor*** with "no benchmarks for what constitutes effectiveness" when conducting its independent assessments. (Comm'r Chopra Dissent at 13.) Part VIII would impose significant mandatory obligations on Meta with no criteria whatsoever as to "what constitutes effectiveness." The law is clear that the Commission cannot require Meta "to overhaul and replace its . . . program to meet an indeterminable standard." *LabMD*, 894 F.3d at 1236.

4. Independent Privacy Committee, Definition M

The Proposed Order would require one of the directors on the Independent Privacy Committee of Meta's Board to "hold . . . or have held . . . a position within the last five (5) years, at a nonprofit where that person has worked, in whole or in part, to safeguard civil liberties, protect consumers from data abuses, strengthen consumer privacy standards online, research or advocate for such consumer privacy protections or enforce consumer privacy laws." (Proposed Order at Definition M.)

This extreme and novel requirement defies the Commission's remedial authority, as the Commission has recognized. In describing Meta's ***agreement*** to create an Independent Privacy Committee in the first place, the Commission explained that "because we do not, and could not, allege and prove that Facebook's current Board structure is illegal or that changes in corporate governance are necessary to effectuate compliance with the Order and the FTC Act, it is unlikely that a court would mandate any corporate governance reforms." (July 2019 Statement at 6.) That remains true today. Nothing in the Commission's preliminary findings discusses (let alone finds fault with) Meta's Board or its Independent Privacy Committee. This is simply another area in which today's Commission wishes that its predecessors had approved a different order.

Moreover, imposing requirements as to the experience required to serve on Meta's board raises fundamental federalism issues. State law governs—and, in Delaware, fiercely protects—the shareholder franchise, including with respect to who may serve on corporate boards. *See,*

e.g., *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012) ("The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm."); *Blasius Indus., Inc. v. Atlas Corp*., 564 A.2d 651, 659 & n.2 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests . . . . Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.); *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310–11 (Del. Ch. 2002) ("Delaware law recognizes that the right of shareholders to participate in the voting process includes the right to nominate an opposing slate. And, the unadorned right to cast a ballot in a contest for corporate office . . . is meaningless without the right to participate in selecting the contestants."). The Proposed Order's imposition of qualifications for at least one member of Meta's Board impermissibly narrows the pool of nominees and infringes on the states' rights to govern matters of corporate management. *See Bus. Roundtable v. SEC*, 905 F.2d 406, 407, 413 (D.C. Cir. 1990) (rejecting SEC rule that "invade[d] the firmly established state jurisdiction over corporate governance and shareholder voting rights").

5. Part IV "Comprehensive Data Map"

The Proposed Order includes new requirements to create a "comprehensive data map" documenting, for each type of Covered Information, the collection source, purpose of collection, use type, retention schedule, and location of each data store containing each type of Covered Information. (Proposed Order at Part IV.)

As a preliminary matter, nowhere is "data map" defined in the Proposed Order, and there is no common understanding for what such a data map may look like or contain. Nor is there any basis to require Meta to complete such an unprecedented exercise within weeks, as required under the Proposed Order.

Moreover, there is nothing in any of the Commission's prior allegations or the 2020 Order that relates in any way to a requirement that Meta organize or "map" its data in any particular way—let alone the specific way now desired by the Commission. Indeed, the lack of any nexus is underscored by including a requirement that Meta "map" data it ***stores*** in a section titled, "Deletion of Information." (Proposed Order at Part IV.) Data storage and data deletion are two distinct concepts. If nothing in the Order prescribed Meta to map or organize its data in any way, then there is no basis for the Commission to rewrite the Order to add one.

Part IV of the Order was extensively negotiated to reflect the state of technology and what would be feasible and workable. Settled law precludes the Commission from treating it as a blank canvas to impose entirely new and unworkable requirements. *See Pigford*, 292 F.3d at 927 (holding that modification "must preserve the essence of the parties' bargain").

6. Part VIII.E.4—Mergers and Affiliates

The Proposed Order includes a host of sweeping new provisions regarding newly merged or acquired entities, including drastic deadlines for when such entities must comply with the Proposed Order (Proposed Order at Part VIII.E.4.a–b), and even goes so far as to require the merged or acquired entity to maintain privacy protections, policies, and practices that are even more stringent than what would otherwise be required of Meta under its own Mandated Privacy Program (*id.* at Part VIII.E.4.c).

Among other problems, there is—quite literally—nothing in the Commission's preliminary findings that relates in any way to Meta's acquisitions. With good reason. [redacted] (2021 Assessment Report at 40.) Accordingly, there can be no plausible argument that any facts or the public interest has changed that warrant these provisions. The Commission simply wants a do-over.

7. Publication Obligations

The Proposed Order would also require Meta to publish on its website a number of different documents, including Covered Incident reports (Proposed Order at Part XI.E), and quarterly certifications (Proposed Order at Part XIII.A), and to provide Users with "(1) the categories of information that will be collected; (2) the specific purpose(s) for which such data will be collected, used, or disclosed; (3) the name(s) of any entity that collects the information or to which the information is disclosed; (4) a simple, easily located means for the User to withdraw consent; (5) any limitations on the User's ability to withdraw consent; and (6) all other information material to the provision of consent" as part of any consent flow (Proposed Order at Definition B).

Once again, there are no facts asserted that relate to these new obligations, let alone support them. But if these obligations sound familiar, it is because they are precisely the provisions for which Commissioner Slaughter advocated in her dissent from the 2019 settlement. (Comm'r Slaughter Dissent at 13 ("Facebook should be required to publicly disclose: all categories of information that it collects about consumers and how it collects such information; the purpose and use for each collected category; how long each category is stored; and how consumers can access and delete their information . . . Facebook should be required to publicly disclose a summary of its privacy incident reports for each reporting period.").) But having already considered and rejected them, the Commission may not now impose them because its composition has changed. Modification is improper where one side to the bargain regrets the terms on which it chose to settle. *See Damon*, 1983 WL 486320 at *2.

Moreover, these obligations—compelled speech—infringe on Meta's First Amendment rights. For compelled speech to survive scrutiny under the First Amendment, courts (1) "identify and assess the adequacy of the governmental interest motivating the disclosure requirement"; and

(2) "evaluate the effectiveness of the measure in achieving it." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524–25 (D.C. Cir. 2015). Here, the Commission has failed to articulate any government interest in the added disclosure (i.e., no harm to be alleviated as articulated in the PFOF), let alone a harm that would be materially (and measurably) mitigated by the proposed disclosures. *Id.* at 527 ("[T]he SEC had the burden of demonstrating that the measure it adopted would in fact alleviate the harms it recited to a material degree.") This is not a valid basis to compel speech. *Id.* at 530.

8. Privacy Risk Assessments

Similarly, the Commission would impose sweeping changes to the Privacy Risk Assessment ("PRA") process (Proposed Order at Part VIII.D), based on an incomplete and outdated factual finding regarding its first company-wide privacy risk assessment under the Order. Meta has since completed ***three*** annual privacy risk assessments and there is no remedial interest served by imposing changes based on such outdated, stale assertions.

In any case, in addition to requiring the PRA process to assess the same new Privacy Risks and Harms definition discussed above (*see supra* Section IV.D.3), the Proposed Order also mandates Meta to evaluate "each individual product or service feature that collects, uses, or shares Covered Information" across five factors (Proposed Order at Part VIII.D).[192] But not only is there no factual basis to support this proposed modification, the addition of this onerous process is also unnecessary because, as the Assessor recognized, and was previewed to the Commission (*see, e.g.*, Resp. to PFOF, Section IV.B ¶¶ 50–62), Meta has made [redacted]

[redacted]

[192] The Proposed Order would also require Meta to consider those identical five factors as part of the Privacy Review process. (Proposed Order at Part VIII.E.2.) And, consistent with all of the Commission's proposed changes, there is no factual support that such changes are necessary to address current, ongoing allegations regarding Privacy Review. (*See* Resp. to PFOF, Section IV.C ¶¶ 171–370.)

[redacted]. (2023 Assessment Report at 56). In fact, the Assessor ultimately found that, through these and other enhancements to the PRA methodology, [redacted]. (*Id.* at 12, 56, 59–60.)

9. Effective Date

Other provisions make clear that the Commission is proposing to issue an entirely new order—not to modify or alter the existing Order. For instance, on its face the Proposed Order purports to impose entirely new relief flowing from the new effective date (Proposed Order at Parts IV, XII.A.7), meaning that the 20-year term would start anew. That is order issuance, not order modification.

And the Commission has proposed to do so in a way that conflicts with the FTC Act. The new Proposed Order would be "final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order." (Proposed Order at Part XVIII). But Section 5(g) requires that orders shall become final upon the expiration of the time allowed for filing a petition for review or after 60 days if a petition is filed. 15 U.S.C. § 45(g). Thus, on its face, the Commission's Proposed Order would violate Section 5(g) and introduce uncertainty about when it even takes effect.

V. THE FTC'S ATTEMPT TO MODIFY THE ORDER IS CONTRARY TO ENFORCEMENT PRINCIPLES AND WILL HARM THE AGENCY

A. The Finality of FTC Orders Is Essential to Obtaining Agreement to Settlements

As described above, the Commission's statutory power to order anyone to do anything other than "cease and desist" from a particular practice is suspect and, in any case, limited. As a result, the Commission has consistently relied on consent to obtain remedies that dramatically

exceed its remedial authority under Section 5—and that it could not realistically attain through litigation.[193] The Order clearly illustrates these principles. The Commission (and its Staff) made clear that Meta's ***agreement*** allowed the Commission to obtain relief that it could not otherwise have obtained. (*See supra* Section IV.A.)

This consent-order framework is 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." *Louisiana-Pac.*, 1989 WL 1126760 at *4. Indeed, for regulated entities, the principal function of a consent order is to achieve finality and certainty. *See Salazar* 896 F.3d at 498; *Armour*, 402 U.S. at 681. The Commission's proposal in this case threatens to upend this regime: if the Commission unilaterally reopens and substantially modifies the order in this case, the Commission will struggle to secure consent decrees from other parties, who will (correctly) harbor serious doubts that they are in fact obtaining the finality and certainty for which they are bargaining. *See United States v. St. Regis Paper Co.*, 355 F.2d 688, 697 (2d Cir. 1966) ("Adoption of the Government's position would deal a serious blow to the reasonable expectations of those who consented to cease and desist orders with the FTC."). Respondents ***only*** agree to enter into consent decrees because those agreements are final. Parties resolve their disputes to obtain finality, certainty, and repose. *See Archer v. Warner*, 538 U.S. 314, 321 (2003). No rational actor would be willing to agree to such relief—in excess of the Commission's remedial authority—if it serves only as a floor for the Commission to impose even more significant relief based on nothing more than the Commissioners' shifting views of

[193] *See Testimony of the FTC Before the House Comm. on Appropriations Subcomm. on Fin. Servs. and General Gov't*, at 15, 17 (Apr. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p210100houseappropriationstestimonyfy2024.pdf (emphasizing the importance of settlement agreements in furtherance of the agency's consumer-protection mission).

the "public interest." That, in the words of the Supreme Court, that would be an "absurdity." *Murray*, 96 U.S. at 445.

The Commission and courts have repeatedly found a significant public interest in finality of orders. Gross modification of the Order in the manner contemplated here opens the door to future modifications, impermissibly converting the Commission into a manager of a respondent's business conduct for the duration of the order. *See LabMD*, 894 F.3d at 1236 ("Open[ing] the door to future modifications . . . would be as if the Commission was LabMD's chief executive officer and the court was its operating officer.").

These concerns are especially acute where, as here, the decision to upend the finality of an extensively negotiated consent order followed a change in the political composition of the Commission. In 2019, two Democrats on the Commission dissented from the Order, arguing that the public interest required the Commission to obtain additional relief from Meta. The Commission and its then three Republican party-appointed commissioners approved the Order over the dissent of Commissioners Chopra and Slaughter, following which the District Court approved the Order, finding that it was in the public interest. *Facebook*, 456 F. Supp. 3d at 126.

The Commission's defense of its own constitutionality turns on the premise that its adjudicatory process is not susceptible to political interference or bias. *See, e.g.*, FTC Br. at 68, *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. July 26, 2023) (citing *Humphrey's Ex'r*, 295 U.S. at 625). But the Proposed Order—issued as part of an OTSC process commenced just two years into the 20-year term of the Stipulated Order—hardly gives the appearance of disinterested adjudication. Rather, it vindicates the policy preferences expressed by Commissioners Chopra and Slaughter in their earlier dissents and expressly rejected by the five-member Commission in 2019:

- In his dissent, then-Commissioner Chopra expressed concern that "[t]he [Privacy] Committee will be chosen by a nominating committee whose members the controlling shareholder, Zuckerberg, can essentially pick or vote not to retain, reducing their level of independence." (Comm'r Chopra Dissent at 14–15.) The Proposed Order, in turn, requires that at least one *independent* director of the Privacy Committee serve or have recently served on a nonprofit focused on civil liberties, protecting consumers from data abuses, strengthening consumer privacy standards online, research or advocacy for consumer privacy protections, or enforcement of consumer privacy laws. (*See* Proposed Order at Definition M.)

- Commissioner Chopra also complained that the "restrictions placed on new products, practices, and services" in the Order are "narrow" because they "do not actually place any substantive limit on Facebook's collection, use, or sharing of personal information." (Comm'r Chopra Dissent at 13.) This preference for substantive restrictions is reflected in Section I of the Proposed Order, which would bar Meta's commercial use of data from users under the age of 18.

- In her dissent, Commissioner Slaughter asserted that Meta should "be required to publicly disclose: all categories of information that it collects about consumers and how it collects such information; the purpose and use for each collected category; how long each category is stored; and how consumers can access and delete their information." (Comm'r Slaughter Dissent at 13.) In turn, the Proposed Order at Part IV would require Meta to develop a comprehensive data map that documents:

  > [F]or each element of Covered Information stored in each data map: (i) the type of Covered Information (e.g., Mobile Advertising ID); (ii) the source(s) of collection; (iii) the particular purpose(s) for which Covered Information was collected; (iv) each use of that type of Covered Information; (v) the retention schedule; and (vi) the location of each data store that contains each type of Covered Information.

  (Proposed Order at Part IV.)

- Commissioner Chopra argued that the Mandated Privacy Program was "less than meets the eye" because Meta "is essentially allowed to decide for itself the extent to which it will protect user privacy" and safeguards "provide no limitation or even guidance on what constitutes justified information collection." (Comm'r Chopra Dissent at 12.) In turn, the Proposed Order requires Meta to take into account several enumerated Privacy Risks and Harms, including injuries as indefinite as "relationship harm." (Proposed Order at Definition T.) Meta would be required to consider these Privacy Risks and Harms as part of Privacy Review. (Proposed Order at Part VIII.E.2a.)

- Commissioner Chopra also dissented on the grounds that the Independent Assessor is "unlikely to be able to stop a major program change, such as [a] platform integration, so long as Facebook can adequately state a justification for the change." (Comm'r Chopra Dissent at 13.) The Proposed Order elevates the Assessor to precisely this role, making it the *de facto* gatekeeper for Meta's launch of products, services, or features. (Proposed Order at Part X.)

- Commissioner Slaughter called in her dissent for the order to "require public disclosure of Facebook's . . . data privacy incident reports." (Comm'r Slaughter Dissent at 13.) The Proposed Order would require Meta to do just that. (Proposed Order at Parts XI, XIII.)

Indeed, the Chair has suggested in recent comments that revisiting the Order to vindicate the policy preferences unsuccessfully advocated in the two dissents was, in fact, a purpose of the OTSC.[194]

This appearance of political interest harms the reputation of the Commission, diminishes public trust in its operations, lends weight to constitutional concerns about the Commission's underlying structure, and raises concerns that the Commission's reopening proceeding here is governed by political fiat more than the law. *See U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

The Commission's action here, and the precedent it sets—that no order is ever final, that no relief is ever certain, and that no settlement will offer repose—will significantly hinder it from obtaining consent decrees going forward, ultimately harming consumers who would otherwise benefit from these decrees, and burdening the Commission and the courts with unnecessary litigation. *See St. Regis Paper Co.*, 355 F.2d at 698 (warning that upending settled expectations in finality and enforcement would "jeopardize the Commission's vitally important consent order

[194] Digital Content Next, *F.T.C. Chair Lina Khan live at the 2024 DCN: Next Summit*, YouTube, at 24:49-25:02 (Feb. 9, 2024), https://www.youtube.com/live/Ov5zj46YmSw?si=Knkj32gFSqhURp7D (Q: "But you only charged $5 billion; Meta is making well over a hundred billion dollars annually in revenue, so wouldn't you argue that your own enforcement mechanism was not strong enough?" "A: "So that fine and that consent decree was finalized in 2019, before I arrived at the agency; it was also accepted on a 3-2 vote. There were 2 commissioners that strongly dissented from that, and so even at that time there were differences of opinion about whether a fine alone was enough without addressing some of the underlying business practices.").

procedure"). If the Commission proceeds down this path, its "negotiated consent agreement[s]" will never meaningfully "operate with any finality"—a "result which would rob the consent procedure of much of its usefulness." *Phillips Petrol.*, 1971 WL 128558 at *2.

B. The OTSC Misapplies and Subverts Fundamental Compliance Principles

Even setting aside the Commission's legal constraints, the Commission's actions here turn fundamental principles of compliance and enforcement on their head and will make it more difficult for companies to develop and implement effective compliance programs.

The OTSC's assertions with respect to Meta's Privacy Program rely on nothing more than the number of gaps and weaknesses identified by the Assessor in the first six months of the Program. As described above and in more detail in the PFOF Response, that number was a product of Meta's development of a Privacy Program that went well beyond Part VII's requirements and Meta's extensive cooperation with a thorough 2021 Assessment. (*See, e.g.*, Resp. to PFOF, Section IV.A ¶ 22.) The Commission's punitive approach will deter companies from doing anything more than the absolute minimum going forward. No rational company would take steps beyond those required by an order if gaps and weaknesses in those areas could be cited as a basis for order noncompliance, and companies would be disincentivized from embracing and partnering with their assessors—as Meta did here—if that cooperation could be turned against them. It is precisely for those reasons that the OTSC runs counter to settled compliance principles.

1. Conflating Gaps with Ineffectiveness Is in Conflict with Compliance Principles Recognized by Other Federal Agencies and Organizations.

The Commission finds itself at odds with well-established compliance principles consistently recognized and applied by other federal agencies and organizations. It is axiomatic

that gaps and weaknesses will arise in even the most effective corporate compliance programs, and, indeed, are a signal that the program is working as intended.

The Order itself reflects years of Commission doctrine in analogous contexts that effective compliance programs will be imperfect, identify flaws, and correct them accordingly. For example, the Safeguards Rule requires certain nonbanking financial institutions to implement a comprehensive security program that contains similar requirements to Meta's Part VII obligations. (*Compare* 16 C.F.R. § 314.4 (setting forth elements of information security programs), *with* Order at Part VII.) But even in that context, "the Commission has made clear that it does not require perfect security; that reasonable and appropriate security is a continuous process of assessing and addressing risks; that there is no one-size-fits-all data security program; and that the mere fact that a breach occurred does not mean that a company has violated the law."[195] On the contrary, Commission "orders do not require companies to achieve perfection. The most important relief we obtain is to require a comprehensive security program that takes into account the sensitivity of the information collected and includes an ongoing assessment of *reasonably foreseeable* risks and threats to information the company collects."[196]

As the DOJ explains in its guidance for evaluating such programs, "[t]he actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment."[197] Likewise, in joint guidance issued with the Securities and Exchange

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[195] *Protecting Consumer Information: Can Data Breaches Be Prevented?: Prepared Statement Before the Comm. on Energy and Commerce, Subcomm. on Commerce, Manufacturing, and Trade*, U.S. House of Representatives, at 4 (Feb. 5, 2014), https://www.ftc.gov/system/files/documents/public_statements/prepared-statement-federal-trade-commission-protecting-consumer-information-can-data-breaches-be/140205databreaches.pdf.

[196] J.H. Beales III, *Remarks of J. Howard Beales, III, Director, Bureau of Consumer Protection, FTC, Before the 2003 Symposium on the Patriot Act, Consumer Privacy, and Cybercrime*, 5 N.C. J. L. & Tech. 1, 23–24 (2003). The OTSC ignores these fundamental principles of effectiveness.

[197] *Evaluation of Corporate Compliance Programs*, U.S. Dep't of Just., at 15, https://www.justice.gov/d9/pages/attachments/2017/02/08/evaluation-of-corporate-compliance-programs-march-20-2023.pdf ("Evaluation of Corporate Compliance Programs").

Commission, the DOJ observes that "compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements."[198] And in the context of privacy compliance specifically, the Centre for Information Policy Leadership observed that among 17 mature privacy programs, each program approached compliance as "an ongoing endeavour driven by continuous risk assessments and the need for constant improvement."[199]

Thus, the identification of gaps and weaknesses is a necessary piece of any effective compliance program, which must continuously improve and evolve to address new risks—especially here, where the Company itself is involved in a continuous process of change, creating and changing products.[200] This is why federal prosecutors may still "credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction." Evaluation of Corporate Compliance Programs at 3. The U.S. Sentencing Commission has similarly concluded that an effective compliance and ethics program is one that is "*generally effective* in preventing and detecting criminal conduct," and an organization's "failure to prevent or detect [a particular] offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct."[201] "Perfection," in short, is not the relevant standard when evaluating the effectiveness of a compliance program, FCPA Resource Guide at 57, and the

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[198] A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. Dep't of Just. & Sec. & Exchange Comm'n, at 66 (2d ed., July 2020), https://www.justice.gov/media/1106611/dl?inline ("FCPA Resource Guide").

[199] *What Good and Effective Data Privacy Accountability Looks Like: Mapping Organisations' Practices to the CIPL Accountability Framework*, Centre for Information Policy Leadership, at 6 (2020), https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_accountability_mapping_report__27_may_2020_.pdf.

[200] *See* FCPA Resources Guide at 66.

[201] U.S. Sentencing Comm'n, Guidelines Manual 2021 § 8B2.1, https://www.ussc.gov/guidelines/guidelines-archive/annotated-2021-chapter-8#8b21.

Commodity Futures Trading Commission has even recognized that the *absence* of identified gaps and weaknesses might justifiably raise concern as to the adequacy of a compliance program. *See* 17 C.F.R. Part 3, App'x C ("In general, identifying areas in need of improvement and recommending steps to effect those improvements should be a core function of compliance. Accordingly, a [Chief Compliance Officer] Annual Report that makes no recommendations for changes or improvements to the compliance program *may raise concerns about the adequacy of the compliance program review* intended by the Chief Compliance Officer Annual Report process.").

Faulting Meta for the existence of gaps and weaknesses, then, runs counter to these principles of constant improvement. To hold Meta to a standard of perfection is not only a departure from established federal policy but prioritizes a superficial metric over a robust and self-critical compliance program, as Meta has built here.

2. Experts on Compliance Programs Attest to the Commission's Mistaken View of Gaps and Weaknesses and Premature Conclusions Regarding Meta's Privacy Program.

These principles find additional support in the expert report of Dr. Eugene F. Soltes, Professor of Business Administration at Harvard Business School and one of the nation's leading authorities on the design, monitoring, and evaluation of corporate compliance programs.

"[S]trong, effective compliance programs," Dr. Soltes explains, "are those in which the organization continually engages in efforts to understand whether new areas of risk have emerged, which compliance processes are no longer effective (and which are most effective), and where opportunities for improvement exist." (Soltes Report at 8–9.) Moreover, "even the best programs are by their nature imperfect and have gaps." (*Id.* at 11.) Thus, the identification of gaps through "dynamic monitoring [is] generally a healthy sign of continual learning and improvement, rather than an indication" that a compliance program is ineffective. (*Id.*) As Dr.

Soltes explains, tallying the number of a compliance program's gaps, as the Commission has done here, is not a reliable or recognized mechanism for evaluating the overall effectiveness of that program. (*Id.* at 10.)

Former Deputy Attorney General Larry Thompson, who later served as the DOJ-appointed Independent Compliance Monitor and Auditor for Volkswagen AG, echoes these principles in his report. (Thompson Report, Section II ¶ 11.) Because "[a]ll good compliance programs should constantly improve, evolve, and mature *over time*," companies must vigilantly monitor and test their programs to identify new areas of risk and opportunities for improvement. (*Id.* at Section VI.B ¶¶ 89–90 (emphasis in original).) That is particularly true where, as here, the program under evaluation is still in its nascency. Thompson concludes that the gaps and weaknesses identified by the Assessor "are *precisely what is to be expected* for a company as large and complex as Meta," especially when the company is still "in the infancy stages of developing its new Privacy Program." (*Id.* at Section VI.B ¶ 95 (emphasis in original).) By relying on gaps and weaknesses as evidence of an ineffective compliance program after only six months of a 20-year Consent Order, the Commission has reached conclusions that are both "premature and inaccurate," (*id.* at Section VI.B ¶¶ 99, 103), and entirely ignore a well-established body of guidance.

Applying these principles to Meta's program, both Dr. Soltes and former Deputy Attorney General Thompson agree with the Assessor's conclusion that Meta had established the key foundations of a comprehensive, effective privacy compliance program at the time of the initial report. (Soltes Report at 14–15; Thompson Report, Section VI.A ¶ 76.) As both experts make clear, the Commission's attempt to use gaps and weaknesses as evidence of an ineffective privacy program contravenes well-established principles governing the design, remediation, and

evaluation of corporate compliance programs. This flawed approach also overlooks key nuances in the design and operation of the Privacy Program, and threatens to weaponize the role of independent compliance monitors, with troubling implications for the government and other companies who might benefit from a monitorship.

The Commission invokes the "sheer number of total gaps and weaknesses" as evidence that the Privacy Program is ineffective. (OTSC at 4.) As Dr. Soltes explains, however, the presence of these gaps and weaknesses "is neither inconsistent with, nor undermines" the Assessor's conclusions. (Soltes Report at 15.) First, as the Assessor itself noted, Meta has invested extraordinary resources in the Privacy Program, partly by "dramatically expand[ing]" the number of personnel focused on privacy compliance. (*Id.*) Dr. Soltes explains that where, as here, a company is aggressively deploying resources to identify and remediate gaps, the presence of such gaps is "less likely to indicate overall program ineffectiveness." (*Id.* at 13.) Second, because of its "significant resourcing investment" in the Privacy Program, Meta demonstrated its ability to respond quickly to gaps in real time, remediating [redacted] of the [redacted] categories of gaps identified by the Assessor *during the initial Assessment period*. (*Id.* at 16.) This responsiveness, according to Dr. Soltes, shows a nimble, aggressive compliance program "that appropriately adapts to improvement opportunities." (*Id.* at 17.) Third, many of the gaps identified in the Assessor's 2021 Assessment Report stemmed from Meta's "decision to comprehensively redesign" its privacy compliance program. (*Id.* (quoting 2021 Assessment Report at 2).) This decision will likely produce a stronger, more sustainable program in the long run, thus "benefiting consumers and the broader public alike," but arguably exposed the company to more gaps and weaknesses during the 2021 Assessment period. (Soltes Report at 17.) Indeed, Meta could have strategically minimized the "sheer number" of gaps by limiting its

Program to the four corners of Part VII, but it did not—rather, the identified gaps (affecting only a fraction of Meta's safeguards) are reflective of the Program's breadth and scale. (*See* Resp. to PFOF, Section I.A ¶¶ 5–14.) And finally, many of the gaps identified by the Assessor were mitigated by other controls (*id.* at Section IV.A ¶¶ 8–70), a phenomenon that is often observed in well-designed, risk-based programs (Soltes Report at 17). For these reasons, the Commission's approach of simply tallying the number of gaps and weaknesses identified in the 2021 Assessment Report is not a reliable technique for evaluating the effectiveness of Meta's Privacy Program, is not a recognized approach for evaluating the effectiveness of *any* compliance program, and is counter to the goal of building a sustainable, effective program. (*See id.* at 14–18.)

Like Dr. Soltes, former Deputy Attorney General Thompson observes that "even mature compliance programs are expected to have gaps, which should be considered opportunities to improve and to foster positive change, rather than to conclude it is ineffective." (Thompson Report, Section VI.B ¶ 93.) This is particularly true here, where "Meta chose the more ambitious but difficult course [of] comprehensively redesigning its Privacy Program from the ground up, rather than renovating the existing one. By embarking on this multi-year process necessary to create a more effective and sustainable program *over the long term*, Meta assured that the Assessor would identify gaps and weaknesses along the way." (*Id.* at Section VI.B ¶ 96 (emphasis in original).) By finding otherwise, the Commission "has jumped to premature and erroneous conclusions that are inconsistent with the Assessor's findings." (*Id.* at Section VI.B ¶ 78.)

3. The OTSC's Misreading and Misuse of the Assessment Will Impair the Commission's Efforts Going Forward

As both experts warn, the Commission's effort to reopen and radically rewrite a settled order based on "gaps and weaknesses" identified by the Assessor during the first six months of a 20-year term will compromise the ability of the Commission to enter into meaningful consent orders and monitorships going forward.

There "is a clear 'moral hazard' to the FTC's punitive approach." (*Id.* at Section VI.D ¶ 125.) "A punitive approach sets a bad example that tends to deter other companies from even agreeing to a monitorship or an independent third-party review. It also tends to dissuade other companies from implementing lasting improvements to their compliance programs." (*Id.*) "The public loses if companies are discouraged from agreeing to independent third-party reviews like this one. This moral hazard will limit the broader benefits that monitorships and independent third-party reviews can provide to the public, regulatory bodies, and the government." (*Id.* at Section VI.D ¶ 129.)

This "moral hazard" is made worse by the fact that the Commission's reopening procedures rests on "premature and inaccurate conclusions." (Thompson Report, Section VI.B ¶¶ 99, 103; *see also* 2023 Assessment Report at 10 [redacted] The Commission did not wait to receive the first full Assessment, submitted less than two months after it filed its OTSC, the findings of which show that the conclusions reflected in the 2021 Assessment Report are now outdated and stale.

The Commission's misuse of the 2021 Assessment will put companies and their monitors at cross purposes. As former Deputy Attorney General Thompson explains, the most effective

monitoring relationships are those in which the company views the monitor as a trusted partner who can help identify and remediate weaknesses. (*See* Thompson Report, Section VI.C ¶¶ 110–15.) The Commission's attempt to weaponize the Initial Assessment "is not only inconsistent with [this] intended remedial role," but also threatens to create "an adversarial relationship with the company" which is "damaging to the monitorship and will likely hinder the development and implementation of a strong and sustainable compliance program." (*Id.* at Section VI.C ¶ 115.) And by jumping to premature conclusions based on the Privacy Program's first six months, the Commission will encourage companies to adopt quick fixes and shortcuts and deter companies from doing what Meta did here, in the words of the Assessor, deciding "to comprehensively redesign" the program to be [redacted] (2021 Assessment Report at 2.) As Thompson observes, the Commission's "punitive approach" in this case will "tend[] to disincentivize companies from implementing significant and foundational changes, in favor of short-term 'safer' changes, which are less likely to yield findings, gaps, or weaknesses." (Thompson Report, Section VI.C ¶ 117.)

CONCLUSION

For the foregoing reasons and the reasons set forth in the accompanying PFOF Response, the Commission should not reopen the Order. In any event, at a minimum, hundreds of "substantial factual issues" preclude the entry of the Proposed Order and require resolution.

In the event the Commission enters the Proposed Order, Meta respectfully requests that it should be stayed pending judicial review for all of the reasons stated herein.

Dated: April 1, 2024

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PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

[PROPOSED] ORDER

It is hereby ORDERED that the Order to Show Cause why the Commission Should Not Modify the Order and Enter the Proposed New Order, filed on May 3, 2023, is vacated.

By the Commission.

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024, I caused a true and correct copy of the foregoing Response to Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed New Order to Show Cause to be filed and served as follows:

One electronic copy via the encrypted FTP transmission 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.

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