

No. 19-825

IN THE
Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

CREDIT BUREAU CENTER, LLC, *et al.*,
Respondents.

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

**OPENING BRIEF FOR RESPONDENTS
CREDIT BUREAU CENTER, LLC AND
MICHAEL BROWN**

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QUESTION PRESENTED

Whether the term “permanent injunction” in Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), authorizes the district courts to grant monetary judgments, in light of the text and structure of the FTC Act.

PARTIES TO THE PROCEEDING

Petitioner Federal Trade Commission was the appellee in the court of appeals and the plaintiff in the district court.

Respondents Credit Bureau Center, LLC and Michael Brown were the appellants in the court of appeals and the defendants in the district court.

RULE 29.6 DISCLOSURE STATEMENT

Credit Bureau Center, LLC is wholly owned by Michael Brown and is not a parent company or a subsidiary of any other company.

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**OPENING BRIEF FOR RESPONDENTS
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INTRODUCTION

The Federal Trade Commission Act grants the FTC authority to address “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2). At issue in this case are the limits on that authority. Section 13(b) of the FTC Act states that in “proper cases” the agency may seek “a permanent injunction.” *Id.* § 53(b). According to the FTC, an injunction is simply a court order commanding an action. *See* FTC Pet. 14-15. And so, the agency contends, Section 13(b) authorizes it to obtain a court order requiring a party to pay millions or billions of dollars to compensate for past consumer harm. *See id.*

The FTC’s definition of an “injunction” may be a definition of something, but manifestly is not the definition of an injunction. Injunctions come from equity. They address *ongoing or future* harm, not harm that occurred in the past. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 108-109 (1998). They are available where an injury is *irreparable*—not where it can be compensated through money. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). And they provide respite where remedies at law are *inadequate*, not where a plaintiff seeks a classic legal remedy. *See id.* The FTC’s claim that an “injunction” includes backward-looking monetary relief is inconsistent with more than a century of this Court’s precedent. *See Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 75-76 (1867).

The FTC’s backup position—that the word “injunction” *implicitly* authorizes monetary relief—should likewise be rejected. *See* FTC Pet. 15. The text of Section 13(b) does not mention other forms of relief. *See* 15 U.S.C. § 53(b). And the structure of the FTC Act demonstrates that where Congress empowered the FTC to seek monetary relief, it said so explicitly and imposed clear limits on the agency’s power. *See id.* §§ 45(l)-(m), 57b. The Court should not imply a remedy in Section 13(b) that is absent from its text and incompatible with its structure.

The FTC’s approach to enforcement under Section 13(b) fails to give regulated entities fair notice, and it deprives consumers of the benefits of consistent rules. Where the agency proceeds through rulemaking, it provides nationwide standards for an entire industry to follow, rather than subjecting businesses to one-off monetary judgments based on the agency’s

perception of what qualifies as “unfair or deceptive.” Section 13(b) is a straightforward provision that permits the FTC to obtain an injunction; it should not be the agency’s primary enforcement tool. The Court should affirm the decision below, which carefully analyzed the text and structure of the FTC Act and concluded that Section 13(b) authorizes injunctions—and nothing more.

OPINIONS BELOW

The Seventh Circuit’s opinion is reported at 937 F.3d 764. FTC Pet. App. 1a-63a. The District Court’s opinion is reported at 325 F. Supp. 3d 852. FTC Pet. App. 65a-99a. The District Court’s final judgment and order are unpublished. *Id.* at 101a-134a.

JURISDICTION

The Seventh Circuit entered judgment on August 21, 2019. Justice Kavanaugh granted a 30-day extension of the period for filing a petition to December 19, 2019. The FTC filed a timely petition, and the Court granted certiorari on July 9, 2020. The Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the FTC Act, 15 U.S.C. § 41 *et seq.*, and other pertinent statutes, are set forth in an appendix to this brief. *Infra* pp. 1a-37a.

STATEMENT

A. Statutory Background

The FTC Act, enacted in 1914 and revised in the decades since, instructs the agency to “prevent

persons, partnerships, or corporations” from using “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2). This broad language is tempered by clear statutory limits on the FTC’s enforcement authority, which permit the agency to act through one of three mechanisms.

First, under Section 18 of the FTC Act, the agency may publish a rule prohibiting a business practice. *See* 15 U.S.C. § 57a. This provision allows the agency to promulgate “rules which define with specificity acts or practices which are unfair or deceptive,” *id.* § 57a(a)(1)(B), “preemptively resolving whether certain conduct violates” the FTC Act. FTC Pet. App. 11a. Prior to issuing a rule, the FTC must publish notice, seek comments, and provide an opportunity for an informal hearing. 15 U.S.C. § 57a(b)(1). The agency must also issue a statement of basis and purpose explaining “the prevalence of the acts or practices treated by the rule” and the “manner and context in which such acts or practices are unfair or deceptive.” *Id.* § 57a(d)(1).¹

After adopting a rule, Section 5 of the FTC Act authorizes the agency to “commence a civil action to recover a civil penalty” of up to \$10,000 per violation against any person or entity that violates the rule “with actual knowledge or knowledge fairly implied” that its actions are “prohibited by such rule.” *Id.* § 45(m)(1)(A). The agency may also file a civil suit under Section 19 of the FTC Act, which authorizes

¹ Congress enacted the FTC’s modern rulemaking authority in 1975. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-98 (1975).

the federal courts “to grant such relief” as they find “necessary to redress injury to consumers,” which “may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property,” and “the payment of damages.” *Id.* § 57b(a)(1), (b). The statute of limitations for Section 19 actions is three years. *Id.* § 57b(d).²

Second, under Section 5 of the FTC Act, the agency may initiate an enforcement action before an administrative law judge, who may issue a cease-and-desist order prohibiting the conduct at issue. *Id.* § 45(b). The cease-and-desist order must be accompanied by a written report, *id.*, and is subject to judicial review. *See id.* § 45(c), (g). After the cease-and-desist order becomes final, the FTC may file a civil action under Section 5 seeking a “civil penalty” of up to \$10,000 for each violation of the order, including against parties who are not named in the order but have “actual knowledge” that their actions are “unfair or deceptive” under the order. *Id.* § 45(l), (m). In an action to enforce a cease-and-desist order under Section 5, the “courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate.” *Id.* § 45(l).³

² Congress added Sections 5(m) and 19 to the FTC Act in 1975. *See* §§ 205-206, 88 Stat. at 2200-02. The FTC’s cease-and-desist power stretches back to the original FTC Act in 1914. *See* Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719-721 (1914).

³ Congress adopted Section 5(l) in the 1973 Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(c), 87 Stat. 576, 591 (1973).

The FTC may also commence a civil action under Section 19 against entities that engage in conduct prohibited by a cease-and-desist order, provided that the agency “satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent.” *Id.* § 57b(a)(2). Under that provision, the agency may seek the refund of money or property and the payment of damages within the three-year limitations period. *Id.* § 57b(b), (d).

Third, under Section 13(b) of the FTC Act—the provision at issue in this case—the agency may request an injunction against “any person, partnership, or corporation” that “is violating, or is about to violate, any provision of law enforced by” the FTC. *Id.* § 53(b). The FTC may obtain a temporary restraining order or preliminary injunction upon “a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” *Id.* After the temporary restraining order or preliminary injunction is granted, the FTC must file an administrative complaint within 20 days, or “the order or injunction shall be dissolved by the court and be of no further force and effect.” *Id.* In addition, “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Id.* Section 13(b) does not specify a statute of limitations. *See id.*⁴

⁴ Congress enacted Section 13(b) in 1973. *See* § 408(f), 87 Stat. at 592.

B. Procedural History

Michael Brown owned and operated Credit Bureau Center, LLC, a web-based credit report and monitoring service. FTC Pet. App. 1a. In 2017, the FTC initiated an enforcement action under Section 13(b) against Credit Bureau Center and Brown, alleging that Credit Bureau Center's websites misled consumers by advertising a free credit report and then charging consumers a monthly fee for credit monitoring services. *Id.* at 3a-5a. The FTC acknowledged that Credit Bureau Center's website advised consumers of the fee, but claimed that it improperly did so in a "smaller font" and with insufficient detail. *Id.* at 3a-4a. The FTC also alleged that Credit Bureau Center and Brown were responsible for the conduct of two independent contractors, who induced consumers to sign up for Credit Bureau Center's services through deceptive Craigslist advertisements. *Id.* at 3a-5a.

The FTC sought a permanent injunction imposing lifetime conditions on Brown's participation in the credit monitoring industry and placing other significant restrictions on Brown's business activities and those of future business partners, in addition to requiring Brown to comply with ongoing reporting requirements. *Id.* at 5a, 110-115a, 130a-132a. The agency also sought a monetary judgment against Credit Bureau Center and Brown in excess of \$5 million. *See id.* at 5a, 91a-92a. Credit Bureau Center and Brown opposed the monetary judgment on the ground that Section 13(b) authorizes injunctions, but not monetary awards. *See id.* at 5a. The District Court rejected that argument, citing the Seventh Circuit's 1989 decision in *FTC v. Amy*

Travel Service, Inc., 875 F.2d 564 (7th Cir. 1989), which had interpreted Section 13(b) to permit monetary judgments. See FTC Pet. App. 88a-90a. The District Court awarded the FTC \$5.2 million in “monetary relief,” in addition to entering the permanent injunction requested by the agency. *Id.* at 88a, 106a, 126a.

The Seventh Circuit affirmed the permanent injunction but reversed the monetary judgment. *Id.* at 2a-3a. The court began its analysis “with the text of section 13(b).” *Id.* at 14a. Describing the monetary judgment as “restitution,” the court found it “obvious” that “[r]estitution isn’t an injunction.” *Id.* at 12a. The Seventh Circuit emphasized that Section 13(b) provides a “forward-facing” remedy to address “ongoing or imminent harm,” rather than backward-looking relief. *Id.* at 14a. It also emphasized that Congress expressly authorized the FTC to seek monetary awards and other forms of equitable relief under Sections 5 and 19 of the FTC Act, while placing important limitations on the agency’s exercise of that power. See *id.* at 15a-17a. The Seventh Circuit concluded that the FTC’s remedy under Section 13(b) “is limited to injunctive relief.” *Id.* at 17a.

In ruling for Credit Bureau Center and Brown, the court overturned its earlier decision in *Amy Travel*, which had relied on “an exploration of statutory purpose” as the “polestar in cases raising interpretive questions about the scope of statutory remedies.” *Id.* at 32a. The Seventh Circuit explained that this Court had long since “‘abandoned’ its prior understanding that judges must ‘be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute,’” and

that it is “now well settled that Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action.” *Id.* at 32a-33a (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Chief Judge Wood, joined by Judges Rovner and Hamilton, dissented from the denial of rehearing en banc, and would have upheld *Amy Travel*. *See id.* at 41a-43a, 57a.

The Court granted certiorari, consolidating this case with *AMG Capital Management, LLC v. FTC*, No. 19-508.

SUMMARY OF ARGUMENT

I. Section 13(b) authorizes the FTC to seek an “injunction.” 15 U.S.C. § 53(b). The agency defines an injunction as a “court order commanding * * * an action”—basically anything a court mandates. FTC Pet. 14 (internal quotation marks omitted). According to the agency, an order to pay money to remedy a past injury meets that sweeping definition. *See id.* The agency’s interpretation of the word “injunction,” however, fails to account for the “traditional principles of equity govern[ing] the grant of injunctive relief.” *California v. Am. Stores Co.*, 495 U.S. 271, 281-282 (1990) (internal quotation marks omitted).

An injunction is available only where a plaintiff seeks relief from ongoing or future injury. *See United States v. Oregon State Med. Soc’y*, 343 U.S. 326, 333 (1952). The “basis of injunctive relief in the federal courts,” moreover, “has always been irreparable harm and inadequacy of legal remedies.” *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (internal quotation marks omitted). A suit seeking “recovery of a money judgment” is a classic action at law to remedy a past harm; it is not a suit for injunctive

relief. *White v. Sparkill Realty Corp.*, 280 U.S. 500, 510 (1930) (internal quotation marks omitted); see *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). An order to pay money does not meet the requirements for an injunction under this Court’s precedent.

II. As a fallback position, the FTC asserts that Section 13(b) *implicitly* grants the agency authority to seek other forms of relief, including a monetary judgment. See FTC Pet. 15-16. This argument fares no better. Neither the text of Section 13(b) nor the structure of the FTC Act supports it. Section 13(b) refers only to “injunction[s]”—a discrete category of equitable relief. 15 U.S.C. § 53(b). The statute states that the FTC may obtain an injunction only where a party “is violating” or “is about to violate” federal law, aligning neatly with the scope of injunctive relief at equity. *Id.* The structure of the FTC Act confirms that where Congress intended to grant the agency authority to seek “other and further equitable relief,” or the “refund of money or return of property,” it did so explicitly in the text of the statute, imposing clear limits on the agency’s authority to obtain those remedies. *Id.* §§ 45(l), 57b(b). The agency cannot circumvent those limits by seeking a monetary judgment under Section 13(b).

The FTC relies primarily on two mid-century cases, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), to support its position. See FTC Pet. 15. *Porter* is plainly distinguishable; it holds that a statute authorizing “a permanent or temporary injunction, restraining order, or *other order*” allows the federal courts to award restitution. 328 U.S. at

399 (emphasis added and internal quotation marks omitted). Section 13(b), in contrast, does not authorize “other order[s].” *Mitchell* is a manifestly atextual opinion; it rests on the Court’s assessment of the “policy of the Fair Labor Standards Act.” 361 U.S. at 289-292. The Court no longer subscribes to that kind of interpretive approach. *See Alexander*, 532 U.S. at 287. Where Congress specifies a remedy, the Court provides that remedy—and nothing more. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996).

III. Limiting Section 13(b) to injunctive relief best serves congressional policy, as enacted in the text of the FTC Act. Congress already allows the FTC to seek monetary remedies under both Sections 5 and 19. But it has done so under specific conditions: The agency must first promulgate a rule or obtain a final cease-and-desist order *before* it can collect a monetary judgment against entities that violate the rule or order. *See* 15 U.S.C. §§ 45(l), 57b. This ensures that regulated entities will have fair notice of which business practices are prohibited before being subject to a million- or billion-dollar judgment for engaging in those practices. That kind of notice is particularly important in the context of the amorphous “unfair or deceptive” standard set forth in the FTC Act. Where the FTC acts through administrative proceedings, as opposed to scattershot enforcement under Section 13(b), businesses and consumers benefit from industrywide rules.

The FTC’s interpretation of Section 13(b) creates other problems, too. The statute’s terms do not anticipate or provide for a monetary award, leading to confusion and inconsistent rules in the lower

courts on questions ranging from when awards are available to how they are calculated to the statute of limitations for relief. The Ninth Circuit, for example, permits the agency to obtain billion-dollar awards at summary judgment based on an approximation of the defendant's unjust gains, without regard to traditional rules of equity, and without any ruling by a factfinder. *See* AMG Pet. App. 38a-39a (Bea, J., specially concurring); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 602-603 (9th Cir. 2016) (holding that Section 13(b) permits “monetary relief that would traditionally be viewed as ‘legal’ ” (citation omitted)). The Second Circuit sets a higher bar: The agency must show that the relief it seeks is available at equity. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006). Reading Section 13(b) to permit only injunctive relief, as that term is understood at equity, prevents this confusion.

All 50 states have enacted statutes that prohibit unfair and deceptive business practices. If the Court interprets Section 13(b) narrowly, it will not disturb those state-law remedies. *See infra* pp. 42-43.

IV. If the Court concludes that Section 13(b) is not limited to injunctive relief, it should nevertheless hold that the monetary award in this case is unauthorized. Section 13(b) grants the FTC authority to seek an “injunction.” Even if the word “injunction” could be read to encompass other forms of equitable relief, what the FTC seeks in this case is a classic money judgment *at law*. *See Great-West*, 534 U.S. at 213-214. Section 13(b) does not provide that kind of remedy, explicitly or implicitly. Nor does the judgment below comply with the requirements of equity. To qualify as equitable restitution, a money judg-

ment must trace specific funds in the possession of the defendant back to the plaintiff. *See Great-West*, 534 U.S. at 213. To qualify as disgorgement, a judgment must award net profits, eschew joint-and-several liability, and mandate reimbursement to consumers. *See Liu v. SEC*, 140 S. Ct. 1936, 1947-50 (2020). The monetary judgment in this case does not meet those basic requirements. The Court should affirm the judgment below, or at a minimum, remand for further proceedings.

ARGUMENT

I. AN ORDER TO PAY MONEY IS NOT AN “INJUNCTION.”

The Court should reject the FTC’s position that an order to pay money is an “injunction.” In *Great-West*, the Court cautioned that “any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction.” 534 U.S. at 211 n.1. The FTC seeks to do exactly that here, characterizing a straightforward claim for money as an “injunction” seeking the return of property.⁵ At equity, injunc-

⁵ The FTC advanced this argument for the first time in its petition. The agency did not “seriously argue” in the proceedings below that the term “injunction” encompasses retrospective monetary relief. FTC Pet. App. 12a. Instead, the agency asserted that Section 13(b) “allows [it] to seek both injunctive *and* monetary relief for the violation of ‘any provision of law enforced by’ the FTC.” FTC Br., at 51 (7th Cir. Mar. 12, 2019), 2019 WL 1300373 (emphasis added) (quoting 15 U.S.C. § 53(b)). None of the circuit cases cited by the FTC adopt the agency’s new position. *See, e.g., Commerce Planet*, 815 F.3d at 598 (9th Cir.) (monetary relief awarded under Section 13(b) is ancillary to injunctive relief); *FTC v. Bronson Partners, LLC*, 654 F.3d

tions provide relief against ongoing or future harm, address irreparable injuries, and act where legal remedies are inadequate. An order to pay money flunks each of those requirements.

A. Injunctions Operate In Defined Circumstances At Equity.

The FTC argues that an injunction is simply a court order commanding or preventing an action. *See* FTC Pet. 14-15. And so, according to the agency, an order to pay money is an “injunction.” *See id.* at 15 (criticizing the Seventh Circuit’s reading of the word “injunction” to “exclude monetary remedies”). Whether any order by a court “might technically be called an injunction,” however, “is beside the point.” *Nken v. Holder*, 556 U.S. 418, 430 (2009). An “injunction is inherently an equitable remedy,” unavailable in traditional courts of law, and is subject to the limitations that equity imposes. *Great-West*, 534 U.S. at 211 n.1; *see also* 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1338, at 935-936 (5th ed. 1941).

The history of the injunction stretches back to the Roman “interdict.” 2 Joseph L. Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 1185, at 555 (14th ed. 1918). In ancient Rome, an interdict was “an interlocutory decree between two parties contending for possession” of property prior to trial. *Id.* § 1186, at 555. It was later extended to final orders of the same nature. *Id.* Interdicts were “chiefly used in controversies

359, 367 (2d Cir. 2011) (Section 13(b) permits “not only injunctive relief but also ancillary relief, including monetary relief.”).

respecting possession.” *Id.* at 556. The interdict evolved under English law into the injunction. *See id.* §§ 1188-89, at 556-557; *see also* 1 Howard C. Joyce, *A Treatise on the Law Relating to Injunctions* § 1, at 3-4 (1909). With “the development of equity jurisprudence,” the English courts granted injunctions “with increasing frequency.” 1 Joyce § 1, at 4. The injunction matured into an equitable remedy governed by defined standards and longstanding practice. *See, e.g.*, 4 Pomeroy § 1338, at 935-936.

When Congress uses the word “injunction” in a statute, it “brings the old soil with it.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (internal quotation marks omitted). This “old soil” has “long governed how courts enforce injunctions.” *Id.* (internal quotation marks omitted). A statutory reference to the word “injunction” “must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.” *Great-West*, 534 U.S. at 211 n.1. The word “injunction” in Section 13(b) should be understood in accordance with “Congress’ intention that traditional principles of equity govern the grant of injunctive relief.” *Am. Stores Co.*, 495 U.S. at 281-282 (internal quotation marks omitted). As explained below, equity imposes several crucial limitations on the availability of that relief. None are met here.

B. Injunctions Provide Forward-Looking Relief.

The “province of the injunction is not to afford a remedy for what is past but to prevent future mischief.” 1 Joyce § 41, at 82. The “sole function” of an injunction is thus “to forestall future violations.” *Oregon State Med. Soc’y*, 343 U.S. at 333. There are

two kinds of injunctions: prohibitory and mandatory. A prohibitory injunction commands a defendant to “refrain from doing a particular thing,” whereas a mandatory injunction “command[s]” the defendant “to do * * * a particular thing.” 1 James L. High, *A Treatise on the Law of Injunctions* § 2, at 3 (4th ed. 1905); see 4 Pomeroy § 1359, at 970.⁶ Neither kind of injunction permits an award of monetary relief to remedy a past wrong.

An injunction “is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured.” *Oregon State Med. Soc’y*, 343 U.S. at 333. Even “where relief is mandatory in form, it is to undo existing conditions,” rather than to provide a backward-looking remedy. *Id.* A mandatory injunction “always by its language prohibits the continuance of an act or of a structure.” 4 Pomeroy § 1337, at 934; see also 2 Fred F. Lawrence, *A Treatise on the Substantive Law of Equity Jurisprudence* § 1093, at 1176 (1929) (The “only purpose” of a mandatory injunction “is to prevent the continuance of a condition created by the defendant.”).

This Court has repeatedly affirmed these principles. In *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 56 U.S. (15 How.) 233 (1853), the Court described an injunction as “[i]n its nature * * * preventative justice.” *Id.* at 243. In

⁶ The “jurisdiction of equity by way of mandatory injunction is rarely exercised” and is “confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages.” 1 High § 2, at 3-4.

Lacassagne v. Chapuis, 144 U.S. 119 (1892), it held that an injunction “afford[s] preventative relief” and does not “redress alleged wrongs which have been committed already.” *Id.* at 124. In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the Court explained that “[t]he purpose of an injunction is to prevent future violations.” *Id.* at 633. And in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), it held that injunctive relief redresses “a continuing violation or the likelihood of a future violation,” not “past infractions.” *Id.* at 109; *see also Los Angeles County v. Humphries*, 562 U.S. 29, 31 (2010) (describing an injunction as “prospective relief” distinct from “monetary damages”).

Treatise authors agree. An injunction cannot “be employed to correct a wrong already done or restore to a party rights of which he has been deprived” unless “the injuries are continued.” 1 Joyce § 41, at 81-82. “To employ [an injunction] for the correction or redress of wrongful acts would be a perversion of the remedy.” Thomas C. Spelling, *A Treatise on the Law Governing Injunctions* § 21, at 34 (1926). “The appropriate function of the writ of injunction is to afford preventative relief only * * *. It is not, therefore, an appropriate remedy to procure relief for past injuries * * *.” 1 High § 23, at 38; *see* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2942 (3d ed. 2020 update) (“[I]njunctive relief looks to the future * * *.”).⁷

⁷ The FTC argues that injunctions may serve a “reparative” purpose. FTC Pet. 14 (internal quotation marks omitted). Where an injunction repairs an injury, it does so to prevent

A monetary judgment that compensates for past injury is not an injunction. It does not prevent future harm. Nor does it afford redress for an ongoing injury. The monetary judgment in this case awarded the FTC \$5.26 million to compensate for past “consumer losses.” FTC Pet. App. 88a, 92a, 106a, 126a; *see also* FTC Br., at 31 (7th Cir. Mar. 12, 2019), 2019 WL 1300373 (“FTC seeks redress for consumer losses * * * .”). This is a textbook monetary award to correct a wrong that has already occurred. Injunctions may take many forms, but there is one form they cannot take: An order to pay money to compensate for past injury.

C. Injunctions Repair Irreparable Harm When Legal Remedies Are Inadequate.

This Court’s precedent is clear: An injunction is available *only* where the plaintiff “has suffered an irreparable injury” and “remedies available at law, such as monetary damages, are inadequate to compensate for that injury.” *eBay Inc.*, 547 U.S. at 391. The “basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Sampson*, 415 U.S. at 88 (internal quotation marks omitted); *see also Younger v. Harris*, 401 U.S. 37, 46 (1971) (irreparable injury is “the traditional prerequisite to obtaining an injunction”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312

ongoing or prospective harm, rather than to remedy past harm. *See* 42 Am. Jur. 2d *Injunctions* § 2 (2020 update) (“To obtain injunctive relief based on past injury, the plaintiff must show a real and immediate threat that the injury will continue or be repeated.”).

(1982) (collecting cases). Neither of those requirements is met by the monetary judgment in this case.

Where a statute authorizes a plaintiff to seek an “injunction,” the plaintiff must “satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm.” *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). Injury is irreparable when it cannot be “compensated by damages at law.” *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 80 (1866). That requirement “cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Thus, “[m]ere injuries, however substantial, in terms of money, time and energy * * * are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Sampson*, 415 U.S. at 90 (internal quotation marks omitted); see also *Great-West*, 534 U.S. at 216 (holding that “equity would never permit” an “injunction against failure to pay a simple indebtedness—or, for that matter, an injunction against failure to pay punitive damages”); 1 Roger Foster, *A Treatise on Federal Practice, Civil and Criminal* § 205, at 685 (4th ed. 1909) (defining an “injunction” to exclude “the payment to the complainant of a sum of money”). Even where an injury is ongoing, if “substantial redress can be afforded by the payment of money,” an injunction is inappropriate. *City of Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933) (denying injunction where monetary award sufficient to compensate for ongoing nuisance).

For an injunction to issue, “remedies available at law, such as monetary damages,” must be “inadequate to compensate” for the plaintiff’s injury. *eBay Inc.*, 547 U.S. at 391; *see also Stanton*, 73 U.S. (6 Wall.) at 75-76 (discussing Court’s “jurisdiction to grant an injunction” where “the remedy at law [is] inadequate”). As the Pomeroy treatise explains, the “incompleteness and inadequacy of the legal remedy” is a “criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.” 4 Pomeroy § 1338, at 936. The legal remedy of damages is “inadequate if the property involved is unique, so that it or its substantial equivalent could not be replaced with the damages recovered, or if the probable injury suffered is of such a nature that the damages cannot be ascertained with reasonable accuracy.” Henry L. McClintock, *Handbook of the Principles of Equity* § 43, at 105 (2d ed. 1948) (footnote and citation omitted).

Where a plaintiff’s action is “for the recovery of a money judgment, the action is one at law.” *White*, 280 U.S. at 510 (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)). “Almost invariably[,] suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages.’” *Great-West*, 534 U.S. at 210 (alterations and internal quotation marks omitted); *see also* Austin Wakeman Scott, *Select Cases and Other Authorities on the Law of Trusts*, Constructive Trusts § 1, at 714 (3d ed. 1940) (“[I]n the case of money the remedy at law for the recovery of damages is ordinarily adequate * * * .”). Because legal remedies are adequate, a plaintiff “is ordinarily not entitled to maintain a suit in equity for the specific recovery of [his] mon-

ey.” Restatement (First) of Restitution § 160, cmt. e (1937); *see also id.* § 163, cmt. d.⁸

An order to pay money does not meet these fundamental requirements for injunctive relief. If an injury can be compensated through money, it is *reparable*—not irreparable. It is calculable and compensable. And relief is available at law: Indeed, a monetary judgment is *the* remedy typically awarded at law. *See Great-West*, 534 U.S. at 210; *see also infra* pp. 42-43 (discussing legal remedies available to consumers under state law). Where a court determines a sum owed and orders the defendant to pay that sum, it is not ordering injunctive relief, as the District Court itself recognized. *See* FTC Pet. App. 106a, 126a (describing award as a “monetary judgment” and “monetary relief”). It is issuing a money judgment at law.⁹

⁸ The FTC claims that an injunction may be used to return “property” to a plaintiff. *See* FTC Pet. 14-15. It is clear from context that the agency’s sources discuss non-fungible property or situations involving irreparable harm. *See* 2 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 861, at 155 (1836) (an injunction “may contain a direction to the party defendant to yield up, to quiet, or to continue, the possession of lands or other property”); *id.* § 873, at 164 (use of injunction “to restrain the alienation of property”); *id.* § 908, at 191 (use of injunction “to restrain a party from making vexatious alienations of real property *pendente lite*”); *id.* § 912, at 196 (use of injunction to preserve “property from destruction or irreparable injury”).

⁹ The Court should reject the FTC’s argument that the word “injunction” should be given broader scope in a government enforcement action. *See* FTC Pet. 19. The meaning of the word “injunction” does not change based on the identity of the party

D. Restitution Isn't An Injunction.

According to the FTC, this Court's decision in *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824), permits courts to use an injunction "to return money improperly seized" to the defendant. FTC Pet. 14. But in *Osborn*, the lower court issued an injunction to *restrain* the collection and use of tax revenue from the bank, *see* 22 U.S. (9 Wheat.) at 837-838, in accordance with the power of the federal courts to enjoin state officers "from executing an unconstitutional statute of the state" and creating "irreparable damage." *Ex Parte Young*, 209 U.S. 123, 152 (1908) (internal quotation marks omitted) (describing *Osborn*). The injunction issued in *Osborn* provided forward-looking relief against continuing and irreparable injury, preventing "the total destruction" of the bank. *Osborn*, 22 U.S. at 840-842. The *Osborn* court separately authorized *restitution* of tax revenue already collected. *See id.* at 870-871 (describing decree directing "restitution of the specific sum of 98,000 dollars").

As the Seventh Circuit put it, "[r]estitution isn't an injunction." FTC Pet. App. 12a. "[R]estitutionary remedies" are distinct from "[c]oercive remedies such as injunctions." 1 Dan B. Dobbs, *Law of Remedies: Damages–Equity–Restitution* § 1.1, at 2 (2d ed. 1993). An injunction is a "purely preventative" remedy, separate from "pecuniary" forms of relief. 4 Pomeroy § 1316, at 894-895 & n.18. Restitution, in contrast, "is a return or restoration of what the defendant has

who seeks it. *See* FTC Pet. App. 37a ("[T]he fact that the government is the plaintiff here does not affect the analysis.").

gained in a transaction.” 1 Dobbs § 4.1(1), at 551. By using the word “injunction” in Section 13(b), Congress limited the agency to a specific form of equitable relief. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365 (2011) (distinguishing between injunctions and other equitable remedies); *Owner-Operator Indep. Drivers Ass’n v. Landstar Sys., Inc.*, 622 F.3d 1307, 1324 (11th Cir. 2010) (“Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.”).

“Restitution claims for money are usually claims ‘at law.’” 1 Dobbs § 4.1(1), at 556. Restitution may also be available at equity. *See id.* § 4.3(1), at 587 (describing different kinds of equitable restitution, including a constructive trust, equitable lien, and accounting for profits). Regardless of whether restitution is legal or equitable in a given situation, however, an injunction is a separate remedy with separate requirements. The monetary judgment in this case does not meet those requirements.

II. THE TEXT AND STRUCTURE OF THE FTC ACT CONFIRM THAT SECTION 13(B) DOES NOT AUTHORIZE MONETARY RELIEF.

The text of Section 13(b) states that the FTC may obtain an “injunction.” 15 U.S.C. § 53(b). It does not authorize—either explicitly or implicitly—other forms of relief. The structure of the FTC Act confirms that conclusion. Where Congress intended for the FTC to obtain “other and further equitable relief,” “the refund of money,” or “the payment of damages,” it said so explicitly—and placed important limits on those remedies, including fair notice and a

statute of limitations. *Id.* §§ 45(l), 57b(b), 57b(d). Under this Court’s precedents, there is no basis for interpreting the word “injunction” in Section 13(b) to authorize a money judgment. *See Meghrig*, 516 U.S. at 486.

A. The Text Of Section 13(b) Authorizes Injunctions And Nothing More.

“As in any statutory construction case, we start, of course, with the statutory text.” *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (alterations and internal quotation marks omitted). Section 13(b) allows the FTC to seek an “injunction.” 15 U.S.C. § 53(b). That’s it. The text does not mention monetary relief. It does not discuss other forms of equitable relief. It does not grant the power to seek restitution, disgorgement, a civil penalty, or damages. By authorizing the FTC to seek an injunction in Section 13(b), Congress limited the agency to a specific form of equitable relief, which is available only in defined circumstances. *See Meghrig*, 516 U.S. at 484 (holding that a “plain reading” of the word “restrain” is limited to injunctive relief).

Section 13(b), moreover, is all about injunctions: It authorizes the agency to seek “a temporary restraining order,” “a preliminary injunction,” or “a permanent injunction.” 15 U.S.C. § 53(b). It requires the agency to find that “enjoining” a legal violation would be in the public interest. *Id.* It grants the agency power to bring suit to “enjoin” practices that violate federal law. *Id.* And it allows courts to issue “a temporary restraining order or a preliminary injunction.” *Id.* By repeatedly using the words “injunction” and “enjoin,” Congress demonstrated

that the scope of Section 13(b) is limited to injunctive relief.

Congress's reference to specific *kinds* of injunctions in Section 13(b) further indicates that Congress limited Section 13(b) to a narrow subset of equitable remedies. Section 13(b) sets forth a specific procedure for obtaining a temporary restraining order or preliminary injunction, including the requirement that the FTC file an administrative complaint within 20 days "after issuance of the temporary restraining order or preliminary injunction." *Id.* Section 13(b) also authorizes a "permanent injunction" in "proper cases" and after "proper proof." *Id.* If Congress intended the word "injunction" in Section 13(b) to refer to all forms of equitable relief, it would not have distinguished between different types of injunctions and discussed the procedures for obtaining them.

A final textual clue is the requirement in Section 13(b) that the FTC seek an injunction only where a "person, partnership, or corporation *is violating, or is about to violate*, any provision of law enforced by the Federal Trade Commission." *Id.* (emphases added). "The meaning of this timing restriction is plain * * * ." *Meghrig*, 516 U.S. at 485. By confining the FTC's enforcement power to current ("is violating") or prospective ("is about to violate") infractions, Section 13(b) "was designed to provide a remedy that ameliorates present or obviates the risk of future imminent harms, not a remedy that compensates for past" injury. *Meghrig*, 516 U.S. at 486 (internal quotation marks omitted); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (holding that "pervasive use of the present tense" and the phrase "to be in violation"

shows relief is “forward-looking”); *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (concluding that a statutory authorization “to prevent and restrain” violations “indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations”). Ongoing or future harm is precisely the kind of injury an injunction is designed to address—and fundamentally inconsistent with an order to pay money for past injury. See *Oregon State Med. Soc’y*, 343 U.S. at 333.

In short, Section 13(b)’s text strongly supports the conclusion that Congress intended to limit the FTC to injunctive relief, as that term is understood at equity.

B. The Structure Of The FTC Act Demonstrates That Congress Knew How To Authorize Monetary Relief.

The agency contends that by authorizing *one* form of equitable relief, Section 13(b) implicitly authorizes *all* forms of relief. See FTC Pet. 15-17. That argument is as odd as it sounds. It defies the standard principle that where “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). The “presumption” that Congress purposefully omitted certain remedies is “strongest” where Congress enacted “an integrated system of procedures for enforcement.” *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (internal quotation marks omitted); see *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)

(explaining that a “carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly” (internal quotation marks omitted)).

Meghrig exemplifies this principle. There, the Court examined a statutory scheme where Congress authorized the federal courts to “restrain” environmental violations in one statute, while permitting the recovery of “all costs” in a separate statute that also addressed environmental harm. *See* 516 U.S. at 484-485. Comparing the two provisions, the Court concluded that the former did not permit a monetary award. *See id.* The “stark differences between the language” of the two statutes, *id.* at 487, demonstrated that Congress “knew how to provide for the recovery of * * * costs,” and chose not to do so. *Id.* at 485. As the Court explained, “where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute,” it “cannot be assumed that Congress intended to authorize by implication additional judicial remedies.” *Id.* at 487-488 (internal quotation marks omitted).

So too here: The intricate structure of the FTC Act—and the carefully calibrated remedies provided by Congress in different parts of the Act—demonstrate that the FTC’s authority under Section 13(b) is limited to injunctive relief. Section 5 of the FTC Act permits the agency to “recover a civil penalty” where a party violates an FTC rule or a cease-and-desist order. 15 U.S.C. § 45(m)(1). It also provides that “district courts are empowered to grant mandatory injunctions and *such other and further equitable relief* as they deem appropriate in the

enforcement of such final orders.” *Id.* § 45(l) (emphasis added). Where a party violates an FTC rule or a cease-and-desist order, Section 19 authorizes the district court “to grant such relief” as it “finds necessary to redress injury to consumers,” including “the refund of money or return of property” and “the payment of damages.” *Id.* § 57b(b).

Sections 5 and 19 make clear that Congress “knew how” to invoke the equitable jurisdiction of the federal courts and provide for monetary remedies. *Meghrig*, 516 U.S. at 485. Section 5 explicitly distinguishes between “mandatory injunctions” and “other and further equitable relief.” 15 U.S.C. § 45(l). That distinction is intentional: Congress added the phrase “other and further equitable relief” to Section 5(l) *at the same time* that it authorized the FTC to seek only a “permanent injunction” in Section 13(b). *See* § 408, 87 Stat. at 591. Section 19 provides for “the refund of money or return of property.” 15 U.S.C. § 57b(b). Congress adopted Section 19 just *two years after* Section 13(b). *See* § 206, 88 Stat. at 2201-02. As the Seventh Circuit held, if Section 13(b) “permitted restitution as a general matter, Congress would have had no reason to enact” Section 19, “which authorizes restitution under narrower circumstances.” FTC Pet. App. 16a.

Congress distinguishes between injunctions and other forms of equitable and monetary relief throughout the U.S. Code. For example, federal courts may issue “temporary and final injunctions” to prevent copyright violations, 17 U.S.C. § 502(a), while separately awarding “damages and profits,” *id.* § 504. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 n.1 (2014). In trademark suits,

courts may grant both “injunctions,” 15 U.S.C. § 1116(a), and the recovery of profits. *Id.* § 1117(a). In Employee Retirement Income Security Act proceedings, courts may “enjoin” unlawful practices and provide “other appropriate equitable relief * * * to redress” violations. 29 U.S.C. § 1132(a)(3), (8). And to address violations of securities laws, courts may issue “a permanent or temporary injunction or restraining order,” 15 U.S.C. § 78u(d)(1), in addition to “any equitable relief that may be appropriate or necessary for the benefit of investors.” *Id.* § 78u(d)(5).

Congress recognizes, moreover, that an injunction is a narrow form of equitable relief, and frequently chooses to grant additional equitable powers. For instance, Congress authorized the Consumer Financial Protection Bureau “to seek all appropriate legal and equitable relief including a permanent or temporary injunction.” 12 U.S.C. § 5564(a). In employment cases, courts may “enjoin” unlawful employment practices and order “any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g)(1); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 785 (1976) (noting Congress added the phrase “any other equitable relief” in a later amendment, expanding the federal courts’ equitable powers). In cases involving military service members, courts have “full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders” to enforce employment protections. 38 U.S.C. § 4323(e). And in certain Federal Energy Regulatory Commission cases, the agency may seek an injunction or “other legal or equitable relief as the court determines appropriate,

including refund or restitution.” 15 U.S.C. § 3414(b)(4).

“Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.” *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019). Interpreting Section 13(b) to implicitly provide additional equitable remedies, or to allow the refund of money or property, would be inconsistent with the structure of the FTC Act. It would also be inconsistent with Congress’s practice in many different statutory provisions. If Congress had intended Section 13(b) to provide for monetary relief, it would have said so—and it didn’t, pointedly using the word “injunction” instead of some broader phrase.

The FTC resists this structural argument. It points to the so-called “saving clause” of Section 19(e), which states that the remedies “provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law,” and that “[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law.” 15 U.S.C. § 57b(e). According to the agency, this language prevents the Court from making structural inferences based on the text of Section 19. *See* FTC Pet. 21.

As the Seventh Circuit explained below, the FTC’s “understanding of the saving clause runs against more than a century of interpretive practice.” FTC Pet. App. 18a. A saving clause “cannot in reason be construed” as permitting the agency to do that “which would be absolutely inconsistent with the provisions of the act.” *Tex. & Pac. Ry. Co. v. Abilene*

Cotton Oil Co., 204 U.S. 426, 446 (1907). “In other words, the act cannot be held to destroy itself.” *Id.* Interpreting Section 13(b) to permit the FTC to seek monetary relief *without* complying with the detailed requirements of Section 19 would allow Section 19 “to destroy itself.”

In any event, the saving clause in Section 19 does not answer the basic question in this case. As the Seventh Circuit pointed out, Section 19 preserves only the authority that the FTC is granted by statute. *See* FTC Pet. 19a. If Section 13(b) does not grant authority to seek monetary relief, Section 19 does not preserve that authority. *See id.* Equally important, there is no saving clause in Section 5, which explicitly provides for a “civil penalty” and “*other and further equitable relief.*” 15 U.S.C. § 45(l) (emphasis added). The Court can infer based on Section 5 alone that Congress did not intend to grant either of those remedies in Section 13(b).

C. It Would Be Unsound For An Implied Remedy To Have Greater Scope Than An Explicit Remedy.

“It would be unsound” for “a statute’s *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998) (refusing to imply damages remedy where defendant lacked notice of Title IX violation). The FTC seeks that unsound result here. Sections 5 and 19 of the FTC Act authorize monetary and equitable remedies only *after* the

FTC issues a rule prohibiting a specific business practice or obtains a final cease-and-desist order against that practice—and a party engages in it anyway. *See* 15 U.S.C. §§ 45(m)(1)(A)-(B), 57b(a). The Court should not imply a monetary remedy in a provision of the FTC Act that does not contain those protections.

To adopt a rule prohibiting an unfair or deceptive business practice, Congress requires the FTC to first publish “an advance notice of proposed rulemaking” containing “a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives” and inviting “the response of interested parties.” *Id.* § 57a(b)(2)(A). The FTC must then “publish a notice of proposed rulemaking stating with particularity the text of the rule,” “allow interested persons to submit written data, views, and arguments,” and “provide an opportunity for an informal hearing.” *Id.* § 57a(b)(1). Finally, the FTC may issue a final rule that is “based on the matter in the rulemaking record.” *Id.* Only then—once the final rule has issued—may the agency seek monetary relief for rule violations under Section 19. *See id.* § 57b(a)-(b). To obtain a civil penalty under Section 5, the FTC must similarly show that the defendant had “actual knowledge or knowledge fairly implied” that its actions were prohibited by a final rule. *Id.* § 45(m)(1)(A).

To obtain a cease-and-desist order, the agency must prove its case before an administrative law judge and survive appellate review in the federal courts. *See id.* § 45(b)-(c), (g). Only then may the agency recover “other and further equitable relief” under Section 5,

id. § 45(*l*), or a monetary remedy under Section 19 from a party that violates the cease-and-desist order. *Id.* § 57b(b). To obtain a civil penalty under Section 5, the FTC must likewise prove that the defendant had “actual knowledge” that its actions were “unfair or deceptive” under the cease-and-desist order. *Id.* § 45(*l*), (m)(1)(B)(2).

The FTC’s interpretation of Section 13(b), in contrast, does not provide fair notice to regulated entities. According to the agency, it may collect millions or billions of dollars under Section 13(b) *without* forewarning that a specific act or practice is prohibited, and without allowing regulated entities an opportunity to cease that activity. *See* FTC Pet. 12-13 (explaining that Sections 5 and 19 are less effective enforcement tools because they require notice). The Court should reject the FTC’s position, which is fundamentally inconsistent with the structure of the FTC Act, and which renders the important constraints on the agency’s authority in Sections 5 and 19 superfluous. As the Court said in *Gebser*, where “a statute’s express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.” 524 U.S. at 290.

The fact that Section 13(b) does not specify a statute of limitations—where a neighboring provision explicitly provides for monetary relief and attaches a three-year limitations period—is further evidence that Congress did not intend to allow monetary judgments under Section 13(b). If the FTC seeks the “refund of money” or “the payment of damages”

under Section 19, it must do so within “3 years after the rule violation” or “unfair or deceptive act or practice.” 15 U.S.C. § 57b(b), (d). Section 13(b), in contrast, does not contain a statute of limitations—and the FTC has argued that one does not apply. See *FTC v. Real Wealth, Inc.*, No. 10-0060-CV-W-FJG, 2011 WL 3206887, at *3 (W.D. Mo. July 28, 2011).¹⁰ As this Court said in *Meghrig*, if Congress had intended Section 13(b) “to function as a cost-recovery mechanism, the absence” of a statute of limitations “would be striking.” 516 U.S. at 486. The absence of a statute of limitations “strongly support[s]” the conclusion that Section 13(b) does not permit monetary relief. *Id.*

D. The FTC’s Reading Of Section 13(b) Is Un-supported By This Court’s Precedents.

Instead of relying on the text or structure of the FTC Act, the agency instead rests primarily on two old cases, *Porter* and *Mitchell*, holding that “there is inherent in the Courts of Equity a jurisdiction to give effect to the policy of the legislature.” *Mitchell*, 361 U.S. at 292 (alterations and internal quotation marks omitted). The FTC posits that under these cases, any statutory reference to one equitable remedy must be understood to authorize the full equity

¹⁰ If the Court interprets Section 13(b) to authorize monetary relief, such relief may be subject to the five-year statute of limitations in 28 U.S.C. § 2462. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1639, 1642-43 (2017). The Ninth Circuit, however, has rejected that interpretation of Section 13(b). See *FTC v. Dantuma*, 748 F. App’x 735, 739 (9th Cir. 2018) (Section 13(b) “contains no statute of limitations”), *petition for cert. filed sub nom., Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (Oct. 18, 2019).

powers of the federal courts. *See* FTC Pet. 10, 15. *Porter* and *Mitchell* are distinguishable, however; and if not, they should be limited to their facts or overruled.

Porter involved the Emergency Price Control Act of 1942, a wartime statute authorizing an Administrator to seek “a permanent or temporary injunction, restraining order, or other order” to address violations of the Act. 328 U.S. at 396-397 (internal quotation marks omitted). At issue in *Porter* was whether this statutory provision permitted the Administrator to seek disgorgement of unlawful rents collected by a landlord. *See id.* The Court concluded that it did, explaining that “the term ‘other order’ contemplates a remedy other than that of an injunction or restraining order,” and that an “order for the recovery and restitution of illegal rents may be considered a proper ‘other order.’” *Id.* at 399. *Porter* is plainly distinguishable; the statute at issue expressly provided for equitable relief *beyond* a “permanent injunction” or “restraining order.”

Mitchell involved the Fair Labor Standards Act of 1938, which authorized the federal courts to “restrain violations” and provided that “no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation.” 361 U.S. at 289 (internal quotation marks omitted). At issue in *Mitchell* was whether the statute empowered the federal courts “to order reimbursement for loss of wages caused by an unlawful discharge or other discrimination.” *Id.* The Court concluded that it did, stating that when “Congress entrusts to an equity

court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.” *Id.* at 291-292.

Mitchell is likewise distinguishable. It is a thoroughly atextual decision: The Court interpreted the statute in light of its “purposes,” “policy,” and “central aim,” rather than the text that Congress wrote. *Id.* at 292. Indeed, the Court did not simply imply a monetary remedy where the statute failed to specify one; it implied a monetary remedy despite a statutory provision *explicitly prohibiting* monetary remedies. *See id.* at 299 (Whittaker, J., dissenting) (disagreeing on the ground that the Act “expressly denies to all courts jurisdiction and power” to order payment of unpaid wages or overtime). To the extent the Court departed from ordinary principles of statutory interpretation in a 1960 opinion, such an interpretive approach should not be extended here. *See Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660-661 (2016) (rejecting argument that statutory language permitting “other appropriate equitable relief” grants courts “ancillary jurisdiction to award complete relief”); *see also Mertens*, 508 U.S. at 256-258.

Mitchell did not involve the same text or statutory scheme as Section 13(b), and thus does not dictate the outcome of this case. *See* 361 U.S. at 289. Nor should the Court extend its reasoning. In *Meghrig*, the Court held that a statutory provision authorizing forward-looking injunctive relief without a statute of limitations did *not* authorize monetary remedies to compensate for past harm, in the context of an elabo-

rate statutory scheme that provided for such remedies elsewhere. See 516 U.S. at 484-486. *Meghrig*, not *Mitchell*, governs the outcome here.

To the extent *Mitchell* is not distinguishable, it should be limited to its facts or overruled. *Mitchell* is an example of this Court's mid-century embrace of the "equity of the statute," a doctrine authorizing "courts to extend a clear statute to reach omitted cases that fell within its ratio or purpose." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 22 (2001). The Court has since rejected that approach as inconsistent with the power of the federal courts. See *Alexander*, 532 U.S. at 287 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink."); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) (rejecting expansive interpretation of consumer protection statutes "that are narrowly drawn").

In *California v. Sierra Club*, 451 U.S. 287 (1981), the Court held that the "federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.* at 297. In *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court explained that it is "an elemental canon of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Id.* at 533 (internal quotation marks omitted). In *Great-West*, the Court emphasized that it was "reluctant to tamper with" a statutory scheme "by extending remedies not specifically authorized by its text." 534

U.S. at 209 (internal quotation marks omitted). And in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), the Court stated that an “express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *Id.* at 328 (quoting *Alexander*, 532 U.S. at 290). Just last Term, the Court refused to engage in “[a]textual judicial supplementation” of a statute. *Rotkiske*, 140 S. Ct. at 361.

Mitchell departs from a long line of precedent holding that Congress “says what it means and means what it says.” *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). If it reaches the question, the Court should limit *Mitchell* to its facts, or overrule it.

III. LIMITING SECTION 13(B) TO INJUNCTIVE RELIEF BEST SERVES CONGRESSIONAL POLICY.

Limiting Section 13(b) to its text best serves congressional policy, as expressed through the text of the FTC Act. Congress repeatedly demonstrated its intent to provide regulated entities with fair notice *before* subjecting those entities to a money judgment. Reading Section 13(b) narrowly helps both businesses and consumers; where the FTC proceeds through rulemaking rather than ad hoc enforcement, the agency can influence the practices of an entire industry, rather than a handful of entities. State-law enforcement actions, moreover, provide consumers with a separate avenue for obtaining monetary judgments, and in many cases may provide similar or greater relief.

A. Requiring The FTC To Proceed Through Rulemaking Or A Cease-And-Desist Order Gives Fair Notice To Regulated Entities.

The FTC's mandate is both broad and vague. Congress granted the agency authority to prohibit "unfair or deceptive acts or practices," 15 U.S.C. § 45(a), without defining which practices are unfair or deceptive. It tempered that broad grant of authority by requiring the FTC to give clear notice of which practices are prohibited—and afford regulated entities an opportunity to cease those practices—*before* collecting a monetary judgment. The FTC's interpretation of Section 13(b) to allow monetary awards circumvents those statutory restraints on the agency's authority.

In recent years, the FTC has dramatically expanded its use of Section 13(b) to obtain monetary judgments. *See* Cert.-Stage Amicus Br. of Chamber of Commerce 6-8, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 ("Cert-Stage Chamber Amicus Br."). In 2012, the FTC announced that it would seek monetary awards under Section 13(b) "regardless of whether the alleged misconduct is 'common or novel, clearly a violation or never before considered.'" *Id.* at 8 (quoting *Withdrawal of the Comm'n Policy Statement on Monetary Equitable Remedies in Competition Cases*, 77 Fed. Reg. 47,070, 47,071 (Aug. 7, 2012), 2012 WL 3163476). The agency has kept its word, increasing its take under Section 13(b) from \$223.7 million in 2011 to \$5.29 billion in 2017. *See id.* at 7-8. By pursuing million- or billion-dollar judgments even where conduct does *not* clearly violate federal law, the agency fails to give fair notice to regulated entities of prohibited business practices.

The FTC's ad hoc enforcement of its statutory mandate under Section 13(b) prevents the development of industrywide regulations that guide businesses and assist consumers. Since 2000, the FTC has promulgated only three rules pursuant to its authority to prevent deceptive and unfair trade practices. *See* Daniel A. Crane, *Debunking Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1863 (2015); *see also* 16 C.F.R. subch. D. Agency adjudication—another potential way to develop substantive standards—has also become “a vanishingly small aspect of what the FTC does.” Crane, *supra*, at 1867. “Far more often,” the FTC simply enters into consent decrees without elaborating on or developing broadly applicable standards. *Id.* at 1867-68. As a result, regulated entities are left guessing at what the agency may consider unfair or deceptive, and consumers are subject to a patchwork of business practices.

B. The FTC's Atextual Interpretation Of Section 13(b) Leads To Further Uncertainty For Regulated Entities And Courts.

The FTC's reliance on Section 13(b) as an enforcement mechanism poses yet other problems for regulated entities and courts. Section 13(b) states that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). It does not mention monetary relief at all, much less provide guidance on when monetary relief is warranted, in what amount, and under which conditions.

Take, for instance, the phrase “proper cases.” What is a proper case for monetary relief? Sections 5 and 19 plainly state that a regulated entity must have

prior notice that its conduct is unlawful—either through a regulation or cease-and-desist order—before the FTC can collect a monetary judgment. Section 13(b) does not provide any such guidance. And what is “proper proof”? In the Ninth Circuit, the FTC may obtain a money judgment *at summary judgment*, without proving its case to a factfinder. See AMG Pet. App. 38a-40a (Bea, J., specially concurring) (disagreeing with this approach).

And how should the monetary award be calculated? The Second Circuit holds that Section 13(b) provides only *equitable* relief, and it computes monetary judgments in accordance with equitable rules. Where money in the defendant’s possession can “clearly be traced” to injured consumers, the Second Circuit permits equitable restitution. *Verity Int’l*, 443 F.3d at 66-67 (internal quotation marks omitted). In other cases it permits equitable disgorgement. See *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372-374 (2d Cir. 2011). The Ninth Circuit, in contrast, has “expressly rejected the argument that § 13(b) limits district courts to traditional forms of equitable relief,” and instead awards any form of *legal* relief. AMG Pet. App. 17a (citing *Commerce Planet*, 815 F.3d at 602). Several courts have held, moreover, that the FTC need not prove its case “with precision,” and may instead “seek an award that ‘reasonably approximates the amount of the defendant’s unjust gains.’” Cert-Stage Chamber Amicus Br. 10 (quoting *Bronson Partners*, 654 F.3d at 368) (alterations omitted).

What is the statute of limitations for a monetary award under Section 13(b)? Does the three-year statute of limitations in Section 19, see 15 U.S.C.

§ 57b(d), implicitly apply to Section 13(b)? Is Section 13(b) governed by the five-year statute of limitations for civil penalties, 28 U.S.C. § 2462? Or is there no statute of limitations at all, as the Ninth Circuit has held? *See FTC v. Dantuma*, 748 F. App'x 735, 739 (9th Cir. 2018), *petition for cert. filed sub nom., Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (Oct. 18, 2019). Section 13(b) does not answer those questions, either.

Limiting Section 13(b) to injunctive relief alleviates these problems. Longstanding principles of equity, and this Court's precedents, establish when a permanent injunction is appropriate. *See eBay Inc.*, 547 U.S. at 391 (A "plaintiff seeking a permanent injunction must satisfy a four-factor test * * *."). And because injunctions provide forward-looking relief, there is no need for a limitations period. The uncertainty created by the FTC's reliance on a provision that does not mention monetary relief—or provide any guidance on when such relief is appropriate—is yet another reason to read Section 13(b) in accordance with its plain text.

C. Consumers Are Protected By Robust State-Law Remedies.

Limiting Section 13(b) to injunctive relief will leave consumers with significant protection from unfair and deceptive business practices. The FTC may obtain an injunction under Section 13(b) to halt such practices. *See* 15 U.S.C. § 53(b). And consumers, as well as State Attorneys General, may seek relief under a myriad of state laws.

All fifty states have enacted statutes to prohibit unfair and deceptive acts and practices. *See* Prentiss Cox et al., *Strategies of Public UDAP Enforcement*,

55 Harv. J. on Legis. 37, 42-43 (2018). Every state also “recognizes some form of common-law action for deceit, fraud, misrepresentation, or warranty that is applicable to consumer transactions.” Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* § 2:1 (2019 update). Monetary remedies, including restitution, are available under state consumer protection statutes, which may be enforced both by individual consumers and by State Attorneys General. *Id.* § 6:8; Cox, *supra*, at 56, 59 (noting that over 670 consumer actions brought by State Attorneys General were resolved in 2014). State consumer protection laws often allow private plaintiffs to recover attorney’s fees, Cox, *supra*, at 43 & n.26, and may authorize treble damages, punitive damages, or statutory minimum damages. See Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L. J. 437, 448-449 (1991).

This state-level enforcement may be swift and efficient. “Investigation and voluntary settlements comprise the bulk of the consumer protection work of most state AGs.” Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 Antitrust L.J. 911, 920 (2017). And the vast majority of state enforcement efforts, whether settled or litigated, secure some form of monetary relief. See Cox, *supra*, at 70 tbl.5. That monetary relief often comes in the form of restitution. See Pridgen & Alderman § 7:13. And, even in settlements, customers tend to recover “100% of the purchase price.” Cox, *supra*, at 78. State Attorneys General secure hundreds of millions of dollars each year through these procedures. *Id.* at 70-71 & fig.7. Limiting the

FTC's authority under Section 13(b) will not impair these state-law suits, which provide substantial protection for consumers.

IV. THE MONETARY JUDGMENT IN THIS CASE IS UNAUTHORIZED.

The Court should hold that the FTC's authority under Section 13(b) stretches no further than the traditional bounds of an injunction at equity. Even if Section 13(b) permits other remedies, however, the judgment in this case is unauthorized. Here, the District Court awarded a sum of money to compensate for past consumer harm. That is a "classic form of *legal* relief." *Great-West*, 534 U.S. at 210 (internal quotation marks omitted). The FTC's authority to seek an injunction—a quintessential *equitable* remedy—does not grant the agency permission to obtain restitution *at law*. Nor does the monetary award in this case meet the requirements for equitable restitution or disgorgement. *See id.* at 213; *see also Liu*, 140 S. Ct. at 1947-50. Even under an expansive reading of Section 13(b), the Court should affirm the judgment below or remand for further determination of these issues.

A. Section 13(b) Does Not Authorize Legal Remedies.

The FTC requests a monetary judgment in this case. It does not explain, however, whether the relief it seeks is equitable restitution, disgorgement, or something else entirely. *See* FTC Pet. 14 (arguing that "an injunction can provide for restitution or other forms of monetary relief"). To the extent the FTC is seeking *legal* restitution, it does not cite any statutory support for such a remedy. An "injunc-

tion”—which is all Section 13(b) provides—“is inherently an equitable remedy.” *Great-West*, 534 U.S. at 211 n.1. Reading a provision that authorizes a single form of equitable relief to permit legal restitution would be plainly inconsistent with the statutory text.

Equitable relief “must mean *something* less than *all* relief.” *Id.* at 209 (internal quotation marks omitted). Where a statute grants “equitable relief,” that remedy is limited to “those categories of relief that were *typically* available in equity.” *Id.* at 210 (internal quotation marks omitted). The same analysis applies to a statute that authorizes an “injunction.” The term “injunction” must mean something less than all relief. Otherwise, the word “injunction” in Section 13(b) “would limit the relief” available to the FTC “*not at all.*” *Mertens*, 508 U.S. at 257 (rejecting argument that the phrase “equitable relief” included “whatever relief a common-law court of equity could provide” (internal quotation marks omitted)). An injunction is not a form of legal relief. *See id.* at 255 (stating that an “injunction” is “a remedy traditionally viewed as ‘equitable’ ”). To the extent the FTC is seeking a legal remedy in this case, Section 13(b) does not provide one.¹¹

¹¹ As the AMG petition notes, there is a circuit split on the question whether Section 13(b) affords legal restitution or equitable restitution. *Compare Commerce Planet*, 815 F.3d at 601-602 (9th Cir.), *with Verity Int’l*, 443 F.3d at 66-67 (2d Cir.).

B. The Monetary Judgment Does Not Comply With The Requirements For Equitable Restitution Or Disgorgement.

The judgment below provides neither equitable restitution nor disgorgement. Equitable restitution is available “where money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property in the defendant’s possession.” *Great-West*, 534 U.S. at 213. Where a plaintiff seeks cash in a commingled bank account, the plaintiff’s remedy is restitution at law. *See id.* at 213-214; *see also Montanile*, 136 S. Ct. at 658 (stating that an order requiring “general assets” to be paid from a company’s general treasury is “a *legal* remedy, not an equitable one”); *see* 1 Dobbs § 4.1(1), at 556.

The FTC has not attempted to identify specific money or property in Credit Bureau Center or Brown’s possession that belongs to consumers; it instead seeks to recover whatever funds may be available in Brown’s bank accounts. *See* FTC Pet. App. 126a-127a. Nor did the District Court require the FTC to make such a showing. Instead, citing Ninth Circuit precedent, the District Court held that Section 13(b) permits *legal* restitution, and that the FTC is not required to comply with the tracing requirement for *equitable* restitution. *See* FTC Pet. App. 90a-91a (citing *Commerce Planet*, 815 F.3d at 601). Thus, even if Section 13(b) permits equitable restitution, the judgment below does not qualify.¹²

¹² Confusingly, the District Court describes the monetary judgment in this case as “legal restitution” in its opinion, FTC Pet. App. 90a-91a, and “equitable monetary relief” in the order

The monetary judgment in this case is not disgorgement, either. *Liu* holds that courts may award “disgorgement” of the “defendant’s net profits as a remedy for wrongdoing.” 140 S. Ct. at 1944. That remedy is circumscribed “in multiple ways to avoid transforming it into a penalty outside” the federal courts’ “equitable powers.” *Id.* Disgorgement is limited to net profits, must be calculated on an individual basis, and must be returned to injured consumers. *See id.* at 1944-45. The monetary judgment below does not comply with those limitations.¹³

The District Court calculated the monetary award based on Credit Bureau Center’s “revenue,” rather than its net profit. FTC Pet. App. 91a-92a. It refused to “set off business expenses” and lost revenues, and instead awarded the “full amount of consumer loss.” *Id.* at 93a. The District Court imposed joint and several liability on Credit Bureau Center and Brown; it did not apportion liability between them, nor did it determine the liability of the co-defendants who settled with the FTC. *See id.* at 106a, 126a.¹⁴ The District Court did not require the FTC to return all funds to injured consumers. *Id.* at 127a. Instead, it permitted the agency to spend the

accompanying its opinion, *id.* at 106a. The District Court’s opinion makes clear, however, that the monetary judgment does not meet the requirements for equitable restitution. *See id.* at 90a-91a.

¹³ The Court did not address in *Liu* whether disgorgement is subject to the tracing requirement for equitable restitution.

¹⁴ The District Court subtracted from the monetary judgment the amounts paid to the FTC by the settling co-defendants. The court did not determine whether the settlement amounts reflected those defendants’ full liability.

funds on “consumer information remedies” if the agency determined “that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed.” *Id.* And it held that “[a]ny money not used for * * * equitable relief is to be deposited to the U.S. Treasury.” *Id.*

The judgment below does not comply with the requirements for equitable restitution or disgorgement. The Court should affirm on that alternative ground, or at a minimum, remand for further proceedings on these issues.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. FTC Act Sec. 5, 15 U.S.C. § 45, provides:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(1a)

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in

or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time,

upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evi-

dence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either

(a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a peti-

tion for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired

and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become

final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive

and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

2. FTC Act Sec. 13, 15 U.S.C. § 53, provides:

§ 53. False advertisements; injunctions and restraining orders

(a) Power of Commission; jurisdiction of courts

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partner-

ship, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in

proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Service of process; proof of service

Any process of the Commission under this section may be served by any person duly authorized by the Commission—

- (1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;
- (2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or
- (3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications

Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

3. FTC Act Sec. 18, 15 U.S.C. § 57a, provides:

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings

(a) Authority of Commission to prescribe rules and general statements of policy

(1) Except as provided in subsection (h), the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or

practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

(b) Procedures applicable

(1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data,

views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c); and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

(2)(A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

- (i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and
- (ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).

(C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the

Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

(A) it has issued cease and desist orders regarding such acts or practices, or

(B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.

(c) Informal hearing procedure

The Commission shall conduct any informal hearings required by subsection (b)(1)(C) of this section in accordance with the following procedure:

(1)(A) The Commission shall provide for the conduct of proceedings under this subsection by hearing officers who shall perform their functions in accordance with the requirements of this subsection.

(B) The officer who presides over the rulemaking proceedings shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except

that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(C) Except as required for the disposition of ex parte matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(2) Subject to paragraph (3) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submission (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (3)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(3) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (2) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required

for a full and true disclosure with respect to disputed issues of material fact.

(4)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (2) and (3) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(5) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

(d) Statement of basis and purpose accompanying rule; “Commission” defined; judicial review of amendment or repeal of rule; violation of rule

(1) The Commission’s statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

(2)(A) The term “Commission” as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule.

(e) Judicial review; petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(B) For purposes of this section, the term “rulemaking record” means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5), any written submissions, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified

or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term "evidence", as used in this paragraph, means any matter in the rulemaking record.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be

final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5)(A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B), if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). Section 706(2)(E) of Title 5 shall not apply to any rule promulgated under subsection (a)(1)(B). The contents and adequacy of any statement required by subsection (b)(1) (D) shall not be subject to judicial review in any respect.

4. FTC Act Sec. 19, 15 U.S.C. § 57b, provides:

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section

45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in

this section shall be construed to affect any authority of the Commission under any other provision of law.

5. 12 U.S.C. § 5564 provides in pertinent part:

§ 5564. Litigation authority

(a) In general

If any person violates a Federal consumer financial law, the Bureau may, subject to sections 5514, 5515, and 5516 of this title, commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

* * *

6. 15 U.S.C. § 78u provides in pertinent part:

§ 78u. Investigations and actions

* * *

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of

which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

* * *

(5) **EQUITABLE RELIEF.**—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

* * *

7. 15 U.S.C. § 1116 provides in pertinent part:

§ 1116. Injunctive relief

(a) Jurisdiction; service

The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem

reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant has complied with the injunction. Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other United States district court in whose jurisdiction the defendant may be found.

* * *

8. 15 U.S.C. § 1117 provides in pertinent part:

§ 1117. Recover for violation of rights

(a) Profits; damages and costs; attorney fees

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of

this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

* * *

9. 15 U.S.C. § 3414 provides in pertinent part:

§ 3414. Enforcement

* * *

(b) Civil enforcement

(1) In general

Except as provided in paragraph (2), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in

the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

* * *

(4) Relief available

In any action under paragraph (1) or (2), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

* * *

10. 17 U.S.C. § 502 provides in pertinent part:

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court

in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

11. 17 U.S.C. § 504 provides in pertinent part:

§ 504. Remedies for infringement: Damages and profits

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

* * *

12. 29 U.S.C. § 1132 provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

* * *

13. 38 U.S.C. § 4323 provides in pertinent part:

§ 4323. Enforcement rights with respect to a state or private employer

* * *

(e) EQUITY POWERS.—The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders,

and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

* * *

14. 42 U.S.C. § 2000e-5 provides in pertinent part:

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

* * *