Nos. 19-507 & 19-508

IN THE

Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ET AL.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

AMG CAPITAL MANAGEMENT, LLC, ET AL.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

CYNTHIA FLEMING CRAWFORD
Counsel of Record
MICHAEL PEPSON
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(202) 499-2421
cynthia.crawford@causeofaction.org
Counsel for Amicus Curiae

November 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae CoA is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, the rule of law, and principled enforcement of the separation of powers protects liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by appearing as *amicus curiae* before federal courts.

CoA has a particular interest in this case because it has represented defendants in Federal Trade Commission ("FTC") enforcement actions, including in the case study discussed below.

INTRODUCTION

Petitioners present a question of statutory interpretation. But the FTC's misuse of Section 13(b) involves more than merely misreading the Federal Trade Commission Act ("FTCA"). This brief provides

---

[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

a resumé of the FTC's premeditated use of the courts to cultivate the virtually unfettered power it employs today and a case study of its abuse of that power to violate constitutional rights.

SUMMARY OF ARGUMENT

The FTC has wrongly conscripted the courts to transmogrify the limited function of Section 13(b)—restraining conduct pending administrative proceedings—into expansive power to impose receiverships, shut down businesses, and seize and disgorge personal assets. The FTC has convinced courts to bless its invented Section 13(b) powers via a long-term litigation strategy to methodically advance atextual legal arguments in "test cases" involving egregious facts.

Once the FTC got its foot in the door by convincing one district court to reinterpret Section 13(b), it expanded its powers by suing in cases with easy facts and then citing that precedent to incrementally develop caselaw. Until the Seventh Circuit took a stand in *Federal Trade Commission v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), this calculated litigation strategy worked; courts accepted the FTC's newly claimed power because other courts had done so (and relying largely on *dicta*), without analyzing Congress's grant of powers to the FTC. But these successes cannot alter Section 13(b)'s text and should not be permitted to stand. Neither the plain language nor the legislative history of the FTCA support this expansion of administrative power.

The case of *Federal Trade Commission v. Vylah Tec*[2] presents a sadly characteristic tale in which the FTC deprived over a million consumers of prepaid contracts without notice or compensation—all in the name of "restitution." That this "deception" case derived from the FTC's purposeful distortion of Section 13(b) adds an ironic twist to a tragic tale.

ARGUMENT

I. THE FTC'S "EXPANSION" OF SECTION 13(B) VIOLATES THE SEPARATION OF POWERS.

A. Congress Created a Multi-Step Process for the Recovery of Money Damages.

The FTC is a creature of statute and it has only those powers that Congress conferred upon it. *See La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).

In 1938, Congress enacted Section 13, for the first time delegating to the FTC authority to seek preliminary (*but not permanent*) injunctive relief for violations of Section 12 of the FTCA, 15 U.S.C. § 52, which prohibits deceptive advertising related to food, drugs, devices, services, or cosmetics. Wheeler-Lea Act, Pub. L. No. 447, § 13(a), 52 Stat. 111, 115 (1938) (codified at 15 U.S.C. § 53(a)). This stopgap allowed the FTC to temporarily halt such practices pending completion of the administrative process.

---

[2] No. 17-cv-00228 (filed M.D. Fla. May 1, 2017). All record cites contained herein, and any factual statements, can be found in that docket at ECF Nos. 2, 4, 5, 63, 65, 99, 115, 173, 195, 203, 233, 235, 247, 263, 265–67, 270, 277, 303–07, 312, 341, 356, 371–72, 376–77, 380–81, 383–84, 386, 391–92, 396, 405, 410, 412, 416, 434, and accompanying exhibits.

In 1973, Congress amended Section 13 to authorize the FTC to immediately stop additional deceptive practices by seeking a temporary restraining order ("TRO") or preliminary injunction in federal court pending completion of the administrative process. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(b), (f), 87 Stat. 576, 591–92 (1973) (codified at 15 U.S.C. § 53(b)); *see, e.g.*, *Fed. Trade Comm'n v. Sw. Sunsites, Inc.*, 665 F.2d 711, 720 (5th Cir. 1982). Congress also added a "proviso" authorizing issuance of a "permanent injunction" in "proper cases." 15 U.S.C. § 53(b).

In 1974, the Ninth Circuit held that the FTC could not obtain restitution through an administrative cease-and-desist order. *See Heater v. Fed. Trade Comm'n,* 503 F.2d 321, 323–24 (9th Cir. 1974) (rejecting the FTC's attempt to impose monetary liability "*before giving notice* that the prior conduct was within the statutory purview" (emphasis added)). Then, in 1975, against the backdrop of *Heater*—and *before* the FTC first claimed that Section 13(b) authorized "equitable monetary relief"—Congress responded by enacting Section 19 of the FTCA.[3]

Section 19 for the first time provided the FTC with statutory authorization to obtain "restitution" and other backward-looking remedies under limited

[3] Contrary to the FTC, Section 19 does not express any intention of Congress expanding the agency's injunction powers under Section 13. *See* 15 U.S.C. § 57b(e); *see also Credit Bureau Ctr., LLC*, 937 F.3d at 774–75. Instead, its purpose was to preserve the FTC's litigating position in *Heater*. *See* Peter Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions*, 41 Am. U. L. Rev. 1139, 1193–94 (1992).

circumstances, subject to a three-year statute of limitations. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 206(a), 88 Stat. 2183, 2201 (1975) (codified at 15 U.S.C. § 57b); *cf. Credit Bureau Ctr., LLC*, 937 F.3d at 773 ("The absence of similar language in section 13(b) is conspicuous."); Ward, *supra*. Congress thus balanced the FTC's desire to obtain monetary relief against basic fair-notice due process principles: To recover damages, the FTC would have to prove that "a reasonable man would have known under the circumstances" that the conduct subject to the cease-and-desist order "was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2).

Congress also imposed procedural hurdles. Unless the FTC first used its Magnuson-Moss rulemaking authority to ban an "unfair or deceptive" act or practice, *id.* § 57b(a)(1), it could only obtain money damages under Section 19 through a multi-step process: first, obtaining a final cease-and-desist order against an alleged violator through its in-house administrative process, *id.* §§ 45, 57b(a)(2); and next, subject to judicial review, *id.* § 45(c), and only after the order became final, *id.* § 45(g), obtaining monetary relief if it also could prove a reasonable person would understand such conduct to be dishonest or fraudulent. *Id*. § 57b(a)(2),(b); *see Sw. Sunsites, Inc.*, 665 F.2d at 719 ("[A] consumer redress action [i]s a continuous two-phase process, the first phase being administrative adjudication, and the second judicial determination of appropriate redress[.]"); *cf. Credit Bureau Ctr., LLC*, 937 F.3d at 784 ("Section 13(b) also lacks a central feature of the FTCA provisions that expressly permit monetary relief: a notice requirement.").

B. The FTC Rejects Congress's Statutory Scheme.

Initially, the FTC seemingly accepted that Section 19 authorized consumer redress, but Section 13(b) did not. Compelling evidence of this can be found in a version of the FTC's Operating Manual predating "judicial precedents regarding permanent injunctions under [Section] 13 (b)." Fed. Trade Comm'n, Operating Manual § 11.5.7, *available at* http://bit.ly/2lfBqjz. The manual draws a sharp distinction between "[c]onsumer redress following the issuance of a final adjudicated cease and desist order under FTCA § 19(a)(2)," *id.* § 11.1.1.5, and "[t]emporary and permanent injunctions under FTCA § 13." *Id.* § 11.1.1.6. Yet, it says nothing about disgorgement, restitution, or any other "equitable monetary relief" under Section 13(b). Nor does it mention "asset freezes" or "receivers."

But the FTC eventually balked at Section 19's procedural hurdles and sought a shortcut. As a former FTC official would later highlight, "the problem" with Section 19 was the procedural protections Congress provided respondents:

> You needed three separate lawsuits to get final relief. You had to bring a preliminary injunction in federal court and you had to bring a complete Section 5 case, administrative case, all the way through, and then you have to go for a Section 19 case. That is time consuming, and it is very inefficient.
>
> So, actually by . . . [1982], the Commission was already looking at alternatives, because at the very tail end

> of Section 13(b) . . . there are 14 key words . . . .
>
> [T]oday those 14 words are the basis for the 13(b) program. This legislative history doesn't mention very much about what that little proviso was intended to do, except that it was thought that, well, the Commission could go to court in routine fraud cases and get a permanent injunction[.]

David M. FitzGerald, FTC 90th Anniversary Symposium: Session on "Injunctions, Divestiture and Disgorgement" (Sept. 23, 2004) (transcript available at http://bit.ly/2kW0VWS).

Until recently, the FTC's website echoed this: "Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one step." *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Fed. Trade Comm'n, http://bit.ly/2lrPuGq (last visited Nov. 6, 2019). This shortcut also relieved it of Section 19's *scienter* requirement and three-year statute of limitations. *See* 15 U.S.C. § 57b(a)(2), (d).[4]

C. The FTC Uses Test Cases to Expand Its Section 13(b) Powers.

How is it that the FTC convinced courts to adopt its policy preferences over those mandated by

---

[4] Courts have held that Section 13(b) actions are not subject to *any* statute of limitations. *See, e.g.*, *Fed. Trade Comm'n v. Dalbey*, No. 11-1396, 2012 WL 1694602, at *2–3 (D. Colo. May 15, 2012).

Congress? A former Assistant Director for Litigation in the Bureau of Consumer Protection ("BCP"), who was a key architect of the FTC's expansion of its Section 13(b) powers, has offered insights into the FTC's long-term strategic litigation campaign to invade the legislative domain. He advised:

- "*Step cautiously when proceeding boldly*. In exploring its Section 13(b) authority, the Commission moved warily, selecting cases with compelling facts . . . before pursuing a more ambitious agenda." *See* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* at 21–22 (Paper, FTC 90th Anniversary Symposium) (Sept. 23, 2004), *available at* http://bit.ly/2kUIIcf.
- "*Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there*, however, research into the case law interpreting statutes conferring *similar injunctive authority on other agencies led to the* Porter *line of cases*, providing critical support for a broad interpretation of Section 13(b)." *Id.* at 22 (emphasis added).
- "*Being out of the spotlight can be an advantage*[.]" *Id.*
- "*Don't let naysayers discourage pursuit of a promising theory or approach*. When the early cases were proposed, *many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized only injunctive relief*." *Id.* (emphasis added).

Echoing this, a former FTC Chairman and Director of the BCP explained: "Admittedly, this use of Section 13(b) was something of a 'stretch.' . . . [T]here was some internal opposition, arguing, with considerable force, that the 1975 amendments provided the exclusive road to financial relief." J. Howard Beales & Timothy Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 2 (2013).

The FTC proceeded anyway, like a fox toward the henhouse, with staggering success.[5] According to the FTC, in 2017 alone it obtained $5.29 billion in awards, without including amounts suspended due to defendants' inability to pay. *See Stats & Data 2017 – Annual Highlights 2017*, Fed. Trade Comm'n, http://bit.ly/2mwz7sj (last visited Nov. 6, 2019). This was obtained without the safeguards Congress granted defendants under Section 19.

D. Inapposite Precedent Cannot Override a Statute's Plain Language.

The FTC's mansion of favorable Section 13(b) precedent is built upon statutory quicksand. There is no textual foundation for its claimed Section 13(b) powers. Agencies only possess powers Congress *affirmatively chooses* to delegate to them. *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Congress did not do so here. That should end the matter.

---

[5] *But see City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 307 (2013) ("The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority.").

Congress also is not required to expressly negate an agency's claimed administrative powers, as the FTC appears to assume. *See Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Nor is there any indication in Section 13(b)'s sparse legislative history that Congress intended to provide the FTC broad authority to obtain "equitable monetary relief" or even considered the possibility. *See* Beales & Muris, *supra*, at 4 ("[T]here is no hint in the legislative history that Congress intended to grant the FTC broad authority to seek monetary relief when it enacted Section 13(b)."). The watchdog of congressional intent didn't bark here. *See Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1982). If it were otherwise, there would have been no reason to enact Section 19, a more specific statute, only two years later. A contrary result renders Section 19 a nullity and does violence to the statutory scheme. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *see also United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005).

Undeterred, the FTC uncovered elephantine new powers hidden in the mousehole of Section 13(b)'s permanent-injunction proviso. *But see Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). The vehicle the FTC used was judicial precedent interpreting other statutes enforced by other agencies (in particular, a seventy-year-old Supreme Court case,

Porter v. Warner Holding Co., 328 U.S. 395 (1946)).[6] It effectively admits this. *See, e.g.*, FTC Opp'n to Pet. for Reh'g En Banc at 10–11, *Fed. Trade Comm'n v. Publishers Bus. Servs.*, No. 17-15600 (9th Cir. filed Dec. 20, 2018) ("*Porter* and *Mitchell* form the foundation of this Court's long established holding that equitable monetary relief is available under Section 13(b)[.]").

But judicial precedent interpreting different statutes (enforced by different agencies) cannot override plain language and structure. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (rejecting "analogies to other statutory regimes").

Porter should be viewed in context. Congress gave the Price Controls Board broad powers under the Emergency Price Control Act to limit profiteering in wartime. Unlike Section 13(b)'s provision for injunctive relief only, Section 205(a) allowed a "permanent or temporary injunction restraining order, *or other order*[.]" *Porter*, 328 U.S. at 397 (emphasis added); *see Credit Bureau Ctr., LLC*, 937 F.3d at 776.

The FTC may seek to elide the lack of textual basis for its claimed 13(b) powers by averring "congressional ratification" based on "subsequent legislative history." This should be rejected out-of-hand. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part).

---

[6] Appellate courts have primarily relied on *Porter* as authority for this expansion of FTC's powers. *See, e.g.*, *Credit Bureau Ctr., LLC*, 937 F.3d at 775–82.

This Court should also reject any attempt by the FTC to trot out the old adage that remedial statutes should be broadly construed. *See, e.g.*, *Fed. Trade Comm'n v. Shire ViroPharma, Inc.,* 917 F.3d 147, 158 (3d Cir. 2019); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). If anything, Section 13(b) should be *narrowly* construed to protect defendants' due-process rights. *See Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (due process requires fair notice).

The FTC's slow accretion of power has gone too far and gone on too long. It is time for this Court to prune back the agency's overreach and stop the real-world harm this overreach has caused.

II. THE FTC'S ACTIONS SEEKING MONETARY AWARDS VIOLATE CONSTITUTIONAL RIGHTS.

The following case study underscores why the Court should address the FTC's extra-statutory quests for monetary awards.

A. Collateral Damage: A Case Study.

Vylah Tec LLC and two sister entities (together, "V-Tec") were Florida start-ups. V-Tec had two principal income streams: (1) servicing pre-paid technical support contracts for buyers of electronic devices from HSN, QVC-UK, and Evine Live; and (2) sales of third-party security software, utility software, and data-backup services, or discrete remote support services. *Fed. Trade Comm'n v. Vylah Tec LLC*, No. 17-228, 2018 WL 4328218, at *1 (M.D. Fla. Sept. 11, 2018). V-Tec was owned by Robert Cupo and managed by his son, Angelo.

On May 1, 2017, the FTC and the State of Florida filed an *ex parte* complaint under seal, alleging

deceptive practices in selling "unneeded" software and support services. There was no allegation that the shopping channel service contracts were deceptive nor that the associated technical support was inadequate.

Also under seal, the FTC filed an *ex parte* motion for a TRO with an asset freeze and appointment of a receiver. In support, it filed a sworn declaration of counsel claiming the Cupos were at risk of concealing and dissipating assets, relying on nine pages of boilerplate case citations unrelated to V-Tec. Because the FTC sought joint and several liability, adhering to the Cupos as individuals, and a monetary award of $1.8 million, which exceeded the funds in the company bank accounts, the Cupos' personal assets were frozen, "to preserve the status quo."

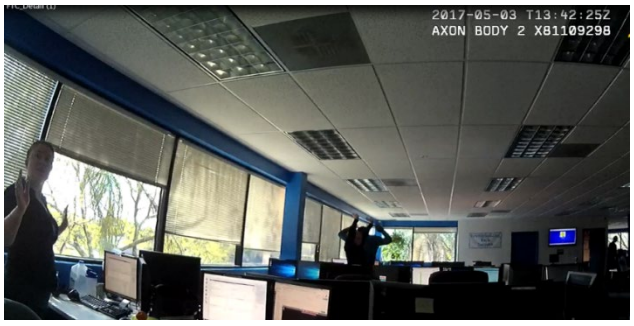
The following day, the court granted the TRO—again under seal. The order included the following provisions relating to the FTC's monetary demand:

- A freeze on all assets (company and personal), including assets of non-defendant third parties that might benefit any defendant;
- A credit freeze on all defendants, including credit cards;
- Transfer of all company assets ("Receivership Estate") and records to the Receiver;
- Receiver authority to liquidate assets, discontinue the business, and break contracts;
- Receiver and FTC authority to search the business premises, including plenary access to documents (physical or electronic) [not granted to Florida]; and,

- Authority to employ law enforcement in entering and searching the premises.

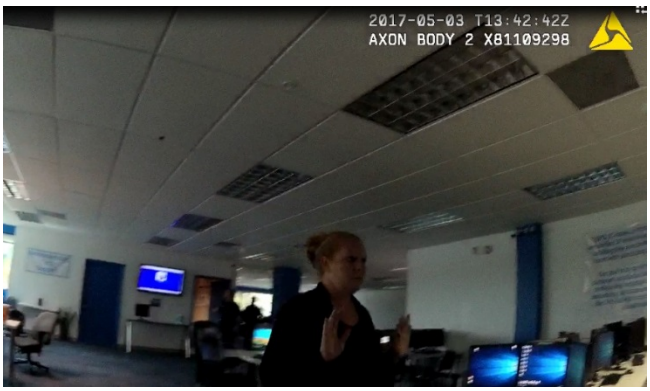
The TRO also provided for Receiver compensation from the Receivership Estate.

On the morning of May 3, 2017, the Receiver, with FTC representatives, the Florida Attorney General ("FL-AG"), and the Fort Myers Police Department ("FMPD") raided V-Tec's offices.[7] Police officers with the FTC investigator entered first, commanding employees to step away from their computers and put their hands up.[8]



[7] Asked whether it typically involves local law enforcement in accessing a business, the FTC confirmed that "it's not unusual to retain law enforcement support for the purpose spelled out in the temporary restraining order." ECF No. 270-1 at 250:5–6, 11–17.

[8] Photographs excerpted from FMPD body-cam footage, found at trial exhibit DX-B; also available here: *FTC Raids Private Business Without Notice or Chance to Defend – Body Cam Footage One*, YouTube, https://youtu.be/Y8GQfodWJyE (last visited Nov. 11, 2019); *FTC Raids Private Business Without Notice or Chance to Defend – Body Cam Footage Two*, YouTube, https://youtu.be/7_MOp7rl74I (last visited Nov. 11, 2019).



In addition to relinquishing company phones, employees were instructed to leave their personal cell phones on the table. One officer told employees they were being detained. Employees were never allowed to tell the customers on hold why they had been abandoned.

Shortly thereafter, the Receiver, two FTC attorneys, an Assistant FL-AG, and support staff entered the V-Tec offices. They shut down security cameras and compelled employees to open secure locations. The employees were detained for hours in a small vestibule, interviewed individually in a separate room, and asked to sign statements. No attorneys were present on behalf of V-Tec or any

employee; the Cupos were not in the office; and employees were not allowed to contact the Cupos.

The FTC investigator(s) retrieved information from V-Tec's computers and cloud storage.

During the raid, FTC and FL-AG litigation counsel read computer screens and documents and explored offices that had been secured. No court had issued a warrant nor authorized Florida to enter or search V-

Tec's offices. Nevertheless, the Assistant FL-AG participated in the raid and search of V-Tec's offices; and, during the raid, introduced to one of the police officers the possibility of the Cupos arriving armed. Florida's witness provided no basis for this supposition.

Following the raid, some V-Tec computers were imaged and electronic copies made of documents in cloud storage. Those files were placed on hard drives and provided to the FTC and FL-AG litigation counsel, who searched them without limitation, without a warrant, and without privilege screening. Indeed, litigation counsel and government investigators working under their direction passed documents between themselves and the Receiver despite Florida having no authority to search V-Tec's records. The Receiver, likewise, had plenary access to the records, which he searched, identifying potential evidence. The Receiver retained all computers for the duration of the litigation.

The Cupos' personal bank accounts were frozen, including an account jointly owned by Robert Cupo and his wife. Mrs. Cupo's marital home was frozen and she was forced to disclose bank accounts she held jointly with her sister and daughter, who had no relation to the case. The marital assets remained frozen during seventeen months of litigation, until a successful appeal to the Eleventh Circuit and denial of the FTC's post-appeal motion to reinstate the freeze mandated their release. During that time, the Cupos

could not pay their mortgage[9] and could not sell the house or refinance the mortgage because of the asset and credit freezes.

In addition, when the complaint was filed, Dennis Cupo, Robert Cupo's brother, was a named defendant. His tenuous connection to V-Tec sprang from Robert's hope to involve Dennis with the business. That hope never materialized; nevertheless, because Dennis's name appeared on bank account applications, he was named and his assets frozen.

The freeze on Dennis extended to his employer, Lisa Robertson, who was never involved with V-Tec—but whose money the FTC sought to claim. She had given Dennis signatory authority over her window-tinting business's bank accounts for a short time while she was recovering from hospitalization so he could handle payroll. That was enough to trigger the FTC to freeze Ms. Robertson's business accounts, which she discovered when her employees' payroll checks could not be cashed. Her business lost employees, and suffered damage to its business prospects, reputation, and financial status. Three weeks after entry of the TRO, Ms. Robertson's bank accounts were unfrozen in part. Her account was not entirely unfrozen until seventeen months later. Unfortunately, she did not live to see her property released.[10]

---

[9] For several months, Mrs. Cupo was able to make the payments from individually held funds that she had saved to pay for her daughters' weddings.

[10] Following the freezing of her business accounts, Ms. Robertson suffered months of mental and physical decline, and passed away in December 2017 at the age of 51.

The Receiver transferred over $670,000 from the corporate defendants' bank accounts into the Receivership account. In light of the personal asset freeze, the court intermittently released $80,000 for living expenses and attorney fees.[11] However, after the asset freeze, but before defense funds were released, FTC counsel shared with the Receiver that she had spoken with an attorney who was considering representing the defendants "if he can get paid." She had responded to prospective counsel's inquiry that, "the defendants need to complete their financial statements before [the FTC] could even consider his request," and that they "also encouraged Defendants' Stipulation to the Preliminary Injunction." ECF No. 312-2 at 2. Without access to payment, it's not surprising that the attorney did not assume the defense. The following week, $10,000 was released to retain defense counsel.

Roughly three weeks after seizing the businesses, the Receiver determined that these previously profitable businesses could not be run profitably and recommended to the court that the businesses remain closed. Because the sole purpose of the receivership was to preserve assets to satisfy the FTC's monetary demand, the court agreed. As a result, the prepaid service contracts of over one million customers were nullified and those customers were denied, without notice, the services they had purchased. To defendants' knowledge, no customer was ever compensated by the Receiver or the FTC for being dispossessed of a prepaid service contract.

---

[11] Litigation continued for over two years, involving thousands of hours of attorney services.

There was no allegation against the prepaid service contracts—indeed plaintiffs conceded early on that the revenue from the shopping channel contracts was "clean." But the rationale for the FTC's monetary demand, which began at $1.8 million and grew to $3.4 million repeatedly changed. *See* Mem. Op. & Order, ECF No. 405 at 8–10. After trial, the court denied the monetary claim and entered judgment of $0.00. *Fed. Trade Comm'n v. Vylah Tec LLC*, 378 F. Supp. 3d 1134, 1143 (M.D. Fla. 2019).

By then, however, the businesses had been closed for two years, over one million contracts nullified, employees fired, the office dismantled, legal entities lapsed, and derogatory and misleading statements issued to V-Tec's customers. There was little left except roughly $497,000 in the bank account held by the Receiver, who submitted a request for fees in excess of that amount, which would have consumed the estate.

The court granted the Receiver a reduced amount of $318,000 in fees plus $138,000 for his attorney, for a total of $456,000 payable from the Estate and ordered him to wrap up the receivership and return the remaining funds to Defendants. Instead, the Receiver filed a request for additional payment. In the end, only $34,500 was returned to Mr. Cupo. Had the FTC prevailed at trial, the result would have been unchanged—the Receiver still would have claimed the bulk of the estate, leaving virtually nothing for "restitution."

B. The FTC's Abuse of Section 13(b) Threatens Constitutional Rights.

"[T]he love of money is the root of all evil[.]" *United States v. Melvin*, 730 F.3d 29, 35 (1st Cir. 2013) (citing

1 Tim. 6:10). So too here. As illustrated above, the FTC's use of Section 13(b) in pursuit of headline-grabbing monetary judgments undermines defendants' constitutional rights.

1. The FTC Uses Section 13(b) to Circumvent the Fourth Amendment.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. amend IV, and it applies to the FTC. *Knoll Assocs., Inc. v. Fed. Trade Comm'n*, 397 F.2d 530, 536 (7th Cir. 1968).

This Court has held that the warrant itself—not merely supporting documents—must state with particularity the things to be seized such that the description is available for inspection by the person whose premises is to be searched. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). Any "warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). This Court has never allowed the Fourth Amendment to be nullified or circumvented simply by appointing a receiver to seize the premises before a general search is conducted.

The evils of general warrants go to the heart of the Founding. Yet now, centuries later, courts routinely issue general warrants in FTC enforcement actions; they just call them TROs with appointment of a receiver. Although the Fourth Amendment prohibits general searches and seizures, a shadow jurisprudence has developed allowing the FTC to evade the warrant requirement.

For instance, the V-Tec TRO authorized the Receiver to:

> Take exclusive custody, control, and possession of all Assets, Documents, and electronically stored information . . ., wherever situated.
>
> . . . [and]
>
> Cooperate with reasonable requests for information or assistance from any state or federal law enforcement agency.

ECF No. 9 at 13, 14, and 18.

The Receiver and the FTC, using armed law-enforcement officers, entered V-Tec's offices and seized defendants' records before defendants knew the TRO had issued and without a warrant. They demanded access to secured locations and information from V-Tec's employees while denying them contact with their employers or benefit of counsel. The Receiver then excluded defendants from their documents and data, seizing the onsite computers and changing passwords to block access to remotely stored electronic documents. This bore no resemblance to the particularity required by the Fourth Amendment.

The FTC and Florida searched V-Tec's records, fishing for evidence of wrongdoing, without limitation on what or where they could search, or who could see it. The TRO thus acted as a general warrant issued to the FTC, acting as investigator and prosecutor. Florida by contrast was granted no authority to search —but was provided fulsome access by the FTC and the Receiver just the same.

Because the Receiver was appointed to maintain the *status quo* to preserve assets—having no investigative or prosecutorial duties—these Fourth Amendment violations flowed directly from the FTC's monetary demand.

2. Pursuing Damages Under the Guise of Equity Deprives Defendants of their Seventh Amendment Jury Trial Right.

By labeling their monetary demand as "equitable" relief, the FTC deprives defendants of their Seventh Amendment right to a jury trial. *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

The Seventh Amendment preserves the right to trial by jury in "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. "Suits at common law," as used in the Seventh Amendment, comprise "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Parsons*, 28 U.S. at 447. "The Seventh Amendment thus applies . . . to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (cleaned up). Whether an FTC action is equitable or legal requires an examination of "both the nature of the statutory action *and the remedy sought*." *Id.* (emphasis added); *see also Tull v. United States*, 481 U.S. 412, 417–18 (1987). Because deception cases sound in fraud—a classic legal action—the second inquiry is paramount.

The FTC camouflages its demand for legal damages by labeling it "restitution, the refund of monies paid, and disgorgement of ill-gotten gains." But using "restitution" interchangeably with "disgorgement" misconstrues the law. Whether restitution is legal or equitable depends on the nature of the remedy sought. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *see generally* John E. Villafranco & Daniel S. Blynn, *Consumer Redress Under Section 13(b) of the FTC Act: Correcting the Record*, Regulatory Focus (Kelley Drye), Nov. 2010 (explaining the difference between equitable and legal restitutions, and FTC's history of seeking *ultra vires* legal damages in Section 13(b) actions), *available at* http://bit.ly/2JZrBiO. Restitution may be equitable "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-W. Life & Annuity Ins. Co.*, 534 U.S. at 213. With a fungible asset like money, such traceability would be rare.

By contrast, legal restitution applies when the plaintiff seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213 (citation omitted). Against the Cupos, the FTC sought joint and several liability from individuals. In other words, the agency didn't care where the money came from or whether it could be traced. This is the very definition of restitution at law.

The Seventh Amendment's protection of the jury trial right is crucial in cases like these where the action is based on extra-textual judge-made law that

exceeds statutory authority. Without recourse to a jury as a sanity-check, the slippery slope of ever-expanding agency power will never reach bottom.

3. The FTC's Pursuit of Money Damages Undermines the Sixth Amendment.

As the Cupos' experience illustrates, the FTC uses Section 13(b) to freeze *untainted* assets to effectively deny defendants' ability to meaningfully defend themselves, placing enormous pressure on them to settle. This Court has held that in criminal cases "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). As a matter of fairness, the same *should* hold true here. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (noting the "fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes").

4. The FTC's Misuse of Section 13(b) Is Contrary to Values Protected by the Fifth and Eighth Amendments.

The FTC's use of Section 13(b) to transfer companies' assets to receivers is in tension with the values protected by the Fifth and Eighth Amendments. *Cf. Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (discussing doctrine of *suo contenemento*). For example, in the V-Tec matter, no monetary judgment was imposed. Yet of the $670,000 seized by the Receiver, only 5% was returned. In addition to dissipating 95% of the corporate assets, the Receiver rendered nugatory over one million service contracts and razed a going concern, including services the FTC conceded were lawful. Whether this wholesale

destruction of value and transfer of assets is better described as a deprivation of property under the Fifth Amendment or an excessive fine under the Eighth Amendment is beside the point. It was wrong.

III. SEPARATION OF POWERS PRINCIPLES NECESSITATE REVIEW.

The FTC is not a legislative body, but instead must implement Congress's intent. It has not done so here. "The FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language." *Shire ViroPharma, Inc.*, 917 F.3d at 159. Its litigation preferences must yield to Section 13(b)'s actual text. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). If the FTC wants to expand its enforcement options, it must convince Congress, not the judiciary. *See id.* at 1726.

The FTC will likely seek to evade review by pointing to a line of federal appellate court decisions mistakenly (and uncritically) accepting its wayward *Porter*-based arguments, as it has done before. *See, e.g.*, Br. of Resp't FTC in Opp'n at 7–8, *Ross v. Fed. Trade Comm'n*, No. 13-1426 (U.S. filed July 30, 2014); *see also Credit Bureau Ctr., LLC*, 937 F.3d at 775 ("Unsurprisingly, the [FTC] wagers nearly all of its case on *stare decisis*[.]").

But longstanding statutory misapplication of Section 13(b) does not immunize such error from this Court's review. *See, e.g.*, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177, 191 (1994), *superseded on other grounds by* 15 U.S.C. § 78t(e) (1995) (overruling sixty years of allowance of

a statutory cause of action because Congress had not expressly provided for it).

And, as shown above, the FTC's overreach has expanded into shuttering unchallenged business lines in the name of equity. Despite the FTC convincing other courts to bless its accumulation of extra-statutory authority, this Court has never accepted the FTC's purported Section 13(b) powers. Nor should it.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
MICHAEL PEPSON
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(202) 499-2421
cynthia.crawford@causeofaction.org

Counsel for Amicus Curiae

November 13, 2019