No. 18-1501

IN THE

Supreme Court of the United States

CHARLES C. LIU AND XIN WANG A/K/A LISA WANG,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER FEDERAL TRADE COMMISSION OFFICIALS IN SUPPORT OF RESPONDENT

DAVID C. VLADECK
Counsel of Record
RACHEL L. FRIED
GEORGETOWN UNIVERSITY
LAW CENTER
CIVIL LITIGATION CLINIC
600 New Jersey Ave. NW
Washington, DC 20001
(202) 661-6614
vladeckd@georgetown.edu

Counsel for Amici Curiae

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BRIEF OF *AMICI CURIAE* FORMER FEDERAL TRADE COMMISSION OFFICIALS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici are former senior staff of the Federal Trade Commission ("FTC"). *Amici* submit this brief because the resolution of *Liu v. SEC* could have a profound impact on the FTC's ability to obtain compensatory redress for consumers who lose money to scam artists. For the past thirty-five years, the FTC's principal enforcement goals have been to return monies illegally acquired to consumers and to put a stop to conduct that violates the law. At times, however, redress is impossible, either because the FTC cannot identify the victims or the recovered funds are insufficient. Until recently, courts have uniformly held that the FTC Act authorizes courts to compel wrongdoers to return monies illegally acquired. *Amici* urge the Court to ensure that these remedies remain available to the FTC.[1]

The *amici* are former FTC officials who directed, or participated in the direction of, the FTC's consumer protection enforcement efforts. Joan Z. Bernstein served as Director of the FTC's Bureau of Consumer Protection from 1995 to 2001. M. Eileen Harrington served as Executive Director of the FTC from 2010 to 2012, and Acting Director of the Bureau of Consumer

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Petitioners have filed a blanket consent to the filing of *amicus* briefs. Respondent consented to the filing of this brief.

Protection in 2009. C. Lee Peeler served as Deputy Director of the Bureau of Consumer Protection from 2001 to 2006. Jessica Rich served as Director of the Bureau of Consumer Protection from 2013 to 2017. Mozelle W. Thompson served as Commissioner of the FTC from 1997 to 2004. David C. Vladeck served as the Director of the Bureau of Consumer Protection from 2009 to 2012. Joel Winston served as Associate Director, Division of Financial Practices, from 2000 to 2005 and 2009 to 2011; and as Associate Director, Division of Privacy and Identity Protection, from 2005 to 2009.

INTRODUCTION

This *amici curiae* brief is submitted by former FTC senior officials to call to the Court's attention the potentially adverse effect the Court's ruling in this case could have on the FTC's ability to enforce the FTC Act's prohibitions on "unfair or deceptive acts or practices" and "unfair methods of competition." 15 U.S.C. 45(a). Most FTC enforcement actions are brought under Section 13(b) of the Act, 15 U.S.C. 53(b), which authorizes the FTC to file cases directly in federal district court and empowers courts to issue injunctions. Using Section 13(b), the FTC regularly brings enforcement actions in court to shut down scams and to return ill-gotten gains to injured consumers. FTC enforcement efforts have returned billions of dollars to millions of consumers. For the past thirty-five years, courts have uniformly held that Section 13(b) empowers courts to order compensatory relief based on Congress's conferral of injunctive authority and the "comprehensive[]" equitable jurisdiction of federal courts. *See generally Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Amici's concerns rest in part on the Court's ruling in *Kokesh v. SEC* that the five-year statute of limitations for "penalt[ies]" under 28 U.S.C. 2462 applies to cases brought by the Securities and Exchange Commission ("SEC") in which disgorged illegally obtained funds are disbursed to the Treasury, and not to injured investors. 137 S. Ct. 1635, 1639, 1643-45 (2017). The Court pointed out that the SEC's primary focus in seeking disgorgement is deterrence, not compensation, and thus SEC disgorgement "bears all the hallmarks of a penalty." *Id.* at 1644. The question presently before the Court in *Liu* is whether Congress has empowered courts in SEC cases to order *non-compensatory* disgorgement.

Amici urge the Court, in its deliberations in *Liu*, to be cautious not to restrict enforcement cases seeking *compensatory* equitable remedies. This concern is a serious one because the Seventh Circuit has held, and one Ninth Circuit Judge has urged, that notwithstanding the unbroken precedent holding that Section 13(b) authorizes courts to award compensatory redress, those decisions were all wrongly decided. The Seventh Circuit ruled that Section 13(b) does not authorize compensatory redress. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019), *petition for cert. pending*, No. 19-825 (filed Dec. 19, 2019). Relying on *Kokesh*, Judge O'Scannlain reached the same conclusion. *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018), *petition for cert. pending*, No. 19-508 (filed Oct. 18, 2019). *Amici* urge the Court to grant the FTC's petition in *Credit Bureau Center*, and not hold that petition pending the Court's decision in *Liu*. The resolution of the question presented in *Liu* will not answer the question in *Credit Bureau Center*, namely, whether Section 13(b) authorizes compensatory redress.

Amici also urge the Court not to disturb the longstanding rule that actions to compel the disgorgement of ill-gotten gains are equitable, even if some aspects of relief may be characterized as a "penalty" under Section 2462. The arguments for finding a *remedy* is a "penalty" for the purposes of Section 2462 do not justify characterizing the *underlying action* as a "penalty" as well. After all, an action to disgorge ill-gotten gains is "traditionally considered" equitable. *Tull v. United States*, 481 U.S. 412, 424 (1987). Although the FTC ordinarily seeks compensatory remedies, on occasion it is unable to provide redress, for instance, when it cannot identify injured consumers. Allowing wrongdoers to keep monies illegally acquired in those cases is anything but "equitable," and would undermine the goal of the FTC Act, which is to protect consumers in the marketplace.

SUMMARY OF ARGUMENT

This brief focuses on two points that do not stand out in the parties' submissions. Part I explains that actions for compensatory redress have long been thought to be "equitable" in nature, and that the eight circuits that have held that Section 13(b) authorizes courts to impose compensatory redress were correct. Part II addresses why enforcement actions by the SEC and the FTC to prevent unjust enrichment are authorized by statutes empowering injunctive relief *and* by the courts' equity jurisdiction, regardless of whether some provisions of a disgorgement order might constitute a penalty under 28 U.S.C. 2462.

I. Section 5 of the FTC Act directs the Commission to protect consumers from "unfair or deceptive acts or practices" and "unfair methods of competition." 15 U.S.C. 45(a). Section 13(b) is the FTC's most effective tool to force wrongdoers to return money illegally obtained from consumers. Section 13(b)'s grant of injunctive authority has for thirty-five years been understood by courts and Congress to enable the FTC to seek not just compensatory redress, but also preliminary equitable relief—including asset freezes and the appointment of receivers—measures that are often essential to ensure that defendants do not dissipate illegally acquired assets. Unlike the SEC, the FTC does not have authority to order monetary relief in administrative proceedings.[2]

Denying the FTC's authority to seek compensatory redress under Section 13(b), as the Seventh Circuit has ruled, thus guarantees a windfall for scam artists and fraudsters, who will be able to keep their illegally gotten gains. At most, wrongdoers would be subject to prospective injunctive relief, but nothing more.

As explained below, the FTC's authority to obtain compensatory relief is different from, and more circumscribed than, the SEC's authority. Since 1973, however, Congress has repeatedly amended the FTC Act to ensure that the FTC has authority to bring enforcement actions to stop defendants' illegal conduct *and* compel wrongdoers to return their ill-gotten gains. Courts have uniformly affirmed that authority.

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[2] Once an administrative order is entered and judicial review exhausted, the FTC may in some cases go to court to seek penalties and compensatory relief. 15 U.S.C. 45(*l*) (applies to violations of an order by the same wrongdoer); *id.* 57b(a) (applies to violations of Section 5, if the violations resulted in an order and are "dishonest or fraudulent," or violations of an FTC rule). But that remedy is often a fantasy; the defendants' illegally-obtained gains may disappear before the FTC can go to court, and there is no practical way to secure assets in the meantime. *See infra* n.7.

Kokesh apparently has rekindled oft-discredited arguments about the district courts' remedial authority under Section 13(b). *Amici* urge this Court to make clear in its decision in *Liu* that its ruling in *Kokesh* does not cast doubt on the longstanding rule that agencies like the FTC, charged with protecting consumers in the marketplace, may seek traditional, compensatory equitable remedies, especially where Congress has unqualifiedly empowered courts to impose injunctive relief. *See Porter,* 328 U.S. at 399, 402.

II. *Amici* stand with the SEC to the extent that it argues that disgorgement of unjustly-gotten gains is an authorized equitable remedy, regardless of whether the proceeds go to injured investors. SEC disgorgement prevents unjust enrichment by forcing defendants to give up funds acquired unlawfully. If an investor is duped into investing $1,000 in a sham enterprise, it is inaccurate to characterize an action to disgorge that $1,000 as a penalty for the purposes of determining the scope of equity jurisdiction—the scammer has no legal entitlement to that ill-gotten money. Being compelled to surrender what is not rightfully yours is a traditional remedy of equity jurisdiction, namely, to restore parties to the *status quo ante*. *Porter*, 328 U.S. at 402. For these reasons, the judgment below should be affirmed.

ARGUMENT

I. Section 13(b) Authorizes Compensatory Remedies.

A. The History of FTC's Enforcement Powers.

The FTC's mission is spelled out in Section 5 of the Act, which prohibits "[u]nfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce, and "direct[s]" the Commission to "prevent" such conduct. 15 U.S.C. 45(a). Before 1973, the FTC could enforce the Act's prohibitions only through administrative proceedings, and the only remedy the Commission was authorized to impose were forward-looking cease and desist orders. *See Heater v. FTC*, 503 F.2d 321, 321-22 (9th Cir. 1974). The FTC lacked authority under Section 5 to order interim injunctive relief (such as an asset freeze) or to compel the return of money illegally obtained. As the *Heater* court characterized the Act prior to the 1973 amendments:

> Under the present design of the Act, those sufficiently unscrupulous or reckless to engage in conduct clearly forbidden by the Act may do so until a cease and desist order is entered, escaping with the fruits of the violation. In many situations . . . a violation of the Act may be quite profitable.

Id. at 325 n.16.

To provide the FTC more robust enforcement mechanisms, Congress took two steps in 1973. *First*, Congress added Section 13(b) to the FTC Act to authorize the Commission to file cases alleging violations of Section 5 directly in district court. 15 U.S.C. 53(b); *see also* S. Rep. No. 93-151, at 30-31 (1973); Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. Rev. 567, 578-84 (2006). Section 13(b) empowers courts to issue temporary restraining orders and preliminary injunctions, and "in proper cases, the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction." This grant of injunctive authority encompasses a broad range of equitable remedies, thereby permitting a district court to order asset freezes, the appointment of receivers, and compensatory relief to injured consumers.[3]

Second, Congress added Section 5(*l*) to the Act to authorize the Commission to challenge violations of its cease and desist orders in district court. 15 U.S.C. 45(*l*). If the FTC can prove a violation of its order, district courts may impose civil penalties and "mandatory injunctions and such other and further equitable relief as they deem appropriate" against the violating party. *See* 15 U.S.C. 45(*l*). These remedies, however, do not provide redress to consumers injured by the violation giving rise to the FTC's order.

In 1975, and in the wake of the *Heater* ruling, Congress added Section 19 to the Act. That section authorizes courts to order relief, including damages, against (a) parties who violate an FTC rule, or (b) parties whose violations of Section 5 result in a cease and desist order involving a practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent." 15 U.S.C. 57b. Congress was careful to ensure that Section 19 added to, not displaced, remedies available under Sections 5(*l*) or 13(b) by specifying that Section 19's remedies are "in addition to, and not in lieu of, any other remedy or right of action" available to the Commission. *Id.* 57b(e).

Congress enacted Section 19 to fill a void Section 13(b) left open. Section 5(*l*) did not authorize redress for consumers injured by the violation triggering the underlying order. Section 19 was enacted to ensure

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[3] *See, e.g.*, *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (holding that district courts have "the inherent power of a court of equity to grant ancillary relief, including freezing assets and appointing a Receiver, as an incident to [their] express statutory authority to issue a permanent injunction under Section 13 of the Federal Trade Commission Act.").

that the FTC is able to obtain redress for injured consumers, without regard to whether it proceeds administratively under Section 5 or brings an enforcement action under Section 13(b). Congress understood that cease and desist orders are integral to the FTC's policy-making function. S. Rep. No. 93-151, at 30-31 (1973). As Congress anticipated, the FTC continues to bring cases administratively, particularly when it seeks to flesh out legal standards or develop emerging policies. *See*, *e.g.*, *In re POM Wonderful, LLC*, 155 F.T.C. 1 (2013), *aff'd as modified*, 777 F.3d 478 (D.C. Cir. 2015) (FTC order clarifying policy on health claim substantiation). Section 19 enables the Commission to use its administrative process to develop FTC policy, and then, when appropriate, to go to court to seek redress, including damages, for the violation of a cease and desist order or FTC rule.

Two more recent developments underscore Congress's ongoing commitment to ensure that the FTC may obtain compensatory relief in appropriate cases. In 1994, Congress amended the FTC Act to expand the venue and service of process provisions of Section 13(b) so that the Commission could bring a single lawsuit against all defendants involved in an illegal transaction, even if they do not all reside in the same district. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat 1691 (1994). The Senate Report recognized that, pursuant to Section 13(b), "[t]he FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 103-130, at 15-16, 1993 WL 322671 (1993). Congress thus understood that Section 13(b) encompasses compensatory remedies.

That understanding is also reflected in Congress's 2006 amendment to the FTC Act to enable the Commission to work more effectively with its international counterparts. *See* U.S. Safe Web Act of 2006, Pub. L. No. 109-455, § 3, 120 Stat 3372 (2006). The Safe Web Act added a new subsection to Section 5, Section 5(a)(4)(B), which provides that "[a]ll remedies available to the Commission with respect to unfair and deceptive acts and practices shall be available for acts and practices described in this paragraph, *including restitution to domestic or foreign victims*." (Emphasis added).

As this history shows, at least since the enactment of Section 13(b) Congress has sought to ensure that the FTC has authority to bring enforcement actions to compel the return of illegally acquired money to injured consumers. By 1994, and surely by 2006, Congress was well aware that courts had uniformly interpreted Section 13(b) to authorize claims for compensatory relief. "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012). Had Congress been dissatisfied with consumer redress under Section 13(b), it could have restricted the remedies available under Section 13(b) rather than incorporate the full breadth of these remedies, as consistently applied by courts, into new provisions in Section 5.[4]

[4] FTC enforcement cases have returned billions of dollars to millions of consumers. *See, e.g., Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter "Clean" Diesels to Receive Refunds*, Federal Trade Commission (May 17, 2017), https://www.ftc.gov/news-events/press-

B. Courts Have Historically Held that Section 13(b) Authorizes Compensatory Relief.

Since Section 13(b)'s enactment, defendants have challenged the authority of courts to order compensatory relief. Until the Seventh Circuit's ruling in *Credit Bureau Center*, every court had rejected these challenges. The first circuit court to rule was the Ninth. It held in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), that compensatory relief is available in Section 13(b) cases. *Singer*, like the seven circuits that followed, anchored its ruling on the decisions in *Porter* and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), which held that equitable power is inherent in the grant of injunctive authority. 668 F.2d at 1112-13. For that reason, until the Seventh Circuit's recent ruling, courts had uniformly held that Section 13(b), which authorizes injunctions, permits

releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi ($11 billion); *FTC Returns Nearly $108 Million to 450,000 Homeowners Overcharged by Countrywide for Loan Servicing Fees*, Federal Trade Commission (July 20, 2011), https://www.ftc.gov/news-events/press-releases/2011/07/ftc-returns-nearly-108-million-450000-homeowners-overcharged ($108 million to 450,000 homeowners); *FTC Sends Checks to Nearly 350,000 Victims of Herbalife's Multi-Level Marketing Scheme*, Federal Trade Commission (Jan. 10, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/ftc-sends-checks-nearly-350000-victims-herbalifes-multi-level ($200 million to 350,00 people who lost money running Herbalife businesses); *MoneyGram Refunds*, Federal Trade Commission (Nov. 2018), https://www.ftc.gov/enforcement/cases-proceedings/refunds/moneygram-refunds ($125 million to people who lost money in scams). *See also 2018 Annual Report on Refunds*, Federal Trade Commission (Feb. 2019), https://www.ftc.gov/reports/2018-annual-report-refunds-consumers.

courts to order equitable relief, including compensatory redress, in FTC enforcement cases.[5]

Porter held that the Emergency Price Control Act of 1942, which authorized the Administrator of the Office of Price Administration to seek a "permanent or temporary injunction, restraining order, or other order," empowered district courts to order not only prospective injunctive relief, but also to compel the return of illegally exacted rents. 328 U.S. at 399. The Court stated that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. The Court added that:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the

[5] *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564 (7th Cir. 1989); *FTC v. Security Rare Coin and Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991); *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014). District courts in three of the remaining circuits—the D.C., Third and Fifth Circuits—have reached the same conclusion. *See, e.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999); *In re Nat'l Credit Mgmt. Grp., LLC*, 21 F. Supp. 2d 424, 462 (D.N.J. 1998); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008). Interpreting Section 13(b)'s grant of injunctive authority to carry with it the power to order monetary relief is consistent with rulings under other regulatory statutes that confer injunctive authority similar to that in Section 13(b). *See, e.g., United States v. Rx Depot, Inc.,* 438 F.3d 1052, 1053-1058 (10th Cir. 2006) (Federal Food, Drug and Cosmetics Act); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223-226 (3d Cir. 2005) (same); *CFTC v. Co Petro Mktg. Grp.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (Commodity Exchange Act); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1184-1185 (1st Cir. 1980) (Motor Carrier Act).

> absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id.

Turning to compensatory redress, the Court ruled that the "comprehensiveness of this equitable jurisdiction" encompasses the authority to require the reimbursement of unlawful rents. *Id.* at 398-99. Restitution, the Court observed, is "within the highest tradition of a court of equity." *Id.* at 402. The Court also drove home that because "the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398. The Court added that "where, as here, the equitable jurisdiction of the court has properly been invoked, for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Id.* at 399.[6]

In *Mitchell*, the Court relied on its ruling in *Porter* to hold that the Fair Labor Standards Act, which authorizes district courts to "restrain violations" of the Act, 29 U.S.C. 217, empowers courts to award back-

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[6] *Porter* added that its judgment could also be supported by the "other order" language in the Emergency Price Control Act. 328 U.S. at 399. The Court in *Mitchell* found that the "other order" holding was wholly independent of its holding on the equitable nature of the relief, which was based on "the language of the statute" that provided "affirmative confirmation of the power to order reimbursement." 361 U.S. at 291.

pay to employees who have been unlawfully discharged. In response to the employer's argument that an order compelling back pay would be a "penalty" and thus beyond the court's equitable power, the Court held that "the public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only." 361 U.S. at 293. The Court also echoed *Porter*, noting that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92.

The principle announced in *Porter* and reaffirmed in *Mitchell* that "the comprehensiveness of [the district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command," applies with full force to actions brought under Section 13(b). *See Mitchell*, 361 U.S. at 291 (*quoting Porter*, 328 U.S. at 398). Until *Kokesh*, every court to consider the question relied on *Porter* and *Mitchell* to hold that Section 13(b) authorizes courts to order compensatory relief. *See supra* n.5.

C. The Attacks on Section 13(b) are Misguided.

The Seventh Circuit has held, and Judge O'Scannlain has maintained, that Section 13(b) does not authorize the FTC to obtain compensatory redress. Instead, they contend that other provisions of the Act, namely Section 5(*l*) and Section 19, are the exclusive avenues for redress available to the FTC. But that interpretation of the FTC Act makes little sense: It would return the FTC to the pre-Section 13(b) days when fraudsters and scam artists would get at least one free bite at the apple, because these provisions may be invoked only after the FTC completes administrative proceedings and judicial review is exhausted or in the relatively few cases involving violations of substantive FTC rules.[7]

Equally problematic are the justifications offered for restricting the scope of Section 13(b). The Seventh Circuit's first claim, namely that "[r]estitution isn't an injunction," *Credit Bureau Ctr.*, 937 F.3d at 771, is meritless. "Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 328 U.S. at 399. An order requiring the defendant to return illegally acquired gains is an injunction, just as an order of divestiture is an injunction because it seeks to return the parties to the *status quo ante*. *See California v. Am. Stores Co.*, 495 U.S. 271, 275 (1990) ("divestiture is a form of injunctive relief"); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948) ("Like restitution [divestiture] merely deprives a defendant of the gains from his wrongful conduct" and is "an essential feature" of injunction decrees for violations of the Sherman Act).

The Seventh Circuit's claim that *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), "displaces the rationale"

[7] To the extent that Section 13(b) critics argue that the FTC can seek an asset freeze under Section 13(b) to prevent asset dissipation during an administrative proceeding, that claim is technically correct, but wholly impractical. To obtain an asset freeze, the FTC must file a complaint in district court and overcome the high bar of showing that preliminary injunctive relief is warranted—a showing that requires the FTC to put forward evidence that it has a strong likelihood of prevailing on the merits. Congress's goal in Section 13(b) was to facilitate consumer protection cases, not to make the FTC prove its case twice. *See* S. Rep. No. 93-151, at 30-31 (1973).

of *Porter* and *Mitchell*, *Credit Bureau Ctr.*, 937 F.3d at 776, also misses the mark. This Court has never signaled that *Porter* and *Mitchell* should be limited; indeed, *Kokesh* cites *Porter* approvingly to contrast cases involving traditional compensatory relief with SEC non-compensatory disgorgement. 137 S. Ct. at 1644.

Nor does *Meghrig* "displace[]" *Porter* and *Mitchell*'s rationale. There the Court held that the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 ("RCRA") does not authorize a private party to recover the costs of a past clean-up of toxic waste. The Court did not frame its decision as a departure from *Porter*. Rather, the Court found that Congress, in RCRA and related legislation, did not intend to permit private citizens to recover past cleanup costs—an intent that may "restrict[] the court's jurisdiction in equity." *Porter*, 328 U.S. at 398. *Meghrig* did not cast doubt on or even distinguish, let alone "displace," *Porter*.

None of the cases *Credit Bureau Center* characterizes as applications of *Meghrig*, 937 F.3d at 781-82, undermines *Porter*. These cases too are ones in which the Court found that Congress intended to limit courts' equity jurisdiction. For example, in *Miller v. French*, 530 U.S. 327, 340-41 (2000), Congress's intent "to displace courts' traditional equitable authority" by making an automatic stay provision mandatory was "unmistakable." None of the three cases the Seventh Circuit cites as cementing the *Meghrig* regime even mentions *Meghrig*. *See id.*; *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

Judge O'Scannlain's reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), is similarly misplaced, for two reasons. *See AMG*, 910 F.3d at 434-36. One is that *Great-West*, like the Court's decisions just discussed, also construed statutory provisions in which Congress intentionally limited courts' powers in equity. 534 U.S. at 209-10. The other is that *Great-West* involved a provision in the Employee Retirement Income Security Act authorizing private parties to file civil actions seeking injunctions or "other appropriate equitable relief." 29 U.S.C. 1132(a)(3). The question was whether Congress intended "equitable relief" to include the petitioners' claim for *contractual* remedies, and the Court said no. In contrast to the relief sought in *Great-West*, the compensatory relief the FTC seeks in Section 13(b) enforcement actions "lies within [courts'] equitable jurisdiction," not contract law. *See Porter*, 328 U.S. at 402.

The Seventh Circuit's strained reading of the FTC Act, if adopted, would inevitably give scammers "at least on[e] free shot at violating" the FTC Act. *See Bronson Partners*, 654 F.3d at 366 n.3. As described above, Congress gave the FTC the choice of enforcing the Act through administrative proceedings or by filing actions in court. Each avenue has its benefits. But the only viable way for the FTC to obtain redress for injured consumers in cases involving scams and frauds is through an action filed in district court under Section 13(b). Otherwise, compensation is limited to the rare case where there has been a violation of a substantive FTC rule under Section 19 or following lengthy administrative proceedings, by which time any assets would likely have been dissipated. *Amici* urge the Court to avoid stripping the FTC of authority to seek compensatory redress in Section 13(b) cases.

II. The Judgment Below Should Be Affirmed.

This case provides the Court with an opportunity to reaffirm that enforcement actions to compel the disgorgement of illegally acquired monies are equitable actions, even if some aspects of a court order could be viewed as a "penalty" under 28 U.S.C. 2462. This declaration would be consistent with *Kokesh* and the longstanding rule that cases brought to prevent unjust enrichment are equitable, not punitive, in nature. As this Court has explained, disgorgement is "traditionally considered an equitable remedy," unlike "civil penalties" that may be awarded by courts of law. *Tull*, 481 U.S. at 423-25; *accord* 2 Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. (*k*), at 222 (2011) ("Disgorgement of wrongful gain is not a punitive remedy.").

There is good reason for treating statutes of limitation, and limitations on equitable relief, differently. After all, they serve entirely different purposes. Congress enacts statutes of limitation "to limit the temporal extent or duration of liability," *CTS v. Waldburger*, 573, U.S. 1, 7 (2014), not to nullify the right of action that gives rise to liability. And Congress limits equity jurisdiction when it seeks to provide a different remedial scheme, and it does so only explicitly or by "inescapable inference." *E.g.*, *Porter*, 328 U.S. at 398. Congress has not done that here. For that reason, the Court's ruling in *Kokesh* that non-compensatory disgorgement is a "penalty" for Section 2462 purposes does not undermine the conclusion that courts have the equitable authority to prevent unjust enrichment. To the contrary, the "complete relief" doctrine anticipates that equity courts may, at times, order legal remedies as an adjunct to equitable relief. This declaration would send a clear message that courts in FTC and SEC enforcement cases have the authority to force disgorgement of monies illegally acquired, and that the Seventh Circuit misfired in *Credit Bureau Center*.

Kokesh reserved the question whether the SEC is authorized to seek disgorgement. 137 S. Ct. at 1642 n.3. The answer to that question is plainly "yes," so long as the disgorgement order seeks to deprive the defendant of money illegally obtained. Equity does not favor wrongdoers. Equity courts have always provided relief to prevent unjust enrichment. Suits by agencies to recover gains ill-gotten through the violation of a statute are equitable in nature. *Bronson Partners*, 654 F.3d at 371-72; *see also Tull*, 481 U.S. at 423-25. As the Second Circuit observed in *Bronson Partners*, "[i]n 1936, the American Law Institute adopted the Restatement of Restitution in an effort to demonstrate that a range of seemingly disparate rights and remedies," including equitable claims such as constructive trust and legal ones such as quasi-contract, "could in fact be explained . . . in terms of the common objective of preventing unjust enrichment." 654 F.3d at 367 (internal quotation omitted).

In any event, by empowering courts in SEC and FTC enforcement actions to enjoin violations of law, Congress authorized courts to order "complete relief," which includes disgorgement of ill-gotten gains. *Porter* emphasized that, "since the public interest is involved in a proceeding of this nature, [a court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." 328 U.S. at 398; *see also Kansas v. Nebraska*, 135 S. Ct. 1042, 1053, 1057 (2015); *id.* at 1066 (Thomas, J., concurring). For this reason, a court "may invoke the full range of its remedial powers—both legal and equitable—in fashioning an order that affords 'complete relief.'" *Bronson Partners*, 654 F.3d at 368.

That understanding makes sense. Although the FTC seeks to provide compensatory redress in cases involving scams or deceptive conduct, sometimes redress is impossible because there is no way to identify the wrongdoer's victims, or impractical because the cost of administering a redress program would exceed the amounts recovered. In those cases, it would stand the consumer-protection purpose of the FTC Act on its head to let the wrongdoer keep ill-gotten gains. That result would encourage, not deter, wrongdoing, and would return the FTC to the days, pre-*Heater*, when willful violations of the FTC Act could be profitable.

CONCLUSION

For the reasons stated above, *amici* respectfully request this Court to clarify that *Kokesh* does not undermine the longstanding rule, grounded in equity, that courts empowered by Congress to order injunctive relief may order the return of illegally acquired money to compensate victims of scams and frauds. *Amici* also urge the Court to hold that non-compensatory disgorgement of unjustly-gotten money is an authorized equitable remedy, so long as the statutory grants of injunctive relief do not expressly or by inescapable inference bar equitable relief. The judgment below should therefore be affirmed.

Respectfully submitted.

DAVID C. VLADECK
Counsel of Record
RACHEL L. FRIED
GEORGETOWN UNIVERSITY
LAW CENTER
CIVIL LITIGATION CLINIC
600 New Jersey Ave. NW
Washington, DC 20001
(202) 661-6614
vladeckd@georgetown.edu

Counsel for Amici Curiae

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