ORAL ARGUMENT SCHEDULED FOR JANUARY 9, 2018

No. 17-5128

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL J. DAUGHERTY and LABMD, INC.,

Plaintiffs-Appellees,

v.

ALAIN H. SHEER, in his individual capacity and
RUTH T. YODAIKEN, in her individual capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE CAUSE OF ACTION INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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Dated: November 13, 2017

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES AND RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellees.

Rule 26.1 Corporate Disclosure Statement

Amicus Curiae CoA is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Pursuant to D.C. Circuit Rule 26.1(b), CoA further states that it is a nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, inter alia, appearing as amicus curiae before federal courts. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellees.

C. Related Cases

This case has not previously been before this Court. *LabMD, Inc. v. FTC*, No. 16-16270 (11th Cir.), is a related case within the meaning of Circuit Rule

28(a)(1)(C), as it involves substantially the same parties and similar issues. It remains pending before the Eleventh Circuit.

Respectfully submitted,

/s/ Michael Pepson
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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other Authorities

GLOSSARY OF ABBREVIATIONS

ALJ……..……FTC Chief Administrative Law Judge D. Michael Chappell

CEO……...Chief Executive Officer

CFTC…….U.S. Commodity Futures Trading Commission

CID……..Civil Investigative Demand

Commission Opinion…… Opinion of the Commission, *In re LabMD*, Dkt. No. 9357 (July 28, 2016), stayed sub nom., *LabMD v. FTC*, No. 16-16270-D (11th Cir. Nov. 10, 2016)(SA055-067)

FBI……Federal Bureau of Investigation

"FTC" or "Commission"……...……..Federal Trade Commission

FTC Act……Federal Trade Commission Act, 15 U.S.C. §§ 41-58

EAJA……...…Equal Access to Justice Act

Initial Decision…….……...Initial Decision, *In re LabMD*, No. 9357 (Nov. 13, 2015)(SA001-054), vacated by Opinion of the Commission, (July 29, 2016), stayed sub nom., *LabMD, Inc. v. FTC*, No. 16-16270-D (11th Cir. Nov. 10, 2016)(SA055-067)

IG……....Inspector General

Issa Letter……..Letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, to Hon. Kelly Tshibaka, Acting IG, FTC, (June 17, 2014), http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-17-DEI-to-Tshibaka-FTC-IG-LabMD-Tiversa.pdf

JA……Joint Appendix

OB……..Defendants-Appellants' Opening Brief

OGR……..Committee on Oversight and Government Reform, U.S. House of Representatives

OGR Report…….STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015), *available at* https://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf

PI Tr…….Preliminary Injunction Hearing Transcript, *LabMD v. FTC*, No. 1:14-cv-810-WSD, Dkt. No. 30 (N.D. Ga. May 7, 2014), https://www.ftc.gov/system/files/documents/cases/150612labmdmtn.pdf#page=37

RB…….Plaintiffs-Appellees' Response Brief

SA…….Supplemental Appendix

Trial Tr. ……...Trial Transcript, *In the Matter of LabMD, Inc.*, FTC No. 9357

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Cause of Action ("CoA") is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government misuse of power by, inter alia, appearing as amicus curiae. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA has a particular interest in challenging the Federal Trade Commission's ("FTC" or "Commission") overreaching enforcement of Section 5 of the FTC Act, 15 U.S.C. § 45. CoA has defended businesses, including LabMD, against FTC enforcement actions in federal district and appellate courts, *see*, *e.g.*, *LabMD v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014), *aff'd*, 776 F.3d 1275 (11th Cir. 2015); *FTC v. D-Link Sys.*, No. 3:17-cv-00039-JD, 2017 U.S. Dist. LEXIS 152319 (N.D. Cal. Sep. 19, 2017), and before the

[1] Undersigned counsel and CoA previously represented Appellee LabMD pro bono before the Commission and in related federal litigation. A party's former counsel authored this brief in whole or in part; no party nor any party's current counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus's counsel contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. CoA filed its notice of intent to participate as amicus curiae and representation of consent on October 24, 2017.

Commission, *see, e.g., In re LabMD*, FTC No. 9357. CoA has also represented pro bono a group of doctors who chose to speak out as amici about the real-world harms the FTC has caused the medical profession. *See* Doctors' Amicus Br., *LabMD v. FTC*, No. 16-16270-D (11th Cir., filed Jan. 3, 2017).

SUMMARY OF ARGUMENT

This case in simple.

It is never permissible for federal law enforcement to retaliate against citizens or businesses for exercising their First Amendment rights, no matter how vigorously law enforcement may disagree with or is offended by the speaker's message. Every "FTC line attorney[]," *see* OB 2, knows or should know this. Defendants agree that it "is unquestionably true" that the "'right[] to criticize the actions of the federal government without fear of government retaliation [is] as clearly established as can be.'" OB 35 (citing JA 107). Yet, as alleged in the Complaint,[2] Defendants knowingly violated Appellees' First Amendment rights anyway, making a calculated decision to punish them for speaking out.

The Complaint alleges a straightforward First Amendment retaliation claim actionable under *Bivens*: LabMD's CEO, Michael Daugherty, publicly criticized the Defendants' abusive investigation of LabMD. In response, Defendants retaliated by

[2] All well-pleaded factual allegations in the Complaint should be accepted as true at this stage. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009).

ramping up the investigation to harm LabMD; bamboozling the Commission into authorizing an administrative prosecution based on false pretenses and stolen files; and then continuing to retaliate against LabMD throughout the enforcement action (including by subpoenaing its CEO's book drafts and allegedly importuning the creation of false evidence for use against LabMD). Defendants' conduct led to the destruction of LabMD, formerly a thriving cancer-detection business supporting numerous jobs. That is a plausible *Bivens* claim. Therefore, Appellees should be entitled to discovery and the opportunity to make their case on the merits.

This is underscored by documents referenced in the Complaint and other matters properly subject to judicial notice further illuminating Defendants' conduct. For example, it is no accident that Sheer's symbiotic relationship with a third party all agree fabricated false evidence and provided perjured testimony for use against LabMD was a focal point of a 100-page congressional report: STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015)("OGR Report").[3] Nor is the FTC Chief Administrative Law Judge's ("ALJ") detailed rejection of this "evidence," critique of Defendants' investigation and reliance on this third party, and dismissal of the

[3] https://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf

Complaint.[4] It is no coincidence that the Chairman of the House Oversight and Government Reform Committee ("OGR") specifically requested that the FTC Acting Inspector General ("IG") investigate Defendants' role in the Commission's receipt of a stolen LabMD file through a shell entity, the "Privacy Institute."[5] There is a reason why a U.S. District Judge admonished the FTC for monitoring Mr. Daugherty's website—including 75 visits the day after Mr. Daugherty posted a blog criticizing Defendants.[6]

And if Defendants' multiyear persecution of LabMD was truly as by-the-book as they suggest, *see* OB 6-9, then an Eleventh Circuit panel would not have told FTC counsel at oral argument that "the aroma that comes out of the investigation of this case is that Traversa (sic) was shaking down private industry with the help of the FTC," noting Tiversa's "falsifications to the Commission," *see* RB 18-20 & n.3. As

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[4] Initial Decision, *In re LabMD*, No. 9357 (Nov. 13, 2015)(SA001-054), vacated by Opinion of the Commission, (July 29, 2016), stayed sub nom., *LabMD, Inc. v. FTC*, No. 16-16270-D (11th Cir. Nov. 10, 2016)(SA055-067).

[5] Letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, to Hon. Kelly Tshibaka, Acting IG, FTC, at 4 (June 17, 2014)("Issa Letter"), http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-17-DEI-to-Tshibaka-FTC-IG-LabMD-Tiversa.pdf

[6] *See* PI Tr. 19:13-28:12, *LabMD v. FTC*, No. 1:14-cv-810-WSD, Dkt. No. 30 (N.D. Ga. May 7, 2014), https://www.ftc.gov/system/files/documents/cases/150612labmdmtn.pdf#page=37

the panel observed, this "should have become obvious after you–after the evidence collapsed and your—and complaint counsel couldn't go any further." RB 19.

Defendants attempt to deflect this Court's attention from the disturbing *factual* allegations in the Complaint by offering a sanitized rendition of events coupled with new *legal* arguments. But Defendants are wrong that the statute under which LabMD was investigated and prosecuted—the FTC Act, 15 U.S.C. §§ 41-58—somehow displaces *Bivens*. The FTC Act's text, structure, and history confirm the availability of a *Bivens* remedy to hold accountable rogue FTC agents who violate clearly established First Amendment rights. Defendants' new "special factors" arguments—raised for the first time on appeal—cannot change this, even if considered by this Court.

The District Court should be affirmed.

ARGUMENT

I. THE FTC ACT DOES NOT DISPLACE *BIVENS* OR IMMUNIZE FIRST AMENDMENT RETALIATION

In an effort to evade accountability, Defendants wrongly seek to use the FTC Act, which they wielded as a sword against LabMD, to shield their actions from judicial review,[7] *see* OB 3, as the FTC has successfully done before, *see LabMD v. FTC*, 776 F.3d 1275, 1279-80 (11th Cir. 2015).

[7] Contra Defendants, OB 21 n.6, to the extent it could, LabMD raised its First Amendment retaliation claim to the Commission, which squarely ruled on it. Order

Defendants first suggest that the "FTC Act's administrative and judicial review scheme," OB 20, forecloses a *Bivens* action here. Defendants are wrong. Courts apply a familiar test to determine whether a *Bivens* remedy is available, asking first "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages"; and second, whether "any special factors counsel[] hesitation[.]" *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Here, the FTC Act, 15 U.S.C. §§ 41-58, simply does not provide an "alternative remedial structure," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). And no purported "special factors" weigh against holding "FTC line attorneys," OB 2, personally liable for violating First Amendment rights they admit are clearly established, generally, quibbling only as to the degree of factual specificity, *see* OB 35 (citing JA 107).

A. The FTC Act Does Not Preclude *Bivens*

Congress may expressly preclude or allow a *Bivens* remedy in a federal statute. *See Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Koprowski v. Baker*, 822 F.3d 248, 252-53 (6th Cir. 2016). Congress did not do that here. Defendants do not contend otherwise. Therefore, it is necessary to look to evidence of congressional

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Denying LabMD Application For Stay of Final Order, No. 9357, 2016 FTC LEXIS 180, *11 (Sept. 29, 2016)(ruling on merits of retaliation claim). As discussed in Sections I.B.1 and II.C, FTC Rules and precedent do not contemplate a First Amendment retaliation defense and bar discovery necessary to substantiate it.

intent in the FTC Act's structure and history. *See generally Koprowski*, 822 F.3d at 252-53.

1. Structure

The FTC Act's structure confirms that it does not displace *Bivens*, particularly as to First Amendment retaliation claims relating to the pre-Complaint investigation and issuance of the Complaint.

The FTC Act is a statute under which the FTC investigates and prosecutes companies for, inter alia, allegedly "unfair" practices. *See* 15 U.S.C. § 45(a)-(b). It is not designed to provide a remedy to individuals and companies aggrieved by FTC staff, as the District Court noted. JA 91-92. Defendants' suggestion that the statute utilized by Defendants to destroy LabMD somehow insulates them from accountability should be rejected.

Defendants contend that because the FTC Act permits respondents to raise certain constitutional defenses before the Commission subject to review in a U.S. Court of Appeals, a *Bivens* action raising a First Amendment retaliation claim arising out of the FTC's precomplaint investigation and enforcement action cannot lie. *See* OB 2. Not so.

Limited judicial review of a final Commission cease-and-desist order is available in a U.S. Court of Appeals, *see* 15 U.S.C. § 45(c), which has exclusive jurisdiction upon the filing of the record, *see* 15 U.S.C. § 45(d). But "15 U.S.C. §

45(c) only gives courts of appeals authority to review 'an order of the [Federal Trade] Commission to cease and desist….'" *LabMD v. FTC*, No. 13-15267-F, 2014 U.S. App. LEXIS 9802, at *1 (11th Cir. Feb. 18, 2014).

As a practical matter, this means that only some constitutional defenses may be plausibly channeled through the FTC Act review scheme, as the District Court found. *See* JA 90. For example, respondents in FTC administrative enforcement actions may argue that an FTC "deception" claim or the terms of a notice order violate the First Amendment by banning truthful commercial speech. *See, e.g., POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499-500 (D.C. Cir. 2015) (addressing this type of First Amendment claim on petition for review). *Cf.* OB 20 (citing precisely these sorts of cases). Likewise, respondents may argue that imposition of liability violates due process. *See, e.g., Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966)(biased Commissioner). These types of defenses can be meaningfully addressed on review of a final order.

But First Amendment *retaliation* defenses arising out of a precomplaint investigation and initiation of an enforcement action are fundamentally different in kind. It is perhaps theoretically possible that FTC staff's motives for triggering an enforcement action—key to a First Amendment retaliation claim—would be relevant to whether issuance of a complaint is in the "interest of the public." 15 U.S.C. § 45(b). But the Supreme Court has left open whether compliance with this

statutory requirement is subject to any judicial review under 15 U.S.C. § 45(c) and, if so, what, if any, remedy is appropriate. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 245 & n.13 (1980).

Defendants' suggestion that the putative comprehensiveness of the FTC Act displaces *Bivens*, *see* OB 22-24, is also misplaced. Notably, although Section 5 governs the extent to which *final* Commission cease-and-desist orders are subject to judicial review, *see* 15 U.S.C. § 45(c)-(d), it does not facially limit judicial review of actions predating or unrelated to issuance of a *final* cease-and-desist order. Consequently, federal district courts long assumed jurisdiction over ongoing FTC administrative enforcement actions under limited circumstances. *See, e.g., Coca-Cola v. FTC*, 342 F. Supp. 670, 676-77 (N.D. Ga. 1972) (constitutional violations); *E.I. Du Pont de Nemours & Co. v. FTC*, 488 F. Supp. 747, 751 (D. Del. 1980) ("[T]he [FTC] Act does not deprive it of jurisdiction to review orders issued or actions taken during the course of an FTC administrative proceeding when a cease and desist order has not yet issued.").

Courts of Appeals also reached the same conclusion. *See, e.g., American General Insurance Co. v. FTC*, 496 F.2d 197, 199-200 (5th Cir. 1974) (substantial showing constitutional rights violated and *Leedom* jurisdiction); *Borden, Inc. v. FTC*, 495 F.2d 785, 786-87 (7th Cir. 1974). Even *LabMD v. FTC*, 776 F.3d 1275 (11th Cir. 2015), implicitly adverted to the possibility of district court jurisdiction

over ongoing FTC enforcement actions, *see id.* at 1279 ("[T]he FTC Complaint and Order are not sufficiently definitive, cleanly legal, or immediately burdensome ***so as to require our review at this stage***." (emphasis added)).

This is unsurprising because nothing in the FTC Act suggests that district courts lack jurisdiction, in all instances, to review freestanding constitutional claims brought against the FTC or its employees. *See also Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 777 (D. Del. 1980) ("[N]othing in the Federal Trade Commission Act suggests that courts of appeals have exclusive jurisdiction over agency actions prior to the issuance of a cease and desist order." (citation omitted)). Thus, as the *FTC* effectively conceded in this Court, district courts have general federal-question jurisdiction to adjudicate First Amendment retaliation claims. *See Trudeau v. FTC*, 456 F.3d 178, 190-91 & n.22 (D.C. Cir. 2006).

Finally, Defendants' suggestion for the first time on appeal, *see* RB 34-35, that Commission regulations are "special factors" counseling hesitation, *see* OB 22, should be rejected. FTC *regulations* are irrelevant to the question of Congress's intent, which is expressed in federal *statutes*. A footnote in a general regulation stating a truism—the existence of procedures to investigate and discipline federal employees—has nothing to do with the question here: whether *any* remedy is available to *victims* of FTC line attorney retaliation. *Cf.* OB 22 (citing 16 C.F.R. § 4.1(e) n.1). And the Commission's Equal Access to Justice Act (EAJA) regulation,

16 C.F.R. § 3.81, only allows for recovery of attorneys' fees and expenses (*not* damages) incurred in Part 3 adjudications—not Part 2 precomplaint investigations, *see* 16 C.F.R. § 3.81(c). EAJA cannot displace *Bivens*. *See, e.g.*, *Loumiet v. United States*, No. 12-cv-1130(CKK), 2017 U.S. Dist. LEXIS 90555, at *3 n.2,*36-41,*55-56 (D.D.C. June 13, 2017) (denying motion to dismiss First Amendment retaliation claim arising out of abusive administrative enforcement action in case where attorneys' fees already awarded under EAJA). *Cf. Kreines v. United States*, 33 F.3d 1105 (9th Cir. 1994) (prevailing *Bivens* plaintiff not *also* entitled to attorneys' fees under EAJA).

Tellingly, Defendants omit mention of the FTC's recently promulgated *Bivens* regulation. *See* 82 Fed. Reg. 30,966 (June 13, 2017). FTC states therein that, like "several other government agencies"—including the CFTC, which brings administrative enforcement actions subject to limited review in a U.S. Court of Appeals, *see* 7 U.S.C. § 9, similar to the FTC—it has discretion to indemnify FTC employees sued in their individual capacities under *Bivens*. *See id.* at 30,967. This belies Defendants' suggestion that FTC alone, unlike other federal agencies, is somehow categorically immunized against *Bivens* by its organic statute.

2. History

The FTC Act's history, too, supports the availability of *Bivens*. Congress is presumed to be aware of existing judicial precedent and legislate against that

backdrop. *Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). *Bivens* was decided in 1971. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971). Since the late 1970s FTC employees have been sued in their individual capacities under *Bivens*.[8] *See, e.g.*, *Odessky v. FTC*, 471 F. Supp. 1267, 1270-71 (D.D.C. 1979); *Hartje v. FTC*, 106 F.3d 1406, 1408 (8th Cir. 1997). Since 1988, "the contours of the First Amendment right to be free from retaliatory prosecution" have been "clearly established" in this Circuit. *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013). In 2006, the FTC effectively acknowledged district court jurisdiction to adjudicate First Amendment retaliation claims. *See Trudeau*, 456 F.3d at 190-91. Here, Congress's silence against this backdrop speaks for itself.

i. Pre-*Bivens*

Importantly, the FTC Act's basic judicial-review scheme traces its genesis to the FTC Act of 1914.[9] *See* § 5, 38 Stat. 717, 720 (codified at 15 U.S.C. § 45(c)); Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate*

[8] *Bivens* suits against FTC employees continue to this day. *See, e.g., Doe v. U.S.*, 210 F. Supp. 3d 1169, 1173 (W.D. Mo. 2016); *FTC v. Commonwealth Mktg. Grp.*, 72 F. Supp. 2d 530, 536 (W.D. Pa. 1999); *Blodgett v. Franco*, No. 98-49 (JMR/RLE), 1999 U.S. Dist. LEXIS 23740, *11-12 (D. Minn. Mar. 17, 1999).

[9] The FTC Act was amended in 1938 to prohibit "unfair or deceptive" business practices. Wheeler-Lea Act, Pub.L.No. 75-447, §5, 52 Stat. 111,111 (1938). However, this did not alter the Act's judicial review scheme.

Review Model of Administrative Law, 111 COLUM. L. REV. 939, 969-972 (2011). This predates *Bivens* by over fifty years; therefore, the Congress that created it could not have foreseen *Bivens* or intended to preclude a *Bivens* remedy.

ii. Post-*Bivens*

As discussed in Section I.A.1, post-*Bivens* amendments to the FTC Act have all been against the backdrop of consistent judicial recognition that the Act does not bar district court review of all claims outside of the rubric of Section 5. Yet Congress has done nothing to further restrict judicial review of such claims, underscoring congressional acquiescence to and acceptance of this widespread construction of Section 5.

If Congress wanted to immunize FTC employees from personal liability under *Bivens*, it had ample opportunity. Congress did not. Since 1971, the FTC Act has been amended on numerous occasions. *See, e.g.*, Pub.L.No. 93-153, 87 Stat. 576 (1973); Pub.L.No. 93-637, 88 Stat. 2193 (1975); Pub. L.No. 96-252, 94 Stat. 374 (1980); Pub.L.No. 103-312, 108 Stat. 1691 (1994); Pub.L.No. 109-455, 120 Stat. 3372 (2006). Not once has Congress restricted judicial review of constitutional claims brought against the FTC or its employees.

B. The FTC Act Does Not Afford Meaningful Review of or Remedy for First Amendment Retaliation Claims

Defendants are wrong that the FTC Act allows for meaningful review of First Amendment retaliation claims, let alone meaningful remedy. *Cf.* OB 13, 21.

1. Commission Rules and Precedent Bar Discovery Necessary to Raise First Amendment Retaliation Defense

FTC precedent bars inquiry into the circumstances of the pre-Complaint investigation and reasons why a complaint is issued, *see In re Exxon Corp*., No. 8934, 83 F.T.C. 1759, 1974 FTC LEXIS 226, at *2-3 (June 4, 1974), stating that these matters "will not be reviewed by courts," *see id.* This limitation on the scope of discovery, *see also* 16 C.F.R. § 3.31(c)(1), prevents respondents from obtaining evidence necessary to substantiate First Amendment retaliation defenses.

2. Lack of Remedy

Although Defendants suggest otherwise, OB 22-25, "[f]or people in [Appellees'] shoes, it is damages or nothing." *Bivens*, 403 U.S. at 410.

First, Mr. Daugherty was not a respondent in the enforcement action. *See* JA 43. Thus, his personal claims against Defendants can only be addressed under *Bivens*, even accepting Defendants' contentions as to LabMD.

Second, even assuming judicial review of a First Amendment retaliation defense (and *some* relief) is theoretically available under 15 U.S.C. § 45(c)-(d), *cf. Standard Oil*, 449 U.S. at 245 & n.13, a Court of Appeals vacating an otherwise unlawful Commission cease-and-desist order against LabMD does nothing to vindicate LabMD's (or Mr. Daugherty's) First Amendment right to criticize the government free from fear of retaliation.

Third, and relatedly, the fact that the Commission *Final* Order imposing Section 5 liability is subject to limited judicial review in an Article III Court, which may vacate or modify this Final Order, *see* 15 U.S.C. § 45(c)-(d); *POM Wonderful*, 777 F.3d at 489-90, does nothing to remedy illegality during the pre-Complaint investigation continuing through the enforcement action.

Fourth, and most obviously, monetary damages cannot be recovered under Section 5's judicial-review scheme, which only grants jurisdiction "to affirm, enforce, modify, or set aside" Commission orders, 15 U.S.C. § 45(d), or under any other statutory scheme.[10] This, too, counsels in favor of allowing a *Bivens* action here, as the District Court correctly held, *see* JA 93.

C. No Other Purported "Special Factors" Counsel Hesitation

Although Defendants suggest otherwise, OB 25-27, the *Abbasi* Court's "special factors" analysis confirms by contrast why Appellees' First Amendment retaliation claim should be permitted to proceed.

Unlike *Abbasi*, which involved high-ranking government officials engaged in high-level policy deliberations, *see Abbasi*, 137 S. Ct. at 1860-61, here Defendants are "FTC line attorneys," OB 2.[11]

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[10] Constitutional claims cannot be raised under the Federal Tort Claims Act. *See FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994).

[11] Sheer was "the managing attorney" of the investigation. Sheer Declaration, *FTC v. LabMD*, 12-cv-03005-WSD, Dkt. No. 1-1, ¶1 (N.D. Ga., filed August 29, 2012).

Unlike *Abbasi*, which implicated "sensitive issues of national security" and a broad governmental response to terrorist attacks, *see Abbasi*, 137 S. Ct. at 1860-61, Appellees' First Amendment retaliation claim arises in the context of "standard 'law enforcement operations,'" *id.* at 1861. The FTC is a "law enforcement agency." 82 Fed. Reg. at 30,967. Defendants investigated and prosecuted LabMD in a discrete FTC enforcement action.

Unlike *Abbasi*, which involved "high-level policies" implicating national-security concerns likely to attract congressional attention, *see Abbasi*, 137 S. Ct. at 1862, the need to affirmatively provide a damages remedy to victims of FTC line staff misconduct has not garnered congressional attention (at least prior to this case).

And unlike *Abbasi*, which found "of central importance" the fact that it was "not a case…in which 'it is damages or nothing,'" *Abbasi*, 137 S. Ct. at 1862, monetary damages is the sole remedy available to Appellees, as discussed above. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("where there is a legal right, there is also a legal remedy").

Defendants contend for the first time on appeal, *see* RB 34-37, that additional "special factors" weigh in favor of immunizing them from liability, *see* OB 25-27, for destroying a business because its CEO criticized them. They are wrong.

Defendants' purported concern that "future FTC attorneys" would be intimidated and afraid to investigate companies that criticize them, *see* OB 26, is

meritless. All agree that FTC attorneys have qualified immunity for their actions. *Cf.* OB 32. This means that they can only be held liable for violations of clearly established constitutional rights. Qualified immunity should allay Defendants' concerns, since it "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In any event, Defendants agree that it "is unquestionably true" that, as the District Court found, the "'right[] to criticize the actions of the federal government without fear of government retaliation [is] as clearly established as can be.'" OB 35 (citing JA 107).

Allowing a *Bivens* remedy would, in Defendants' view, burden and distract FTC employees. *See* OB 26-27. Defendants are wrong. First, qualified immunity amply protects FTC employees, so long as they are not "plainly incompetent" and do not "knowingly violate the law." *Cf. Malley*, 475 U.S. at 341. This should not be too much to expect. Second, Defendants' purported fear of "manufacture[d] First Amendment retaliation claims," OB 26, ignores Rule 11, Rule 8, and Rule 12(b). *See Iqbal*, 556 U.S. at 678-79 ("Rule 8…does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). These screening mechanisms ensure that meritless *Bivens* lawsuits against FTC employees are dismissed on Rule 12 motions. *See, e.g., Hartje*, 106 F.3d at 1408 (qualified

immunity); *Odessky*, 471 F. Supp. at 1270-71 (failure to state claim). Conversely, meritorious *Bivens* lawsuits may proceed to discovery.

By Defendants' telling, allowing a *Bivens* remedy against "FTC line attorneys," *see* OB 2, would also intrude on agency policymaking, *see* OB 26-27. This strains credulity. First, "line attorneys" do not make agency policy; high-ranking political appointees, like Commissioners and Bureau Directors, do. Second, Defendants cannot seriously contend that investigating a single business, monitoring its CEO's constitutionally protected speech, and ultimately triggering a retaliatory enforcement action based on false evidence has anything whatsoever to do with FTC policymaking.

Defendants' new argument that "the availability of injunctive relief…also qualifies as a special factor," OB 27, is similarly misplaced, as explained in Section I.B.2.

Finally, this case does not involve split-second life-or-death decisions, *cf. McLenagan v. Karnes*, 27 F.3d 1002, 1007-08 (4th Cir. 1994), or high-ranking officials reacting to urgent national crises, *cf. Abbasi*, 137 S. Ct. at 1863. Here, Defendants had time to reflect on their actions during the three-and-a-half-year investigation, JA 25-26, ¶¶115-16, and, as alleged in the Complaint, made a deliberate choice to punish LabMD and its CEO for speaking out, JA 28-33, ¶¶127-45. This, too, counsels in favor of allowing Appellees' retaliation claim to proceed.

II. THE "AROMA" OF DEFENDANTS' MISCONDUCT PERMEATES THE INVESTIGATION AND ADMINISTRATIVE PROSECUTION OF LABMD

Defendants' rendition of the Complaint omits mention of a number of salient facts putting their alleged conduct in context.[12] On a motion to dismiss, courts may properly consider any documents "'either attached to or incorporated in the complaint and matters of which [courts] may take judicial notice.'"[13] *Trudeau*, 456 F.3d at 183. These materials underscore why the District Court should be affirmed.[14]

A. Defendants' "Mean-Spirited" Investigation

Even before Defendants allegedly triggered the enforcement action based on false pretenses for the purpose of retaliating against Plaintiffs for LabMD's CEO's protected speech three days earlier, *see* JA 2,17-34, ¶¶1,82-146, Defendants' abusive investigation of LabMD did not go unnoticed.

The genesis of this case is Defendants' symbiotic relationship with Tiversa, JA 15-28, ¶¶ 66-125; *see* JA 85, an entity with a questionable-at-best business model,

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[12] As pled, the Complaint's retaliation claim (Count I) incorporates by reference detailed factual allegations set forth in paragraphs 1-152. JA 38, ¶153.

[13] This Court may also take judicial notice of materials posted on FTC's website, *see Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007), and other public records, including court filings and exhibits. *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007); *Abhe & Svoboda v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *Veg-Mix v. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012).

[14] Judicial notice is particularly appropriate given Defendants' reliance on the Commission Opinion. *See* OB 8-9,30-31 (citing JA 55-56); RB 43-44.

see JA 5-8, 13-15, ¶¶19-32, 52-65, and which fabricated false evidence and provided perjured testimony for use against LabMD, *see* SA019-022. In 2012, a then-Commissioner warned Defendants against relying on information or evidence provided by Tiversa. *See* JA 27, ¶123.[15] Defendants ignored this warning. "Instead, Complaint Counsel chose to further commit to and increase its reliance on Tiversa." SA005; *accord* SA057 ("Despite the dissent of at least one commissioner, the FTC relied on the information provided by Tiversa, including the false assertion that at least four different Internet Protocol addresses had downloaded the 1718 file from peer-to-peer networks.").

This is consistent with Defendants' scorched-earth pursuit of Appellees. *See* JA 25-29, ¶¶116-130. As a federal judge put it: "I could tell you as a result of…[a September 2012 hearing] that there was already a history of acrimony and I think on behalf of the agency the exertion of authority in a mean-spirited way" against LabMD. PI Tr. 47:19-21. This raises the question: why?

Circumstantial evidence suggests the answer: Defendants' adverse actions against Appellees appear to correlate with Mr. Daugherty's public criticism of Defendants. Data from Google Analytics available in public court filings shows temporal proximity between FTC monitoring of Mr. Daugherty's website and

[15] https://www.ftc.gov/sites/default/files/documents/petitions-quash/labmd-inc./1023099-labmd-full-commission-review-jtr-dissent.pdf

Defendants' alleged retaliatory conduct. *See* Second Supplemental Declaration of Michael Daugherty, *LabMD v. FTC*, No. 1:14-cv-810-WSD, Dkt. No. 24 (May 1, 2014) (attached exhibits providing data from Google Analytics show spikes in monitoring from FTC computers corresponding to CEO's criticism of FTC and certain retaliatory acts). *Cf. LabMD*, 776 F.3d at 1277 ("On July 19, 2013, Mr. Daugherty posted an online trailer to his book highlighting corruption in the federal government, including specific claims about the FTC. Three days after Mr. Daugherty posted the trailer online, the FTC gave notice of its intent to file a complaint against LabMD.").

At a May 2014 preliminary injunction hearing in federal court, Mr. Daugherty gave testimony on this data. *See LabMD v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090, at *8-9 n.3 (N.D. Ga. May 12, 2014) ("Mr. Daugherty testified that FTC employees accessed his blog 75 times shortly after he criticized the FTC for bringing an enforcement action against LabMD." (citation omitted)). The court asked FTC counsel to explain this. "Counsel for the FTC did not know why FTC personnel repeatedly accessed Mr. Daugherty's blog shortly after the criticisms were published, but surmised that a possible explanation for accessing the blog was that FTC personnel wanted to ensure that Mr. Daugherty's free speech rights were not impeded." *Id.* at *8-9 n.3.

The court was skeptical:

> Are you telling me as an officer of the court that after a critical blog post, that somebody at the FTC, in order to make sure that he was—that he was not impeded in his First Amendment rights, decided the next day to 75 times make sure that the same post was up there…?

PI Tr. 25:3-11. The court described FTC counsel's explanation as "incredible," observing: "This is taking an interesting and troubling turn which…[the court] never expected, for an admission by an FTC lawyer that they monitor blogs routinely of companies for whatever purposes…."[16] PI Tr. 27:5-10. The court asked FTC counsel to "contact your agency and find out if anybody in response to a critical blog post 75 times the next day accessed the blog…[a]nd explain to me what was on the blog post that was of interest to your investigation of this company….Will you do that?" PI Tr. 24:9-17. FTC counsel stated: "I can have FTC provide an explanation for that." PI Tr. 24:18-19. FTC did not do so.

B. Sheer Subpoenas Mr. Daugherty's Book Drafts

As alleged in the Complaint, Sheer's retaliatory conduct continued through the enforcement action. JA 32-33, ¶¶142-44. For example, the FTC enforcement action related to an allegation that LabMD's medical data-security was "unfair." *See* JA 43-47. Yet Sheer subpoenaed drafts and promotional materials relating to Mr. Daugherty's book, "The Devil Inside the Beltway," which (justifiably) criticizes

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[16] Judge Duffey also remarked: "It seems odd that if you are an enforcement regulatory body, that rather than doing your regulatory activity, that you would be monitoring somebody's blog that is criticizing the FTC, unless you are thin-skinned about that." PI Tr. 20:18-22.

Defendants, JA 32-33, ¶142, but has nothing whatsoever to do with LabMD's data-security practices. Thus, the ALJ observed that "the relevance of [book] drafts, related promotional materials, or the other materials…is not at all apparent" and barred Sheer from obtaining discovery into these matters. *See* Order on LabMD Motion for Protective Order, *In re LabMD*, No. 9357, at 7-9 (Nov. 22, 2013).[17]

C. LabMD Denied Discovery Necessary to Prove Retaliation

Complaint Counsel's improvident book draft subpoena raised red flags. Accordingly, beginning in November 2013, LabMD first raised its First Amendment retaliation defense to the Commission. *See* Motion to Dismiss, *In re LabMD*, No. 9357, at 30 n.23 (Nov. 12, 2013);[18] Stay Motion, *In re LabMD*, No. 9357, at 4-6 (Nov. 26, 2013).[19] LabMD promptly pursued discovery necessary to develop evidence substantiating it.

But, as discussed above, the FTC Rules of Practice and precedent, for all practical purposes, forbid inquiry into the circumstances of the precomplaint

17 https://www.ftc.gov/sites/default/files/documents/cases/131122adminlawjudgeorder.pdf

18 https://www.ftc.gov/sites/default/files/documents/cases/131112respondlabmdmodiscomplaintdatyadminproceed.pdf#page=30

19 https://www.ftc.gov/sites/default/files/documents/cases/d09357_r_motion_to_stay_proceedings_pending_review_567522.pdf#page=5

investigation and reasons why an administrative complaint is issued. LabMD was therefore barred from obtaining discovery necessary to substantiate its First Amendment retaliation defense.[20] *See* Order on CC's Motion to Quash Subpoena Served on CC and for Protective Order ("January 30 Order"), *In re LabMD*, No. 9357, 2014 FTC LEXIS 22, *13-14 (Jan. 30, 2014); Order Denying Respondent's Motion for Rule 3.36 Subpoena, *In re LabMD*, No. 9357, 2014 FTC LEXIS 35, *9 (Feb. 21, 2014) ("[T]he Commission's decision making in issuing a complaint is outside the scope of discovery in the ensuing administrative litigation[.]"); Order Granting CC's Motion to Quash and to Limit Deposition Subpoenas Served on Commission Attorneys, *In re LabMD*, No. 9357, at 6-7 (Feb. 27, 2014) (LabMD barred from deposing Yodaiken regarding pre-Complaint communications "in order to challenge the Commission's actions in investigating and filing the Complaint in this case" because such communications are "not relevant" and "not discoverable").[21]

[20] As the ALJ explained: "[LabMD's] purpose in eliciting information concerning the pre-Complaint investigation…is to challenge the bases for the Commission's commencement of this action. Precedent dictates that such matters are not relevant for purposes of discovery in an administrative adjudication." January 30 Order, 2014 FTC LEXIS 22, at *15-16.

[21] https://www.ftc.gov/system/files/documents/cases/140225labmdquashmotion.pdf

D. Defendants' "Evidence" Collapses

Defendants' revisionist-history-by-omission tactics also warrant brief discussion. They attempt to paint the FTC investigation and enforcement action as by-the-book and unremarkable. *See* OB 5-9. Not so.

Defendants' case against LabMD was predicated on a crime and a lie, as alleged in the Complaint. *See* JA 20-21, ¶¶94-99. The core FTC harm allegation was that a sensitive LabMD file had "spread" on the Internet and was found at multiple IP addresses belonging to identity thieves.[22] *See* SA006 (discussing "fabricat[ion of] a list of those IP addresses, which Complaint Counsel introduced into evidence as CX0019"). Sheer told the ALJ at opening statements that "a[LabMD] insurance billing file that was designated for sharing from the billing manager's computer was found at IP addresses in Arizona, San Diego, Costa Rica, and London." Trial Tr. 16.[23] This was not true, as even the Commission now acknowledges. *See* JA 79 ("[W]e agree that Mr. Boback's assertion that Tiversa had gathered evidence showing that the 1718 file had spread to multiple Internet locations by means of LimeWire was false[.]").

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[22] Both FTC harm experts relied on this false claim. *See* SA027-029. *See also* SA007 ("Complaint Counsel does rely on expert opinions that were predicated on Mr. Boback's testimony.").

[23] https://www.ftc.gov/system/files/documents/cases/160830labmdstayapplication.pdf#page=1119

In late May 2014, shortly after Complaint Counsel rested their case-in-chief, a whistleblower, Mr. Richard Wallace, emerged who revealed that their case against LabMD was predicated on false evidence and perjured testimony provided by Tiversa for use against LabMD.[24] *See* SA005.

Less than one month later Congress specifically requested an FTC IG investigation of Defendants' dealings with Tiversa.[25] SA022.

These revelations also resulted in a parallel congressional investigation into the FTC's relationship with Tiversa, as alleged in the Complaint, JA 34 ¶¶147-49, which culminated in a 100-page report shedding light on Sheer's unusual interactions with Tiversa and its former CEO.[26] *See* OGR Report at 55-58;[27] *id.* at

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[24] In 2016, the FBI raided Tiversa; Tiversa's former CEO, Robert Boback, subsequently invoked his Fifth Amendment privilege against compelled self-incrimination in connection with his dealings with Defendants. *See* Daugherty Decl. Exs. A-B (Boback Stay Motion and Hearing Transcript), LabMD Stay Motion, No. 9357 (Sept. 6, 2016), https://www.ftc.gov/system/files/documents/cases/160830labmdstayapplication.pdf#page=292

[25] *See* Issa Letter, http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-17-DEI-to-Tshibaka-FTC-IG-LabMD-Tiversa.pdf

[26] The ALJ took judicial notice of OGR Report findings. *E.g.*, SA022. It contains a section titled "The FTC misrepresented the extent of its relationship with Tiversa to the Committee." *See* OGR Report at 56-58. OGR had access to documents and testimony that LabMD did not, including Sheer's transcribed interview. *See id.* at 66-67.

[27] https://www.ftc.gov/system/files/documents/cases/150612labmdmtn.pdf#page=175

55 n.162 (Boback testified "the only person I 'know' at…FTC is…Sheer."). According to the OGR Report: "***The reason for forging the IP addresses*** [from which Tiversa purportedly obtained LabMD's sensitive files], according to the whistleblower, ***was to assist the FTC*** in showing that P2P networks were responsible for data breaches that resulted in likely harm[.]" OGR Report at 71 (emphasis added). As alleged in the Complaint—which must be taken as true at this stage—Defendants expressly or tacitly solicited and knowingly received and used this false evidence. *See* JA 20-21, ¶¶94-100.

For good reason, the Initial Decision dismissing the Complaint against LabMD dissected in detail FTC staff's unusual relationship with Tiversa; the funneling of stolen files to FTC through a shell corporation, the "Privacy Institute," created for that sole specific purpose;[28] and the creation of false evidence for use against LabMD. *See* SA005-007, SA017-022.

The Initial Decision "found…that after the meeting between Tiversa and FTC staff in the fall of 2009, Boback directed Wallace to generate false information purporting to show that the 1718 file had spread…." JA 80 n.84. Wallace testified

[28] "Upon Tiversa's request, the FTC issued the CID for Tiversa's information and documents to the Privacy Institute." SA037 n.27.

that Sheer was present at this meeting. Trial Tr. 1385-1388.[29] The ALJ found Wallace's testimony credible.[30] SA021.

E. The Commission Opinion Reversing the ALJ is the Product of a Rigged Game

Defendants' reliance on the Commission Opinion to support their "alternative explanation" for their actions, *see* OB 30-31, is misplaced.

First, the Commission Opinion reversing the ALJ's dismissal of the FTC Complaint is a product of a biased and rigged administrative process, as demonstrated by empirical data compiled by former FTC Commissioner Joshua Wright: "[I]n the past nearly twenty years[,]…in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed." Wright, Commissioner, FTC, Section 5 Revisited, 6 (Feb. 26, 2015).[31] "This is a strong sign of an unhealthy and biased institutional process." *Id.*

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29 https://www.ftc.gov/system/files/documents/cases/160830labmdstayapplication.pdf#page=1160

30 "Sheer in particular did not recall meeting with Tiversa in Washington, D.C." OGR Report at 56.

31 https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf

Second, a U.S. District Judge appropriately described parts of the FTC investigation of LabMD as "a sad comment on your agency" and "strik[ing the court] as almost being unconscionable."[32] PI Tr. 77:9-10,15.

Third, Defendants ignore the Initial Decision dismissing the Complaint and rejecting in detail Sheer's administrative prosecution of LabMD. *See* SA001-054. *Cf. Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (vindicating ALJ Chappell's dismissal; vacating Commission order).

Fourth, Defendants gloss over the reality, *cf.* OB 8-9, that the now-stayed Commission Opinion, *see* SA055-067, appears destined for reversal. As the Eleventh Circuit merits panel observed to FTC counsel: "The administrative law judge just shredded Traversa's (sic) presentation, just totally annihilated it.… [I]t should have become obvious after you—after the evidence collapsed and your—and complaint counsel couldn't go any further." *See* RB 18-19.

This refutes Defendants' suggestion that the Commission Opinion shields their alleged misconduct from all accountability.

[32] The court told FTC that "by your conduct, you have taken" a cancer-detection healthcare provider "out of the market it looks like." PI Tr. 89:2-3.

CONCLUSION

For these reasons, the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 6,488 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: November 13, 2017

/s/ Michael Pepson
Michael Pepson

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I electronically filed the foregoing Brief of Amicus Curiae Cause of Action Institute In Support of Appellees Michael J. Daugherty and LabMD, Inc. with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
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