

1 FREDRICK A. HAGEN (Cal. Bar No. 196220)  
Berding & Weil LLP  
2 2175 N. California Blvd., Suite 500  
Walnut Creek, CA 94596  
3 fhagen@berdingweil.com  
Tel: (925) 963-6796  
4

5 JOHN J. VECCHIONE  
KARA M. ROLLINS  
NEW CIVIL LIBERTIES ALLIANCE  
6 1225 19th St. NW, Suite 450  
Washington, DC 20036  
7 john.vecchione@ncla.legal, kara.rollins@ncla.legal  
Tel: (202) 869-5210  
8 *Counsel for Defendants*

9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

11	FEDERAL TRADE COMMISSION,	)	Case No. 3:22-cv-7307
12		)	
13	Plaintiff,	)	
14	vs.	)	<b>ANSWER TO FIRST AMENDED</b>
15	PRECISION PATIENT OUTCOMES, INC.,	)	<b>COMPLAINT FOR PERMANENT</b>
16	a corporation; and	)	<b>INJUNCTION, MONETARY RELIEF,</b>
17	MARGRETT PRIEST LEWIS,	)	<b>CIVIL PENALTY JUDGMENT AND</b>
18	Individually and as CEO of Precision)	)	<b>OTHER RELIEF AND</b>
19	Patient Outcomes, Inc.,	)	<b>COUNTERCLAIM</b>
20	Defendant(s).	)	<b>JURY TRIAL DEMANDED</b>
		)	
		)	
		)	
		)	

21 Defendants Precision Patient Outcomes, Inc. (“PPO”) and Margrett Priest Lewis (collectively  
22 “Defendants”) respond to the First Amended Complaint for Permanent Injunction, Monetary  
23 Relief, Civil Penalty Judgment, and Other Relief (DE 15) (“FAC”) with respect to their own  
24 actions and knowledge and/or upon information and belief. Defendants reserve the right to  
25 amend and/or supplement this Answer at a later stage of the proceedings as permitted by the  
26 Federal Rules of Civil Procedure. Neither COVID Resist nor VIRUS Resist is a current product  
27 of Defendants, and to the extent the FAC alleges otherwise, all such allegations are denied. A  
28 jury trial is demanded on all counts of the FAC and Counterclaims.

1 To the extent not expressly admitted, all allegations in the FAC are denied and as to each  
2 allegation<sup>1</sup>:

3 1. The allegations of this paragraph are legal conclusions to which no response is required.  
4 To the extent a response is necessary they are denied.

5 2. The allegations of this paragraph rest on a falsehood that COVID Resist and VIRUS  
6 Resist are the same “product.” Defendants deny that falsehood and its premise and do so every  
7 time it is alleged in the FAC. Defendants deny that their activities in connection with COVID  
8 Resist amounted to any conduct reached by any statute under the purview of the Federal Trade  
9 Commission (“FTC”). Defendants admit PPO developed, labeled, marketed, distributed, offered  
10 for sale, and sold a dietary supplement under the name VIRUS Resist. Defendants further admit  
11 that the ingredients of VIRUS Resist were as described in this paragraph. The allegations of  
12 paragraph 2 are otherwise denied.

13 3. Defendants deny the allegations in paragraph 3 except they admit that there is scientific  
14 evidence to support Defendants concerning VIRUS Resist. Further, Defendants deny that it is  
15 their burden to show the truthfulness of any statement regarding VIRUS Resist but the Plaintiff’s  
16 burden to prove falsity.

17 4. Defendants deny the allegations of paragraph 4.

18 5. The allegations of paragraph 5 are legal conclusions to which no response is required. To  
19 the extent a response is necessary they are denied.

20 6. The allegations of paragraph 6 are legal conclusions to which no response is required. To  
21 the extent a response is necessary they are denied.

22 7. The allegations of paragraph 7 are legal conclusions to which no response is required. To  
23 the extent a response is necessary they are denied.

24 8. Defendants deny all allegations of paragraph 8 regarding COVID Resist. Defendants  
25 admit the first sentence of paragraph 8. Defendants have insufficient information to admit or  
26 deny the other allegations of paragraph 8.

---

27  
28 <sup>1</sup> The headings of the FAC are legal statements to which no response is required and to  
the extent a response is required they are denied.

1 9. Defendants admit that Margrett Priest Lewis founded PPO and directs it. Defendants  
2 deny all allegations in regard to COVID Resist. Defendants admit Ms. Lewis controls PPO.  
3 Defendants admit Ms. Lewis resides in the district and has transacted business there. Defendants  
4 admit that Ms. Lewis has promoted VIRUS Resist through, among other things, social media.  
5 All other allegations are denied.

6 10. The allegations of paragraph 10 are legal conclusions to which no response is required.  
7 To the extent a response is necessary they are denied.

8 11. Denied.

9 12. Admitted.

10 13. Admitted.

11 14. Admitted.

12 15. Admitted.

13 16. Defendants admit that the Commission sent Defendants a written response and that the  
14 quoted statements appear therein. All other allegations are denied.

15 17. Denied.

16 18. Denied.

17 19. Defendants admit the letter mentioned 400 letters the Commission had sent to marketers.  
18 All other allegations are denied.

19 20. Defendants admit the letter contains the cited words, otherwise denied and deny that the  
20 Commission's actions have any legal force.

21 21. Defendants admit that the letter contains the cited words. Defendants deny the other  
22 allegations.

23 22. Defendants admit that the letter contains those words. Otherwise denied.

24 23. Denied, except admit the name change occurred subsequent to the FTC's letter.

25 24. Admit that a new website was created to sell VIRUS Resist. Otherwise denied.

26 25. Denied.

27 26. Denied.

28

1 27. Deny all allegations regarding COVID Resist. Admit that VIRUS Resist was an  
2 ingestible capsule. Otherwise denied.

3 28. Admit VIRUS Resist contains the cited instruction. Otherwise denied.

4 29. Denied.

5 30. Admitted.

6 31. Admitted.

7 32. Denied except that a website with COVID Resist on it was created.

8 33. Denied, except that VIRUS Resist was advertised on Defendants' website.

9 34. Denied, except that Defendants removed COVID Resist from any website, and no sales  
10 of it were made.

11 35. Denied.

12 36. Admit that at some point Defendants directed traffic from the old site to the new site,  
13 otherwise denied.

14 37. Denied.

15 38. Admitted Ms. Lewis promoted VIRUS Resist on social media, otherwise denied.

16 39. Denied.

17 A. Defendants admit the stated language appeared on the website, otherwise denied.

18 B. Defendants admit the stated language appeared on the website, otherwise denied.

19 C. Defendants admit the stated language appeared on the website, otherwise denied.

20 D. Defendants admit the stated language appeared on the website, otherwise denied.

21 E. Defendants admit the stated language appeared on the website, otherwise denied.

22 F. Defendants admit the stated language appeared on the website, otherwise denied.

23 G. Defendants admit the stated language appeared on the website, otherwise denied.

24 H. Defendants admit the stated language appeared on the website, otherwise denied.

25 I. Defendants admit the stated language appeared on the website, otherwise denied.

26 J. Defendants admit the stated language appeared on the website, otherwise denied.

27 40. Denied.

28 41. Denied.

1 A. Denied

2 B. Denied.

3 C. Denied.

4 D. Denied.

5 42. Denied.

6 43. The allegations of this paragraph are legal conclusions to which no response is required.

7 To the extent a response is necessary they are denied.

8 44. The allegations of this paragraph are legal conclusions to which no response is required.

9 To the extent a response is necessary they are denied.

10 45. The allegations of this paragraph are legal conclusions to which no response is required.

11 To the extent a response is necessary they are denied.

12 46. The allegations of this paragraph are legal conclusions to which no response is required.

13 To the extent a response is necessary they are denied.

14 47. The allegations of this paragraph are legal conclusions to which no response is required.

15 To the extent a response is necessary they are denied.

16 48. The allegations of this paragraph are legal conclusions to which no response is required.

17 As of the filing of this Answer no health emergency is in effect. To the extent a response is  
18 necessary they are denied.

19 49. The allegations of this paragraph are legal conclusions to which no response is required.

20 To the extent a response is necessary they are denied.

21 50. The allegations of this paragraph are legal conclusions to which no response is required.

22 To the extent a response is necessary they are denied.

23 51. The allegations of this paragraph are legal conclusions to which no response is required.

24 To the extent a response is necessary they are denied.

25 52. The allegations of this paragraph are legal conclusions to which no response is required.

26 To the extent a response is necessary they are denied.

27 53. Denied.

28 54. Denied.

1 55. Denied.

2 56. The allegations of this paragraph are legal conclusions to which no response is required.  
3 To the extent a response is necessary they are denied.

4 57. The allegations of this paragraph are legal conclusions to which no response is required.  
5 To the extent a response is necessary they are denied.

6 58. Denied.

7 59. Denied.

8 60. Denied.

9 61. The allegations of this paragraph are legal conclusions to which no response is required.  
10 To the extent a response is necessary they are denied.

11 62. The allegations of this paragraph are legal conclusions to which no response is required.  
12 To the extent a response is necessary they are denied.

13 **PRAYER FOR RELIEF**

14 The remainder of the FAC constitutes a prayer for relief for which an answer is not  
15 required. Defendants deny that they violated the statutes cited and deny that plaintiff is entitled  
16 to any relief. An entry of judgment of non-liability should be entered for Defendants.

17 **AFFIRMATIVE DEFENSES**

18 Without assuming the burden of proof as to any defense or issue that would otherwise  
19 rest on Plaintiff or as to any element of Plaintiff's claims, Defendants assert the following  
20 affirmative and other Defenses.

21 **FIRST DEFENSE**

22 Plaintiff lacks statutory authority to assert the claims alleged in the FAC.

23 **SECOND DEFENSE**

24 The action violates Defendants' due process rights under the Fifth Amendment of the  
25 U.S. Constitution because, *inter alia*, the FTC has failed to provide constitutionally adequate fair  
26 notice of what acts or practices the Covid-19 Consumer Protection Act, Section 1401, Division  
27 FF, of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, or the FTC Act, 15  
28 U.S.C. § 41, et seq., prohibits or requires as applied to the allegations in the FAC. The FTC

1 failed to use its authority under 15 U.S.C. § 57(a) to promulgate understandable regulations.  
2 Neither Act provides fair notice of what acts or practices it prohibits or requires; and the FTC's  
3 lack of standards of enforcement of said Acts' authorizes or encourages seriously discriminatory  
4 enforcement. The FTC failed to provide adequate notification of alleged violations of the FTC  
5 Act to defendants as required by 15 U.S.C. § 45(m)(1)(B).

6 **THIRD DEFENSE**

7 The FAC and all Claims therein fail to state a claim upon which relief can be granted.

8 **FOURTH DEFENSE**

9 The FTC is entitled to no relief because this is not a "proper case" within the meaning of  
10 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), as no violation of Section 5 or other applicable  
11 violation occurred, was not clear, and is not likely to reoccur.

12 **FIFTH DEFENSE**

13 The FTC is not entitled to injunctive relief as conduct occurred solely in the past and  
14 there is no danger of recurrence.

15 **SIXTH DEFENSE**

16 The contemplated relief would not be in the public interest because it would, among other  
17 things, harm consumers.

18 **SEVENTH DEFENSE**

19 The FTC cannot demonstrate any statement made was material to any purchase of any  
20 product, no COVIDResist was sold, or that any statement was likely to mislead a consumer.

21 **EIGHTH DEFENSE**

22 The alleged statements and claims that form the basis of the FTC's claims are truthful  
23 Commercial Speech protected by the First Amendment of the U.S. Constitution; were not false,  
24 misleading or inaccurate; constituted statements of opinion; and/or were nonactionable puffery.

25 **NINTH DEFENSE**

26 Plaintiff's claims are barred by laches, estoppel, waiver, and or other equitable principles  
27 or defenses.  
28

1 **TENTH DEFENSE**

2 Neither Plaintiff nor any consumer has suffered any actual or likely injury, harm, or  
3 economic loss.

4 **ELEVENTH DEFENSE**

5 Defendants acted at all times with reasonable care and competence and/or in accordance  
6 with industry standards in the matters alleged in the FAC.

7 **TWELFTH DEFENSE**

8 This action is barred because it is contrary to the U.S. Constitution and so void because  
9 the FTC, as structured, violates the separation of powers required by the U.S. Constitution by,  
10 *inter alia*, combining investigative, prosecutorial, quasi-legislative, and adjudicative functions  
11 and powers into a single administrative body whose members are not removable at will by the  
12 President and are insulated from constitutional control.

13 **THIRTEENTH DEFENSE**

14 The FTC failed to provide Defendants, who qualify as small entities, with the requisite  
15 response to their inquiries as required by Section 213(a) of the Small Business Regulatory  
16 Enforcement Fairness Act of 1996 (“SBREFA”), Pub.L. 104–121, Title II, § 201 to 224, Mar.  
17 29, 1996, 110 Stat. 857–862.

18 **FOURTEENTH DEFENSE**

19 The FTC was informed at all times by the Defendants of their proposed course of  
20 conduct, and the FTC is empowered to obtain injunctions for future behavior but did not do so  
21 and so failed to mitigate any damage it now alleges.

22 **FIFTEENTH DEFENSE**

23 The Commissioners’ vote authorizing consultation with the Attorney General pursuant to  
24 15 U.S.C. § 56(a)(1) and/or vote to bring this case was procedurally invalid because on  
25 information and belief Commissioner Noah Joshua Phillips resigned effective October 14, 2022,  
26 a full month before the complaint was filed and all the actions of the FTC to bring this action  
27 were unlawful. This invalid vote violated, *inter alia*, Defendants’ right to due process of law  
28 under the Fifth Amendment of the U.S. Constitution.



1 **SIXTEENTH DEFENSE**

2 The FTC, as required by law, gave the Justice Department the right to review and then to  
3 bring this action which course of action was declined by the Justice Department. This  
4 constituted the considered judgment of the agency lawfully and constitutionally constituted to  
5 prosecute the laws of the United States, so the FTC’s subsequent action is unlawful and violative  
6 of separation-of-powers principles.

7 **SEVENTEENTH DEFENSE**

8 The FTC cannot require double-blind human studies to make valid claims about a  
9 product under its substantiation claim because only FDA-approved drugs are required to be so  
10 tested, the FDA Act exempts dietary supplements from such a regimen, and the FTC has not  
11 made a valid regulation to that effect. Further, the FTC’s assertion contradicts valid scientific  
12 principles recognized as reliable in this Court and throughout the scientific world. Under law  
13 structure and function claims are protected with only sufficient competent evidence.

14 **EIGHTEENTH DEFENSE**

15 The “guidance” documents of the FTC or the FDA are not law, and the FTC cannot rely  
16 on regulated parties’ alleged failure to adhere to such guidance to form the basis of a violation, in  
17 whole or in part, under either the Covid-19 Consumer Protection Act or the FTC Act.

18  
19  
20  
21 **[Remainder of page intentionally left blank.]**  
22  
23  
24  
25  
26  
27  
28

1                                   **COUNTERCLAIMS OF DEFENDANTS AGAINST THE FTC**

2           Counterclaimants Margrett Priest Lewis and Precision Patient Outcomes, Inc., by their  
3 attorneys, bring the following counterclaims against Counterclaim Defendant Federal Trade  
4 Commission (“FTC” or “Counterclaim Defendant.”)

5   **NATURE OF THE ACTION**

6           1. The Supreme Court has noted that challenges to the combination of prosecutorial and  
7 adjudicatory functions in a single agency, including the FTC, are “fundamental, even  
8 existential.” *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. \_\_\_, 143 S.Ct. 890,  
9 897 (2023). The challenge in *Axon*, as here, is that “in essence the agencies, as currently  
10 structured, are unconstitutional in much of their work.” *Id.*

11           2. The FTC is run by a multi-member body, all of whom are not removable by the President  
12 except for cause. They have chosen to press cases on deception claims by litigation rather than  
13 regulation.

14           3. By law, the Justice Department, the chief law enforcement office of the United States,  
15 must assess whether it will bring an action of this sort before the FTC can. The Justice  
16 Department has chosen not to prosecute this case. That represents the judgment of the Executive.

17           4. This Court should declare the FTC’s structure and procedures unconstitutional. It should  
18 enjoin the FTC from prosecuting this action and dismiss the case.

19   **THE PARTIES**

20           5. Counterclaim Defendant FTC is an administrative agency of the United States  
21 Government established, organized and existing pursuant to the FTC Act, 15 U.S.C. § 45, and is  
22 authorized by law, in certain circumstances to bring actions in federal court.

23           6. Counterclaim Plaintiff Precision Patient Outcomes, Inc. is a California company doing  
24 business in this district. It makes and markets, among other things, dietary supplements.

25           7. Margrett Priest Lewis is the founder and principal of PPO and resides in this district.  
26  
27  
28

**JURISDICTION AND VENUE**

8. This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C. § 1331.

9. Venue is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(b), (c), and (e).

**FACTUAL BACKGROUND**

10. Counterclaimants challenge the unconstitutional structure and processes of the FTC and the usurpation of the FDA and Justice Department’s prerogatives as properly constituted agencies.

11. Counterclaim Defendants brought the instant action against Counterclaimants unlawfully and without Constitutional power to do so.

12. The Constitution sets out the three branches of government and vests each with a different power—legislative, executive, and judicial. *See* U.S. Const. art. I, § 1, art. II, § 1, cl. 1, art. III, § 1. Article II vests “[t]he executive Power” in the “President of the United States of America.” § 1, cl. 1. To exercise that power, the Constitution directs the President to “take Care that the Laws be faithfully executed.” *Id.* § 3.

13. Initiating a lawsuit is the essence of “tak[ing] Care that the Laws be faithfully executed,” and that responsibility is entrusted to the President. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *see also Cunningham v. Neagle*, 135 U.S. 1, 64 (1890) (that the laws be faithfully executed refers to the President’s “enforcement of acts of [C]ongress”). “The entire ‘executive Power’ belongs to the President alone,” and it includes the power to initiate lawsuits. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

14. The President cannot fulfill his role of “faithfully” initiating lawsuits without assistance. He must “select those who [are] to act for him under his direction in the execution of the laws.” *Myers v. U.S.*, 272 U.S. 52, 117 (1926); *Cunningham*, 135 U.S. at 63-64. The President’s selection of administrative officers is essential to his execution of the laws. *Myers*, 272 U.S. at 117.

1 15. Equally essential is his power to remove those officers. *Id.* “[T]o hold otherwise would  
2 make it impossible for the President ... to take care that the laws be faithfully executed.” *Id.* at  
3 164; *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) (“Since 1789, the  
4 Constitution has been understood to empower the President to keep [his] officers accountable—  
5 by removing them from office, if necessary.”).

6 16. The FTC’s initiation of this lawsuit—and the statutes authorizing it—unconstitutionally  
7 usurp the President’s Article II powers because commencing civil litigation is an act of executive  
8 power. Lest there be any doubt that FTC exercises a truly executive, rather than “quasi-  
9 legislative” or “quasi-judicial” function, the Commission has taken legal stances directly  
10 contrary to those advanced by the Executive Branch. The Justice Department chose not to bring  
11 this action.

12 17. The Commissioners who authorized this action were not Article II executive officers  
13 accountable to the President. *See Humphrey’s Ex’r v. U.S.*, 295 U.S. 602 (1935). Vesting FTC  
14 with the power to bring enforcement actions while challenging presidential authority to “take  
15 Care that the Laws be faithfully executed,” U.S. Const. art. II., § 3, contradicts the constitutional  
16 structure the Framers designed and set out in the Constitution’s text, *see Free Enter. Fund*, 561  
17 U.S. at 484 (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot  
18 oversee the faithfulness of the officers who execute them.”).

19 18. Under Section 16(a)(1) of the FTC Act, FTC must notify DOJ in writing and “consult  
20 with the Attorney General” before filing actions like this. 15 U.S.C § 56(a)(1). The Commission  
21 can only commence an action in its own name, as it is doing here, if DOJ declines to bring the  
22 case itself. *Id.* § 56(a)(1)(B). In contrast to FTC Commissioners, the Attorney General is  
23 appointed and removable by the President, as well as a top Cabinet member. DOJ bills itself as  
24 “the world’s largest law office,” and it helps the President take care that the laws are faithfully  
25 executed. *Office of Attorney Recruitment & Management*, Dep’t of Justice,  
26 <https://www.justice.gov/oarm> (last visited Jan. 31, 2023). Here, by declining to bring an action,  
27 it did so.  
28

1 19. *Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935) did not determine that the current FTC  
2 actions and powers are constitutional.

3 20. The Supreme Court did not doubt the Executive's Article II power to terminate executive  
4 officers' employment, which the Court characterized as "exclusive and illimitable." *Id.* at 627.

5 21. As the Supreme Court explained, "*Humphrey's Executor* reaffirmed the core holding of  
6 *Myers* that the President has 'unrestrictable power ... to remove purely executive officers.'" *Seila Law*, 140 S. Ct. at 2199 (quoting *Humphrey's Ex'r*, 295 U.S. at 632).

7  
8 22. In 1935 the FTC exercised "no part of the executive power vested by the Constitution in  
9 the President." *Humphrey's Ex'r*, 295 U.S. at 628. To the contrary, the Court concluded that  
10 "[i]n administering the provisions of the statute in respect of 'unfair methods of competition,' ...  
11 the commission acts in part quasi legislatively and in part quasi judicially," and that "[t]o the  
12 extent that it exercises any executive function, as distinguished from executive power in the  
13 constitutional sense, it does so ... as an agency of the legislative or judicial departments of the  
14 government." *Id.*

15 23. But bringing and prosecuting this suit is ur-executive power. This is dramatically the  
16 case because the Justice Department could have brought the same suit in the name of the United  
17 States. The Justice Department has only executive power and is headed by a single officer  
18 appointed by the President and removable by him.

19 24. The Supreme Court's blessing of the FTC of yesteryear, with vastly different powers,  
20 does not imply an endorsement of the Commission's newer minted executive powers. *See*  
21 *Consumers' Rsch. v. CPSC*, 592 F. Supp. 3d 568, 584 (E.D. Tex. 2022) ("[T]he Court must  
22 consider 'the set of powers the [Supreme] Court considered as the basis for its decision' in  
23 *Humphrey's Executor*, and 'not any latent powers that the agency may have had not alluded to  
24 by the Court.'" (quoting *Seila Law*, 140 S. Ct. at 2200 n.4), *appeal docketed*, No. 22-40328 (5th  
25 Cir. May 18, 2022). That blessing "has not withstood the test of time." *Seila Law*, 140 S. Ct. at  
26 2198 n.2. Because FTC is now vested with core executive powers, any limit on the President's  
27 ability to remove Commissioners violates separation of powers.  
28

1       25. Article II vests the executive power in the President, who must “take Care that the Laws  
2 be faithfully executed.” *See, e.g., Humphrey’s Ex’r*, 295 U.S. at 627 (citing the “illimitable  
3 power of removal by the Chief Executive”); *Free Enter. Fund*, 561 U.S. at 492 (citing the Take  
4 Care Clause); *Seila Law*, 140 S. Ct. at 2197 (same). The President cannot effectively fulfill that  
5 duty when Congress restricts his removal power. *Myers*, 272 U.S. at 164 (“[T]o hold otherwise  
6 would make it impossible for the President, in case of political or other difference with the  
7 Senate or Congress, to take care that the laws be faithfully executed.”); *Free Enter. Fund*, 561  
8 U.S. at 492 (same); *Seila Law*, 140 S. Ct. at 2197 (same). Thus, an unrestricted removal power  
9 is “the general rule.” *Seila Law*, 140 S. Ct. at 2198. The President cannot readily remove FTC  
10 Commissioners, so their decisions are unreviewable and incorrigible by him. *Cf. U.S. v. Arthrex*,  
11 141 S. Ct. 1970, 1981 (2021).

12       26. Just as the President’s ability to select administrative officers “is essential to the execution  
13 of the laws by him, so must be his power of removing” officers. *Myers*, 272 U.S. at 117. That  
14 removal power is important to the democratic legitimacy of the Executive Branch in at least two  
15 ways. First, it makes officers less likely to deviate from the President’s (and hence, the People’s)  
16 will. An officer who knows that disobedience can (and will) be met with removal is less likely to  
17 take an action at odds with the President’s agenda. Second, and perhaps more importantly, the  
18 removal power gives the People political recourse if they are displeased with the actions taken by  
19 those who enforce federal law. Although the People cannot vote for (or against) an Executive  
20 officer directly, they can vote for (or against) the President, who bears ultimate responsibility for  
21 federal law enforcement. These are mechanisms of accountability vital to the Constitution.

22       27. FTC Commissioners, however, are shielded from at-will Presidential removal—and  
23 hence from the key mechanism of democratic accountability—in violation of Article II. The FTC  
24 is headed by five Commissioners, nominated by the President and confirmed by the Senate, each  
25 serving a 7-year term. 15 U.S.C. § 41. But once appointed, the Commissioners are not subject to  
26 removal by the President absent a finding of “inefficiency, neglect of duty, or malfeasance in  
27 office.” *Id.* This means FTC Commissioners are not politically accountable for their actions.  
28

1 28. The result is that crucial law enforcement actions, sometimes with massive consequences  
2 for the target of the action, are currently taken by individuals not elected by the People, and not  
3 controlled by the President. That runs directly contrary to Article II and the democratic  
4 principles underlying the Constitution.

5 29. In this case the violation of separation of powers, lack of political accountability, and lack  
6 of executive control over the FTC is compounded by the due process of law violation of so-  
7 called zombie votes. On information and belief, the Commissioners' vote authorizing  
8 consultation with the Attorney General pursuant to 15 U.S.C. § 56(a)(1) and/or their vote to  
9 bring this case was procedurally invalid because, on information and belief, Commissioner Noah  
10 Joshua Phillips resigned effective October 14, 2022, a full month before the complaint was filed,  
11 so all the actions of the FTC to bring this action were unlawful. This action violated, *inter alia*,  
12 Defendants' right to due process of law under the Fifth Amendment of the U.S. Constitution.

### 13 **Count I**

#### 14 **Seeking Declaratory and Injunction Relief Against** 15 **Violation of PPO's and Margrett Lewis's Constitutional Rights**

16 30. Counterclaimants restate and incorporate by reference each and every allegation of the  
17 preceding paragraphs.

18 31. The FTC's actions separately violate Counterclaimants' rights because the agency's  
19 structure, on its face, is unconstitutional under Article II. In particular, the "for cause" dismissal  
20 requirements and staggered terms of the Commissioners create distance from Executive, and  
21 therefore from democratic, control. Because the agency's structure violates Article II, any  
22 actions taken against Counterclaimants under its present structure are invalid.

23 32. The vote authorizing the filing of this action was procedurally invalid in violation of  
24 Counterclaimants' right of due process under the law. On information and belief, the  
25 Commission included the vote(s) of a former Commissioner after his resignation in its official  
26 count to proceed with this action.

27 33. The division of enforcement between the FTC and the Department of Justice regarding  
28 these claims is anything but transparent. It also violates separation of powers, as well as the

1 requirement that Congress provide an “intelligible principle” when delegating power to the  
2 agencies. No such “intelligible principle” governs which agency presses these claims.

3 34. The FTC’s conduct has caused and will continue to cause Counterclaimants to suffer  
4 immediate and irreparable harm to their Constitutional rights. No money damages can remedy  
5 this harm, and Counterclaimants have no legal avenue by which to recover any money damages  
6 against the FTC. This action is not speculative. It is happening and ongoing.

7 35. According to *Humphrey’s Executor*, the FTC has no executive power. Whether or not  
8 this holds true today (it does not), the FTC’s conduct is unconstitutional. Indeed, under  
9 *Humphrey’s*, the bringing of this action (an indisputable exertion of executive power) is  
10 unlawful. And assuming that *Humphrey’s* was wrongly decided, the for-cause removal  
11 provisions and staggered terms of FTC commissioners are unlawful.

12 36. Neither for-cause removal nor staggered terms are severable from the FTC Act.

13 37. Therefore, the FTC’s Action must be declared unlawful and only Congress can cure any  
14 statutory deficiency so the court must declare the FTC’s Action unlawful.

15 38. These violations of Counterclaimants’ Constitutional Rights entitle them to declaratory  
16 relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and an injunction against the FTC  
17 proceeding against Counterclaimants.

18 **Count II**

19 **Violation of Non-Delegation of Legislative Powers**

20 39. Counterclaimants restate and incorporate by reference each and every allegation of the  
21 preceding paragraphs.

22 40. The enforcement of federal law regarding dietary supplements, such as those produced by  
23 Counterclaimants is currently split between the FTC, the FDA and the Justice Department.

24 41. The division of enforcement between the FTC and the Department of Justice regarding  
25 these claims, as well as the division of responsibility with the FDA, is not transparent and also  
26 violates the non-delegation doctrine.

27 42. In order that legislative power granted only to the Congress under Article I of the U.S.  
28 Constitution not be transferred to the Executive Branch, Congress is required to provide an



1 “intelligible principle” when delegating power to the agencies. No such “intelligible principle”  
2 governs which agency presses these claims.

3 43. The decision to bring such claims is not uniform between the agencies and produces  
4 arbitrary results.

5 44. These violations of Counterclaimants’ Constitutional Rights entitle them to declaratory  
6 relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and an injunction against the FTC  
7 proceeding against Counterclaimants.

8 **Count III**

9 **Violation of Due Process**

10 45. Counterclaimants restate and incorporate by reference each and every allegation of the  
11 preceding paragraphs.

12 46. Standing alone, the due process of law violation of so-called zombie votes prevents the  
13 FTC from prosecuting this suit.

14 47. On information and belief, the Commissioners’ vote authorizing consultation with the  
15 Attorney General pursuant to 15 U.S.C. § 56(a)(1) and/or their vote to bring this case was  
16 procedurally invalid because, on information and belief, Commissioner Noah Joshua Phillips  
17 resigned effective October 14, 2022, a full month before the complaint was filed, thus rendering  
18 all actions of the FTC to bring this action unlawful.

19 48. This action violated, *inter alia*, Defendants’ right to due process of law under the Fifth  
20 Amendment of the U.S. Constitution.

21 49. The violations of Counterclaimants’ due process rights entitle them to declaratory relief  
22 under the Declaratory Judgment Act, 28 U.S.C. § 2201, and an injunction against the FTC  
23 proceeding against Counterclaimant.

24 **PRAYER FOR RELIEF**

25  
26 WHEREFORE, Defendants and Counterclaimants respectfully request that the  
27 Court enter a judgment:

28 A. Denying the FTC any relief on its claims.

- 1 B. Dismissing the FTC's FAC in its entirety with prejudice.
- 2 C. Declaring the FTC's structure unconstitutional.
- 3 D. Awarding Counterclaimants the costs it has incurred defending the FTC's FAC
- 4 and pressing its declaratory action, and
- 5 E. Awarding such other relief to Counterclaimants as the Court deems Just and
- 6 Proper.

7  
8 May 17, 2023

Respectfully Submitted,

9 /s/ John J. Vecchione  
10 John J. Vecchione  
11 Kara M. Rollins  
12 New Civil Liberties Alliance  
13 1225 19th St. NW, Suite 450  
14 Washington, DC 20036  
15 john.vecchione@ncla.legal, kara.rollins@ncla.legal  
16 Tel: (202) 869-5210

17 /s/ Fredrick A. Hagen  
18 Fredrick A. Hagen (Cal. Bar No. 196220)  
19 Berding & Weil LLP  
20 2175 N. California Blvd., Suite 500  
21 Walnut Creek, CA 94596  
22 fhagen@berdingweil.com  
23 Tel: (925) 963-6796  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2023, I electronically filed the foregoing Answer to First Amended Complaint for Permanent Injunction, Monetary Relief, Civil Penalty Judgment and Other Relief and Counterclaim the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ John J. Vecchione  
John J. Vecchione

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28