TechFreedom

Third Party Intervention and Combatting Consent Decree Rulemaking

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I. Introduction

Over the last two decades, use of, and access to, the Internet has grown exponentially, connecting people and businesses and improving the human condition in ways never before imagined. In 2011, 71.7 percent of households reported accessing the Internet, a sharp increase from 18 percent in 1997 and 54.7 percent in 2003.[2] This digital growth—from a network of computers that only a few consumers could reach, to a seemingly infinite marketplace of ideas accessible by almost all Americans—has benefited society beyond measure, affording consumers the ability to access information, purchase goods and services, and interact with each other almost instantaneously without having to leave the home.[3]

However, as use and benefits of the Internet has grown, so too has the collection of personal data and, consequently, cyber-attacks endeavoring to steal that data. Since 2013, the number of companies facing data breaches has steadily increased.[4] In 2016, 52 percent of companies reported experiencing a breach—an increase from 49 percent in 2015—with 66 percent of those who experienced a breach actually reporting multiple breaches.[5] Perhaps not surprisingly, not much has changed since 2000, where one report revealed that system penetration by outsiders grew by 30 percent from 1998 to 1999.[6] Interestingly, despite immense improvements in companies' ability to anticipate and prevent cyber-attacks, some of the largest

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[2] THOM FILE, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES 1 (May 2013), https://www.census.gov/prod/2013pubs/p20-569.pdf; *see also* Steve Case, The Complete History of the Internet's Boom, Bust, Boom Cycle, Business Insider (Jan. 14, 2011), *available at* http://www.businessinsider.com/what-factors-led-to-the-bursting-of-the-internet-bubble-of-the-late-90s-2011-1.
[3] *See* FED. TRADE COMM'N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A REPORT TO CONGRESS 1 (2000), https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf.
[4] PONEMON INST. LLC, FOURTH ANNUAL STUDY: IS YOUR COMPANY READY FOR A BIG DATA BREACH? 1 (2016), http://www.experian.com/assets/data-breach/white-papers/2016-experian-data-breach-preparedness-study.pdf [hereinafter PONEMON, DATA BREACH].
[5] *Id.*
[6] Hope Hamashige, *Cybercrime can kill venture*, CNN (March 10, 2000), http://cnnfn.cnn.com/2000/03/10/electronic/q_crime/index.htm (reporting the findings of the Computer Security Institute at Carnegie Mellon University).

and most sophisticated companies in the world, including Sony, Target, eBay, and JPMorgan, continue to experience data breaches today,[7] just as they did in 2000.[8] In spite of these statistics, the United States currently has no comprehensive legal framework in which to inform companies of the best practices to both prevent or respond to cyber-attacks, as well as to ensure that they're acting responsibly in the eyes of the Government.[9]

Absent a comprehensive statutory framework, the Federal Trade Commission ("FTC" or "Commission") happily stepped in to police the vast number of data security and privacy practices not covered by the few Internet privacy and cyber security statutes enacted at the time. Given the immensely broad language of its authorizing statute, which essentially grants the FTC enforcement powers over any business activity "in or affecting commerce," the FTC was quickly able to extend this power to the cyber security practices of any company susceptible to cyber-attacks.[10] However, in filling this vacuum, the FTC has also failed to provide companies with a framework that provides any "'ascertainable certainty' of the FTC's interpretation of what specific cyber security practices" are considered reasonable, resulting in confusion in both legal and business communities.[11] With cyber-crime costs expected to reach $2 trillion by 2019,[12]

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[7] PONEMON INST. LLC, 2014: A YEAR OF MEGA BREACHES 1 (2015), http://www.ponemon.org/local/upload/file/2014%20The%20Year%20of%20the%20Mega%20Breach%20FINAL3.pdf.
[8] Hamashige, *Cybercrime* (noting that, just as today, in 2000, "[e]ven the biggest Internet companies with the most sophisticated technology are vulnerable to hackers, a trend highlighted last month when hackers stopped traffic on several popular Internet sites including Yahoo!, Amazon.com and eBay.").
[9] *See, e.g.,* ALAN CHARLES RAUL, TASHA D MANORANJAN & VIVEK MOHAN, THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW 268 (Alan Charles Raul, 1st ed. 2014) ("With certain notable exceptions, the US system does not apply a 'precautionary principle' to protect privacy, but rather, allows injured parties (and government agencies) to bring legal action to recover damages for, or enjoin, 'unfair or deceptive' business practices.").
[10] According to a 2016 study, the top five U.S. industries susceptible of cyber attacks are healthcare, manufacturing, financial services, government, and transportation, although very few industries are not affected by cyber-risks. Steve Morgan, *Top 5 Industries At Risk of Cyber-Attacks*, Forbes (May 13, 2016), https://www.forbes.com/sites/stevemorgan/2016/05/13/list-of-the-5-most-cyber-attacked-industries/#7ce3ebdf715e.
[11] *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 256, n.21 (3d Cir. 2015).

business communities can ill afford to have to anticipate the approaches of both hackers and federal regulators simultaneously, and it would seem more practical for the agency to help guide businesses by provided best practices to better protect their consumers. Yet, rather than promulgate rules or provide any clear guidance, the FTC has instead chosen to approach the issue through case-by-case enforcement actions, almost always ending in judicially entered settlement agreements known as consent decrees. In fact, since the FTC began truly wielding its newfound cyber security enforcement power in 2002, the Commission has brought nearly 60 data security enforcement actions against companies whose computers and technological infrastructure were breached or compromised by hackers looking to steal personal customer information, with all but two of these suits not ending in consent decrees.[13]

A consent decree is an agreement between the parties to a lawsuit to settle on mutually acceptable terms, which the judge agrees to enforce as a judgment.[14] Since the reviewing court enters these consent decrees as orders, they act as both a settlement and a legally binding judicial order, yet differ greatly in material aspects as well. As the Supreme Court put it, "consent decrees bear some of the earmarks of judgments entered after litigations," yet "[a]t the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts."[15] This "dual character … has resulted in different treatment for different purposes."[16]

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[12] Steve Morgan, *Cyber Crime Costs Projected to Reach $2 Trillion by 2019*, Forbes (Jan. 17, 2016), https://www.forbes.com/sites/stevemorgan/2016/01/17/cyber-crime-costs-projected-to-reach-2-trillion-by-2019/#6e10063a3a91.

[13] Justin (Gus) Hurwitz, *Data Security and the FTC's Uncommon Law,* 101 Iowa L. Rev. 955, 972 (2016) ("To date the FTC has brought more than 50 data security actions; all but two of these actions have settled) [hereinafter Hurwitz, *Uncommon Law*].

[14] *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 325 (1988) [hereinafter Kramer, *Consent Decrees*].

[15] *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986).

[16] *Id*.

Because consent decrees are stipulated terms mutually agreed to by the parties to the litigation, they appear like traditional settlements. However, in the typical settlement situation, the parties will agree to a mutually acceptable figure to resolve the dispute, enter into an agreement outside of court, and the suit will be voluntarily dismissed.[17] In the event a party fails to comply with the terms of the settlement, the party seeking enforcement can initiate a new, separate action for breach of the settlement contract.[18] However, where the parties ask the court to enter the settlement as a decree, if either party fails to fulfill their obligations under the agreement, the other party can ask the court to find the party in contempt without having to file a new lawsuit for breach of contract.[19] Given this "quasi-judicial nature," consent decrees are as legally binding as any other court order.[20] For this reason, consent decrees also appear to serve a similar role as traditional litigation, since a judge enters the order.[21] Yet, this is again misleading, since unlike traditional litigation where courts rule on the merits, these cases actually involve no adjudication at all—"meaning that either a court or the agency enters a consent decree without an impartial decision maker doing anything at all of an adjudicatory character."[22] As a result, the Commission's only real guidance on what constitutes reasonable data security practices comes from unsubstantiated claims filed by the Commission, which admit no liability, yet are seemingly blessed by the courts. Since 1,524 of the 2,092 enforcement actions brought by the FTC in either federal or administrative courts have ended in consent decrees without any

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[17] Kramer, *Consent Decrees* at 325.
[18] *Id*.
[19] Susan B. Dorfman, *Mandatory Consent: Binding Unrepresented Third Parties Through Consent Decrees*, 78 MARQ. L. REV. 153, 155 (1994).
[20] *United States v. American Cyanmid Co.*, 719 F.2d 558, 564 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).
[21] In its simplest form, consent decrees are essentially settlements enforceable as judicial orders. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees or … administrative orders.").
[22] Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1867 (2015) [hereinafter Crane, *Humphrey's Executor*].

adjudication, this means that almost 73% of the FTC's enforcement actions have ended in legally enforceable orders, despite no impartial judicial guidance as to the factual and legal legitimacy of the FTC's claims.[23] This approach, referred to as consent decree rulemaking, and the resulting ambiguity, has left companies facing uncertainty in terms of whether their data security practices are sufficient to safeguard against an FTC enforcement action, has frustrated judges and legal commentators, and even resulted in one company's demise.

While some commentators have gone so far as to challenge the FTC's jurisdictional claims over cyber security altogether, this Article will more narrowly address the FTC's practice of exercising its jurisdictional power by using consent decrees to create legally binding "rules" governing what the Commission believes to be "reasonable" data security practices, and, most importantly, how third parties can establish standing to challenge this practice given the understandable reluctance of defendants to do so. According to the FTC, these consent decrees, individually and collectively, constitute legally binding "rules" or "standards" that must be followed by not only the parties to the agreement, but also by *any* business that could theoretically find itself on the wrong end of an enforcement action. Due to the case-by-case nature of this practice, the Commission has referred to it as their "common law"—a remark that caused at least one commentator to retort by referring to it as "the FTC's uncommon law" due to the FTC's unique ability, unlike the courts, to act in both a quasi-legislative and quasi-judicial manner.[24] To date, this practice of using consent decrees to establish "rules" that legally bind companies, though admonished by courts in dicta, has not been found to be improper. This is so despite the Ninth Circuit recently holding in *Conservation Northwest v. Sherman*, that similar practices by other agencies were improper, at least so far as the consent decrees effectively serve

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[23] *Id*.
[24] *See generally* Hurwitz, *Uncommon Law* (discussing in great lengths the FTC's "common law" approach).

to promulgate a "substantial and permanent" rulemaking in circumvention of statutorily required rulemaking procedures, such as the Administrative Procedure Act (APA).[25] While similar, the rulemakings there were not identical to the FTCs practice, with the environmental agencies in *Conservation Northwest* utilizing the more common form of "consent decree rulemaking"—as it will be referred to generally throughout this Article—as opposed to the unique "common law" consent decree rulemaking practice employed by the FTC. Thus, this Article will also address both forms of consent decree rulemaking, starting with analyzing consent decrees generally, and then turning to the various ways agencies use them to formulate rules, including their differences and similarities.

Generally, consent decrees can serve a useful purpose, allowing private parties to settle claims in an efficient manner, while having the benefit of judicial oversight to ensure every party upholds their end of the agreement. Further, agreements between private parties and federal agencies occur regularly. However, consent decrees that compel a federal agency to undertake certain future actions with regard to changing a rule or legal standard that is applicable to everyone within the rule's purview—particularly where those individuals are not involved in the litigation—are not "typical" consent decrees, and it is here where courts must be mindful of improper consent decree rulemaking taking form. So long as the parties' agreement stipulates the rights and obligations of only those parties under law, there is generally no issue. However, where the terms of the parties' agreement either (1) begin to affect the rights of parties not present in the suit or (2) begin to conflict with, or even violate, applicable statutory requirements, consent decree rulemaking begins to take form.

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[25] *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013).

While this is true of both the FTC and other agencies' use of consent decree rulemaking, how, and to what extent, the agreement binds the federal agency—and most importantly individuals under the agency's jurisdiction—is where the differences arise. In cases like *Conservation Northwest*, the relevant agency and other party to the suit will typically agree to terms that, as mentioned, affect the rights of third parties, have consequences beyond the dispute between the parties, or conflict with applicable statutes. Through this practice, the agencies essentially amend rules affecting all individuals within its jurisdiction, even where those individuals are not parties to the suit and have no means of providing input, let alone challenging, the action. Where a judge enters this agreement, the new rule has the force of law. However, to the extent the agreement conflicts with, or even violates, statutorily required rulemaking procedures, courts may not approve them. Thus, consent decree rulemaking generally raises concerns by violating statutes, thereby implicating the separation of powers doctrine by asking courts to bless rulemakings that only Congress has the power to create.

Unlike the altered rules underlying traditional consent decree rulemakings, which have generally been otherwise formed through *some* rulemaking procedures, the FTC's practice, particularly in developing "rules" governing companies' data security and privacy, involves the Commission effectively creating a common-law-like body of precedent built *solely* upon consent decrees. To this extent, the Commission has not provided any rationale or basis for their decision-making, and instead asks the affected business communities to attempt to decipher the meaning of "reasonable practices" by identifying some "rule" imbedded throughout various consent decrees and their initiating complaints, "which admit no liability and which focus on prospective requirements on the defendants" only. In this regard, the FTC's practice is more akin to a treasure hunt than a "rule." Thus, in addition to raising concerns about whether the

rulemaking itself is proper like other agencies' practices, the Commission's practice additionally raises concerns related to due process and whether parties to an FTC enforcement action have been given fair notice as to what the rule even is.

While, admittedly, the FTC's rulemaking authority differs in material ways from that of other agencies as they're generally not guided by the APA, it is nonetheless abundantly clear that the FTC does have statutorily mandated rulemaking requirements.[26] Further, in light of these recent court rulings, it seems likely that the Commission's practice of creating rules through consent decrees—a practice going back almost two decades—is likely improper. This is so even though the FTC's practice of using consent decrees to develop "rules" differs from the practice employed by other federal agencies.

This Article's ultimate purpose is to address the legitimacy—both from a legal and policy perspective—of the FTC's practice of using consent decrees to form legally binding "rules" and "standards" in the context of data security and privacy practices, and—most critically—provide a framework with which companies and affected third parties can start to challenge the FTC's data security practices. To this latter end, a central fact in each of the cases successfully challenging agencies use of consent decrees to create legally binding rules, was a third party who intervened specifically to challenge this practice. This fact is vital because consent decrees, by their very nature, are agreements by the parties to end the litigation, thus effectively terminating the chance that either party would challenge the very settlement they agreed to. Further, the FTC's consent

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[26] The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act provides authority and procedures for the FTC's promulgation of "trade regulation rules." The statute requires the Commission to engage in "hybrid" rulemaking, a style which adds to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such requirements as oral hearings (of both the legislative and evidentiary types), more extensive provision for public comment, including rebuttal, and judicial review of the rulemaking record under a "substantial evidence" standard. *See generally* Hybrid Rulemaking Procedures for the Federal Trade Commission, 44 Fed. Reg. 38817 (July 3, 1979), https://www.acus.gov/recommendation/hybrid-rulemaking-procedures-federal-trade-commission.

decrees often stipulate that the other party cannot challenge the facts or result of the agreement. Regarding the FTC's cyber security enforcement, no third parties have intervened in order to challenge the validity of the consent decrees, and, due to a myriad of reasons, companies that the FTC has accused of having "unreasonable" data security practices have also yet to challenge the validity of these consent decrees, particularly on the grounds that they constitute improper rulemaking. Thus, given the success of these intervening parties in challenging consent decree rulemaking at other agencies, this Article will also address the practicality of intervention by third parties in the context of the FTC's cyber security enforcement. Finally, and most critically, this Article will attempt to provide a legal framework through which interested third parties can establish standing to intervene in the FTC's cyber security and privacy actions in order to challenge the legitimacy of the proposed consent decrees and their quasi-rulemaking effects. In establishing standing, this Article hopes to arm would-be intervenors with the necessary framework to force the FTC to provide clear and detailed data security best practices so businesses may protect their consumer's data and privacy, both to avoid liability and to ensure their consumers' well-being.

II. Agency Abuse of Discretion: Agency Rulemaking and Consent Decree Rulemaking

Courts and federal agencies have both played critical roles in the development of law in the United States. Courts, through litigation, have developed the common law[27] dating back to our Nation's origins in England. Since the creation of the Interstate Commerce Commission in

[27] *See* Victor E. Schwartz et al., Prosser, Wade & Schwartz's Torts: Cases and Materials 1 (12th ed. 2010) ("[T]ort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them.").

1887,[28] federal agencies—or the administrative state[29] as we now know it—have developed regulations governing a broad range of industries and areas, including everything from the environment[30] to the Internet.[31] These two institutions of American law, in conjunction with the Legislative Branch, have generally worked together in harmony, with agencies promulgating rules and regulations derived from Congressional grants of power, and enforcing them through litigation in the courts. For example, the Food and Drug Administration ("FDA") protects consumers from the unsafe and harmful ingestion of foods and drugs by promulgating rules and regulations aimed at preventing any injury before it occurs.[32]

As a general rule, in order for any agency to create legally binding norms through rules and regulations, they must follow certain statutorily required procedures, mostly set forth in the Administrative Procedure Act ("APA").[33] These procedural rules ensure that any party that may be adversely affected by a proposed regulation has adequate notice of the potentially forthcoming regulation, as well as the opportunity to comment on its prudence and impact before

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[28] *See generally* Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 NYU J.L. & Liberty 491 (2008).
[29] Generally speaking, the administrative state refers to a large bureaucracy made up of federal agencies that grew out of Franklin Roosevelt's New Deal. These agencies reside within the executive branch, but through congressional delegations of both judicial and legislative functions, the agencies' powers are often believed to transcend the traditional boundaries of the executive branch. *See* Ronald J. Pestritto, Ph.D., *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, The Heritage Foundation (Nov. 20, 2007), http://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited.
[30] *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide by the Environmental Protection Agency).
[31] Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (2017) (restricting the online collection of personal information from children under the age of 13).
[32] *See, e.g.,* Daniel Carpenter, Reputation and Power 75-112 (2010) (describing the history of FDA's regulatory powers from the 1920s through the passage of the Food, Drug and Cosmetic Act); *see also* 21 U.S.C. § 603 (requiring the examination of animals prior to slaughter); 21 U.S.C. § 331 (2016) (prohibiting, among others, the sale or distribution of any "food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded").
[33] *See* Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2012).

it takes effect.[34] Further, while the APA sets the minimum degree of public participation an agency must provide, "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[35]

Despite this procedural framework and the historically harmonious relationship between the three coequal federal branches of government, a trend has formed over the past two decades where federal agencies have begun to more frequently[36] utilize consent decrees, "as a technique to shape agencies' regulatory agendas, without input from the public or the regulated community."[37] By avoiding public input, federal agencies have essentially started utilizing consent decree settlements—a practice pejoratively known as "sue and settle"—as a means of circumventing the traditional regulatory development and review process.[38]

Typically, this process occurs when a private party's counsel and a regulatory agency, during the course of litigation relating to the rulemaking process, agree to a "settlement" that may set an accelerated timeline for a certain rulemaking or, even more perversely, actually adopt new substantive law.[39] Such consent decrees often realign regulatory priorities and establish new rules that affect many companies and individuals despite their not having been a party to the consent decree.[40] Ultimately, a consent decree is a hybrid that acts as both a settlement and an

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[34] *Id*. § 553 (2012); *see also Nat'l Petroleum Refiners Ass'n v. F.T.C*., 482 F.2d 672, 692 (D.C. Cir. 1973) ("[U]nder the Administrative Procedure Act the public, including all parties in the industry who might be affected, are given a significant opportunity prior to promulgation of a rule to ventilate the policy and empirical issues at stake through written submissions, at a minimum.").
[35] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946).
[36] *See* Sue and Settle: Regulating Behind Closed Doors, U.S. Chamber of Commerce (2013), https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf [hereinafter Sue and Settle].
[37] H.R. Rep. No. 114-184, at 4 (2015).
[38] *Id.*
[39] *Id*.
[40] *Id*.

injunction,[41] and because these are negotiated settlements approved by the courts, they carry the same force of law as a regulatory act undertaken through the APA process.[42] However, because rules derived from consent decrees avoid APA and other procedural safeguards, the practice of using them raises not only significant legal concerns, such as separation of powers questions, but also economic concerns as regulated entities are effectively shut out from the rulemaking process, leaving them with no opportunity for input and providing minimal, if any, advanced notice. To the extent these rules developed through consent decrees are subsequently enforced against parties through litigation, this also raises questions of procedural due process and the constitutional requirement that the government, in crafting laws and rules that limit your freedoms, must at the very least provide affected individuals fair notice and an opportunity to respond.[43]

This means that procedure matters. When agencies fail to utilize fair procedures in developing laws, the public's faith in both the laws and underlying institutions is diminished, which undermines their effectiveness and further erodes the public's trust in the government institutions that our democracy rests upon.[44] Thus, even in instances where the policy behind the

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[41] *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 237 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees or …administrative orders.").
[42] *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1183 (9th Cir. 2013) ("Plaintiffs and the Agencies…negotiated a settlement which the court approved and entered into in the form of a consent decree.").
[43] *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884) ("Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.").
[44] *See, e.g*, PEW RESEARCH CENTER, BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT (2015) ("Only 19% of Americans today say they can trust the government in Washington to do what is right "just about always" (3%) or "most of the time" (16%).").

rule may be sound, a failure by the implementing agency to follow basic due process will undermine the public's faith and deprive businesses of the certainty they need to thrive.[45] As one legal scholar eloquently put it:

> The process by which rules are created gives legitimacy to the substance of those rules. It gives notice to relevant stakeholders, and ensures that the proper stakeholders are subject to those rules. It ensures that other regulating entities--e.g., Congress, the courts, and other agencies--are able to participate in the process, and that regulatory responsibility is properly apportioned between them. And, more generally, even if the result of the FTC's process in the data security context is sound, permitting use of an illegitimate process in this context gives legitimacy to the use of flawed processes in other contexts.[46]

Thus, recognizing that procedure matters, Congress has passed multiple laws requiring agencies to follow certain procedures in promulgating rules, both generally[47] as well as certain statute-specific procedures.[48]

A. Statutory Policymaking Procedures and the Courts Preference for Rulemaking

As discussed above, the APA is the traditional statute governing the internal policymaking procedures for agencies, which includes how agencies interact with the public.[49] Absent constitutional due process concerns related adjudication in some instances or a

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[45] *See, e.g., Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 675–76 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974) (recognizing that "courts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone," including in providing businesses with greater certainty as to what business practices are not permissible).

[46] Hurwitz, *Uncommon Law* at 961.

[47] 5 U.S.C. § 553 (2012); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-95 (1975) (outlining procedures the FTC must use for trade regulation rulemaking); *see generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012).

[48] *See*, *e.g.*, *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 555–56 (9th Cir. 2006) (holding that, under the Federal Land Policy & Management Act, if the Bureau of Land Management "wishes to change a resource management plan, it can only do so by formally amending the plan pursuant to 43 C.F.R. § 1610.5-5.").

[49] Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2012). The APA encompasses the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a.

Congressional mandate to the contrary,[50] the APA generally affords agencies the choice between policymaking through rulemaking or adjudication—essentially, giving agencies both quasi-legislative and quasi-judicial powers, respectfully.[51] This principle stems from the APA's structure, whose two main procedural sections are, unsurprisingly, "Rule making"[52] and "Adjudications."[53] However, despite this long-settled principle, the APA's definitions appear to contemplate rulemaking as the procedure for formulating *general* rules[54] and courts have long-favored agencies devising such general policies through rulemaking.[55] Indeed, in *SEC v. Chenery Corp.*—the case that first enunciated the general rule that agencies have the choice between rulemaking and adjudication—the Supreme Court expressly stated that rulemaking should be utilized "as much as possible."[56] In announcing the policy underlying its opinion favoring agency rulemaking, the Court explained:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-

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[50] *See Londoner v. Denver*, 210 U.S. 373 (1908) (holding that where an agency's action is particularized, due process requires the agency to give aggrieved parties a hearing with the right to present arguments and evidence); *but see Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) (holding that when "more than a few people" are affected by an agency's actions, legislative procedures are sufficient and the normal channels of government accountability provide the best practical safeguard).

[51] *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (first articulating the principle that agencies are generally free to decide which policymaking procedures to follow) [hereinafter *Chenery II*].

[52] 5 U.S.C. § 553 (setting forth the procedural requirements for policymaking through rulemaking).

[53] *Id*. § 554 (setting forth the procedural requirements for policymaking through adjudication).

[54] The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Rulemaking is, therefore, the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

[55] *See Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 675 (D.C. Cir. 1973) (resolving doubts as to whether the FTC had rulemaking power in the agency's favor because the rulemaking process would simplify the FTC's hearing process, the regulated parties would have more certain knowledge of the regulatory requirements, and that all members of the industry would be regulated at once); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir. 1966), *cert denied*, 385 U.S. 843 (1966) (stating that "rulemaking is a vital part of the administrative process . . . and . . . is not to be shackled, in the absence of clear and specific congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rulemaking.").

[56] *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.[57]

To engage in rulemaking, the APA first requires periods for public notice and comment.[58] The APA defines a rulemaking as "formulating, amending, or repealing a rule,"[59] and defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…."[60] Further, in addition to rulemaking and adjudication, the APA provides certain circumstance where agency actions may fall within an exception to the general notice and comment requirement.[61] Agency actions that are "relating to agency management or personnel," for example, are entirely exempt from the APA's normal procedural requirements.[62] Also of note, the APA differentiates between "nonlegislative" rules—interpretive rules or general statements of policy—and "legislative rules."[63] This distinction is significant as "nonlegislative rules" are exempt from notice and comment requirements, though they must still be accompanied with a concise general statement of basis and purpose and provide the effective date of the rule's enactment. In defining whether a rule is legislative or merely a "general statement of policy," courts have employed a two-prong test to determine, above all, whether the rule is a "binding norm" that creates new rights or duties and thus constitutes a legislative rule.[64] First, "unless a pronouncement acts prospectively, it is a

[57] *Id.*
[58] *See* 5 U.S.C. § 553(b)-(c).
[59] *Id*. § 551(5).
[60] *Id.* § 551(4).
[61] *Id*. § 553(a)-(b).
[62] 5 U.S.C. § 553(a)(2). This section also excludes matters involving "a military or foreign affairs function of the United States" and matters relating to "public property, loans, grants, benefits, or contracts." *Id*.
[63] *See* ***Pacific Gas & Electric Co. v. FPC***, 506 F.2d 33, 38 (D.C. Cir. 1974) (discussing the difference between a policy statement that "announces the agency's tentative action for the future," and a "binding norm").
[64] *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) ("a 'general statement of policy' is one that does not impose any rights and obligations" ....) (quoting *Texaco*

binding norm," because "a statement of policy may not have a present effect."[65] Second, to be exempt from notice and comment requirements, the purported policy statement must "genuinely leave[] the agency and its decision-makers free to exercise discretion," and "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is a binding rule or substantive law."[66]

At their core, these procedural requirements and rule distinctions collectively ensure that the public—particularly those most affected by a proposed policy—have the ability to participate in a meaningful way when a substantive change in law or policy occurs. It also means that an agency may not agree to dispense with the notice and comment requirements especially when reaching substantive outcomes. This was the very reason the APA was drafted: to preserve individual rights as against the abuse of administrative power and to make actions taken by unelected agencies more authoritative and acceptable to the public.[67]

B. Value of Traditional Consent Decrees

Although this Article focuses on the improper use of consent decrees as a mechanism for circumventing the traditional rulemaking processes, it is important to understand that consent decrees, when used properly, are a valuable tool in the government's enforcement arsenal.[68] Indeed, as with all settlements, consent decrees have long been favored by public policy[69] as an effective means of saving the government — and, in turn, the taxpayers — significant resources,

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[65] *Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).
[66] *Id.* (quoting *Pacific Gas*, 506 F.2d at 41).
[67] *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 208-09 (2016).
[68] Susan B. Dorfman, *Mandatory Consent: Binding Unrepresented Third Parties Through Consent Decrees*, 78 MARQ. L. REV. 153, 153 (1994) ("Settlement is the most common and efficient way to resolve … suits" and "[o]ne manner in which such settlements are made is through consent decrees.").
[69] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (recognizing that, in ensuring "equality of employment opportunities" under the Civil Rights, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," and, as such, the statute granted agencies "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.").

allowing them to investigate and prosecute a larger number of companies and individuals who are acting outside of the law.[70] Congress tasks federal agencies with enforcing a wide range of obligations, often within specific deadlines and on a limited budget, and given these great demands, it is no surprise that agencies eagerly embrace alternative dispute resolution techniques such as consent decrees.[71] As the Supreme Court long ago recognized, by choosing to settle and enter into consent decrees, "[t]he parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation."[72]

The value of consent decrees was illustrated in *SEC v. Citigroup Global Markets, Inc.*, where, despite rejecting the proposed consent decree because the SEC failed to provide the court with any proven facts "upon which to exercise even a modest degree of independent judgment," the court nonetheless recognized the favorable nature of consent decrees to the parties.[73] Specifically, the court noted that even though the SEC charged Citigroup with defrauding investors, the settlement only charged them with negligence, resulted in "a very modest penalty," and imposed "relatively inexpensive prophylactic measures."[74] Similarly, the SEC benefited to the tune of a $95 million civil penalty.[75] Ultimately, it is at least partly because of this inherent value that agencies should strive to not abuse consent decrees improperly, as doing so risks tarnishing their perceived value.

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[70] *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) ("But what if we were to reject all these efforts to promote settlement? What if all claimants in mass cases could be forced to go to trial? The result would be bewildering. The costs to the legal system and all parties would skyrocket. The efficiencies that created a viable mass plaintiffs' bar would collapse. And what would be the public value of forcing every individual plaintiff to the uncertainty of individual judgments, which necessarily overvalue the claims of some and undervalue the claims of others?").
[71] *See, e.g.*, Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 329-30 (outlining the great demands placed on agencies and their eagerness to embrace settlements).
[72] *Local No. 93, Int'l Asso. of Firefighters, etc. v. Cleveland*, 478 U.S. 501, 522 (1986) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971)).
[73] *SEC v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011).
[74] *Id.* at 333.
[75] *Id.*

C. Legal, Economic, and Public Policy Consequences of Consent Decree Rulemaking

Though agencies may choose to craft policy either through adjudication or rulemaking, consent decree rulemaking creates a unique problem in that it is neither rulemaking nor adjudication. Suits ending in consent decrees, unlike traditional litigation and the adjudicatory process envisioned by the APA, actually involve no adjudication at all—"meaning that either a court or the agency enters a consent decree without an impartial decision maker doing anything at all of an adjudicatory character."[76] Rules and regulations developed through consent decrees also avoid statutorily required rulemaking procedures and other regulatory safeguards provided by the APA, thus shutting out groups affected by the regulation from providing any beneficial input for the rule's development.[77] Thus, consent decrees—or "non-law law" as some commentators' christened it[78]—exists in a twilight that manages to have both the force of law without the procedural requirements that serve to protect individual rights from abuses of administrative power.[79] Indeed, because these decrees are essentially settlements, the underlying claims upon which the agencies bring their actions evade having to be litigated on the merits, thus essentially creating law through complaints.[80] As one might imagine, circumventing these procedural—and constitutional—safeguards comes with significant legal, economic, and public policy consequences.

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[76] Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1867 (2015) [hereinafter Crane, *Humphrey's Executor*].
[77] *See* Sue and Settle, *supra* note 29, at 11.
[78] Brief of Amicus Curiae TechFreedom, International Center for Law and Economics & Consumer Protection Scholars in Support of Defendants, *FTC. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014) (No. 13-1887), 2013 WL 3739729.
[79] *See, e.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 237 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees or … administrative orders."); *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) ("A consent decree is a hybrid; it is both a settlement and an injunction.").
[80] *Id.*; *see also FTC. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 257 n.22 (3d Cir. 2015) ("We agree with Wyndham that the consent orders, which admit no liability and which focus on the prospective requirements on the defendant, were of little use to it in trying to understand the specific requirements imposed by § 45(a).").

First and foremost, the use of consent decrees to develop legal "standards" or "rules" raises constitutional questions mostly related to separation of powers, but also to due process, and freedom of speech in certain instances. When regulatory agencies, residing in the Executive Branch, develop new "rules" through consent decrees, they are overriding rulemaking safeguards adopted by Congress.[81] In addition to the APA requirements—and the unique Magnuson-Moss rulemaking procedures governing the FTC[82]—consent decree rulemaking also circumvents review by the Office of Management and Budget (OMB), which Congress created to "provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations."[83] Further, Congress created an agency within OMB specifically to review drafts of proposed and final rules and regulations to ensure that they comply with statutory requirements before being enacted.[84] Thus, consent decree rulemaking not only avoids the statutory rulemaking procedures, it avoids the congressionally created agency charged with ensuring compliance these procedures.

Due process and First Amendment concerns are less often raised by consent decree rulemaking, but do nonetheless arise, particularly in the context of the FTC's cyber security and privacy enforcement actions. To the extent they include a "gag order" precluding the non-governmental party from contesting the agencies allegations publicly, consent decrees also raise

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[81] *See* Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. Pub. Int. L.J. 185, 214 ("The ability of regulatory agencies to use "sue and settle" practices to develop new law raises a serious separations of powers concern.") [hereinafter Schwartz & Appel, *Government Regulation*].

[82] 15 U.S.C. § 57a (2012); *see also* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982-1985 (2015) (outlining in detail the FTC's Magnuson-Moss rulemaking procedures) [hereinafter Lubbers, *Mossified*].

[83] Proclamation No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981); *see generally* U.S. Gov't Accountability Office, GAO-09-205, Federal Rulemaking: Improvements needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews (2009), http://www.gao.gov/assets/290/288538.pdf.

[84] *See* Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, Congressional Research Service (2009) ("Executive Order 12291, issued by President Reagan in 1981, gave OIRA the responsibility to review the substance of agencies' regulatory actions before publication in the *Federal Register*.").

potential First Amendment concerns.[85] Due process concerns generally arise only in the context of an agency enforcing rules developed through consent decrees against parties, such as the FTC in their enforcement of cyber security. Indeed, in the only two cyber-security cases not resulting in consent decrees, a central issue was whether the FTC's development of "rules" through settlements provided the defendants with "fair notice" sufficient to satisfy due process.[86]

The requirement of fair notice is derived from the well-settled constitutional principle that statutes and regulations "must give fair notice of conduct that is forbidden or required."[87] Courts refer to this clarity requirement as the "void for vagueness doctrine," which protects two concerns underlying the Fifth Amendment's Due Process Clause.[88] First, regulations must be clear enough to "provide a person of ordinary intelligence fair notice of what is prohibited," so "they may act accordingly."[89] Second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[90] When constitutional rights like speech are involved, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[91] Further, while notice requirements "are especially

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[85] *See U.S. S.E.C. v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011), *vacated and remanded,* 752 F.3d 285 n.5 (2d Cir. 2014) ("On its face, the SEC's no-denial policy raises a potential First Amendment problem."); *S.E.C. v. Vitesse Semiconductor Corp.,* 771 F. Supp. 2d 304, 308 (S.D.N.Y. 2011) ("[H]ere an agency of the United States is saying, in effect, 'Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it'").

[86] *See Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 252 (3d Cir. 2015) ("Wyndham argues that it was entitled to 'ascertainable certainty' of the FTC's interpretation of what specific cyber security pracites are required by § 45(a)."); *see also* Hurwitz, *Uncommon Law* at 972 (recognizing that defendants in both cases "argue that the FTC has failed to provide notice or otherwise promulgate any data security standards, such that the Commission's enforcement actions violate constitutional due process guarantees.").

[87] *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law")).

[88] *Id*.

[89] *Id.*

[90] *Id.*; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

[91] *Fox Television*, 567 U.S. at 253.

lax for civil statutes that regulate economic activities," they nonetheless apply.[92] Though the Third Circuit ultimately rejected the contention that the FTC's practice failed to adequately give the party fair notice, the court made clear that its holding was based solely on the lower standard of notice required in civil cases such as the one at issue, and that typically agency rules require a "higher standard of fair notice…because agencies engage in interpretation differently than courts."[93] Thus, as will be discussed later in greater detail, the question has yet to be truly decided as to whether the FTC's use of consent decrees passes constitutional review.

Beyond legal issues, the practice of consent decree rulemaking by agencies also raises economic and public policy concerns. In fact, these concerns were largely the impetus for Congress passing the regulatory safeguards set forth by the APA and Magnuson-Moss, and authorizing OMB oversight of agency rulemaking. OMB oversight in particular was established to ensure that regulations "properly balanced polices and costs to societies."[94] In addition to the lack of review by OMB and potential for duplication that results, consent decree rulemaking deprives the business community of the very clarity that the D.C. Circuit believed to be so vital in finding that the FTC had substantive rulemaking authority.[95] In so holding, the D.C. Circuit expressly noted the efficiency, flexibility, and clarity inherent to rulemaking, when it stated:

> In dealing with … the agencies' interests in promulgating clear policy guidelines to provide notice to an industry and to avoid time-consuming individualized hearings on issues that are common in that industry, courts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone.[96]

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[92] *Wyndham Worldwide*, 799 F.3d at 250.
[93] *Id*. at 251-52.
[94] Schwartz & Appel, *Government Regulation* at 214; *see* Proclamation, *supra* note 74.
[95] *Nat'l Petroleum Refiners Ass'n*, 482 F.2d at 681 ("Thus there is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate.").
[96] *Id*. at 692.

Most notably, the court expressly recognizes the importance of providing businesses with certainty as to what business practices are or are not permissible, an advantage notably missing when agencies develop rules through consent decrees since the public enjoys neither the benefits of adjudication nor rulemaking.

Lastly, consent decree rulemaking raises serious public policy concerns related to agencies' reason for bringing certain actions, namely because the agency can essentially self-select cases that are likely to settle and further its policy goals. With regard to the FTC's consumer protection mission, since there is no congressional statute governing data security and privacy, the agency is seemingly free to develop the law as it sees fit. Thus, as even former FTC Commissioner Joshua Wright noted, rather than choosing cases on the basis of stopping the most nefarious actors and truly protecting consumers, self-serving personal and agency goals may push agencies to pursue cases "with the best prospect for settlement, cases that will consume few investigative resources, settle quickly, and are more likely to result in a consent decree that provides a continuing role for the agency."[97]

Ultimately, despite the clear legal, economic, and policy advantages of creating rules through traditional rulemaking procedures, the FTC and other agencies have nonetheless continued cultivating their "culture of consent."[98] By giving agencies the opportunity to extract from parties under investigation "commitments well beyond what the agency could obtain in litigation," this practice has in fact grown, and so too have the purvurse consequences of consent decree rulemaking "borne not only by the parties that are subject to them, but also by consumers

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[97] D.H. Ginsburg & J.D. Wright, *Antitrust Settlements: The Culture of Consent, in* I. William E. Kovacic: An Antitrust Tribute – Liber Amicorum (Charbit et al. eds., February 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf.
[98] *Id*.

and by non-parties who glean the agency's enforcement position from the terms of those decrees."[99] Given the FTC's leading role in utilizing this practice in data security enforcement—a position taken by not only critics, but also FTC Commissioners—the next section will address the FTC's enforcement and regulatory roles, the Commission's controversial past, and how these factors led to the Commission's current practice of regulation through settlement.

III. FTC Enforcement, Rulemaking, and the Practice of Developing "Rules" Through Consent Decrees

Like other administrative agencies, the FTC is engaged in the process of developing regulations and policy and has broad authority to develop these regulations and policies through either quasi-adjudicatory or quasi-legislative means.[100] Although the FTC "promulgates regulations and guidance and engages in research and consumer education," the FTC has notoriously long-viewed itself first and foremost as a law enforcement agency, responsible for enforcing legal norms rather than setting them,[101] and has conducted itself similarly.[102] This enforcement authority is derived from Section 5 of the Federal Trade Commission Act ("FTC

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[99] *Id*.
[100] *See generally Chenery II*, *supra* note 37 (discussing agencies' general choice between rulemaking and adjudication).
[101] *See Hearing Before the Subcomm. on Commerce, Mfg., & Trade of the H. Comm. on Energy & Commerce*, 113th Cong. 94, 2 (2014) (statement of Professor Paul Ohm, Associate Professor, University of Colorado Law School; Faculty Director, Silicon Flatirons Center for Law, Technology, and Entrepeneurship) ("Many employees of the FTC see the agency first and foremost as a civil law enforcement agency. Of course the agency also promulgates regulations and guidance and engages in research and consumer education, but these roles are second in priority for many at the FTC.") [hereinafter Ohm, House Testimony]; *see also* Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science and Transportation, United States Senate (April 8, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-commissions-work-protect-consumers-and-promote/p034101reauth.pdf ("The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies.");
[102] For a detailed discussion of the illusion of the FTC's "legislative" function, *see* Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1868 (2015) (noting that "[o]n paper, the agency does look independent, expert, quasi-legislative, and quasi-judicial. But its actual behavior has generally tended away from those qualities….Legislative activity, in the sense of rulemaking, has not been an aspect of its original and continuing antitrust mission at all, and only a sporadic aspect of its consumer protection mission.") [hereinafter Crane, *Debunking*].

Act"), which declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[103] Under the broad terms of Section 5, the FTC exercises its enforcement power by challenging "unfair methods of competition" through their antitrust division and "unfair or deceptive practices" through their consumer protection division.[104]

Despite the FTC's rhetoric regarding being a law enforcement agency, it is worth emphasizing that the FTC has clear rulemaking authority for both "unfair methods of competition" and "unfair or deceptive practices," even if the Commission refuses to acknowledge or utilize this authority.[105] However, unlike other agencies that generally are held to the APA's requirements, the FTC's rulemaking—or lack thereof—is entirely unique.[106] For these reasons, the FTC is an entirely unique agency, having been called both the "Second National Legislature"[107] and the "National Nanny"[108] at different points throughout its existence. As both the unique characteristics of the agency's enforcement and rulemaking authority relate directly to challenging the FTC's use of consent decrees to develop "rules," the next section will first discuss the FTC's role as an enforcement agency, including the broad underlying statutory authority that grants the Commission such powers. Turning next to the Commission's

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[103] 15 U.S.C.A. § 45 (West).
[104] Hurwitz, *Uncommon Law* at 964.
[105] *See* Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 232 (2014) ("The FTC has the authority to adjudicate violations of Section 5, to seek temporary or permanent injunctions against conduct violative of Section 5, and to promulgate substantive rules as to what constitutes a violation of Section 5.").
[106] *See* BERIN SZOKA & GEOFFREY A. MANNE, THE FEDERAL TRADE COMMISSION: RESTORING CONGRESSIONAL OVERSIGHT OF THE SECOND NATIONAL LEGISLATURE 101 (2016), http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf (noting that, although there is a "common misconception that the FTC lacks rulemaking authority—something the Chairman and other Commissioners have said causally," what the FTC really means is "that the FTC lacks *APA* rulemaking authority.") [hereinafter SZOKA & MANNE, SECOND NATIONAL LEGISLATURE].
[107] *Id.*
[108] Hurwitz, *Uncommon Law* at 964 (discussing the public outcry following the FTC's effort to ban "all advertising directed at children," culminating in a "Washington Post editorial labeling the FTC the 'National Nanny.'").

rulemaking authority, this section will particularly focus on the procedural requirements Congress expressly placed upon the agency, as well as the equally important history behind their unique rulemaking powers. Finally, this next section will turn to how the FTC's use of its enforcement powers—and refusal to use its rulemaking authority—has created a muddled mess of ambiguous "rules" developed through consent decrees in the context of data security and privacy enforcement.

A. FTC Enforcement Under Section 5

The FTC's enforcement authority is derived from Section 5 of the Federal Trade Commission Act (FTC Act), which declares unlawful "[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce."[109] Under the broad terms of Section 5, the FTC challenges "unfair methods of competition" through their antitrust division and "unfair or deceptive practices" through their consumer protection division.[110] In pursuing its consumer protection mission there are different standards for "unfair" and "deceptive" practices, with its unfairness authority being "the broadest portion of the Commission's statutory authority."[111] Indeed, this "unfairness" authority was initially unrestrained by any statutory definition of "unfair."[112] It is under this broad "unfairness" prong that the FTC's Bureau of Consumer Protection has generally regulated the digital economy since 2002, bringing enforcement actions against companies who employ "unreasonable" data security

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[109] 15 U.S.C.A. § 45 (West).
[110] Hurwitz, *Uncommon Law* at 964.
[111] *Id*.
[112] *See Id*.; *see also* Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (setting the three-factor contours of the "unfairness" prong for the first time through application of Section 5 to cigarette advertisements).

and privacy practices.[113] In addition to Section 5 authority, however, the FTC has also asserted violations of other statutes in its data security enforcement, most notably the Gramm-Leach-Bliley Act ("GLBA"),[114] Children's Online Privacy Protection Act ("COPPA"),[115] as well as regulations promulgated under those statutes.[116]

Congress intentionally framed the FTC's authority under Section 5 in the general terms "unfair" and "deceptive" to ensure that the agency could protect consumers and competition throughout all trade and under changing circumstances.[117] To be sure, this broad authority has not been lost on the FTC, who readily acknowledges that "Congress intentionally framed the statute in general terms," which the agency interprets to mean "[t]he task of identifying unfair methods of competition" as being "assigned to the Commission."[118] Perhaps unsurprisingly, this lack of clear statutory guidance as to what constitutes "unfair" proved to be problematic, with at least one Commissioner recently recognizing that "nearly one hundred years after the agency's

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[113] *See* Michael D. Scott, *The FTC, the Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 ADMIN. L. REV. 127, 129, 147 (2008); *see also*

[114] *See* Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (2012) ("It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to … protect the security and confidentiality of … customers' nonpublic personal information.").

[115] The Child Online Privacy Protection Act of 1998, 15 U.S.C. § 6501, *et seq* (1994 & Supp. IV 1998) (making it unlawful under § 6502(a)(1) "for an operator of a website or online service directed to children … to collect personal information form a child in a manner that violates the regulations prescribed under subsection (b) of this section."); *see also* Melanie L. Hersh, Is Coppa A Cop Out? The Child Online Privacy Protection Act As Proof That Parents, Not Government, Should Be Protecting Children's Interests on the Internet, 28 Fordham Urb. L.J. 1831, 1878 (2001) (detailing how the FTC uses COPPA to regulate data security for children).

[116] *See, e.g.,* FTC Final Rule, 16 C.F.R. §§ 313.10–313.12 (2000); *Individual Reference Servs. Grp., Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 20 (D.D.C. 2001), *aff'd sub nom. Trans Union LLC v. F.T.C.*, 295 F.3d 42 (D.C. Cir. 2002) (holding that the FTC's final rule, promulgated under the GLBA "did not contravene plain meaning of Act and were permissible construction of that legislation" and "agencies' action in promulgating final rules was not arbitrary and capricious").

[117] *See* H.R. REP. NO. 63- 1142, at 19 (1914) (Conf. Rep.) (observing if Congress "were to adopt the method of definition, it would undertake an endless task").

[118] Joshua D. Wright, Commissioner, Federal Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority at the Executive Committee Meeting of the New York State Bar Association's Antitrust Section, 2 (June 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf.

creation, the Commission has still not articulated what constitutes … unfair… leaving many wondering whether the Commission's Section 5 authority actually has any meaningful limits."[119]

This unrestrained authority came to a head in the 1980s, when, following the Commission's effort to ban all children's advertising, Congress took the drastic measure of actually shutting down the FTC for a period.[120] During this time, Congress and the Commission both took drastic steps to rein in the FTC's seemingly boundless authority. First, Congress passed the FTC Improvements Act of 1980, which, among other things, "imposed heightened procedural requirements on the Commission's unfairness-related rulemaking and prohibited the Commission from regulating certain industries."[121] Second, the FTC finally adopted a policy statement clarifying its "unfairness" authority,[122] which was later codified as Section 5(n) of the FTC Act.[123] Section 5(n) defines an unfair act or practice as one that (1) causes or is likely to cause substantial injury to consumers, (2) is not reasonably avoidable by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition.[124]

B. The Curious Case of FTC Rulemaking

Despite the Commission's extensive enforcement authority, throughout the 1960s and 1970s the FTC undertook a substantial rulemaking role—a role so large it led to Congress

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[119] *Id*.
[120] *See* FEDERAL TRADE COMM'N, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (noting that "[i]t was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency.") (citing 139 Cong. Rec. S8253 (daily ed. June 22, 1993) (statement of Sen. Bryan)).
[121] Hurwitz, *Uncommon Law* at 964; *see generally* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. § 57a (2012)).
[122] Letter from Michael Pertschuk et al., Chairman, Fed. Trade Comm'n, to Hon. Wendell H. Ford, Chairman, Consumer Subcomm., Comm. on Commerce, Sci., & Transp., and Hon. John C. Danforth, Ranking Minority Member, Consumer Subcomm., Comm. on Commerce, Sci., & Transp. (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.
[123] Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (1994) (codified at 15 U.S.C. § 45n (2012)).
[124] 15 U.S.C. § 45(n).

admonishing the agency.[125] Congress' rebuking of the agency led to the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss"),[126] which, among other things, imposed significant and cumbersome procedural requirements on the FTC's rulemaking authority.[127] With the exception of a few congressional grants of narrow APA rulemaking authority,[128] the FTC's rulemaking authority is dictated by the cumbersome procedural requirements for rulemaking under Magnuson-Moss, coupled with some additional procedures set forth by the Federal Trade Commission Improvements Act of 1980 ("Improvements Act")[129] (collectively "Section 5 rulemaking").[130] Thus, Section 5 rulemaking is unique for three main reasons. First, and most notably, procedurally it is far more extensive in its requirements than the relatively efficient notice-and-comment rulemaking procedures under the APA.[131] Second, the FTC is the only agency that has acted so beyond the scope of congressional intent that Congress felt it necessary to prescribe unique, and extensive, rulemaking requirements upon the agency. Finally, it simply isn't used.[132]

With regard to the procedural requirements, Section 5 rulemaking first requires that, in developing rules under either (or both) of the FTC's Section 5 "unfair" or "deceptive acts"

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[125] *See* Hurwitz, *Uncommon Law* at 1001.
[126] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-95 (1975).
[127] *See* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982-1985 (2015) (outlining in detail the FTC's Magnuson-Moss rulemaking procedures) [hereinafter Lubbers, *Mossified*].
[128] *See* Lubbers, *Mossified*, *supra* note 86, at 1982 (noting that, after 1980, the FTC "stopped issuing new Magnuson-Moss rules other than amendments to existing rules," and began to receive "occasional statutory authorizations to use APA rulemaking procedures to issue specific rules."); *see also* SZOKA & MANNE, SECOND NATIONAL LEGISLATURE, *supra* note 65 at 98 (noting that the FTC occasionally makes rules " "under narrow grants of standard APA rulemaking authority specific to a particular issue.").
[129] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7–12, 15, 21, 94 Stat. 374, 376–80, 388–90, 393–96 (codified at 15 U.S.C. § 57a (2012)).
[130] 15 U.S.C. § 57a (2012).
[131] *See* Lubbers, *Mossified*, *supra* note 88, at 1982 (outlining the full requirements of Section 5 rulemaking).
[132] *See* Lubbers, *Mossified*, *supra* note 88, at 1982 (recognizing that, after 1980, the FTC stopped using the Magnuson-Moss rules).

authority, the Commission must publish a mandatory advance notice of proposed rulemaking ("ANPRM") in the Federal Register, which must then be submitted to two designated congressional committees.[133] Further, under Section 5 rulemaking, the Commission must develop a preliminary regulatory analysis relating to the proposed rulemaking,[134] and a final regulatory analysis relating to the final rule, [135] both containing at a minimum: (1) a concise statement of the need for, and the objectives of, the proposed rule; (2) a description of any reasonable alternatives to the proposed rule; and (3) for the proposed rule, and for each of the alternatives outlined in the analysis, a preliminary cost-benefit analysis. Should even a single person request it, the FTC must provide an oral hearing, presided over by an independent hearing officer.[136] Perhaps most significant to challenging consent decree rulemaking at the FTC, Section 5 rulemaking provides special judicial review provisions that allow individuals to apply to the court for leave to make additional oral or written submissions, requiring courts to apply the substantial evidence test to the rule, rather than the APA's lower arbitrary-and-capricious test.[137]

Due at least partly to these extensive requirements, the FTC has essentially foregone its authority to develop rules under the Section 5, particularly following the Improvements Act.[138] According to one study, the FTC has issued sixteen total "trade regulation rules," although the Commission has only promulgated three new rules since the passage of Magnuson-Moss.[139] The

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[133] 15 U.S.C. § 57a(b)(2)(A) (2012).
[134] *Id*. § 57b-3(b)(1).
[135] *Id*. § 57b-3(b)(2).
[136] *Id*. §§ 57a(b)(1)(C), 57a(c).
[137] *Id*. §§ 57a(e)(2), 57a(e)(3)(A); 5 U.S.C. § 706(2)(A) (requiring that, under the APA, "[t]he reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious….").
[138] *See* Lubbers, *Mossified*, *supra* note 88, at 1989 (detailing how with one minor exception, due to procedural restraints and the resulting length of the rulemaking process, "no *new* rulemakings under Magnuson-Moss Procedures have been initiated since 1980, when the procedures were made more complex by that year's FTC Improvements Act").
[139] *Id*. at 1985-1989 (discussing in detail the rules issued before and after the passage of Magnuson-Moss);

rules were the FTC's Credit Practices Rule,[140] the Used Motor Vehicle Trade Regulation Rule,[141] and the Funeral Industry Rule.[142] Under the new procedures established by Magnuson-Moss, these three rules all took between seven and nine years to issue—"almost as long as the [FDA's] infamous Peanut Butter Rule, which was promulgated through the now discredited process of formal rulemaking."[143] By comparison, the rules promulgated prior to Magnuson-Moss took an average of 2.94 years to issue.[144] The drastic difference in the length it took to issue a rule before and after Magnuson-Moss, as well as the fact that the FTC has issued no new rules since the Improvements Act, collectively highlights two important realities facing the FTC. First, the procedural hurdles facing the FTC, absent a congressional grant of APA rulemaking authority,[145] are indeed difficult, and require far more resources, effort, and time than traditional rulemaking.[146] Second, and most importantly, it highlights the severe degree to which the Commission overstepped its boundaries in the years leading up to 1980, and the drastic—yet quite intentional—statutory procedures that the Congress felt was necessary to protect against the FTC doing so ever again.

C. FTC Enforcement of Cyber Security and Over a Decade of Consent Decrees

Following the tumultuous 1980s, the FTC slowly began to reassert its unfairness authority through the 1990s, including some heralded successes against harmful telemarketing

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[140] Credit Practices, 16 C.F.R. pt. 444 (taking approximately nine years to issue).
[141] Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455 (taking approximately nine years to issue).
[142] Funeral Industry Practices, 16 C.F.R. pt. 455 (taking approximately seven years to issue).
[143] Lubbers, *Mossified*, *supra* note 88, at 1988 (citing Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 Tex. L. Rev. 1132, 1143-45 (1972) (describing the nine-year FDA proceeding to establish a food standard for peanut butter)).
[144] *Id*. at 1987 (outlining the rules and processes for each rule issued prior to Magnuson-Moss).
[145] *See, e.g.,* the Gramm-Leach-Bliley Act, *supra* note 105, § 105; Contact Lens Rule, 69 Fed. Reg. 40,482 (July 2, 2004) (codified at 16 C.F.R. pt. 315 and amending 16 C.F.R. pt. 456).
[146] In comparison to the pre-Magnuson-Moss rules, the rules promulgated under congressionally authorized APA authority took less than one year to issue. *See* Lubbers, *Mossified*, *supra* note 88, at 1995.

practices and fighting spam.[147] Without any clear statutory framework from Congress for data security enforcement, the FTC quickly jumped to exercise its immensely broad statutory powers under Section 5 to begin regulating data security and privacy.[148] Traditionally, the FTC focused its enforcement efforts on "deceptive" practices in its enforcement of data security and privacy—generally bringing an enforcement action where a company failed to follow its own stated privacy polices. However, although the Commission still brings claims for deceptive practices,[149] since 2002 the agency has increasingly asserted claims based on "unfair" data security practices.[150] Practically speaking, this shift made sense because companies could theoretically avoid liability simply by maintaining minimal data security and privacy policies that are easy to follow—thus avoiding an enforcement action from the FTC for failing to follow said policy.

Just as Congress failed to provide any statutory framework for data security and privacy enforcement, so too is Section 5 silent with regards to any specific guidance as to how the unfairness authority should be applied in a specific case.[151] In lieu of such ambiguity, the FTC began developing the jurisprudential theory of their unfairness authority through what then-Commissioner Julie Brill referred to as the FTC's "common law."[152] This "uncommon law"—as one legal scholar christened it[153]—is characterized by developing the policies and regulations

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[147] *See e.g.,* Hurwitz, *Uncommon Law* 965 [FIND PRIMARY SOURCE/CASE]
[148] *See e.g,* Alexander E. Reicher, Yan Fang, *FTC Privacy and Data Security Enforcement and Guidance Under Section 5*, 25 Competition: J. Anti., UCL & Privacy Sec. St. B. Cal. 89 (2016) [hereinafter FTC Privacy].
[149] For example, the FTC recently brought an action, and subsequently entered into a consent decree, against Oracle claiming that their "failure to disclose, or adequately disclose, the material information" related to their Java software updates constituted "a deceptive act or practice." Complaint at 22, In re Oracle, No. C-4571 (F.T.C. March, 28 2016), https://www.ftc.gov/system/files/documents/cases/160329oraclecmpt.pdf.
[150] *See generally* Hurwitz, *Uncommon Law*; *William* R. Denny, *Cybersecurity as an Unfair Practice: FTC Enforcement under Section 5 of the FTC Act*, BUSINESS LAW TODAY (June 2016).
[151] Hurwitz*, Uncommon Law* at 966.
[152] *See* Julie Brill, Comm'r, Fed. Trade Comm'n, *Privacy, Consumer Protection, and Competition*, Address at the 12th Annual Loyola Antitrust Colloquium (Apr. 27, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-and-competition/120427loyolasymposium.pdf.
[153] *See generally*, Hurwitz, *Uncommon Law*.

that define "reasonable" through case-by-case decisions, complaints, statements and analysis associated with enforcement actions, and—most critically here—consent decrees.[154]

As mentioned, the FTC and other agencies have long used consent decrees to settle litigation and their availability is a valuable tool to settling litigation in a timely and amicable fashion and preserving judicial resources. However, recently there has been a trend where, in the case of the FTC and its enforcement of data security breaches and privacy, the bulk of the agency's enforcement has been carried out through administrative actions and resulted in consent decrees.[155] Generally, these consent decrees require, at a minimum, that defendants agree to 20 years of continuing security monitoring and audits by the Commission.[156] Indeed, due to a multitude of reasons, in the years since the FTC first began asserting claims based on "unfair" cyber security practices, all but two of the nearly 60 cyber security enforcement actions brought by the FTC resulted in negotiated consent agreements.[157] As highlighted above, not only does the FTC see no problem in this, but actually extols it as an accomplishment[158] and considers it part of their development of the Commission's "common law" approach to developing Section 5.[159]

Given the broad nature of Section 5, few industries are beyond the FTC's reach and the

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[154] *See* Edith Ramirez, Chairwoman, FTC, Unfair Methods and Competitive Process: Enforcement Principles for the Federal Trade Commission's Next Century, Keynote Address at the George Mason University School of Law 17th Annual Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), https://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf.
[155] Soyong Cho & Andrew L. Caplan, *Cybersecurity Lessons Learned from the FTC's Enforcement History*, K&L Gates Cybersecurity Alert (Dec. 2014), http://www.klgates.com/cybersecurity-lessons-learned-from-the-ftcs-enforcement-history-12-22-2014/ ("Since 2002, the FTC has brought nearly 60 data security enforcement matters and settled more than 50 of those actions.") [hereinafter Cho & Caplan, *Cybersecurity Lessons*].
[156] *See* Hurwitz, *Uncommon Law* at 971-72.
[157] William R. Denny, Cybersecurity as an Unfair Practice: FTC Enforcement under Section 5 of the FTC Act, Business Law Today (June 2016).
[158] *See* Fed. Trade Comm'n, Commission Statement Marking the FTC's 50th Data Security Settlement (Jan. 31, 2014), https://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf ("Today marks a milestone for the Federal Trade Commission—the announcement of the Commission's 50th data security settlement.").
[159] *See* Hurwitz, *Uncommon Law* at 971 (citing Ramirez, *supra* note 73, at 6 ("This brings me to the second topic I would like to address today: the process the Commission uses to develop Section 5 doctrine. I favor the common law approach, which has been a mainstay of American antitrust policy since the turn of the twentieth century.").

FTC has met the broad statutory language with an equally broad exercise of its authority to enforce Section 5.[160] The FTC has brought data security and privacy actions against advertising companies, financial institutions, health care companies, and, significantly, companies engaged in providing data security products and services.[161] Further, not only are companies responsible for their own cyber practices, but the FTC has further alleged that companies are responsible for any data security failings of their third-party clients and vendors too.[162] Companies who are the victims of such cyber attacks suffer immense financial losses, much of which is the result of reputational damage as customers are fearful of remaining loyal to companies who can't protect their personal and financial information.[163] According to one study, 76 percent of customers surveyed said they "would move away from companies with a high record of data breaches," with 90% responding that "there are apps and websites that pose risks to the protection and security of their personal information."[164] Unquestionably, data security is the cornerstone of the digital economy and digitization of the physical economy. As Naveen Menon, President of Cisco Systems for Southeast Asia, put it "[s]ecurity is what protects businesses, allowing them to innovate, build new products and services."[165]

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[160] *See* Cho & Caplan, *Cybersecurity Lessons*; Stuart L. Pardau & Blake Edwards, The FTC, the Unfairness Doctrine, and Privacy by Design: New Legal Frontiers in Cybersecurity 12 J. Bus. & Tech. L. 227, 232 (2017) (discussing the FTC's enforcement of "everything from funeral homes, vending machine companies, telemarketing and mail marketing schemes, credit reporting, and the healthcare industry.") [hereinafter Pardau & Edwards, *New Legal Frontiers*].

[161] *See* Fed. Trade Comm'n, 2016 Privacy & Data Security Update (Jan. 2017), https://www.ftc.gov/reports/privacy-data-security-update-2016 (providing overview of various enforcement actions).

[162] For example, the consent decree agreed to in the FTC's enforcement action against Ashley Madison required the defendants to implement a comprehensive data-security program, including third-party assessments. *Id*.

[163] *See generally* PONEMON, DATA BREACH; *see also Data breaches cost US businesses an average of $7 million – here's the breakdown*, Business Insider (April 27, 2017), http://www.businessinsider.com/sc/data-breaches-cost-us-businesses-7-million-2017-4 (providing that the average cost of a data security breach is $7 million, with 76% of customers saying they would move away from companies with a high record of data breaches).

[164] *See* VANSONBOURNE, DATA BREACHES AND CUSTOMER LOYALTY REPORT (2015), http://www.vansonbourne.com/client-research/18091501JD.

[165] Naveen Menon, *There can be no digital economy without security*, World Economic Forum (May 8, 2017), https://www.weforum.org/agenda/2017/05/there-can-be-no-digital-economy-without-security/.

Understanding that data security and the economic viability of businesses are intrinsically tied, it becomes easy to understand why—with no clear guidance from Congress or the FTC—companies have opted to settle and enter into consent decrees rather than risk further reputational damage, and likely customers, through embarrassing and costly litigation.[166] Ultimately, out of approximately 60 data security enforcement actions, only two defendants dared face the FTC knowing it had minimal, if any, knowledge as to what "reasonable" data security practices, let alone whether their specific practices could overcome the FTC's challenge. This hesitation of challenging the FTC in order to gain court-ordered guidance as to what actually constitutes unreasonable practices was only reinforced after *LabMD*, whose decision to litigate against the FTC rather than enter into a consent decree led to the company's demise.[167] The next section will therefore discuss these two challenges to the FTC's authority to use consent decrees to develop legally binding rules, how the challengers fared, and, lastly, what these cases outcomes mean for the future of data security enforcement at the FTC.

D. The Bold Challengers: LabMD & Wyndham

As noted earlier, only two companies have been bold enough to challenge the FTC's enforcement action against them for "unreasonable" data security practices, thus forcing the Commission to defend their practices on the merits.[168] The two companies—LabMD and Wyndham Worldwide, Inc.—both took aim at the FTC's approach to developing data security regulations, arguing that doing so merely through consent decrees, which admit no liability, and

[166] *Id.*
[167] *Id.*
[168] *See* Hurwitz, *Uncommon Law* at 972.

minimal guidance constituted an improper way to develop legally binding norms.[169] Interestingly, while the FTC's complaints against each company and the companies' respective challenges of the Commission's authority to rely on consent decrees to give parties "fair notice" appeared similar, the cases were remarkably different procedurally and factually.[170]

Procedurally, the cases differed in that the FTC proceeded through the administrative courts against LabMD and through the federal courts against Wyndham.[171] Factually, the cases differed in two particularly relevant ways. First, the egregiousness of the breaches at each company that prompted the FTC's enforcement action, as well as the cyber standards employed by each company to protect against said breaches, were quite different, with LabMD representing a far more sympathetic defendant.[172] Second, the makeup and resources of each company stood in stark contrast to one another. Wyndham, a Fortune 500 company, brought in upwards of $5 billion in revenue in 2015 and owns and operates more than 55 hospitality brands.[173] LabMD, on the other hand, only employed approximately 20 people at the time the lawsuit was filed against them.[174] Given that both cases essentially ended with the respective courts affirming the FTC's authority to regulate data security practices under Section 5—even though the factual circumstances differed greatly—the following sections will address each case in turn.

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[169] *See Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 253 (3d Cir. 2015) (interpreting Wyndham's position as asserting that "there is no relevant FTC rule, adjudication or document that merits deference"); *see also* Hurwitz, *Uncommon Law* (providing a detailed analysis of the procedural history of the cases).
[170] *See generally* Complaint, In re LabMD, Inc., (F.T.C. Aug. 29, 2013) (No. 9357), 2013 WL 4761163 [hereinafter LabMD Complaint]; Complaint for Injunctive and Other Equitable Relief, *F.T.C. v. Wyndham Worldwide Corp.*, No. 2:12-cv-01365-SPL (D.N.J. June 26, 2012) [hereinafter Wyndham Complaint]; *see also* Stuart L. Pardau & Blake Edwards, The FTC, the Unfairness Doctrine, and Privacy by Design: New Legal Frontiers in Cybersecurity 12 J. Bus. & Tech. L. 227, 228 (2017) [hereinafter Pardau & Edwards, *New Legal Frontiers*].
[171] *See* Hurwitz, *Uncommon Law* at 972 (discussing the two cases procedural and factual differences).
[172] Compare *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 609 (D.N.J. 2014), *aff'd*, 799 F.3d 236 (3d. Cir. 2015), with *LabMD, Inc. v. F.T.C.*, No. 1:14-CV-00810-WSD, 2014 WL 1908716, at *1 (N.D. Ga. May 12, 2014), *aff'd,* 776 F.3d 1275 (11th Cir. 2015).
[173] Pardau & Edwards, *New Legal Frontiers* at 228.
[174] *Id*.

1. Wyndham Hotels

Starting in early 2008, Wyndham, a hotel chain and management company, was hacked on three separate occasions.[175] After the initial attack, the FTC claimed that Wyndham failed to patch the vulnerable servers that were exploited and failed to deploy any new security measures, which allowed the hackers to access their network on two more occasions.[176] Specifically, the FTC claimed, among other things, that Wyndham failed to use "readily available security measures" such as firewalls, "failed to 'adequately restrict' the access of third-party vendors to its network, and "failed to employ 'unreasonable measure to detect and prevent unauthorized access' to its computer network."[177] As a result of the collective attacks, and Wyndham's apathetic response to them, the FTC alleged that Wyndham "engaged in unfair cyber security practices" that resulted in hackers obtaining "payment card information from over 619,000 consumers, which … resulted in at least $10.6 million in fraud loss."[178]

At trial, Wyndham moved to dismiss and, seemingly vindicating the FTC's application of Section 5 in enforcing claims relating to data security, Judge Salas of the District Court for the District of New Jersey denied Wyndham's motion, explaining that "the contour of an unfairness claim in the data-security context, like any other, is necessarily 'flexible' such that the FTC can apply section 5 'to the facts of particular cases arising out of unprecedented situations.'"[179] However, before the case could proceed, it took a surprising turn with Judge Salas certifying portions of her opinion denying Wyndham's motion to the Third Circuit on interlocutory

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[175] *Wyndham*, 799 F.3d at 241-42.
[176] *Id*.
[177] *Id*. at 241.
[178] *Id*. at 240-42 (the FTC also claimed that "consumers suffered financial injury through 'unreimbursed fraudulent charged, increased costs, and lost access to funds or credit,' and that they 'expended time and money resolving fraudulent charges and mitigating subsequent harm.'").
[179] *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 631 (D.N.J. 2014), *aff'd*, 799 F.3d 236 (3d. Cir. 2015).

appeal.[180] Most notably, while many commentators heralded Judge Salas' opinion as vindicating the FTC's approach of establishing data security "standards" through case-by-case adjudication resulting in consent decrees, Judge Salas, in her certification, actually cautioned against her own judgment, explaining that Wyndham's "statutory and fair-notice challenges confront this Court with novel, complex statutory interpretation issues that give rise to a substantial ground for difference of opinion."[181]

The Third Circuit's interlocutory decision ultimately upheld the district court's denial of Wyndham's motion to dismiss, which, yet again, was heralded by most commentators as a victory for the FTC.[182] However, other commentators have noted, upon closer inspection the Third Circuit's decision was a split decision, with both the FTC and Wyndham claiming victories.[183] Specifically, the circuit's decision both affirmed the FTC's authority to regulate cyber security practices under the "unfair practices" prong of Section 5, while also rejecting the Commission's assertion that FTC consent decrees in cyber security cases have created standards against which Wyndham's—and other companies—cyber practices can be tested for "unfairness."[184] Further, to the extent the Third Circuit found in the FTC's favor, its important to recognize that, since they were reviewing a motion to dismiss, the court was required to "accept all factual allegations as true" and "construe the complaint in light most favorable to the [FTC]."[185] Further, with regard to the development of agency "standards" through consent

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[180] *Id*. at 636.
[181] *Id*. at 634.
[182] *Wyndham*, 799 F.3d at 259; *see also* Hurwitz, *Uncommon Law* (discussing characterization by commentators that the Third Circuit's decision affirmed "the FTC's authority to regulate firms' data security practices").
[183] *See, e.g.,* Hurwitz, *Uncommon Law* at 975; Gerald J. Ferguson & Alan L. Friel, *Challenging FTC Regulation of Cyber-security after FTC v. Wyndham*, Data Privacy Monitor, https://www.dataprivacymonitor.com/cybersecurity/challenging-ftc-regulation-of-cyber-security-after-ftc-v-wyndham/.
[184] *Wyndham*, 799 F.3d at 252-253, 255.
[185] *Id*. at 242.

decrees, even the circuit recognized that "[a] higher standard of fair notice applies [in the context of agency rules] than in the typical civil statutory interpretation case because agencies engage in interpretation differently than courts."[186] Understanding this, to the extent the Third Circuit held in favor of the FTC, later courts applying their decision should duly note two important aspects of their decision. First, the findings were made under an exceptionally deferential *judicial* standard of review, and, as the court recognized, should the district court ultimately decide to apply the higher standard applicable to agency interpretations of statutes, the district court will need to reevaluate whether the FTC's data security "standards"—developed through consent decrees—meet the constitutional fair notice requirement.[187] Second, in evaluating the fair notice requirement, a later court should note, and be guided by, the Third Circuit's clear recognition that, despite upholding the district court's denial of summary judgment motion, they nonetheless "agree[d] with Wyndham that the consent orders, which admit no liability and which focus on prospective requirements on the defendant, were of little use to it in trying to understand the specific requirements imposed by [Section 5]."[188] Therefore, understanding the entirety of the *Wyndham* decision,[189] it seems clear that, should a future court review a similar FTC enforcement action claiming "unfair" data security practices, the Third Circuit would warn them to be skeptical of the adequacy of the FTC's use of consent decrees to the extent they create "standards" or "rules" upon which the FTC can base unfairness enforcement actions.

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[186] *Id*. at 251-252.

[187] *Id*. at 255 ("If later proceedings in this case develop such that the proper resolution is to defer to an agency interpretation that gives rise to Wyndham's liability, we leave to that time a fuller exploration of the level of notice required.").

[188] *Id*. at 257, n.22. The court further noted that they "agree with Wyndham that the [FTC's] guidebook could not, on its own, provide 'ascertainable certainty' of the FTC's interpretation of what specific cyber security practices fail [section 5]." *Id*. at 257, n.21.

[189] A few weeks after this decision, Wyndham and the FTC actually announced a settlement of the FTC's claims against Wyndham. *See Wyndham Settles FTC Charges It Unfairly Placed Consumers' Payment Card Information At Risk*, FEDERAL TRADE COMMISSION (Dec. 9, 2015), https://www.ftc.gov/news-events/press-releases/2015/12/wyndham-settles-ftc-charges-it-unfairly-placed-consumers-payment.

2. LabMD: Death by Consent Decree Rulemaking

The enforcement action against LabMD is even more illustrative of both the procedural problems underlying the FTC's efforts to establish "rules" to "guide" companies' data security practice, as well as the resulting economic consequences of such an ambiguous and, ironically, unfair regulatory framework. LabMD *was* a medical testing company specializing in cancer that performed medical testing for consumers around the country.[190] In their complaint, the FTC alleged that LabMD engaged in "unfair…acts or practices" by failing to reasonably protect the security of consumers' personal data, including medical information, and on two separate occasions exposed the personal information of approximately 10,000 consumers by means of a peer-to-peer file sharing network available to the public.[191] On the first occasion, the FTC claimed that LabMD "failed to discover that its billing manager had installed a peer-to-peer file sharing application known as Limewire on his or her work computer, and a file that contained personal information on approximately 9,300 consumers was accessible to any individual, who used or had access to Limewire's software."[192] Despite the FTC's characterization, the facts later revealed that a third-party "consulting" firm actually downloaded the files in question and threatened to report LabMD to the FTC if the company didn't pay a hefty "consulting" fee.[193] As one commentator reported, there was "no evidence before the court that anyone other than this 'consulting' firm ever accessed the customer records—including no evidence that any of this

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[190] *See FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy*, FEDERAL TRADE COMMISSION, (August 29, 2013), https://www.ftc.gov/news-events/press-releases/2013/08/ftc-files-complaint-against-labmd-failing-protect-consumers.
[191] *Id.*
[192] *LabMD, Inc. v. F.T.C.*, No. 1:14-CV-00810-WSD, 2014 WL 1908716, at *1 (N.D. Ga. May 12, 2014), *aff'd,* 776 F.3d 1275 (11th Cir. 2015).
[193] *See* Gus Hurwitz, *The FTC's Data Security Error: Treating Small Businesses Like The Fortune 1000*, Forbes (Feb. 20, 2017), https://www.forbes.com/sites/washingtonbytes/2017/02/20/the-ftcs-data-security-error-treating-small-businesses-like-the-fortune-1000/#7c464c9e5a82.

information was ever used in any way that harmed a single LabMD customer."[194] After LabMD refused to pay the "consulting" firm, LabMD was then reported to the FTC, ultimately launching the federal investigation in question.[195] On the second occasion, the Sacramento, California police department arrested purported identity thieves and, in their possession, found LabMD's documents that contained sensitive information related to the personal information of customers.[196]

In response to the complaint, which was filed in the FTC's own administrative court, LabMD responded by filing a motion to dismiss arguing that the FTC lacked the statutory authority to enforce data security practices under Section 5, and that "the application of Section 5 to LabMD's data security practices violated the Due Process Clause of the United States Constitution."[197] LabMD's motion to dismiss was ultimately heard—and denied—by the FTC's own Commissioners who, as one commenter noted, were "the same Commissioners who [gave] life to the underlying legal theory in the case."[198] Following the FTC's denial of the motion to dismiss the claim they initiated, LabMD appealed the decision the District Court for the Northern District of Georgia, where Judge William S. Duffey, Jr. ultimately denied the review on the procedural grounds that the issue was not ripe—although not before chastising the FTC.[199] Judge Duffey, in a hearing considering LabMD's motion, addressed the FTC's counsel:

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[194] *Id*.
[195] *Id*.
[196] *LabMD, Inc. v. F.T.C.*, No. 1:14-CV-00810-WSD, 2014 WL 1908716, at *1 (N.D. Ga. May 12, 2014), *aff'd,* 776 F.3d 1275 (11th Cir. 2015).
[197] *Id*.
[198] Hurwitz, *Uncommon Law* at 973; *see LabMD, Inc.*, 2014 WL 1908716, at *1 ("On January 16, 2014, the Commission denied the Plaintiff's Motion to Dismiss, concluding that Section 5 vests the FTC with authority to address a private company's data security practices 'as unfair ... acts or practices' if they are found to be so deficient that it 'causes or is likely to cause substantial injury to consumers [that] is not reasonably avoidable by consumers themselves and [the harm is] not outweighed by countervailing benefits to consumers or competition.'").
[199] *LabMD, Inc.*, 2014 WL 1908716, at *6 (holding that, because the denial of a motion to dismiss does not constitute a "final agency action," "LabMD's alleged constitutional injuries are not currently ripe for review.").

> No wonder you can't get this resolved, because if [a 20-year consent order is] the opening salvo, even I would be outraged, or at least I wouldn't be very receptive to it if that's the opening bid…. You have been completely unreasonable about this. And even today you are not willing to accept any responsibility…. *I think that you will admit that there are no security standards from the FTC*. You kind of take them as they come and decide whether somebody's practices were or were not within what's permissible from your eyes…. [H]ow does any company in the United States operate when . . . [it] says, well, tell me exactly what we are supposed to do, and you say, well, all we can say is you are not supposed to do what you did…. *[Y]ou ought to give them some guidance as to what you do and do not expect, what is or is not required*. You are a regulatory agency. I suspect you can do that.[200]

After a lengthy delay due to a congressional investigation,[201] the FTC's administrative hearing before the FTC Chief Administrative Law Judge Chappell resumed.[202] During closing arguments, Judge Chappell, like Judge Duffey before him, admonished the FTC, questioning both the fairness of their practices[203] and whether they could even provide any legal precedent for their actions.[204] In his subsequent opinion, Judge Chappell rejected the FTC's claim against LabMD, and even went so far as to reject the FTC's basic underlying theory that "Section 5 unfair conduct liability can be imposed based solely on the risk of a data breach and that proof of

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[200] Hurwitz, *Uncommon Law* at 974 (quoting Transcript of Proceedings at 91, 94-95, LabMD, Inc. v. Fed. Trade Comm'n, No. 1:14-CV-810-WSD, 2014 WL 1908716 (N.D. Ga. May 7, 2014)) (emphasis added).

[201] Though the full details are not necessary for this discussion, the "consulting" firm, identified as Tiversa, became the subject of a congressional investigation led by the House Oversight Committee. The Committee's investigation was over concerns about the FTC's relationship with Tiversa, as the FTC had worked with Tiversa in pursuing data security cases against a number of other companies. Indeed, the investigation found that Tiversa had fabricated evidence of data and falsified reports of data breaches, and threatened to report the falsified reports to the FTC unless the companies hired them for security consulting. Further, it was alleged that the FTC, eager to develop its "rules" on data security, embraced Tiversa's falsified reports and evidence in pursuing claims for unfair data security practices without properly vetting them. See Hurwitz, *Uncommon Law* at 977-978; *see also* Press Release, House Committee on Oversight & Government Reform, Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail (June 18, 2014), https://oversight.house.gov/release/issa-ftc-watchdog-investigate-allegations-corporate-blackmail/.

[202] Closing Arguments at 6, 10, 16-17, LabMD, Inc., No. 9357 (F.T.C. Sept. 16, 2015).

[203] *Id*. at 8 (asking the FTC "where is the fairness in a standard of what the law is being issued or published after the case is brought?").

[204] *Id*. ("But you haven't cited any Court of Appeals case that agrees with that, have you?... I'm asking you to cite any autoirty to me, any case law, other than the ruling on a motion to dismiss in this case, that says a mere breach is sufficient harm to sustain a violation of section 5.").

an actual data breach is not required."[205] In rejecting the FTC's theory, Judge Chappell held that, not only is the FTC's theory insufficient to meet the requirements of Section 5, but if it were, then the FTC's entire interpretation of Section 5 would be unconstitutional. Specifically, Judge Chappell noted:

> If unfair conduct liability can be premised on 'unreasonable' data security alone, upon proof of a generalized, unspecified risk of a future data breach, without regard to the probability of its occurrence, and without proof, "then [the statutory standard provided in section 5(n)] would not provide the required constitutional notice of what is prohibited.[206]

Ultimately, while LabMD won before the Administrative Court in that the FTC failed to show actual or likely harm, the fact that the decision focused greatly on this lack of actual harm—as opposed to the FTC's process of developing "rules" though consent decrees—means that companies are still left in the dark as to whether, in cases like *Wyndham* where there is actual harm, the FTCs consent decree rulemaking is sufficient to establish binding legal rules with which to gauge their own practices. Further, because LabMD's decision to challenge the Commission rather than settle ultimately led to the company's demise, companies' hesitation in challenging an FTC enforcement action, even to gain court-ordered guidance as to what actually constitutes unreasonable data security practices, has likely only become heightened.[207] Thus, despite significant pushback from the court, the future is still uncertain for companies with regards to whether the FTC views their data security practices as reasonable and safe from an enforcement action, it seems unlikely that the pattern of companies entering into consent decrees to save the embarrassment and costs of challenging the FTC will only continue. Indeed, even in

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[205] Initial Decision, No. 9357, at 87 (F.T.C. Nov. 13, 2015), https://www.ftc.gov/system/files/documents/cases/151113labmd_decision.pdf.
[206] *Id*. at 86-87.
[207] William R. Denny, *Cybersecurity as an Unfair Practice: FTC Enforcement under Section 5 of the FTC Act*, Business Law Today (June 2016).

cases as sympathetic as LabMD's, there is still no guarantee of a satisfactory ending, particularly given consumers' understandable concern with companies protecting their private information.

E. Lessons Learned: The Future of Consumer Protection Regulations in the Digital Economy

As highlighted by *LabMD* and *Wyndham*, the FTC's use of consent decrees in enforcing data security and privacy practices has deprived the business community of the regulatory clarity necessary for our economy to grow.[208] As the FTC has stated, "[t]he touchstone of the Commission's approach [to data security] … is reasonableness." Yet, under this vague and highly subjective standard, and without more guidance, one can only question how a company would know whether their policies are sufficient or whether they're currently sitting in the Commission's crosshairs. Even to the extent the consent decrees provide companies with guidance, as both the courts and commentators have noted, "the standard language that the FTC uses is terse and offers little in the way of specifics about the components of a compliance program."[209] Consequently, "aside from requiring the designation of an adequately trained chief data security or privacy officer and the undertaking of regular risk assessments," anyone seeking to design a program that complies with FTC expectations must look to the complaints "to parse out what the FTC views as '*un*reasonable'—and, by negation, reasonable—privacy and data security procedures." Unfortunately, given the Commission's recent statement that "data security

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[208] *See Nat'l Petroleum Refiners Ass'n*, 482 F.2d at 675 (recognizing that "courts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone," including in providing businesses with greater certainty as to what business practices are not permissible).
[209] PATRICIA BAILIN, IAPP WESTIN RESEARCH CENTER, STUDY: WHAT FTC ENFORCEMENT ACTIONS TEACH US ABOUT THE FEATURES OF REASONABLE PRIVACY AND DATA SECURITY PRACTICES 1 (2015), https://iapp.org/media/pdf/resource_center/FTC-WhitePaper_V4.pdf.

enforcement remains a critical FTC priority," it seems like this trend is not only likely to continue, but may actually accelerate as the risk of cyber attacks increases.[210]

This trend is particularly troubling in the context of the regulating the digital economy, which continues to outperform the physical economy in growth as new startups rapidly emerge and traditionally non-digital businesses transition into the digital age.[211] This rapid growth of the digital economy—and the application of technology to the physical economy, which continually creates a plethora of never-before-imagined businesses—indicates that two significant problems will need to be addressed. First, the growth of the digital economy means that the economic problems that occur as a result of the FTC's unwillingness to use rulemaking and instead rely on consent decrees—namely the lack of clear regulatory guidelines that give businesses the clear and certain knowledge they need to thrive that results—is going to only become more troublesome. Second, the rapid growth of the digital economy means that cyber attacks are only going to become more prevalent and increasingly dangerous. As such, clear guidance from the FTC on cyber security best practices will not only provide businesses with clear regulatory standards, but perhaps more importantly help secure our nation's private information. Ultimately, both of these trends indicate that data security is the cornerstone of this digitization and clear regulations developed with input from industry—not secret settlements—is not only legally required, but also necessary if the United States wants to remain one of the top 10 digital economies in the world.[212]

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[210] Jessica Rich, *From Health Claims to Big Data: FTC Advertising and Privacy Priorities for Today's Marketplace—Brand Activation Association Keynote* (Nov. 7, 2014), *available at* https://www.ftc.gov/public-statements/2014/11/health-claims-big-data-ftc-advertising-privacy-priorities-todays.
[211] James Surowiecki, *Why Tesla is Worth More than GM*, MIT TECHNOLOGY REVIEW (June 27, 2017), https://www.technologyreview.com/s/607954/why-tesla-is-worth-more-than-gm/.
[212] Keith Breene, *The 10 Countries best prepared for the new digital economy*, World Economic Forum (July 6, 2016), https://www.weforum.org/agenda/2016/07/countries-best-prepared-for-the-new-digital-economy/.

IV. Courts, Through Intervening Third-Parties, Fight Back

Two recent Ninth Circuit decisions indicate that courts are ready and willing to critique—and, in fact, overturn—consent decrees that circumvent statutory rulemaking procedures and substantively alter rules or regulations indefinitely.[213] In *Conservation Northwest v. Sherman*, the court considered "whether a district court may approve resolution of litigation involving a federal agency through a consent decree, which substantially and permanently amends regulations that the agency could only otherwise amend by complying with statutory procedures."[214] Specifically, the court considered whether a consent decree entered into by a coalition of environmental groups and the Bureau of Land Management ("BLM"), Forest Service, and Fish and Wildlife Service ("the Agencies") that detailed how the Survey and Manage Standard of the Northwest Forest Plan would operate going forward."[215]

An industry intervenor defendant entered the suit and objected to the proposed agreement on the grounds that "the settlement modified the [Survey and Manage] Standard without complying with statutorily mandated public-participation procedures" required by NEPA, but the district court rejected this contention and entered the settlement as a consent decree.[216] On appeal, the Ninth Circuit found for the intervenor defendant and held that a consent decree is considered "improper" and will not be approved if it constitutes a "substantial and permanent" amendment to agency rules in circumvention of "statutorily required procedures.[217] The court so held despite only one year prior finding that the consent decree in *Turtle Island Restoration*

[213] *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1167 (9th Cir.2012).
[214] *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1183 (9th Cir. 2013).
[215] *Id.*
[216] *Id.* at 1184-85.
[217] *Id.* at

Network v. U.S. Dep't of Commerce was proper because it "merely temporarily restore[d] the status quo ante pending new agency action and [did] not promulgate a new substantive rule."[218]

In *Turtle Island*, environmentalists challenged agency fishing regulations, one part of which limited how many loggerhead turtles the fishing boats could take in their nets.[219] Midway through the litigation, the parties entered into a consent decree that (1) vacated that portion of the new rule setting the turtle limit, (2) temporarily re-imposed the prior rule until the agency could reconsider its new rule, and (3) remanded the case to the agency to reconsider the new rule.[220] An intervenor defendant fishing company objected, claiming that by vacating the new rule, the agency had made a substantive change to the rule without engaging in the required public notice and comment.[221] The circuit disagreed, finding that the new rule was only temporarily vacated while the agency reconsidered it, and that the consent decree "leaves [the agency] free on remand to fashion a new rule ... without imposing any substantive requirements on its terms."[222]

Despite the contrasting outcomes in *Turtle Island* and *Conservation Northwest*, the Ninth Circuit had no problem distinguishing the two cases by noting that the consent decree in *Conservation Northwest* "goes further than the one that we approved in *Turtle*," which was "simply a stop-gap measure while the agencies amended their regulations through existing administrative procedures."[223] In contrast, the consent decree in *Conservation Northwest*, "sets the rules … unless and until the Agencies decide to conduct further analysis and decision making," and if the Agencies wish, "they could simply let it stand indefinitely."[224] Indeed, the Ninth Circuit specifically recognized that their "decision in *Turtle Island* lends *further* support to

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[218] *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1167 (9th Cir.2012).
[219] *Id.*
[220] *Id.* at 1164.
[221] *Id.*
[222] *Id.* at 1168.
[223] *Conservation Northwest*, 715 F.3d at 1187.
[224] *Id.*

the conclusion that procedural requirements remain relevant in the context of consent decrees," not the other way around.[225]

V. Looking Forward: Intervenors, Standing, and Establishing a Right to Challenge Consent Decree Rulemaking

As discussed above, using consent decrees as a means for rulemaking raises a myriad of procedural, constitutional, economic, and public policy issues.[226] However, despite these concerns, challenging consent decrees remains a difficult task for four key reasons—with the first three dealing with the parties to the agreement, and the last dealing with the challenges facing a third-party intervenor in establishing standing. First, because the parties, by definition, have consented to the decree it is unlikely that a party will suddenly oppose the agreement. Second, in cases where the regulated parties have no certain knowledge of the regulatory requirements—such as those involving data security before the FTC—the defendants are unlikely to risk the embarrassment and costs associated with lengthy litigation absent any ability to gauge their likelihood of success. This is true even though the parties likely would prefer to litigate on the merits in order to have the reviewing court clarify the ambiguous regulatory requirements, and to force the Commission to clarify their standards. Third, and most critically for challenges by original parties, even if a party was willing to challenge the decree on appeal for circumventing rulemaking procedures, the parties are actually barred from violating the terms of the agreement absent a grant of relief from the court.[227] Indeed, the terms of the FTC's consent decrees often stipulate that the defendant "waives…all rights to seek judicial review or

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[225] *Id*. at 1185 (emphasis added).
[226] *See supra* Part II.C.
[227] FED. R. CIV. P. 60 (stating that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for certain reasons, including "any other reason that justifies relief.").

otherwise challenge or contest the validity of the order entered pursuant to this agreement."[228] Finally, if an affected third-party wishes to challenge the settlement in an independent action on the grounds that the consent decree violates his rights, the court will dismiss the claim as an "impermissible collateral attack."[229] Understanding this, it becomes clear that challenging even the most egregiously improper consent decrees can be nearly impossible. Indeed, while many legal commentators have attacked the "collateral attack bar" as both undesirable and unconstitutional, there has been very little written on how to solve the problem.[230] As one scholar eloquently articulated this difficult position before Congress:

> Federal Rule of Civil Procedure 60(b) allows for the modification of judgments, but underlying it is the assumption that a judgment accurately reflects parties' entitlements under law—something that may not be true in the case of a consent decree where the parties' interests are not opposed, but aligned. Based on this assumption, courts typically require a strong showing of changed circumstances to justify revision of a consent decree. They also typically disfavor challenges by third parties. The result is that the public's rights and interests may go unrepresented in legal proceedings that incorrectly assume an adversarial posture and only minor externalities.[231]

Ultimately, even despite the seemingly insurmountable burden of challenging an agreed-to consent decree, the holdings in *Conservation Northwest* and *Turtle Island*, coupled with the courts' dicta in *LabMD* and *Wyndham* questioning the FTC's "common law" practice, provide an adequate means for challenging consent decrees with quasi-rulemaking effects.

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[228] Agreement Containing Consent Order at 3(C), In re Oracle, No. 132 3115 (F.T.C. Dec. 21, 2015), https://www.ftc.gov/system/files/documents/cases/151221oracleorder.pdf.

[229] Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 322 (1988) [hereinafter Kramer, *Consent Decrees*].

[230] *See, e.g.*, *Id.*; Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103 (1987) [hereinafter Laycock, *Consent Decrees Without Consent*]; Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U.CHI. LEGAL F. 209, 224 (1987).

[231] *Hearing on: H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act" Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 3 (2012) (statement of Andrew Grossman, Visiting Legal Fellow, Center for Legal and Judicial Studies, Heritage Foundation), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/Grossman-02032012.pdf.

A. Intervention as a Means of Providing Third Parties with Opportunity to Challenge Consent Decrees

Central to the ability of the consent decrees to be challenged in both *Conservation Northwest* and *Turtle Island* was the presence of an intervening third-party willing and able to step in and contest the settlement on the grounds that it circumvented certain procedural requirements. Though the outcomes were different, the vital point remains that, in both cases, a non-party was able to intervene and at least force a court to review the consent decree's procedural propriety on the merits. It seems rather intuitive to say that a court should review a suit on the merits, particularly given that is their explicit purpose. However, as shown above, forcing a court to review the propriety of the consent decrees that make up the FTC's cyber security "rules" is actually quite difficult for procedural reasons, and, as illustrated by *LabMD* and *Wyndham*, hard to accomplish even when a defendant chooses to litigate. In *Wyndham*, the court found in favor of the FTC due to the incredibly deferential standard with which they're required to review a lower court's denial of Wyndham's motion to dismiss, even though they substantively critiqued the FTC's practice seemingly at every chance they could.[232] Similarly, in *LabMD*, Judge Duffey scolded the FTC's practice for being "completely unreasonable," yet had to dismiss the case solely because the case was not yet ripe since the administrative court's decision was not a final order.[233] Given these courts' hostility towards the FTC's use of consent decree rulemaking, it seems quite possible, if not altogether likely, that a court reviewing a similar case on the merits free from these procedural issues would find the practice improper. Yet, given that LabMD's bold decision to challenge the Commission resulted in their corporate demise and Wyndham's ultimate decision to settle, businesses facing an enforcement action from

[232] *See supra* Part III.D (discussing *Wyndham* in detail).
[233] *See supra* Part III.D (discussing *LabMD* in detail).

the Commission seem less likely than ever to risk the costs and reputational embarrassment. Therefore, absent some unexpected congressional action, finding an appropriate third party both willing and able to challenge the FTC's practice is, above all else, the critical factor necessary to force the FTC into providing fair notice and guidance to the business community.

Although individuals who are not original parties to litigation are generally barred from participating in the suit, through the procedural device of intervention, interested non-parties may be granted status as a party to an existing suit, with full rights to participate in, and control, the proceedings of the suit.[234] Indeed, under the fourth challenge outlined above—referred to as the "collateral attack bar" theory—a third-party *must* intervene in the original proceedings or the non-party may be barred from challenging the consent decree altogether.[235] For this reason, coupled with the already-present difficulties in challenging consent decrees generally, it is important, if not a necessity, that courts grant third-parties the right to intervene and challenge consent decrees that affect individuals and groups who are not parties to the litigation.

However, whether, and to what extent, other interested parties might be able to replicate the intervenor defendants in *Turtle Island* and *Conservation Northwest* to challenge future consent decrees at the FTC requires a critical analysis of three specific questions raised in those cases: (1) what's required for a potential intervenor defendant to be granted party status to an existing suit; (2) when and until what point in the litigation may an intervenor defendant join the

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[234] *See* Eric S. Oelrich, *The Relationship between Standing and Intervention: the Tenth Circuit Answers by "Standing" Down: San Juan County v. United States*, 14 MO. ENVTL. L. & POL'Y REV. 209, 215 (2006) [hereinafter Oelrich, "*Standing" Down*].

[235] Kramer, *Consent Decrees* at 322 (noting that if a third party "brings an independent action alleging that the settlement violates his rights, it will be dismissed as an 'impermissible collateral attack.'"); John R. B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order after Disobeying It*, 88 CORNELL L. REV. 215 (2002) ("When it comes to final judgments, the basic rules of res judicata limit the grounds on which parties can advance collateral attacks. Res judicata lays down the fundamental principle that one cannot collaterally attack flaws in a judgment's merits, whereas one can sometimes collaterally attack flaws in the court's authority to have rendered the judgment").

challenge given the unique nature of consent decrees as settlements; and (3) to what extent, if at all, do the more stringent and statutorily defined procedural requirements unique to environmental law statutes—in contrast to general procedural requirements under the APA and Magnuson-Moss—affect the likelihood that an intervenor defender can win on the merits of a procedural claim.

Ultimately, as one legal scholar noted, if a third-party's intervention is denied, they will be "stuck with a disadvantageous and possibly unlawful arrangement that [they] had no say in making."[236] For this reason in particular, establishing a right to intervene is the paramount hurdle a third-party must overcome in order to challenge an improper consent decree. In fact, this issue's significance led one former Assistant Attorney General to propose that courts totally abolish this bar and grant third parties the right to maintain separate actions challenging consent decrees.[237] Another commentator even went so far as to propose that courts altogether refuse to enter a consent decree that affects the "arguable rights" of some known or foreseeable third party.[238] Ultimately, these proposals all recognize one vital fact: the failure to establish a right to intervene may very well mean that each and every individual affected by the settlement, yet not a party to its formation, will nevertheless be left without any recourse. While these proposals would clearly help alleviate this problem, absent a stark shift in the courts' third party standing jurisprudence or congressional assistance, individuals must utilize the existing rules to establish a right to intervene and challenge harmful, or even unconstitutional, consent decrees. The next section will therefore turn to what a would-be intervening party must establish in order to challenge an FTC consent decree, particularly in the context of data security and privacy.

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[236] Kramer, *Consent Decrees* at 322.
[237] See Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155 (1987).
[238] *See* Laycock, *Consent Decrees Without Consent*.

1. Establishing the Right to Intervene in Article III Courts

In determining whether a third-party intervenor can successfully challenge a consent decree entered into by a federal agency and another party, the first inquiry is whether the intervening party is entitled to join the existing suit and have the court decide the merits of their claim.[239] This question, as the Supreme Court stated, "is the threshold question in every federal case," and turns on whether the litigant has standing to challenge the consent decree.[240] The doctrine of standing, which lies at the center of our constitutionally prescribed judicial system, sets limits on who may seek relief in federal court.[241] This doctrine originates from Article III of the Constitution, which restricts federal courts' jurisdiction to only "cases" and "controversies."[242] Further, would-be intervenors must meet the "interest" requirement of Rule 24(a) of the Federal Rules of Civil Procedure (Rule 24).[243] Though separate doctrines, courts have noted that both "standing and intervention require that a party have an interest in the subject matter of the litigation."[244]

Despite the standing doctrine directly implicating a federal court's subject matter jurisdiction[245]—thus requiring the court to establish standing before addressing the merits of the case—Federal circuit courts were (and arguably still are) divided over whether meeting the "interest" requirement is alone sufficient or whether the intervening party must also

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[239] *See Warth v. Seldin*, 422 U.S. 490 (1975).
[240] *Id.*
[241] *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (noting that "the threshold question in every federal case" is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant."); *see also* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539, 1541 (2012) (discussing generally the origins and constitutional basis of the standing doctrine).
[242] U.S. CONST. art. III, § 2, cl. 1.
[243] FED. R. CIV. P. 24(a).
[244] *San Juan Cty., Utah v. United States*, 420 F.3d 1197, 1203 (10th Cir. 2005), *opinion vacated on reh'g en banc*, 503 F.3d 1163 (10th Cir. 2007).
[245] *See Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (noting that if "events change such that the appellate court can no longer grant 'any effectual relief whatever to the prevailing party,' any resulting opinion would be merely advisory," and the court would lack subject matter jurisdiction.).

independently establish Article III standing.[246] The majority of circuits did not require intervenors to establish Article III standing independently of Rule 24,[247] while three circuits—most notably the D.C. Circuit[248]—required intervenors to establish independent Article III standing.[249] Ultimately, in *McConnell*, the Supreme Court seemingly settled the split by adopting the majority rule and holding that, where the original parties have established the requisite case or controversy for Article III standing, an intervening party need not independently establish standing.[250] An intervenor's right to piggyback on an established case or controversy is not without limits, however. The exception to the *McConnell* rule is that an intervenor must establish standing independently if they either exceed the scope of the existing case or controversy by raising issues outside of those raised by the original litigants,[251] or if the original case or

[246] *Id.* at 1204. (discussing the rule split between the Circuits).
[247] The Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits did not require intervenors to establish Article III standing independently. *See, e.g., U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998).
[248] The D.C. Circuit hears the clear majority of cases brought by, or against, Federal agencies. For this reason, the D.C. Circuit's standing requirement is of particular importance. *See, e.g.,* Hon. Patricia Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 232, n.66 (1996) (noting that 57% of the D.C. Circuit's caseload is made up of agency appeals and the D.C. Circuit is responsible for 37% of all federal agency appeals in the country).
[249] The Seventh, Eighth, and District of Columbia Circuits required intervenors to establish independent Article III standing, because Congress cannot legislate around constitutional standing requirements. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) ("But the interest required by Article III is not enough by itself to allow a person to intervene in a federal suit and thus become a party to it. There must be more. Rule 24(a)(2) requires that the applicant claim, "an interest relating to the property or transaction that is the subject of the action." "Interest" is not defined, but the case law makes clear that more than the minimum Article III interest is required.").
[250] *McConnell v.* FEC, 540 U.S. 93, 233 (2003) ("The National Right to Life plaintiffs argue that the District Court's grant of intervention to the intervenor-defendants, pursuant to Federal Rule of Civil Procedure 24(a) and BCRA §403(b), must be reversed because the intervenor-defendants lack Article III standing. It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's."); *but see ACLU of Minn. V. Tarek Ibn Ziyad Acad.*, 643 F.3d 1088, 1092 (8th Cir. 2011) ("In our circuit, a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24.") (quoting United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 838 (8th Cir. 2009)).
[251] *See McConnell*, 540 U.S. at 233 (holding that intervenor-defendant need not establish standing where the original defendant had standing, and "[intervenor's] position…is identical to the [original defendant's]").

controversy ceases to exist.[252] Further, any intervenor—regardless of whether they're aligned with plaintiffs or defendants—must still satisfy the requirements of Rule 24.

Thus, for a would-be intervening party to establish standing in order challenge a proposed consent decree on procedural deficiency grounds, the party must always first establish an "interest" under Rule 24. Further, if an intervenor wishes to go beyond the scope of the original case or controversy—either substantively, by raising issues not raised by original parties, or procedurally, by moving forward with the litigation after their original aligned party has chosen to not continue—they must establish standing under Article III. This section will first set forth the legal standard for establishing a right to intervene under Rule 24 as statutorily required by all circuits and then discuss the Supreme Court's minimal guidance in interpreting the requirements of Rule 24. Next, this section will discuss the legal standards applicable to an intervenor establishing Article III standing where the original aligned party has ceased litigating, such as challenging a court-approved consent decree. Finally, this section will apply these legal standards to the FTC and discuss what is required for a theoretical intervenor defendant to successfully establish standing to challenge an FTC consent decree in the context of data security and privacy enforcement.

a. Rule 24 Standing

As statutorily required, all parties applying to intervene in an action must meet the requirements of Rule 24, which sets forth two methods of intervention: intervention of right and permissive intervention.[253] As Rule 24 is to be given a liberal construction "broadly construed in

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[252] *See Diamond v. Charles*, 476 U.S. 54, 68–69 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.").
[253] The current version of Rule 24 states (in relevant part):

favor or applicants,"[254] the Supreme Court has rejected the assertion that Rule 24 is "a comprehensive inventory of the allowable instances for intervention," and held that "the public interest may require intervention to be allowed entirely outside of the rule's scope."[255] Under Rule 24(a), intervention of right requires, as its name implies, that a court must grant a moving party the right to intervene once they establish either "an unconditional right…by statute," *or* "an interest relating to the property or transaction that is the subject of the action…."[256] Permissive intervention is granted solely at the court's discretion and "can be allowed when there is a common question of law or fact between the litigation and the applicant's claim or defense."[257] Justice Brennan famously distinguished the two methods by the stake applicants have in the case, stating, "[t]he intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation, while the permissive intervenor does not."[258]

Though courts have full discretion to grant permissive intervention motions, courts have granted motions to intervene permissively—even when denying their motion to intervene as of right—where the applicants' proposed complaint in intervention and the complaint filed by the

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> (a) Intervention of Right. On timely motion, the court *must* permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an *interest* relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
> (b) (1) On timely motion, the court *may* permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact… (3) In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

FED. R. CIV. P. 24(a)-(b) (emphasis added).

[254] *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) (citing *Washington State Building & Construction Trades Council v. Spellman,* 684 F.2d 627, 630 (9th Cir.1982)).

[255] *Missouri-Kansas Pipe Line Co. v. U.S.*, 312 U.S. at 505-506; *see also* 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1904 (3d ed. 2017).

[256] FED. R. CIV. P. 24(a).

[257] Oelrich, *"Standing" Down* at 217 (citing Brian Hutchings, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in Sierra Club v. City of San Antonio*, 43 VILL. L. REV. 693, 703-704(1998) [hereinafter Hutchings, *Divine Intervention*].

[258] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 381 (1987) (Brennan, J. concurring).

original party raise "common questions of fact and law."[259] While "restrictions may be placed on an intervenor of right and on an original party,"[260] courts have greater discretion to impose certain conditions upon its grant of permissive intervention, such as prohibiting intervenors from "asserting any claims not already asserted by original parties."[261] Because an applicant can guarantee themselves access to a suit by meeting either prong of Rule 24(a) —coupled with the fact that, as a practical matter, an applicant will move to intervene permissively in the alternative to intervention as of right,[262] and there is minimal difference in the burden of establishing "an interest" as opposed to "a common question of law or fact"—the "majority of case law and commentary on Rule 24 has focused on intervention of right."[263]

When broken down, courts have found that Rule 24(a)(2) requires four elements to be met for an individual to establish a right to intervene.[264] An order granting intervention as of right is appropriate if (1) the application was timely; (2) the applicant "claims an interest relating to the property or transaction which is the subject of the action;" (3) the disposition of the action may impair or impede the ability to protect that interest; *and* (4) the applicant's interest is not adequately represented by existing parties. [265] As all four factors must be met, each will be

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[259] *United States v. Stringfellow*, 783 F.2d 821, 824 (9th Cir. 1986), *vacated sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) ("Notwithstanding its denial of CNA's motion to intervene as of right, the district court granted CNA leave to intervene permissively, reasoning that since CNA's proposed complaint in intervention and the complaint filed by the United States and California raised common questions of fact and law, permissive intervention was appropriate.").
[260] *Concerned Neighbors in Action*, 480 U.S. at 383 (Brennan, J. concurring).
[261] *See id.* (prohibiting intervenors from "(1) asserting any claims not already asserted by the original parties; (2) intervening in the original parties' cost recovery claims; and (3) initiating any motion or discovery, unless appellant had conferred with the original parties and had secured the concurrence of at least one of them in the proposed motion or discovery.").
[262] *See id.* ("In July, 1983, CNA and Newman … moved to intervene as of right, pursuant to Fed.R.Civ.P. 24(a)(1) and 24(a)(2). In the alternative, CNA moved to intervene permissively, pursuant to Fed.R.Civ.P. 24(b).").
[263] Oelrich, *"Standing" Down* at 217.
[264] *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (setting out the four-prong test for Federal Rule of Civil Procedure Rule 24(a) intervention as of right); *San Juan*, 420 F.3d at 1205 (synthesizing the rule for meeting Rule 24's requirements).
[265] *See Id*. (quoting *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)).

discussed in turn. However, it is worth noting that, while a court's decision to grant intervenor standing to an applicant typically turns on whether they can establish a sufficient "interest" under the second factor, given the unique timing requirements inherent in challenging consent decrees, as well as the less stringent standard of review, the timing requirement is arguably more important in the context of challenging consent decrees.[266]

i. Standard of Review

Appellate courts review de novo a district court's denial of a party's motion to intervene as a matter of right,[267] with the exception of the issue of timeliness, which is reviewed under the more stringent "abuse of discretion" standard.[268] Since "[p]ermissive intervention is committed to the broad discretion of the district court," denial of a motion for permissive intervention is reviewed for an abuse of discretion[269] and courts will reverse only in "extraordinary circumstances."[270] In reviewing a motion to intervene, district courts must accept as true any non-conclusory allegations made in support of a motion to intervene.[271]

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[266] Hutchings, *Divine Intervention* at 708-710.

[267] *See, e.g., Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995) *abrogated by* Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011) (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir.1995)); *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, No. 16-11246, 2017 WL 2858770, at *9 (11th Cir. July 5, 2017) (quoting *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 909–10 (11th Cir. 2007) ("Our review of the denial of a motion for intervention as of right is de novo.").

[268] *See, e.g., Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 366 (1973) (""Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.").

[269] *See, e.g., Orange Cty. v. Air California*, 799 F.2d 535, 539 (9th Cir. 1986); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002).

[270] *M2 Tech., Inc. v. M2 Software, Inc.*, 589 F. App'x 671, 675 (5th Cir. 2014) (citing *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003) ("Orders denying permissive intervention are reviewed for "clear abuse of discretion" and will be reversed only if 'extraordinary circumstances' are shown.").

[271] *See, e.g., Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) (adopting "the rule requiring acceptance of the proposed intervenor's well-pleaded allegations"); *Reich v. ABC/York–Estes Corp.,* 64 F.3d 316, 321 (7th Cir.1995) (concluding that a court "must accept as true the non-conclusory allegations of [a] motion [to intervene]"); *Chesapeake Bay Found. v. Am. Recovery Co.,* 769 F.2d 207, 209 n. (4th Cir.1985) (reviewing a statutory right to intervention and concluding, "[s]ince plaintiffs' complaint and motion to intervene were dismissed at preliminary stages without evidentiary testing, we must accept plaintiffs' allegations as true"); *Foster v. Gueory,* 655 F.2d 1319, 1324 (D.C.Cir.1981) (stating that "motions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention").

ii. Timely Motion to Intervene

R.M. Drake, a writer who famously used the photo-sharing, mobile app Instagram to become a best-selling author, once quipped that "If we move too fast, we'll break things. If we move too slow, we'll miss things."[272] This quote captures perfectly why the timing of a motion to intervene in the context of challenging a consent decree is perhaps the most crucial factor. On the one hand, if a motion to intervene is filed too early (i.e., before they can show that the original parties are likely to enter a consent decree adversely affecting their rights), the third party may not yet have a sufficient interest to establish standing. Conversely, if the motion is filed too late (i.e., after the parties have entered, and a court approved, a consent decree), the court may deny the motion for fear of disrupting lengthy litigation ready to be mutually settled. As the Seventh Circuit put it, "[t]he purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal."[273]

Whether intervention is sought as a right or permissively, the Supreme Court has held that the application must be timely and "[i]f it is untimely, intervention must be denied."[274] Although the point to which the suit has progressed is one factor in determining whether an application is timely, "it is not solely dispositive" and "[t]imliness is to be determined from all the circumstances."[275] Ultimately, the Supreme Court has held that timeliness is "to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."[276]

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[272] Heba Hasan, *Who is R.M. Drake? How One Writer Used Instagram to Become An Amazon Best-Seller*, Tech Times (Feb. 18, 2015), http://www.techtimes.com/articles/31427/20150218/who-is-r-m-drake-how-one-writer-used-instagram-to-become-an-amazon-best-seller.htm.
[273] *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (citing *United States v. South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir.1983)).
[274] *Nat'l Ass'n for Advancement of Colored People v. N.Y.*, 413 U.S. 345, 365 (1973).
[275] *Id.*
[276] *Id.* at 366.

Thus, a prospective intervenor must "move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation."[277] In determining whether an applicant's motion to intervene was timely, all courts apply a balancing test, although Federal circuits differ in how they articulate the relevant factors.[278] Generally speaking, however, courts consider four factors in determining the timeliness of a petition: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances militating either for against a determination that the application is timely.[279]

Since most litigation does not end in consent decrees, and even fewer result in consent decrees with rulemaking effects, determining the right moment to intervene is particularly difficult when challenging a consent decree on the grounds that it constitutes rulemaking in circumvention of statutorily prescribed procedural requirements. As one commentator recognized, the collateral attack bar distinctly affects an intervening party by "shorten[ing] the time [the intervenor] has to bring his claim," because the third party must "join the consent decree proceeding by intervening" and "in practice Rule 24's time limit is invariably shorter than

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[277] *Babbitt*, 214 F.3d at 949.

[278] The Eight Circuit, for example, has held that, in determining the timeliness of a motion to intervene, the court is to consider *all* of the circumstances. *See United States v. Union Electric Co.*, 64 F.3d 1152, 1158-59 (8th Cir. 1995) (noting that the court should focus on "the reason for any delay by the proposed intervenor in seeking intervention, how far the litigation has progressed before the motion to intervene is filed, and how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed."). Further, the Ninth Circuit, in evaluating timeliness, considers "the stage of the proceeding, prejudice to other parties, and the reason for and length of the delay." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *United States v. State of Or.*, 913 F.2d 576, 588 (9th Cir. 1990)); *Orange Cty*., 799 F.2d at 537.

[279] *Babbitt*, 214 F.3d at 949; *see also Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003); *Moore v. Rees*, No. 06-CV-22-KKC, 2007 WL 2955947, at *1 (E.D. Ky. Oct. 1, 2007); *Stallsworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *Fiandaca v. Cunningham*, 827 F.2d 825, 833-35 (1st Cir. 1987); *South v. Rowe*, 759 F.2d 610, 612-13 (7th Cir. 1985); *Reeves v. Wilkes*, 754 F.2d 965, 969 (11th Cir. 1985).

the applicable statute of limitations."[280] If the motion to intervene is filed on such grounds, but the parties ultimately either litigate on the merits or settle without violating any procedural requirements, then intervention was unwarranted and the motion may be dismissed altogether for lack of a cognizable interest. Conversely, if the litigation does result in an improper consent decree, yet the court has already approved it, then said approval constitutes a final order and any potential challenge would likely be rendered moot. Thus, in challenging a procedurally deficient consent decree with quasi-rulemaking authority, two critical questions must be answered for a potential intervening defendant in terms of timeliness. First, may the party intervene prior to having actual knowledge that a challengeable consent decree will actually result? Second, if not, what is the threshold requirement a movant must show in terms of proving that the litigation will likely result in a procedurally proper consent decree with rulemaking authority? Courts have held that motions to intervene that are filed after a consent decree has become final, or after the parties have agreed to a settlement, yet before final approval, "weigh heavily against the moving applicant."[281] However, despite courts disfavoring the timing of such motions, filing a motion after a settlement has been reached is not alone dispositive.[282] Understanding the requisite analysis, there are two cases—one in the Supreme Court and one in the Ninth Circuit where *Conservation Northwest* and *Turtle Island* were decided —that aptly apply the timeliness analysis to circumstances where parties wish to intervene to challenge consent decrees.

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[280] Kramer, *Consent Decrees* at 332 (noting additionally that the collateral attack bar also limits an intervening party's choice of forum, since that intervenor "is allowed to seek relief only in the proceeding in which the consent decree was entered").

[281] *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978) ("Since the motion was filed after the consent decree was approved, the first factor weighs heavily against appellants."); *Orange Cty.*, 799 F.2d at 538.

[282] *Orange Cty.*, 799 F.2d at 538 (noting that "Although Irvine did intervene before the Stipulated Judgment was officially approved by the district court, the fact that Irvine waited until after all the parties had come to an agreement *after five years* of litigation should nevertheless weight heavily against Irvine.").

In *NAACP v. New York*, the Supreme Court reviewed, among other issues, whether the NAACP's motion to intervene pursuant to Rule 24 was improperly denied as untimely.[283] On April 7, 1972, the NAACP attempted to intervene in a suit originally brought by the State of New York in December 1971, on behalf of New York, Bronx, and Kings counties, against the United States.[284] New York sought a judgment declaring that, "during the 10 years preceding the filing of the suit, voter qualifications prescribed by the State had not been used by the three named counties 'for the purpose … of denying or abridging the right to vote on account of race or color.'"[285] Thus, the Voting Rights Act sections designed to prohibit the use of a literacy test for the alteration of voting qualifications in order to deprive a citizen of his right to vote were inapplicable to such counties.[286] On April 7, the NAACP's motion to intervene was filed. The motion claimed, in addition to their interests in the case, that on March 21 they met with a Department of Justice (DOJ) attorney who promised to notify them when New York submitted their redistricting laws. In light of this meeting, on April 5 DOJ informed the NAACP's attorney that two days earlier they had consented to New York's summary judgment motion.[287]

On April 13, in the same order denying the NAACP's motion to intervene, the district court granted New York's motion for summary judgment on the basis of a formal consent agreement with the Assistant Attorney General in charge of the Civil Rights Division, concluding that "there is no reason to believe that a literacy test has been used…with the purpose or effect of denying the right to vote on account of race or color."[288] On appeal, the NAACP contended that their motion to intervene was improperly denied because "(1) the United States

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[283] *Nat'l Ass'n for Advancement of Colored People v. N.Y.*, 413 U.S. 345 (1973).
[284] *Id*. at 348.
[285] *Id*. at 349.
[286] *Id*.
[287] *Id*. at 363-362.
[288] *Id*.

unjustifiably declined to oppose New York's motion for summary judgment…and (3) the appellants possessed 'substantial documentary evidence' to offer in opposition to the entry of the declaratory judgment."[289] While the United States took no position with respect to the NAACP's motion to intervene, New York opposed the motion on six grounds. The first, and ultimately decisive, contention was that the motion was untimely because the suit had been pending for over four months, the New York Times had published an article detailing the suit three months earlier, and the "appellants did not deny that they had knowledge of the pendency of the action."[290]After the district court denied their motion, the NAACP filed an additional motion one week later to Alter Judgment, "on the ground, among others, that their motion to intervene was timely since neither the appellants nor their counsel knew of the … action until March 21."[291] After the district court again denied the NAACP's motion, and while the appeal was pending with the Supreme Court, two new facts came to light: (1) the NAACP's attorney, who executed the affidavits, did not begin his employment with the NAACP until March 9, 1972, and (2) DOJ attorneys met with two appellants in January of 1972 in the course of their investigation.[292]

In holding that the district court's denial of the NAACP's motion to intervene was not an abuse of discretion, the Court outlined four specific factors indicating untimeliness, two of which are particularly relevant. First and foremost, the court found that, despite their assertion that they had no prior knowledge of the pendency of the action prior to March 21, the NAACP "knew or should have known of the pendency of the … action because of an informative February article

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[289] *NAACP*, 413 U.S. at 349-50.
[290] *Id*. at 362 (providing the additional 5 grounds in detail).
[291] *Id*.
[292] *Id*. at 364.

in the New York Times discussing the controversial aspect of the suit;[293] public comment by community leaders; the size and astuteness of the membership and staff of the organizational appellant; and the questioning of two of the individual appellants themselves by Department of Justice attorneys investigating the use of literacy tests in New York."[294] Second, the Court noted that, in addition to the aforementioned facts, "the record amply demonstrates that appellants failed to protect their interest in a timely fashion after March 21, 1972, the date they allegedly were first informed of the pendency of the action."[295] Namely, "the suit was over three months old and had reached a critical stage," wherein the United States' answer to New York's complaint, submitted on March 10, "had clearly indicated that it was without knowledge or information sufficient" to challenge New York's assertions.[296] Thus, since the U.S. lacked the information necessary to challenge New York's allegations and oppose the motion for summary judgment, "[i]t was obvious that there was a strong likelihood that the United States would consent to the entry of judgment," and therefore, "it was incumbent upon the appellants, *at that stage of the proceedings*, to take immediate affirmative steps to protect their interests…by way of an immediate motion to intervene."[297]

In *County of Orange v. Air California*, the Ninth Circuit affirmed a district court's order denying the City of Irvine's motion to intervene pursuant to Rule 24(a) and (b) because the motion was "made only after a proposed, and as it turned out, final settlement had been reached"

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[293] The Court also noted in a footnote that this "was the only news article on the page" and the article "recited that [NY's] Attorney General 'had moved in Federal Court in Washington to have the state exempted from potential Federal supervision over registration and voting' in the three counties." *Id*. at 267, n.19.
[294] *NAACP*, 413 U.S. at 366-67.
[295] *Id*. at 367.
[296] *Id*.
[297] *Id*. The final two factors discussed by the Court were regarding (3) their being "no unusual circumstances warranting intervention since…no appellant alleged an injury, personal to him," and (4) the potential "for seriously disrupting the State's electoral process" if the motion was granted. *Id*. at 368-69.

and was thus untimely.[298] There, Orange County adopted a plan for the future development of commercial activity at John Wayne Airport, which drew the ire of Newport Beach and several citizen groups who all challenged certain aspects of the proposed plan that increased activity at the airport and expanded the terminals.[299] In early 1985, the parties began negotiating a settlement, and informed the district court of the tentative agreement on September 18, 1985.[300] Throughout the process, the press chronicled the progress of the parties' negotiations. On September 20, 1985, Irvine filed a motion to intervene as a matter of right and permissively.[301] On October 28, 1985, the court denied Irvine's motion, and on November 18, 1985, the parties formally submitted the agreement to the court, which subsequently entered a judgment approving the consent decree on December 13, 1985.[302]

Applying the Ninth Circuit's three-factor balancing test for determining timeliness, the Court determined that the situation implicated both "the state of the proceeding" and "prejudice to other parties" factors.[303] In analyzing the two factors, the court invoked *Alaniz v. Tillie Lewis Foods*, where the Ninth Circuit held that "a motion to intervene filed seventeen days after a consent decree had become effective was untimely."[304] Although the court recognized that, unlike the motion in *Alaniz*, Irvine intervened *before* the consent decree was officially approved by the district court, the court still found that "the fact that Irvine waited until after all the parties

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[298] *Orange Cty*., 799 F.2d 535.
[299] *Id*. at 536.
[300] *Id*. at 537.
[301] *Id*.
[302] *Id*.
[303] *Orange Cty*., 799 F.2d at 538 (noting that the district court's holding "implicates the first two factors that must be weighed.").
[304] *Id*. (citing *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658 (9th Cir. 1978)).

had come to an agreement after five years of litigation should nevertheless weigh heavily against Irvine."[305]

In so finding, the court also noted that in both cases "[t]he consent decree had been preceded by extensive and well-publicized negotiations," and such publicity should have made Irvine aware that "the litigation might be resolved by negotiated settlement."[306] Further, in finding that the timing of the motion would prejudice the parties involved under the second factor, the court focused on the fact that the issues had been litigated for five years and "to allow Irvine to intervene 'at this late date' would be the undoing of five years of protracted litigation *finally* resolved by the Stipulated Judgment."[307] Ultimately, weighing these factors against Irvine's contention that it did not intervene sooner because it was unaware that its interests would not be adequately represented until after it learned of the proposed consent decree, the Court held that the motion was untimely.[308] In light of the newspaper reports on the settlement negotiations, the court concluded that, "[i]n order to protect itself against the eventuality, Irvine should have intervened sooner."[309]

Although the motion to intervene was found to be untimely in *NAACP*, *Orange County*, and *Alaniz*, the factors analyzed all make one thing clear: if some third-party wishes to intervene to challenge a consent decree, it is incumbent upon them to assiduously watch the suit and promptly take immediate affirmative steps to protect their interests whenever it even seems possible that a procedurally improper consent decree may result, or their interests may be injured. These cases also indicate that a reviewing court, in determining whether a moving party

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[305] *Id*.
[306] *Id*. at 538.
[307] *Id*. (emphasis added).
[308] *Id.*; *see Alaniz*, 572 F.2d at 659 ("To protect their interest, appellants should have joined the negotiations before the suit was settled.").
[309] *Id*.

knew or should have known of the pendency of the action, will consider *any* source of information that might inform a prudent party that their rights may be impacted, especially documents filed in the course of litigation and local and national news sources. Finally, courts will also consider the size and resources of the moving party in determining whether they knew or should have known of the pendency of the action, as the Court did in *NAACP*. Thus, an individual who wishes to intervene must pay careful attention to the case itself, including any claims, answers, or motions, as well as any external information, such as press releases and newspaper articles that might indicate the action *may* end in a consent decree. A failure to do so, even where the moving party truly was unaware of the pendency of the action or where there has been no final judgment, will cause a court to dismiss their motion to intervene for being untimely.

iii. Interest Relating to Property or Transaction

Courts and commentators have both struggled to delineate exactly what "interests" are sufficient to establish intervention of right.[310] However, most courts agree that it is a fact-intensive balancing endeavor, which "involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending."[311]

Although there is no clear-cut test to determine nature of interest required for intervention of right, the courts' inquiry is "a flexible one, which focuses on the particular facts and

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[310] *See, e.g., Diamond v. Charles*, 476 U.S. 54, 68 (1986) (acknowledging circuit split on interpretation of Rule 24's application); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992) (noting that case law regarding interest requirements of Rule 24 "varies substantially between courts"); *See e.g*., Carl W. Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 420 (1991) ("Numerous courts and commentators have recognized that the federal judiciary has experienced considerable difficulty in defining the interest necessary to satisfy Rule 24(a)(2) ….") [hereinafter Tobias, *Standing to Intervene*].
[311] *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969)

circumstances surrounding each application," and "intervention as of right must be measured by a practical rather than technical yardstick."[312] Courts have construed this practical rule "liberally in favor of potential intervenors."[313] This liberal interpretation is even more necessary in "atypical cases" such as administrative cases, which "often vary from the norm" since there is a "greater impetus to intervention that inheres in administrative cases."[314] This different treatment of administrative cases is also illustrative of the different roles that judges assume in the context of public law litigation as opposed to private litigation, where a party to the suit often has "less tangible rights" and where courts often attempt to prevent or correct inappropriate government behavior.[315] Though their interests are less tangible, courts have allowed, and indeed benefit from, the intervention of public interest groups in order to protect the interests of large unrepresented segments of the public, garner a broader base of information—allowing judges to make more well-informed decisions—and to promote judicial economy.[316] Finally, and perhaps most importantly, allowing third party public interest groups to intervene provides greater legitimacy to the court's decision in the public's eye.[317]

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[312] *M2 Tech., Inc. v. M2 Software, Inc.*, 589 F. App'x 671, 675 (5th Cir. 2014) (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975)).
[313] *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995)).
[314] *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (holding that the "provisions (of Rule 24) require other than literal application in atypical cases," and "Administrative cases, as the present one demonstrates often vary from the norm."
[315] *See e.g.*, Tobias, *Standing to Intervene*, at 420; Brian Hutchings, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in Sierra Club v. City of San Antonio*, 43 VILL. L. REV. 693, 693–94 (1998) (stating that while "traditional litigation involves one private party suing a second private party for the infringement of an easily identifiable right, public law litigation often involves one or more public entities as a party to a suit concerning less tangible rights.") [hereinafter Hutchings, *Divine Intervention*]; see Abram Chayes, *The Supreme Court, 1981 Term--Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982) (stating that term "'public law litigation"' is meant to "emphasize that in such cases the federal courts are no longer called upon to resolve private disputes between private individuals according to the principles of private law.") [hereinafter Chayes, *Supreme Court*].
[316] See Hutchings, *Divine Intervention*, *supra* note 236, at 695 (discussing the benefits of intervention by third party public interest groups) (citing Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 Ariz. St. L.J. 853, 941, n.353 (1989)).
[317] *Id*.

Further, understanding the timing restraints relevant to challenging consent decrees, courts have held that "'[a]lthough intervenor cannot rely on interest that is wholly remote and speculative, intervention as of right may be based on interest that is contingent upon litigation's outcome.'"[318] Thus, a person claiming an interest in the litigation in order to challenge even a theoretical consent decree "does not have to wait until he or she has suffered irreparable harm before the requirements for intervention under Rule 24(a) have been met."[319] Finally, courts have been clear that the proper question under Rule 24 is *not* whether the intervenor has an independent cause of action sufficient to start a lawsuit, but rather "whether already initiated litigation should be extended to include additional parties."[320] Under this lower bar, "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving *as many apparently concerned persons* as is compatible with efficiency and due process."[321] Thus, in determining whether a moving party has an interest sufficient to establish intervention of right, particularly in the context of public law cases, courts apply a fact-specific review and, "absent sham, frivolity, or other objections,"[322] courts are to accept all well-pleaded, nonconclusory allegations set forth by the moving party, and construe them in a light most favorable to the moving party. This section will begin by addressing the minimal precedent provided by the

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[318] *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (quoting *United States v. Union Elec. Co.,* 64 F.3d 1152, 1162 (8th Cir. 1995)).
[319] *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995) (quoting *Jenkins by Agyei v. State of Mo.*, 967 F.2d 1245, 1248 (8th Cir. 1992) ("The language of the rule itself contemplates that the affected party can intervene in proceedings that "may" affect him before harm is done by execution of a court order."); *See Little Rock School Dist. v. Pulaski County Special School Dist.,* 738 F.2d 82, 84 (8th Cir.1984) ("The rule does not require, after all, that appellants demonstrate to a certainty that their interests *will* be impaired in the ongoing action. It requires only that they show that the disposition of the action '*may* as a practical matter' impair their interests.") (emphasis in original).
[320] *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969); *see Jones v. Prince George's Cty., Maryland*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("In a motion to intervene under Rule 24(a)(2), the question is not whether the applicable law assigns the prospective intervenor a cause of action. Rather, the question is whether the individual may intervene in an already pending cause of action.").
[321] *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (interpreting the then-recent congressional amendments to Rule 24 that are currently applicable).
[322] *Sw. Ctr. for Biological Diversity*, 268 F.3d at 820.

Supreme Court for determining what constitutes a sufficient interest under Rule 24. Second, given the fact-intensive framework and dearth of Supreme Court precedent, this section will then look to the lower federal courts to analyze what factors courts have considered in their review, particularly where intervening parties have attempted to challenge consent decrees in the context of public law litigation where parties have "less tangible interests."

In one of the first cases decided after Rule 24's application was broadened through the 1966 amendments,[323] the Supreme Court, in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, squarely addressed whether several parties' motion to intervene to challenge a consent decree requiring divestiture of a company in an antitrust context was improperly denied.[324] There, the Court read Rule 24 broadly in granting the applicants' intervention of right, suggesting that a specific equitable or legal interest is unnecessary to satisfy the requirements of the rule.[325] Specifically, the Court held that a gas distributor was entitled to intervene "although its only 'interest' was the economic harm it claimed would follow from an allegedly inadequate plan for divestiture approved by the Government in an antitrust proceeding."[326] Commentators and courts have interpreted the Court's ruling in *Cascade* to its "splenetic displeasure" with the federal government's handling of the antitrust case and to "the Court's desire to facilitate the vindication of substantive rights considered to have national consequence by potential intervenors," which included the public and companies that were dependent upon competition.[327] Thus, although "it is undoubtedly true that *Cascade* should not be read as a carte blanche for

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[323] *See* Hutchings, *Divine Intervention*, *supra* note 236, at 696-697, n.12 (highlighting that Fed. R. Civ. P. 24 advisory committee's notes specifically stated that amendment was intended to broaden application of the rule).
[324] *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).
[325] *Id*. at 132-136.
[326] *Smuck*, 408 F.2d at 179 (discussing *Cascade Natural Gas* in detail and applying the holding to its own decision).
[327] Tobias, *Standing to Intervene* at 433; *see Smuck*, 408 F.2d at 179, n.16 ("The majority's splenetic displeasure with the substantive provisions of the divestiture plan approved by the Government and the trial court may have been an important factor in the liberal rending given Rule 24(a) in *Cascade*.").

intervention by anyone at any time,"[328] the Supreme Court has made it clear that intervention can be proper to correct illegitimate conduct in the form of a consent decree approved by the government, even where the only harm is an alleged economic harm yet to be proven.

In later cases, however, the Supreme Court seemingly narrowed their interpretation of the interest requirement, starting in *Donaldson v. U.S.*, where the Court held that Rule 24 required that an applicant have a "significantly protectable" interest in order to intervene.[329] Where an intervening party seeks relief different from what the original parties seek,[330] or in the absence of the original attached party (e.g., in the event the original litigants settle), the Court has required an even more concrete interest.[331] In *Arizonans for Official English v. Arizona*, the Court held that where the intervening party stands in the place of an original party, "standing…demands that the litigant possess 'a direct stake in the outcome,'" that is "no less than standing to sue."[332] Just recently, the Supreme Court's holding in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, made it clear that an intervenor must establish Article III standing "in order to pursue relief that is different from that which is sought by a party with standing," which includes "cases in which both the plaintiff and intervenor seek *separate* money judgments in their own names."[333] Thus, the Supreme Court has essentially articulated the rule as requiring an applicant to have a "significantly protectable" interest, although no specific equitable or legal interest is necessary. However, where the original parties to the suit are no longer present and independent relief is sought, the intervening party must establish independent Article III standing.

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[328] *Smuck*, 408 F.2d at 179 (discussing *Cascade*); *see also Cascade Natural Gas*, 386 U.S. 129 (1967).
[329] *Donaldson v. United States*, 400 U.S. 517, 531 (1971).
[330] *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.").
[331] *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).
[332] *Id.* at 64 ("Standing to defend in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'") (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).
[333] *Town of Chester*, 137 S. Ct. at 1651.

With this minimal guidance in mind, the district and circuit courts have understandably struggled to define "interest" under Rule 24 with any particular clarity, despite no shortage of opportunities to do so.[334] In *Smuck v. Hobson*—a case decided immediately after *Cascade*—the D.C. Circuit applied *Cascade* and found that "parents whose only 'interest' is the education of their children" was nonetheless sufficient to establish the right to intervene.[335] In coming to this conclusion, the court enunciated the goal of intervention to be "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" and, with this goal in mind, "there is no apparent reason why an 'economic interest' should always be necessary to justify intervention."[336]

iv. Impairment of Ability to Protect Interest

Where a court concludes that an applicant's motion is timely and has demonstrated a "significantly protectable interest," they must "next determine whether these interests would as a practical matter be impaired or impeded by the disposition of this action."[337] The guidance provided by Rule 24's advisory committee, subsequently adopted by many courts, states that "if an absentee would be substantially affected in a *practical sense* by the determination made in an action, he should, as a general rule, be entitled to intervene."[338] While there is no bright-line rule, courts have found the requisite practical impairment warranting intervention as of right where

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[334] *See* Tobias, *Standing to Intervene*, at 434 (noting "thousands of opportunities available" to define interest).
[335] *Smuck*, 408 F.2d at 179.
[336] *Id*. The court continued and found that "[t]his does not imply that the need for an 'interest' should or can be read out of the rule." However, "[i]f barriers are needed to limit extension of the right to intervene, the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task." *Id*.
[337] *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001).
[338] *Id*. (citing Fed. R. Civ. P. 24 advisory committee's notes) (emphasis added); *see also Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995).

the remedial schemes sought by the original parties and intervenor diverge[339] and where the prospect of *stare decisis* resulting from decision in the present case would affect any subsequent claims.[340]

In *United States v. State of Oregon*, the Ninth Circuit reviewed a district court's denial of intervention, where "the pivotal issue" was "whether the disposition of this action, as a practical matter, may impair or impede the intervenors' ability to protect their interests."[341] There, residents of a state-run facility for people with developmental disabilities in Oregon sought to intervene in a suit filed by the U.S. against Oregon claiming the state failed "to provide minimally adequate training, medical care, sanitation and trained staff."[342] The district court denied the motion to intervene, holding that the disposition of the action would not impair the intervenors' ability to protect their interests, "because it was of the view that the intervenors should file a separate lawsuit to air the issues and arguments they wish to inject into this litigation."[343] In overturning the district court's denial of intervention, the Ninth Circuit found that the disposition of the action could impair the intervenors' ability to protect their interests "in a practical sense" on two grounds.

First, the court recognized that the case, "which directly involves the conditions at the applicants' institution, must of necessity result in factual and legal determinations concerning the nature of those conditions," and "[s]uch determinations when upheld by an appellate ruling will

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[339] *See, e.g., Stringfellow*, 783 F.2d at 827 (intervention allowed because litigation would result in a remedial scheme that could affect intervenor's interests); *Johnson v. San Francisco Unified School District*, 500 F.2d 349, 353 (9th Cir.1974) (intervention allowed because remedial plan in desegregation case brought by black parents could impair Chinese parents' rights).
[340] *See, e.g., Stringfellow*, 783 F.2d at 826; *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir.1981); *Atlantis Development Corp. v. United States*, 379 F.2d 818, 826–29 (5th Cir.1967).
[341] *Id*. at 638.
[342] *Id.* at 636.
[343] *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988).

have a persuasive *stare decisis* effect in any parallel or subsequent litigation."[344] Under the doctrine of *stare decisis,* "appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants."[345] Thus, even though the applicants could file a separate suit against Oregon as noted by the district court, absent intervention they would be precluded from litigating several of its claims, while still being beholden to the courts' findings in a separate action. For this reason, the court emphasized that "such a *stare decisis* effect is an important consideration in determining the extent to which an applicant's interest may be impaired."[346] The second "practical limitation[] on the ability of intervention applicants to protect interests" found by the court was the possibility that "this litigation may impair appellants' ability to obtain effective remedies in later litigation."[347] As the court stated:

> The record reflects that Medicaid decertification of the Fairview facility because of its inadequate services led to a state plan to improve services at Fairview, relocate current residents to community services and expand and improve those community services. Under the plan, the State of Oregon has a limited amount of money to spend on improving the care and treatment of mentally retarded persons. Applicants are concerned with all elements of that plan. The United States in this litigation is concerned only with flagrant conditions at Fairview.[348]

Thus, because "the district court's consideration of the United States' claims in isolation from the concerns of the applicants could have a powerful and immediate effect upon the practical ability of the applicants to affect in later litigation the distribution of resources available for mental health in the State of Oregon," the court concluded that "the position of this action thus 'may as a practical matter impair or impede' their ability to protect their interests."[349]

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[344] *Id.* at 638.
[345] *Stringfellow*, 783 F.2d at 826 (citing *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984)).
[346] *Id.*
[347] *Id.* at 639.
[348] *State of Or.*, 839 F.2d at 638–39.
[349] *Id.* at 639 (quoting Fed. R. Civ. P. 24(a)).

v. Not Adequately Represented by Original Parties

The final requirement for intervention of right under Rule 24 is that the applicant's interest is not "adequately satisfied by the existing parties."[350] The Supreme Court has stated that the burden of showing inadequacy in representation "should be treated as minimal."[351] To satisfy this prong, an applicant need not affirmatively show that the parties to the suit inadequately represent his interest, but must only show that such representation "*may be*" inadequate.[352] However, where "the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance."[353]

As shown by *Southwest Center*, to the extent an original party to the suit is willing to attest, through a memorandum, that they do not represent the interests of the intervening party, a reviewing court will likely find this sufficient to recognize that the applicant is not adequately represented. This is true even where the original party "share[s] the same interest."

b. Article III Standing

Even though the Supreme Court has indicated that an intervening party need not also establish Article III standing independently, where an intervening party wishes to raise an issue outside the scope of the original suit or continue litigating after the original party has left the action, an intervenor will be required to establish Article III standing. Further, some circuit courts have seemingly continued to require a would-be applicant to establish both standing under

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[350] Fed. R. Civ. P. 24(a)(2).
[351] *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).
[352] *Id.*
[353] *M2 Tech., Inc. v. M2 Software, Inc.*, 589 F. App'x 671, 675 (5th Cir. 2014) (finding that an applicant, who is the CEO and sole shareholder of the defendant company, is adequately represented since he and the company have the same ultimate objective and he has "exclusive control over it") (quoting *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir. 1987)).

both Article III and Rule 24.[354] Thus, given the likelihood that an intervenor challenging a consent decree will be required to continue the litigation after the original parties have left the action (by way of settlement), the next section will discuss what an intervening party challenging a questionable consent decree must establish to show a "case" or "controversy" under Article III.

The Supreme Court has read Article III to generally require that the party invoking the court's jurisdiction must allege, at a minimum, a sufficient "personal stake in the outcome of the controversy."[355] To determine whether a party's "personal stake" is sufficient, the Court has developed a three-prong test, which requires the plaintiff to establish:

> First ... an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[356]

While standing does not depend on the merits of the plaintiff's claim,[357] the Court has held that standing is not established by asserting a "'generalized grievance' shared in

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[354] *See, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) ("The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability."); *Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir. 2013) ("Turning to standing, appellants assert initially that as defendant-intervenors, they are not obliged to demonstrate Article III standing at all…It is … circuit law that intervenors must demonstrate Article III standing, and we think appellants fail to do so here."); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003)("We have further held that, in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution.") (citing Military Toxics Project v. EPA, 146 F.3d 948, 953 (D.C.Cir.1998)).

[355] *Warth*, 422 U.S. at 498 (1975); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

[356] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (requiring the plaintiff to "'show that he personally … suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'") (citations omitted).

[357] *See, e.g., Flast v. Cohen*, 392 U.S. 83, 99 (1968).

substantially equal measure by all or a large class of citizens."[358] Applying this test, for example, courts have dismissed suits brought by taxpayers challenging the propriety of certain federal expenditures,[359] as well as suits contending that a judge's appointment was unconstitutional.[360] Thus, a party's alleged injury that fails to show that *they* individually—rather than collectively with the general public—sustained, or might immediately sustain, a direct injury is insufficient to establish standing.[361]

In addition to the constitutional restrictions on the federal courts' jurisdiction, the Court has also recognized that there are prudential limitations on the federal courts' exercise of that jurisdiction.[362] With respect to prudential standing, the Supreme Court has made it clear that courts may disregard these principles under exceptional circumstances "where countervailing considerations … outweigh the concerns underlying the usual reluctance to exert judicial power."[363] This is particularly true where "the plaintiff's claim to relief rests on the legal rights of third parties."[364] Further, to the extent Article III permits, Congress may statutorily create legal rights, "the invasion of which creates standing."[365] However, where Congress grants an

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[358] *Warth*, 422 U.S. at 499; *see also Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").
[359] *See Mellon*, 262 U.S. 447 (dismissing for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures).
[360] *Ex parte Levitt*, 302 U.S. 633(1937) (dismissing a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2).
[361] *See Lujan*, 504 U.S. at 573-74 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488-489 (1923) ("The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . .").
[362] *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) ("a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").
[363] *Warth*, 422 U.S. at 500-501.
[364] *Id.*
[365] *Id.* at 500 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing….").

express right of action, the plaintiff must still allege a direct and demonstrable injury, "even if it is an injury shared by a large class of other possible litigants."[366]

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[367]

2. Establishing the Right to Intervene in Agency Proceedings

Intervention in administrative proceedings is controlled in four ways—by statutory provisions, agency rules, agency practices, and judicial decisions.[368] The APA provides that a "party" to an agency proceeding includes "a person or agency … properly seeking and entitled as of right to be admitted as a party"[369] and permits the participation of "interested parties" in adjudicatory proceedings "when time, the nature of the proceeding, and the public interest permit."[370] To the extent that a controversy is not resolved by consent, such a party is entitled to a full hearing.[371] "Interested persons," as distinct from "parties," are permitted to appear before an agency to present evidence or request determination of an issue "so far as the orderly conduct of public business permits."[372]

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[366] *Id.*; *see also Sierra Club v. Morton*, 405 U.S. 727 (1972) (stating that Congress may not confer jurisdiction on Article III courts to render advisory opinions, or to entertain "friendly" suits, or to resolve "political questions," because suits of this character are inconsistent with the judicial function under Article III.).
[367] *Warth v. Seldin*, 422 U.S. at 501; *see also Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1969).
[368] *Intervention in Agency Proceedings*, 1971 DUKE L.J. 228, 233 (1971), *available at* https://scholarship.law.duke.edu/dlj/vol20/iss1/11 (citing 1 K. Davis, ADMINISTRATIVE LAW TREATISE, § 8.11, at 564 (1958)).
[369] 5 U.S.C. § 551(3).
[370] *Id.* § 554(c)(1).
[371] *Id.* § 554(c)(2). *See also* section 555(b), which provides that a party may appear in person or by counsel and section 556(d), which permits a party to present evidence and conduct cross-examination.
[372] *Id.* § 555(b).

As with intervention under Rule 24, a would-be intervenor must meet several general prerequisites. First, the petition to intervene must be filed in a timely manner,[373] although agencies, like courts, generally have the discretion to permit untimely filings for good cause.[374] Further, the interest of the intervenor may not be already adequately represented,[375] or the evidence presented, or issues raised, must be material to the matter being considered.[376] Finally, agencies often seek to determine whether the intervenor's participation in the proceedings will be in the "public interest."[377]

a. FTC-Specific Rules Governing Intervention

The statutory provision governing intervention before the FTC is even less precise than the APA, suggesting only that "upon good cause shown" may one be permitted by the Commission to intervene.[378] That provision of Section 5 provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."[379] Rule 3.14(a) of the Commission's Rules of Practice provides that an Administrative Law Judge ("ALJ") or the Commission "may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."[380] These provisions have been interpreted as making intervention in FTC adjudicative proceedings a privilege rather than a right, the grant or denial of which is a discretionary matter to be decided on the particular facts

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[373] *See Easton Util. Comm'n v. AEC*, 424 F.2d 847, 851 (D.C. Cir. 1970).
[374] *Intervention in Agency Proceedings*, 1971 DUKE L.J. 228, 231 (1971).
[375] *See, e.g., San Antonio v. CAB*, 374 F.2d 326 (D.C. Cir. 1967); *Duke Power Co*., 24 AD. L.2D 1057, 1059 (AEC 1968).
[376] *American Tel. & Tel. Co.*, 20 AD. L.2d 78, 81 (F.C.C. 1966).
[377] *See, e.g., National Capital Airlines, Inc. v. CAB*, 419 F.2d 668, 676 (D.C. Cir. 1969), *cert. denied*, 398 U.S. 908 (1970); *First Nat'l Bank Corp*., 27 AD. L.2D 82-84 (Fed. Res. Bd. 1970).
[378] 15 U.S.C. § 45(b); See also *FTC v. Klesner*, 280 U.S. 19, 26, n.2 (1929).
[379] 15 U.S.C. § 45(b)
[380] 16 C.F.R. § 3.14(a).

and circumstances of each case.[381] However, courts have noted that section 6 of the APA[382] limits agency discretion in denying intervention because it grants "any interested person" the right to appear and be heard in a proceeding "so far as the orderly conduct of the public business permits."[383] In this way, the courts have apparently curtailed the discretion of the agencies in favor of permitting at least limited intervention.[384]

Additionally, before the FTC will allow intervention into its proceedings, it requires that the party seeking intervention "raise substantial issues of law or fact which would not otherwise be properly raised or argued," and that "the issues raised are of sufficient importance to warrant additional expenditure of Commission resources on a necessarily longer and more complicated proceeding."[385] Further, "in considering a motion to intervene, Administrative Law Judges shall also take into account the need to conclude the proceedings as expeditiously as possible."[386]

Most notably, the FTC's rules do not explicitly provide for intervention in its consent order proceedings, but applicants for intervention are permitted to "intervene" at least to submit written comments on the adequacy of the proposed consent order. Where such "intervention" is granted, the Commission will delay consideration of the consent order until after the applicant's comments are filed."[387] Such was the case in *Georgia-Pacific Corp.*, where the FTC ultimately denied motions to intervene filed by a lumber manufacturers association and nine lumber companies to express their views on the adequacy of a proposed settlement stemming from a

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[381] *Federal Trade Com. v Klesner*, 280 U.S. 19 (1929); Firestone Tire & Rubber Co. (1970) FTC Dkt. 8818.
[382] 47 U.S.C. § 154(j).
[383] *Am. Commc'ns Ass'n v. United States*, 298 F.2d 648, 650 (2d Cir. 1962).
[384] *See Intervention in Agency Proceedings*, 1971 Duke L.J. 228, 233 (1971), *available at* https://scholarship.law.duke.edu/dlj/vol20/iss1/11 (citing Am. Commc'ns Ass'n, 298 F.2d at 650).
[385] *In the Matter of Polypore Int'l, Inc.*, Dkt. 9327, 2009 WL 3138657 at *1 (MSNET Sept. 23, 2009) ((citing *In re Firestone Tire & Rubber Co.*, Dkt. 8818, 77 F.T.C. 1666 (1970)).
[386] *Id.* (citing *In re Kellogg Co.*, Dkt. 8883, 1979 FTC LEXIS 89, *3 (1979)).
[387] *In the Matter of Campbell Soup Co.*, 77 F.T.C. 664 (1970).

proceeding challenging a lumber company's acquisition of 16 southern lumber firms.[388] The FTC said that, since the movants' purpose was to comment on the settlement, their motions would be treated as comments and as amicus curiae briefs. However, if the matter were returned for further adjudication, the movants could renew their motions to intervene.[389]

Most relevant here, in *Campbell Soup Co*., which concerned a motion for intervention in consent order proceedings, and *Firestone Tire & Rubber Co.*, which concerned intervention in adjudication, the FTC squarely addressed "the scope of the privilege of intervention and participation in Commission adjudications by responsible representatives of the consumer interest."[390] In both cases, a consumer-interest organization called Students Opposing Unfair Practices, Inc. (SOUP), filed motions to intervene alleging that certain proposed orders were inadequate to protect the public interest.[391] In *Campbell Soup*,

In *Firestone*, applying the principles outlined in *Campbell Soup* the FTC permitted a consumer-interest organization to intervene *in forma pauperis* in an adjudicatory proceeding involving charges of deceptive advertising with respect to the price and safety of Firestone tires.[392] The organization, Students Opposing Unfair Practices, Inc. (SOUP), filed a motion to intervene alleging that a proposed cease and desist order was inadequate to protect the public interest but, after both opposition from both respondent and complaint counsel, was denied permission to intervene by the hearing examiner "on the ground that no good cause for intervention had been established."[393] Thereafter, SOUP filed an amended motion to intervene,

[388] *In re Georgia-Pacific Corp*. Dkt. 8843
[389] 19 A.L.R. Fed. 696 (Originally published in 1974).
[390] *In re Firestone Tire & Rubber Co.*, Dkt. 8818, 77 F.T.C. 1666 (1970).
[391]
[392] *Id.*
[393] *Id.*

this time "explaining in some detail" the reasons that good cause existed for intervention. As the Commission noted, the reasons were as follows:

> consumers are within the zone of interests sought to be protected by the FTC Act; SOUP is recognized as a responsible representative of the consumer's interests; member of SOUP have a personal stake in the outcome of the proceeding; this is an aggravated case, directly involving the health and safety of the public; the proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's deceptions; and SOUP desires to introduce factual and expert evidence on the residual effects of respondent's advertisements to prove the need for an affirmative disclosure provision in the final order. Respondent and complaint counsel again opposed the motion.[394]

Despite the multitude of reasons provided by SOUP for intervention, the hearing examiner once again denied the motion. Immediately thereafter, SOUP filed with the FTC a request for leave to file an interlocutory appeal from the denial of its amended motion to intervene.[395] The FTC quickly determined the request should be granted, and SOUP "should be allowed to intervene in the proceeding, with all the rights of a party, for the limited purpose of presenting evidence and argument on the issue of the proper remedy and scope of the final order."[396]

B. Successful Intervenor's Likelihood of Success on the Merits

Should a third-party applicant successfully gain intervenor status by the court or agency, the next, and arguably most important, question is whether they can successfully challenge the consent decree in question.

1. Standard of Review for Consent Decrees

District court's review a consent decree to determine "whether the proposed Consent Judgment … is fair, reasonable, adequate, and in the public interest."[397] In reaching this

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[394] *Id.*
[395] *Id.*
[396] *Id.*
[397] *See Securities v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009).

conclusion, the Court is very mindful of the considerable deference it must accord the parties' proposal, since it would seemingly result in the consensual resolution of the case.[398] Circuit court's review a district court's decision to approve a consent decree for an abuse of discretion.

2. Third-Party Claims and the Likelihood of Preventing Consent Decrees in Actions Brought Challenging "Deceptive Practices"

As the FTC, under the "deceptive practice" prong of Section 5, generally brings an enforcement action against companies that fail to follow its own stated privacy policies, a third party, particularly customers of the defendant, could arguably much more easily establish an interest sufficient to meet Rule 24 since the customer of the company was, by definition, the one being deceived. In the case of *Oracle*, for example, a customer who uses Java and who was promised that they would be protected by updating the software would very likely have an interest in ensuring that the deceptive practice was adequately terminated and that Oracle was held accountable.

3. Third-Party Claims and the Likelihood of Preventing Consent Decrees in Actions Brought Challenging "Unfair" Practices

VI. Conclusion

[398] *See SEC v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d 328, 329 (S.D.N.Y. 2011).