

IN THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

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LABMD, INC.,  
PLAINTIFF/APPELLANT,

V.

FEDERAL TRADE COMMISSION,  
DEFENDANT/APPELLEE.

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Appeal from the United States District Court  
for the Northern District of Georgia, Atlanta Division,  
District Court Docket No. 1:14-cv-810-WSD  
The Honorable William S. Duffey, Jr.

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**APPELLANT'S BRIEF**

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Dated: June 24, 2014

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

LABMD, INC., )  
 )  
 APPELLANT, )  
 )  
 V. ) CASE NO. 14-12144-EE  
 )  
 FEDERAL TRADE COMMISSION, )  
 )  
 APPELLEE. )  
\_\_\_\_\_ )

**APPELLANT’S CERTIFICATE OF INTERESTED  
PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, I, the undersigned counsel of record for Appellant, LabMD, Inc. (“LabMD”), certify that LabMD is not publicly held, has no parent corporation, subsidiary, conglomerate or affiliate, and no publicly-held corporation owns 10% or more of its stock. I further certify that to the best of my knowledge the following is a complete list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant, LabMD, Inc. (“LabMD”), respectfully requests oral argument because this appeal raises important statutory and constitutional questions concerning the authority of Appellee, the Federal Trade Commission (the “FTC”), to regulate computer data security for protected health information, a term defined by Congress and the Department of Health and Human Services. As the district court stated, “the authority of the FTC to enlarge its regulatory activity in the data security area presents an interesting and likely important jurisdictional issue that needs to be resolved promptly.” (RD 33 at 14 n.6.)

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**STATEMENT OF SUBJECT-MATTER  
AND APPELLATE JURISDICTION**

**A. Basis for the District Court’s Subject-Matter Jurisdiction**

The basis for the district court’s subject-matter jurisdiction was 28 U.S.C. § 1331.

Judicial review was based on various grounds.

First, LabMD requested review because the FTC’s January 16, 2014 order that the general “unfairness” prohibition in Section 5 of the FTC Act, 15 U.S.C. § 45(n), authorized it to regulate PHI data security was “final agency action” under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. The FTC’s order fixed the parties’ legal relationship and marked the consummation of the FTC’s decision-making process. *See Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *TVA v. Whitman*, 336 F.3d 1236, 1248 (11th Cir. 2003). The FTC treated the order as final agency action, claiming deference for it under *Chevron v. NRDC*, 467 U.S. 837 (1984). The FTC’s order did not implicate data security expertise or require any factual findings, and it clearly violated LabMD’s rights. *See generally Federal Trade Comm’n v. Feldman*, 532 F.2d 1092 (7th Cir. 1976); *E.I. du Pont de Nemours & Co. v. Federal Trade Comm’n*, 488 F. Supp. 747 (D. Del. 1980); *Boise Cascade Co. v. Federal Trade Comm’n*, 498 F. Supp. 772 (D. Del. 1980).

Second, LabMD requested review because the FTC's action was *ultra vires* and therefore reviewable regardless of final agency action. *See Sackett*, 132 S. Ct. at 1372-74; *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) (“The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is where an agency has exercised authority in excess of its jurisdiction . . . .”); *see also XYZ Law Firm v. FTC*, 525 F. Supp. 1235, 1237 (N.D. Ga. 1981) (exhaustion not required “where an agency has clearly exceeded its authority” or the plaintiff asserts a “non-frivolous constitutional right”).

Third, LabMD requested review because the FTC had failed to provide LabMD with fair notice and violated LabMD's due process rights by failing to provide an impartial forum to hear its defenses and evidence. These constitutional claims were reviewable regardless of final agency action. *Am. Gen. Ins. Co. v. FTC*, 496 F.2d 197, 200 (5th Cir. 1974) (jurisdiction exists when “substantial showing that . . . [litigant's] constitutional rights have been violated”); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240-41 (11th Cir. 2003) (“final agency action” requirement “inapplicable” to constitutional claims); *see also Duarte Nursery, Inc. v. United States Army Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 56800, \*22 (E.D. Cal. Apr. 22, 2014) (final agency action is not required for the court to review agency action that allegedly caused constitutional injury).

Fourth, LabMD requested review because it alleged government retaliation for protected First Amendment speech meeting the criteria of *Smith v. Mosely*, 532 F.3d 1270, 1276 (11th Cir. 2008). This claim too is reviewable regardless of final agency action. *Susan B. Anthony List v. Driehaus*, No. 13-193, slip op., 573 U.S. \_\_\_ (June 16, 2014); *Trudeau v. FTC*, 456 F.3d 178, 190-91 & n.22 (D.C. 2006); *Nat'l Parks Cons. Ass'n v. Norton*, 324 F.3d 1229, 140-41 (11th Cir. 2003).<sup>1</sup>

**B. Basis for the Court of Appeals' Jurisdiction and Statement of Final Judgment Entered by the District Court**

This Court's jurisdiction is pursuant to 28 U.S.C. § 1291. The district court entered a final judgment on May 12, 2014, dismissing the entire case and denying LabMD's motion for preliminary injunction as moot, and LabMD filed its Notice of Appeal on May 14, 2014.

**C. The Appeal is Timely**

LabMD has timely appealed the final judgment.

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<sup>1</sup> The district court mistakenly relied on *American Airlines Inc. v. Herman*, 176 F.3d 283, 292 (5th Cir. 1999) to conclude that 5 U.S.C. § 704 denied it jurisdiction to rule on constitutional claims. *American Airlines* is a pre-*Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), decision that does not reflect current law in any circuit that has addressed the issue. See *Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 660-61 (D.C. Cir. 2010); *Sharkey v. Quarantillo*, 541 F.3d 75, 88 n.10 (2d Cir. 2008).

## **STATEMENT OF THE ISSUES**

- 1) Whether 5 U.S.C. § 704's "final" agency action requirement denies the district court 28 U.S.C. § 1331 jurisdiction to hear well-pled constitutional claims.
- 2) Whether a jurisdictional order described by the FTC as a "definitive statement" of its authority and for which it claims deference under *Chevron v. NRDC*, 467 U.S. 837 (1984), is final agency action.
- 3) Whether the FTC's administrative complaint in this case is final agency action.
- 4) Whether the FTC's exercise of Section 5 "unfairness" jurisdiction over LabMD's patient information computer data security practices was *ultra vires*.
- 5) Whether the Commission failed to provide fair notice and serve as a fair tribunal in violation of due process.

## **STATEMENT OF THE CASE**

### **A. Statement of Proceedings and Dispositions in the District Court**

LabMD sued to enjoin the FTC's ongoing administrative enforcement action against it, filing a motion for preliminary injunction with the complaint.<sup>2</sup> The FTC filed a Rule 12(b) motion to dismiss the complaint. On May 7, 2014, the district court conducted an evidentiary hearing on LabMD's motion for preliminary

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<sup>2</sup> Record Document (hereinafter "RD") 1.

injunction. On May 12, 2014, the district court granted the FTC’s motion, dismissed the entire complaint and denied as moot the motion for preliminary injunction. (RD 33 at 19.)

**B. Statement of Facts**

This appeal arises from a four and one-half year action by the FTC against LabMD arising from alleged data security breaches of protected health information (“PHI”). (RD 1 at 26; RD 1-5 at 4-5.) The FTC has never identified a single consumer “victim” of the alleged breaches. (Hearing Trans., *LabMD v. FTC*, No. 1:14-cv-810-WSD, 7:2-10, 80:15-20 (May 7, 2014) (“PI Tr.”).) And, on June 11, 2014, the public learned that the FTC’s action is itself the subject of a U.S. House of Representatives’ Committee on Oversight and Government Reform (“OGR”) investigation.<sup>3</sup>

**1. Background**

LabMD is a small but innovative cancer-detection laboratory. (RD 1-16 ¶¶ 2-3.) The FTC’s action against LabMD has had a devastating impact on the business. (*Id.* ¶ 11.) In mid-January 2014, LabMD stopped offering cancer testing services. (*Id.* ¶ 16; RD 1-19.) It now offers only archival access to patient records by physicians. (RD 14-1 ¶¶ 2-6.)

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<sup>3</sup> June 11, 2014 Letter from the Honorable Darrel E. Issa to the Honorable Edith Ramirez at 1 (“Issa Letter”), attached as Exhibit A to LabMD’s Request for Judicial Notice, filed concurrently herewith.

LabMD’s cancer-detection work required it to hold and maintain PHI data on its computer system. (*See* RD 1-5 at 2.) LabMD’s PHI data security was and is regulated by the United States Department of Health and Human Services (“HHS”) under the Health Insurance Portability and Accountability Act (“HIPAA”)<sup>4</sup> and the Health Information Technology for Economic and Clinical Health Act (“HITECH”).<sup>5</sup> (RD 1, ¶ 16; RD 1-16 ¶ 3; RD 17-3 at 22 n.15.)

HHS has promulgated PHI data security rules for what LabMD and other medical companies must do to protect PHI.<sup>6</sup> There is no allegation, by HHS, the FTC or anyone else, that LabMD violated these rules. (RD 1-16 ¶¶ 3-4.)

On or about February 5, 2008, Tiversa, Inc., a self-described “cyber-intelligence company” specializing in searching and copying files on peer-to-peer (“P2P”) networks using unique, patented technology, took an insurance aging file containing PHI (the “1718 File”) from a LabMD workstation in Atlanta, Georgia. (*Id.* ¶ 23.) On May 13, 2008, Tiversa contacted LabMD, advised LabMD that Tiversa

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<sup>4</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 & 42 U.S.C.).

<sup>5</sup> Health Information Technology for Economic and Clinical Health Act of 2009, 42 U.S.C. 300jj *et seq.* §§17901 *et seq.*

<sup>6</sup> *See, e.g.*, 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) (HHS’s HIPAA Privacy Rule); 68 Fed. Reg. 8,334, 8,334 (Feb. 20, 2003) (HHS’s HIPAA Security Rule); 78 Fed. Reg. 5,566, 5,639 (Jan. 25, 2013) (HHS’s HITECH Breach Notification Rule); *see* 42 U.S.C. § 1320d-2(d)(1) (“Security standards for health information” established and enforced by HHS).

had “found” the 1718 File on a P2P network and offered LabMD a contract for data security services. (*Id.* ¶ 24.) LabMD turned down Tiversa’s offer. (*Id.*)

In 2009, Tiversa gave the 1718 File to the FTC under highly irregular circumstances. (*Id.* ¶ 25.) The FTC and Tiversa met on multiple occasions and ultimately agreed that Tiversa would transfer the 1718 File to a shell company (the “Privacy Institute”), that the FTC would issue a civil investigative demand to the Privacy Institute, and that the Privacy Institute would then give the 1718 File to the FTC. (*Id.*)

Unlike HHS, the FTC had not then (and has not now) published any PHI regulations, provided written guidance regarding appropriate PHI data security practices or even, prior to the LabMD case, advised medical companies that the FTC could and would over-regulate HHS. (RD 19-4 at 19-20, ¶¶1-2; RD 1-10 at 9:13-10:16.) Nevertheless, the FTC made its deal with Tiversa and then, in January, 2010, notified LabMD that it was under investigation. (RD 1-41, Ex. A.)

The FTC’s investigation lasted more than three and one-half years. (*See* RD 1 ¶ 54.) It included civil investigative demands, investigatory hearings and interviews with current and former LabMD employees. It required LabMD to produce thousands of documents, fatally distracted its management team and caused LabMD significant reputational harm in the marketplace. (*See id.* ¶¶ 27, 53, 96.)

On September 17, 2012, Mr. Daugherty, LabMD's CEO, posted a statement on his website blog criticizing the FTC. The FTC's employees visited the website approximately 75 times the next day. (PI Tr. 23:14-27:15; RD 24, ¶ 13 & Ex.7.) Nothing in the blog shed any light on LabMD's data security practices. (PI Tr. 30:19-22.)

On July 19, 2013, Mr. Daugherty posted a trailer to his book, *The Devil Inside the Beltway*, on his website. (RD 24, ¶9(e).) The trailer called the FTC's actions against LabMD an "abusive government shakedown" and explained that his book would "blow the whistle" about the FTC's "abusive beltway tactics." The trailer also criticized the FTC's enforcement staff. (RD 1 ¶ 38.)

On July 22, 2013, three days after the trailer was posted, LabMD was notified that Commission staff had recommended enforcement proceedings against LabMD. (RD 1 ¶39.)

On August 28, 2013, the FTC filed an Administrative Complaint (the "FTC Complaint") alleging that LabMD's data security practices were "unfair" under Section 5 and seeking a "cease and desist" order with enforceable twenty-year reporting and compliance obligations. (RD 1-5.) The FTC Complaint claimed that LabMD had two separate "security incidents" that caused, or were likely to cause, consumers harm. (RD 33 at 2-3 & n.1.) However, the FTC now admits that

neither alleged “security incident” ever caused any harm to anyone. (RD 19-4 at 12-13, 30-31, ¶¶ 15, 19; PI Tr.75:20-82:4.)

On November 12, 2013, LabMD moved to dismiss the FTC Complaint for lack of jurisdiction and for a lack of fair notice. (RD 1 ¶ 61.)

On January 16, 2014, the FTC by order denied LabMD’s jurisdictional and fair notice challenges and took for itself the authority to over-regulate HHS and impose its own PHI data security requirements. (RD 1 ¶ 69, RD 1-3) (the “FTC Order”). It then immediately claimed *Chevron* deference for the FTC Order in this court and in a U.S. District Court in New Jersey. (*Id.* ¶¶ 69-70.)

On March 20, 2014, LabMD sued to enjoin the FTC’s ongoing administrative enforcement action against it, filing a motion for preliminary injunction with the complaint. (RD 1, RD 2, RD 2-1.)

On April 7, 2014, the FTC filed a Rule 12(b) motion to dismiss the complaint. (RD 13.)

On May 7, 2014, the district court conducted an evidentiary hearing on LabMD’s motion for preliminary injunction.

During the hearing, an FTC representative described the FTC’s investigation with respect to one of the alleged security incidents, the “day sheets.” The day sheets were printed LabMD forms that were found by the Sacramento, California, Police Department in a bag during an arrest of suspects for municipal utility fraud.

The FTC told the district court that the FTC could not, among other things, explain how the day sheets “got out” or tie the exposure to LabMD’s computer data security practices:

**The Court:** So you don’t know where the documents came from, you don’t know how these people got the possession of it, you don’t know whether they originated from LabMD or some other place, but you are going to use that to show that, because [two individuals] committed identity theft, that certain individuals were damaged by documents, the source of which you don’t even know?

**[The FTC’s Representative]:** Yes, Your Honor.

**The Court:** Holy cow.<sup>7</sup>

On May 12, 2014, the district court granted the FTC’s motion and dismissed LabMD’s case. (RD 33.)

## **2. Post-dismissal developments appropriate for judicial notice**

The Court may take judicial notice of the following post-dismissal developments.

First, on May 12, 2014, Deputy Director Daniel Kaufman, testifying as the FTC’s Bureau of Consumer Protection (“BCP”) designated “corporate” representative, admitted that the FTC lacks any Section 5 “unfairness” data-security standards and that the FTC has not promulgated Section 5 data-security regulations.<sup>8</sup> Instead, “[the FTC’s purported] standard is reasonableness and the

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<sup>7</sup> (PI Tr. 80:24-81:07.)

<sup>8</sup> May 12, 2014 Kaufman Tr. (attached as Exhibit B to LabMD’s Request for Judicial Notice) at 215:11-15.

BCP's academic expert, a Dr. Hill, has offered opinion testimony explaining why LabMD's practices were not reasonable."<sup>9</sup> The Hill opinion was not given to LabMD until March 18, 2014, more than four years after the FTC commenced its investigation and nearly eight months after the FTC Complaint was filed.

Second, on May 19, 2014, the Commission denied LabMD's motion for summary decision and reaffirmed the FTC Order's finality and effect.<sup>10</sup> It held in part:

[LabMD] contends that Complaint Counsel's expert witness, Dr. Raquel Hill, articulated data security standards pursuant to Section 5 "that are difficult to reconcile with," and are "far more stringent" than, the HIPAA Security Rule and other HIPAA Standards. For example, LabMD asserts that Dr. Hill's proposed standards "do not account, as required by HIPAA, for the needs and capabilities of small health care providers and rural health care providers," improperly "presume a level of technical knowledge generally not available to small health care providers," and are "inconsistent with HHS guidance...." [But] the facts that LabMD alleges about HIPAA could be "material" for purposes of this Motion for Summary Decision only if LabMD were correct that, as a matter of law, the Commission could not hold LabMD liable under Section 5 if its data security practices complied with HIPAA Standards. But that legal argument is now foreclosed. We held in the Order denying LabMD's Motion to Dismiss that HIPAA does not "trump" Section 5, and that LabMD therefore "cannot plausibly assert that, because it complies with [HIPAA], it is free to violate" requirements imposed independently by Section 5 of the FTC Act.<sup>11</sup>

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<sup>9</sup> *Id.* 203:16-19.

<sup>10</sup> Order Denying Respondent LabMD, Inc.'s Motion for Summary Decision (May 19, 2014) ("Summary Decision Order") (attached as Exhibit E to LabMD's Request for Judicial Notice).

<sup>11</sup> *Id.* at 5.

Third, on May 20, 2014, the administrative hearing against LabMD commenced. There are issues concerning the testimony of one witness, Mr. Richard Wallace, a former Tiversa employee who is prepared to testify to the circumstances under which Tiversa acquired the 1718 File.<sup>12</sup> On June 12, 2014, Mr. Wallace invoked his Fifth Amendment privilege against self-incrimination. The administrative law judge then stayed the proceedings to allow Mr. Wallace to negotiate an immunity deal with Congress.<sup>13</sup>

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<sup>12</sup> If the 1718 File was acquired illegally or improperly, then it and all derivative evidence, including the day sheets, should be excluded and as a result the administrative case dismissed. *See Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 651 (5th Cir. 1977) (if the FTC acted “improperly or illegally” in obtaining evidence then respondent “should be entitled to have any evidence so obtained -- as well as its ‘fruits’ -- excluded from the proceeding or to obtain a reversal of any adverse judgment...”); *Knoll Associates v. FTC*, 397 F.2d 530, 537 (7th Cir. 1968) (remanding case to FTC with instruction to reconsider evidence without documents and testimony given or produced by or through witness that stole materials from respondent). Therefore, the circumstances under which the 1718 File came into the possession of Tiversa and/or the FTC are critical.

<sup>13</sup> June 12, 2014 Tr. *In re LabMD, Inc.*, FTC Docket No. 9357, at 1300:23-1302:10; 1302:15-1304:13. (attached to LabMD’s Request for Judicial Notice as Exhibit C). When immunity is resolved, Mr. Wallace will testify and the hearing will close. Twenty-one days thereafter, the parties will submit proposed findings of fact and conclusions of law. Shortly thereafter, the parties will make final arguments. The administrative law judge will then issue a decision that will be final unless appealed to the Commission *or* if the Commission *sua sponte* chooses to reverse. 16 C.F.R. § 4.3. The Commission reviews all evidence and legal analysis *de novo* and it has a generation-long record of consistently disregarding administrative law judge fact, credibility and legal findings favoring respondents. 16 C.F.R. § 3.54; *see infra* at Argument § II(B); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065, 1070 (11th Cir. 2005).

Fourth, on June 11, 2014, the Honorable Darrell Issa, Chairman of the OGR, wrote a letter to the Honorable Edith Ramirez, FTC Chairwoman, stating that Tiversa had provided “incomplete and inaccurate” information about LabMD and to the FTC that the testimony against LabMD given during discovery “may not have been truthful.”<sup>14</sup> Then, on June 17, 2014, OGR requested that the FTC’s Acting Inspector General Kelly Tshibaka “undertake a full review of the FTC’s relationship with Tiversa.”<sup>15</sup> OGR said:

In addition to concerns about the merits of the enforcement action with respect to the FTC’s jurisdiction, the Committee has substantial concerns about the reliability of the information Tiversa provided to the FTC, the manner in which Tiversa provided the information, and the relationship between the FTC and Tiversa.<sup>16</sup>

**C. Standard of Review**

This Court reviews *de novo* (1) pure questions of constitutional law and statutory interpretation; (2) jurisdictional questions, and (3) a district court’s grant of a motion to dismiss under Rule 12(b)(6). *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009) (examining constitutional and statutory interpretation); *Ehlen Floor Covering, Inc. v. Lamb*, 660 F.3d 1283, 1287 (11th Cir. 2011) (examining jurisdictional questions); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004) (12(b)(6) motions). This Court may

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<sup>14</sup> Issa Letter, attached as Exhibit A to LabMD’s Request for Judicial Notice.

<sup>15</sup> June 17, 2014 Letter from the Honorable Darrel E. Issa to Ms. Kelly Tshibaka (attached to LabMD’s Request for Judicial Notice as Exhibit D) at 3.

<sup>16</sup> *Id.* at 1.

reach the merits of all such issues raised before the district court even when the district court declined to rule directly on them. *United States v. Charles*, 722 F.3d 1319, 1331 n.15 (11th Cir. 2013).

### **SUMMARY OF THE ARGUMENT**

The district court's decision to grant the FTC's motion to dismiss is reversible error for at least three reasons. First, the district court erroneously held that LabMD's First Amendment retaliation claim was not reviewable until after the administrative case is concluded. This ruling, however, conflicts with controlling precedent, and review is proper now.

Second, the district court erroneously held that it lacks jurisdiction over LabMD's Administrative Procedure Act ("APA") claims because the FTC has not taken final agency action. Yet, the FTC Order was admittedly a "definitive interpretation of the application of Section 5 to data security," (RD 13-1 (FTC Br.) at 24; *see also* Summary Decision Order at 3, 5-6), and the FTC has claimed *Chevron* deference for it. Thus, the FTC Order (and arguably the FTC Complaint as well) was final agency action, and review is proper now.

Third, the district court erroneously held that it lacked jurisdiction to decide the fair notice and due process claims until after the administrative case ends. Again, this holding was contrary to controlling precedent, and review is proper

now. Furthermore, this court should decide the *ultra vires* and constitutional issues without remand in the interest of judicial efficiency.

### **ARGUMENT AND CITATIONS OF AUTHORITY**

#### **I. LabMD States A Claim That The FTC Retaliated Against LabMD For Constitutionally-Protected Free Speech**

The district court erroneously ruled the FTC’s ongoing administrative case is grounds for dismissing a First Amendment retaliation claim. (*See* RD 33 (Order) at 16-17.)

To state a First Amendment retaliation claim, this Court requires that: “(1) [the] speech was constitutionally protected; (2) [the plaintiff] suffered adverse action such that [the government’s] retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech.” *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

The Verified Complaint meets this test. First, paragraphs 35 through 38 describe the protected free speech of Mr. Daugherty that criticized the FTC. (RD 1, ¶¶ 35-38.) Second, three days after Mr. Daugherty published the trailer to his book criticizing the FTC on his website, an attorney for FTC told LabMD that Commission staff had recommended that the FTC commence enforcement proceedings against LabMD. (*Id.* ¶¶ 37-39.) Third, the FTC filed its complaint against LabMD in the enforcement action within days after Mr. Daugherty

published the trailer. (*Id.* ¶ 38.) Finally, LabMD described harms it has suffered as a direct consequence of the FTC’s reprisal. (*See* RD 1 ¶¶ 99-101, 144-50.)

Official reprisal for constitutionally-protected speech violates the First Amendment. *Trudeau v. Federal Trade Comm’n*, 456 F.3d 178, 190-91 & n.22 (D.C. 2006); *White v. Baker*, 696 F. Supp. 2d 1289, 1312-13 (N.D. Ga. 2010). And, a recent unanimous Supreme Court decision confirms that LabMD’s claim should have been heard. In *Susan B. Anthony List v. Driehaus*, 573 U.S. \_\_\_ (June 16, 2014), the Court found a pre-enforcement administrative claim involving protected free speech was ripe for adjudication, stating that it has “permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent” or where the administrative action will impose adverse requirements on a citizen. *Id.* at 8, 15. LabMD’s allegations here plainly meet this standard. (RD 1 ¶¶ 144-50.)

The district court did not address *Smith v. Mosley* in dismissing LabMD’s complaint. It instead relied on *Ticor Tile Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), for the proposition that all constitutional claims arising in an administrative action are not reviewable until final agency action has occurred.<sup>17</sup> *Ticor*, however, was misapplied by the district court and, to the extent it was cited to bar to judicial review of a well-pled constitutional claim, is contrary to controlling authorities.

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<sup>17</sup> (RD 33 at 16-17.)

*See Nat'l Parks Conservation Ass'n*, 324 F.3d at 1240-41 (“final agency action” requirement “inapplicable” to constitutional claims); *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984).<sup>18</sup>

The Supreme Court allows First Amendment challenges before final agency action to prevent the government from compelling citizens to self-censor. *See Driehaus*, 573 U.S. at \_\_\_ (slip op. at 16) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 n.13 (1979), “the prospect of issuance of an administrative cease-and-desist order or a court-ordered injunction against such prohibited conduct provides substantial additional support for the conclusion that appellees’ challenge . . . is justiciable”); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988). In fact, it is well-established that the government may unlawfully suppress protected speech without actually prosecuting citizens or taking any immediate action against them. *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2004).

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<sup>18</sup> To begin with, the district court’s conclusion that the APA cabins 28 U.S.C. §1331’s broad jurisdictional grant conflicts with the Supreme Court’s admonition that “Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over ‘all civil actions arising under the Constitution, laws, or treaties of the United States.’” *Arbaugh*, 546 U.S. at 503. Nothing in the APA or any other statute divests the district court of jurisdiction over a well-pled retaliation claim and absent this, jurisdiction is presumed. *See id.* at 514-16 (“[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character”).

Thus, where, as here, First Amendment rights are at stake, there is no requirement of actual enforcement, much less final agency action, to prevent government retaliation against a citizen for protected speech. *See Am. Booksellers Ass’n, Inc.*, 484 U.S. at 393; *Driehaus*, 573 U.S. at \_\_\_ (slip op. at 15) (“We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review.”); *Babbitt*, 442 U.S. at 301 (“[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute”).<sup>19</sup> The FTC’s administrative case had no bearing on the district court’s jurisdiction over LabMD’s retaliation claim. Accordingly, LabMD properly pled a claim of retaliation, and the district court erroneously dismissed it.

## II. The FTC Has Taken Final Agency Action

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<sup>19</sup> As the Court explained:

We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

*Am. Booksellers Ass’n, Inc.*, 484 U.S. at 393.

The district court erroneously granted the FTC’s motion to dismiss because the FTC has taken final agency action that is reviewable now under 5 U.S.C. §§ 702 and 704.

**A. The LabMD Order**

The FTC termed the LabMD Order “a determinative interpretation of the application of Section 5.” (RD 13-1 (FTC Br.) at 24.) This, by itself, is sufficient for APA finality. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1994).

Additionally, the FTC claimed *Chevron* deference for the FTC Order here and in the U.S. District Court of New Jersey.<sup>20</sup> Only final agency action is entitled to *Chevron* deference. *Christenson v. Harris County*, 529 U.S. 576, 587 (2000); *Franklin Fed’l Sav. Bank v. Dir. Office of Thrift Supervision*, 927 F.2d 1332, 1337 (6th Cir. 1991) (“When an agency has acted so definitively that its actions are defended based on *Chevron*” its action should be treated as final). Again, this is sufficient for finality. *Id.*; *CSI Aviation Services, Inc. v. Dep’t of Transportation*, 637 F.3d 408, 412-13 (D.C. Cir. 2011); *Athlone Indus., Inc. v. Consumer Prod. Safety Comm’n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983).<sup>21</sup>

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<sup>20</sup> (RD 1, ¶¶ 70-71; see RD 1-4 at 6 (citing LabMD Order to Judge Salas in the matter styled as *FTC v. Wyndham Worldwide Corp. et al.*, No. 2:13-cv-01887-ES-JAD).) The FTC argued that the district court apply deference to the order under *Chevron*, 467 U.S. at 837. (RD 13-1 at 23-24, 28.)

<sup>21</sup> Having an “order” be the vehicle for final agency action is entirely consistent with the FTC’s claim that it may declare what conduct is an “unfair practice”

The cases cited by the FTC should not deny review. *DRG Funding Corp. v. Secretary of HUD*, 76 F.3d 1212, 1215 (D.C. Cir. 1996) was cited for the proposition that the district court lacked jurisdiction under the *Bennett* test, (RD 33 at 13 (quoting *Bennett*, 520 U.S. at 177-78.)). But *DRG* is not even current District of Columbia Circuit law and should not control.<sup>22</sup> Furthermore, *Chevron* deference is a “legal consequence” under *Bennett*. *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 642 (6th Cir. 2004); *see also Franklin Fed. Sav. Bank v. Dir., Office of Thrift Supervision*, 927 F.2d 1332, 1337 (6th Cir. 1991). Only agency actions that satisfy the *Bennett* test are eligible for *Chevron* deference. The FTC Order thus must be “final agency action” under 5 U.S.C. § 704.

The APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. *Sackett*, 132 S. Ct. at 1373. Based on *Bennett*, the district court erroneously denied LabMD review.

## **B. The FTC Complaint**

The FTC Complaint is also final agency action under *Bennett*, 520 U.S. at 177-78. The reason is that this agency action effectively determined there would be legal consequences imposed on LabMD. The empirical data shows that over the

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through rulemaking, adjudication, or information posts to the FTC website. *See In re POM Wonderful LLC*, 2012 FTC LEXIS, 106, 703-05 (FTC May 12, 2012).

<sup>22</sup> *See Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 660-61 (D.C. Cir. 2010); *Oryszak v. Sullivan*, 576 F.3d 522, 524-25 & n. 2 (D.C. Cir. 2009); *Trudeau v. Federal Trade Comm’n*, 456 F.3d 178, 190-91 & n.22 (D.C. 2006).

past twenty years, a Section 5 complaint issued by the FTC has been tantamount to a final cease and desist order. According to the FTC Commissioner Joshua Wright:

The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges (“ALJs”) in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed.

(RD 1 ¶ 94) (quoting Joshua D. Wright, Comm’r, Fed. Trade Comm., *Recalibrating Section 5: A Response to the CPI Symposium*, CPI Antitrust Symposium, at 4 (November 2013).<sup>23</sup> See also generally *Schering-Plough Corp. v. Fed. Trade Comm’n*, 402 F.3d 1056 (11th Cir. 2005).

In *Fed. Trade Comm’n v. Standard Oil Co. of California* (“SoCal”), 449 U.S. 232, 239 (1980), the Court held that the administrative complaint in that case was not final agency action. Subsequently, the government raised *SoCal* as a shield against review in *Athlone Indus. v. Consumer Product Safety Comm’n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983). But as *Athlone* made clear, *SoCal* did not apply when an

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<sup>23</sup> This article is available at the website address [http://www.ftc.gov/sites/default/files/documents/public\\_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf). Research by A. Douglas Melamed and Andrew Ewalt for the period 1983 - 2007 confirms Commissioner Wright’s data. Melamed and Ewalt, *The Wisdom of Using the “Unfair Method of Competition Prong of Section 5*, Nov-08(1) GCP, at 21-22 (Nov. 2008) available at [http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/Editorial/Publication/Melamed\\_Nov\\_08\\_1.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Melamed_Nov_08_1.pdf).

agency used an administrative complaint to create jurisdiction beyond its statutory authority.

In [*SoCal*] the Court ruled that the FTC's decision to issue a complaint was not 'final agency action' within the meaning of 5 U.S.C. § 704 (1976). The Court stressed that the agency's "averment of 'reason to believe' that [plaintiff] was violating the Act [was] not a definitive statement of position." The present case is, in that respect, distinguishable. By filing a complaint in the present case, the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction.... Thus, with respect to the issue we address, the Commission has taken a definitive position, and [*SoCal*] is not controlling.

*Athlone*, 707 F.2d at 1489 n.30 (citations omitted).

The D.C. Circuit's holding in *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412-13 (D.C. Cir. 2011) is also instructive:

[*SoCal*] differs from the present case in three key respects. First, unlike in this case, the FTC in [*SoCal*] did not definitively state its legal position....Second, ... [*SoCal*] did not raise a purely legal question that was amenable to immediate judicial review. Whether [*SoCal*] had violated the law – and whether there was a "reason to believe" it had – depended on a large body of unresolved facts, best sorted out by the FTC with its expertise and fact-finding capability. In the presence of disputed facts, the case did not present a fully crystallized "legal issue ... fit for judicial resolution." Granting [*SoCal*]'s petition for review would have been premature: it would have caused "interference with the proper functioning of the agency and [imposed] a burden [on] the courts." Here, by contrast, we face a clean question of statutory interpretation with no disputed facts.... Third, the FTC's enforcement action against [*SoCal*] did not impose the same magnitude of hardship that DOT has imposed on CSI. As the Supreme Court explained, the FTC's tentative determination that [*SoCal*] might be violating the antitrust laws had no significant "effect upon [*SoCal*]'s daily business." Here, however, DOT's legal position cast a shadow over CSI's customer relationships, tainted almost every aspect of its long-term planning, and impaired the company's ability to fend off competitors. Indeed, the very

purpose of DOT's legal pronouncements, accomplished with six other companies, was to prompt CSI to shut down its operations....

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It is clear from [*SoCal*] that courts should take care not to inject themselves into fact-bound agency proceedings that have yet to produce any definitive legal conclusions. But this is not such a case. DOT took a definitive legal position denying the right of GSA contractors to continue operating without certification from the agency. This order imposed a substantial burden on CSI, and the disputed statutory authority underlying the order is fully fit for judicial review without further factual development.

*CSI*, 637 F.3d at 412-13 (citations omitted).

Here, the FTC Complaint and the FTC Order, especially when viewed in light of the empirical data, and the testimony given in the district court, establish that the FTC has taken a definitive legal and factual position regarding LabMD's PHI data security and imposed massive burdens on the company. The FTC's disputed statutory authority to regulate PHI is therefore fully fit now for judicial review without further factual development.<sup>24</sup>

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<sup>24</sup> Interestingly, the concurrence in *Ticor* (the decision wrongly argued by the FTC as blocking review) actually supports the notion that the FTC Complaint was final agency action and that its filing triggered LabMD's right to judicial review. *See Ticor*, 817 F.2d at 754-55 (Green, J., concurring in part) (arguing that to "hold that an agency's exercise of prosecutorial powers is non-final agency action where the exercise of such authority is consistent with the agency's decades-old practice, and where all parties agree that the agency will not and cannot renounce its authority to initiate prosecutions, strikes me as a wooden application of the finality requirement.")

### **III. This Court Should Decide LabMD’s Jurisdictional and Due Process Claims Now**

This Court should address the merits of LabMD’s *ultra vires* and due process arguments now.

This case presents the optimal circumstance for this court to decide issues the district court did not reach because the standard of review is *de novo*, the record is complete and the parties have had ample opportunity to address the issues. *Walter v. Blue Cross & Blue Shield United*, 181 F.3d 1198, 1202 (11th Cir. 1999); *LabMD, Inc. v. FTC*, No. 13-15267-F, at 1 (11th Cir. Feb. 18, 2014) (RD 1-2); *see also Driehaus*, 573 U.S. at \_\_\_ (slip op. at 18) (constitutional review should be heard where the challenge “presents an issue that is purely legal, and will not be clarified by further factual development.”). “As there are no factual issues to resolve and for reasons of judicial efficiency,” this Court should “apply the law to the undisputed facts, rather than remanding this issue for further consideration of the trial court.” *A.N. Deringer, Inc. v. Strough*, 103 F.3d 243, 248 (2d Cir. Vt. 1996).<sup>25</sup>

That this case presents optimal circumstances for judicial review is further demonstrated by the fact that Judge Salas, of the United States District Court for

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<sup>25</sup> *Randall v. Scott*, 610 F.3d 701, 710 n.5 (11th Cir. 2010); *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 967 & nn.7-8(11th Cir. 2007); *Walter v. Blue Cross & Blue Shield United*, 181 F.3d 1198, 1202 (11th Cir. Fla. 1999); *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 209-210 & n.4 (2d Cir. 2000); *Julian v. Bartley*, 495 F.3d 487, 497-98 (7th Cir. 2007).

the District of New Jersey, certified to the United States Court of Appeals for the Third Circuit the key controlling legal issues concerning the authority of the FTC to regulate in the field of data security under the Section 5 “unfairness” prong and whether it has provided adequate notice of what data security practices are required.<sup>26</sup> This appeal raises the same controlling issues of law. This Court should address these issues as well.

**A. The FTC Lacks “Unfairness” Jurisdiction to Regulate PHI Data Security**

This court should skeptically analyze the FTC’s claim of jurisdiction to regulate PHI data security pursuant to its general Section 5 “unfairness” authority in light of the express delegation of authority to HHS to regulate medical service providers. This week, the Supreme Court reaffirmed the principle that an agency may not invoke general authority to broaden its regulatory mandate well-beyond what Congress intended:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”

*Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. \_\_\_, \_\_\_ (2014)(citations omitted) (slip op. at 19).

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<sup>26</sup> June 23, 2014 Mem. Opinion & Order, *Fed. Trade Comm’n v. Wyndham Worldwide Corp.*, 2:13-cv-01887-ES-JAD, DE 203.

In striking down the EPA’s claimed authority to regulate a large universe of greenhouse gas emitters, the Court ruled that the “EPA’s interpretation [of the scope of its authority] is . . . unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” *Id.* The FTC also seeks to bring about an enormous and transformative expansion in its regulatory authority by regulating PHI data security without clear congressional authorization and in contravention of congressional authorization to HHS. (PI Tr. 59:24-60:10, 60:15-61:02, 69:02-13.) As a result, the FTC’s Section 5 interpretation is unreasonable and its broadly claimed authority should be cabined. *Id.*<sup>27</sup>

Section 5 is an older general statute, last amended in 1994. It does not mention data security. That is important because, beginning in 1996, Congress has legislated in the area of data security. It has delegated PHI data security to HHS,<sup>28</sup> and also made very narrow delegations in other parts of the economy to the FTC.<sup>29</sup>

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<sup>27</sup> The EPA’s grab for power was based on the misapprehension that the Clean Air Act compelled a greenhouse gas-inclusive interpretation of permitting triggers, and on a construction of the Act that was at roughly tethered to specific statutory provisions. *Utility Air*, 573 U.S. at \_\_ (slip op. at 14-16, 19-20). Here, the FTC claims the power to regulate by administrative “common law” tens of millions of health care and other businesses based solely on Section 5’s ambiguous “unfairness” language. Such an authorization “falls comfortably within the class of authorizations [the Court] has been reluctant to read into an ambiguous statutory text.” *Id.* at \_\_ (slip op. at 20).

<sup>28</sup> HIPAA was enacted in 1996, and even the FTC admits that it did not claim “unfairness” data-security authority until years later. (RD 1-3 at 8.) The recent

As a matter of law, older general statutes yield to more recent specific statutes. *Federal Trade Comm'n v. A.P.W. Paper Co.*, 328 U.S. 193, 200-04 (1946); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 265 (2007).<sup>30</sup> Furthermore, the FTC must exercise its power consistently with the congressionally enacted administrative structure and the scope of its Section 5 authority must be viewed in the light of other relevant statutes “particularly where

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vintage of the FTC’s claimed Section 5 “unfairness” data-security authority is why the HIPAA Privacy Rule’s Implied Repeal Analysis omits mention of Section 5 but specifically discusses the FTC’s data-security authority under a different, targeted statute. 65 Fed. Reg. 82,462, 82,481-82,485 (Dec. 28, 2000). HIPAA was necessary, in part, because the FTC has never had Section 5 “unfairness” authority over PHI. *Cf. id.* at 82,464 (HHS’s HIPAA rule “establishes, for the first time, a set of . . . fair information practices”).

<sup>29</sup> *See, e.g.*, Fair Credit Reporting Act (FCRA), Pub. L. 108-159, 117 Stat. 1953, as amended by Pub. L. 108-159, 111 Stat. 1952 (2003) (financial institution data security); Gramm-Leach-Bliley Act (GLBA), Pub. L. 106-102, 113 Stat. 1338 (1999) (mandating data-security requirements for and authorizing FTC regulation of financial institutions); Children’s Online Privacy Protection Act (COPPA), Pub. L. 105-277, 112 Stat. 2681-728 (1998) (authorizing FTC regulation of online privacy and security for children). These statutes explicitly authorize the FTC to set and enforce substantive data-security standards, *see* 15 U.S.C. §§ 1681m(e)(1), 6804(a)(1)(C), 6502(b). This list is illustrative, not exhaustive.

<sup>30</sup> The FTC Order claims HIPAA’s enactment in 1996 did not displace the FTC’s control over PHI that lay lurking (though unknown) in the general language of Section 5. (RD 1-3 at 8, 12.) But the recent vintage of the FTC’s claimed Section 5 “unfairness” data-security authority is why the HIPAA Privacy Rule’s Implied Repeal Analysis omits mention of Section 5 but specifically discusses the FTC’s data-security authority under a different, targeted statute. *See* 65 Fed. Reg. 82,462, 82,481-82,485 (Dec. 28, 2000). HIPAA was necessary, in part, because the FTC has never had Section 5 “unfairness” authority over PHI. *Cf. id.* at 82,464 (rule “establishes, for the first time, a set of . . . fair information practices”).

Congress has spoken subsequently and more specifically to the topic at hand.”

*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 133 (2000).

The FTC claims jurisdiction over any practice it deems “unfair” unless Congress “expressly withdraws” that authority. (RD 1-3 at 10.) But that theory of power is untenable. The FTC’s action “may not stand if the agency has misconceived the law.” *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). In fact, the FTC has no power to act against LabMD unless *the FTC* can show specific congressional intent to delegate PHI data security regulatory authority. *See Utility Air*, 573 U.S. at \_\_\_ (slip op. at 19); *La. Pub. Serv. Com. v. FCC*, 476 U.S. 355, 374 (1986) (agency only has powers Congress statutorily delegates to it).<sup>31</sup>

Congress does not hide massive regulatory schemes in statutory mouseholes. *Whitman*, 531 U.S. at 468; *see also Brown & Williamson*, 529 U.S. at 160. This holds particularly true here because the Commission claims broad authority from Section 5’s vague “unfairness” language in the face of both an amended Section 5 designed to end the Commission’s abuse of its “unfairness” authority and a raft of targeted data security statutes. *Accord Utility Air*, 573 U.S. at \_\_\_ (slip op. at 19-20). Simple common sense as to the manner in which

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<sup>31</sup> The FTC may argue that *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) is authority to grab power with *Chevron* deference to defeat judicial review. But the fox-in-the-henhouse syndrome of agencies’ unilaterally expanding jurisdiction beyond that which Congress has given is to be avoided by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority. *Utility Air*, 573 U.S. at \_\_\_ (slip op. at 16-17); *City of Arlington*, 133 S. Ct. at 1869.

Congress would likely delegate a policy decision of such economic and political magnitude as general regulatory authority over the data security of all U.S. businesses reinforces the conclusion that the FTC’s action against LabMD was *ultra vires*. 529 U.S. at 133; *Utility Air*, 573 U.S. at \_\_\_ (slip op. at 16).

But even if the FTC had the power to regulate data security for some businesses using Section 5 “unfairness,” it cannot override HHS and regulate PHI because the Supreme Court has prohibited the FTC from using Section 5 to prohibit conduct permitted by more specific statutes such as HIPAA.

In *A.P.W. Paper Co.*, the FTC sought to use its Section 5 “unfairness” authority to prevent a company from using the words “Red Cross” and the image of the Greek cross on its product packaging. 328 U.S. at 195. While the American Red Cross Act, 36 U.S.C. § 4, prohibited such use, *A.P.W. Paper Co.* was excepted because it had used the words and image before January 5, 1905, the date the statute took effect. *A.P.W. Paper Co.*, 328 U.S. at 196.

Despite the explicit statutory provision permitting the use, the FTC nevertheless issued a cease and desist order pursuant to Section 5. *Id.* The Court rejected the FTC’s action holding:

We cannot lightly infer that this specific right was intended to be swept away under the 1938 amendment to the Federal Trade Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the [American Red Cross Act] becomes a nullity.

*Id.* at 202.

The Supreme Court confirmed this result in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 265 (2007), setting a four-part test to determine when a specific regulatory regime displaces, or implicitly precludes enforcement under, a more general and earlier enacted scheme:

(1) the existence of regulatory authority under the [ ] law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the [two bodies of law in question] would produce conflicting guidance, requirements, duties, privileges, or standards of conduct . . . [and] (4) . . . the possible conflict affect practices that lie squarely within an area [that the more specific regulatory regime] seeks to regulate.

*Id.* at 275-76.

These factors support finding that HIPAA data security regulation is incompatible with, and therefore displaces, the FTC's Section 5 over-regulation. First, HIPAA directly applies and delegates rulemaking and standard setting authority to HHS. Second, HHS has adopted specific rules addressing the same activities that are subject to the FTC enforcement proceeding pursuant to the general Section 5 "unfairness" authority. Third, dual enforcement is resulting in and will continue to result in conflicting guidance and requirements. (*See* RD 19-6 ¶¶ 11-12.) The FTC Order confirms that the FTC interprets Section 5 to impose PHI data security requirements that are different from and on top of those in HIPAA and HITECH. (*See* RD 1 ¶¶ 17, 42-48, 61, 69, 72-73, 79; *see also*

Summary Decision Order at 5.) Fourth, this conflict affects practices that lie directly within Congress’s explicit grant of PHI data security authority to HHS.

Consequently, this court should find the FTC Complaint is *ultra vires* and that judgment for LabMD is appropriate.

**B. The FTC’s Failure to Provide Fair Notice and the Commission’s Failure to Act as a Fair Tribunal Violate Due Process**

Fair notice due process requirements apply here.<sup>32</sup> So does the requirement that the Commission provide fair and impartial process so a respondent may defend itself.

“Fair notice” due process means fair *ex ante* warning of prohibited or required conduct. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A regulatory standard fails to give fair notice if it “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Georgia Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994) (quoting *Connally*, 269 U.S. at 391).<sup>33</sup>

Due process here first required the FTC to state with ascertainable certainty what its “unfairness” PHI data security standards were and how LabMD could

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<sup>32</sup> *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1355-56 (D.C. Cir. 1998) (car recall); *In re Bogese*, 303 F.3d 1362, 1368 (Fed. Cir. 2002) (forfeiture); *PMD Produce Brokerage v. USDA*, 234 F.3d 48, 51 (D.C. Cir. 2000) (license revocation); *Trinity Broad. v. FCC*, 211 F.3d 618, 619 (D.C. Cir. 2000) (license renewal).

<sup>33</sup> The Supreme Court has repeatedly affirmed this principle. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012); *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

comply. *Georgia Pac. Corp.*, 25 F.3d at 1005.<sup>34</sup> Yet, the FTC has never done so, claiming that Section 5’s statutory “unfairness” language alone is all the fair notice due process requires. (RD 1-3 at 16.)

Section 5 does not mention “data security.” It certainly does not prescribe or proscribe PHI data security practices. Therefore, it cannot provide constitutionally adequate *ex ante* notice. *See Connally*, 269 U.S. at 391-95.<sup>35</sup>

Second, the FTC’s complaint against LabMD does not mention, much less cite, any industry standards that LabMD failed to follow. Thus, even if the text of Section 5 did provide adequate notice under the Constitution, the FTC violated due process because its “reasonableness” standard is disconnected from *any* health care industry standards. *See S&H Riggers & Erectors v. OSHRC*, 659 F.2d 1273, 1273, 1280-85 (5th Cir. 1981) (reasonableness standard divorced from objective industry-specific standards violates due process);<sup>36</sup> *see also Fla. Mach. &*

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<sup>34</sup> The FTC Order, (*see* RD 1-3 at 16), cites the following case to claim fair notice: *Trans Union Corp. v. FTC*, 245 F.3d 809, 817-18 (D.C. Cir. 2001) (rejecting a fair notice claim “because of the extremely clear process for clarifying the meaning of the regulation”). Here, however, Section 5 does not mention data security; LabMD could not have obtained guidance or an advisory opinion (RD 1, ¶ 67; RD 1-15 at 52:10-11); and the FTC pointedly refuses even to endorse *any* standards at all (RD 1-15 at 53:9-10). *Trans Union* is factually inapposite and neither controlling nor persuasive.

<sup>35</sup> The district court recognized the serious problems with the FTC’s approach, suggesting that the public would be better served if the FTC abandoned its standardless *ex post* enforcement approach. (PI Tr. 94:14-17, 94:25-95:3, 95:7-15.)

<sup>36</sup> *See Stein v. Reynolds Sec., Inc.*, 667 F.2d 33 (11th Cir. 1982).

*Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120-21 (11th Cir. 1982) (industry-specific standards control).

Third, FTC's Deputy Director Kaufman admitted the FTC lacks any Section 5 "unfairness" data security standards and the FTC has not promulgated data security regulations. (May 12, 2014 Kaufman Tr. at 215:11-15.) Instead, the FTC's contends "[t]he standard is Section 5 and reasonableness' and that a litigation report by Dr. Hill, the FTC's paid academic expert, sets the standards against which the "reasonableness" of LabMD's practices are tested. (*Id.* 203:16-19.) Yet, the FTC cannot to create enforceable PHI requirements through an "expert" report, and then to spring them on LabMD in an enforcement action more than four years after the alleged violations occurred. *S&H Riggers*, 659 F.2d at 1285; *see also Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Finally, the Commission's generation-long practice of rubber-stamping its own complaints, no matter the factual, credibility and/or legal findings made by the administrative law judge, means that its administrative process denies LabMD, and other respondents, their right to a fair hearing before a fair tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). In *Withrow*, the Court held that a fair administrative tribunal "is a basic requirement of due process." *Id.* at 46. The Court began with the premise that "[n]ot only is a biased decisionmaker

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constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.” *Id.* Thus, it concluded that “various situations have been identified in which experience teaches that the probability of actual bias on the part of decisionmaker is too high to be constitutionally tolerable.” *Id.* at 47.

The FTC process, as administered by the Commission, violates LabMD’s due process rights. The Commission has the sole and final authority over contested cases and is unconstrained by the findings made by the trier of fact. As such, the Commission owes LabMD and all respondents a fair hearing. *See Larkin*, 421 U.S. at 46-47. However, it has failed to deliver the basic fairness that due process demands. *See generally Schering-Plough Corp.*, 402 F.3d at 1056. The empirical data demonstrate that for a generation, the Commission has ruled against respondents in every contested case. This suggests a probability of actual bias that is simply too high to be constitutionally tolerable.<sup>37</sup>

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<sup>37</sup> *See supra* at Argument §B(2)(citations omitted). David Balto, former Policy Director of the FTC’s Bureau of Competition recently criticized the FTC’s “unprecedented” winning streak, describing this as “particularly unsettling” because the FTC is “both prosecutor and judge.” David A. Balto, *The FTC At a Crossroads: Can It Be Both Prosecutor and Judge?*, 28 WASHINGTON LEGAL FOUNDATION LEGAL BACKGROUNDER 12, at 1 (Nov. 2013), *available at* [http://www.wlf.org/upload/legalstudies/legalbackgrounder/08-23-13Balto\\_LB.pdf](http://www.wlf.org/upload/legalstudies/legalbackgrounder/08-23-13Balto_LB.pdf) (last visited Feb. 10, 2014). Commissioner Wright, in trying to explain the why the Commission always finds against respondents, said:

## CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court reverse the district court's decision granting the FTC's motion to dismiss and resolve the pure questions of constitutional law and statutory interpretation presented by this appeal.

Respectfully submitted, this 24th day of June, 2014.

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There are a number of hypotheses one might suggest to explain this disparity, but the leading two possibilities are (1) Commission expertise over private plaintiffs in picking winning cases and/or (2) institutional and procedural advantages for the Commission in administrative adjudication that are fundamentally different than what private plaintiffs face in federal court.

*Id.* Given that Commissioner Wright's data showed the FTC is reversed by courts of appeal at four times the rate of federal district judges, he concluded that the "relatively harsh treatment Commission decisions have endured in federal courts of appeal over the same time period relative to the treatment federal district courts have received gives at least some pause to the expertise hypothesis." *Id.*

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the entirety of this brief contains 11,227 words. I have relied on a word-processing system for the word count. I further certify that, other than certain letters in the names of law firms in the signature blocks, this brief has been prepared in a proportionally spaced typeface utilizing 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of June, 2014, the foregoing APPELLANT’S BRIEF was filed in the Eleventh Circuit Court of Appeals using the CM/ECF system. I further certify that electronic copies of the foregoing APPELLANT’S BRIEF were served via the CM/ECF system, and paper copies were served via U.S. Mail to:

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