Nos. 19-508 & 19-825

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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 and Ninth Circuits

BRIEF OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS (NO. 19-508) AND RESPONDENTS (NO. 19-825)

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

The Federal Trade Commission is at the center of many major public-policy debates about competition, consumer protection, innovation, privacy, and more. TechFreedom has accordingly developed extensive expertise on the FTC, its workings, and how the agency and its powers could be reformed. *See*, *e.g.*, Comments of TechFreedom, *Hearings on Competition & Consumer Protection in the 21st Century: Topic 11: The agency's investigation, enforcement, and remedial processes*, https://bit.ly/2Gb3LBL (Aug. 20, 2018); Comments of TechFreedom, *Hearings on Competition & Consumer Protection in the 21st Century: Topic 5: The Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters*, https://bit.ly/3j7ltEB (Aug. 20, 2018); Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature*, https://bit.ly/3kUu-2D3 (2016).

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[1] No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission. Each party's counsel of record has consented in writing to the brief's being filed.

TechFreedom believes that the FTC does important and valuable work. But we also believe that sound public policy requires a stable rule of law—a system in which laws are applied as written. Those two beliefs inform our view of this case.

SUMMARY OF ARGUMENT

We are not here to hurt the FTC. The agency protects consumers from deceptive or unfair business practices. As part of that laudable work, it collects ill-gotten gains from fraudsters and returns them to ordinary Americans. This is all to the good. No, we are here merely to insist that the FTC obtain its powers the proper way—the constitutional way. When seeking monetary awards in federal court, the FTC has not done things the proper way. That is what this case is about.

Section 13(b) of the FTC Act empowers the FTC to obtain, among other things, a "permanent injunction." The FTC has been using Section 13(b)'s permanent-injunction clause to obtain equitable monetary relief. We do not object to the FTC's obtaining such relief in federal court, nor to its having an efficient process for doing so. We have a problem, however, with the FTC using a statute that says "injunction" to obtain money. An injunction is a prospective form of relief; it cannot be used as a substitute for a money judgment. If the FTC wants to use Section 13(b) to collect assets, our lawmakers must rewrite the statute.

There are several reasons why only Congress—not the FTC, not the courts—can do this. First and most obviously, only Congress has the power to pass laws. It cannot delegate that power to others. Although agencies can arguably fill statutory gaps in

certain situations, they may not rewrite the law, for instance by replacing the word "injunction" with the word "restitution."

Second, the judiciary is unauthorized, and ill-equipped, to "adjust" statutory language. This case proves the point. By effectively writing the word "equitable" into Section 13(b), the courts have needlessly exposed that section to several hard questions about how to distinguish law and equity, as well as to a tricky overarching debate about what the word "equitable" should mean to our post-divided-bench courts. The judicial expansion of the statute has also produced the more predictable problem of inconsistency. Once the courts depart from statutory text, nothing is left to keep them on the same page (as it were). Irreconcilable outcomes are almost sure to arise—and so it has proven here.

For these reasons, Congress is not only authorized, but also the body best equipped, to write the law. By expanding Section 13(b), the judiciary has let the FTC bypass other statutory sections that empower it to obtain monetary awards *while* affording defendants protections Section 13(b) does not contain. By changing Section 13(b), the courts have in effect broken those other parts of the FTC Act. Congress, by contrast, can consider the FTC Act as a whole. It can tweak this or that section while making sure the full statute works harmoniously.

ARGUMENT

I. THE FTC INDEED NEEDS A QUICK PATH TO MONETARY RELIEF—BUT THAT DOES NOT MEAN SUCH A PATH ALREADY EXISTS IN THE FTC ACT.

"An essential part" of the FTC's "mission," the agency recently told Congress, "is getting back to consumers money wrongly taken from them." *Prepared Statement of the Federal Trade Commission Before the Senate Committee on Commerce, Science, and Transportation* ("FTC Prepared Statement") at 3, https://bit.ly/3mLUoJr (Aug. 5, 2020). We agree. We applaud the FTC for "return[ing] more than $975 million directly to consumers" over "the past four fiscal years." *Id.*

But the FTC may not take an "any means necessary" approach to the pursuit of monetary awards. Obtaining "equitable monetary relief" under Section 13(b), specifically, has become a "cornerstone of the FTC's enforcement program." FTC's Mot. to Stay, *FTC v. Credit Bureau Ctr., LLC*, No. 18-2847, Dkt. 61 at 5 (7th Cir. Sept. 17, 2019). "Over the years, the FTC has utilized Section 13(b) to return billions of dollars to victimized American consumers." *Id.* Yet Section 13(b) says nothing about "equitable monetary relief." The provision the FTC has used to obtain such relief says only that the FTC may obtain a "permanent injunction." 15 U.S.C. § 53(b).

The FTC complains that this case "threatens" its ability to continue using Section 13(b) as its "principal means of securing judicial orders that require [equitable monetary] relief." FTC Prepared Statement, *supra*, at 3. "A ruling adverse to the

FTC," the agency warns, "would have dire consequences for consumer redress and other forms of monetary relief." *Id.* at 4.

But this is a problem for Congress. Congress chose not to add the words "equitable monetary relief," or something like them, to Section 13(b). Nevertheless, the FTC has embarked on a litigation strategy to persuade the courts to imply those words into the statute. *See* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, https://bit.ly/2S10N58 (2004). That was not the proper course. Even if it believes that a statutory scheme has "turn[ed] out not to work in practice," an "agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 327-28 (2014). Nor may it have a court do so on its behalf.

The FTC thinks there should be an efficient process by which it can obtain money from wrongdoers in federal court. We do too. But agencies must obtain their powers the right way. The FTC is now "request[ing] that Congress clarify the agency's statutory authority to obtain complete equitable monetary relief under Section 13(b)." FTC Prepared Statement, *supra*, at 3-4. In going to Congress, the FTC is now doing what it needed to do all along.

II. ONLY CONGRESS CAN AMEND THE FTC ACT TO PROVIDE THE FTC THE REMEDIAL PROCESS IT WANTS; THE JUDICIARY IS NEITHER AUTHORIZED NOR CAPABLE OF MAKING SUCH CHANGES ITSELF.

Someone who thinks judges are adept at "fulfilling" legislative intent through "loose construction" would do well to study this case. It is a cautionary tale. The courts have departed so far from Section 13(b)'s words as to have rewritten them, in violation of the separation of powers. In doing so, they have brought confusion to the statute where none need exist, and, no longer guided by the text, they are unable to agree on *how much* atextual expansion is warranted. This case shows why lawmaking should be left to Congress, the body best able to produce a statute that functions well as a whole.

A. Only Congressional Amendment of Statutes Is Consistent with the Separation of Powers.

"All legislative Powers" are "vested" in Congress. Const. Art. I, § 1. Congress may not transfer that power to another branch of government. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

Agencies like the FTC exercise the "executive Power" in Article II. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). Although some cases suggest that agencies may, within certain bounds, make "policy choices" that "Congress has delegated" to them, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984), there is no dispute that agencies may not deviate from the instructions Congress sets forth for them in a statutory text, *Util.*

Air. Reg. Grp., 573 U.S. at 327-28. Equally, courts, which "are not part of either political branch of the Government," *Chevron*, 467 U.S. at 865, may not rewrite a statute, *see Arlington*, 569 U.S. at 304-05. Congress's laws are binding on the courts and the agencies alike. The text of the law is what governs.

It is especially pernicious when a court or an agency introduces the word "equity" into a statute whose text has not invited it. The Anti-Federalist Brutus worried that judges would use equity to "explain . . . the reasoning spirit" of the law, "without being confined to the words or letter." Essays of Brutus No. XI (Jan. 31, 1788). Although this Court (as we'll see in a moment) has tried to place workable limits on equitable principles, the judiciary has tended to wield equity the way Brutus feared. Judges often treat the word "equitable" as a "license to expand their own power." *Liu v. SEC*, 140 S. Ct. 1936, 1954 (2020) (Thomas, J., dissenting).

Fundamentally, introducing the word "equitable" into a statute that says only "injunction" "contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies." No. 19-508 Pet. App. 37a (O'Scannlain, J., specially concurring).

B. The Judiciary Is an Unskilled Statutory Editor.

By treating Section 13(b) as though it contains the word "equitable," the courts have invited ceaseless debate about what the word "equitable" means. No longer in agreement about simply applying the word "injunction" as written, moreover, the courts lack a common point of textual reference

they can use to ensure that Section 13(b) is applied consistently—and so they haven't.

1. Judicial Statutory Editing Breeds Confusion.

Judicial statutory "fixes" tend to create more problems than they resolve—especially when various courts of appeals offer their different "fixes" at once. The judicial expansion of Section 13(b) illustrates this pernicious dynamic.

Applied as written, Section 13(b) is a simple provision. It empowers a court, in "proper cases," to grant the FTC a "permanent injunction." 15 U.S.C. § 53(b)(2). Such an injunction is meant to provide the FTC with *prospective* relief. We know this not only because "injunctive relief" by nature "looks to the future," No. 19-825 Pet. App. 15a (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2942 at 47 (3d ed. 2013)), but also because Section 13(b) applies only when someone "*is* violating, or is *about to* violate," the FTC Act, 15 U.S.C. § 53(b)(1) (emphasis added). The permanent-injunction clause in Section 13(b) is no more (and no less) than a tool the FTC can use to promptly *stop* a violation of the FTC Act.

By expanding the word "injunction" in Section 13(b) to mean "equitable relief," the courts have created knotty interpretive problems where none need exist. In particular, they have needlessly plunged the statute into the protracted and messy debate over how modern courts should navigate the ancient divide between law and equity.

To understand the headaches that introducing the seemingly benign term "equitable" into Section 13(b) has caused, consider first the

judiciary's struggles to define the word "equitable" as it is used in Section 502(a)(3) of ERISA (the Employment Retirement Income Security Act). Various parties affiliated with an ERISA plan may use Section 502(a)(3) "to enjoin" violations of ERISA or the plan or "to obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The section's reference to "appropriate equitable relief" has been a constant source of trouble.

Start with *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), where the issue was whether a party may invoke Section 502(a)(3)'s "appropriate equitable relief" clause to obtain an award of money damages. "Equitable relief," *Mertens* notes, can mean at least two things. On the one hand, it could mean "whatever relief a court of equity is empowered to provide in the particular case at issue." *Id.* at 256. On the other hand, it could mean "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* The problem with the first definition is that an equity court, to do complete justice, would often award legal remedies that "would otherwise be beyond the scope of its authority." *Id.* (quoting 1 J. Pomeroy, *Equity Jurisprudence* § 181 at 257 (5th ed. 1941)). Yet "'equitable' relief," *Mertens* observes, "must mean *something* less than *all* relief." *Id.* at 258 n.8. To hold otherwise would effectively scratch the word "equitable" out of the statute, in defiance of "the interpretative canon against surplusage—the idea that every word and every provision is to be given effect and that none should needlessly be given an interpretation that causes it . . . to have no consequence." *Nielson v. Preap*, 139 S. Ct. 954, 969 (2019) (cleaned up). *Mertens* therefore adopts the

second definition, and holds that only traditional forms of equitable relief are available under Section 502(a)(3).

The downside of reading "equitable relief" to mean "traditional forms of equitable relief," however, is that it triggers an inquiry into what those "traditional forms" are. "[M]emories of the divided bench, and familiarity with its technical refinements," *Mertens* acknowledges, are "reced[ing]" ever "further into the past." 508 U.S. at 256. Courts unfamiliar with equity practice must rely on their dusty copies of Story's *Commentaries on Equity Jurisprudence* (1836), Pomeroy's *Equity Jurisprudence* (1881-83), and the first Restatement of Restitution (1937) to navigate procedural niceties that were confusing even before they became extinct.

What's more, "typical equitable remedy" does not operate well as a standalone concept. Equity arose as a system for petitioning the chancellor of England to afford relief that the law courts, with their abstruse array of writs, circuitous procedures, and cramped rules of evidence, would not supply. The equity courts were merely a *supplementary* piece of the legal system. They often dismissed pleas that sounded in law, and they often afforded even legal relief for pleas that sounded in equity. It makes little sense, therefore, to detach traditional equitable remedies from traditional equity practice. Doing so is sure to lead to "bizarre conclusion[s]." *Montanile v. Bd. of Trustees*, 136 S. Ct. 651, 662 (2016) (Ginsburg, J., dissenting).

Equitable tracing rules, especially, seem to perplex modern courts. The liability that undergirds many monetary equitable remedies is "premised on the fiction that the victim at all times retained title

to the property in question, which the defendant merely holds in trust for him." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011). Equity therefore limited most recoveries to "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). If a cheat uses money he holds in trust to buy a horse that dies, F.W. Maitland noted in his lectures on equity, the equitable fund is represented by the carcass. F.W. Maitland, *Equity: A Court of Lectures* 220 (1936).

The quirks and vagaries of equity being what they are, this Court repeatedly has had to revisit Section 502(a)(3) and further clarify what *Mertens* meant by "typical equitable remedy." These decisions deal at length with arcane, and often obsolete, equitable concepts. *See Knudson*, 534 U.S. 204 (drawing a "fine distinction between restitution at law and restitution in equity"); *Sereboff v. Mid-Atlantic Med. Serv., Inc.*, 547 U.S. 356 (2006) (holding that an equitable lien by agreement qualifies as equitable restitution); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (holding that the common-fund doctrine can limit a plaintiff's recovery in equity); *Montanile*, 136 S. Ct. 651 (confirming that the tracing requirement is an element of equitable restitution). And there will presumably have to be more such decisions in the future. Called upon to apply "the obsolete distinctions between law and equity," *Knudson*, 534 U.S. at 222 (Stevens, J., dissenting), the lower courts keep falling into disagreement, if not befuddlement. The difficulty and uncertainty are exacerbated by the fact that

some judges continue, somewhat understandably, to insist that "appropriate equitable relief" means simply "that the courts are free to craft whatever relief is most appropriate." *Mertens*, 508 U.S. at 269 (White, J., dissenting); *see Knudson*, 534 U.S. at 222 (Stevens, J., dissenting); *Montanile*, 136 S. Ct. at 662 (Ginsburg, J. dissenting).

When it comes to Section 502(a)(3), at least, courts' struggles with equity jurisprudence have a statutory grounding: this Court has said to take the word "equitable" in "appropriate equitable relief" seriously. *Mertens*, 508 U.S. at 256. As we are about to see, however, the courts' expansion of the relief available under Section 13(b) has needlessly introduced the same sorts of intractable law-versus-equity puzzles into the FTC Act. Difficult, drawn-out, and expensive disputes are arising, in cases involving a remedy clause that says only "injunction," over the meaning of the word "equitable." This was quite avoidable.

2. Judicial Statutory Editing Produces Inconsistency.

It is "hardly surprising" that, when courts start granting rights and remedies not "expressly create[d]" by Congress, the "usual sources" of statutory construction "yield no explicit answer" about how those judicially concocted rights and remedies should be applied. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring). When result-oriented judicial intuition, rather than statutory text, guides statutory interpretation, results are detached from any common touchstone. Courts will constantly reach conflicting results.

The debate over the meaning of Section 13(b) is an especially stark illustration of this point. Concluding that "injunction," in Section 13(b), means "equitable relief," the courts of appeals introduced into Section 13(b) the issue of what "equitable" means. Then, having introduced the issue, those courts proceeded to splinter between precisely the two potential meanings of "equitable"—equity as traditional equitable remedies; equity as doing full justice—that this Court identified in *Mertens*.

The Second Circuit, for its part, has looked to this Court's typical-equitable-remedies ERISA jurisprudence. "Because the availability of restitution under § 13(b) of the FTC Act, to the extent it exists, derives from the district court's equitable jurisdiction," says *FTC v. Verity International, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006), after discussing one of this Court's ERISA cases, "it follows that the district court may award only equitable restitution," *id.* at 65. And equitable restitution, *Verity* continues, is a measure not of a plaintiff's loss (as it is with compensatory damages), but of a defendant's unjust gains. *Id.* at 68.

The Ninth Circuit, by contrast, has said that Section 13(b) gives "the district court authority to grant any ancillary relief necessary to accomplish complete justice." *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). This has at times included awards of "equitable monetary relief" measured by "the full amount lost by consumers rather than . . . [just] the defendant's profits." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). Inherent in the Ninth Circuit's do-full-justice view of equity is a rejection of the notion that "courts proceeding under § 13(b) must make the same 'fine

distinction' between legal and equitable restitution required under ERISA § 502(a)(3)." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601 (9th Cir. 2016) (quoting *Knudson*, 534 U.S. at 214).[2]

Adding to the confusion and inconsistency, the Second Circuit, the court on the traditional-equitable-remedy side of the divide, has claimed that the FTC can obtain money under Section 13(b) without satisfying equitable tracing requirements. *Bronson*, 654 F.3d at 371-72. According to the Second Circuit, a court may use Section 13(b) to award equitable disgorgement, a remedy "available only to government entities" that "does not require the district court to apply tracing rules." *Id.* at 372-73.

But "disgorgement," Justice Thomas objected in dissent in *Liu*, 140 S. Ct. 1936, is a term "with no fixed meaning" and "no history in equity jurisprudence," *id.* at 1953-54. Applying the Court's

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[2] In the Ninth Circuit, therefore, the word "injunction" in Section 13(b) of the FTC Act has a wider meaning than do the words "appropriate equitable relief" in Section 502(a)(3) of ERISA. Hence this eyebrow-raising passage:

> The interpretive constraints facing the [Supreme] Court in [ERISA cases] are wholly absent here. We do not have before us a statute that limits the court to providing "equitable relief." Section 13(b) invokes a court's equity jurisdiction by authorizing issuance of injunctive relief.

Commerce Planet, 815 F.3d at 602. In the Ninth Circuit, the broad word "equitable" *limits* a court to providing traditional equitable relief, while the narrow word "injunction" *empowers* a court to provide traditional equitable relief and more.

ERISA jurisprudence to Section 13(b)—as the Second Circuit claims to do, *Verity*, 443 F.3d at 67—means requiring the FTC to "seek a remedy traditionally viewed as 'equitable,'" *Mertens*, 508 U.S. at 255; yet "disgorgement is not a traditional equitable remedy," *Liu*, 140 S. Ct. at 1950 (Thomas, J., dissenting).

Odder still, the majority in *Liu*, applying the ERISA cases to the securities laws, *id.* at 1942 (discussing *Mertens*, *Knudson*, and *Montanile*), declared that disgorgement passes the traditional-equitable-remedy test. Although disgorgement was not *itself* available in equity, the majority explained, it *resembles* remedies that were. *Id.* at 1943. If this is the ERISA standard, it's been watered down. *See id.* at 1953 (Thomas, J., dissenting). Not completely watered down, however: disgorgement, the Court said, is still subject to various limits. Disgorgement must (to some unspecified degree) benefit specific victims rather than just the public at large, *id.* at 1948; it is "sometimes . . . at odds" (in ways yet to be fleshed out) with the imposition of joint-and-several liability, *id.* at 1949; and it does not require a defendant to return money spent on legitimate expenses, *id.* at 1950.

One might think that *Liu*'s words on equity should inform the scope of equitable remedies purportedly available under Section 13(b). Like those sued by the SEC, after all, those sued by the FTC object when recoupments don't go to victims, when joint-and-several liability is imposed, or when expenses aren't deducted from remedial awards. At this point, however, the district courts can be forgiven for throwing up their hands. Rather than try to apply *Liu* to Section 13(b), they have, thus far,

declared that *Liu* governs only securities cases. *In re Sanctuary Belize Litig.*, ___ F. Supp. 3d ___, 2020 WL 5095531 *69 (D. Md. Aug. 28, 2020); *FTC v. Noland*, 2020 WL 4530459 *4-*5 (D. Ariz. Aug. 6, 2020); *FTC v. Cardiff*, 2020 WL 3867293 *5-*6 (C.D. Cal. July 7, 2020), appeal docketed, No. 20-55858 (9th Cir.).

If this all seems deeply perplexing, that's because it is. The courts of appeals can't agree on what Section 13(b) means. They can't even keep their *intra*-circuit interpretations straight. *Compare Stefanchik*, 559 F.3d at 931-32 (9th Cir.) (the FTC can use Section 13(b) to recover the consumers' loss) *with Commerce Planet*, 815 F.3d at 603 (9th Cir.) (actually, it can recover only the defendant's gain); *compare Verity*, 443 F.3d at 67 n.10 (2d Cir.) (assuming that Section 13(b) is subject to tracing rules) *with Bronson*, 654 F.3d at 373 (2d Cir.) (holding that it isn't).

This is what happens when statutory text is discarded. Once adherence to text is abandoned, statutory "interpretation" has a way of turning into statutory "surgery." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1311 (11th Cir. 2020) (Sutton, J., visiting). The courts' gloss on the statute prompts satellite disputes about what the gloss means, which lead to further glosses, which lead to further disputes—none resolvable by what the statute actually says. Nothing *in Section 13(b)* can help resolve the many questions that now surround that section.

Limit Section 13(b)'s use of "injunction" to mean "injunction," however, and the whole baffled mess disappears.

C. Only Congress Can Create Statutes That Successfully Balance Competing Policy Interests.

Expanding Section 13(b), so that the FTC can use it to obtain money, is bound to produce a confused jurisprudence and to generate needlessly tortured litigation. Yet it might still seem tempting, to some adjudicators in some cases, to accept that as the price of getting to what *looks* like a sensible result: letting the FTC invoke Section 13(b) as a quick route to a monetary recovery. That result, enacted by Congress, would indeed be our preferred policy outcome. The FTC (or some other federal agency) should have the proper tools to deter, and remedy, instances of genuine consumer fraud. But letting the FTC short-circuit the existing statutory scheme is not the answer.

Distorting Section 13(b), to reach what might seem like a desirable outcome in a discrete case, does far more harm than good. Congress has carefully designed the litigation process set forth in the FTC Act. The Act contains important substantive and procedural protections for defendants. When a court lets the FTC use Section 13(b) to obtain money, those protections are lost.

Consider, for instance, that Section 19 explicitly empowers the FTC to obtain among other things the "refund of money," the "return of property," or the "payment of damages." 15 U.S.C. § 57b(b). "Read[ing]" Sections 13(b) and 19 "together" confirms that Section 13(b) "functions as a simple stop-gap measure that allows the Commission to act quickly to prevent harm," while Section 19 ensures that "the Commission can collect ill-gotten gains." No. 19-508 Pet. App. 26a-27a (O'Scannlain, J.,

specially concurring). But Section 19 does not allow the FTC to head directly to court—as it can when proceeding under Section 13(b)—to enforce the "unfair or deceptive acts or practices" clause in Section 5 of the FTC Act. Instead, the FTC must either (1) prosecute based on an already-issued rule that "define[s] with specificity" the "unfair or deceptive" behavior that the defendant has purportedly engaged in, or (2) conduct an administrative adjudication, obtain a cease-and-desist order there, and *then* prove in court that a reasonable person would know the defendant's conduct was not just "unfair or deceptive," but downright "dishonest or fraudulent." 15 U.S.C. § 57b(a); *see* No. 19-508 Pet. App. 27a; No. 19-825 Pet. App. 11a. Section 19 provides a defendant more process, and more notice of what conduct is forbidden, than does Section 13(b). Letting the FTC ignore Section 19, and instead obtain money under Section 13(b), "wrongly allows [it] to avoid the administrative processes that Congress directed it to follow." Pet. App. 28a (O'Scannlain, J., specially concurring); *see also FTC v. AbbVie Inc.*, ___ F.3d ___, 2020 WL 5807873 *33-*34 (3d Cir. Sept. 30, 2020) (citing Section 19 as support for its holding that disgorgement is not available under Section 13(b)).

Notice, too, that Section 19 is subject to a statute of limitations, while Section 13(b) is not. 15 U.S.C. § 57b(d). A key limit in Section 19 is that the Commission will usually be allowed to collect only three years' worth of damages. *Id.* A key limit in Section 13(b) is that it is supposed to apply only when a defendant "is violating, or is about to violate," the FTC Act, *id.* § 53(b)(1)—a limit that makes sense in a clause about injunctions, but that

means little in a clause about damages. Once the FTC convinces a court to award damages under Section 13(b), nothing stops the FTC from collecting damages going as many years back as it wants. Again, expanding the scope of Section 13(b) lets the FTC evade the processes and protections put in place by Congress.

It should hardly need saying that courts are not allowed "to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." *Util. Air Reg. Grp.*, 573 U.S. at 328 (cleaned up). Nor would they be any good at such projects if they tried. Only Congress can study a matter, hold hearings, weigh competing interests, and then design a law in which all the moving pieces fit together. Congress can decide, for example, that the FTC should be able to head straight to court to collect money damages—that, in other words, the procedural hurdles of Section 19 have proven too high—but that the agency must be subject to a statute of limitations when it does so. Congress can also clarify the proper measure of damages (defendants' gains or consumers' losses), the scope of liability (joint and several—or not), the types of expenses that are deductible, when executives may be held personally liable, when penalties or punitive damages are available, and so on. Only Congress can adjust all the dials in a way that strikes the best balance.

It bears repeating, in closing, that the FTC was the driving force behind the courts' atextual expansion of Section 13(b). *See* FitzGerald, *supra*. It is anathema to our constitutional system for legislative power to be wielded by an agency—especially by an independent one. An agency's

independence—its comparative lack of accountability and insulation from democratic oversight—must be premised on, indeed, *conditional* on, rigorous adherence to the law.

The Court recently made clear that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the decision that blessed the FTC's independent structure, should be "take[n] . . . on its own terms," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 n.4 (2020). *Humphrey's Executor* stands on the assumption that the FTC is merely a "legislative . . . aid" that "mak[es] reports and recommendations to Congress." 140 S. Ct. at 2200. This case presents an opportunity to make the FTC aware that when it goes to the courts, rather than to Congress, to push for statutory amendments, it undermines the legitimacy of its independence.

CONCLUSION

The judgment of the Seventh Circuit (No. 19-825) should be affirmed. The judgment of the Ninth Circuit (No. 19-508) should be reversed.

Respectfully submitted,

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