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 Writs of Certiorari to the United States Courts of Appeals for the Seventh and Ninth Circuits**

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, AND DIRECT SELLING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN NO. 19-508 AND RESPONDENTS IN NO. 19-825**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

CASES

## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 52 million American workers—and contributing $3.9 trillion to the annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues impacting the retail community, and advocates for issues that affect retailers and their customers.

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[1] No party's counsel authored any part of this brief. No one apart from *amici*, their members, and their counsel contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

The Direct Selling Association ("DSA") is a 110-year-old national trade association that represents companies that market products and services directly to consumers through an independent, entrepreneurial salesforce. Familiar to the public as party plan, door to door and similar in-person sales, the DSA serves to promote, protect and police the direct selling industry. In 2019, there were 6.8 million direct sellers in the United States, with retail sales of approximately $35.2 billion. DSA estimates that its 107 member companies, which include some of the country's most well-known and respected businesses, account for the vast majority of the industry's annual sales.

The appropriate scope of enforcement powers granted by Congress to the Federal Trade Commission ("FTC" or "Commission") is an important issue to the members of the Chamber of Commerce, the National Retail Federation, and the Direct Selling Association. Defining and enforcing the limits of these powers ensures that industries and markets function effectively.

## SUMMARY OF ARGUMENT

The FTC's recent pursuit of massive restitution and disgorgement awards under Section 13(b) of the Federal Trade Commission Act ("FTC Act") is not only legally incorrect, but imposes unwarranted costs and uncertainties on businesses and the public. This Court should therefore affirm the decision of the Seventh Circuit, reverse the decision of the Ninth Circuit, and curtail the FTC's recent assertion of expansive equitable powers.

Properly construed, the Act equips the FTC with the appropriate tools to fulfill its critical mission to protect consumers from anticompetitive conduct, fraud, and deceptive practices. Section 13(b) grants the FTC the authority to seek injunctive relief to prevent harm from ongoing or imminent acts—but not to seek restitution and disgorgement. If the FTC wishes to seek retrospective monetary penalties, it must invoke its authority under Section 19, which contains safeguards ensuring that affected businesses receive fair notice and process before such penalties are imposed. By contrast, under the FTC's current approach, businesses face potential liability for millions or, as in *AMG*, billions of dollars in disgorgement or restitution for adhering to common, accepted industry practices.

I. A. Before 2012, the FTC acknowledged that Section 13(b) was a limited grant of statutory authority. Following a 2012 "policy change," however, the FTC began to routinely seek retrospective monetary relief under Section 13(b).

By aggressively invoking Section 13(b), the FTC dramatically increased the monetary awards extracted from businesses. Between 2012 and 2018, the FTC increased its yearly restitution and disgorgement penalties more than *23-fold*. For example, in 2017 alone, the agency wielded Section 13(b) to collect $5.29 billion in disgorgement and restitution. *AMG* exemplifies the expansion of the FTC's claimed authority, where the agency obtained a judgment of $1.3 billion in restitution—then the largest restitution award ever obtained by the Commission.

**B.** Even as the FTC has vastly expanded its demands for monetary remedies, it has disavowed any obligation to provide notice to affected businesses of what practices violate the Act before seeking monetary relief. Businesses have little guidance regarding what practices the FTC considers "unfair" or deceptive, much less regulations that define prohibited acts "with specificity," *see* 15 U.S.C. 57a(a)(1)(B). Businesses thus face enormous, even multi-billion-dollar, liability when the FTC pursues monetary remedies under Section 13(b) for violations of the broad and malleable "unfair" or "deceptive" standard.

Making matters worse, the FTC frequently imposes significant monetary penalties at the very outset of a proceeding through an *ex parte* asset freeze that restrains assets for future monetary awards before the affected business may even respond or disprove the purported violations. A business subject to such a freeze may be unable to effectively fund its own defense or continue operations.

Further compounding businesses' uncertainty, the FTC asserts that it need not precisely prove the amount of restitution or disgorgement, but rather may impose a monetary award that "reasonably approximates the defendant's unjust gains." Businesses are left to guess about not only whether the FTC will find that their conduct violates the FTC Act, but also the amount of retroactive monetary liability they may face as a result.

II. The FTC's current interpretation of Section 13(b) should be rejected because it is inconsistent with the statutory text and ignores the two-part structure of the Act. Section 13(b)'s text is limited to injunctive relief; it thereby grants the FTC the tools to prevent harm from ongoing or imminent acts. Conversely, Congress gave the FTC power to seek monetary remedies under Section 19 of the Act—a provision of the statute that provides just punishment for bad actors and is accompanied by procedural and substantive protections that ensure fair notice to entities before imposing monetary remedies. The FTC undoubtedly finds it convenient to bypass the safeguards of Section 19 in seeking massive monetary awards, but that is not what Congress authorized, and for good reason.

Accordingly, to bring certainty to businesses around the country, *amici* ask this Court to hold that the FTC's Section 13(b) authority is limited to prospective injunctions, and does not authorize retrospective monetary relief.

## ARGUMENT

### I. This Court Should Bring Certainty to Businesses by Rejecting the FTC's Assertion of Authority to Seek Monetary Awards Under Section 13(b)

The $1.3 billion disgorgement award in this case exemplifies how the Commission aggressively employs Section 13(b) contrary to the statute's terms. Even though that provision is expressly limited to injunctive relief, the FTC routinely uses it to seek monetary damages for past practices—even practices common in the industry—without advance notice to the affected entity. As a result, businesses undertaking even ordinary and common industry practices currently face uncertainty and a significant risk that the FTC will use its newly claimed authority to seek large monetary awards under Section 13(b). This Court should limit the FTC's authority to the Act's statutory terms.

#### A. The FTC Has Increasingly Sought Monetary Relief Under Section 13(b), Amplifying Its Effect on Businesses

The FTC only arrived at its expansive interpretation of Section 13(b) within the last decade. Before 2012, the FTC would seek disgorgement or restitution only in "exceptional cases" where there was, among other things, a "clear violation" of the law; this approach ensured proper notice to the offending entity.[2] In 2012, however, the FTC changed course and claimed its prior position was "an overly restrictive view" of what the FTC believed was its discretion to seek monetary awards.[3] Instead, the FTC declared in its policy withdrawal that it is free to seek antitrust monetary relief under Section 13(b), irrespective of whether a "clear violation" of the Act has occurred—and even if the alleged misconduct is a "common" business practice.[4] Indeed, the *AMG* case is a prime example: the loan disclosures found to violate the FTC Act were widespread in the industry.[5]

The impact of the FTC's policy change has been substantial. The FTC proclaimed that the award in *AMG* was "the largest litigated judgment ever obtained by the FTC."[6] That is no small feat, as the policy change has produced staggering monetary awards in recent years. In 2011—just before its policy change—the FTC obtained only $223.7 million in

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[2] *Policy Statement on Monetary Equitable Remedies in Competition Cases*, 68 Fed. Reg. 45,821 (Aug. 4, 2003), 2003 WL 21780660.

[3] *Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases*, 77 Fed. Reg. 47,070 (Aug. 7, 2012), 2012 WL 3163476 ("*Policy Withdrawal*").

[4] *Id.* at 47,071

[5] *See* Br. of Resp't at 29, *AMG Capital Mgmt., LLC V. FTC*, No. 19-508 (U.S. Dec. 13, 2019), 2019 WL 6840723.

[6] Press Release, FTC, *U.S. Court Finds in FTC's Favor and Imposes Record $1.3 Billion Judgment Against Defendants Behind AMG Payday Lending Scheme* (Oct. 4, 2016), https://tinyurl.com/yb8mrxxt.

disgorgement and restitution awards.[7] But by 2014—just two years after the policy change—that amount had nearly tripled to $642.4 million for the year.[8] It more than tripled that amount the following year to $2 billion,[9] followed in 2016 and 2017 with whopping monetary amounts of *$11.98 billion* and *$5.29 billion*, respectively.[10] Thus, within just five years of the FTC's policy change, the Commission's newly aggressive stance on restitution has exploded the value of such awards *by more than 23 times*. Those efforts continued apace in 2019; even in a "down" year by recent standards, the FTC obtained $1.17 billion in judgments, or five times the amount obtained in 2011 prior to the policy change.[11]

This case is not unique in the magnitude of individual awards sought by the FTC for common business practices. For example, in 2015, the FTC sought $3.95 billion under Section 13(b) from a broadcast

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[7] FTC, *Annual Highlights 2011: Stats & Data* (Feb. 2012), https://tinyurl.com/y4j4ecgg.

[8] FTC, *Annual Highlights 2014: Stats & Data* (Dec. 2014), https://www.ftc.gov/annual-highlights-2014/stats-data-2014.

[9] FTC, *Annual Highlights 2015: Stats & Data* (Dec. 2015), https://www.ftc.gov/node/943403.

[10] FTC, *Annual Highlights 2016: Stats & Data* (Dec. 2016), https://www.ftc.gov/node/1205233; FTC, *A Recap of 2017: FTC's Annual Highlights* (Apr. 10, 2018), https://tinyurl.com/yy2d68k3.

[11] FTC, *Annual Highlights 2019: Stats & Data* (Dec. 2019), https://www.ftc.gov/reports/annual-highlights-2019/stats-and-data.

satellite service provider because it claimed that advertising services for "$24.99/mo for 12 months" constituted misleading advertising where the prices later increased.[12] The FTC also claimed that advertising more than "30 premium channels free for 3 months" was impermissible because the consumer had to affirmatively cancel the free trial to avoid future charges.[13] The FTC demanded billions in retrospective damages in the form of "disgorgement" even though the targeted practices were common within the industry, as many companies offer "teaser rates" or free trials to attract customers. In a *volte-face*, after years of litigation, the FTC ultimately dropped its suit mid-trial after the district court found inadequate evidence as to most of FTC's deception claims.[14]

In the same year, the FTC secured a $26.8 million settlement with a healthcare services company[15] after seeking monetary relief under Section 13(b), alleging that the company's exclusive agreements to distribute radiopharmaceuticals violated antitrust

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[12] *See* Compl. ¶ 16, *FTC v. DIRECTV, Inc.*, No. 15-cv-1129, 2015 WL 1054142 (N.D. Cal. Mar. 11, 2015).

[13] *FTC v. DIRECTV, Inc.*, No. 15-cv-1129, 2018 WL 3911196, at *6, *15 (N.D. Cal. Aug. 16, 2018).

[14] *Id.* Dkt. No. 428, (Oct. 22, 2018)

[15] Press Release, FTC, *Cardinal Health Agrees to Pay $26.8 Million to Settle Charges it Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics*, (Apr. 20, 2015), https://tinyurl.com/o3pfzqv.

laws.[16] But members of the Commission found it was unclear that exclusive agreements were even anti-competitive, much less illegal. Commissioner Wright dissented from the FTC's decision to enter into the consent decree not only because he did not believe the alleged conduct was plainly anticompetitive, but more fundamentally because he was concerned with the FTC's "continued efforts to pursue monetary remedies without providing any guidance regarding the bases it uses to choose when and whether it will pursue them."[17] Commissioner Ohlhausen issued a similar statement and bemoaned that the "lack of guidance from the Commission on the use of its disgorgement authority makes any such use inherently unpredictable and thus unfair."[18]

As these Commissioners have noted, the FTC's policy change has led to a drastic expansion of its use of Section 13(b) to seek and extract massive monetary awards under the amorphous standards for "unfair" or "deceptive" practices.

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[16] *See* Compl., *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031, 2015 WL 1805091 (S.D.N.Y Apr. 20, 2015).

[17] FTC, *Cardinal Health, Inc. – Dissenting Statement of Commissioner Joshua D. Wright*, File No. 101-0006, at 1 (Apr. 17, 2015), https://tinyurl.com/y2y2do7n.

[18] FTC, *Cardinal Health, Inc. – Dissenting Statement of Commissioner Maureen K. Ohlhausen*, File No. 101-0006, at 4 (Apr. 17, 2015), https://tinyurl.com/y6tohclr.

### B. The FTC's Failure to Provide Businesses with Fair Notice of Prohibited Conduct Before Seeking Monetary Sanctions Chills Commerce

The magnitude of monetary awards recently sought by the FTC under Section 13(b) has unsettled the business community as entities struggle to understand the potential liability they may face. The FTC has disavowed any obligation to provide businesses with advance notice of the practices it believes violate the Act; it contends that it can seek substantial monetary awards, regardless of whether the alleged misconduct is "common or novel, clearly a violation or never before considered." *Policy Withdrawal* at 47,071. In other words, in the FTC's view, there is no "basis for creating a heightened standard" requiring "a notice requirement." *Id.*

The FTC's approach deprives businesses of their right to "fair notice" of what conduct is regulated. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.") (collecting cases). Particularly given the general nature of the FTC Act's prohibition against "unfair or deceptive acts," it is critical that the FTC provide the public with fair notice of prohibited conduct before it imposes monetary sanctions for past conduct. *See* Pet. App. 36a, *FTC v. Credit Bureau Ctr., LLC*, No. 19-825 (Dec. 19, 2019).

Indeed, judicial construction of laws regulating businesses is "grounded not only on economic prediction" but also "business certainty." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 354 (1982) (describing judicial construction of the Sherman Act). To be a "profitable business," a company "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct" as unlawful. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Business uncertainty hampers innovation and investment activity to the detriment of businesses and consumers alike. As the federal regulator of unfair business practices, the FTC has a significant effect on business practices throughout the country. Confusion about the FTC's powers—particularly when paired with the threat of liability in the millions or billions of dollars—harms the nation's economy. Further, businesses cannot discern from enforcement actions how to steer future conduct and comply with the law, because the FTC uses the statute to extract settlements that yield little insight as to what constitutes offensive conduct for other businesses. Businesses are therefore left to guess as to what courts would deem to be an unfair or deceptive practice under the statute.

The FTC's use of *ex parte* asset freezes exacerbates business uncertainty and the potential for unfairness. At the very outset of some proceedings, the FTC invokes Section 13(b) to restrain funds it may later claim as monetary relief.[19] Such funds are fro-

[19] *See, e.g.*, Ex Parte Motion for Temporary Restraining Order and Asset Freeze, *FTC v. Simple Health Plans LLC*, No. 18-cv-62593 (S.D. Fla. Oct. 29, 2018).

zen before businesses have any opportunity to contest the validity of the claims. And without outside sources of funding, an asset freeze may deprive businesses of the ability to retain counsel and pay other costs to defend themselves in FTC enforcement proceedings.[20]

Finally, the uncertainty created by the FTC's shifting policy is further magnified because courts have agreed with the FTC that it need not prove the amount of restitution with precision. Instead, courts have held that the FTC may seek an award that "reasonably approximate[s] the amount of the defendant's unjust gains." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011); *see also FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016) (same); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (en banc) (same). The burden then falls to the defendant to show that the FTC has overstated the harm. *See Commerce Planet*, 815 F.3d at 604. Such a nebulous standard belies any argument that the awards garnered by the FTC are restitutionary in nature.

This Court should confirm that businesses are entitled to the certainty they need—and that the law requires them to receive—so they can appropriately structure industry practices.

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[20] *See* Barry J. Cutler, *The Criminalization of Consumer Protection – A Brave New World for Defense Counsel*, 22 Antitrust L.J. 61, 65–66 (2007).

## II. This Court Should Construe Section 13(b) According To Its Plain Language, Which Authorizes Only Injunctive Relief.

Section 13(b), by its plain terms, authorizes only *prospective* "injunction[s]" of the sale of products, operation of a business, or other "act or practice." 15 U.S.C. § 53(b). This follows from the plain meaning of the statutory text, the context in which that language is used, and the broader statutory framework. No reason exists to doubt that "Congress sa[id] what it mean[t] and mean[t] what it sa[id]" in limiting the FTC's Section 13(b) authority to enjoining ongoing or imminent wrongful acts and practices. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

That does not mean the FTC is without a mechanism to make consumers whole for unfair or deceptive business practices. Congress authorized damages in Section 19 of the Act, a provision that authorizes retrospective remedies and includes "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts, the refund of money or return of property, the payment of damages." 15 U.S.C. § 57b. That distinction is crucial to the business community because "refund of money" and "damages" may be imposed under Section 19(b) only when its fair notice and procedural requirements are satisfied.

The FTC's attempt to sidestep the requirements of Section 19 by seeking retrospective monetary relief under Section 13(b) runs headlong into the text and structure of the Act. First, the plain statutory language of Section 13(b) shows that the FTC's authority to seek permanent injunctive relief is "a simple stop-gap measure that allows the Commission to act quickly to prevent harm." *AMG Capital Mgmt.*, 910 F.3d at 431 (O'Scannlain, J., concurring). Under Section 13(b), when the Commission "has reason to believe" (1) that a person "is violating, or is about to violate" Section 5 of the FTC Act and (2) that "enjoining thereof pending the issuance of a complaint by the Commission . . . would be in the interest of the public," then the Commission may bring suit "*to enjoin* any such act or practice." 15 U.S.C. § 53(b) (emphasis added). Then, "[u]pon a proper showing" of factors warranting relief, "*a temporary restraining order* or a *preliminary injunction* may be granted" and "*further*, . . . in proper cases the Commission may seek, and after proper proof, the court may issue, *a permanent injunction*." *Id.* (first and third emphases added). By its terms, Section 13(b) authorizes a court to "award relief to prevent an *ongoing* or *imminent* harm—but not to deprive a defendant of 'unjust gains from *past* violations.'" *AMG Capital Mgmt.*, 910 F.3d at 430 (O'Scannlain, J., concurring).

If Congress intended for Section 13(b) to authorize the FTC to seek retrospective relief, it would not have used the terms "enjoin" or "injunction." By contrast, when Congress has authorized monetary relief elsewhere, both in the FTC Act and in other statutes, it employed broader statutory language that invoked a wide range of equitable powers beyond the narrow power to enjoin. *See*, *e.g.*, 15 U.S.C. § 57b(b) (authorizing "relief as the court finds necessary to redress injury to consumers or other persons" that "may include, but shall not be limited to . . . the refund of money or return of property" and "the payment of damages" for violations of cease and desist orders); *Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020) (holding that a statute authorizing the agency to seek "equitable relief" included the authority to obtain disgorgement or restitution awards to deprive defendants of the gains of wrongful conduct). These crucial textual distinctions show that "Congress intended a difference in meaning" that should be respected. *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citation and internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted; alteration in original).

Second, the FTC is not helpless to severely punish bad actors in the absence of the powers it has reimagined under Section 13(b). Properly construed, Section 13(b) authorizes powerful remedies. As the FTC itself admits on its web site, it "makes widespread use of the permanent injunction proviso of Section 13(b) in its consumer protection program" to seek permanent injunctions. This injunctive relief includes enjoining deceptive practices, as well as barring companies and entities from future participation in the market, also known as "fencing in." *See, e.g.*, *FTC v. Gill*, 265 F.3d 944, 957–58 (9th Cir. 2001) (affirming injunctive relief permanently prohibiting defendants from engaging in credit repair business given repeated and continuous violations).

The statutory framework for the FTC Act shows that Congress created a dual-track remedial system that would be rendered meaningless if the FTC could obtain monetary relief under Section 13(b). Whereas Section 13(b) authorizes the FTC to obtain forward-looking injunctive relief, Section 19 of the FTC Act creates a distinct process under which the FTC may obtain backward-looking monetary relief.

Section 19 requires that, to obtain monetary relief, the FTC must either (1) prove that the defendant "violate[d] any rule under this subchapter respecting unfair or deceptive acts or practices" (*i.e.*, a rule promulgated by the Commission), or (2) if no such violation exists, obtain a "final cease and desist order" through an administrative proceeding, and then prove to a trial court that the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent." 15 U.S.C. §§ 57b(a)(1)–(2). As Judge O'Scannlain explained in his special concurrence below, Section 19 "requires the Commission either to promulgate rules that define unlawful practices *ex ante*, or first to prosecute a wrongdoer in an administrative adjudication that culminates in a cease and desist order." *AMG Capital Mgmt.*, 910 F.3d at 432 (O'Scannlain, J., concurring).

The Act's two-part structure thus ensures that American businesses are given sufficient notice of whether their conduct violates the Act and could expose them to substantial monetary liabilities. *Supra* p. 14. That is why Congress conditioned the FTC's ability to seek monetary remedies upon the FTC's establishment of rules that businesses can reasonably follow. Reading an implied monetary remedy "into section 13(b) allows the Commission to circumvent [these] detailed notice requirements." *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 784 (7th Cir. 2019) (describing notice as "a central feature of the [FTC Act] provisions that expressly permit monetary relief"). This Court should interpret the Act in a way that ensures that the FTC complies with these notice provisions before seeking monetary remedies. *See*

*Liu*, 140 S. Ct. at 1948 (applying the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute") (citation omitted); *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010) (courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous").

## CONCLUSION

For the foregoing reasons, the Court should hold that Section 13(b) of the FTC Act does not authorize the FTC to seek restitution, disgorgement, or any other form of retrospective monetary relief.

Respectfully submitted,

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