

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

META PLATFORMS, INC.,

Plaintiff,

v.

THE FEDERAL TRADE COMMISSION,

– and –

LINA M. KHAN, REBECCA KELLY
SLAUGHTER, and ALVARO BEDOYA,
in their official capacities as Commissioners
of the Federal Trade Commission,

Defendants.

Case No. _____

**DECLARATION OF JAMES P. ROUHANDEH IN SUPPORT OF
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to 28 U.S.C. § 1746, I, James P. Rouhandeh, declare as follows:

1. I am a partner with the law firm of Davis Polk & Wardwell LLP, counsel for Plaintiff Meta Platforms, Inc. (“Meta”). I am an attorney admitted to practice law in the State of New York and am a member of the Bar of the United States District Court for the District of Columbia. I submit this declaration in support of Plaintiff’s Motion for Preliminary Injunction to enjoin Defendants from taking further action in the FTC administrative proceeding *In the Matter of Facebook, Inc.*, FTC File No. C-4365 (the “FTC Proceeding” or “Proceeding”) pending resolution of the constitutional challenges asserted by Meta in this action. I have personal knowledge of the facts set forth herein and am competent to testify thereto if called as a witness.

2. Following entry of the Stipulated Order in *United States v. Facebook, Inc.*, 19-cv-02184-TJK (D.D.C. July 24, 2019), the FTC entered the 2020 Order in the FTC Proceeding on April 27, 2020. Meta promptly began implementing its obligations under the 2020 Order,

including by instituting compliance programs and retaining the Assessor to conduct assessments of Meta's programs.

3. Meta invested billions of dollars in designing and implementing the compliance programs required by the 2020 Order, and in facilitating the oversight of the Independent Assessor required by the 2020 Order.

4. The Initial Assessment, covering the first six months of the privacy program, was submitted to the FTC and DOJ on July 1, 2021.

5. Between August 2021 and May 2022, Meta responded to numerous requests from the FTC under Part XV of the 2020 Order relating to the Assessor's findings. Its responses included multiple depositions, hundreds of pages of narrative responses, and nearly 30,000 pages of underlying source material concerning its extensive efforts to design and implement a new privacy program. After completing its responses in May 2022, Meta did not hear further from the FTC concerning these issues for nearly a year.

6. On March 13, 2023, FTC Staff sent letters to Meta stating that the Commission was "considering initiating a proceeding" against Meta and identifying documents that "may be disclosed" in such a proceeding. In subsequent discussions, FTC Staff declined to provide any further details about the proceeding the Commission was considering or to discuss any concerns with Meta.

7. On March 20, 2023, Meta sent a letter to FTC Staff requesting that the Commission follow its typical process and afford Meta an opportunity to engage with senior staff and Commissioners to understand any concerns. FTC Staff declined to do so.

8. On April 6, 2023, Meta sent another letter to the Commission's Associate Director of the Division for Enforcement reiterating its request for "the same opportunity the Commission

routinely provides to companies to engage with senior staff and Commissioners prior to initiating any proceeding.”

9. On April 10, 2023, FTC Staff responded by stating that, “[a]t the present time, we have no further information to share with you.”

10. On May 31, 2023, Meta filed a motion to enforce the Stipulated Order in *United States v. Facebook*. Pursuant to the agreement of the parties on a briefing schedule for that motion, on June 13, 2023, Meta filed a second unopposed motion to extend its time to respond to the OTSC in the FTC Proceeding through November 30, 2023.

11. On November 21, 2023, Meta filed an unopposed expedited motion to extend its time to respond to the OTSC in the FTC Proceeding, which the Commission granted on November 22, 2023. The Commission ordered that, if the District Court in *United States v. Facebook* ruled on Meta’s motion to enforce the Stipulated Order on or before November 30, 2023, Meta would have 14 days after such ruling to respond to the OTSC.

12. On October 17, 2023, the District Court held an oral argument on Meta’s motion to enforce the Stipulated Order. A true and correct copy of the transcript is attached hereto as Exhibit 1.

13. The District Court denied Meta’s motion to enforce the Stipulated Order on November 27, 2023. *See United States v. Facebook, Inc.*, 2023 WL 8190858, at *1 (D.D.C. Nov. 27, 2023). Meta now has until December 11, 2023, to respond to the OTSC.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 29, 2023

Respectfully submitted,

/s/ James P. Rouhandeh

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Counsel for Plaintiff Meta Platforms, Inc.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- - - - - x
 UNITED STATES OF AMERICA, CV No. 1:19-cv-02184-TJK
 Plaintiff,
 v. Washington, D.C.
 Tuesday, October 17, 2023
 FACEBOOK, INC., 9:30 a.m.
 Defendant.
 - - - - - x

TRANSCRIPT OF MOTION HEARING
 HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

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 Zachary Cowan, Esq.
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 Official Court Reporter
 U.S. Courthouse, Room 6722
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 Washington, DC 20001
 (202) 354-3111

Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: This is Civil Matter 19-2184,
3 United States of America v. Facebook, Incorporated.

4 Present for the plaintiff are Katherine Ho,
5 Zachary Cowan, and Lisa Hsiao; present for the defendant are
6 James Rouhandeh and Michael Scheinkman.

7 THE COURT: All right. Well, good morning to
8 everyone, counsel and everyone else alike.

9 We are here for a hearing on Meta's motion to
10 enforce.

11 The way I would like to handle things is simply
12 I've got a bunch of questions. It's, obviously, Meta's
13 motion, and so I'll hear from you all first. I have some
14 questions I want to ask and then I'll give counsel for both
15 sides, frankly, the opportunity to hit any topics we haven't
16 hit.

17 Some of my questions are going to be of the -- oh,
18 how to put this -- just, sort of, the -- almost the -- of
19 the decision tree variety, because the dispute here between
20 the parties, I think, has a number of different places where
21 things -- I could go one way or the other and then the
22 downstream effect of that on your dispute could be
23 dramatically different.

24 So let me invite counsel for -- first of all, is
25 there anything preliminary from either side before we begin?

1 You all have resolved your dispute and we can all go home?

2 No.

3 MR. COWAN: No, Your Honor.

4 MR. ROUHANDEH: No, Your Honor.

5 THE COURT: All right, then. Let me invite
6 counsel for Facebook or Meta to the podium.

7 Very well. So look, I think the -- I think the
8 first -- it's no secret. The question right off the bat
9 that you -- that both sides are going back and forth on, and
10 then I really have to address as a threshold matter, is
11 whether the administrative order, or Attachment A to the
12 stipulated order that I entered -- whether I have
13 jurisdiction over what -- the subsequent administrative
14 order that the FTC entered. If I do, all sorts of things
15 flow from that that are in your favor; if I don't, then my
16 jurisdiction may well end there and that's the end of the
17 question, although I have some additional questions, but my
18 role may be -- may end.

19 So let me start with that. I think we're going to
20 spend a lot of our time on that today. And let me just
21 offer some thoughts after reading all the briefing on that
22 and have you, Counsel, just address these points.

23 As I looked at it closely, you know, what I
24 ordered as far as that Attachment A was simply that your
25 client consent to its entry. I didn't order it -- I didn't,

1 sort of, substantively order the contents of Attachment A.
2 That's number one.

3 Number two, the FTC, as the parties have laid out,
4 had to undertake a -- sort of, a separate process with even
5 some commissioners dissenting and taking the position that
6 they shouldn't enter that order. So it's, sort of -- I
7 think that, to me, suggests that I -- how it could have been
8 part of my order or at least, for purposes of this, how it
9 could have been substantively part of my order, when the
10 FTC's position -- and, I guess, both sides' anticipated
11 position -- was that the FTC would go through its normal
12 process and enter the order if they made the requisite
13 findings [sic]. Obviously, I think, clearly, both sides
14 envisioned that happening, but the FTC -- a number of
15 commissioners felt, no, this wasn't an appropriate order.
16 So that, to me, also suggests that it wasn't part of my
17 order for jurisdictional purposes.

18 And, number three, I -- assuming you're right --
19 Meta's right that, in fact, it was part of my order, I think
20 an implicit part of your position, then, would be that the
21 FTC, sort of, bargained away their ability to make any
22 changes. This is all before we get to whether this is an
23 appropriate modification. Totally separate question. But
24 if Meta -- if the FTC negotiated away its ability to make
25 changes to one of its own administrative orders, it seemed

1 to me that that would likely have been more clearly spelled
2 out.

3 So -- I don't know. Can you address those three
4 points. And, you know, so I'll just -- I think it's,
5 frankly -- these things are more helpful if the judge lays
6 his cards on the table, his or her, and says, "Here's where
7 I am on this. Tell me why I'm wrong or tell me why I'm
8 right." And on that threshold question, look, both sides
9 leverage the facts and the law well in their briefing, and
10 I'm not -- you all have an argument here, obviously, but
11 those types of things -- the points I just laid out are
12 things that make me skeptical of the idea that I have --
13 that for jurisdictional purposes, Attachment A was -- or the
14 administrative order was something that I ordered as opposed
15 to just your client's consent to the FTC entering it.

16 So with that long soliloquy, please proceed.

17 MR. ROUHANDEH: Thank you, Your Honor. Jim
18 Rouhandeh from Davis Polk & Wardwell on behalf of Meta.

19 And thank you for those questions. I think they
20 go right to the heart of this dispute. I think, clearly,
21 the Court can -- reserved jurisdiction in the stipulated
22 order here --

23 THE COURT: Over something.

24 MR. ROUHANDEH: -- of something, and it's clear
25 that the parties and the FTC consented to that. Even in

1 Attachment A, they said "this Court" has jurisdiction.

2 THE COURT: Well, okay. I mean, I know you all go
3 back and forth about that. I'm a little skeptical about
4 whether -- I lay that to the side only because I think
5 it's -- I understand your argument on that. It's a document
6 that was entitled to -- or that was envisioned -- both
7 parties envisioned that would be entered by the FTC. I
8 think it's a little strange to say "this Court." I don't
9 know what to make of that, frankly. I'm not sure it points
10 strongly in either direction, but I take --

11 MR. ROUHANDEH: Well, we --

12 THE COURT: -- your argument --

13 MR. ROUHANDEH: We -- it makes no sense to say
14 "this Court" when they mean themselves. It doesn't --
15 textually and otherwise. And, in fact, the fact that the
16 DOJ is standing here in -- going to stand here in front of
17 Your Honor and say "the Court" means "Commission" is, kind
18 of, stunning. I mean, are -- is the DOJ going to come in
19 this court and every time say they say "this Court," federal
20 district courts are going to have to say, "Now, do you --
21 when you say 'this Court' are you referring to me or some
22 federal agency?" I mean, it's not a -- it doesn't pass the
23 smell test.

24 THE COURT: I don't know that either
25 interpretations make much sense. So I don't know -- I agree

1 with you -- I agree with what you're saying. I also don't
2 know that the other way of interpreting it makes much sense
3 either, but okay.

4 MR. ROUHANDEH: Well, I can come back to that.
5 Let me -- the heart of the question, I think, is they
6 consented to jurisdiction. And that's important in
7 Attachment A because they consented to jurisdiction. We
8 think, when read in light of the other provisions in that
9 agreement, they consented to it. It's not what they usually
10 say. They usually say -- they always say "the Commission."
11 In 2012 -- and it's not -- it's not just a statement about
12 subject matter jurisdiction. The 2012 order said "the
13 Commission" has subject matter jurisdiction. This said "the
14 Court" has jurisdiction. So it's very important, in answer
15 to Your Honor's questions, that there's also an agreement
16 here in addition to a federal order -- federal district
17 court order. But in terms of the federal district court
18 order, the Court did, in fact, say multiple times in the
19 memorandum opinion that the stipulated order was imposing
20 the injunctive relief. And that's very important because
21 the FTC couldn't impose the injunctive relief. So if
22 they're saying Your Honor didn't impose the relief set
23 forward in an administrative order, then there's no valid
24 injunction against Meta.

25 THE COURT: That was going to be another -- my

1 next layer of question. But -- so is it -- and this is
2 something, really, that is beyond my expertise, I suppose
3 you might say. So the FTC is not -- would not have been
4 able to -- let me put it this way. What part of the -- what
5 portion of the provisions in the administrative order do you
6 think the FTC would have been -- it would have been unlawful
7 for them to order Meta without my -- the stipulated order?

8 MR. ROUHANDEH: I haven't looked at it for that
9 purpose, but I think, essentially, there is no -- nothing in
10 there they could order because it is, in effect, an
11 injunction, and the stipulated -- it's -- order that
12 contains Attachment A ordered the monetary relief. The
13 injunctive relief is contained in this Attachment A which is
14 the same thing filed. It's part of Your Honor's order, just
15 to state it plainly. It's the same document. It's the same
16 docket entry. It's the way -- under 65(d), I think, it has
17 to be considered Your Honor's order because you can't refer
18 to -- under 65(d), to other documents as containing
19 injunctive relief. So it is the Court's order. It's part
20 of the Court's order. And it also -- the Court specifically
21 retained jurisdiction. And we know that from the face of
22 the document that we just talked about, but we also know
23 that from your memorandum opinion. In conclusion, Your
24 Honor said "in the event that the parties return to this
25 Court because the United States alleges, once again, that

1 Facebook has reneged on its promises and continued to
2 violate the law or the terms of the amended administrative
3 order, the Court may not apply the -- quite the same
4 deference" --

5 THE COURT: But --

6 MR. ROUHANDEH: -- "in terms of the proposed" --

7 THE COURT: I did --

8 MR. ROUHANDEH: -- "resolution."

9 THE COURT: I did say that.

10 MR. ROUHANDEH: That's pretty clear that if you
11 come back and say that the administrative order is to be
12 violated, you've got to come back to this Court.

13 THE COURT: Sure. Well, you could. I mean, I
14 think -- and that's the point, is that certainly one way for
15 the Government to proceed is to -- if they thought -- any --
16 it seems to me just based on how they proceeded the first
17 time and how they proceeded in the past, they could have
18 approached Meta and said, "We think you violated parts of
19 our administrative order, the renewed one, and we think --
20 we need -- we want to strike a new bargain and go back to
21 the Court and agree on changes to it." So I guess by
22 leaving open the possibility, as I did, that the Government
23 might proceed in that way, the question is -- you're
24 suggesting, for your position to be right, they would have
25 to have proceeded in that way, and I'm not -- I certainly

1 didn't say that or mean to imply it.

2 MR. ROUHANDEH: But there are two reasons why they
3 have to. One is this court's jurisdiction. The federal
4 district court's jurisdiction is exclusive. It doesn't
5 share it with any other body. It certainly doesn't share it
6 with a federal agency.

7 THE COURT: I agree with you. To the extent I
8 have jurisdiction, it has to be exclusive. I don't -- I --
9 I mean, I don't see a world in which -- if that is part of
10 my order -- the question is, is it? But if it is, I don't
11 see how I could amend it and we can have a part of the
12 federal branch -- federal -- the executive branch amending
13 it, as well. I agree with you.

14 MR. ROUHANDEH: Well -- but the second reason
15 why -- the only -- the second issue is that the only place
16 the FTC could come back to enforce that order is this court,
17 the federal district court, and that's because they don't
18 have power. Congress didn't give the Federal Trade
19 Commission the power to both, you know, make that order and
20 then authority to determine whether there's been a violation
21 and impose relief as a result of that violation, because as
22 the Second Circuit has said in -- quoting a United States
23 Supreme Court case -- this is the J.B. Williams case --
24 ordering enforcement, that's the role of the courts. And,
25 as I said, that's -- and, in fact, if you look at Attachment

1 A, it says it, as well; that you've got to come back to this
2 Court. They don't have the authority because it says -- it
3 keys the termination date in Attachment A. It keys it off
4 of the date that the United States or the Commission files a
5 complaint in federal court alleging any violation of this
6 order. It is simply revisionist history to somehow say,
7 "It's our order; it's not the Court's order."

8 And the other overarching point, even if there is
9 any doubt -- and we don't think there is in light of what we
10 said in the briefs and what I've said here today, but we
11 don't think there's any doubt -- but if there was, it's
12 important that this is also an agreement, a settlement, and
13 Your Honor said that it was a finding that Your Honor found
14 that the parties consented to the order and unilateral
15 modification of that order is not permitted. And if they
16 wanted to freely modify it, it should -- the document should
17 have said it, and it didn't say it, so there's no agreement
18 by Meta that it can be unilaterally modified by the FTC on
19 its own initiative, which is what they're doing, because if
20 they were permitted to do that, it would, in effect, deny
21 the benefit of the bargain to Meta. And there's a case in
22 the D.C. Circuit that's very on point, the Salazar case.
23 There, the court actually did modify an order and -- under
24 60(b), and it imposed injunctive relief as a result of that
25 modification under 60(b), which is really where they should

1 have come. They should have come back to this federal court
2 and argued for modification. But the D.C. Circuit reversed,
3 and they reversed because they said that this would -- that
4 imposing new injunctive relief in the guise of modification,
5 that would also deny the enjoined party the contractual
6 bargain it struck in agreeing to the consent decree in the
7 first place which is just another reason why it cannot be
8 that they can unilaterally modify this order.

9 And those two points that this Court has
10 jurisdiction, stated its jurisdiction, the Attachment A
11 states very clearly that this Court has jurisdiction. It
12 doesn't say subject -- the Commission has subject matter
13 jurisdiction. That's what they said in 2012. Now, they're
14 saying -- in 2012, they said "the Commission" has subject
15 matter jurisdiction. This Court -- this one said "this
16 Court" has jurisdiction.

17 THE COURT: But it's so strange -- look, I agree
18 with you. I don't find either reading of the "this Court"
19 super satisfactory, but, you know, to say "this Court" in a
20 document to be filed before the FTC with a caption, right --
21 with the FTC's administrative caption on it, I don't know
22 what to make of that. It's not a, you know -- it's -- it
23 would be strange to refer to another court in a document
24 like that.

25 MR. ROUHANDEH: Well, I --

1 THE COURT: I guess your point is, like, that
2 strangeness is what helps -- is what helps your argument,
3 and I think that's fair, but --

4 MR. ROUHANDEH: Oh, it is unique. I mean, they
5 don't do it very often. In fact, the same day this order
6 was entered on the FTC administrative docket, there were two
7 others that didn't say that --

8 THE COURT REPORTER: Can you please speak into the
9 microphone.

10 MR. ROUHANDEH: Sorry.

11 -- there were two others that didn't say that.

12 But the important point on that is that it must be read -- I
13 mean, it wasn't just filed on the administrative docket. It
14 was filed in this court. So when they filed it in this
15 court -- of -- part of the Court's order, it said "this
16 Court." That made sense. When they filed it into the -- in
17 the FTC proceeding, they didn't change that. That has to be
18 deemed an intentional act. They didn't change that. And it
19 made sense because "this Court," in the context in which
20 this was filed and done -- they couldn't file in their own
21 administrative proceeding until this Court entered that
22 order, and the Court entered that order with them consenting
23 to jurisdiction. And it's more important that that
24 statement, in some ways, appears in Attachment A to this
25 Court's order and it forms part of that -- this Court's

1 order.

2 But the suggestion that it's not part of the
3 Court's order, it really -- it -- that argument by them, it
4 directly conflicts with what the Government said in the
5 consent motion themselves. I mentioned what Your Honor
6 said. They said it, too. They said the stipulated order
7 imposes significant injunctive relief. And, as I said, it
8 directly conflicts with the -- what the Court said. It's
9 how the document was filed. It's one document. It
10 conflicts, by the way -- and this is very important -- that
11 reading conflicts with what the FTC and the DOJ have said to
12 Meta in June of 2022. There, they said that -- they defined
13 "the stipulated order" as "the order" in that letter. And
14 then they said that the mandatory -- and -- that the
15 mandatory provisions of the mandatory privacy program were
16 part of that order. And those orders were found -- that
17 provision is only found in Attachment A. And so the letter
18 makes clear that the injunctive relief is part of the
19 Court's stipulated order, and it was sent on behalf of the
20 DOJ and the FTC.

21 Now, you know, something -- and I would say, also,
22 that this also directly conflicts with how contracts are
23 interpreted. I mean, it's not incorporated by reference.
24 It's an attachment. It forms part of the same thing. And
25 their argument also conflicts with 65(d). It has all of

1 those problems. But what, apparently, happened after June
2 of 2022 when they clearly said that the mandatory privacy
3 program -- which is what Attachment A largely is -- is part
4 of the stipulated order, they had a change of heart, but
5 they have no change in law or facts to change their
6 argument, you know? There's nothing wrong with coming up
7 with creative arguments as long as you have support for
8 them, but there is no support for this. And, as I said,
9 there's no legally binding injunction if it's not part of
10 the Court's order. And why is it part -- why is it not a
11 part of this Court's order? Because it says "Attachment A."
12 But it's part of the FTC's order? It's "Attachment A"
13 there, too, to their order entering this administrative
14 order --

15 THE COURT: And --

16 MR. ROUHANDEH: -- at Attachment A.

17 THE COURT: You know, to be clear, we're all --
18 this is, to some degree, a semantic argument in the sense
19 that we all understand it was attached -- at a minimum, it
20 was an attachment to my order. There's no -- I mean, I --
21 for whatever that means. And both parties anticipated the
22 fact that the FTC would enter it. I -- my -- as a technical
23 matter, I ordered Meta to consent to that document's entry
24 and, clearly, the parties expected that to happen. The
25 question is just whether, for jurisdictional purposes, it is

1 part of my order such that the FTC can't alter it in the way
2 you're suggesting. So I guess, you know, again -- I guess I
3 don't -- I mean, it was attached to the order. We all can
4 see that. But I don't know that that really answers the
5 ultimate question. But proceed.

6 MR. ROUHANDEH: Well, simply because it's --
7 appears on the FTC docket that it's called an administrative
8 order, that alone says nothing about whether they have a
9 right to modify it, and they don't have the right to modify
10 it, and we didn't agree to the modification of it. And it
11 doesn't mean, by entering it, that it imposed the relief in
12 it. They couldn't impose the relief. The difference
13 between Attachment A when attached to Your Honor's order and
14 Attachment A when it's attached to the FTC's covering order
15 is that only Your Honor, only a federal district court can
16 impose the relief that's contained in it. They can't. And
17 there was a reason for them to do it, but I see Your
18 Honor's --

19 THE COURT: And so -- no. And so they don't have
20 the ability to order any injunctive relief?

21 MR. ROUHANDEH: No. They have to come to federal
22 court for that. And there was a reason. The reason -- I
23 mean, I think -- Your Honor may have asked this. I may have
24 missed it. But there was a reason for the administrative
25 order to be filed on the FTC docket. And it's -- there's

1 really two reasons. The first is the 2012 order was being
2 modified and needed to be replaced. And, in fact, these are
3 words right out of the FTC's and the Government's mouth.
4 They said -- when they were seeking Court approval in their
5 consent motion, they said the stipulated order requires
6 Facebook to consent, as Your Honor just said, to the
7 reopening of the FTC's earlier administrative proceeding
8 against it so the FTC -- these are the words -- so that the
9 FTC can replace the 2012 order. So otherwise, we would have
10 a Court order and we'd have an FTC order, and their FTC
11 order would still be on the docket in the FTC. It was never
12 on the docket here. And it had to be replaced. That was
13 one of the two reasons.

14 THE COURT: Why couldn't -- I mean, again, this
15 is -- I don't know how much this weighs in the balance in
16 terms of trying to figure out the answer to the legal
17 question. But why couldn't the parties have just proceeded
18 by saying the FTC was free to vacate that earlier order;
19 right? The 2012 order. You all -- in theory, you all could
20 have put all those -- that injunctive relief in the
21 stipulated order and just had the FTC vacate their prior
22 order; right? I mean, there was no reason why that path
23 wasn't available to the parties; is that fair?

24 MR. ROUHANDEH: Well, I --

25 THE COURT: I mean --

1 MR. ROUHANDEH: You're a step ahead of me --

2 THE COURT: Okay.

3 MR. ROUHANDEH: -- because that's the second
4 reason. The second reason, apart from it replacing -- okay.
5 You could say, "Well, maybe, couldn't have just vacated,"
6 but there's a second reason which is if it's not an
7 administrative order -- well, by filing that as an
8 administrative order, it arguably gave them a remedy they
9 wouldn't have, and that's the remedy that Your Honor talked
10 about where they could come back to this Court to allege
11 violations of the consent decree, and that is these 5(1)
12 powers, and 5(1) -- Section 5(1) says you can come to the
13 court, federal court, and seek civil penalties for an
14 injunctive relief for an alleged violation of that order, in
15 effect. So arguably, it gave the FTC -- and I say
16 "arguably" because I don't want to pre-judge any later thing
17 that they might do -- but it gave the FTC arguably a
18 potential enforcement right that they wouldn't have if it
19 was just a court order. So they could -- it would be a
20 claim that they would bring pursuant to 5(1) and say --
21 which was contemplated by everybody. It was contemplated by
22 them. It was in the Court's memorandum opinion because
23 that's what they argued; that if there was going to be a
24 violation alleged here, they come back to Your Honor and
25 Your Honor would have the power to consider a claim that --

1 for civil money penalties or for an injunction. And
2 otherwise, if they don't have that power, their remedies are
3 extremely limited. So they had every incentive to want to
4 have an administrative order so that they could come back to
5 Your Honor. That's the irony of it. The administrative
6 order was not so that they could proceed unilaterally
7 through an order to show cause process without the consent
8 of the defendant and without Your Honor's consent. It was
9 to -- in order to come back to Your Honor. That was the
10 point of them making it an administrative order, is, "We
11 want to come back," because otherwise their remedies would
12 have been things like 60(b), you know? Very limited
13 potential modification.

14 THE COURT: Well, I don't know that -- so you
15 think proceeding that way would have given them more
16 authority rather than --

17 MR. ROUHANDEH: Oh, yes.

18 THE COURT: -- having all of it before me and
19 coming back to me? Because -- I mean, 60(b) -- well, I
20 haven't --

21 MR. ROUHANDEH: Well --

22 THE COURT: I haven't thought about this, but go
23 ahead.

24 MR. ROUHANDEH: Well, if you think about it,
25 the -- Your Honor's order -- and it's a judgment. It's a

1 final judgment. It's res judicata. You have very limited
2 authority to be able to modify that under 60(b),
3 extraordinary circumstances. And what they said at the
4 time, what Your Honor said at the time is there's a reason
5 why this -- in effect, that this is being filed in an
6 administrative order and that is so that they could come
7 back to this Court and allege violations of it. Otherwise,
8 you can't -- they couldn't come back to this Court. And,
9 maybe, they can't because of res judicata anyway. But
10 that's what they said at the time, and that's what Your
11 Honor said at the time. There was a reason to enter it in
12 order to come back here.

13 The -- I did want to just --

14 THE COURT: I want to --

15 MR. ROUHANDEH: Yeah.

16 THE COURT: Make any other argument you want to on
17 this point, because I do want to move to, sort of, the
18 question of what happens if I -- let's just say -- and I
19 hear you. You've made some points I'm going to go back and
20 look at and strongly consider. But I do want to move to,
21 also, the question of what happens if you think -- if --
22 well, if I think that I don't have jurisdiction over
23 Exhibit-A or the administrative order, however we want to
24 call it. I think the parties seem to suggest -- so we'll
25 get to that in a moment. But any other points you want to

1 make on --

2 MR. ROUHANDEH: Yes.

3 THE COURT: -- convincing me that I do have that
4 jurisdiction?

5 MR. ROUHANDEH: Well, yes. I'm -- and you're
6 saying, then, we would move on to --

7 THE COURT: Yeah, I --

8 MR. ROUHANDEH: -- what? The next step? Okay.
9 Because I --

10 THE COURT: Right.

11 MR. ROUHANDEH: I do want to --

12 THE COURT: Right.

13 MR. ROUHANDEH: -- address that next step --

14 THE COURT: I don't want to move -- but I don't
15 want to move on until you've made any other point you want
16 to on this.

17 MR. ROUHANDEH: Yeah. I think the only other
18 point that I would make is, you know, this Court was very
19 clear in its order -- memorandum opinion about the various
20 roles of the federal judiciary and the executive branch and
21 essentially said, you know, its role is limited to consider
22 this and it's not going to go investigate this. It's going
23 to take what the parties have said and what the agency has
24 alleged and what the parties have settled and take it from
25 there. It's not going to interfere with the executive

1 branch. The -- it's not a favor. It hasn't been returned,
2 let me just say. They're refusing to stay in their lane.
3 And those are lanes -- I don't mean that, you know, as a
4 joke. They refuse to stay in their lane. Those lanes are
5 set forth in the Constitution. And they can't, on their
6 own, enforce a federal court order. It is a federal court
7 order. They have no jurisdiction. Your Honor's
8 jurisdiction -- the federal -- I mean, in some ways, this is
9 a much broader issue than this particular case because it
10 goes to the heart of whether federal jurisdiction is
11 exclusive. And there's no way they get around the fact that
12 they consented to jurisdiction in the stipulated order and
13 that they said that the mandatory privacy program in
14 Attachment A was part of the stipulated order. They said
15 that very clearly in their consent motion and Your Honor
16 made that clear. So I think there's a broader principle at
17 play here that really implicates the protection of federal
18 court jurisdiction.

19 THE COURT: Fair point.

20 MR. ROUHANDEH: But even beyond that, I think, to
21 Your Honor's -- if you move to the next step, it certainly
22 wouldn't --

23 THE COURT: Well, let me just frame the next step
24 as I see it. I -- it wasn't 100 percent clear to me from
25 the briefing, but as I see things, if I don't have that

1 jurisdiction, the question -- I think the next point in the
2 decision tree or the next issue is whether you all have to
3 file -- whether you get to argue this issue about Axon
4 jurisdiction and all the rest before me or whether you have
5 to go file another lawsuit. I -- because it seems to me
6 there's at least a colorable -- there's a case that no --
7 neither party -- I don't think was included in either
8 party's briefing, *Kokkonen v. Guardian Life Insurance*
9 *Company of America*. It's a Supreme Court case from 1994
10 that, I think, at least stands for the proposition that if I
11 don't have -- in that case, it was, again, an issue of -- it
12 was a question of whether a settlement agreement that hadn't
13 been specifically referenced in a judge's order was
14 enforceable through an action -- an action through that
15 original -- the original case in which -- I think it was
16 a -- some sort of consent decree was entered by the court.
17 But the -- putting aside the question of whether the
18 settlement agreement had been, sort of, subsumed into the
19 court's order such that it was enforceable, the court said,
20 "Look, if it's not and if the Court doesn't have
21 jurisdiction that way, it doesn't have any kind of roving
22 ancillary jurisdiction." The cite for that case, by the
23 way, is 511 U.S. 375, a 1994 case.

24 But the point is -- so if I don't have
25 jurisdiction by virtue of -- and I know you're arguing to

1 the contrary, so -- clearly. But if I don't have
2 jurisdiction by virtue of Exhibit-A being my order -- again,
3 I know you disagree and, maybe, I'll be persuaded -- but
4 then it seems to me these other arguments and the question
5 of whether you get to jump ahead and not wait for the
6 administrative process to play out and you get to -- I mean,
7 Axon seems pretty clear to me that at least some of your
8 claims are Axon jurisdiction claims. But the question is
9 that -- is it something you can come to me for or do you
10 have to just go to the courthouse steps and get assigned a
11 random judge and file a new complaint and go that method?
12 So that's my question to you, is what's --

13 MR. ROUHANDEH: We would come to you. But I want
14 to just preface that by one other point which is, if I might
15 make a suggestion, there's one other step before you get
16 from exclusive jurisdiction to the Axon issue, and that is
17 even if Your Honor has doubts about what was intended --
18 and we think it's clear from the record here -- about its
19 own jurisdiction, it -- the second point -- the second
20 threshold point before you even get to the Axon issue is
21 that this is an agreement of -- between the parties and they
22 don't -- they can't establish that they have the unilateral
23 right to make changes on their own initiative. And what
24 they cite is they cite two provisions that allow Meta to
25 seek modification, you know? The parties agreed and the

1 Court allowed Meta to seek modification in two very limited
2 circumstances. There's nothing in there that says the FTC
3 can use their order to show cause process. It's something
4 that they said in the 2012 order. They didn't say it here,
5 and they don't have that right. And if we're going to --
6 just from a contract point of view -- from a contract point
7 of view, benefit of the bargain, we never gave them that
8 right. And, you know, there are thousands of orders --
9 administrative orders that they enter and they all basically
10 say that, because there's a C.F.R. provision that says that
11 respondents must submit -- it's at 2.- -- 16 C.F.R. 2.32 --
12 that respondents must submit -- must agree that a -- the
13 order can be modified by the agency. And here, there's no
14 such agreement. It's not in there. And the only thing they
15 cite to is, ironically, two provisions that say not that
16 respondent could make changes but they --

17 THE COURT: Right.

18 MR. ROUHANDEH: -- can seek changes. So just the
19 benefit of the bargain would be the next analysis, because
20 even if there was a doubt about jurisdiction, there's
21 res judicata. It was agreement. It was a settlement. It
22 was approved. There's a rule, 60(b), as to modifications.
23 And there's federal law that doesn't permit them to enforce
24 it. So I think they're stuck anyway if you look at it under
25 that rubric.

1 THE COURT: Well, don't those -- so the contract
2 argument, it seems to me, is a separate argument than one
3 you've made on the papers; is that fair or not fair?

4 MR. ROUHANDEH: No, I think we made it on the
5 papers.

6 THE COURT: Okay.

7 MR. ROUHANDEH: I think the unilateral
8 modification point, we made it on the papers. I think it's
9 probably because it's more -- a lot of it is in the reply
10 brief because they raised this argument that they could
11 unilaterally modify it and gave some textual arguments. A
12 lot of the discussion is there in the -- is in the reply.

13 THE COURT: Okay.

14 MR. ROUHANDEH: But I think it's really important
15 that these three arguments that they made -- just before you
16 get to Axon, they made three arguments that we don't think
17 have any basis. And the first argument, as we talked about,
18 is, you know, that the Court didn't retain jurisdiction.
19 They basically say, "We didn't" -- they didn't retain -- the
20 Court didn't retain jurisdiction over this dispute because
21 Attachment A is not part of the order. That's the first
22 thing that they say. And then they say "the Court" means
23 "Commission." And then they say that they expressly had the
24 right to modify. Those three issues. They have to win
25 every one of those to survive here. And they made them, and

1 they made them about four pages in their brief, and they
2 just don't hold water. If any one of those fails, their
3 argument fails. If Attachment A is part of the Court's
4 order -- which we think it is; has to be -- they -- their
5 argument fails. If "Court" means "Commission," then they
6 consented to this Court's jurisdiction, again, in the very
7 document that they're saying they have authority over --
8 jurisdiction over. And then if they -- even if they -- they
9 also would have to show -- they also would have to show that
10 they have the right to modify it, and they don't. They
11 don't have -- they -- sometimes they call this an
12 enforcement action. They don't have any right to --

13 THE COURT REPORTER: Speak into the microphone,
14 please.

15 MR. ROUHANDEH: They don't have any right to
16 enforce, nor do they have a right to modify. So -- and
17 unilaterally. So that's where that unilateral modification
18 comes in. They can't do it.

19 But in terms of -- let me just turn to Axon. I --
20 although I know -- forgive me, but I wasn't sure if Your
21 Honor was following me at one point. There was something
22 to --

23 THE COURT: No, no. I --

24 MR. ROUHANDEH: -- suggest -- okay. I just wanted
25 to make sure --

1 THE COURT: I've got you.

2 MR. ROUHANDEH: -- I wasn't going too fast or, you
3 know --

4 THE COURT: No. I think the question of
5 "Court" -- it's a side point. I mean, I think the question
6 of "Court" means "Commission," you can argue, is, sort of, a
7 flavor of the first point or a -- it's evidence one way or
8 the other of the first point, but it's -- I take your point.
9 It's an argument.

10 MR. ROUHANDEH: I mean, we would just urge -- I
11 don't need to spend time on it here -- we would just urge
12 the Court to look at some of the provisions that we've
13 pointed to like the provision that says the Commission is
14 authorized -- the Commission, not the Court, obviously --
15 says the Commission, in Attachment A, is authorized, without
16 further leave of Court, to use the federal discovery --
17 Rules of Civil Procedure. I mean, that -- I know Your Honor
18 said it's not clear, but that's just word salad. It's just
19 word salad if "the Court" means "Commission." What are they
20 saying? The Commission -- if -- is authorized to obtain
21 discovery under the federal rules without further leave of
22 the Commission. It makes no sense, their reading.

23 But in terms of the constitutional arguments, I
24 think there is one that -- well, first, we think, under
25 Axon, we have the -- Your Honor should, in this proceeding,

1 address the constitutional arguments.

2 THE COURT: But -- so address my --

3 MR. ROUHANDEH: Yeah.

4 THE COURT: -- point before we get to those
5 arguments a little bit. Why should it be -- again, just for
6 purposes of argument; I know it's painful -- assuming, for
7 whatever reason, I think I don't have exclusive -- or I
8 don't have jurisdiction in the way you're arguing, it seems
9 to me just at that point, then, why aren't you -- and it --
10 for either way -- even if I think of the right to modify --
11 the contractual, kind of, sounding argument you make --
12 let's just say I don't buy that for whatever reason and we
13 get to Axon. It seems to me, at that point -- I'm not sure
14 I do have jurisdiction to just bootstrap on and, sort of --
15 and address your Axon arguments without that hook into the
16 agreement or the order one way or the other. Is that fair
17 or -- I mean, neither party really talked about this, but it
18 seemed to me that there's -- there is a decision point where
19 I've got to conclude I have jurisdiction one way or the
20 other before I get to Axon.

21 MR. ROUHANDEH: Well --

22 THE COURT: Well, I shouldn't say that. I mean,
23 Axon is a jurisdictional concept, obviously. But whether I,
24 as opposed to any of my colleagues down the hall -- whether
25 I have some sort of reason to have jurisdiction through this

1 suit or whether, you know, you all just have to -- I mean, I
2 know it's not what everyone wants to hear, but it -- a
3 possible outcome is you all just have to go file a new case
4 down the hall and you're going to get an Article III
5 judge -- a district judge, not a circuit judge, to evaluate
6 whether that judge has Axon jurisdiction and whether you can
7 get an injunction through that method.

8 MR. ROUHANDEH: Yeah. I mean, we shouldn't -- I
9 would say that Your Honor does have that jurisdiction.
10 It's -- even -- in some ways, it's both a separate and
11 intertwined point, but there is a separate point under Axon
12 which is that even a -- that the Court has the power to
13 determine whether the agency proceeded in an
14 unconstitutional way and that that -- we've suffered a
15 here-and-now injury by being subjected to an
16 unconstitutional process, an unconstitutionally structured
17 FTC. And that, we think, Your Honor can address and has
18 jurisdiction to address quite apart from the modification
19 issue that they're trying to pursue in the order to show
20 cause process. In some ways, you could say the fundamental
21 question is, can they even, you know, use that
22 unconstitutionally structured process?

23 And I would say that there is one -- there
24 certainly is one argument that, kind of, stands out because
25 it is so intertwined with the facts here and the

1 proceedings, and that is that they are -- and is unique,
2 Your Honor. I understand there's this constitutional
3 avoidance doctrine, but there's also, you know, the thought
4 that you should decide cases where the issue might escape
5 judicial review. And here, there is one that's really, kind
6 of, unique to this case, and that is the Commission's
7 role -- dual role as both prosecutor and judge because of
8 this particular order to show cause process in the
9 particular context that it's in. They have filed -- they've
10 acted as a prosecutor in making allegations of -- about the
11 facts and violations of -- alleged violations of the order
12 and they're acting as -- in the same breath in their
13 adjudicative capacity by find- -- making findings of fact or
14 preliminary findings of fact. I mean, that just means they
15 can make more or change them, but they are findings of fact
16 and that is an adjudicative process and that is, you know --
17 that is sufficient. That's -- that argument that in this
18 case -- you don't have to show actual bias, but in this case
19 you could show actual bias because they are, in fact, acting
20 in both of those two capacities. But in any event, there's
21 a structural bias, as well. But the order to show cause
22 process at well -- as -- in and of itself demonstrate
23 there's actual bias because they're acting as both the
24 prosecutor and adjudicator, and they can't do that. But --
25 and one argument they make is a waiver argument which,

1 clearly, it just does not pass the smell --

2 THE COURT: Yeah.

3 MR. ROUHANDEH: -- test here.

4 THE COURT: I'm -- I've said a lot of things that
5 I said that I've -- that I seem -- I've indicated I thought
6 you had an uphill climb at least on some of this, but
7 I'll -- I don't think that's an uphill climb for you. I'll
8 just say that.

9 MR. ROUHANDEH: Okay. The one other point I
10 wanted to make -- and I would like to reserve some time for
11 a rebuttal, unless Your Honor has other questions now --
12 is --

13 THE COURT: I do, and I will give you -- and I
14 would give you time anyway to respond to anything the
15 Government said. The one other question I wanted to raise
16 is irreparable harm, you know? I think there's a fine line
17 here on -- reading Axon -- Axon was a case in which it --
18 the court found that the district court had jurisdiction.
19 It didn't say there was a -- it didn't reach the issue of
20 whether there was irreparable harm, but it said a lot of
21 things that seemed to suggest that, talking about how it
22 wouldn't -- how the harm couldn't be remedied on the back
23 end of the -- of being subject to an unconstitutional
24 proceeding. On the other hand, you know, it's not just --
25 in order for harm to be irreparable, one of the -- at least

1 in this Circuit, one of the, sort of, aspects of that is
2 that the harm has to be great. And I know there's some case
3 law that says often a constitutional injury is enough to get
4 over the hump, and you'll probably cite that to me, but I,
5 you know -- that is -- I don't know that in a case -- in a
6 situation where we're talking about a procedural injury
7 which is, sort of, like, what you would be arguing here, you
8 find many occasions where courts have found irreparable
9 harm. So I thought -- if you can address that a little bit.

10 MR. ROUHANDEH: I think that is one form. I think
11 there are three forms of irreparable harm. We've talked
12 about all of them, you know? The one is being subjected to
13 this unconstitutional administrative proceeding. Another is
14 that, you know, forcing a party to relitigate a finally
15 decided matter constitutes irreparable harm. I can't
16 emphasize enough that this was an agreement and a court
17 order approving that agreement, and there's res judicata,
18 and having to relitigate those issues, I think, constitutes
19 irreparable harm. And it's also irreparable harm that we'd
20 be -- would be denied the benefit of our bargain. I think
21 that's irreparable harm, as well. So I think we meet the
22 test of irreparable harm for all of the, sort of,
23 substantive arguments or a number of them that we have made.

24 THE COURT: But I guess I would just say as far as
25 relitigating, fair enough, but in terms of the "benefit of

1 the bargain" point, we don't know where that's going to -- I
2 mean, my -- I guess my point is that is something, it seems
3 to me, is totally reparable. In other words, if you're
4 subject to, you know -- we get all the way down this part of
5 the analysis and you all are subject to this proceeding,
6 there's some sort of amended order entered by the FTC. At
7 that point, you can come back and -- you could, in theory,
8 come back and say, "Well, look at what they're subjecting us
9 to. That's so much more onerous. We have now irreparable
10 harm," as opposed to at the beginning of the process where
11 the outcome may not be as certain.

12 MR. ROUHANDEH: Well, I guess what I would say on
13 that is that the irreparable harm comes from failing to
14 enforce, in effect, the agreed-upon bargain that we had.
15 And it can't really be remedied that we would go through
16 this process. I mean, going through the process almost
17 suggests that we don't have that. That's why I say you'd
18 have to establish all three of these things. And they don't
19 have a leg to stand on here where they say they have the
20 right to unilaterally modify this without the involvement of
21 the Court. They can't do that unless they point to some
22 language. That language is there by C.F.R. provision.
23 That's a requirement that they force people to do that.
24 It's not here. It's not what was in the 2012 order. And so
25 denying that, we think, would also be irreparable harm

1 because we wouldn't get the benefit of the bargain; we
2 wouldn't get the benefits of res judicata; and we wouldn't
3 get the benefits of 60(b) which says modifications, you
4 know, should be only given in extraordinary circumstances.
5 We also would -- it would be irreparable harm that, you
6 know, we're subject to an enforcement proceeding that they
7 have no power to engage in, certainly, absent consent, which
8 we didn't provide. And so we're also subject to irreparable
9 harm for that.

10 But on these points, I think I would just say, you
11 know, the clincher here in many respects is what they said.
12 If you look at it from a contract point of view but just
13 also from a point of view of what is actually meant by the
14 agreements, the clincher is what they said to us on June 30
15 of 2022 in that letter to us which essentially said that the
16 stipulated order includes the provisions in the -- of the
17 mandatory privacy program. They treated them as one order.
18 They treated them as your Court -- as Your Honor's order.
19 They defined it as the order and included Attachment A --
20 not just the provisions. Attachment A is defined and is --
21 they use it -- they cite to Attachment A as part of the
22 order, the order's provisions concerning a mandatory privacy
23 program. And then they cite the Attachment A, Sections 1,
24 7, and 15. I mean, it couldn't be any clearer that they are
25 saying that's part of this Court's order, and what they're

1 saying now is completely at odds with that.

2 THE COURT: All right. Thank you. Let me --

3 MR. ROUHANDEH: Thank you.

4 THE COURT: -- give the Government a word in
5 edgewise, and I will give you time to rebut in the opposite
6 direction.

7 MR. ROUHANDEH: Thank you, Your Honor.

8 THE COURT: Thank you. Absolutely.

9 MR. COWAN: Good morning, again.

10 THE COURT: Good morning, Counsel.

11 And, you know, I think we'll just start, again,
12 you know, with the core threshold issue. I laid out some
13 things that I thought tilted the field, sort of, in the
14 Government's favor, at least on first blush, with regard to
15 the question of whether the attachment is -- whether I have
16 jurisdiction over the order entered -- the administrative
17 order, as Meta suggests. But counsel raised some good
18 points -- and I don't need you to address the points I
19 raised with them to just say, "Yes, Judge, you're so
20 right" -- but they raised some points in the other
21 direction, I think, that are worth you addressing, and
22 particularly whether, as a practical matter -- look, all
23 sides thought -- whether, technically, it was part of the
24 order or not, it was clearly part of the parties'
25 expectation that administrative -- that that order would be

1 entered by the FTC and that that was something both parties,
2 you know, bargained for and expected. Why isn't that at
3 least -- even if not technically, functionally, part of my
4 order, what do you make of the great "Commission" versus
5 "Court" debate about the line in that -- in the
6 administrative order? And how would you say I should
7 consider, kind of, how the parties have discussed the effect
8 of the order since then as whether -- when I say "the
9 order," I mean the administrative order -- about why that
10 isn't part -- something -- part of what I ordered?

11 MR. COWAN: Yes, Your Honor.

12 So I think it probably starts to make some sense
13 of why we chose the pathway that we actually did in terms of
14 drafting out the order. So the language in Section 2 says
15 that Meta shall -- well, the defendant shall consent to
16 entry of the stipulated order as attached -- as
17 Attachment A. And, Your Honor, that makes a lot of sense
18 because Section 5(b) of the FTC Act authorizes the Federal
19 Commission -- Trade Commission to enter cease and desist
20 orders and then, again, under section 5(l), just as we did
21 in this lawsuit, we could bring a civil penalties lawsuit to
22 enforce that. So it certainly makes sense -- while Your
23 Honor correctly noted that perhaps we could have included
24 all of the language in the stipulated order itself rather
25 than putting it in an administrative order, by laying it out

1 in an administrative order, I think it authorized the
2 Commission to seek civil penalties under Section 5(1) to the
3 extent that there were some knowing violations in the
4 future. So just wanted to start by giving that bit of
5 context.

6 Your Honor asked about the expectations of the
7 parties.

8 THE COURT: So let me --

9 MR. COWAN: Sure.

10 THE COURT: -- press pause on that, though. So
11 what would be the scenario by which -- so your point is by
12 structuring it this way, you all envisioned the possibility
13 of seeking -- you could seek certain types of penalties
14 through the administrative process if some portion of that
15 administrative order was violated; correct?

16 MR. COWAN: We would come back to the district
17 court.

18 THE COURT: You would come back --

19 MR. COWAN: Under Section 5(1), it would be -- if
20 there were a violation, the United States could seek
21 penalties before the U.S. District Court, is what the FTC
22 Act says.

23 THE COURT: Okay. And that would be the case,
24 though, regardless of whether the case before me existed;
25 right? I mean, in a world in which just -- this is just

1 educating me about your process --

2 MR. COWAN: Sure.

3 THE COURT: -- clearly. Let's say, you know,
4 Company A, you end up having an administrative order before
5 the FTC that lays out what it has to do, and that company --
6 you want to seek those kind of penalties. You -- even if
7 you had no case pending before me or any judge, you would
8 march into federal court and seek those penalties?

9 MR. COWAN: Yes, Your Honor. That's exactly what
10 we did in 2019. There was the 2012 administrative order and
11 the violation, so we came to the District Court to seek
12 civil penalties.

13 THE COURT: Okay. What are you -- what is the
14 Commission permitted to do without seeking -- without the --
15 without the authority of an Article III court?

16 MR. COWAN: So Section -- I mean, the FTC Act, of
17 course, encompasses a lot of rights, but just to be
18 particularly clear here, Section 5(b) of the FTC Act does
19 authorize the Commission, upon notice and opportunity for
20 hearing, to issue an administrative cease and desist order
21 commanding a corporation to refrain from engaging in some
22 practices -- unfair and deceptive trade practices. It also
23 expressly provides that -- under Section 5(b), that the
24 Commission may alter, modify, or set aside, in whole or in
25 part, one of those administrative orders to the extent that

1 it was necessary for changed circumstances or for the public
2 interest.

3 THE COURT: All right. Very well. Continue.

4 MR. COWAN: So essentially, Your Honor, as I
5 understand Meta's position here, it is, essentially, that
6 the parties have hidden, essentially, an elephant in a mouse
7 hole. "This Court has jurisdiction," in its view,
8 essentially means that the Commission has given up any right
9 it has to ever exercise a statutory authority under Section
10 5(b) to alter or modify its order in the future. This --
11 that argument is essentially inconsistent with other parts
12 of the administrative order which expressly recognize that
13 the Commission can modify the order again under certain
14 circumstances. It --

15 THE COURT: And this is all -- just for both
16 parties, this is all before -- in being somewhat skeptical
17 that the Commission can't do this -- I want to, I guess,
18 underscore the fact that that's entirely separate -- when I
19 say "do this," I mean make some amendment -- that's entirely
20 separate from the question of whether, in this case -- what
21 the FTC purports -- is purporting to do is appropriate under
22 the limitations that are placed on their ability to modify
23 the order; right? I just want to make that clear. I'm
24 not -- I mean, I know that's part of the arguments you all
25 have before me, but there are many decision points I would

1 have to pass before I would get to that. And by being
2 skeptical here, I just want to make clear I'm not
3 necessarily suggesting either way that the FTC has the
4 ability to do the specific things it's trying to do here.

5 MR. COWAN: Sure, Your Honor. And to decide
6 whether the Commission would have to do that, they should be
7 given the opportunity to develop a record associated with
8 that, and that gets into Axon and we can --

9 THE COURT: Right.

10 MR. COWAN: -- leave those aside. I think there's
11 a few more questions, I mean, really focusing on this
12 jurisdiction matter which is where I see the Court's
13 interest. Counsel's made a few more points that I want to
14 address.

15 THE COURT: Please.

16 MR. COWAN: He makes much of the 20-year filing
17 point that, essentially -- that the 20 years would
18 recommence if there was a filing of the complaint. I also
19 want to point out that same language was in the original
20 2012 administrative order, as well. And at that time, there
21 was no federal court case involved. So I'm not sure that
22 really points one way or another except to say that the
23 parties had negotiated an extension of time to the extent
24 that the FTC were to file another case in federal court for
25 the -- how long the administrative order would apply.

1 THE COURT: Where is that language? Oh, that's in
2 the administrative order.

3 MR. COWAN: That's right. It was in the 20- -- so
4 the language is part 14 of the 2020 administrative order and
5 it's also, I believe, the last section of the 2012
6 administrative order, as well.

7 There's also this point about 65 -- Federal Rule
8 65(d) and whether that has been violated in some way. Rule
9 65(d)(1) requires that the injunction specify in reasonable
10 detail exactly the acts that are restrained or enjoined or
11 required of the party.

12 That actually makes a lot of sense in terms of
13 including Attachment A. If Meta was going to be ordered to
14 consent to an administrative order, it makes sense for the
15 Court to be very clear precisely what Meta is being ordered
16 to consent to. So by including Attachment A, as Your Honor
17 recognized already -- I mean, Attachment A is serving a
18 purpose to the stipulated order -- is making very clear
19 precisely what Meta is being ordered to consent to by the
20 Court in connection with this civil penalties lawsuit.

21 THE COURT: Right. I think -- I agree that it --
22 just because it was attached doesn't necessarily mean -- I'm
23 not saying who's right, but it's -- as you say, it serves a
24 purpose even if it's not part of my order in a formal sense,
25 because they'd have to know what they're -- what I'm

1 ordering them to consent to.

2 MR. COWAN: And I think the last point that they
3 made -- this came up on reply, and I think Your Honor
4 touched on it, but just for the point of clarity -- there is
5 injunctive relief in the stipulated order, as well. And the
6 injunctive relief, most importantly for this hearing, is
7 that Meta shall consent to entry of the administrative
8 order. That is the injunction.

9 So I think those are the main points that counsel
10 hit. I don't know if Your Honor has more questions in this
11 first tier.

12 THE COURT: Well, I mean, I think -- I guess
13 you -- we haven't discussed the -- or, maybe, we did, but I
14 don't know -- I don't think you raised the issue of how --
15 what -- that language in the administrative order about the
16 court having jurisdiction, what should I make of that?

17 MR. COWAN: So I would say, Your Honor, I think
18 we've laid an argument out. It sounds like Your Honor may
19 be skeptical about "this Court." I mean, it --

20 THE COURT: I don't -- I -- as I said to Meta's
21 counsel, I don't find either side's explanation that
22 understandable or that -- frankly, that -- not --
23 "understandable" is not the right word. I don't know that
24 either one of them is a very satisfying explanation for what
25 the parties meant by that, but --

1 MR. COWAN: Well, so Your Honor could even, if you
2 wanted to -- for the same reasons we discussed, you could
3 find it to be a scrivener's error if you find that to be
4 more persuasive. I mean, what's clear from the stipulated
5 order is that it's the first finding, and the sentence is
6 immediately preceded by "the Commission makes the following
7 findings and issues the order." So you know, on reply,
8 co-counsel -- my friend also mentions several other orders
9 that were issued that say "the Commission has jurisdiction
10 that day." I mean, if those orders were to even have said
11 "this Court has jurisdiction," there would be no question
12 what that would have meant. I think it's -- essentially,
13 Meta is recognizing that there was a judicial action using
14 that as a way to advance the argument here, but all
15 together, I just don't think that language can accomplish
16 essential- -- what Meta is alleging is a complete ceding of
17 authority to modify any administrative order in one sentence
18 which has plenty of other possible readings.

19 THE COURT: What about the argument -- maybe you
20 were about to get to this; I'm not sure -- but before we get
21 to the question of what you think I should do -- what the
22 next step is if I think I don't have jurisdiction, but for
23 the -- let's stick on the last point that counsel raised
24 about, kind of -- the, sort of, quasi-contractual argument
25 that this was really an agreement between the parties; it

1 resolved certain claims, you know, et cetera, et cetera; and
2 that, yes, they agreed to -- I ordered them, as part of that
3 agreement, to stipulate to -- to consent to the entry of
4 that administrative order, and yet -- and now, you all are,
5 sort of, changing the bargain in some way that is unfair to
6 them. It's not what they bargained for.

7 MR. COWAN: Well, Your Honor, I think it's
8 important to recognize there, is that the statute always
9 allowed for the administrative order to be modified. Meta
10 has sophisticated counsel and has had sophisticated counsel
11 throughout the history of these negotiations. To the extent
12 they wanted to try to have the Commission bargain away its
13 right to exercise its statutory authority, they should have
14 done that in a way that was express and clear, not by trying
15 to point to one line that says this Court has jurisdiction
16 to do that. And my last point, again, just to emphasize,
17 again, Your Honor, the authority to modify is actually laid
18 out in the administrative order in Part 2 and Part 3. So
19 it's clear that counsel was aware of that.

20 THE COURT: Well, at least one of those, as I
21 recall the parties going back and forth about, in part -- I
22 marked it up on another copy. At least one of them was
23 talking about Meta's right --

24 MR. COWAN: That's correct.

25 THE COURT: -- to modify; correct?

1 MR. COWAN: Well, Your Honor, I think it's talking
2 about particular -- both Part 2 and Part 3, one talks about
3 Meta's -- certain obligations with respect to sharing of
4 information, and one talks about obligations with respect to
5 deletion of information. I think there could be a question
6 about whether or not those sorts of factual circumstances
7 would be sufficient to modify an administrative order
8 without some language of clarity to that -- in that way. So
9 I certainly would understand if Meta wanted to include
10 language to that nature to be clear that this might be a
11 factual circumstance in which it could seek modification.
12 That doesn't change the statute, and that doesn't change the
13 Supreme Court's or the D.C. Circuit's explanations that we
14 just presume that statutes are built into contracts --

15 THE COURT: Okay.

16 MR. COWAN: -- and stipulated orders.

17 THE COURT: Okay. So let's move to the next
18 point, which is --

19 MR. COWAN: Sure.

20 THE COURT: Again, I'm not sure this was super
21 clear from either side's briefing. But what's the
22 Government's position on -- again, if I agree with you on
23 the -- at least the issue of whether I have jurisdiction in
24 the sense that I have jurisdiction over the administrative
25 order or over Attachment A, however you want to put it, if I

1 agree with you on that point, do I move right to an Axon
2 analysis or is there some intermediate step by which I have
3 to say, "Actually, I think I don't really have any kind of
4 ancillary or pendent jurisdiction" -- or I'm not even sure
5 how you would phrase it, but, basically -- and this would
6 be, I'm sure, frustrating to all the parties if it is the
7 right answer -- but that really what happens -- what has to
8 happen is Meta has to go and file another lawsuit and,
9 maybe, it will be assigned to me, but, maybe, it will be
10 assigned to one of my colleagues, and that -- whoever it's
11 assigned to would go through the issue of whether there's
12 Axon jurisdiction at this point.

13 MR. COWAN: Thank you, Your Honor.

14 The Government, essentially, in its brief, laid
15 out two different ways that addressed that exact question.
16 So the first one, I think, is Section 3(c)(1) of the
17 Government's opposition. And, essentially, the point that
18 we're making there, to just really summarize for you, is
19 that this case is about the particular pleadings that were
20 filed in this matter. There's not been any pleadings that
21 have challenged the agency's actions. And it doesn't seem
22 appropriate to seek an injunction about unrelated conduct in
23 a civil penalties lawsuit that resolved in 2019. So I think
24 that's the first way we would frame it.

25 THE COURT: Well, isn't that -- that's a --

1 that's, kind of, the waiver argument; right?

2 MR. COWAN: Well, so I think there's different
3 ways you could look at it. So the question they -- could
4 they file a new lawsuit and raise these same actions, I
5 think we would argue at that point -- and we could -- and we
6 argued here as well -- that that would be waiver. But even
7 putting that aside -- putting the waiver argument aside, the
8 first question here is, is this the appropriate lawsuit to
9 be filing this -- in the first place? And the pleadings
10 here were about Meta's actions in 2019 and before. It's not
11 about the Commission's actions or its decision to modify
12 now. It just seems outside the scope of what this lawsuit
13 was about. And so, for those reasons, I -- in our briefing,
14 we framed it two different ways: One that it just -- an
15 injunction would not be appropriate because it would be
16 outside the scope of the pleadings; and another way that we
17 framed it is it's a -- you could even move to -- you could
18 strike those arguments as a failure to follow the normal
19 chain of briefing. It, essentially, has nothing to do with
20 this lawsuit.

21 THE COURT: Right. Isn't -- okay. So isn't --
22 flowing from "this has nothing to do with this lawsuit" is
23 they need to file another lawsuit. I know you're not in the
24 business of giving opposing counsel, you know, legal advice.
25 But isn't that the implication of what you're saying?

1 MR. COWAN: That is the first argument we made.

2 Yes --

3 THE COURT: Okay.

4 MR. COWAN: -- Your Honor. And, to my knowledge,
5 I didn't really see a response to that except to say it was
6 a formalism. But the other argument we did make, Your
7 Honor, about Axon is Axon is fundamentally a question about,
8 when can you invoke a District Court's federal question
9 jurisdiction to hear certain challenges? And we made very
10 clear in a slightly different way of framing it that they
11 never invoked the Court's federal question jurisdiction at
12 all. It was the Government that invoked the Court's
13 jurisdiction to deal with Meta's action. It wasn't Meta.

14 THE COURT: Yeah. I'm not sure -- okay. But --
15 okay. I mean, I guess these are different -- again, we're
16 in a world, for purposes of our discussion here, in which I
17 don't have jurisdiction over that administrative order, or
18 it's not part of my order, however you want to frame it.
19 And I guess these are different ways of saying -- I mean,
20 there's a whole line of case law I don't think either side
21 cited also where, you know, when you're talking about coming
22 in, asking for a preliminary injunction, you're talking
23 about, what is the likelihood of success on the merits? The
24 merits are the merits of the lawsuit. And so that's
25 another, kind of, disconnect -- however you want to put

1 it -- between -- because you don't get to say "the merits of
2 my motion." It's the merits of the lawsuit. And there
3 really aren't -- I mean, that's another disconnect that
4 suggests it has to be through a different lawsuit.

5 MR. COWAN: That's right, Your Honor. And we did
6 cite a few cases towards the end of our brief. This
7 particular circumstance doesn't come up very often. But
8 there are a few instances where District Courts have
9 considered this and say, "Well, you can't have a -- merits
10 on a closed case. You can't be successful on those merits."
11 So we would -- the Government would also agree with that.

12 THE COURT: I mean, I had it come up in another --
13 a different kind of -- it was an open case recently, but
14 long story short -- and it was the plaintiff -- it was also
15 the plaintiff in the case. So again, that's a little bit of
16 a different situation here. It was the plaintiff. The
17 plaintiff came in and said, "I want this" -- lack of a -- "I
18 want this other relief," that really was pretty far
19 disconnected to the merits and -- so I had occasion to wade
20 into this.

21 All right. So tell me about -- so that's your
22 position on where things are. Tell me on -- tell me
23 about -- I mean, the two other things I think it's worth you
24 addressing are the Axon issue, because I do think whatever
25 you want to say -- I mean, they -- Meta throws a lot of

1 arguments at you here and I don't, you know -- and I -- it
2 seems hard for me to accept that at least some of them
3 aren't of the Axon variety. That's number one.

4 And number two is your position on the irreparable
5 harm point I mentioned earlier which is, you know, it's just
6 interesting, reading Axon. They say some things that are
7 certainly suggestive of there being harm that is literally
8 irreparable in the sense that the proceeding can't be undone
9 when you're arguing being subject to the proceeding is
10 harmful. That, I think, was more along the lines of, like,
11 injury for jurisdictional purposes is what they meant, but
12 they, I think, may have used the word "irreparable" or
13 something close to that. But on the other hand, that's not
14 the kind of injury typically that courts will find
15 irreparable harm for purposes of an injunction.

16 MR. COWAN: And, Your Honor, I'll start with the
17 irreparable harm, if that's okay, because it's a little bit
18 more straightforward. I completely agree with the Court's
19 analysis and, in fact, the D.C. Circuit said in Morgan
20 Drexen, dealing with a very similar case that predated Axon
21 Free Enterprise that was essentially a question about
22 resolving the question of jurisdiction, not a question about
23 the Court's equitable power and whether something would
24 constitute the need to issue an injunction. So I think the
25 D.C. Circuit is completely in line with the Court's reading

1 there.

2 THE COURT: How would you distinguish -- I mean,
3 there is a line of cases that say a constitutional violation
4 is irreparable harm in some circumstances. And some of
5 these arguments are arguments about constitutional
6 violations. So how would you distinguish that line of
7 cases?

8 MR. COWAN: Well, I think, Your Honor, the answer
9 to that would be a lot of these cases actually, on this
10 irreparable harm analysis, predated Axon. This isn't the
11 first type of question about whether you get to immediately
12 go to court and seek an injunction. And there's just always
13 been a slight heightened standard in terms of, you know --
14 the question is exactly what, you know, will happen in front
15 of the agency proceedings, and courts just haven't always,
16 as a matter of right, issued injunctions every time it's
17 possible that someone could allege some form of irreparable
18 harm and --

19 THE COURT: Well --

20 MR. COWAN: And, of course, there's Winter as
21 well, Your Honor, which stands for the proposition that an
22 injunction is never granted as a matter of right, also.

23 THE COURT: Well, obviously, all those things are
24 true, but -- I mean, okay. All right. Fair enough. I
25 mean, I think -- I, you know -- if I get to this -- if I get

1 down the road this far, there are cases that suggest that
2 irreparable harm -- that a deprivation of a constitutional
3 right can be irreparable harm. I don't think -- to me, just
4 from memory, a lot of them are -- because the parties didn't
5 go super deep into this in their briefing -- a lot of those
6 are -- the -- I don't recall that ever being the case in a,
7 kind of, procedural -- where the injury was procedural, and
8 that may be, kind of, the difference.

9 MR. COWAN: You're right, Your Honor, and it was a
10 very short discussion in the briefing. It wasn't a focus of
11 Meta's argument. And so we -- essentially, their main point
12 was that this here-and-now injury would be sufficient to
13 constitute irreparable harm, and the D.C. Circuit
14 essentially said, no. And so we responded to that.

15 THE COURT: Okay.

16 MR. COWAN: So I mean, perhaps they could make
17 other arguments, but they failed to do so in their briefing.

18 THE COURT: Okay. And backpedal to where you --

19 MR. COWAN: Sure.

20 THE COURT: -- wanted to --

21 MR. COWAN: Sure.

22 THE COURT: -- end up.

23 MR. COWAN: Yes. In terms of Axon, Your Honor, as
24 we, sort of, have grouped them, there are, in fact, a lot of
25 arguments. We, sort of, bucketed them in three categories.

1 THE COURT REPORTER: Speak into the microphone,
2 please.

3 MR. COWAN: Of course. Yes.

4 There are essentially three types of arguments. I
5 think what I would -- we've qualified them as the scope
6 arguments; so whether these scope modifications are
7 sufficient on the -- or justifiable on the record or based
8 on the statutory authority to do that. There are the
9 procedural arguments essentially claiming that the
10 Commission is going to deprive Meta of all of its procedural
11 rights, make it carry the burden of proof, not give it an
12 opportunity for discovery. And then there are a third
13 bucket which are the more -- claims that we have qualified
14 as structural claims. And I think the structural claims,
15 Your Honor, we sought leave from you to have my colleague,
16 Ms. Ho, argue those. But dealing with, first -- to the
17 extent that you have any questions on those, we could
18 certainly have Ms. Ho address those. But to deal with the
19 scope and the procedural arguments, the statute as to the
20 scope, Section 5(b) is very clear that the Commission can
21 alter, modify, or set aside, in whole or in part, its order.

22 THE COURT: Let me just ask you this. You agree
23 that the only -- or let me ask you if you agree. The scope
24 and procedural -- would you characterize those -- the first
25 two of those buckets as, sort of, non-Axon buckets and the

1 third as one that is an Axon or is it not so clean?

2 MR. COWAN: Well, I think there's a bit more
3 nuance when it comes to the structural arguments, but I
4 think it's very clear that the scope and procedural
5 arguments, just sticking to Axon, then, for Your Honor, are
6 not the type of Axon challenges. And the Axon opinion is
7 very clear that courts are continuing -- that the -- they're
8 not seeking a new-found desire to bring every case
9 immediately into court. And there's this discussion that it
10 says those procedural decisions and evidentiary decisions,
11 those sorts of questions are the kind of questions that
12 courts favor reviewing alongside the final decision. And
13 that makes sense, Your Honor, because these are fact-bound
14 questions. These are the kind of questions that the
15 Commission should have the opportunity to apply its
16 expertise to determine whether, you know -- what, you
17 know -- it -- the Commission runs proceedings all the time.
18 It has its own administrative proceedings. It certainly is
19 familiar with its rules and how they should apply in
20 different circumstances.

21 And so it seems that it would be -- applying Axon,
22 the Court would want to give the agency an opportunity to
23 apply its expertise and to make those fact-bound decisions,
24 and also to have the benefit of some discussion from Meta
25 and to determine what's appropriate in light of what -- how

1 Meta responds, for example, to the order to show cause.

2 THE COURT: All right. I don't need to hear -- I
3 mean, I think where we are in this, I don't need to hear the
4 merits of the structural arguments or, frankly, even the
5 merits of the scope or procedural arguments. I mean, I'm
6 more interested in just hearing -- which you just laid
7 out -- kind of, which seemed to fall into which -- whether
8 they seem like an Axon argument or not an Axon argument for
9 the time being.

10 MR. COWAN: Sure.

11 THE COURT: Very well. Thank you.

12 MR. COWAN: Thank you, Your Honor.

13 THE COURT: Let me have counsel for Meta with
14 anything you'd like to say in rebuttal. You will -- this
15 will be a question-free period from me.

16 MR. ROUHANDEH: Okay. Thank you, Your Honor.

17 THE COURT: Well, maybe I shouldn't promise that,
18 but at least at the outset.

19 MR. ROUHANDEH: Maybe I shouldn't say thank you,
20 because I like -- I -- certainly, it's helpful to get
21 questions from Your Honor so we know what to focus on.

22 If the party -- if the FTC could have come back to
23 Your Honor -- and they most assuredly could, and I think
24 that's been recognized in the memorandum opinion and I think
25 Your Honor said it here today -- and if the Court has

1 jurisdiction -- if the Court's jurisdiction is exclusive, we
2 would submit that that's the end of the inquiry. If the
3 Court has any jurisdiction, it's exclusive.

4 And it's also important just to note here that the
5 FTC could not have ordered any injunctive relief to resolve
6 the complaint that they wanted to bring.

7 THE COURT: When they said -- they said earlier --
8 counsel said earlier they could order -- they can order a
9 company to cease and desist.

10 MR. ROUHANDEH: Yes.

11 THE COURT: Okay. So that's -- I mean, whether
12 you count that as injunctive or not -- but in any event,
13 they can do that.

14 MR. ROUHANDEH: They can do that.

15 THE COURT: They can't do anything else --

16 MR. ROUHANDEH: They can't do anything else.
17 Anything else would have to be by agreement of the parties,
18 including the other thing that they mentioned which is
19 modification.

20 But it is 13(b) and 5(1) that --

21 THE COURT: Well, hold on. Modification -- I
22 don't -- I want to make sure --

23 MR. ROUHANDEH: Well, there -- the injunctive
24 relief -- oh, I'm sorry.

25 THE COURT: I just want to make sure I didn't

1 misunderstand you. They don't need consent to modify?

2 MR. ROUHANDEH: Oh, no. They do need consent to
3 modify. They require, in effect -- in this case, because
4 this is a contract, they need consent to modify --

5 THE COURT: Okay.

6 MR. ROUHANDEH: -- certainly --

7 THE COURT: It --

8 MR. ROUHANDEH: -- and because they --

9 THE COURT: To the extent --

10 MR. ROUHANDEH: -- didn't insist in the agreement
11 that we mod- -- that we agree to modification.

12 THE COURT: Sorry. I didn't mean that. And I
13 understand, to the extent it's an order before me, they
14 would need that, but -- or some other way of proceeding. In
15 a typical case in which you only had an FTC -- an
16 administrative order, they've laid out the process they
17 would go through in which -- in another case, saying -- not
18 your client -- they wouldn't need consent; is that -- that's
19 fair; right?

20 MR. ROUHANDEH: Well, I'm not sure about that.
21 I'm not sure it's presented here. But actually, there is a
22 C.F.R. provision that suggests that they believe they need
23 consent because they say that the respondent shall agree.
24 Like, they won't settle unless the respondent agrees to
25 modification. And that's a critical point because we did

1 not agree to that. That provision is not in this order.
2 It's in the 2012 order. On its face, it's plain as day in
3 the 2012 order that there was -- modification was agreed to.
4 It said on Page -- I guess, in Paragraph 6, "When so
5 entered, the order shall have the same force and effect and
6 may be altered, modified, or set aside in the same manner
7 and within the same time provided by statute for other
8 orders." And that is part of the agreement, and it was not
9 part of this agreement. They need to -- I guess the one way
10 to look at it is they need to find a source of the ability
11 to modify on their own --

12 THE COURT: Well, their --

13 MR. ROUHANDEH: -- because they don't have a --

14 THE COURT: Their argument is -- however far it
15 gets them -- is that they -- I mean, I guess that's why I
16 just asked you that prior question -- is that they can do
17 that -- that they have procedures to modify and that, I
18 guess -- and this -- I'm glad we hit on this -- is, I
19 think -- I don't know what they'd say about whether they can
20 do it unilaterally, but they have, by statute, by
21 regulation, whatever, a process by which they can modify an
22 administrative order. I understand you -- in this case,
23 it's different. Your arguments relate back to the order
24 before me and all the rest. But they picked up on what --
25 where -- one of the places I started, which is -- and,

1 maybe, your argument here is showing me that, maybe, this
2 is -- it's not so cut and dry -- but it does seem like a
3 pretty big item for them to bargain away without any
4 explicit knowledge of it that we cannot modify this.

5 MR. ROUHANDEH: Well, I -- Your Honor, I would say
6 that, both on a contract level and otherwise, it's not our
7 burden to negotiate it away. It's their burden to find
8 authority for the illegal action that they're taking which
9 is unilateral modification. And it's interesting. What
10 they argued in their brief was this argument that because we
11 could seek modification, that gave them a right to
12 unilaterally modify on its own initiative.

13 THE COURT: I --

14 MR. ROUHANDEH: That doesn't work. The other
15 argument they make -- the other argument they make is they
16 cite two cases. They cite Dolcin -- I believe it's Dolcin
17 and Ruberoid. And they say inherent in the authority of the
18 FTC is the power to modify its own orders. Those cases --
19 D.C. Circuit -- I think it was a D.C. Circuit and a Supreme
20 Court case, but those cases, the Ruberoid and Dolcin cases,
21 what they actually say is a respondent came in and said this
22 order is invalid because what it does is it doesn't permit
23 me to engage in lawful pricing -- you know, I think one was
24 for medical services and one was for something else -- and
25 the courts there said, no, no, the order doesn't have to

1 spell out everything that you're permitted to do. That's
2 the case they rely on to say it's in their inherent
3 authority to modify. And they don't have -- and also, the
4 language of C.F.R. 2.32 -- it would be totally superfluous
5 to say, "You've got to agree to modification." If they have
6 that right, they wouldn't need that agreement, and they
7 certainly didn't get that agreement. And that's -- it's
8 very interesting. The cease and desist and the
9 modification, that's what they listed. If you look at 5(l)
10 and 13(b), injunctive relief, civil money penalties have to
11 come through those provisions, and those provisions require
12 the federal court. So I think that that was an admission,
13 in fact, when counsel for the Government said their powers
14 are cease and desist, and they can also modify orders, and
15 we would agree under certain circumstances this is just not
16 one of them which is also a contract.

17 And, you know, it's interesting that the view of
18 Your Honor's order that we have put forth was actually, in
19 part, at issue in the Northern District of California in a
20 case a couple of years ago, this BrandTotal case, and there
21 the court had reason to say that -- I won't bore you with
22 the details of the case, but it basically said that it was
23 looking at the 2012 version of the order and it said that
24 version, while the original 2012 version of the FTC order
25 was issued unilaterally, the operative version issued on

1 April 27, 2020, reflects a stipulation between the FTC and
2 Facebook in a judicial enforcement proceeding. And I think
3 that's the reading that -- that squares with our view of
4 Your Honor's order that it was -- and, in fact, the case --
5 the complaint that they filed in front of Your Honor was
6 pursuant to 5(l) and 13(b). They couldn't seek that in the
7 form of an administrative order. I mean, basically, what
8 they're saying is, you know, we'd -- we, you know -- we came
9 here after 17 months of negotiation and we said we're coming
10 to federal court because we need a federal district court
11 order to get this relief and that we don't have the ability
12 to enforce orders on their own. That's, in essence, what
13 they did and why they came here. And they want to forget
14 all that and say, "We'll take it from here," and that's just
15 not permitted, and especially if this Court has
16 jurisdiction, that jurisdiction is exclusive, and they could
17 have come to this Court; that should end the inquiry.

18 But I wanted -- I did want to just -- also,
19 modifying the administrative order would put it at war with
20 this Court's order, because the modification says that the
21 FTC has the unilateral right to select the assessor. Your
22 Honor's order --

23 THE COURT: I -- so we hadn't -- tell me what you
24 think -- I understand this argument. What does it --
25 like -- so let's just assume I -- it's only an interesting

1 thing to think about if I disagree with you on the other
2 point. So if that's all I was left with, right, is that
3 there is -- I think you pointed out two different ways in
4 which, even if -- if I considered only my order, you know --
5 the only thing to be my order, the actual text of the
6 stipulated order as opposed to the -- you do have -- I think
7 it was two different ways: choosing the assessor and --
8 there was one other thing. What's the downstream, you
9 know -- what is the impact of that?

10 MR. ROUHANDEH: I think the order should be
11 vacated.

12 THE COURT: The show-cause order?

13 MR. ROUHANDEH: I think the order should be -- I
14 think Your Honor's order would be vacated and the FTC's
15 order would be vacated, because absent Your Honor there's no
16 power to enter any injunctive relief, and what we're saying
17 is that that's a separate order -- there had to be a
18 statutory, legal, constitutional basis for them to do what
19 they did, and they imposed -- with our consent, they imposed
20 injunctive relief improperly. They're not permitted to do
21 that. They can't impose judicial -- they can't enforce it
22 and they can't impose injunctive relief. I think the upshot
23 of that is there is no valid order binding Meta, and if we
24 did not get the benefit of the bargain, then the deal should
25 be unwound. It's a contract. It's a deal. It's a

1 settlement. That's a key component of -- every piece of it
2 was a key component as negotiated. You know, they're big
3 boys in the government. They know how to say when you can
4 modify an agreement, and they didn't say it. That's why
5 they're so -- that's why they say -- that's the reason they
6 point to --

7 THE COURT: We'll stipulate that both sides are
8 sophisticated parties in this proceeding. You may proceed.

9 MR. ROUHANDEH: They could have, you know -- they
10 could have brought a -- they -- they are desperate to find
11 some source of modification and they haven't found it yet.
12 That's why they say it's inherent and they cite these two
13 cases, inherent in the -- every FTC order, and that's why
14 they make this argument that, "Well, it says Meta can ask
15 for modification and that must mean we can modify it, too."
16 And they don't include the language on modification that
17 they include in every other order. This language doesn't
18 have it. And they know what that means. They know what
19 that means if they can't get past that argument and they can
20 unilaterally modify -- and the -- that would allow them to
21 unilaterally modify it, then it's dead in the water and they
22 have to come back to Your Honor.

23 THE COURT: All right.

24 MR. ROUHANDEH: One wonders -- and also, one
25 wonders why they don't come back to Your Honor. What Meta

1 is entitled to here is -- they've never proven the
2 allegations of their complaint. And we've never admitted
3 them. And they haven't proven anything. And they are
4 slapping one attempt on top of the other to now use that
5 prior order, which was a settlement and an agreement and the
6 four corners of a document that included Attachment A, to
7 say they can do whatever they want. They can order changes
8 in the structure of the board. They can seriously limit its
9 business. That's -- that is illegal, contrary to federal
10 law, and violates this Court's order. It's also
11 unprecedented. This, you know -- that -- I just would
12 continue to point out here that the settlement is a contract
13 and that -- and we're entitled to res judicata on it and
14 they can't modify it on their own.

15 And I would also argue that -- and I'll come to
16 the Axon point. Just one other -- two points. The heart of
17 the argument here, in addition to unilateral modification,
18 is that this is the only forum for enforcement. They have
19 no ability to enforce and it's the only forum for
20 modification. And that's what they're trying to escape.
21 And unilateral modification, we say, would do two things.
22 This was a three-part -- there were three parties involved:
23 the federal district court, Meta, and the Government. And
24 what they're trying to do would usurp -- at the same time
25 usurp this Court's jurisdiction and it would deny Meta the

1 benefit of the -- of its bargain.

2 And as to this -- as to the Axon issue, the D.C.
3 Circuit's decision in Alpine addressed -- this was the case
4 that I -- on irreparable harm. I think I said cases support
5 that the -- our reading that an unconstitutionally
6 structured adjudication is -- subjecting one to that is
7 irreparable harm. And the case is Alpine, D.C. Circuit,
8 2023 WL 4703307.

9 And as to the Kokkonen case, there's no question
10 that -- this goes to your -- the jurisdictional issue.
11 There's really no question that there's -- that the Court
12 has original federal question jurisdiction over an Axon
13 issue. That's not a matter of --

14 THE COURT: Right.

15 MR. ROUHANDEH: Right.

16 THE COURT: No, no. Right. That's why I said
17 it -- yes, I understand that --

18 MR. ROUHANDEH: Okay.

19 THE COURT: -- obviously.

20 MR. ROUHANDEH: Finally, Your Honor -- unless Your
21 Honor has other questions, there's one final point I wanted
22 to raise, and that is this -- currently, Meta is under a
23 November 30th deadline to respond to what we've said is an
24 improper procedure. And, I guess -- obviously, we have no
25 interest in Your Honor rushing itself to render a decision.

1 And so if there's not going to be a decision by November
2 30th, we would request, you know, some injunction while
3 that -- while your court -- while Your Honor is considering
4 the issues here.

5 THE COURT: So -- very well. Here's what I'll
6 say. I do -- you raised two points that, I think, I want to
7 hear the Government address, but on this last point, look, I
8 think, it's -- first of all, let me just say, I appreciate
9 that -- I guess it's really the Government, in whatever
10 form, has pushed off that deadline a few times. We've had a
11 busy few months around this courthouse, and a busy year.
12 And so it's very helpful for me to get up to speed and be
13 able to hear you all out here today that this didn't ripen
14 whenever it originally was scheduled to ripen, I think,
15 earlier in the summer. I -- look, I think there's every
16 likelihood that I'll have you a decision, I think, well
17 before that date. If, for some reason, something comes up
18 that might prevent that, I would reach out to the parties to
19 see what the possibilities are as far as extending that
20 further or whatnot, but I appreciate -- again, I think it
21 was the -- I appreciate the set of circumstances that
22 allowed me to consider this on the schedule I have, but I --
23 and I will let you all know if, for some reason,
24 November 30th seems like a date that's unrealistic.

25 MR. ROUHANDEH: Thank you, Your Honor.

1 THE COURT: Okay. Let me just hear -- can I hear
2 counsel for the Government respond to two points that Meta
3 made.

4 One was just this issue about modification
5 language. I think what was represented was that in -- and
6 you'll -- someone can correct me if I'm wrong, but that
7 typically there is modification -- and, maybe, even in the
8 2012 order, but there's typical language in some of these
9 administrative orders that, basically, I think, as I heard
10 it, suggests that, you know -- that more specifically
11 recognize the FTC's modification authority and that that
12 language was not in this particular -- was not negotiated in
13 this particular order. So I guess that -- that's the first
14 thing. Is that correct? Did I have that right?

15 MR. COWAN: So there is a regulation, Your Honor,
16 that says something to the effect of you would include
17 language of that nature, but that particular provision, to
18 my recollection, is connected with issuing an administrative
19 order in the first instance. It's not necessarily having to
20 have -- get that recommitment every single time that the
21 modification -- there's a modification that's done. So yes,
22 Your Honor, that language was, in fact, in the original 2012
23 administrative order that was issued. At that time, Meta
24 did agree that the order could be modified. It's unclear to
25 me why Meta thinks that the fact that that language wasn't

1 included in the modification, that that's now -- the FTC's
2 relinquished that right when it has already agreed and
3 consented to the fact that the Commission can modify the
4 order.

5 THE COURT: Well, I don't know. That's -- if --
6 to the extent I came out of the box with the argument
7 that -- or to the extent one might say that, gee, it --
8 there would have to be something more explicit to suggest
9 that the Commission had bargained away this power, if indeed
10 it did, that strikes me as a thing for them to rely on and
11 at least argue to me; isn't that fair?

12 MR. COWAN: So I think there are three more
13 responses, Your Honor.

14 THE COURT: Okay.

15 MR. COWAN: You know, the first, I would say this
16 argument wasn't raised in their opening brief. The second
17 that I would say is it would be troubling if every time
18 there was an order that was entered, you would have to cite
19 every particular regulation or statute that would be
20 required for enforcement purposes. I mean, presumably, a
21 litigant could, then, try to take that and make an argument
22 that they are not subject to any other things besides what's
23 precisely in there. And I think that's what's really
24 animating the Supreme Court and the D.C. Circuit's reasoning
25 in Dolcin and Ruberoid, which is, you know, we're going to

1 presume the statutes are built into every order.

2 THE COURT: Okay.

3 MR. COWAN: And I would think, you know -- again,
4 just, once more, I would say that if they wanted to build
5 that right in, they had sophisticated counsel; they could
6 have done more than simply relied on the fact that that
7 language was omitted.

8 THE COURT: I mean, okay. I mean, they're making
9 that point, you know -- they're aiming that argument
10 directly at you on this point and so -- but I hear you. I
11 hear you. Both parties are sophisticated. Both parties
12 could have been clearer. Sometimes sophisticated parties
13 decide -- on one side or the other -- decide that lack of
14 clarity is what they want.

15 MR. COWAN: Sure.

16 THE COURT: Anyway, the second point is this issue
17 of -- that, again, didn't come up until I heard from counsel
18 in rebuttal, which is there are, I think, two things that
19 were raised in the briefs that, even if you assume, right --
20 you know where I'm going here. Even if you assume that the
21 attachment is not what I ordered --

22 MR. COWAN: Sure.

23 THE COURT: -- that the proposed modification
24 would make it inconsistent with the other parts of my
25 core -- the stipulated order. What should I make of that?

1 MR. COWAN: So a couple of things, Your Honor.
2 Again, that was raised in the procedural history section of
3 their brief. It wasn't raised in argument. But to --

4 THE COURT: Not sure -- okay. But --

5 MR. COWAN: But regardless, Your Honor, what's --
6 that's pointing to Section 3 which talks about the rights of
7 a -- the assessor. And so essentially, the way that
8 language was crafted, it says that the DOJ shall have,
9 quote, the same rights as the FTC would have under the
10 administrative order. And it's worth pointing out until the
11 FTC actually entered the administrative order, neither party
12 had any rights whatsoever. Neither the FTC nor the DOJ had
13 any rights. In fact, Meta recognized the same thing at
14 ECF 29 at 7 -- specifically says that the administrative
15 order would become effective upon the date of the
16 publication on the Commission's website as a final order.

17 So up until that point, there were no rights
18 whatsoever under the administrative order and, therefore,
19 the same rights for the DOJ would be no rights. To the
20 extent that there's some modification at some point or
21 another, it could go back to the pre-administrative order
22 status quo. Now, exactly what that might look like could
23 depend upon what the modifications look like, and I think
24 that would be a fact-specific question that ultimately would
25 depend on how the Commission approaches modifying the

1 administrative order.

2 THE COURT: But it does create a situation where,
3 at least if I buy a certain -- well, either way, it is one
4 party to the proceeding here acting to create a situation
5 that would be -- that could be and is proposed to be
6 inconsistent with -- I mean, undeniably, inconsistent with
7 my order. That's -- there's no running from that; correct?

8 MR. COWAN: I actually don't think it's
9 inconsistent, Your Honor, because it says it would be the
10 same rights. And, again, before the FTC actually enacted
11 for itself the administrative order, there were no rights.
12 So it's a parity provision to make sure whatever rights the
13 FTC would have under the administrative order the DOJ would
14 also have.

15 THE COURT: I see.

16 MR. COWAN: And so --

17 THE COURT: Okay.

18 MR. COWAN: I mean, the other reason, just to be
19 clear, why that language would be included and it would make
20 sense to include that at Section 3 in the stipulated order
21 rather than the administrative order, Your Honor, the DOJ is
22 not typically a party to the FTC's administrative --

23 THE COURT: Right.

24 MR. COWAN: -- proceedings. And so --

25 THE COURT: I get why it --

1 MR. COWAN: Sure.

2 THE COURT: -- originated, but there is a -- I
3 guess there's two different things. One of them, as I
4 recall -- look for it in the briefing here -- was about
5 whether -- it was -- it seemed -- it was about whether a
6 particular party had exclusive -- oh, let me find it. I
7 thought there was an issue about who would have, for
8 example, exclusive authority to choose the assessor and
9 that --

10 MR. COWAN: That's right.

11 THE COURT: -- that -- and that -- so -- and that
12 the -- I don't see it here. And any rate, you think for
13 both of those -- look, I'll look at it and I'll figure out
14 whatever I think about it. But the point is, you think
15 it -- you don't think it would create anything different
16 because it's simply -- it's a -- as you say, it's a parity
17 provision.

18 MR. COWAN: I think that's right. And I would
19 also say, even to the extent that Your Honor has found some
20 inconsistency there and thought a stipulated order required
21 DOJ to have some say in the assessor, it's not clear why
22 that one requirement would, then, mean that the FTC could
23 not the change its administrative order in any way, shape,
24 or form based on that one affirmative obligation.

25 THE COURT: I take your point on that.

1 Is there any -- let me just conclude by saying --
2 remind me the procedural mechanism by which the -- which
3 the -- I guess the -- the -- Meta's obligation to respond to
4 the show-cause order -- that's something that the FTC simply
5 put off a number of times; is that right?

6 MR. COWAN: I think -- if my recollection is
7 correct, the regulation requires a response in some period
8 of time, and they've asked for a continuance, and the
9 Commission --

10 THE COURT: Has granted it.

11 MR. COWAN: That's right.

12 THE COURT: Okay. So I'll say, again -- you heard
13 me -- what I said to Meta. I think I should be able to get
14 an opinion out to you all before -- well before
15 November 30th. If I think that's not going to happen, I'd
16 have you all get on a conference call and talk about
17 whether -- the possibility that could be extended once more.
18 I don't anticipate it now, but I will let you all know if I
19 think that's appropriate. And, again, I thank the
20 Government for extending that --

21 MR. ROUHANDEH: Your Honor -- for just a moment --
22 there were two representations --

23 THE COURT REPORTER: I can't hear you.

24 THE COURT: Hold on one second. I'm not -- it
25 doesn't -- representations that things were not in the brief

1 or were in Section 1(a) and not 1(b) are not material. So
2 I'm not going to hold it against you no matter where it was
3 or was not in your brief.

4 MR. ROUHANDEH: I just wanted to that say they are
5 in the brief --

6 THE COURT: All right.

7 MR. ROUHANDEH: (Inaudible.)

8 MR. COWAN: To the extent I misspoke, I do
9 apologize for that.

10 THE COURT: All right. Thank you all for your
11 time and the parties are dismissed.

12 MR. COWAN: Thank you, Your Honor.

13 THE DEPUTY CLERK: All rise.

14 (Proceedings concluded at 11:26 a.m.)

15 * * * * *

16 CERTIFICATE OF OFFICIAL COURT REPORTER

17 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify
18 that the above and foregoing constitutes a true and accurate
19 transcript of my stenographic notes and is a full, true and
20 complete transcript of the proceedings to the best of my
21 ability, dated this 19th day of October 2023.

22 /s/Timothy R. Miller, RPR, CRR, NJ-CCR
23 Official Court Reporter
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