ORAL ARGUMENT SCHEDULED OCTOBER 8, 2009

No. 08-5205

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

FEDERAL TRADE COMMISSION,
Appellee,
v.

SCOTT TARRIFF, EDWARD MALONEY, and PAUL CAMPANELLI,
Appellants.

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

BRIEF FOR APPELLEE FEDERAL TRADE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing below and in this Court are listed in the brief of appellants Scott Tarriff, *et al.*, filed with this Court on May 29, 2009.

B. Ruling Under Review

Reference to the ruling at issue appears in the brief of appellants Scott Tarriff, *et al.*, filed in this matter on May 29, 2009.

C. Related Cases

This case has not been previously before this Court. There are no related cases.

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

FEDERAL STATUTES

MISCELLANEOUS

GLOSSARY

1) Br. -- Brief of Appellants, Scott Tarriff, *et al.*

2) FTC -- Federal Trade Commission

3) Record citations:

Pet. Exh. -- Exhibit attached to the Commission's petition filed in the district court

J.A. -- Citation to the deferred joint appendix

JURISDICTIONAL STATEMENT

The Federal Trade Commission ("FTC" or "Commission") initiated this action in the United States District Court for the District of Columbia to enforce three investigative subpoenas that it issued in the course of a law enforcement investigation. That court's jurisdiction came from Section 9 of the FTC Act, 15 U.S.C. § 49, which provides, in pertinent part:

> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

On June 2, 2008, the district court issued an order enforcing the three subpoenas. That order was final. Accordingly, this Court has jurisdiction to review that order pursuant to 28 U.S.C. § 1291.

Appellants filed their notice of appeal on June 30, 2008, and that notice was timely pursuant to Fed. R. App. P. 4(a)(1)(B).

ISSUES PRESENTED

1) Whether a Commission procedural rule that mandates stenographic transcription of investigational hearings somehow precludes the videotaping of those

hearings, where the Commission's enabling statute gives it ample authority to videotape.

2) Whether appellants' challenges to hypothetical future use of the videotapes are relevant where the only issue in this case is the correctness of the district court's order that required them to comply with the Commission's investigational subpoenas.

STATUTES AND REGULATIONS

Relevant statutes and regulations are set forth in the brief of appellants Scott Tarriff, *et al.*, filed with this Court on May 29, 2009.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

At issue is an Order of the United States District Court for the District of Columbia, entered by Judge Lamberth on June 2, 2008. That order enforced three investigative subpoenas that were issued by the Federal Trade Commission in the course of a law enforcement investigation. The Commission issued these subpoenas on February 13, 2008, to Messrs. Scott Tarriff, Edward Maloney, and Paul Campanelli. (Henceforth, they are referred to as "appellants.") Each subpoena sought the testimony of the recipient, and provided notice that the testimony of each witness would be recorded by sound-and-visual means (*i.e.*, videotape) in addition to stenographic means. The three subpoena recipients refused to testify based on their

contention that the Commission lacked authority to record its investigational hearings by any means other than stenographic transcription.

Pursuant to Section 9 of the FTC Act, 15 U.S.C. § 49, the Commission sought an order from the district court enforcing the subpoenas, and, on June 2, 2008, the court entered an order enforcing all three subpoenas. Appellants complied with the district court's order, and their testimony was recorded stenographically and by videotape. Nonetheless, they have appealed the district court's order.

B. Facts and proceedings below

On March 2, 2007, the Commission issued a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation (FTC File No. 071-0060). Petition Exhibit ("Pet. Exh.") 2 (Joint Appendix ("J.A.") at 5:1). The investigation sought to determine:

> whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by unreasonably restraining trade in the manufacture or sale of AndroGel or its generic equivalent.[1]

[1] AndroGel is a testosterone replacement therapy drug with annual sales of over $350 million in 2007. Pet. Exh. 1, ¶ 6 (J.A. at 26:2).

In particular, the Commission was seeking to investigate agreements entered into between Par, Paddock, Solvay, and Watson that had the effect of delaying the marketing of a generic version of AndroGel, and to investigate the potential harm to consumers from that delay. Pet. Exh. 1 (J.A. at 26:3). The resolution authorized the used of compulsory process. Pet. Exh. 2 (J.A. at 5:1).

On February 13, 2008, the Commission issued three subpoenas *ad testificandum* for investigational hearings of appellants.[2] Pet. Exh. 3 (J.A. at 18:1-9). Each subpoena provided notice that the investigational hearing of the witness would be recorded by sound-and-visual means in addition to stenographic means. *Id*.

On February 20, 2008, appellants filed with the Commission a Petition to Quash or Limit the Subpoenas issued to them ("Petition to Quash"). Pet. Exh. 4 (J.A. at 20:1). This Petition to Quash was filed pursuant to Rule 2.7 of the Commission's Rules of Practice. 16 C.F.R. § 2.7. The Petition to Quash objected only to the fact that the Commission intended to videotape the hearings. The Petition did not dispute that the Commission had *statutory* authority to videotape, but instead argued that, because the Commission's Rules of Practice stated that investigational hearings "shall be stenographically reported," this prohibited the Commission from recording its

[2] Scott Tarriff is the former President and Chief Executive Officer of Par, Edward Maloney is a senior executive of Paddock, and Paul Campanelli is the president of the Generics Division of Par.

investigational hearings by any means other than stenographic transcription. The Petition also argued that, if the hearings were videotaped, it would be inappropriate for the Commission to use those videotapes in any future adjudicative proceeding.

On March 14, 2008, the Commission issued a letter opinion rejecting the Petition to Quash. Pet. Exh. 5 (J.A. at 22:1). The Commission concluded "that the requirement that such hearings be 'stenographically reported' and transcribed establishes a *minimum* standard of recordation, and, further, that this minimum standard does not foreclose any, much less all, other means of recording." *Id.* at 3 (J.A. at 22:3). With respect to arguments regarding possible future use of the videotape, the Commission observed that it could not "anticipate every fact that might arise at the time of trial bearing on the admissibility of any given testimony * * *." Thus, the Commission concluded that "it would be premature and speculative for the Commission to rule on such issues at this time." *Id.* at 6 (J.A. at 22:6). On March 21, 2008, appellants informed the Commission that they would not comply with the subpoenas, and that they would not appear for their investigational hearings. Pet. Exh. 6 (J.A. at 24:1).

On April 16, 2008, the Commission petitioned the district court to enforce the three subpoenas. D.1.[3] Appellants raised only one argument in opposition, the same

[3] Items in the district court docket are referred to as "D.xx."

one they raised in their administrative Petition to Quash: because the Commission's Rules of Practice provide that the transcript of an investigational hearing "shall" be stenographically reported, appellants contended that the Commission was precluded from using any additional means of transcription, including the use of videotape. D.4. Again, they did not contend that the Commission lacked statutory authority to videotape its investigational hearings.

On June 2, 2008, the district court issued its opinion and order. D.8, *FTC v. Tarriff*, 557 F. Supp. 2d 92 (D.D.C. 2008) (J.A. at 2:1, 3:1). The court's opinion focused on the provision of the Commission's Rules of Practice that stated that hearings "shall" be stenographically reported, and the court held that appellants had "failed to convince this Court that the word 'shall' expresses not only a mandatory direction, but also a limiting principle." *Id.* at 94. Accordingly, the court ordered appellants to comply with the subpoenas. D.9 (J.A. at 2:1). Appellants complied with the court's order: Mr. Maloney was deposed on June 19, 2008 (*see* J.A. at 32:1); Mr. Campanelli was deposed on June 26, 2008 (*see* J.A. at 33:1); and Mr. Tarriff was deposed on July10, 2008 (*see* J.A. at 34:1). All three of these depositions were transcribed stenographically and by videotape.

The Commission's investigation culminated on January 29, 2009, in the filing of a complaint naming Watson, Par, Paddock, and Solvay as defendants. *FTC, et al.*

v. Watson, et al., No. 2:09-cv-00598-MRP-PLA (C.D. Cal.). The complaint alleged that agreements among the four defendants unlawfully delayed the marketing of a generic version of AndroGel, harmed competition, cost consumers hundreds of millions of dollars, and violated the Sherman Act and the FTC Act. On April 8, 2009, the court granted defendants' motion to transfer the action to the United States District Court for the Northern District of Georgia. (The case is now captioned *FTC v. Watson*, No. 1:09-cv-00955-TWT (N.D. Ga.).) Since the filing of the complaint in *FTC v. Watson*, the Commission has not made any use of the videotaped transcripts of appellants' investigational hearings.

STANDARD OF REVIEW

Because the only issue before this Court is the proper interpretation of the Commission's procedural rule, this Court reviews the district court's decision *de novo*. *ITC v. Asat, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005). However, this Court should defer to the Commission's interpretation of its own rule, because "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (internal quotation marks omitted); *see American Fed'n of Gov't Employees v. Gates*, 486 F.3d 1316, 1330 (D.C. Cir. 2007) ("an agency's interpretation of one of its own regulations commands substantial

judicial deference" (internal quotation marks omitted)). Indeed, "[c]ourts, the Supreme Court has explained, lack authority to decide which among several competing interpretations [of an agency's own regulation] best serves the regulatory purpose and instead must give effect to the agency's interpretation so long as it . . . sensibly conforms to the purpose and wording of the regulations." *Fina Oil and Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

SUMMARY OF ARGUMENT

Appellants do not dispute that the FTC Act gives the Commission ample statutory authority to videotape its investigational hearings. Thus, the only issue before this Court is whether, by promulgating a procedural rule that states that such hearings "shall be stenographically reported," the Commission has somehow precluded itself from using the full authority Congress gave it. The district court got it right: the Commission has not limited itself in the manner suggested by appellants. Appellants challenge the district court's conclusion by arguing that the word "shall," as used in the Commission's rule, is not only mandatory, but also limiting. That is, they claim that the procedural rule not only mandates stenographic transcription, but also prohibits the use of any other additional method of recording. But appellants' interpretation of the word "shall" is contrary to the dictionary definition, case law, and

common usage. All three make clear that "shall," as that word is used in the Commission's rule, is mandatory, but not limiting. The Commission must record hearings stenographically, but is not precluded from also using additional methods of recording. (Part I.A, *infra*.)

Were appellants' interpretation of the word "shall" correct, this would lead to absurd interpretations of numerous other provisions in the Commission's procedural rules. Nor are appellants helped by the *expressio unius* doctrine. This doctrine has little force in the administrative setting because a court should defer to an agency's interpretation of its own procedural rules. As the Commission has explained, the word "shall," as used in its procedural rules, is not a term of limitation. Finally, the Commission's procedural rule is in no way analogous to Fed. R. Civ. P. 30(c), which governs post-complaint discovery, and interpretations of that rule have no relevance to this case. (Part I.B, *infra*.)

Appellants challenge possible future uses that the Commission might make of the videotapes. But this challenge is not only speculative, it is also irrelevant, because the only issue properly before this Court is whether the district court erred when it required appellants to participate in investigational hearings where their testimony was not only stenographically transcribed but also videotaped. Appellants may challenge possible future use of the videotapes when that use is made, but not now, when such

a challenge is entirely hypothetical. In any event, two of the possible uses of the transcripts that so concern appellants, *i.e.*, use in a Commission law enforcement proceeding, or in another agency's law enforcement proceeding, are specifically authorized by the FTC Act. The third possible use that concerns appellants, release of the transcripts to plaintiffs in private class action lawsuits, is prohibited by the FTC Act, and release of the transcripts to such plaintiffs could result in criminal sanctions. (Part II, *infra*.)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSION'S RULES OF PRACTICE DO NOT PRECLUDE IT FROM VIDEOTAPING INVESTIGATIONAL HEARINGS

A. Commission procedural rules do not limit the Commission's statutory authority to videotape its investigational hearings

Appellants do not contend that the Commission lacks *statutory* authority to videotape an investigation. Indeed, it is well-settled that the Commission's investigative authority, which comes from Section 9 of the FTC Act, 15 U.S.C. § 49, is akin to that of a grand jury, and the Commission has substantial latitude to choose the means by which it conducts its investigations. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (the Commission's investigations are analogous to a grand jury, and the Commission has "the power to get information from those who best can give it and who are most interested in not doing so"); *see FTC v. Manager, Retail*

Credit Co., Miami Branch Office, 515 F.2d 988, 993 (D.C. Cir. 1975) (the Commission's authority to conduct investigations is "plenary").[4]

Thus, the only issue is whether, despite its broad statutory authority, the Commission has, through the promulgation of Rule 2.8(b), limited itself to recording its investigational hearings through stenographic means only. In fact, Rule 2.8(b) imposes no such limitation. Rule 2.8(b) provides that:

> Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

In its response to appellants' administrative petition to quash the subpoenas, the Commission explained the meaning of Rule 2.8(b):

> The Commission finds that the requirement [in Rule 2.8(b)] that such hearings be "stenographically reported" and transcribed establishes a *minimum* standard of recordation, and, further, that this minimum standard does not foreclose any, much less all, other means of recording. Were we to accept Petitioners' narrow reading of the rule, it would forbid court reporters from using stenotype machines or other modern recording systems such as steno masks, audiotapes, and digital back-up systems to enhance the accuracy of transcription. It would also seem to prohibit both Commission staff and counsel for the witness from taking longhand notes during the course of investigational hearings. The Commission sees no merit in denying either itself or the witness the protections afforded by an

[4] Because the Commission has ample statutory authority to videotape its investigational hearings, that authority does not have to be restated in the Commission's Rules of Practice.

> accurate record, and therefore does not draw any negative or preclusive inference from the Rule's stenographic reporting requirement. Instead, we find that the FTC Act and our Rules permit video recording of investigational hearings.
>
> Rule 2.8(b), 16 C.F.R. § 2.8(b) states that "[i]nvestigational hearings shall be conducted . . . for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation." Witness testimony includes both verbal and nonverbal evidence, sometimes referred to as the witness's demeanor, or demeanor evidence. Petitioners' interpretation of Rule 2.89(b) would require the Commission to hold that the Rule was intended to yield records of investigational hearings devoid of witness demeanor evidence. Videotaping captures the witness's nonverbal testimony which, at a minimum, relates to a subject which is always relevant in an investigation: the credibility of each witness.

D.1, Exh.5 at 3-4 (emphasis in original; footnotes omitted) (J.A. at 22:3-4).

The Commission's interpretation of its own procedural rule is consistent with the common meaning of the words of the rule. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000) (words of a statute must be given their ordinary, contemporary, common meaning); *Exportal, Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (applying the plain meaning doctrine to the interpretation of regulations). As commonly used, "shall" means "must," and the dictionary expresses this mandatory meaning. *See Webster's New Collegiate Dictionary* 1056 (1979) ("shall" is "used in laws, regulations, or directives to express what is mandatory"). This is in accord with the normal usage of the word. We are unaware of any dictionary that applies the limiting meaning suggested by appellants.

Indeed, the district court quoted the following illustrative example: a direction to a teenage son that he "shall" clean his room does not thereby forbid him from taking out the trash, walking the dog, or going to school. 557 F. Supp. 2d at 95 n.1 (J.A. at 3:3). Appellants contend that this example is "unilluminating" because it "does *not* specify a means of doing something." Br. at 39 n.5. Thus, they offer a counter example: "'You shall clean your room with environmentally green products,' which necessarily precludes the use of non-green products." *Id.* But appellants' example does not help their cause because the limiting principle comes not from the word "shall," but from the prepositional phrase "with environmentally green products." Plainly, using non-green products would be inconsistent with that phrase. But neither that phrase nor the word "shall" would preclude the room-cleaner from using a broom, sponge, or a dust cloth, because the use of those cleaning aids is not inconsistent with the use of "environmentally green products." Similarly, videotaping an investigational hearing is not inconsistent with simultaneous stenographic recording.

Case law confirms that the word "shall" conveys a mandatory prescription but is not a term of limitation. In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990), the Supreme Court interpreted the enforcement provision of Title VII of the Civil Rights Act of 1964, which states that "each United States district court * * * shall have jurisdiction of actions brought under this subchapter." The Court

specifically held that this language did not limit jurisdiction to federal courts, and, thus, did not oust state courts of jurisdiction to enforce the Act. *Id.* at 823. That is, despite the fact that district courts "shall" have jurisdiction to enforce the Act, state courts were not precluded from also exercising jurisdiction.

Similarly, in *Davis v. Sun Oil Co.*, 148 F.3d 606, 612 (6th Cir. 1998), the court interpreted the citizen suit provision of the Resource Conservation and Recovery Act. That provision states that private suits "shall be brought" in the district court where the violation or alleged endangerment occurs. The court held that this provision does not divest state courts of jurisdiction because "the term 'shall' as it is used in the statute does not affirmatively divest the state courts of their presumptive jurisdiction."

In *Zyla v. Turner*, 590 A.2d 618 (N.H. 1991), the Supreme Court of New Hampshire addressed the meaning of the word "shall." The statute at issue stated that the trial court "shall cover" five factors when deciding whether to revoke a driver's motor vehicle license. The court held that "the language 'shall cover' does not limit the court to considering *only* those five factors and permits it to consider [other] relevant factors * * *." *Id.* at 620 (emphasis in original).

Thus, properly interpreted, Rule 2.8(b) does not limit the Commission's authority to videotape its investigational hearings so long as the hearings are also stenographically transcribed.

B. Appellants' arguments do not support a limiting meaning of the word "shall," as used in the Commission's procedural rule

Neither of the cases on which appellants primarily rely, *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003); and *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518 (2007), supports its contention that the Commission's rules limited its statutory authority to videotape its investigations. *See* Br. at 32-39. *Beverly* is irrelevant because it does not involve an interpretation of the word "shall." In that case, the provision of the National Labor Relations Act at issue provided that "before commencing a strike at a health care institution a union 'shall, not less than ten days prior to such action, notify the institution in writing' and that 'notice shall state the date and time that such action will commence.'" 317 F.3d at 321. The statute further provided that, "[t]he notice, once given, may be extended by the written agreement of both parties." *See id.* The union gave Beverly written notice more than ten days in advance of its intended strike. However, less than a week before the scheduled date, it sent Beverly a second notice indicating that it was unilaterally putting off the strike for three days. This Court held that the attempted extension of the strike date was not valid because it had not been agreed to in writing by both the union and Beverly. *Id.* Although the union argued that the statute did not specifically state that mutual written agreement was the only means of extending a strike date, this Court held that, where Congress carved out "a

single express exception," that exception "would be rendered unnecessary if either party could unilaterally extend the notice at will."[5]

Thus, the focus of *Beverly* is not on the mandate that follows the word "shall," but upon the specific limitations on strike-date extensions that follow the word "may." Unsurprisingly, the Court ruled that those limiting words constrained the circumstances under which the parties "may" extend the notice of a strike.[6] Moreover, the key to this Court's decision was that a statute should not be interpreted in a manner that renders any of its provisions surplusage (*i.e.*, there would have been no need in the extension provision for the phrase "by the written agreement of both parties" if the strike date could have been extended by other means). *Id.* There is no portion of Rule 2.8(b) that will become surplusage if that rule is interpreted to permit the Commission to videotape investigational hearings.[7]

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[5] Because appellants impose both a mandatory and a limiting meaning on the word "shall," they would presumably argue that the statute at issue in *Beverly*, which stated that the union "shall" notify a health care institution of an intended strike "in writing," would invalidate a strike if, in addition to written notification, the union also notified the institution of the strike by telephone, in person, or by other means.

[6] Appellants mistakenly contend that, in *Beverly*, this court interpreted the word "may" as both mandatory and limiting. *See* Br. at 36. Not so. If "may" had been mandatory in the statute at issue in *Beverly*, then, once a union gave notice of a strike, it would have been *required* to extend that notice. Clearly, that is not what the statute required.

[7] *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997), on which appellants rely, *see* Br. at 42-43, is also irrelevant, because, as in *Beverly*, this Court was interpreting a

In *Defenders of Wildlife*, *see* Br. at 36-39, the Court interpreted a provision of the Clean Water Act ("CWA") that provided that EPA "shall approve" a transfer of permitting authority to a state unless that state lacked authority to perform nine functions specified in that section. *Id.* at 2531. The Ninth Circuit had held that the transfer of authority should also be conditioned on a tenth criterion, one not specified in the CWA. *Id.* at 2532. The Supreme Court reversed, holding that, if the nine criteria were met, the transfer of authority was mandatory. The point of the Court's opinion was simply that, as used in this provision of the CWA, "shall" is mandatory -- once a state meets the conditions, authority must be transferred. That is, it would be inconsistent with the statutory mandate if, once the state met the nine criteria, the EPA failed to transfer permitting authority merely because the state had not satisfied some other criterion, not set forth in the CWA. *Defenders of Wildlife* is irrelevant to appellants' argument because nothing in that opinion suggests that the provision of the CWA that was at issue somehow limits any other action that the EPA might take with respect to the states so long as that action is not inconsistent with the CWA.[8] Similarly,

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phrase the followed the word "may."

[8] Presumably, because appellants contend that "shall" is both mandatory and limiting, *see* Br. at 37, they would argue that, although the provisions of the CWA at issue in *Defenders of Wildlife* mandate that the EPA transfer permitting authority to a state if the state satisfies nine criteria, that provision would preclude the EPA from providing the state with a certificate memorializing the transfer.

nothing in Rule 2.8(b) prohibits the Commission from also making a videotape of its hearings, because videotape transcription is not inconsistent with stenographic transcription.[9]

Nor are appellants helped by doctrine of *expressio unius est exclusio alterius*. *See* Br. at 39-44. Indeed, that doctrine -- the expression of one is the exclusion of others -- would be "misplaced" if applied in this case because the doctrine "has little force in the administrative setting, where we defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue." *Mobile Commc'ns Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996). The *expressio unius* doctrine is "too thin a reed" when a court, in a case involving an agency, is called upon to interpret a statute that the agency administers. *See, id.*, citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). The doctrine has no place at all where the court must interpret an agency's procedural rule. *See Long Island Care*

[9] Appellants contend that, because Commission Rule 2.8(c), 16 C.F.R. § 2.8(c), limits who can attend an investigational hearing and makes no provision for a videographer, this precludes videotape transcription. Br. at 24, 44. But appellants ignore that Rule 2.8(c) did not apply to their investigational hearings. The FTC Act authorizes the Commission to use two different types of administrative compulsory process: Section 20, 15 U.S.C. § 57b-1, authorizes the use of civil investigative demands ("CIDs"), and Section 9, 15 U.S.C. § 49, authorizes the use of subpoenas. The limitation in Rule 2.8(c) applies only to hearings conducted pursuant to CIDs, but appellants' hearings were conducted pursuant to subpoenas. Thus, the limitation of Rule 2.8(c) has no relevance here. In any event, even if that limitation did apply to appellants' hearings, a stenographer, who may be present during the hearing, could also serve as the videographer.

v. Coke, 127 S. Ct. at 2349 ("an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted"); *Fina Oil v. Norton*, 332 F.3d at 676 (courts must give effect to the agency's interpretation [of its own rules] so long as it . . . sensibly conforms to the purpose and wording of the regulations."

Here, the Commission's interpretation of its Rule 2.8(b), which it clearly expressed in its response to appellants' administrative petition to quash, is neither "plainly erroneous," nor is it "inconsistent with the regulations being interpreted."[10] Instead, it is appellants' interpretation that is "inconsistent with the regulations" because, if the word "shall" were given a limiting meaning, it would lead to absurd results throughout the Commission's regulations. For example, Commission Rule 2.1, 16 C.F.R. § 2.1, authorizes the Commission's Director of the Bureau of Competition to open certain investigations in response to requests made pursuant to the International Antitrust Enforcement Assistance Act, 15 U.S.C. § 6201 *et seq*. Before responding to such a request, the rule states that the Bureau Director "shall" transmit his proposed response to the Commission's Secretary. If appellants' interpretation of the word "shall" were correct, the Bureau Director would be precluded from transmitting his

[10] Appellants contend that Rule 2.8(b) "has provided certainty and regularity to Commission witnesses for over four decades * * *." Br. at 54. In fact, the "certainty and regularity" that the rule provides is that investigational hearings will always, at a minimum, be recorded stenographically.

proposed response to anyone else, such as his staff attorneys or his personal secretary. Commission Rule 2.6, 16 C.F.R. § 2.6, states that any person under investigation "shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation." If appellants' interpretation of "shall" prevailed, the target of the investigation could not be told the name of the Commission's investigator, or the investigator's phone number or e-mail address because the rule does not mention this information. Similarly, if the limiting meaning of "shall" were applied to Rule 3.11, 16 C.F.R. § 3.11, which states the items that "shall" be included in an administrative complaint issued by the Commission, such a complaint could not include a caption, a date, or a signature.[11]

In any event, even if the *expressio unius* doctrine applied, it would not help appellants because it would merely establish that the only type of transcription that the Commission "shall" provide at investigational hearings is stenographic recording. The Commission has never denied that only stenographic recording is mandated, which is why only stenographic recording is mentioned in the Commission's rules, *see* rule

[11] Appellants dispute the district court's observation that, if "shall" were given a limiting meaning, those attending an investigational hearing could be prohibited from taking longhand notes, and a witness at an investigational hearing could be refused a copy of his transcript. *See* Br. at 52. But the examples set forth above are only a sample of the rules that would be rendered absurd if "shall" were given a limiting meaning.

provisions cited at Br. at 44-45. Thus, *expressio unius* does not answer the issue in this case: whether the word "shall" is not only mandatory but is also limiting. *Christensen v. Harris County*, 529 U.S. 576 (2000), on which appellants rely, *see* Br. at 39-40, does help resolve this question. In that case, the Court interpreted a provision of the Fair Labor Standard Act, which stated that, if an employee requests permission to take compensatory time, the employer "shall" grant that request if this will not unduly disrupt the workplace. The Court held that the provision was not limiting, but that it was "more properly read as a minimal guarantee * * *." 529 U.S. at 583. This case is similar: Commission Rule 2.8(b) establishes a minimal guarantee that investigational hearings will be stenographically recorded.[12]

Nor are appellants helped by their comparison of Rule 2.8(b) to Fed. R. Civ. P. 30(c). *See* Br. at 44-50. Indeed, the comparison is false -- apples to oranges. As explained above, the Supreme Court has analogized the Commission's investigational hearings to grand jury proceedings, *see United States v. Morton Salt*, *supra*, not to post-complaint discovery under the Federal Rules. Fed. R. Civ. P. 30(c) governs post-

[12] Appellants suggest that, if the Commission were authorized to videotape its investigational hearings, nothing would stop it from using lie detectors, thermal-imaging technology, or voice stress analyzers. *See* Br. at 33-35, 52. This suggestion is both farfetched and irrelevant. Neither a lie detector, nor a thermal imager, nor a voice stress analyzer is a means of recording an investigational hearing, and the Commission did not seek to use any of these technologies during appellants' investigational hearings.

complaint discovery, not pre-complaint investigative proceedings. Little wonder that Fed. R. Civ. P. 30(c) differs from Commission Rule 2.8(b). To the extent that Rule 2.8(b) may be validly compared to any of the federal rules, it would be to Fed. R. Crim. P. 6, which provides for grand juries. As of 1967, when the Commission first promulgated Rule 2.8(b), Fed. R. Crim. P. 6(e) allowed for transcription by other than stenographic means.

Even if it were valid to compare Rule 2.8(b) to Fed. R. Civ. P. 30(c), appellants' analysis of the language of both provisions is simply incorrect. Appellants contend that the 1967 version of the Commission's rule and the 1967 version of Fed. R. Civ. P. 30(c) use "nearly identical language." Br. at 25. In fact, the language is not identical at all.[13] Rule 2.8(b) stated then (and states now) as follows: "Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation." The 1967 version of Fed. R. Civ. P. 30(c) was quite different: "The testimony shall be taken stenographically and transcribed unless the parties agree otherwise." The final clause of the federal rule, which does not appear in the Commission's rule, was interpreted to preclude any additional means of transcription, absent agreement. *U.S. Steel Corp. v. United States*, 43 F.R.D. 447

[13] Appellants provide no support whatsoever for their statement that "[i]t seems apparent, however, that the language in 16 C.F.R. § 2.8(b) derives from the Federal Rules as they existed in 1967 * * *." *See* Br. at 47.

(S.D.N.Y. 1968).[14] The proper analysis of this federal rule provision is similar to this Court's analysis of the statute at issue in *Beverly Health v. NLRB*, *supra*, where this Court was careful to avoid an interpretation that would render a clause surplusage. Similarly, the "unless" clause in the 1967 version of Fed. R. Civ. P. 30(c) would become surplusage if the party taking the deposition could, without agreement, designate another means of recording the deposition. Significantly, Commission Rule 2.8(b) has never had a clause similar to the "unless" clause of the 1967 version of Fed. R. Civ. P. 30(c). Thus, even if it were valid to compare Commission Rule 2.8(b) to Fed. R. Civ. P. 30(c), that comparison would not help appellants.

II. APPELLANTS' CHALLENGES TO HYPOTHETICAL FUTURE USE OF THE VIDEOTAPES ARE IRRELEVANT AND MERITLESS

In the final portion of their brief, appellants speculate that the Commission might make some future use of the videotapes of their hearings, and they raise objections as to each of those possible uses. *See* Br. at 55-59. In particular, appellants are concerned that the Commission might seek to use the videotapes during the course of the litigation in *FTC v. Watson*, *supra*, that it might provide the tapes to another federal

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[14] *U.S. Steel* was discussed and criticized in 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2115 pp. 103-104 (2d ed. 1994) ("[i]t is difficult to see the basis for the [*U.S. Steel*] decision, since as long as the examination was to be recorded stenographically in the usual manner as well as electronically the provisions of [Rule 30(c)] were complied with").

law enforcement agency for its use, or that it might supply the tapes to plaintiffs private class action lawsuits. These objections to possible future use are simply irrelevant to this case, since the only issue here is whether the district court properly ordered appellants to testify in response to the investigational subpoenas served on them. Any issues that might arise in connection with future use of the videotapes are properly raised in the proceeding in which such use is attempted, and only when such use is actually attempted. To the extent that appellants have raised these hypothetical concerns to ward off a suggestion of mootness, they need not have bothered. The Commission concedes that this case is not moot because, as a result of the district court's order, the Commission was not only entitled to videotape the investigational hearings, it is also entitled to retain those tapes.

In any event, appellants' challenges to possible future use of the videotapes, which are based, in part, on extra-record material that appellants seek to introduce in the Joint Appendix,[15] *see* Br. at 57-58, ignore the provisions of the FTC Act that specifically permit future use. As to appellants' contention that the Commission might attempt to use the transcripts during the course of the litigation in *FTC v. Watson*, *supra*., *see* Br. at 55-56, Section 21 of the FTC Act, 15 U.S.C. § 57b-2, specifically

[15] This extra-record material includes a May 18, 2009, letter from appellants, in which appellants urged the Commission to destroy the videotapes, *see* J.A. at 46:1, and the Commission's April 28, 2009, response to an FOIA request, *see* J.A. at 45:1.

states that the Commission is entitled to do so.[16] *See* 15 U.S.C. § 57b-2(b)(4) ("[w]henever the Commission has instituted a proceeding against a person, partnership, or corporation, the custodian [of the transcript] may deliver to any officer of employee of the Commission * * * transcripts of oral testimony for official use in connection with such proceeding"); *see also id.* at § 57b-2(d)(2).[17]

Section 21 of the FTC Act also addresses appellants' concern that the Commission might provide the transcripts to another federal law enforcement agency for its law enforcement purposes. *See* Br. at 55-56. That section states that "[t]he custodian * * * may deliver to any officers or employees of appropriate Federal law

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[16] Appellants note that, in this case, the Commission stated to the district court that evidence collected during the investigation could be used in subsequent litigation (*i.e.*, in *FTC v. Watson*) for impeachment purposes. They also refer to a memorandum filed by the Commission in 2001 during the course of an administrative litigation that was completely unrelated to this matter, in which the Commission stated that developing testimony for impeachment is not a purpose of an investigational hearing. Appellants contend that these two statements are somehow "self-serving and unprincipled." *See* Br. at 56. But there is nothing inconsistent (or "self-serving," or "unprincipled") about these statements. It is true that the *purpose* of an investigational hearing is to develop evidence so that the Commission may determine whether it has a reason to believe the law has been violated. It is also true that post-complaint depositions of witnesses may be more effective for impeachment. But this does not somehow preclude the Commission from using evidence it gathered during investigational hearings for impeachment.

[17] If the Commission were to make the transcripts public during the course of the *Watson* litigation, pursuant to Commission Rule 4.10(g), 16 C.F.R. § 4.10(g), the Commission would afford appellants an opportunity (in the *Watson* proceeding) to seek a protective or *in camera* order for the transcripts.

enforcement agencies, in response to a written request copies of [transcripts] for use in connection with an investigation or proceeding under the jurisdiction of any such agency".[18] 15 U.S.C. § 57b-2(b)(6). That same section of the FTC Act requires that, if another agency were to receive the transcripts, it would be required to afford those transcripts the same degree of confidentiality that they would be provided if retained by the Commission. *Id.* This means that, if the receiving law enforcement agency were to make the transcripts public during the course of a law enforcement proceeding, it would have to afford appellants an opportunity to seek a protective or *in camera* order. *See* n.17, *supra*.

But there is absolutely no basis for appellants' suggestion that Commission staff attorneys might voluntarily release copies of the transcripts to plaintiffs in private class action lawsuits. *See* Br. at 57. Appellants ignore that, pursuant to Section 10 of the FTC Act, 15 U.S.C. § 50, any such unauthorized release would constitute a criminal offense. Indeed, even if the Commission were to receive a subpoena from those

[18] Appellants complains that, in a matter that was unrelated to this proceeding, the Commission released an investigational hearing transcript to the Internal Revenue Service. *See* Br. at 55-56. As explained above, such a release would have been permitted by the FTC Act. In fact, however, appellants misunderstood the Commission's statement before the district court. The Commission explained that the transcript, which was made during an investigation of a debt collection agency known as the Universal Church of Jesus Christ, became public when the Commission filed it in court during the course of its prosecution of the Church. *See* Transcript of Hearing, 5/23/2008, at 22 (J.A. at 31:22).

plaintiffs, it would not release the transcripts because such a release is not authorized by Section 21(b) of the FTC Act, 15 U.S.C. § 57b-2(b).[19]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order enforcing subpoenas issued to appellants.

Respectfully submitted,

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[19] In addition, the transcripts are exempt from disclosure under the Freedom of Information Act. 15 U.S.C. § 57b-2(f). *See A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143-146 (2d Cir. 1994) (explaining that § 57b-2(f) is not to be narrowly construed).

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2009, I electronically filed the Brief of Appellee Federal Trade Commission (Final version) on the Clerk of this Court. On that same day, I also filed eight copies of the same document on the Clerk, and I served two copies on appellants by express overnight delivery addressed to:

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