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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the FTC can use the word "injunction," in §13(b) of the FTC Act, to obtain money.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in cases involving the FTC Act. See, e.g., *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

Most of the courts of appeals have ruled that the word "injunction," in §13(b) of the FTC Act, unlocks the entire vault of equitable remedies. Rather than ground this conclusion in a rigorous analysis of the FTC Act's text and structure, these courts—egged on by the FTC—have simply relied on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), a case that reads another statute's use of the phrase "permanent or temporary injunction, restraining order, or other order" to encompass any equitable remedy.

An English judge plucked from the Late Middle Ages would recognize *Porter*'s approach to statutory interpretation. He would say that *Porter* employs the "equity of the statute," a doctrine that the king's judges used, in a time before government became regularized, accountable, or democratic, to revise

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified each party's counsel of record of WLF's intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

statutes at will. Although this Court briefly wielded a freestanding power of this kind in *Porter* and a few other decisions, it had already largely discarded it by the time the courts of appeals began relying on *Porter* to expand §13(b) beyond its text.

This Court has now fully sworn off using anything like the equity of the statute. One court of appeals—the Seventh Circuit—recently took heed of this in a §13(b) case. It reattached its reading of §13(b) to §13(b) itself. Concluding that "injunction" does not mean "injunction (and some other stuff)," it vacated a $5 million restitution award. But that leaves at least seven courts of appeals still reading §13(b) the wrong way. Without this Court's intervention, that split is bound to endure indefinitely. Indeed, shortly before the Seventh Circuit became the first court of appeals to read §13(b) properly, the court below, the Ninth Circuit, stuck to its guns, standing its affirmance of two restitution awards—one of them for $1.27 *billion*—on its old misreading of §13(b).

When they apply §13(b), the courts of appeals should read "injunction" to mean "injunction." No more, no less. WLF urges the Court to grant review and make it so.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND.

A. The Plain Meaning Of §13(b) Of The FTC Act.

Section 13(b) empowers the FTC to "bring suit in a district court of the United States" to obtain a "temporary restraining order," a "preliminary injunction," or a "permanent injunction" against an "act or practice" that violates the FTC Act. 15 U.S.C. § 53(b). To bring such an action, the FTC must have "reason to believe" that the entity or person sued "*is* violating, or *is about to* violate" the Act. *Id.* (emphasis added). "Thus, § 13(b) anticipates that a court may award relief to prevent an *ongoing* or *imminent* harm." *FTC v. AMG Capital Mgmt.*, 910 F.3d 417, 430 (9th Cir. 2018) (O'Scannlain, J., specially concurring). The FTC is generally supposed to use §13(b) "for obtaining injunctions against illegal conduct pending completion of FTC administrative hearings." *Shire ViroPharma*, 917 F.3d at 156.

To obtain *money* for violations of the Act, the FTC must clear additional hurdles. Section 19 gives it two ways to seek "the refund of money" or "the payment of damages." 15 U.S.C. § 57b(b). First, it may prove in court that the defendant violated a preexisting FTC rule. *Id.* at § 57b(a)(1). Second, it may obtain a cease-and-desist order in an administrative proceeding, then prove in court that "a reasonable man" would know that the pertinent conduct was "dishonest or fraudulent." *Id.* at § 57b(a)(2).

The FTC is tasked with stopping "unfair or deceptive" trade practices. *Id.* at § 45(a). "Unfair" and "deceptive" are sweeping words. One might expect the FTC to put some meat on the bones before making someone forfeit a large sum of money. That's exactly what §19 makes it do. The FTC must either notify a party of the specific conduct to be avoided, *id.* at § 57b(a)(1), or, after affording extra process, show that his conduct is obviously wicked, *id.* at § 57b(a)(2). (The FTC can also obtain civil penalties from a party that violates a final cease-and-desist order. *Id.* at § 45(*l*).)

"Read together, §§ 13(b) and 19 give the [FTC] two complementary tools" to "satisfy its statutory mandate." 910 F.3d at 431 (O'Scannlain, J., specially concurring). "Injunctive relief in § 13(b) . . . functions as a simple stop-gap measure that allows the [FTC] to act quickly to prevent harm." *Id.* Section 19, meanwhile, allows the FTC—so long as it provides a defendant additional "procedural protections"—to "seek retrospective relief to punish or to remediate *past* violations." *Id.*

B. The FTC Balks At Applying §13(b) As Written.

This common-sense understanding of the Act began to break down in 1977, when the FTC decided to try using §13(b) in a "more . . . creative manner." David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 10 (2004). The FTC started invoking §13(b) to pursue asset freezes. *Id.* at 10-11. In *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir.

1982), the FTC succeeded in convincing the Fifth Circuit to grant such relief.

Southwest Sunsites relied, at the FTC's urging, on *Porter*, 328 U.S. 395. *Porter* reads a statute's use of the phrase "permanent or temporary injunction, restraining order, or other order" to encompass *any* equitable remedy. *Id.* at 397-98. By *Porter*'s reasoning, any law that mentions *an* equitable remedy must thereby unlock *all* of a court's "inherent equitable powers." *Id.* at 398. According to *Porter*, a court enjoys these powers unless the legislature explicitly *limits* them. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," *Porter* declares, "the full scope of that jurisdiction is to be recognized and applied." *Id.*

Even after *Southwest Sunsites*, §13(b) cases were "largely viewed as curiosities" at the FTC. FitzGerald, supra, at 18. But that changed later in the 1980s, as the FTC shifted its focus from rulemaking to "case-by-case adjudication." *Id.* FTC officials worried that during such adjudications, "the respondent might continue to employ fraudulent practices." *Id.* As we've seen, the Act addresses this concern: the FTC may obtain "preliminary relief under Section 13(b)"; then issue "a final cease and desist order"; then bring "a Section 19 consumer redress action." *Id.* at 19. But "such a three-part process," an attorney who served at the FTC at the time later wrote, "would have been lengthy and cumbersome." *Id.* Following the law as written was inconvenient. "Much more effective and efficient" simply to argue that the FTC could get everything it wanted through §13(b) alone. *Id.*

That's just what the FTC proceeded to do. It "embarked on an ambitious program" to expand §13(b) beyond its terms *Id.* It used "cases with compelling facts that established clear violations" to obtain "limited and clearly justified equitable relief." *Id.* at 21-22. After obtaining those "favorable decisions," it used §13(b) to "pursu[e] a more ambitious agenda." *Id.* at 21. Success followed success. "Over the next several years, it became settled that the district courts have authority under Section 13(b) to grant whatever . . . equitable relief they deem necessary to secure complete justice" in a case. *Id.* As of a year ago, at least eight courts of appeals had adopted this view. AMG Capital Pet. at 12-13 (collecting cases).

Last August, however, the Seventh Circuit rejected that "starkly atextual" reading of §13(b). *FTC v. Credit Bureau Center*, 937 F.3d 764, 767 (7th Cir. 2019). The FTC's position, it concluded, is "incompatibl[e]" not only with the Act itself, but also with this Court's modern, more disciplined approach to statutory construction. *Id.* at 786. True enough, the court said, its decision placed it by itself in a 7-1 circuit split. *Id.* at 785. Then again, it noted, "no [other] circuit has examined whether reading a restitution remedy into section 13(b) comports with the [Act's] text and structure." *Id.* What's more, it continued, "no [other] circuit has ever considered" how this Court's modern method of statutory interpretation applies "in a section 13(b) case." *Id.*

II. PROCEDURAL BACKGROUND.

The FTC accused the petitioners in *Publishers Business Services, Inc. v. FTC*, No. 19-507, of using deceptive telemarketing scripts to sell magazine subscriptions. It accused the petitioners in *AMG Capital Management, LLC v. FTC*, No. 19-508, of failing to adequately disclose the terms of its payday loans. In each case the FTC established liability on summary judgment, and then obtained restitution under §13(b). In *Publishers Business Services* it obtained around $24 million, in *AMG Capital* around $1.27 billion. The same Ninth Circuit panel heard and decided both cases. In each case it affirmed.

In *AMG Capital*, a majority of the panel—namely, Judge O'Scannlain, joined by Judge Bea—also issued a special concurrence lamenting the Ninth Circuit's "unfortunate interpretation" of §13(b). 910 F.3d at 429. "The text and structure of the statute," the judges wrote, "unambiguously foreclose . . . monetary relief." *Id.* Awarding restitution in defiance of the statute's text, they observed, "wrests from Congress its authority to create rights and remedies." *Id.* They urged their circuit (without success) "to rehear th[e] case en banc to relinquish what Congress withheld." *Id.*

SUMMARY OF ARGUMENT

The words "equity of the statute" are not on many lips these days. "The principle involved in the phrase has been relegated," one commentator wrote over a hundred years ago, "to the limbo of legal antiquities, reappearing now and then in altered form, the ghost of its former self." W.H. Loyd, *The*

Equity of a Statute, 58 U. Pa. L. Rev. 76, 76 (1909). Dead the concept may be—but the ghost of its former self stalks these cases.

The equity of the statute was "a vague and undefined power . . . vested in the judiciary . . . to disregard the letter of the law to attain the ends of justice." *Id.* at 77. It entered English law in the Late Middle Ages, and it receded in the nineteenth century. In the mid-twentieth century it enjoyed a brief rebirth, in altered form, when this Court used something very like it to read "implied" rights and remedies into statutes; but the Court soon reversed course. It concluded, quite correctly, that unbridled judicial "equity" in statutory interpretation is incompatible with a system of separated powers and democratic lawmaking.

Yet the phantom wanders still. In the 1980s and 1990s, the courts of appeals started reading the word "injunction" in §13(b) of the FTC Act to mean "injunction *or other equitable relief*." To justify this departure from the statutory text, the lower courts invoked one of this Court's mid-twentieth century deployments of the equity of the statute. The lower courts simply bypassed the Court's more recent decisions declaring its old methods misguided and obsolete.

Recently a few appellate judges have noticed this oversight. A majority of the panel that heard these cases wrote, in a special concurrence, that awarding restitution under §13(b) is "an impermissible exercise of judicial creativity." 910 F.3d at 437. And the Seventh Circuit recently undertook the course-

correction that the panel majority here urged (unsuccessfully) upon the Ninth.

So the good news is that in the Seventh Circuit, "injunction," as used in §13(b), now means "injunction." But that leaves at least seven other circuits, including the court below, where §13(b) still does *not* mean what it says. It is most unlikely that seven circuits can coordinate a transition from the improper reading of §13(b) to the proper one. Look no further than these cases, in which the panel below was obliged to do things the bad old way, whether it liked it or not.

The specter this Court unleashed so many decades ago still roams among the lower courts. It will continue to cause mischief until this Court steps in and expels it.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT ITS DECISIONS DEPLOYING THE EQUITY OF THE STATUTE ARE DEFUNCT.

A. The Lower Courts' Expansion Of §13(b) Is, In Effect, An Exercise Of The Equity Of The Statute.

The court of appeals affirmed two restitution awards (one of them for nearly $1.27 billion) even though the purported authority for that remedy, §13(b) of the FTC Act, says merely that a court may issue a "temporary restraining order," a "preliminary injunction," or a "permanent injunction." 15 U.S.C. § 53(b).

"Injunction" does not mean "restitution." "Apples," after all, does not mean "oranges." Nor does "injunction" mean "equitable relief (including, at times, restitution)." That would be like saying that "apples" means "fruit (including, at times, oranges)." Nor, finally, can it be said that some aspect of the FTC Act's structure reveals Congress's subtle intent to use "injunction" to mean "injunction, but maybe restitution too." Section 13(b) is plainly designed to be "a simple stop-gap measure," 910 F.3d at 431 (O'Scannlain, J., specially concurring), one that enables the FTC to enjoin a practice while it uses *other* statutory authority to prosecute an offender.

The panel was bound by Ninth-Circuit precedent to conclude that "injunction," as used in §13(b), can mean "restitution." Like most other circuits, the Ninth Circuit has decided that *Porter*, 328 U.S. 395, requires this twisted interpretation. *Porter* concludes that Congress's use of "injunction" in a different statute "invoked the court's . . . inherent equitable powers." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). Although *Porter* means by this that the word "injunction" triggers the equity jurisdiction that originated in the Court of Chancery, there are distinct shades, in *Porter* and other mid-twentieth century Supreme Court cases, of another kind of "equity." These cases engage in a form of judicial lawmaking that harkens back to the ancient—and defunct—concept of the equity of the statute.

B. The Equity Of The Statute Is A Relic Of The Middle Ages That Has No Place In Our System Of Government.

The Anglo-Saxon kings issued decrees that look a lot like legislation. Theodore F.T. Plucknett, *A Concise History of the Common Law* 316-17 (5th ed. 1956). Their Norman and Plantagenet successors produced an array of charters, dictums, and ordinances. *Id.* at 318-21; Arthur R. Hogue, *Origins of the Common Law* 207-08 (1966). By the late thirteenth century "the Lord King in his Parliament" had started to pass statutes. Plucknett, supra, at 321-22.

But although the law was occasionally put to parchment in these early days, no one placed much weight on the words themselves. Hogue, supra, at 201-02; Plucknett, supra, at 327, 331. What mattered was the intent of the king. Hogue, supra, at 206. He generally expressed that intent through his councilors, and those councilors often served as judges. So it was that the very man who had written a law could be invited to announce what it really *meant*. In 1305 a barrister tried to explain the meaning of a statute to Ralph de Hengham, Chief Justice of the Common Pleas, but was abruptly shut down. "Do not gloss the statute," Hengham said, "for we know better than you; we made it." Plucknett, supra, at 331.

Throughout the Late Middle Ages, in fact, a king could amend, or a judge ignore, a law without having to offer some theory of governance to justify his action. "Englishmen of the fourteenth and fifteenth

centuries," Lord Macaulay tells us, "were little disposed to contend for a principle merely as a principle." 1 Thomas Babington Macaulay, *The History of England from the Accession of James the Second* 33 (1848). It was an "intensely practical" age. Plucknett, supra, at 322. Eventually, however, the polity began to be "constructed on system." Macaulay, supra, at 29. The judiciary became more formal, printed legislation more reliable and accurate.

Yet the judges clung to their discretion. One prominent way in which they did this was through the concept of the equity of the statute. Plucknett, supra, at 334; John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 30 (Jan. 2001). The equity of the statute empowered a judge both to "restrict the general words of a statute when they produced harsh results" and to "br[ing] omitted cases within the reach of a statute, even when they admittedly lay outside its express terms." Manning, supra, 101 Colum. L. Rev. at 31. So, for example, "a statute imposing liability on the 'Warden of the Fleet' might be extended . . . to all jailers," or "a statute applicable to the City of London might be stretched to include other municipalities." *Id.* (collecting cases).

The events of the late seventeenth and early eighteenth centuries established that Parliament makes, while the king merely applies, the law. See F.W. Maitland, *The Constitutional History of England* 388-98 (1919). And as the king fared, so fared the judges. In 1714 the monarchy lost control of the judiciary. *Id.* at 312-13. Cut loose from the throne, the judges, too, became subservient to

Parliament. "To set the judicial power above that of the legislature," Blackstone wrote in 1765, "would be subversive of all government." 1 William Blackstone, *Commentaries on the Laws of England* 91 (1765).

And yet "the line," in England, "between lawmaking and judging" remained "blurred." Manning, supra, 101 Colum. L. Rev. at 36-37. Propelled by habit and tradition (and judicial self-interest), the doctrine of the equity of the statute persisted in English law well into the nineteenth century. *Id.* at 53-55; Plucknett, supra, at 340.

At all events, "the equity of the statute" is "a doctrinal artifact of an ancient English governmental structure." Manning, supra, 101 Colum. L. Rev. at 8. It is a product of the medieval mindset, and an outgrowth of a system of blended government powers. It is utterly foreign to our modern constitutional framework.

C. This Court's Old Decisions Applying The Equity Of The Statute Are Obsolete—But They Continue To Cause Mischief.

"In contrast with the . . . English common law system," the "U.S. Constitution explicitly disconnects federal judges from the legislative power and, in so doing, undercuts any judicial claim to derivative lawmaking authority." Manning, supra, 101 Colum. L. Rev. at 59. "The sharp separation of legislative powers" in the United States "was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

Our system was viewed this way from the very beginning. "There can be no liberty," the Framers understood, if the power of the judge "be not separated" from the power of the legislator. The Federalist No. 47 (Madison). "The duty of the court," Chief Justice Marshall understood, is "to effect the intention of the legislature"; and that intention, he knew, is "to be searched for in the words which the legislature has employed to convey it." *The Paulina*, 11 U.S. (7 Cranch) 52, 60 (1812). The judiciary *obeys* the law it gets, in a text, from elsewhere.

Yet for a few decades in the mid-twentieth century, this Court dallied with a mode of loose statutory construction redolent of the equity of the statute. *Porter*, for instance, holds that a statute's discussion of injunctive relief permits a court to "give whatever . . . relief may be necessary under the circumstances." 328 U.S. at 398. The statute did not *say* "any relief necessary"; the Court placed those words there itself; it held that "apples" means "fruit." It used the equity of the statute to grant itself a sweeping equity jurisdiction. It then used that judicially constructed jurisdiction to award restitution.

The *Porter* dissent wanted to respect the statute's text—and thus democracy and the separation of powers. "Congress could not have been ignorant of the remedy of restitution," it wrote; "it knew how to give remedies it wished to confer." *Id.* at 405 (Rutledge, J., dissenting). Because "the remedy . . . sought" was "inconsistent with the remedies expressly given by the statute," the dissent would have withheld restitution. *Id.* at 408.

The Court's taste for adding rights and remedies to statutes reached its height in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). A shareholder accused a company of circulating a deceptive proxy statement, but he invoked a section of the Securities Exchange Act of 1934 that says nothing about private suits. Notwithstanding the absence of a "specific reference to a private right of action," the Court allowed the suit to proceed, because it thought "private enforcement of the proxy rules" a "necessary supplement to [SEC] action." *Id.* at 432. The Court created a private right of action from whole cloth because, in its view, doing so was a good idea. Cf. *Platt v. Lock*, 75 Eng. Rep. 57, 59 (K.B. 1550) ("Yet the bill shall be maintainable by equity of the statute . . . notwithstanding [that] the statute does not give the action by express words against any other than the warden of the Fleet . . . [because] the taking it by equity shall be more beneficial than prejudicial to the greater number of men.").

One of the authorities *Borak* relies on as support for inventing a right of action, by the way, is *Porter*, the main precedent the lower courts have used to expand §13(b).

The tide began to turn against the new equity of the statute when Justice Powell called attention to its flaws while dissenting in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). It is not for a court, wrote Justice Powell, to determine "what the goals of a [legislative] scheme should be" or "how those goals should be advanced." 441 U.S. at 740 (Powell, J., dissenting). Such a "mode of analysis," he believed, "cannot be squared with the doctrine of the

separation of powers." *Id.* at 730. "When Congress chooses not to provide a private civil remedy," he concluded, "federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Id.* at 730-31.

Justice Powell's view—and that of the *Porter* dissent—became the majority view in a series of decisions culminating in *Alexander v. Sandoval*, 532 U.S. 275 (2001). "Private rights of action to enforce federal law," *Sandoval* says, "must be created by Congress." 532 U.S. at 286. "The judicial task," it continues, "is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* Creating new rights or remedies "may be a proper function for common-law courts, but not for federal tribunals." *Id.* at 287. See also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (declaring *Borak*'s approach to statutory interpretation defunct).

In reading the words "any equitable remedy" into §13(b), the lower courts bypassed the governing standard of statutory construction—a standard, embodied in decisions such as *Sandoval*, of respect for the legislative role and the separation of powers. The courts reached back and grasped an obsolete standard—a standard, embodied by *Porter* and *Borak*, of judicial aggrandizement and the blending of powers. A few judges have now called attention to this mistake. In the cases at hand, Judges O'Scannlain and Bea unsuccessfully urged the Ninth Circuit to apply §13(b) as written. And the Seventh Circuit, first among its sisters, has in fact started to do so. This is a welcome turn of events. But at least

seven circuits, when they look at §13(b), are still seeing words that aren't there. Confusion will reign until this Court steps in and imposes uniformity.

The Court should accept these cases. It should align the federal courts' interpretation of §13(b) with what §13(b) actually says. Above all, it should clarify, once and for all, that judicial lawmaking is inconsistent with democracy and the separation of powers; that *Porter* and its ilk are bad law; and that the equity of the statute is dead.

CONCLUSION

The petitions should be granted.

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