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

SUPPLEMENTAL BRIEF 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 500
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

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

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief pursuant to this Court's Rule 15.8. The Solicitor General had urged the Court to "hold this petition pending the disposition" of *Liu* v. *Securities and Exchange Commission*, No. 18-1501. Br. for Resp. 4. The Court has now issued its decision in *Liu*. That decision does not address, much less resolve, the question presented in this case, which raises a different question under a different statutory scheme. This case squarely presents an important and recurring issue on which the courts of appeals

are divided. And it is an ideal vehicle. The petition should be granted.

1. The statute at issue in *Liu* authorized the Securities and Exchange Commission to seek "'equitable relief.'" 591 U.S. __ (2020), slip op. 1. The question presented was whether "the SEC may seek 'disgorgement' * * * through its power to award 'equitable relief' under 15 U.S.C. § 78u(d)(5)," a provision of the Securities Exchange Act of 1934. Slip op. 1. The Court explained that, in interpreting the scope of the statutory phrase "'equitable relief,'" "this Court analyzes whether a particular remedy falls into 'those categories of relief that were *typically* available in equity.'" *Id.* at 5 (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). Surveying precedent, the Court found that "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names," including "'disgorgement.'" *Id.* at 6. The Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)." *Id.* at 1.

This case does not concern the Exchange Act or 15 U.S.C. § 78u(d)(5). It does not concern a statute that authorizes the relevant agency, the Federal Trade Commission, to seek "equitable relief." It concerns § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). Unlike § 78u(d)(5), the text of § 13(b) does not, on its face, purport to authorize "equitable relief." Instead, § 13(b) only expressly authorizes the FTC 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 that statute, "by authorizing 'injunction[s],' also authorizes the Commission

to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief." Pet. i (brackets in original). The Court's conclusion in *Liu* that "the umbrella of 'equitable relief'" encompasses certain forms of disgorgement, slip op. 2, says nothing about whether § 13(b)'s mere reference to an "injunction" authorizes monetary relief.

2. Given that *Liu* proved largely irrelevant to this case, there is and can be no dispute that this Court's review is warranted. Respondent Federal Trade Commission 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 FTC agrees the issue is sufficiently important to "warrant this Court's review." *Ibid.* Indeed, the FTC has elsewhere acknowledged 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 review, the circuit split will have "a continuing adverse effect" on the agency's efforts. Pet. 10, 13, 23, *FTC* v. *Credit Bureau Ctr., LLC*, No. 19-825 (filed Dec. 19, 2019) ("FTC *Credit Bureau* Pet.").

3. While two other pending petitions also present the § 13(b) issue, the Court should grant review in *this* case. The FTC acknowledges that this case "present[s] an appropriate vehicle" for reviewing the issue. FTC *Credit Bureau* Pet. 25. By contrast, the Solicitor General has identified a vehicle defect in *Publishers Business Services, Inc.* v. *FTC*, No. 19-507 (filed Oct. 18, 2019). See Br. in Opp. 7, *Publishers Bus. Servs., Inc.* v. *FTC*, No. 19-507 (filed Dec. 13, 2019); Reply for Pet'rs 9-10 & n.3. And

this case was filed months before the FTC's petition in *Credit Bureau*. See Reply for Pet'rs 9 n.2.

The respondents in *Credit Bureau*—but not the FTC—have urged that, although the petition in that case was filed months later, it presents the better vehicle. See Br. in Opp. 18-20, *FTC* v. *Credit Bureau Ctr., LLC*, No. 19-825 (filed Apr. 14, 2020) ("*Credit Bureau* Br. in Opp."). That is a strange assertion coming from the respondents in that case, who have urged the Court to "*deny the petition*" in that case. *Id.* at 9 (emphasis added). Having urged this Court to take a pass on reviewing their case, they are ill-positioned to jump the queue and demand that any review occur in their case. Their arguments are makeweights regardless.

The *Credit Bureau* respondents assert that the Court would benefit from having "the Seventh Circuit's considered views on the issues at stake, in addition to a lengthy dissent." *Credit Bureau* Br. in Opp. 19. But nothing about granting review in this case prevents the Court from obtaining the *Credit Bureau* opinion, reading it, and considering the judges' views. Petitioners in this case specifically cited, endorsed, and addressed the *Credit Bureau* decision in their petition (at 2, 13-18, 21, 26, 29, 31) and reply (at 7). It is assured that the parties in this case would address *Credit Bureau*.[1]

The *Credit Bureau* respondents also argue that "the facts" in this case are "outside the mainstream of FTC

---

[1] The *Credit Bureau* respondents also urge that this case presents a "vehicle problem" because "this Court's disposition of *Liu* could call into question the Ninth Circuit's decision" below. *Credit Bureau* Br. in Opp. 19. But as explained above, *Liu* does not resolve the issue presented here, one way or the other.

cases." *Credit Bureau* Br. in Opp. 19. But this case presents a purely legal question that does not turn on the facts. See Pet. i. To the extent atmospherics matter, however, the *$1.27 billion* judgment in this case powerfully illustrates what is at stake with the Court's interpretation of § 13(b). See Reply for Pet'rs 10.

Finally, the *Credit Bureau* respondents claim that case is a superior vehicle because "the FTC has chosen to exercise its independent litigating authority in [that] case and is a full party." *Credit Bureau* Br. in Opp. 20. But the FTC is a "full party" here, too. See Sup. Ct. R. 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties * * * in this Court * * * ."). Whether represented by the Solicitor General (as in this case), or advocating for itself (as in *Credit Bureau*), the Court need not be concerned that the FTC will want for adequate advocacy or that its counsel will fail to take advantage of "the agency's familiarity with the statute it administers." *Credit Bureau* Br. in Opp. 20.

This case is an ideal vehicle for resolving the § 13(b) issue. The Court should grant review, in this case.

CONCLUSION

The petition should be granted.

Respectfully submitted.

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
SARAH J. NEWMAN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

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

Counsel for Petitioners

JUNE 2020