No. 19-508

IN THE
Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC; BLACK CREEK CAPITAL CORPORATION; BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC; SCOTT A. TUCKER; PARK 269 LLC; AND KIM C. TUCKER,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

REPLY FOR PETITIONERS

PAUL C. RAY
PAUL C. RAY, CHTD
8670 West Cheyenne Ave.
Suite 120
Las Vegas, NV 89129
(702) 823-2292
paulcraylaw@gmail.com

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
SARAH J. NEWMAN
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

NO. 19-508

AMG CAPITAL MANAGEMENT, LLC;
BLACK CREEK CAPITAL CORPORATION;
BROADMOOR CAPITAL PARTNERS, LLC;
LEVEL 5 MOTORSPORTS, LLC; SCOTT A. TUCKER;
PARK 269 LLC; AND KIM C. TUCKER,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

REPLY FOR PETITIONERS

The Solicitor General acknowledges that the courts of appeals are "divided" on the question presented—"whether Section 13(b) of the FTC Act," which mentions only injunctions, "authorizes district courts to award * * * monetary relief." Br. for Resp. 4. The Solicitor General agrees the issue is sufficiently important to "warrant this Court's review." *Ibid.* While the Federal Trade Commission ("FTC") is not a signatory on the Solicitor General's response—none of its officers or employees appears on the brief—there can be no doubt

the FTC agrees on those points. On December 19, 2019, the FTC filed its own petition for a writ of certiorari seeking review of this exact issue. Pet. in No. 19-___, *Federal Trade Commission* v. *Credit Bureau Center, LLC* ("FTC *Credit Bureau* Pet."). In its petition, the FTC explains that the issue is "critically important" to the agency; that it has myriad § 13(b) cases pending that the circuit split throws into uncertainty; and that, absent this Court's prompt review, the circuit split will have "a continuing adverse effect" on the agency's efforts. *Id.* at 10, 13, 23.

Neither the Solicitor General nor the FTC suggests that anything about this case prevents it from being an ideal vehicle for resolving the issue. The Solicitor General's brief nevertheless seeks delay, urging the Court to "hold this petition pending the disposition" of *Liu* v. *Securities and Exchange Commission*, cert. granted, No. 18-1501 (Nov. 1, 2019). Br. for Resp. 4. But as the Solicitor General acknowledges (at 6), *Liu* concerns a different question under a different statutory scheme—whether a provision of the Securities Exchange Act of 1934 allowing the SEC to seek "equitable relief" extends to a form of disgorgement this Court has found to be a "penalty" within the meaning of that statute. Pet. i, *Liu* v. *Securities and Exchange Commission*, No. 18-1501 (May 31, 2019) ("*Liu* Pet."). The Solicitor General fails to identify *any* specific issue *Liu* will decide, or even a common word within the two differently phrased agency statutes, that would justify holding this petition pending its disposition.

The FTC's own petition thus agrees with petitioners that there is no reason for this Court to delay resolution of the § 13(b) issue in light of "the grant of certiorari in *Liu*." FTC *Credit Bureau* Pet. 11. As the agency ob-

serves, the question presented here "is distinct from the question in *Liu*, will not be resolved in that case, and warrants independent review." *Ibid.* Because *Liu* will not purport to answer whether § 13(b) of the FTC Act authorizes monetary remedies, holding this petition for a potential grant, vacate, and remand in light of whatever *Liu* decides would do no more than breed inefficiency and prolong uncertainty.

Eight circuits have addressed the scope of § 13(b). The Solicitor General nowhere urges that it is likely that anything in *Liu* would cause each of those circuits to separately re-evaluate their precedent in light of *Liu*'s *implications*, much less eliminate the conflict in so doing. Nor does the Solicitor General mention the impact of such a protracted process on businesses like petitioners or the agency that enforces the statute. The FTC, however, does. It warns that absent this Court's prompt review of this issue, "the split * * * would likely persist for years with little prospect of righting itself." FTC *Credit Bureau* Pet. 25. Holding this petition thus makes little sense—but will cause the uncertainty, irreconcilable results, and disruptive impact of the circuit split to persist. The FTC explains that as "of mid-2019," it had "55 such cases * * * pending in district courts," and that the "question presented here is integral to all of them." *Id.* at 13. And the FTC will continue "bring[ing] dozens of cases every year" under § 13(b), extracting huge sums of money from defendants, under a provision that mentions only injunctions, until the issue is definitively resolved. *Id.* at 5. The FTC thus agrees that "the Court should not delay resolution of the [§ 13(b)] issue." *Id.* at 25. This petition is now fully briefed and the issues it raises are ripe for review. There is no dispute that this

case is an ideal vehicle. The Court should grant review now, in this case.

I. This Case Should Be Decided Along With—Rather Than Held For—*Liu*

There is no good reason for the Court to grant the Solicitor General's request to "hold this petition pending the disposition of *Liu*." Br. for Resp. 4. The FTC agrees that there is no reason to "delay resolution of the [§ 13(b)] issue" until *Liu* is decided. See FTC *Credit Bureau* Pet. 22-26. Far from supporting a hold, any relationship in broad subject matter between this case and *Liu* counsels granting this petition so that both cases can potentially be decided in the same Term.

A. There is no dispute that *Liu* and this case present different issues, under different statutory schemes. *Liu* concerns § 21(d) of the Securities Exchange Act of 1934, which authorizes courts in SEC enforcement proceedings to order "any *equitable relief* that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5) (emphasis added). The question presented there is whether the SEC "may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that such disgorgement *is a penalty*." *Liu* Pet. i (emphasis added). This case, by contrast, concerns § 13(b) of the Federal Trade Commission Act. Unlike § 21(d) of the Exchange Act, the text of § 13(b) does not, on its face, purport to authorize "equitable relief." Instead, § 13(b) only expressly authorizes the Commission to seek a "temporary restraining order," a "preliminary injunction," and a "permanent injunction." 15 U.S.C. § 53(b). The question presented in this case is, "Whether § 13(b) of the Act, by authorizing 'injunction[s],' also authorizes the Commission to demand monetary relief such as resti-

tution—and if so, the scope of the limits or requirements for such relief." Pet. i.

The Solicitor General offers no convincing reason why, given those differences in the statutes and issues presented, this case should be held for *Liu*. Nor is there one; the core issues do not even track. *Liu* is premised on this Court's determination that disgorgement is a "penalty." *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1639 (2017). The Solicitor General nowhere suggests that, as a matter of statutory construction, deciding whether a disgorgement "penalty" constitutes "equitable relief" under the Exchange Act answers whether a reference to "injunctions" authorizes monetary relief under the FTC Act. Nor does the Solicitor General identify any other way in which this Court's interpretation of §21(d) of the Exchange Act in *Liu* will address a fundamental "premise" underlying the court of appeals' differing interpretations of §13(b) of the FTC Act so as to "determine the ultimate outcome" on that issue. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (discussing standard for GVRs). To the contrary, the Solicitor General acknowledges that "the FTC's and the SEC's authority to seek monetary relief" under the respective statutory provisions at issue "will not necessarily rise and fall together." Br. for Resp. 6-7. That weighs against a hold, not for it.

The FTC agrees with petitioners here that there is no reason for this Court to delay resolution of the §13(b) issue for a decision in *Liu*. In the FTC's view, "no matter how the Court resolves its holding in *Kokesh* that SEC disgorgement is a penalty with the contention that relief under the securities laws must be 'equitable,' the decision in *Liu* will not answer whether Section 13(b) authorizes district courts to order monetary relief * * *." FTC *Credit Bureau* Pet. 24. Like petitioners, the agency

agrees that "[t]he question presented here is ripe for review, distinct from *Liu*, and unlikely to be answered by the Court's disposition of that case." *Id.* at 23.

B. Because *Liu* will not purport to answer the § 13(b) issue presented in this case, a hold followed by a GVR for reconsideration in light of *Liu* would only breed delay, inefficiency, and continued uncertainty. Not only the Ninth Circuit, but *each* of the eight courts of appeals that has already addressed whether § 13(b) authorizes monetary relief would be left to consider what *implications* the decision in *Liu* may have for their existing precedent. And even if *Liu*'s broader teachings do have implications about the FTC's authority under a different statute, *en banc* proceedings might be required for any court of appeals to overturn its precedent. See *Miller* v. *Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (stating that three-judge panel cannot overturn circuit authority unless it is "*clearly irreconcilable* with the reasoning or theory of intervening higher authority" (emphasis added)); see also Pet. App. 16a.

Nor is it likely that, once *Liu* decides a different issue under a different agency statute with different wording, the courts of appeals will themselves resolve the existing circuit conflict. The FTC thus explains that, "[i]f—following *Liu*—the Court were simply to remand [*Credit Bureau*] (and *AMG*), the split and its consequences * * * would likely persist for years with little prospect of righting itself." FTC *Credit Bureau* Pet. 25.

The decision below supports the FTC's view. It suggests that even if the Court were to decide *Liu* in the way potentially most favorable to petitioners in this case—by holding that SEC disgorgement is a penalty and therefore not available as "equitable relief" under the securities laws—that would be unlikely to prompt the Ninth

Circuit to change its interpretation of § 13(b). Petitioners essentially made the *Liu* argument to the panel below, urging "that *Kokesh*'s reasoning compels the conclusion that restitution under § 13(b) is in effect a penalty—not a form of equitable relief." Pet. App. 16a. In his special concurrence, Judge O'Scannlain agreed that the putative "restitution" the Commission seeks under § 13(b) "'bears all the hallmarks of a penalty.'" *Id.* at 31a. Yet the majority opinion, also authored by Judge O'Scannlain, suggests that does not alter the outcome, as Ninth Circuit precedent has "expressly rejected the argument that § 13(b) limits district courts to traditional forms of equitable relief." *Id.* at 17a. The Ninth Circuit "hold[s] instead that the statute allows courts to award complete relief even though the decree includes that which might be conferred by a court of law." *Ibid.* (quotation marks omitted).[1]

Thus, even upon reconsideration, the Ninth Circuit well might remain in conflict with the Seventh Circuit. *Liu* would likewise give that court no reason to alter its holding that "section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution." *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019).

---

[1] There is likewise reason to believe that any decision in *Liu* is unlikely to affect the Second Circuit's view that § 13(b)'s reference to "injunctions" authorizes monetary relief. The Second Circuit (unlike the Ninth Circuit) has held that a court "may award only equitable restitution" under § 13(b). *FTC* v. *Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); see Pet. 26-29. Thus, the Second Circuit could well conclude that its precedent *already* forecloses any form of restitution under § 13(b) that might constitute a non-equitable "penalty," rendering *Liu* irrelevant.

As a result—as the Commission has urged with respect to its own petition—"holding this petition would serve no purpose other than delay." FTC *Credit Bureau* Pet. 25. This case should not be held for *Liu* so as to require this Court to decide the very same issue, and resolve the very same circuit conflict, years later. Such delay serves no one's interests. From the perspective of businesspersons caught in the FTC's cross-hairs, the agency will only continue "bring[ing] dozens of cases every year" under §13(b) until the issue is definitively resolved, extracting huge sums of money under a provision that authorizes only injunctions. *Id.* at 5. And from the FTC's perspective, "the circuit split" will have "a continuing adverse effect on [its] ability to protect consumers." *Id.* at 23. The Court should resolve the issue now.

C. Any "overlap" between the issues presented here and in *Liu* at a high level of generality, see Br. for Resp. 7, only further supports review now. As petitioners here and in *Liu* have urged, both cases involve important issues of federal agencies exceeding the scope of their statutory enforcement authority under the guise of pursuing equity. See *ibid.* (quoting petitions). And the Court's analysis in both cases may involve a historical inquiry into the traditional understanding of legal terms ("equitable relief" in one case and "injunctions" in the other). But that is simply another reason why the Court should take this case so they can potentially be decided in the same Term, allowing the Court to consider any overlapping considerations each case might have for the other.

II. THIS CASE PRESENTS AN IDEAL VEHICLE

Finally, the Solicitor General does not deny that this case presents an excellent vehicle for resolving the circuit

conflict over the proper interpretation of § 13(b). See Pet. 32-34. The opposing *party* in this case—the FTC—elsewhere acknowledged that this case "present[s] an appropriate vehicle" for reviewing the § 13(b) issue. FTC *Credit Bureau* Pet. 25.[2] The Solicitor General has identified a vehicle defect in a different petition raising this issue, No. 19-507, *Publishers Business Services, Inc.* v. *Federal Trade Commission* (filed Oct. 18, 2019).[3] But the

---

[2] While acknowledging that this case is an appropriate vehicle, the FTC cryptically suggests that, because the Solicitor General has urged that this case be held for *Liu*, the "best course would be to grant the Commission's petition" rather than this one. FTC *Credit Bureau* Pet. 26. But whatever reason the Solicitor General has for a hold in this case (supposed "overlap" between the legal issues presented here and in *Liu*) applies with equal force—or equal lack of force—to the FTC's petition in *Credit Bureau*, which presents the very same legal issue. The FTC never suggests otherwise. And the FTC's own arguments defy holding this case and then waiting for the FTC's recently filed petition to become ripe many months from now. The FTC itself urges that "the Court should not delay resolution of the [§ 13(b)] issue." *Ibid.* Unlike the petition in *Credit Bureau*, certiorari-stage briefing in this case is now complete. This petition thus can be granted now and potentially heard this Term. The FTC's petition, by contrast, was filed over two months after the petition in this case, and the opposing party in *Credit Bureau* has sought an extension until January 18, 2019, to file a petition of its own. See Application for an Extension of Time, *Federal Trade Commission* v. *Credit Bureau Center, LLC*, No. 19A528 (Nov. 9, 2019). The FTC offers no reason the Court should wait for *Credit Bureau* when the Court can decide the issue just as well now, in this case.

[3] The Solicitor General has urged the Court to deny the petition in *Publishers Business Services* based on precisely such a defect. Citing the Ninth Circuit's mandate rule, the Solicitor General argues that the petitioners in *Publishers Business Services* "forfeited their current argument that the district court lacked authority to grant the FTC monetary relief" by failing to assert it in a prior appeal.

Solicitor General does not identify any "logically antecedent questions that could prevent [the Court] from reaching the question of the correct interpretation" of § 13(b) in this case. *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013). There are none.

To the contrary, this case is an ideal vehicle. The FTC touts *this* case—and its *$1.27 billion* judgment—as the poster child for its § 13(b) enforcement program. See Press Release, *U.S. Court Finds in FTC's Favor and Imposes Record $1.3 Billion Judgment Against Defendants Behind AMG Payday Lending Scheme* (Oct. 4, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/us-court-finds-ftcs-favor-imposes-record-13-billion-judgment. This is the ideal vehicle for resolving the "important and recurring" question presented. FTC *Credit Bureau* Pet. 10.

CONCLUSION

The petition should be granted.

Br. in Opp. 7, *Publishers Bus. Servs., Inc.* v. *Federal Trade Commission*, No. 19-507 (filed Dec. 13, 2019). By contrast, this case presents no such logically antecedent question—or any other barrier to review.

Respectfully submitted.

PAUL C. RAY
PAUL C. RAY, CHTD
8670 West Cheyenne Ave.
Suite 120
Las Vegas, NV 89129
(702) 823-2292
paulcraylaw@gmail.com

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
SARAH J. NEWMAN
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

DECEMBER 2019