PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT META PLATFORMS, INC.'S FURTHER REPLY IN RESPONSE TO COMPLAINT COUNSEL'S REPLY TO LEGAL ISSUES RAISED IN RESPONDENT'S RESPONSE TO THE ORDER TO SHOW CAUSE

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As set forth in the Commission's June 18, 2024 Order, Meta respectfully submits this further reply to Complaint Counsel's Reply to Legal Issues Raised in Respondent Meta Platforms, Inc.'s Response to the Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed New Order (the "Reply").[1]

INTRODUCTION

As the Commission observed in its May 8, 2024 Order, Meta's Response "raised a number of threshold legal issues" regarding the Commission's attempt to reopen the Order and rewrite the parties' settlement. In its Reply, Complaint Counsel ignores many of these arguments; for others, it rejects longstanding Commission and judicial precedents, and urges the Commission to defy controlling law.

In arguing that the Commission has authority to modify the Order, Complaint Counsel asks the Commission to ignore its own regulation. In promulgating Rule 2.32(c), the Commission formally determined that Section 5(b) only allows for modification of "Commission orders issued on a litigated or stipulated record," and that Rule 2.32(c) requires respondents settling administrative complaints to agree that their consent orders can be modified "in the same manner" provided by statute for such litigated orders. 16 C.F.R. § 2.32(c). Complaint Counsel ignores Supreme Court precedent, the Commission's consistent interpretation of Section 5(b), and the text of Rule 2.32(c)—***all*** of which compel the conclusion that litigated orders are subject to Section 5(b) and consent orders are not. The very reason for requiring that a respondent agree to modification of an order entered on consent is because the Commission does not otherwise

[1] Unless otherwise noted, emphasis has been added to quotations, and internal quotations, brackets, citations, and footnotes have been omitted, and defined terms have the meanings ascribed in Meta's Response to the Order to Show Cause Why the Commission Should Not Modify the Order and Enter the Proposed New Order (the "Response").

have the unilateral, statutory power to modify a consent order. Moreover, Complaint Counsel's argument—that Section 5(b) reaches all consent orders—would result in Rule 2.32(c) having no purpose whatsoever, notwithstanding Supreme Court law cautioning against such regulatory surplusage.

Complaint Counsel also mistakenly seeks to base its attempt to modify the Order on the Commission's purported authority to enforce its own orders. That too is incorrect as a legal matter. The Commission has routinely reaffirmed—as recently as January—that it lacks the authority to enforce its own orders or to adjudicate compliance with them. As the Supreme Court has held, "to adjudicate questions concerning the order's violation" is the "enforcement responsibility of the courts."[2] Yet Complaint Counsel confirms that the purpose of the OTSC is for the Commission to do just that—enforce the Order's provisions—and it requires the Commission to adjudicate whether the Order has been violated. Complaint Counsel appears to take the position that what the Commission held in January (that its orders are "enforceable only by order of the district court")[3] and what courts have held for decades somehow overlooked the Commission's heretofore unexercised, statutory authority to enforce its orders under Section 5(b).

Ultimately, Complaint Counsel recognizes that this proceeding lacks any precedent in more than a century of Commission adjudication. Complaint Counsel does not cite any case in which the Commission has:

- Reopened a consent order that the respondent did not agree could be modified;
- Attempted to enforce its own administrative orders;

[2] *FTC v. Morton Salt, Co.*, 334 U.S. 37, 54 (1948).

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

- Adjudicated order noncompliance; or
- Invoked asserted order violations as changed conditions of facts or public interest bases for order modification under Section 5(b).

This lack of precedent is no accident. It is the product of congressional design, as confirmed by consistent administrative and judicial precedent. Complaint Counsel nonetheless asks the Commission to claim radically expanded powers without a legal basis for doing so.

Meta respectfully requests that the Commission vacate the OTSC. Even if every fact preliminarily found by the Commission were true, there is no set of facts and no legal basis that would allow the Commission to reopen the Order as the OTSC proposes.

ARGUMENT

Meta has shown that: Section 5(b) does not allow the Commission to modify a consent order, Section 5(b) cannot be used for order enforcement, Section 5(b) has no application to an order approved by a federal district court, the OTSC does not meet Section 5(b)'s requirements as a matter of law, and the proceeding is unconstitutional. The OTSC is contrary to law, and none of the facts alleged in the OTSC, the PFOF or the Reply can save it, even if they all were accepted as true.

I. COMPLAINT COUNSEL'S REPLY CONFIRMS THAT THE COMMISSION CANNOT MODIFY THE ORDER[4]

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

Meta's response to the OTSC established that Section 5(b) of the FTC Act authorizes the

[4] Meta does not address in detail herein Complaint Counsel's reply to its jurisdictional arguments set out in Parts I.D–E of Meta's response. Complaint Counsel fails to respond on the substance to these arguments—waving them away on procedural grounds. Meta continues to litigate these issues in federal court, and a necessary consequence of these arguments is that the OTSC is entirely unlawful and the Commission would be deprived of any further authority to adjudicate the issues set out herein.

Commission to modify an order "issued on a litigated or stipulated record," but does not authorize the Commission to modify an order, like the Order at issue here, made on consent and without a hearing. (Resp. at 20–23.)

In reply, Complaint Counsel first acknowledges that any power to modify arises, if at all, solely from Section 5(b), and that Rule 3.72(b) "delineate[s] the ***procedures*** for modification." (Reply at 2–3.) Further, Complaint Counsel concedes that Section 5(b) authorizes modification of an order ***only*** if the order was "issued by [the Commission] ***under this section***." (*Id.* at 2 (quoting Order at 1).)

In the face of these express requirements, however, Complaint Counsel simply asserts that the Order "without question" satisfies these requirements. (Reply at 2.) Yet, Complaint Counsel does not, and cannot, point to any language in Section 5 authorizing the Commission to issue or modify orders that were made on consent and without a hearing.

To the contrary, the language in Section 5 that authorizes the Commission to issue a cease-and-desist order provides:

> ***If upon such hearing*** the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

15 U.S.C. § 45(b). In other words, the plain language of the statute provides that a cease-and-desist order is to be issued only in connection with and "upon" a hearing. It is beyond dispute

that the Order was ***not*** issued "upon such [a] hearing," but after Meta "consented to" its entry. (Order at 1.)[5]

In light of the clear language of the statute, the Commission has long realized, as reflected in its established practice, that consent orders are not "issued by [the Commission] under this section," and thus are not modifiable absent the respondent's consent. Because Section 5, by its plain terms, authorizes the Commission to issue cease-and-desist orders ***only*** "upon [a] hearing" at which a respondent contests a Commission complaint, the Commission has long relied on respondents' consent as the basis for orders issued on consent to "have the same force and effect as if entered after a full hearing."[6]

Accordingly, consistent with its limited authority under Section 5(b), the Commission requires any respondent entering into a consent order resolving an administrative complaint expressly to agree that "[t]he order will have the same force and effect and may be altered, modified or set aside in the same manner provided by statute for Commission orders issued on a litigated or stipulated record." 16 C.F.R. § 2.32(c). Consent orders are only "as enforceable as adjudicated orders," *see Dr. Pepper/Seven-Up Cos., Inc. v. FTC*, 991 F.2d 859, 863 (D.C. Cir. 1993), because "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree," *Local*

[5] Preceding language in Section 5(b) refers to a hearing noticed by the Commission at which a respondent has the right to appear to contest charges set forth in a Commission complaint. 15 U.S.C. § 45(b).

[6] *Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30 1954*, FTC, 1954 WL 47708, at *5 (Jan. 1, 1954). This corresponds to the bedrock principle applicable to consent decrees issued by courts that the authority to issue the decree arises from the parties' consent, not the statute authorizing the underlying complaint. *See*, *e.g.*, *Lawyer v. DOJ*, 521 U.S. 567, 579 n.6 (1997) ("[I]t is the parties' agreement that serves as the source of the court's authority to enter any consent judgment at all.") (quoting *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 522 (1986)).

No. 93, 478 U.S. at 522; *see People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992) ("[T]he source of authority to require the parties [to a consent decree] to act remains their acquiescence rather than rules of law."); *In re 1-800 Contacts, Inc.*, 2018 WL 6078349, at *50 (F.T.C. Nov. 7, 2018) ("[D]istinguishing giving effect to an obligation created by litigants' private agreement from giving effect to the power of federal courts unilaterally to impose that obligation.").

The Commission has a longstanding practice of seeking the respondent's advance consent to modification of a consent decree. Before the agency's Rules of Practice were published in the Code of Federal Regulations, the Commission required respondents to agree that their consent orders may be modified "in the manner prescribed by" or "provided by" Section 5(b) for Commission orders.[7] There can be no clearer acknowledgment that consent orders do

[7] *See*, *e.g.*, *In re Safeway Stores, Inc.*, 62 F.T.C. 1206, 1963 WL 66658, at *4 (F.T.C. Apr. 18, 1963) (describing respondent's agreement that its consent order "may be altered, modified or set aside in the manner provided by statute for other orders"); *In re Cromit Prod. Corp. Trading as Albicrome Prod.*, 59 F.T.C. 1000, 1961 WL 65607, at *3 (F.T.C. Oct. 25, 1961) (describing respondents' agreement that their consent order "may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission"); *In re J. R. Prentice Doing Bus. as Am. Breeders Serv.*, 56 F.T.C. 1268, 1960 WL 64218, at *4 (F.T.C. Apr. 18, 1960) (describing respondent's agreement that its consent order "may be altered, modified or set aside in the manner provided by statute for other orders"); *In re The Specialty House, Inc.*, 54 F.T.C. 1138, 1139, 1958 WL 16849, at *1 (F.T.C. Mar. 11, 1958) (describing respondents' agreement that their consent order "may be altered, modified or set aside in the manner provided by statute for other orders of the Commission"); *In re Emerson Radio & Phonograph Corp.*, 53 F.T.C. 1047, 1048, 1957 WL 16406, at *1 (F.T.C. May 18, 1957) (same); *In re Kalwajtys*, 52 F.T.C. 721, 725, 1956 WL 16191, at *4 (F.T.C. Jan. 27, 1956) (explaining that stipulation for consent order provided that order "may be altered, modified, or set aside in the manner provided by statute for orders of the Commission"); *In re Milner Prod. Co.*, 52 F.T.C. 666, 669, 1956 WL 16184, at *3 (F.T.C. Jan. 11, 1956) (explaining that agreement for consent order provides that "the order may be altered, modified or set aside in the manner provided by statute for orders of the Commission"); *In re Am. Wholesale Furniture Co.*, 52 F.T.C. 359, 362, 1955 WL 15359, at *3 (F.T.C. Oct. 4, 1955) (describing respondents' agreement that consent order "may be altered, modified or set aside in the manner provided by statute for the orders of the Commission"); *In re Brainerd L. Mellinger et al. Trading as Skil-Weave Co.*, 52 F.T.C. 324, 328, 1955 WL 15354, at *4 (F.T.C. Sept. 22, 1955) (explaining that stipulation for consent order provided that order "may

not fall within Section 5(b)'s grant of statutory authority to issue orders upon a hearing. Section 5(b) simply does not by its terms provide for the modification of a consent decree absent the agreement of the respondent.

Complaint Counsel concedes that Meta did not provide such agreement in the parties' 2019 settlement.[8] (Reply at 4.) The absence of such language—after its explicit inclusion in the 2011 Agreement—must be interpreted as intentional. Indeed, the parties clearly understood how to include such language in an agreement, and thus, the only conclusion that can be reached by its absence here is that the parties did not intend for it to apply. *See, e.g.*, *Hoffman v. L & M Arts*, 838 F.3d 568, 582 (5th Cir. 2016) (earlier agreement's "explicit requirement … suggests that the absence of" a similar term in a later agreement "was intentional"); *Slaughter v. Nat'l R.R. Passenger Corp.*, 460 F. Supp. 3d 1, 10 (D.D.C. 2020) (omission of clause in one contract that was included in other contracts between the parties "strongly suggests that such omission was intentional").

Directly addressing this dispositive interpretive issue and employing well-established principles of statutory and regulatory construction, Meta showed that Rule 2.32(c) formally

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be altered, modified, or set aside in the manner provided by statute for orders of the Commission"); *In re All Am. Sportswear Co., Inc.*, 51 F.T.C. 447, 450, 1954 WL 15003, at *3 (F.T.C. Nov. 9, 1954) (describing stipulation providing that consent order "may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission").

[8] And there can be no serious argument that Meta's Rule 2.32(c) agreement in 2011 that the 2012 Order could be modified in the manner provided by Section 5(b) carried over to the Order. In the parties' 2011 Agreement, Meta agreed that "the following order," i.e., ***the 2012 Order*** could be so modified. (2011 Agreement at 2.) The 2012 Order is not the 2020 Order. On the contrary, in entering the 2020 Order, the Commission specifically said that it was "issu[ing] a ***new*** order." Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020) at 1. For that reason, the government's brief opposing Meta's motion to enforce never once cited Rule 2.32(c), much less argued that Meta's 2011 Agreement applied to ***this*** Order. Complaint Counsel does not argue otherwise either.

embodies the Commission's interpretation that Section 5(b) does ***not*** authorize the issuance or modification of orders that are not "issued on a litigated or stipulated record." (Resp. at 20–21.) But instead of even attempting to rebut this interpretation, Complaint Counsel sets up a straw man, and mischaracterizes Meta's position as an argument that "the current proceeding runs afoul of Commission Rule 2.32(c)." (Reply at 4.) In pursuit of this straw man, Complaint Counsel argues—correctly but irrelevantly—that Rule 2.32(c) does not apply to the Order. (*See* Reply at 4; *see also* Resp. at 21–22 (same).) Complaint Counsel has no response to Meta's actual argument that Section 2.32(c) is a formal statutory interpretation by the Commission that Section 5(b) does not authorize modification of orders that were not "issued on a litigated or stipulated record." By failing to respond to Meta's actual argument, Complaint Counsel has implicitly conceded the issue.

Complaint Counsel also does not dispute that the operative language of Section 2.32(c) expressly recognizes that Section 5(b) applies only to "Commission orders issued on a litigated or stipulated record." (Resp. at 20.) Nor does Complaint Counsel address, much less rebut, that under the Supreme Court's reasoning in *National Federation of Independent Business v. Sebelius*, 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. (Resp. at 20–21 (quoting 567 U.S. 519, 546 (2012)).)

Similarly, Complaint Counsel puts forward no explanation of what purpose Rule 2.32(c) would serve if Section 5(b) authorized the Commission to modify consent orders. Nor does Complaint Counsel offer any response to the point that if Section 5(b) authorizes the Commission to modify a consent order—and thus obviates the need for Section 2.32(c)—it would "violate[] the cardinal rule against a construction that would 'render the regulation

entirely superfluous.'" (Resp. at 22 (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007)).) Indeed, the Supreme Court recently reaffirmed that this rule applies with "special force" where, as here, it would "render an entire subparagraph meaningless." *Pulsifer v. United States*, 144 S. Ct. 718, 732 (2024) (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 583 U.S. 109, 128 (2018)).

Having missed the mark as to the substantive implications of Rule 2.32(c), Complaint Counsel simply asserts that Section 5(b) authorizes it to modify the Order without Meta's consent. (Reply at 3.) That argument lacks any legal basis. Complaint Counsel appears to assume that Section 5(b) authorizes the Commission to modify ***any*** Commission order, even orders that were not issued "upon" a hearing as Section 5(b) requires. That argument—for which Complaint Counsel cites no authority—defies the statute's plain language (and the Commission's formal construction of that statutory language in Rule 2.32(c)). To start, it would render "upon such hearing" meaningless, directly contrary to the foundational interpretive principle that "every clause and word of a statute should have meaning." *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023); *see Smith v. Spizzirri*, 601 U.S. 472, 476–77 (2024) (rejecting construction that would render a phrase in statute inapplicable).

Independently, Complaint Counsel ignores dispositive differences within Section 5 that doom its unsupported argument. For example, Section 5(l) provides for civil penalties for violations of "an order of the Commission after it has become final," proving that Congress knows how to make statutory provisions applicable to all of the Commission's "final orders."[9]

[9] Meta agreed not to "appeal or otherwise challenge or contest the validity of th[e] Order," and that the Order would be "final and effective" upon publication. (Order at 1, 20.) But Meta did not agree—as Complaint Counsel acknowledges—that the Order could be modified in the same manner as litigated orders. (Reply at 4.)

But Congress did not do so in Section 5(b), which applies to orders "issued by it under this section," and therefore, "upon such [a] hearing." *Compare* 15 U.S.C. § 45(b), *with id.* § 45(l). The statutory references to a Commission order "issued by it under this section" and a Commission order "after it has become final" were ***both*** added by the Wheeler-Lea Act of 1938. Indeed, Congress chose not to extend Section 5(b) to all final Commission orders even though it was well aware by 1938 of the Commission's use of consent orders, which the Commission previously had reported to Congress. *See*, *e.g.*, FTC, *Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30 1935*, 1935 WL 31524, at *40 (Jan. 1, 1935) ("Both respondents waived hearing on the complaints and consented to the issuance of cease and desist orders."). The source of the Commission' authority to issue a consent order is the parties' agreement, not Section 5. *Cf. Lawyer*, 521 U.S. at 579 n.6 ("[I]t is the parties' agreement that serves as the source of the court's authority to enter any consent judgment at all."); *Elmo Co. v. FTC*, 389 F.2d 550, 551 (D.C. Cir. 1967) (explaining that if a consent order contains a modification provision, "the consent order itself" is the source of the Commission's modification authority, not Section 5(b)). This confirms that consent orders are not "issued by [the Commission] under" Section 5. 15 U.S.C. § 45(b).

"[W]hen the legislature uses certain language in one part of [a] statute and different language in another," it must be assumed that "different meanings were intended" by the different language. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *see also Jewish Hosp., Inc. v. Sec'y of Health & Human Servs.*, 19 F.3d 270, 275 (6th Cir. 1994) ("Adjacent provisions utilizing different terms … must connote different meanings."). The contrast is particularly telling where, as here, Congress enacts the differing provisions simultaneously. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). And the Commission must "faithfully

follow[] the instructions that Congress and courts have given [it]," rather than "import into Section 5 the legal standards [it] happen[s] to prefer."[10]

Neither of the Commission orders cited by Complaint Counsel establish that Section 5(b) authorizes the Commission to modify consent orders. To the contrary, both of the consent orders at issue in the cases cited by Complaint Counsel included an express modification provision. *See In re Nat'l Housewares, Inc.*, 84 F.T.C. 1566, 1974 WL 175859, at *3 (F.T.C. Dec. 3, 1974); *In re ITT Cont'l Baking Co.*, 81 F.T.C. 1021, 1972 WL 128875, at *1 (F.T.C. Aug. 1, 1972). These orders are consistent with the Commission's longstanding practice—codified in Rule 2.32(c) and its predecessor—of obtaining respondents' agreement that consent orders may be modified "in the manner prescribed by" or "provided by" Section 5(b) for other Commission orders. *See supra* n.7. The D.C. Circuit has recognized this distinction, stating in *Elmo* that where the consent orders contain such a modification provision, "the consent order itself" is the source of the Commission's modification authority, not Section 5(b). 389 F.2d at 551.

Complaint Counsel also attempts to dismiss the significance of the parties' express incorporation into Parts II–III of the 2020 Order of a provision giving Meta the right to seek modification pursuant to Section 5(b) under two specific circumstances. (*See* Reply at 5 n.2.) As Meta has shown, express incorporation of a right to seek modification under Section 5(b) would be entirely superfluous if Section 5(b)'s modification provisions governed the Order. (*See* Resp. at 25–26.) Complaint Counsel agrees that its reading would render these provisions meaningless, leaving it in the untenable position of arguing, contrary to fundamental principle of

[10] 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).

interpretation, that sophisticated parties adopted multiple entirely redundant provisions. Nor does Complaint Counsel reconcile its litigation position with its own actions in this proceeding, where it seeks to delete one such provision from Part III (Part IV of the Proposed Order), but not from Part II. If, as Complaint Counsel argues, each provision merely "mak[es] explicit" an "already extant right" (Reply at 5 n.2), there would be no need—and certainly no ***public interest requiring***, *see* 16 C.F.R. § 3.72(b)—that it remove either provision, much less only one of the two.[11]

Complaint Counsel's remaining arguments assume, or simply assert, the conclusion that Section 5(b) authorizes the Commission to issue and subsequently modify consent orders. (*See* Reply at 5 ("Meta was undisputedly aware of the Commission's statutory authority to modify its orders …."); *id.* at 5–6 ("Courts have made clear statutory provisions are 'necessarily implicit in every order issued under the authority of the [FTC] Act, just as if the order set them out in extenso.'"); *id.* at 6 ("[N]either the Stipulated Order nor 2020 Order limited the Commission's statutory authority to modify its own orders."); *id.* at 7 ("Here, Section 5(b) specifically vests the Commission with authority to modify its orders as appropriate.").) That *ipse dixit* does nothing to advance Complaint Counsel's position as to the Commission's supposed statutory authority.

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

Meta also demonstrated that by its plain text, Section 5(b) is limited to orders giving rise

[11] Complaint Counsel also misstates Meta's position by contending that "Meta acknowledges" that Parts II and III "giv[e] Meta 'a right it has regardless.'" (Reply at 5 n.2 (quoting Resp. at 26).) Contrary to Complaint Counsel's mischaracterization, Meta's point is that it is *nonsensical* for the Commission (and now Complaint Counsel) to propose to delete the modification provision from Part III but not from Part II ***in light of the Commission's erroneous view*** that these provisions "giv[e] Meta a right it has regardless"—implying that if the Commission actually believed that these provisions were redundant, it would not be proposing to delete them (much less delete them selectively). (Resp. at 26.)

to a petition for review. (Resp. at 29–30.) As the first page of the Order makes clear, the order here gave rise to an appeal, not a petition for review. Complaint Counsel's response—that the District Court concluded the Order was "not part of the Court's Stipulated Order" is a non sequitur. (Reply at 8.) Whether the District Court incorporated and imposed the Order's provisions or merely approved them (as Complaint Counsel concedes (*id.*)) has no relevance. Complaint Counsel does not (and cannot) respond to the argument that Meta ***actually*** made because it cannot dispute two basic points.

First, Complaint Counsel does not dispute that Section 5(b) applies only to orders giving rise to petitions for review. As relevant here, the statute allows the Commission to reopen orders only "[a]fter the expiration of the time allowed for filing a petition for review." 15 U.S.C. § 45(b). Here, as the Order itself reflects, there was no ability to petition for review. (Order at 1.)

Second, Complaint Counsel does not and cannot dispute that the Order includes unambiguous and reciprocal waivers by both parties—Meta and the Commission alike—of "all rights ***to appeal*** or otherwise challenge or contest the validity of this Order." (*Id.*) A petition for review and an appeal are two mutually exclusive procedures—the same order could not give rise to both. *Compare* Fed. R. App. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk."), *with* Fed. R. App. P. 15(a)(1) ("Review of an agency order is commenced by filing . . . a petition for review with the clerk of a court of appeals."). By waiving the "rights to appeal," the Commission (and Meta) conceded that such a right existed, i.e., that the Order was subject to an appeal, not a petition for review, and the relevant rights subject to waiver were the parties' respective rights to appeal. That is entirely sensible and follows from the District Court's review

and approval of the Order's terms as fair, reasonable, and in the public interest. *United States v. Facebook, Inc.*, 456 F. Supp. 3d 115 (D.D.C. 2020).

Under settled law, because waiver "is an intentional relinquishment of a known right," a party cannot waive a right that does not exist. *Holt v. Winpisinger*, 811 F.2d 1532, 1541 n.67 (D.C. Cir. 1987). Thus, by definition, the existence of a right to appeal (which the Commission knowingly and intentionally waived) precludes the existence of a right to file a petition for review. And because the Order's plain language makes clear that it could not have given rise to a petition for review, it is not subject to Section 5(b)'s modification provision.

II. COMPLAINT COUNSEL CONFIRMS THAT SECTION 5(B) CANNOT BE USED FOR ORDER ENFORCEMENT

The Reply repeatedly confirms that the OTSC seeks to enforce a Commission order which would require the Commission to adjudicate Meta's alleged noncompliance with the Order. In doing so, Complaint Counsel fails to address ***any*** of the legal authority that clearly precludes the Commission from enforcing its own order or adjudicating noncompliance.

The Commission has no authority to enforce its own orders—a fact the Commission itself reiterated earlier this year. *See Intuit Inc.*, 2024 WL 382358, at *56 (confirming that Commission orders are "enforceable only by order of the district court").

It is equally clear that the Commission lacks authority to adjudicate whether its orders have been violated. *See*, *e.g.*, *Morton Salt Co.*, 334 U.S. at 54 ("The enforcement responsibility of the courts, once a Commission order has become final . . . is to adjudicate questions concerning the order's violation."); *United States v. J.B. Williams Co.*, 498 F.2d 414, 422 (2d Cir. 1974) (holding that Congress "vested the FTC with power . . . to make orders," but not "to determine whether they have been violated").

Contrary to this authority, Complaint Counsel expressly takes the position that Section 5(b) is an order "enforcement tool" (Reply at 9)—and that the Commission is using Section 5(b) for that purpose here (*id.* at 8–9). In light of the OTSC, it cannot argue otherwise. Neither the Commission nor Complaint Counsel has identified any grounds for modification—changed circumstances or a public interest—other than purported order violations. This is the basis for modification set out in the OTSC; it is what the Commission told a federal district court, and it is what the Commission has told Congress and the public. (*See* Resp. at 31 (collecting statements).) The Reply repeatedly says the same. (Reply at 20 ("Section 5(b) clearly allows modification based on the changed circumstances caused by Meta's violations."); *id.* at 30–31 (asserting that modification is in the public interest because Meta allegedly has not "establish[ed] a privacy program that protects consumers' information" or ceased "misrepresenting its privacy practices").[12]

Having conceded that the OTSC is an order enforcement action, Complaint Counsel provides no support for the Commission's effort to exercise order enforcement authority. Congress intentionally withheld this enforcement authority from the Commission. *J.B. Williams Co.*, 498 F.2d at 422. Moreover, Complaint Counsel does not address at all the fleet of decisions in which federal courts—including the Supreme Court—expressly hold that the Commission may not enforce its own orders or adjudicate whether an order has been violated. (*See* Resp. at 31–32 (collecting cases).) Nor does Complaint Counsel cite a single case in which the Commission previously exercised the authority it now claims.

[12] The OTSC's allegations regarding Messenger Kids and Expired Apps are no different. Indeed, Complaint Counsel expressly refers to these coding errors as "violations" and rejects any argument that they "do not constitute order violations because they were inadvertent." (Reply at 18–19.)

Complaint Counsel expressly argues without support that Section 5(b) modification authority is another avenue, in addition to Section 5(l), "by which the Commission may seek to ensure compliance with its administrative orders." (Reply at 8.) But that is directly contrary to the position the Commission has taken in rejecting a challenge under Article III to the constitutionality of its "adjudication process" by acknowledging that its orders are "enforceable only by order of the district court." *Intuit*, 2024 WL 382358, at *56 (citing 15 U.S.C. § 45(l) and *CFTC v. Schor*, 478 U.S. 833, 853 (1986)); *see also Schor*, 478 U.S. at 853 (rejecting Article III challenge to CFTC adjudication because, among other factors, "CFTC orders … are enforceable only by order of the district court"). It cannot simultaneously claim to have that authority in this forum under Section 5(b). The Commission's holding in *Intuit* is consistent with its arguments in federal court that Section 5(l) is the "only provision that allows the FTC to sue for violations of a cease-and-desist order."[13] Br. for Appellee (FTC), *FTC v. Katz* (11th Cir. 2021) (Nos. 20-10790, 20-10859), 2020 WL 3073702, at *75.

Moreover, Complaint Counsel's argument is contrary to the plain language of Section 5, which specifically authorizes ***federal courts*** to "enforce" Commission orders in Sections 5(c), (d), and (l), but includes no such language in Section 5(b) (or anyplace else) authorizing the Commission to do so itself. Going further, Section 5(e) specifically refers to an "order of the Commission or ***judgement of court to enforce the same***," thereby making even clearer Congress' intent for the Commission to go to federal court to enforce its orders. That omission cannot be dismissed. *See Collins v. Yellen*, 594 U.S. 220, 248 (2021) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same

[13] And when it does so, it "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).

Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 773 (7th Cir. 2019) (applying presumption to FTC Act).

While Complaint Counsel invokes Section 5(b)'s changed conditions and public interest language, it concedes that, here, the only claimed changed circumstances or public interest need for modification are alleged order violations. Put differently, the Commission cannot find that the purported changed circumstances or public interests invoked in the OTSC require modification unless it first finds that Meta committed the alleged Order violations. Under settled law, the Commission has no legal basis for employing Section 5(b) to adjudicate noncompliance or as a means to enforce the Order.

It is no answer that Section 5(b) modification authority is merely administrative—rather than judicial. (*See* Reply at 9.) Nor is the fact that, in some cases, the Commission "has conducted both judicial and administrative proceedings in connection with the same administrative order." (*Id.*) The question here is whether the nature of the authority invoked by the Commission can be used for order enforcement. The answer from the federal courts—indeed, the answer from the Commission itself—is no. The Commission may not, for the first time ever, "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 [FTC Act]." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

III. COMPLAINT COUNSEL'S REPLY CONFIRMS THAT STATUTORY REOPENING CONDITIONS HAVE NOT BEEN MET

Even if the Commission had the authority unilaterally to reopen and modify an order of a district court for the purposes of enforcing that order—which it does not—the conditions prerequisite to reopening are not met here. As a matter of law, none of the facts alleged in the

OTSC, the PFOF, or the Reply support an exercise of the Commission's modification authority—even if all the facts alleged by the Commission and Complaint Counsel were accepted as true. There is no need for Complaint Counsel to seek to prove—and for Meta to rebut—highly disputed facts that, in any case, cannot meet Section 5(b)'s strict standard for reopening.

A. Conditions of Fact Have Not Changed

1. Section 5(b) Requires Ongoing Conduct

As discussed in Meta's Response, Section 5(b)'s requirement that conditions of fact "have so changed" requires ***ongoing*** conduct. (*See* Resp. at 48–49.) Complaint Counsel does not dispute that the OTSC alleges no such conduct, nor that the allegedly changed conditions cited in the PFOF no longer exist. Instead, Complaint Counsel argues that it need not show ongoing conduct, a view that is contrary to the natural reading of Section 5(b) and Commission precedent.

Specifically, Complaint Counsel argues that whenever the present perfect tense is used in a federal statute, it "***necessarily*** also includes action that occurred at 'a time in the indefinite past.'" (Reply at 20 (quoting *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010)).) In advancing this argument, Complaint Counsel does not engage with the broader language of Section 5(b), but rather argues the present perfect ***always*** includes historical conduct. That argument is belied by decades of case law holding to the contrary—that the present perfect in federal statutes and regulations more naturally applies to ongoing conduct than to completed conduct.[14] *See, e.g.*, *Hernandez-Serrano v. Barr*, 981 F.3d 459, 467 n.1 (6th Cir. 2020) (present

[14] Complaint Counsel relies on *Dobrova*, but omits that the relevant statutory phrase was "has ***previously*** been admitted to the United States as an alien lawfully admitted for permanent residence," 607 F.3d at 301 (citing 8 U.S.C. § 1182(h)), and the court concluded that the inclusion of the word "***previously***"—not found in Section 5(b)— to modify the present perfect

perfect tense in federal regulation "denotes an action that began at some indefinite time in the past but is still continuing") (citing Margaret Shertzer, the Elements of Grammar 28–29 (1986)); *United States v. Allahyari*, 980 F.3d 684, 690 n.5 (9th Cir. 2020) ("Congress's use of the present perfect . . . signifies an action that began in the past and extends into the present."); *S.w. Pa. Growth All. v. Browner*, 121 F.3d 106, 113 (3d Cir. 1997) (Alito, J.) ("The use of the term 'has attained' instead of 'attained' [in Clean Air Act] may be interpreted as suggesting that the attainment must continue until the date of the redesignation.").

Section 5(b) is no different. The only natural reading of Section 5(b)'s reference to conditions of fact that "have so changed" is that it applies only to ongoing conduct. Indeed, the Commission has repeatedly explained that Section 5(b) requires it to compare conditions of fact at the time the order was entered with conditions of fact ***at the time of the potential modification***—not some period in between. *See, e.g.*, *In re Entergy Corp.*, 140 F.T.C. 1125, 1128, 2005 WL 6300826 (F.T.C. July 1, 2005) (referring to factual conditions "no longer" prevailing at the time of the modification); *In re Alleghany Corp.*, 127 F.T.C. 144, 147–48, 1999 WL 33912982 (F.T.C. Feb. 11, 1999) (same); *In re Bendix Corp.*, 107 F.T.C. 60, 60, 1986 WL 722100 (F.T.C. Feb. 6, 1986) (same); *In re Allied Corp.*, 1983 WL 486335, at *1 (F.T.C. May 17, 1983) (same). This is entirely sensible in the context of a provision, Section 5(b), which only authorizes the Commission to issue cease-and-desist orders. Indeed, this temporal limitation applies even where federal courts' broad injunctive authority is at issue. Federal Rule of Civil Procedure 60(b) likewise requires that "[c]onditions existing at the time of original entry must be compared with conditions at the time of requested modification." *United States v. Real Prop.*

"has been admitted" must refer "to action that has taken place sometime in the indefinite past," *id.*; *see also id.* at 298 ("This petition calls upon us to interpret the word 'previously' as it is used in Section 212(h) of the Immigration and National Act.").

Commonly Known as 2526 155th Place SE, 2008 WL 5246381, at *2 (W.D. Wash. Dec. 17, 2008) (quoting *United States v. Swift & Co.*, 189 F. Supp. 885, 905 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961)).

Complaint Counsel's suggestion that Section 5(b) can reach purely historical conduct ignores the Commission's own recognition that its plain language requires a nexus between any changed conditions of fact and the necessity of modification—the facts must "have so changed as to ***require***" modification. *See* Opp. to Mot. for Preliminary Injunction and Mot. to Dismiss of Defendant (FTC) at 22, *Meta Platforms, Inc. v. FTC*, No. 23-3562 (D.D.C. Dec. 13, 2023) ("The change in conditions prong prevents the Commission from modifying orders . . . if there are changes, but, for example, they are not of the degree or nature that would 'require' an order to be modified."). Complaint Counsel resists this "natural reading," and would give the Commission authority to modify an order even where the changed circumstances of fact necessitating modification no longer existed, and where modification is thus no longer required. Complaint Counsel's legal argument also cannot be squared with the ***Commission's*** litigation position before the D.C. Circuit that Section 5(b) cannot be used to impose a "retrospective sanction." Br. for Appellee (FTC) at 24, *Meta Platforms, Inc. v. FTC*, No. 24-5054 (D.C. Cir. Mar. 21, 2024).

Indeed, this is precisely the authority that Complaint Counsel claims for the Commission—punishing violations of an order irrespective of whether they continue. (*See* Reply at 20 (raising specter that Meta's interpretation would allow "wrongdoers to violate the Commission's orders without fear of modification" because they could simply stop their offending behavior).) But this argument is flatly inconsistent with Commission precedent holding that order modification "is not to serve as a penalty but as a remedial measure," *In re ITT*

Cont'l Baking Co., 1972 WL 128875, at *1, and would impermissibly turn modification into a tool for enforcement (*see supra* Sec. II).

For this reason, Complaint Counsel's concerns are misguided. No respondent has ever considered—let alone feared—modification as a consequence of an order violation because the Commission has never sought to enforce its orders through modification. On the contrary, the Commission has repeatedly told the public that its orders are "enforceable only by order of the district court." *Intuit*, 2024 WL 382358, at *56. There is ample ability to deter wrongdoers through its "remedy for most order violations"—"a civil penalty action in federal court." *See Petition of Hoechst Marion Roussel Inc.*, 124 F.T.C. 649, 654, 1997 WL 33483335, at *5 (F.T.C. Oct. 17, 1997).

2. The OTSC Points to No Cognizable Changed Conditions

Whether or not Section 5(b) requires changed conditions of fact to be ongoing, Complaint Counsel points to no changed conditions of fact that are legally cognizable.

As a threshold matter, Complaint Counsel appears to agree that the Commission's decision in *Phillips Petroleum* supplies the governing standard: "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." 78 F.T.C. 1573, 1971 WL 128558, at *2 (F.T.C. Mar. 4, 1971); *see also In re Rite Aid Corp.*, 125 F.T.C. 846, 1998 WL 34077376, at *3 (F.T.C. May 18, 1998) ("foreseeable" fact "does not constitute the change in fact necessary to compel reopening").

Complaint Counsel also appears to agree that the only changed conditions of fact alleged in the OTSC are Meta's purported violations of the Order. (*See supra* Section II.) This is also how the Commission has repeatedly explained the OTSC proceeding to Congress and the public:

"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."[15]

Thus, under the rule of *Phillips Petroleum*, those alleged violations cannot form the basis for order reopening if they "fall within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations." 1971 WL 128558, at *2. If they were reasonably foreseen or foreseeable at the time the Order was negotiated, then they "clearly do not constitute the kind of changed conditions which are substantial and material enough to require modification of the order." *Id.*; *see also In re Union Carbide Corp.*, 108 F.T.C. 184, 1986 WL 722149, at *3 (F.T.C. Nov. 14, 1986) (Section 5(b) requires that changed circumstances "were unforeseeable when the order was entered"). Complaint Counsel cannot meet that burden.

First, Meta established, by citation to numerous cases from multiple courts (including cases involving the Commission) that order violations cannot, as a matter of law, meet the standard set forth in *Phillips Petroleum*. (Resp. at 52–53 (collecting cases).) Quite the opposite. Order violations "fall[] far short of the type of 'changed circumstances' that might warrant the amendment of a settlement agreement." *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 9 (D.D.C. 2002). That is precisely because the potential for violations is "within the range of contingencies" reasonably foreseeable during negotiations. *Phillips Petrol. Co.*, 1971 WL 128558, at *2. As the *Stewart* court explained, "in the negotiation of a settlement, the negotiation of incentives and penalties that will ensure the opposing parties' compliance is an omnipresent concern." 225 F. Supp. 2d at 9.

[15] FTC, FY 2025 Congressional Budget Justification – Budget Request (Mar. 11, 2024), at 27.

Complaint Counsel argues that Meta's view of the law is wrong, but—tellingly—it fails to address or to attempt to distinguish any of the cases cited by Meta. Rather, Complaint Counsel directs the Commission to cases with no relevance to the *Phillips Petroleum* standard. Complaint Counsel relies primarily on *Thompson v. U.S. Department of Housing & Urban Development*, 404 F.3d 821, 834 (4th Cir. 2005), and *David C. v. Leavitt*, 242 F.3d 1206, 1213 (10th Cir. 2011), to argue that order violations can be changed conditions of fact. But both of these cases applied an "actually foreseen" standard fundamentally different from the "reasonably foreseen or foreseeable" standard adopted and consistently applied by the Commission. *See Leavitt*, 242 F.3d at 1212 (explaining that the court's "proper focus is on whether Utah's non-compliance was actually foreseen, not whether the non-compliance was foreseeable."); *Thompson*, 404 F.3d at 824 ("[T]he issue is whether the parties ***actually anticipated*** the events giving rise to the modification request.") (emphasis in original); *see also FTC v. Neovi, Inc.*, 2015 WL 13375566, at *7 (S.D. Cal. Sept. 9, 2015) (requiring that change in fact was actually "anticipated"). Whether particular litigants ***actually*** anticipated particular order violations has no bearing on whether, under Commission precedent, order violations were "reasonably foreseen or foreseeable." On the contrary, the Commission has repeatedly held that whether changed circumstances were *actually* "anticipated at the time the Order was entered" is not relevant, *In re Nestle Holdings, Inc.*, 140 F.T.C. 1130, 1135, 2005 WL 6300827 (F.T.C. July 12, 2005),[16]

[16] *See also, e.g.*, *In re Stop & Shop Cos.*, 123 F.T.C. 1721, 1725, 1997 WL 33483283 (F.T.C. June 20, 1997) ("Reopening is not required for changes in circumstances that were reasonably foreseeable at the time the consent order was entered."); *In re Firestone Tire & Rubber Co.*, 114 F.T.C. 450, 454, 1991 WL 11008532 (F.T.C. Aug. 2, 1991) ("[M]odification not required for changes reasonably foreseeable at time of consent negotiations"); *In re Culligan, Inc.*, 113 F.T.C. 367, 1990 WL 10012596, at *2 (F.T.C. May 14, 1990) ("[C]hanged conditions must be unforeseeable"); *In re Nat'l Tea Co.*, 111 F.T.C. 109, 1988 WL 1025505, at *2 (F.T.C. Sept. 23, 1988) (rejecting as insufficient costs that "were foreseeable at the time National agreed

because even "possibly foreseeable" changes are inadequate under Section 5(b), *see In re Canada Cement Lafarge Ltd.*, 111 F.T.C. 590, 1989 WL 1126737, at *3 (F.T.C. Apr. 4, 1989); *accord, e.g.*, *Nestle*, 140 F.T.C. at 1135 ("Although the possibility that CoolBrands might lose the Weight Watchers ice cream business and acquire the Kraft yogurt business were not anticipated at the time the Order was entered, it is not clear that these changes to CoolBrands' business are ***unforseeable 'changes of fact' within the meaning of Section 5(b)***."); *In re Tarra Hall Clothes, Inc.*, 115 F.T.C. 920, 927–28, 1992 WL 12011077 (F.T.C. Oct. 27, 1992) (holding that "it was foreseeable" that respondent might sell its business, start a new business, stop importing products from a particular supplier or stop importing the products altogether). Complaint Counsel also takes out-of-context quotes from other cases in which the parties ***agreed*** that circumstances had changed, but simply disagreed about the extent of the modifications.[17] Those cases have no application to the legal question of what is sufficient to trigger modification in the first place.[18]

Second, Complaint Counsel's attempts to contort Commission precedent only prove Meta's point. In *ITT Continental Baking Co.*, the Commission proposed—and ultimately

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to the order"); *In re Gen. Ry. Signal Co.*, 108 F.T.C. 181, 1986 WL 722148, at *2 (F.T.C. Nov. 13, 1986) (requiring "unforeseeable changes in fact").

[17] *Washington v. Moniz*, 2015 WL 7575067, at *3 (E.D. Wash. Aug. 13, 2015) ("Washington and DOE agree that the current Consent Decree schedule is now unattainable and that the Consent Decree should be modified to create new, attainable milestones."); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1082 (E.D. Mo. 2007) (same); *FTC v. Fin. Res. Unlimited, Inc.*, 2006 WL 1157612, at *1 (N.D. Ill. Apr. 25, 2006) (stating that defendant stipulated that "modification of the November 2004 Final Order is appropriate.").

[18] And Complaint Counsel invokes other cases that deal with civil contempt sanctions—not mere Rule 60(b) modification—which involved fundamentally different considerations. *See Kelly v. Wengler*, 822 F.3d 1085, 1091 (9th Cir. 2016); *Fin. Res. Unlimited*, 2006 WL 1157612, at *1; *Neiswonger*, 494 F. Supp. 2d at 1082.

rejected—reopening an order after "it was asserted" that market concentration increased and "a United States District Court found respondent's predecessor to have violated the order on two occasions." 1972 WL 128875, at *2. In its order directing an evidentiary hearing, the Commission made clear that order violations cannot be a "sufficient basis for modification of the order." *Id.* Complaint Counsel argues that the respondent "challeng[ed] complaint counsel's factual allegations that concentration in the relevant market showed 'the need for, and public interest in' the extended term." (Reply at 21.) Exactly right. It was the dispute over changed market concentration that led the Commission to refer the matter to a hearing examiner. *ITT Cont'l Baking Co.*, 1972 WL 128875, at *1. Without those disputed factual issues, the only asserted basis for modification would have been order noncompliance, and the case would have ended there—as it should here. *Id.*

Third, order violations cannot constitute changed conditions of fact under Section 5(b), because that would require the Commission to adjudicate whether its orders have been violated. As discussed above, the Commission lacks such authority, and Complaint Counsel identifies no precedent to the contrary. It is the "enforcement responsibility of the courts . . . to adjudicate questions concerning the order's violation," *Morton Salt Co.*, 334 U.S. at 54, and the Commission cannot evade this rule by premising modification on order violations.

Finally, regardless of the governing legal standard, Complaint Counsel cannot rebut Meta's showing that the asserted violations were foreseeable as a matter of law.[19] The potential for Meta to fall short of the Order's requirements was clearly "within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations." *Phillips*

[19] Complaint Counsel concedes that the Messenger Kids coding errors were actually known to the Commission and cannot constitute changed conditions of fact as a matter of law. (Reply at 25 n.21.)

Petrol. Co., 1971 WL 128558, at *2. Indeed, the Order was crafted with that very scenario in mind. For example, Complaint Counsel selectively quotes from cases that dealt not with modifications to orders' substantive provisions but extensions of the duration in which the defendants were required to comply with the original terms.[20] Here, Part XVI of the Order makes that explicit. That the parties specifically agreed in the Order to extend its duration in the event of a violation demonstrates that the parties ***specifically foresaw*** the possibility for future violations and drafted their agreement accordingly.

Moreover, Complaint Counsel mischaracterizes the Commission's press release announcing the 2019 settlement, diminishing it as a generic reference to "the general availability of sanctions for order violations." (Reply at 25–26.) But the Commission did not merely say that Meta remained subject to potential future enforcement. In a quote attributed to the Chair, the Commission told the public that the Order's "relief ***is designed*** . . . to ***punish future violations***," (July 2019 Press Release), eliminating any doubt that the potential for such future violations was well "within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations," *Phillips Petrol. Co.*, 1971 WL 128588, at *2.

3. The OTSC Misinterprets—and Misapplies—Part VII

Meta demonstrated that the OTSC, on its face, failed to actually assert that Meta violated Part VII of the Order because it did not allege that Meta violated any subpart of Part VII. (Resp. at 54–59.) Complaint Counsel appears to recognize this legal defect because its response asks the Commission to interpret Part VII's words contrary to their plain meaning and dictionary definitions. And its attempt, post hoc, to rewrite the OTSC to allege a violation of a Part VII

[20] *See Kelly*, 822 F.3d at 1098; *Thompson*, 404 F.3d at 824, 831–32; *Leavitt*, 242 F.3d at 1211–12.

subpart, is also inconsistent with the plain language of both the Order and the OTSC. While the OTSC's assertion that Meta violated Part VII of the Order raises a litany of factual disputes that would require resolution if the Commission were to ignore the legal authorities set out in Meta's Response and further herein, none of those facts actually allege a violation of Part VII. As a result, Meta addresses only the legal infirmities underlying the OTSC's assertion that Meta violated Part VII, which the Reply exacerbates.

(a) Compliance with Part VII's Subparts Is Sufficient "to Satisfy" Part VII

Part VII requires Meta to maintain a "comprehensive privacy program . . .that protects the privacy, confidentiality, and Integrity of [Covered Information]. ***To satisfy this requirement***, Respondent must, within 180 days of the effective date of this Order, ***at a minimum***" meet the requirements of subparts A-J. (Order at 8–12.) Complaint Counsel argues that meeting the requirements of subparts A-J would not, in fact "satisfy this requirement" because those provisions set out the "necessary, but not sufficient, measures Meta must, at a minimum implement within 180 days of the entry of the Order." (Reply at 16.) This reading of Part VII is legally wrong as a matter of contractual interpretation.

First, Complaint Counsel's reading of "at a minimum" is wrong on its face. Complaint Counsel argues that "at a minimum" means "necessary but not sufficient," (Reply at 16), essentially claiming "at a minimum" means "among other things." But that is ***not*** what the Order says and that is ***not*** what it means. "At a minimum," as a legal term, means "consisting in the fewest necessary things, ***or the least acceptable or lawful amount***." Bryan A. Garner, Garner's Dictionary of Legal Usage 577–78 (3d ed. 2011). That is why courts consistently use that phrase to describe conditions that are sufficient, without more, to satisfy a legal

requirement.[21] *See, e.g.*, *Whitesell Corp. v. Electrolux Home Prod., Inc.*, 2022 WL 5013146, at *2 (S.D. Ga. Oct. 4, 2022) (holding that "'at a minimum' simply means that while they are obligated to purchase the specified amount . . . they ***may*** purchase more") (emphasis in original); *Murphy v. Mass. Tpk. Auth.*, 971 N.E.2d 231, 239 (Mass. 2012) (holding that meeting standard qualified by phrase "at a minimum" in state statute is "sufficient").

Complaint Counsel also ignores the language of the broader sentence in which "at a minimum" appears. The Order provides that for Meta "[t]o satisfy [the] requirement" of "establish[ing] and implement[ing], and thereafter maintain[ing] a comprehensive privacy program," it "must . . . at a minimum" comply with each subpart of Part VII. (Order at 8.) It does not, as Complaint Counsel argues, say that Meta must, "among other things," comply with Part VII's subparts. (Reply at 30–31.) It expressly provides that compliance with each subpart of Part VII will "satisfy" Part VII. There is no ambiguity to interpret; the Order is clear on its face. And any ambiguity about its obligations under the Order must be resolved in Meta's favor. *See United States ex rel. Yelverton v. Fed. Ins. Co.*, 831 F.3d 585, 587 (D.C. Cir. 2016).

Complaint Counsel's strained reading makes even less sense when read in conjunction with Part VIII.D of the Order. That provision states that each Assessment must "determine whether Respondent has implemented and maintained ***the Privacy Program required by Part VII.A-J of this Order***." (Order at 13.) In other words, far from imposing some open-ended set

[21] Complaint Counsel cites only one case for its strained interpretation, which did not involve a contract, a statute or regulation, or even the phrase "at a minimum." Rather, in *In re Plunkett*, 82 F.3d 738 (7th Cir. 1996), the court assessed an earlier decision describing "'excusable neglect' as the normal minimum requirement for belated action" under Federal Rule of Bankruptcy Procedure 9006(b)(1). *Id.* at 741–42 (quoting *In re Singson*, 41 F.3d 316 (7th Cir. 1994)). *Plunkett* did not hold that a tardy bankruptcy filer must demonstrate *additional* requirements for belated action, as Complaint Counsel argues here, but that bankruptcy judges may consider whether other factors outweigh excusable neglect in determining whether to accept a late filing. *Id.*

of requirements on Meta, Part VII's requirements are the requirements in subparts A-J. Further, Part VIII.D tasks the Assessor with assessing the "effectiveness of Respondent's implementation and maintenance of ***each subpart*** in Part VII of this Order." (*Id.*) If Part VII required Meta to do more than meet the requirements of those subparts, there would be a nonsensical and material mismatch between what the Commission might require of Meta under Part VII and what the Assessor must evaluate under Part VIII. *See Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 63 (1995) ("[A] document should be read to give effect to all its provisions and to render them consistent with each other.").

Complaint Counsel's reading would also render Part VII impermissibly vague. It would create a gap between what the text of the Order requires "at a minimum" and what the Commission considers, apparently in its sole discretion, to be sufficient. Especially because neither Complaint Counsel nor the Commission has articulated what additional requirements, beyond those set out in Part VII.A-J, Meta must actually satisfy to comply with Part VII, Complaint Counsel's proposed interpretation would make it impossible for Meta to determine how to comply with Part VII. *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 367–68 (1962) (Commission orders must be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application"). It is precisely such an "indeterminable standard" that led the Eleventh Circuit to vacate the Commission's order against LabMD. *See LabMD, Inc. v. FTC*, 894 F.3d 1221, 1236–37 (11th Cir. 2018).

(b) The OTSC Asserts No Violation of Any Part VII Subpart

Confronted with Meta's showing that the OTSC asserts no violation of any Part VII subpart, Complaint Counsel seeks to rewrite it after the fact. Complaint Counsel argues that "the OTSC clearly asserts Meta violated Part VII of the Order," because it supposedly "detail[s]" that "Meta failed to comply with Part VII.E" by failing to "'[d]esign, implement, maintain, and

document safeguards that control' for the privacy risks identified by the assessment" required by Part VII.D. (Reply at 16–17.) That is obviously incorrect, as is evident from the fact that the Reply does not include a single citation to the OTSC in support of that statement. Nothing in the OTSC suggests—much less asserts—any noncompliance with Part VII.E. Complaint Counsel's effort to effectively amend the OTSC now is invalid and inaccurate.

And even if it were not, the Reply itself fails to point to any facts amounting to a violation of Part VII.E. Complaint Counsel seeks to manufacture a violation by arguing that Part VII.E requires Meta to put in place "'safeguards that control' for [] privacy risks." (Reply at 17.) But that is not what Part VII.E says. Part VII.E states that Meta must "[d]esign, implement, maintain, and document safeguards that control for the ***material*** internal and external risks" identified in Meta's Privacy Risk Assessment. (Order, Part VII.E.) While Meta strongly disagrees with Complaint Counsel's asserted facts, even if true they do not assert a violation of Part VII.E. Nowhere does Complaint Counsel allege that any asserted deficiency impacted a material risk.[22] Nor does Complaint Counsel allege that Meta's safeguard environment more broadly was insufficient to control for such risks. Indeed, any such allegation would be inconsistent with the Assessor's findings about the breadth and completeness of Meta's safeguard environment. (*See, e.g.*, Ex. 4 (2021 Assessment Report) at 2, 15, 43; Resp. to PFOF, Sec. I.A.6.b ¶¶ 30–32.)

B. The OTSC Invokes No Public Interest Supporting Reopening

Meta's Response demonstrated that, under both Commission and judicial precedent, the OTSC's threadbare and conclusory assertion of a "public interest" is legally insufficient,

[22] And in any event, the asserted deficiencies are nothing more than garbled and misleading characterizations of allegations in the PFOF that are themselves factually inaccurate for myriad reasons set forth in Meta's PFOF Response.

particularly when contrasted with the "broad public interest in the finality of Commission orders." (Resp. at 66–70 (citing *In re DTE Energy Co.*, No. C-4691, 2021 WL 5711344, at *2 (F.T.C. Nov. 23, 2021)).) In reply, Complaint Counsel offers string cites to generic Commission and judicial decisions with virtually no application to the assertions in the OTSC. (Reply at 28–30.)

In 2020, the Commission determined that the Order—as agreed by the parties and approved by the District Court—was in the public interest. (Order at 1.) Complaint Counsel does not meaningfully rebut Meta's showing that the OTSC does not explain ***what*** public interest would now be served by reopening, or ***why*** the Commission believes that the public interest requires changes to the Order—in violation of Rule 3.72(b)'s command that the OTSC not only "stat[e] the changes it proposes to make," but also explain "the reasons they are deemed necessary." 16 C.F.R. § 3.72(b)(1).

1. The OTSC Asserts No Basis to "Protect the Public"

Complaint Counsel relies on *Elmo Co. v. FTC*, 389 F.2d 550, 552 (D.C. Cir. 1967) for the generic proposition that the Commission can reopen an order "to protect the public interest." (Reply at 53–55.) Of course, in *Elmo* (unlike here), the respondent expressly and affirmatively agreed to give broad modification rights to the Commission. *Elmo*, 389 F.2d at 551. In *Elmo*, unlike here, the Commission also made factual allegations—sufficient to satisfy the Commission's pleading standards in a ***complaint***—of specific, concrete, and actual harm to the public. *In re The Elmo Co., Inc.* 70 F.T.C. 1374, 1966 WL 87956 (F.T.C. Nov. 18, 1966). By contrast, the OTSC contains a single, conclusory assertion that the Commission's proposed changes would "provide enhanced protections for consumers" (OTSC at 12), without any allegation that Meta's conduct under the existing Order has caused ***any*** harm to ***any*** user. Complaint Counsel essentially concedes the absence of any such allegations in the OTSC by

pointing a finger back at Meta and asserting, vaguely, that Meta merely "speculates" about the absence of harm. (Reply at 19.) But shifting the burden back to Meta cannot work here. It was the Commission's legal obligation to explain in the OTSC "the reasons" why the public interest requires modification, 16 C.F.R. § 3.72(b)(1)—and to meet a "heavy" burden in doing so. *In re La.-Pac. Corp.*, 112 F.T.C. 547, 1989 WL 1126760, at *6 (F.T.C. Nov. 15, 1989). That required Complaint Counsel to "demonstrat[e] in detail the reasons why the public interest would be served by the modification." *Nestle Holdings*, 140 F.T.C. at 1133. Nothing in the OTSC or the PFOF even approaches that standard.

The Commission's conduct in bringing the OTSC further undermines its asserted interest in "protect[ing] the public." *Elmo*, 389 F.2d at 552. If, as Complaint Counsel now argues, the public interest required action to protect users—based on information the Commission received as early as 2019—it would have taken such action long before May 2023. At this point, years later, the most recent facts alleged in the PFOF are more than three years old.

Complaint Counsel does not argue otherwise. As Complaint Counsel concedes, neither the OTSC nor Complaint Counsel's Reply articulate any risk to the public ***now***, and any such assertion would be both untimely and unsupported, particularly in light of the Assessor's conclusion last year that its more recent findings were "consistent with the maturation of the [Privacy Program] in light of Meta effectively addressing previous weaknesses." (Ex. D (2023 Assessment Report) at 7.)

2. There Is No Public Interest in Advancing the "Purpose" of the Order

Complaint Counsel next invokes a public interest in effectuating the "purpose" of the decree (Reply at 28–31), which is meritless for a host of reasons.

To start, Complaint Counsel gets the law wrong. Complaint Counsel accuses Meta of making a "patently false" assertion that consent decrees have no overarching "purpose." (Reply

at 30). To be clear, that assertion was supported by citation to a controlling decision by the Supreme Court. *See United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). And if there were any doubt that the supposedly "patently false" argument remains the law, it has been reaffirmed in the weeks since Meta submitted its response. "As the Supreme Court has long made clear, '[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.' ***Thus, consent decrees cannot be said to have a purpose; they merely reflect the agreement negotiated by adverse parties***." *W. Virginia Highlands Conservancy v. ERP Env't Fund, Inc.*, 99 F.4th 194, 199 (4th Cir. 2024).

It is for this reason that a consent decree may not be modified to require "whatever might be necessary and appropriate" to achieve one party's asserted goals, *see Sierra Club v. Meiburg*, 296 F.3d 1021, 1032 (11th Cir. 2002), even where that party is the Federal Trade Commission, *see*, *e.g.*, *FTC v. Garden of Life, Inc.*, 2012 WL 1898607, at *5 (S.D. Fla. May 25, 2012) (same).

Nothing in the Reply is to the contrary. Complaint Counsel relies principally on a quote from *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 387 (1992), that refers to the "basic purpose" of the consent decree at issue in that case. (Reply at 30.) There, the district court had issued a permanent injunction after litigation on the merits and a determination of legal liability. *Rufo*, 502 U.S. at 374. The consent decree was specifically submitted by the parties in response to a ***court order*** that the "Jail be closed . . . unless a plan was presented to create a constitutionally adequate facility." *Id.* And when the parties agreed on such a plan, they specifically stated in the decree that it "sets forth a program which is both constitutionally adequate and constitutionally required." *Id.* at 375. Thus, *Rufo* contained the unremarkable factual statement that the "basic purpose of the decree . . . was to provide a remedy for what had been found . . . to be unconstitutional conditions obtaining in the Charles Street Jail." *Id.* at 387.

The "basic purpose" of the decree was specifically set forth in the decree itself and in the order to which it responded. *Id*. Here, by contrast, the Commission told the District Court in 2020 that the Order was in the public interest precisely because it would avoid the type of "protracted examination of the parties' legal rights" that preceded the entry of the consent decree in *Rufo*. (Consent Motion at 6–7.) And in approving the settlement in 2020, the District Court specifically concluded that, to the extent the Order has a purpose, its "***stated objective***" was to "***reasonabl[y] resol[ve] the allegations outlined in the Complaint***."[23] *United States v. Facebook, Inc.*, 456 F. Supp. 3d 115, 122 (D.D.C. 2020).

Complaint Counsel cites one case in which the Commission considered—but ultimately rejected—modifications to "ensure that the purpose of the original order has been effectuated." (Reply at 29 (citing *ITT Cont'l Baking Co.*, 1972 WL 128875, at *1).) But *ITT Continental* undermines—rather than supports—Complaint Counsel's argument. To start, unlike Meta, ITT Continental expressly agreed that its order could be modified. *ITT Cont'l Baking Co.*, 1972 WL 128875, at *1. More fundamentally, in subsequent proceedings involving ***the very same administrative consent order***, the Supreme Court reiterated that "it is inappropriate to search for the 'purpose' of a consent decree" because the "decree itself cannot be said to have a purpose," *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235–36 (1975), effectively negating the very legal proposition on which Complaint Counsel relies.

Next, Complaint Counsel relies on *United States v. United Shoe Machinery Corporation* and its progeny, which only further undermine its argument. 391 U.S. 244, 251–52 (1968).

[23] Complaint Counsel's other cases fare no better. *Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020), did not concern modifying a consent order to better achieve its purpose—it was about terminating the decree altogether. And *FTC v. Trudeau*, 662 F.3d 947, 951–52 (7th Cir. 2011), is even less relevant, relating to the imposition of a performance bond as a "coercive sanction" upon a finding of contempt.

First, *United Shoe* concerned a litigated injunction, not a consent decree, and has little if any relevance for that reason alone. Even if it were relevant, as Complaint Counsel concedes, *United Shoe* allows a court "to impose more stringent requirements on the defendant" only when the "original purposes of the injunction are not being fulfilled in ***any material respect***." (Reply at 29 (quoting *Sizzler Fam. Steak Houses v. W. Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1539 (11th Cir. 1986)).) Nothing in the OTSC, PFOF, or Complaint Counsel's Reply comes close to alleging that here. Indeed, the PFOF itself details many of the ways in which the Order is working precisely as the parties intended. Complaint Counsel could not meet that extraordinary burden and concededly makes no attempt to do so. Courts routinely reject arguments that order violations are a sufficient basis to modify even litigated injunctions: "If the court were to grant the FTC's requested relief, then any violation of an injunction would require modification of the injunction." *FTC v. Nat'l Urological Grp., Inc.*, 2014 WL 3893796, at *12 (N.D. Ga. May 14, 2014), *vacated and remanded on other grounds*, 785 F.3d 477 (11th Cir. 2015).[24]

Moreover, even if the "purpose" of the Order were relevant, Complaint Counsel misstates its purpose. Complaint Counsel asserts that "the Order's purpose" is "to protect consumers from alleged "unfair and deceptive privacy practices." (Reply at 30.) But that lopsided articulation (for which Complaint Counsel cites no legal authority) impermissibly prejudges the truth of the alleged facts and their legal effect. Contrary to Complaint Counsel's post hoc litigation argument, the District Court stated, as discussed above, that the Order's "stated objective" was to "reasonabl[y] resol[ve] the allegations outlined in the Complaint." *Facebook*, 456 F. Supp. 3d at

[24] As the Commission recently argued, the "proper relief" for a breach of a Commission order is not to modify the order but rather, "at most," to "simply order [the breaching party] to follow it." Gov't Opp. to X Corp.'s Mot. for Protective Order, *United States v. Twitter, Inc.*, No. 3:22-cv-3070-TSH, at 21 (N.D. Cal. Sept. 11, 2023).

122. Further, at the same time Complaint Counsel offers its self-serving "purpose" for the Order, the Department of Justice, on behalf of the Commission, is arguing before the D.C. Circuit that the "stipulated purpose" of the Order was "to resolve certain claims predating settlement" in 2019. Br. for Appellee (United States) at 20, *United States v. Facebook, Inc.*, No. 23-5280 (D.C. Cir. June 12, 2024). Complaint Counsel cannot rewrite history and argue otherwise now. A consent decree cannot be viewed "by reference to what might satisfy the purposes of one of the parties to it," here, the Commission. *Armour*, 402 U.S. at 682. And Complaint Counsel's rote incantation of the Section 5 standard ignores that a "consent decree cannot be read as though its animating spirit were solely" the FTC Act. *United States v. Microsoft Corp.*, 147 F.3d 935, 946 (D.C. Cir. 1998). That violates the Supreme Court's instruction that consent decrees must be read "without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation." *ITT Cont'l Baking Co.*, 420 U.S. at 237.

The same argument Complaint Counsel makes here was rejected as "untenable" in *Garden of Life*. As Complaint Counsel asserts here, the Commission argued that modification of a consent decree was required because of its "failure to achieve its intended purpose of protecting consumers." *Garden of Life*, 2012 WL 1898607, at *5. The court held that "consent decrees generally do not have overarching purposes," and "[w]hile the FTC may have filed its initial Complaint against GOL to protect consumers," the parties' consent decree "was far more limited." *Id.* The same is true here.

Complaint Counsel's multi-page string cite includes virtually no application of any law to the assertions in the OTSC and PFOF. Complaint Counsel's assertion that the Order has "failed to achieve [its] goals" (Reply at 31), is no more than an assertion that purported noncompliance is a basis for modification, which runs afoul of the Commission's lack of authority to enforce its

own orders. (*See supra* Section II.) Either way, Complaint Counsel's reliance on *Elmo* and *Mohr v. FTC* is misplaced. Both courts clearly explained that the "public interest" was that the original order suffered from an "ineptness of expression" such that it was "not enough to stop the deception" that gave rise to the order in the first place. *Elmo*, 389 F.2d at 552; *Mohr v. FTC*, 272 F.2d 401, 405–06 (9th Cir. 1959). In each case, the Commission and the court of appeals concluded that the order was insufficient to prevent the respondent from continuing, post-order, to violate Section 5 in the very same manner as alleged in the original complaint. *Elmo*, 389 F.2d at 551 (misrepresentations concerning "effectiveness of the 'Elmo Palliative Home Treatment'"); *Mohr*, 272 F.2d at 402–03 (selling and distributing "skip-trace forms" that "contained false and misleading statements and implications").

Those cases have no relevance here. The OTSC does not assert—and the PFOF does not identify—***any*** allegedly deceptive practice that began after the Order was entered, much less a continuation of any deceptive practice alleged in any prior complaint. Complaint Counsel concedes that the coding errors occurred (and, in the case of Messenger Kids, were resolved) well before the Order was entered. Even if they were accurate, the Commission's assertions that Meta violated its obligations under Part VII of the Order do not amount to an underlying deceptive practice. And nothing in the OTSC or PFOF suggests that any of these issues remain ongoing today. Once again, Complaint Counsel does not seriously argue otherwise.

Complaint Counsel seems to appreciate the absence of legal authority and Commission precedent supporting its arguments by contending that Meta should be treated ***differently*** from seemingly every other company or individual ever subject to a Commission order. (Reply at 53.) Complaint Counsel's reference to Meta as a "repeat offender" ignores that the Commission has

never sought to demonstrate—much less actually proven—that Meta violated any law.[25] (*See* Resp. at 92.) Complaint Counsel knows this, having successfully urged the District Court to approve the parties' settlement precisely to "sav[e] the time and money that results from" avoiding being put to its burden of proof. (Consent Mot. at 6–7.) To the extent Complaint Counsel now regrets its decision to settle, the public interest squarely prevents the Commission from seeking to "argue again the issues that the consent agreement resolved." *See La.-Pac.*, 1989 WL 1126760, at *13.

Complaint Counsel's efforts to find a public interest requiring modification cannot be squared with Commission precedent. The Commission long ago determined that order modification "is not to serve as a penalty but as a remedial measure." *ITT Cont'l Baking Co.*, 1972 WL 128875, at *1. Complaint Counsel points to no such purpose here. And it cannot show that modifications are necessary to ***remedy*** the findings in the three-year-old Initial Assessment that the Assessor specifically concluded that Meta "effectively address[ed]," and which it continues to extensively assess. (Ex. D (2023 Assessment Report) at 7.)

3. Complaint Counsel Ignores the Public Interest in Finality

At bottom, Complaint Counsel's argument about the "public interest" appeals to an assertion of raw power. According to Complaint Counsel, the Commission can rewrite any order at any time based on nothing more than a roving perception of the public interest. Of course, whenever the Commission changes composition, it necessarily takes a new view of public

[25] By contrast, in *ITT Continental*, complaint counsel urged modification because the respondent was, unlike Meta, found by a United States District Court to have twice violated a final order. 1972 WL 128875, at *1. Even there, the Commission rejected the argument that order violations can be a "sufficient basis for modification of the order." *Id.* Here, as its Reply makes clear, Complaint Counsel offers nothing more.

interest, but it would defy law and logic if a newly composed Commission could undo final orders negotiated and approved by its prior membership based on nothing more than the different policy preferences of its new members. Indeed, the Commission approves orders over dissents with great frequency—where even in a single adjudication, Commissioners part ways on what the public interest is and what it requires.

The hallmark of administrative adjudication is the finality it imparts. The Commission has repeatedly held that there is a "broad public interest in the finality of Commission orders." *DTE Energy Co.*, 2021 WL 5711344, at *2. Quoting *Chevron*, Complaint Counsel now contends that agencies must be free to change their minds. (Reply at 55 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).) But the Supreme Court overruled *Chevron* because it impermissibly allowed agencies to change course and therefore left "those attempting to plan around agency action in an eternal fog of uncertainty." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272, 603 U.S. ___ (2024). And even pre-*Loper Bright*, Complaint Counsel's contention applied with far less force within a single adjudication. "The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 n.6 (1986). The Commission knows this well, as it has cited favorably—and often—to the Supreme Court's holding that public policy dictates that there be an end of litigation, and that matters once tried should be considered forever settled as between the parties. *See*, *e.g.*, *DTE Energy Co.*, 2021 WL 5711344, at *2 (citing *Fed. Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981)).

Complaint Counsel chooses to ignore this authority—as well as the cases cited in Meta's Response—rejecting the sweeping view of the "public interest" that Complaint Counsel urges on the Commission. As Judge Lamberth concluded, when invoking the public interest to modify a

consent decree, "unelected . . . officials must be constrained in some way from imposing their interpretation of the 'public interest' on unwilling parties." *United States v. Baroid Corp.*, 130 F. Supp. 2d 101, 104 (D.D.C. 2001). And the Commission, too, has rejected conclusory incantations of public interest that "disregarded the strong public interest in repose and finality." *La.-Pac.*, 1989 WL 112750, at *13. This must be so, because the assertion of a standardless "reopening power . . . takes away from the finality that adjudication normally affords." *McCuin v. Sec'y of Health & Hum. Servs.*, 817 F.2d 161, 172 (1st Cir. 1987).

IV. THE PROCEEDING IS UNCONSTITUTIONAL

As Meta explained in its Response, the proceeding is unconstitutional for multiple reasons. (Resp. at Point III.) Those constitutional issues are properly resolved by Article III courts, not an administrative agency, because they are "distant from the FTC's competence and expertise." *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 194 (2023). Meta raised those constitutional arguments in this proceeding "for preservation purposes," (Resp. at 71), and, as a result, responds only to note that Complaint Counsel's defense of this proceeding's compliance with Article III of the Constitution cannot withstand the Supreme Court's intervening decision in *SEC v. Jarkesy*, 144 S. Ct. 2117, 603 U.S. __ (2024). *Jarkesy* confirms that this proceeding deprives Meta of its constitutional entitlement to adjudication of private rights by an Article III court.

Complaint Counsel's response largely mirrors the Commission's boilerplate rejection of Article III challenges, *see, e.g.*, *Intuit*, 2024 WL 382358, at *56, which has been soundly rejected by the Supreme Court. The Supreme Court explained that the "public rights" exception is limited to matters that "historically could have been determined exclusively by the executive and legislative branches," focusing on "cases involving the collection of revenue," "immigration," "foreign commerce," "relations with Indian tribes," "the administration of public lands," "and

the granting of public benefits such as payments to veterans, pensions, and patent rights." *Jarkesy*, 144 S. Ct. at 2132–33. "Even with respect to matters that ***arguably*** fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Id.* at 2134.

Complaint Counsel first argues that the case concerns public rights because the proceeding is between the government and Meta as a party "subject to its authority" and is "inextricably connected" to the government's regulatory and enforcement authority. (Reply at 49 (quoting *Stern v. Marshall*, 564 U.S. 462, 489 (2011)).) *Jarkesy* dismissed that precise argument by the SEC, rejecting the notion that the "constitutionally relevant distinction" is that the issue "has been assigned to a federal agency to enforce." *Jarkesy*, 144 S. Ct. at 2136.

Complaint Counsel next argues that the proceeding implicates the FTC Act and the Commission's statutory authority to protect the public. (Reply at 49); *see also Intuit*, 2024 WL 382358, at *56. But the fact that the action "originated in a newly fashioned regulatory scheme" does not "permit Congress to siphon this action away from an Article III court." *Jarkesy*, 144 S. Ct. at 2136. And the Commission cannot dispute the "close relationship" between Section 5 and common law deceit. *Id.* at 2130. Indeed, Complaint Counsel submits that Meta has "misrepresent[ed] to consumers its privacy practices" (Reply at 19), making the parallels to common law deceit even clearer.

Complaint Counsel conspicuously—and tellingly—omits from its stock Article III response the argument that "the Commission's adjudication process does not violate Article III because 'the institutional integrity of the Judiciary Branch' has not been 'impermissibly threaten[ed].'" *Intuit*, 2024 WL 382358, at *56 (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (1986)). Complaint Counsel appears to recognize that it can make no such assertion here because the factors the Commission discussed in *Intuit* demonstrate—rather than rebut—that this

proceeding defies the institutional integrity of the Article III courts. First, Complaint Counsel cannot argue that *this* adjudication deals only with a "particularized area of law." *Cf. id.* (quoting *Schor*, 478 U.S. at 852). Complaint Counsel concedes that the central issue for adjudication is whether Meta complied with its obligations under its consent orders. (Reply at 53.) But a "consent decree or order is to be construed for enforcement purposes basically as a contract," *ITT Cont'l Baking*, 420 U.S. at 238, and "legal interpretation . . . has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years." *Loper Bright*, 144 S. Ct. at 2273 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Second, it is the "enforcement responsibility of the courts, once a Commission order has become final . . . to adjudicate questions concerning the order's violation." *Morton Salt Co.*, 334 U.S. at 54. This proceeding requires the Commission to adjudicate precisely such questions. And, third, Complaint Counsel cannot concede that "FTC orders, [] like those of the CFTC in *Schor*, are enforceable only by order of the district court," *Intuit*, 2024 WL 382358, at *56, in an action in which the Commission unabashedly claims—and purports to exercise—the authority to do just that. (*See supra* Point II.)

Jarkesy makes clear that this proceeding tramples Meta's entitlement to have its private rights resolved in an Article III court and impairs the "enforcement responsibility" of those courts to adjudicate them.

CONCLUSION

For the foregoing reasons and the reasons set forth in Meta's April 1, 2024 submissions, 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.[26]

Dated: July 18, 2024

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[26] 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.

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2024, I caused a true and correct copy of the foregoing document to be filed and served as follows:

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

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

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