Nos. 19-508 and 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 OF SURESCRIPTS, LLC AS AMICUS CURIAE IN SUPPORT OF PETITIONERS IN NO. 19-508 AND RESPONDENTS IN NO. 19-825

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INTEREST OF AMICUS CURIAE[1]

Surescripts, LLC is a healthcare information technology company that delivers comprehensive patient information to the point of care with a portfolio of solutions that work together to enhance prescribing, inform care decisions, and advance healthcare. Built on years of innovation and an unyielding commitment to prescription quality and safety, Surescripts' nationwide network seamlessly links prescribers with pharmacies and payors (often pharmacy benefit managers) through secure, accurate, and efficient platforms.

Part of the Surescripts platforms' ingenuity is the ability to serve simultaneously both sides of "two-sided" markets, joining the needs of two different groups who both depend on one or more of Surescripts' platforms to intermediate between them. One such two-sided product allows for transmission of a patient's prescriptions and prescription-related data between the prescriber and the patient's pharmacy. Another two-sided product allows for transmission of the patient's formulary and benefits information (such as covered drugs and copay amounts) between the patient's payor and the prescriber. Because the markets are two-sided, greater participation on one side encourages greater participation on the other side. Surescripts, as the platform intermediary, has previously encouraged that increased participation through optional loyalty discounts and incentives.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; and no party, counsel for a party, or any person or entity other than amicus curiae and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

In 2019, the Federal Trade Commission (FTC or Commission) brought an action in federal court against Surescripts under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *See FTC v. Surescripts, LLC*, 424 F. Supp. 3d 92 (D.D.C. 2020). The FTC claims that Surescripts' loyalty discount and incentives constitute anticompetitive exclusive dealing, which is in conflict with how other cases have treated claims based on low (or predatory) pricing under the Sherman Act. The FTC's case further requires a complex analysis of the proper application of this Court's recent exploration of two-sided markets in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). And yet, rather than engaging in administrative adjudication to analyze and opine on these concepts in the first instance, the FTC went straight to federal district court, simply so it could seek monetary relief under Section 13(b).

The case against Surescripts serves as a prime example of the FTC's brazen disregard for Section 13(b)'s text, purpose, and history. Interpreting Section 13(b) to permit retrospective monetary relief will only encourage the FTC to bring more cases involving complex, novel areas of antitrust law in federal court, and chill companies from experimenting with the sort of innovative, efficient business practices Surescripts has pioneered since its formation. And it will further undermine what is supposed to be a key justification for having a second U.S. antitrust agency: the application of the FTC's expertise to decide cases in the first instance through the FTC administrative process. This, in turn, is supposed to put companies on notice of what conduct is lawful and unlawful before subjecting them to monetary relief. The FTC has derailed from that path

all because it wants to use its power to seek monetary relief, which Section 13(b) does not authorize.

SUMMARY OF ARGUMENT

This case turns on a straightforward principle of law: "As the Court has said many times before, the Commission may exercise only the powers granted it by [Congress]." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). Congress did not grant the Commission the power to seek monetary relief under Section 13(b). That provision instead authorizes the Commission to seek "injunction[s]." As AMG and Credit Bureau Center have ably shown, that term does not include monetary relief. Indeed, just a few days after they filed their opening briefs, the Third Circuit joined the growing chorus of courts rejecting the FTC's entitlement to monetary relief in Section 13(b) cases. *See FTC v. AbbVie Inc.*, — F.3d —, 2020 WL 5807873, at *32-36 (3d Cir. Sept. 30, 2020).

Both cases before the Court are consumer-protection cases claiming "unfair or deceptive acts or practices" under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1). But Section 13(b) applies more broadly to "any provision of law enforced by the [FTC]." 15 U.S.C. § 53(b)(1). That includes the antitrust laws. And, unsurprisingly, the FTC has increasingly deployed its textually unmoored interpretation of Section 13(b) to seek massive disgorgement awards in antitrust cases. The FTC's abuse of Section 13(b) in the antitrust context confirms the need to interpret the statute according to its terms.

This brief seeks to inform the Court's consideration of the question presented in two ways. *First*, it traces the FTC's growing reliance on Section 13(b) in the antitrust context over time. Although

Section 13(b) was enacted in 1973, the FTC never sought monetary relief in antitrust cases under Section 13(b) until 1997. After suddenly discovering this "authority"—and recognizing its sweeping implications—the FTC formally adopted, in 2003, restrictions on when it would seek monetary relief in antitrust cases. The FTC explained that such relief should be reserved for exceptional cases involving particularly egregious and clear antitrust violations. But in 2012, the FTC abruptly jettisoned those limitations, paving the way for it to more routinely seek huge monetary awards in antitrust cases under Section 13(b), including in cases advancing novel antitrust theories. This history reinforces that monetary relief is not an organic feature of Section 13(b), but rather an FTC-invented tool that the agency has increasingly employed without meaningful constraint.

Second, this brief explains why the antitrust context confirms the need for the Court to reject the FTC's power grab. Most importantly, the FTC's interpretation of Section 13(b) contradicts the text and structure of the FTC Act, allowing the FTC to circumvent its own statutory constraints as well as those imposed on private-party antitrust suits. Moreover, the long-run consequences of this unbounded view of Section 13(b) are harmful to businesses and consumers. The FTC has dedicated fewer resources to its primary mission of prospectively identifying anticompetitive conduct, choosing instead to act as a pseudo-prosecutor hunting for past antitrust violations. And particularly in the antitrust context, where violations are frequently unclear and the danger of false positives is well-recognized, allowing the FTC to wield

Section 13(b) as a means of extracting large monetary awards only discourages businesses from engaging in innovative—and potentially *procompetitive*—conduct.

This Court should interpret Section 13(b) according to its terms and reject the notion that it authorizes monetary relief in the guise of an "injunction."

ARGUMENT

I. The FTC Has Increasingly Wielded Section 13(b) To Obtain Monetary Relief In Antitrust Cases

The FTC asserts that equitable monetary relief under Section 13(b) is merely one of the "multiple enforcement tools" that "Congress provided the Commission . . . to protect consumers from unfair and deceptive acts or practices." 19-825 Cert. Reply Br. 9-10. This suggestion whitewashes the extent to which the FTC has departed from the authority Congress actually granted it, as well as the reach of the FTC's reimagined authority. In recent years, the FTC has increasingly—and controversially—started to wield Section 13(b) as a means of seeking monetary relief in antitrust cases. This history underscores just how far the FTC has strayed beyond its statutory bounds.

1. The scope of the FTC's statutory remedial arsenal has always been tailored to its purpose. Unlike the Department of Justice's Antitrust Enforcement Division, which is charged with enforcing the antitrust laws, the FTC is a "supervisory" body charged with taking "prophylactic" action toward "*prevention* of diseased business conditions, not cure." *FTC v. Gratz*, 253 U.S. 421, 434-35 (1920) (Brandeis, J., dissenting) (emphasis added), *overruled in part by FTC v. Brown*

Shoe Co., 384 U.S. 316 (1966). The FTC's tools are primarily designed not to "exact compensatory damages for past acts, but to prevent illegal practices in the future." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

The FTC has authority to issue rules governing unfair competition and unfair and deceptive trade practices, 15 U.S.C. §§ 46(g), 57a, and to issue cease-and-desist orders for violations of the Clayton Act, *id.* § 21(b), and of the FTC Act, *id.* § 45(b). When parties violate those rules or cease-and-desist orders, the FTC can then go to court and seek civil penalties, *id.* §§ 21(*l*), 45(*l*), 45(m)(1), along with equitable relief, *id.* § 45(*l*), and, in cases involving certain unfair or deceptive trade practices, refunds and other monetary damages, *id.* § 57b.

This scheme thus envisions the FTC as a body of "expert[s]" promulgating forward-looking rules and orders after "careful study of the business and economic conditions of the industry affected." *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934) (citation omitted); *see Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (per curiam). Armed with tools for untangling "novel and difficult questions of law and policy" that implicate "extensive investigation and analysis of complex economic facts," the FTC was conceived "[a]s an instrument for helping make the antitrust laws more certain, more predictable and more effective" going forward. Philip Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A. J. 609, 610 (1967).

The FTC effectuates this goal, first and foremost, by investigating potentially anticompetitive activity and bringing administrative adjudications, which culminate in cease-and-desist orders bringing

anticompetitive practices to a halt. *See* 15 U.S.C. §§ 18a(e), 46, 49, 57b-1 (authorizing investigations); *id.* §§ 18a(f), 21(b), 45(b) (authorizing administrative adjudications). In granting the FTC this cease-and-desist authority, Congress wanted the FTC "to supplement, not to duplicate, the work of the courts and the Department of Justice in antitrust enforcement" by focusing on "'prevention' and not punishment." Elman, *supra*, at 610, 612 (citation omitted); *see* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U. L. Rev. 1139, 1151-53 (1992).

Section 13(b) was designed to support this administrative regime, not supplant it. Enacted in 1973, Section 13(b) authorizes the FTC, whenever it believes that someone "is violating or is about to violate" any of the laws enforced by the FTC, to seek a "preliminary injunction" in court and, in "proper cases," a "permanent injunction." 15 U.S.C. § 53(b).

Before 1973, it had been virtually impossible for the FTC to stop unlawful conduct until after conducting the lengthy administrative proceedings that culminated in the issuance of cease-and-desist orders. *See Heater v. FTC*, 503 F.2d 321, 326 (9th Cir. 1974). This delay was particularly problematic for the FTC's efforts to enforce the antitrust laws against anticompetitive mergers. Once consummated, such mergers were difficult to "unscramble" after the fact. *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966). Congress enacted Section 13(b) as a "'gap-filling' measure" that would enable the FTC to obtain preliminary injunctive relief and thus preserve the status quo "pending the completion of the lengthy administrative proceedings and appeals which lead to

a final cease-and-desist order." Letter from Lewis A. Engman, Chairman, FTC, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 Cong. Rec. 36,610 (1973); *see FTC v. Shire ViroPharma*, 917 F.3d 147, 156 (3d Cir. 2019) ("When Congress added Section 13(b), the provision was expected to be used for obtaining injunctions against illegal conduct pending completion of FTC administrative hearings.").

Section 13(b) also contains a proviso authorizing courts to enter "permanent injunction[s]" in "proper cases." 15 U.S.C. § 53(b). This proviso was added to address concerns that courts might be "reluctant to grant a temporary injunction" without retaining control over the ensuing proceedings, and it enabled the FTC to obtain permanent injunctive relief "in the routine fraud case" without having to "further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order." S. Rep. No. 93-151, at 30-31 (1973). Contrary to the FTC's suggestion, there is no evidence that anyone "understood" this proviso to authorize retrospective monetary relief. 19-825 Pet. 16.

Indeed, the history shows the opposite: Just two years after enacting Section 13(b), Congress enacted Section 19 of the FTC Act, 15 U.S.C. § 57b. That provision expressly authorizes the FTC to seek monetary relief, including refunds and other consumer redress, in consumer-protection cases involving "unfair or deceptive acts or practices." *Id.* § 57b(a). But Section 19 came with restrictions: It does not apply to antitrust cases, *see id.*; the action is subject to a three-year limitations period, *id.* § 57b(d); and the FTC's claim must rest on either a rule violation, *id.* § 57b(a)(1), or a violation of an "applicable" cease-and-desist order, *id.* § 57b(a)(2).

For the latter, the FTC must *also* demonstrate that a "reasonable man would have known under the circumstances" that the conduct "was dishonest or fraudulent." *Id.*

These restrictions—which were hotly debated in Congress—"provide[] the 'inescapable inference' that Congress did not intend the injunctive relief provision [in Section 13(b)] to swallow the monetary relief provision." J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 18-21 (2013) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Indeed, as Judge Hardiman recently explained for the Third Circuit, these restrictions show that "when Congress want[ed] to empower" the FTC to seek "more expansive equitable relief than injunctions," such as equitable monetary relief, "it d[id] so" expressly and directly in other provisions like Section 19—not indirectly through Section 13(b). *AbbVie*, 2020 WL 5807873, at *34.

2. For more than two decades after Section 13(b) became law, the FTC never claimed that its authority to seek a "permanent injunction" under Section 13(b) also authorized it to seek monetary relief in antitrust cases. And even then, it began seeking such relief sporadically and controversially.

a. The FTC's expanded reliance on Section 13(b) began in the consumer-protection context. Finding "the requirements imposed by Section 19 difficult to meet," the FTC sought to effectively supplant Section 19 by arguing that Section 13(b) authorized it to "seek remedial monetary relief, or any other form of equitable relief, from a court." David K. Park & Richard Wolfram, *The FTC's Use of Disgorgement in Antitrust Actions Threatens to Undermine the*

Efficient Enforcement of Federal Antitrust Law 2-3, Antitrust Source (Sept. 2002).[2] Of course, the FTC realized that "[n]either the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable [monetary] relief." David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 22 (Sept. 23, 2004).[3] So the FTC initially "moved warily" in "pursuing [this] ambitious agenda," carefully "selecting cases with compelling facts." *Id.* at 21-22. The Ninth Circuit first bought this theory in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), and it then took hold in other circuits, *see* 19-825 Pet. App. 23a-26a. But for the next decade the FTC cabined this argument to consumer-protection cases that might have otherwise been brought under Section 19.

b. The FTC did not seek monetary relief under Section 13(b) in the antitrust context until the late 1990s, and it requested this remedy in only three cases before 2003.[4]

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[2] https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/09_02.pdf#page=23.

[3] https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

[4] In 1992, the FTC sued three infant formula manufacturers claiming unlawful price-fixing in connection with bids for a government-backed formula program and sought "restitution." *See FTC v. Abbott Labs.*, No. 1:92-cv-01364 (D.D.C. filed June 11, 1992); *FTC v. American Home Products*, No. 1:92-cv-01365 (D.D.C. filed June 11, 1992); *FTC v. Mead Johnson*, No. 1:92-cv-01366 (D.D.C. filed June 11, 1992). But the restitution was restitution *in-kind*, requiring the defendants to deliver a certain amount of formula to the government agency that administered the formula program. *See* FTC, *1992 Annual Report* 54 (1992), https://www.ftc.gov/sites/default/files/documents/reports_annual/

In the first, *FTC v. College of Physicians-Surgeons of Puerto Rico*, No. 3:97-cv-02466 (D.P.R. filed Oct. 2, 1997), the defendants settled price-fixing claims without fanfare, agreeing to pay $300,000 in equitable restitution. The defendants did not challenge the court's authority to order such relief under Section 13(b).

The next year, the FTC filed suit in *FTC v. Mylan Laboratories, Inc.*, No. 1:98-cv-03114 (D.D.C. filed Dec. 21, 1998). This case was far more controversial and prompted the first court decision to consider the FTC's authority to seek monetary relief under Section 13(b) in an antitrust case. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999). There, the FTC, along with several states and private plaintiffs, alleged that Mylan had monopolized the markets for two anti-anxiety drugs by entering into exclusive-dealing arrangements with suppliers, effectively blocking many of Mylan's competitors from market entry. The plaintiffs sought restitution and disgorgement in amounts equivalent to Mylan's profits.

In considering whether the FTC could seek monetary relief under Section 13(b), the court acknowledged that "the plain language of § 13(b) does not authorize the FTC to seek monetary remedies" and that "courts are generally disinclined to find remedies beyond those that Congress has expressly granted." *Id.* at 36. But the court nevertheless agreed with the FTC that "the remedial powers authorized

annual-report-1992/ar1992_0.pdf. The *American Home Products* and *Mead Johnson* cases settled, *see id.*; the *Abbott Laboratories* case went to trial, where the FTC lost on the merits, *see FTC v. Abbott Labs.*, 853 F. Supp. 526 (D.D.C. 1994).

under § 13(b)" should be "exten[ded]" to encompass "monetary relief." *Id.* at 36-37. Finding "no relevant case law that *prohibits* the FTC from seeking disgorgement or any other form of equitable ancillary relief" under Section 13(b), the court held that such relief could be granted. *Id.* at 37 (emphasis added).

The FTC ultimately settled with Mylan in an agreement that included $100 million in monetary relief. *See* Press Release, FTC, *FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market* (Nov. 29, 2000).[5] But Commissioner Leary offered a powerful dissent from this aspect of the settlement. *See FTC v. Mylan Pharm., Inc.*, FTC File No. X990015 (Nov. 29, 2000) (Leary, Comm'r, dissenting in part and concurring in part) (*Mylan* Leary Dissent).[6] Allowing the FTC to seek disgorgement under Section 13(b), he observed, "transform[ed] the Commission into a prosecutor with an immensely powerful antitrust weapon," far from its statutorily designed role of an expert body that "look[s] forward rather than backward." *Id.* And although the Commission promised to use this newly found weapon only "in the most extraordinary cases," the court's ruling "create[d] an undesirable precedent for antitrust enforcement" that could be used "less scrupulous[ly]" by future Commissioners. *Id.*

Commissioner Leary also explained that interpreting Section 13(b) to authorize the FTC to seek monetary relief on behalf of consumers ran the risk of "seriously undercut[ting] federal policy against

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[5] https://www.ftc.gov/news-events/press-releases/2000/11/ftc-reaches-record-financial-settlement-settle-charges-price.

[6] https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanlearystatment.htm.

multiple claims by direct and indirect purchasers." *Id.* This policy is embodied in "the *Illinois Brick* direct-purchaser rule," which provides that plaintiffs who purchase goods *indirectly* from an antitrust violator cannot recover damages for overcharges passed on through a chain of distribution. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519, 1521 (2019) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)). Only "*direct* purchasers—that is, those who are 'the immediate buyers from the alleged antitrust violators'—may sue." *Id.* at 1521 (emphasis added) (citation omitted). Having the FTC "obtain restitution on behalf of consumers," Commissioner Leary explained, could "directly undermine" *Illinois Brick*'s "avoidance of duplicative recoveries" if those consumers are indirect purchasers, because the defendants remain subject to "liab[ility] for full treble damage recoveries by [the] direct purchasers." *Mylan* Leary Dissent.

The FTC's next antitrust disgorgement case was *FTC v. Hearst Trust*, No. 1:01-cv-00734 (D.D.C. Apr. 4, 2001). There, the FTC claimed that the defendants consummated a merger that monopolized the integrated drug information database market. The FTC sought divestiture of the acquired company and disgorgement of profits. The defendants settled for $19 million in disgorgement. Press Release, FTC, *Hearst Corp. to Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint* (Dec. 14, 2001).[7] Commissioner Leary again dissented from the monetary portion of the settlement, reiterating his concerns about seeking

[7] https://www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge-19-million-and-divest-business-facts-and.

disgorgement in antitrust cases under Section 13(b). *FTC v. Hearst Trust*, FTC File No. 991-0323 (Dec. 14, 2001) (Leary, Comm'r, concurring in part and dissenting in part).[8]

3. Armed with its *Mylan* and *Hearst* settlements, the FTC has spent the last two decades trying to figure out when and how it should wield Section 13(b) to obtain monetary relief in antitrust cases. Because Congress did not actually prescribe this remedy in the statute, the FTC has made up the rules as it has gone along. And the agency has adopted an increasingly unbounded theory of when Section 13(b) monetary relief is appropriate.

a. The FTC started out somewhat cautiously. Prompted by Commissioner Leary's concerns in *Mylan* and *Hearst*, the FTC issued a notice in 2001 seeking comments on how it should determine whether to seek monetary relief in antitrust cases. 66 Fed. Reg. 67,254 (Dec. 28, 2001). The questions posed for comment revealed the extent to which the FTC knew it was in uncharted terrain: What kinds of antitrust violations are appropriate for monetary relief? How should it be calculated? Is disgorgement different from restitution and, if so, is one more appropriate than the other? *See id.* Notably missing from the notice, however, was any consideration of the textual or historical basis for seeking monetary relief under Section 13(b). Indeed, the FTC did not even bother to cite Section 13(b) at all. Instead, the FTC brandished its *Mylan* and *Hearst* settlements and told commenters that it would "not [be] re-examining its

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[8] https://www.ftc.gov/sites/default/files/documents/cases/2001/12/learystate.htm.

statutory authority to seek disgorgement or other monetary equitable relief in competition cases." *Id.*

After a comment period, the FTC issued a formal policy statement in 2003. 68 Fed. Reg. 45,820 (Aug. 4, 2003). Seemingly aware of the potentially far-reaching scope of its position that Section 13(b) authorizes monetary relief, the FTC felt compelled to adopt some self-imposed limitations on "whether to seek disgorgement or restitution in a competition case." *Id.* at 45,821. First, the FTC declared it would "ordinarily" seek those remedies "only when the [antitrust] violation is clear," such that "existing precedent" would lead a "reasonable party [to] expect that the conduct at issue would likely be found to be illegal." *Id.* at 45,821. Second, the FTC asserted it would "not seek a monetary equitable remedy when there is no reasonable basis for calculating the amount." *Id.* at 45,822. Third, the FTC said it would "consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings." *Id.* at 45,821-22. These factors, the FTC claimed, would limit "disgorgement and restitution [to] exceptional cases." *Id.* at 45,821.

By placing these restrictions on when it would use Section 13(b) to seek monetary relief, the FTC expressly recognized the risks that its interpretation of Section 13(b) could pose. For example, the agency recognized it would ordinarily be unfair and inappropriate to seek monetary relief when an antitrust violation was *not* "clear," because in such circumstances a "violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy." *Id.* at 45,821. That concern makes perfect sense given the infamously—and in some

circumstances deliberately—vague antitrust laws enforced by the FTC. Especially in novel or "complex" circumstances, *id.* at 45,822, the prospect of monetary relief could chill experimentation with practices that are ultimately procompetitive.

Notably, the FTC expressly acknowledged that seeking monetary relief under Section 13(b) would allow it to circumvent the "practical [and] legal" restrictions Congress had placed on seeking monetary relief in private-plaintiff antitrust cases. *Id.* at 45,822. "[F]or example," the FTC could, in the name of pursuing "equity," end-run applicable "statutes of limitations," statutory caps on "penalties," and the prohibition on federal antitrust suits by "indirect purchasers." *Id.* at 45,822-23. And the FTC also recognized that seeking monetary relief under Section 13(b) could interfere with other remedies available by statute in private-plaintiff cases, resulting in "duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury." *Id.* at 45,823.

The FTC's 2003 policy statement remained in place for nearly a decade, during which time the FTC obtained monetary relief under Section 13(b) in only one antitrust case. *See* Final Orders and Stipulated Permanent Injunctions, *FTC v. Perrigo Co.*, No. 1:04-cv-01397 (D.D.C. Aug. 25, 2004) (ECF Nos. 9, 10) (settling claims in agreements that included $6.25 million in total disgorgement).[9]

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[9] The FTC sought monetary relief in another antitrust case but lost on the merits at trial (and then lost again on appeal). *See FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1239, 1243 (8th Cir. 2011).

b. Ultimately, however, the FTC could not help itself: Despite the constraints imposed in the 2003 policy statement, the FTC unceremoniously tossed it aside in 2012, without any notice or opportunity for comment from the public. 77 Fed. Reg. 47,070 (Aug. 7, 2012).

According to the FTC, the three factors articulated in the 2003 statement were "overly restrictive of the Commission's options for equitable remedies" and had "chilled the pursuit of monetary remedies in the years since the statement's issuance." *Id.* at 47,070-71. The FTC now claimed that it should be able to pursue monetary relief even in cases involving "novel conduct"—i.e., conduct "never before considered" to violate the antitrust laws. *Id.* at 47,071. Ensuring that parties are on "notice" that their conduct was illegal before extracting money from them had become an unnecessary and burdensome task. *Id.* The FTC also reiterated its distaste for existing limitations on private-plaintiff suits, this time taking aim at this Court's decisions: "At a time when Supreme Court jurisprudence has increased burdens on plaintiffs" in private suits, the FTC declared, its own ability to seek monetary relief should not be limited to only "exceptional cases." *Id.*

Commissioner Ohlhausen vigorously dissented. In her view, the withdrawal of the 2003 guidance "signal[ed]" that the Commission would be seeking monetary relief even when "the alleged antitrust violation is not clear or where other remedies would be sufficient to address [it]." *Id.* at 47,071-72. This prospect raised "troubl[ing]" and "significant concerns," she explained, exacerbated by the Commission's "seeming lack of deliberation" and refusal to consider "public input." *Id.* at 47,072.

4. Free from any restraints—statutory or self-imposed—the FTC has pursued monetary relief in more than double the number of Section 13(b) antitrust actions since 2012 than it did in the preceding four decades combined. *See, e.g.*, *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433 (E.D. Pa. 2015); *FTC v. Cardinal Health, Inc.*, No. 1:15-cv-03031 (S.D.N.Y. Apr. 23, 2015); *FTC v. Endo Pharms., Inc.*, No. 2:16-cv-01440, 2016 WL 6124376 (E.D. Pa. Oct. 20, 2016); *FTC v. Mallinckrodt ARD Inc.*, No. 1:17-cv-00120 (D.D.C. Jan. 30, 2017); *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98 (E.D. Pa. 2018), *rev'd in part*, — F.3d —, 2020 WL 5807873 (3d Cir. Sept. 30, 2020); *FTC v. Shire ViroPharma Inc.*, No. 1:17-cv-00131, 2018 WL 1401329 (D. Del. Mar. 20, 2018), *aff'd*, 917 F.3d 147 (3d Cir. 2019); *FTC v. Surescripts, LLC*, 424 F. Supp. 3d 92 (D.D.C. 2020).

The monetary awards in these cases have been staggering. The *Cephalon*, *Cardinal Health*, and *Mallinckrodt* cases settled, with the FTC extracting $1.2 billion, $26.8 million, and $100 million in disgorgement, respectively. And in the *AbbVie* case, the FTC obtained a district court judgment ordering AbbVie to pay $448 million in disgorgement. *AbbVie*, 329 F. Supp. 3d at 146; *but see AbbVie*, 2020 WL 5807873, at *36 (reversing award and holding that "district courts lack the power to order disgorgement under Section 13(b)"). In these four cases alone, district courts awarded the FTC nearly $1.8 billion in disgorgement—*fourteen times* the $125.6 million the FTC obtained in antitrust cases under Section 13(b) before 2012.

Just as Commissioner Ohlhausen predicted, most of these cases have involved novel or highly complex issues of antitrust law without clear violations. For

example, several cases—*Cephalon*, *AbbVie*, *Endo*, and *Shire ViroPharma*—are "pay-for-delay" cases in the wake of this Court's decision in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). *Actavis* held that a patent holder "can sometimes violate the antitrust laws" by paying an alleged infringer not to produce the patented product until the patent's term expires, thereby settling both the patent holder's infringement claim and the infringer's patent-invalidity counterclaim. *Id.* at 149. Such settlement agreements must be evaluated under the economically "complex[]" "rule of reason" to determine whether they present "significant unjustified anticompetitive consequences." *Id.* at 159-60. Pursuing these cases in court under Section 13(b), rather than under the FTC's own adjudicative process, has eliminated any opportunity for the Commission to "render a thoughtful decision applying the *Actavis* standard, providing much-needed guidance to courts and firms around the country." *In re Endo Pharms. Inc.*, No. 141-0004, 2016 WL 1360809, at *1 (F.T.C. Mar. 31, 2016) (Ohlhausen, Comm'r, dissenting).

The Commission has charted a similar course in monopolization cases arising under Section 2 of the Sherman Act, 15 U.S.C. § 2. "Section 2 remains one of the most vigorously debated areas of antitrust law," making it particularly ill-suited for the "extraordinary remedy of disgorgement." *In re Cardinal Health, Inc.*, No. 101-0006, 2015 WL 1849040, at *6-7 (F.T.C. Apr. 17, 2015) (Ohlhausen, Comm'r, dissenting). Yet the FTC has forged ahead, abandoning its "special mission to develop the antitrust laws" in administrative proceedings and instead bringing novel Section 2 claims in court under

Section 13(b), all in the name of obtaining disgorgement for past conduct. *Id.* at *7; *see id.* at *9-10 (Wright, Comm'r, dissenting).

The FTC's case against Surescripts is a poster child for the agency's radical departure from its 2003 policy statement. Not only is it a Section 2 case, but the FTC's challenge to optional loyalty discounts and incentives sits at the crossroads of predatory pricing and exclusive dealing—an uncharted extension of Section 2.

The novelty is compounded by the presence of two-sided transaction platforms in which Surescripts offers products or services to two different groups connected through its platforms. *See supra* at 1-2. The case also represents the FTC's first attempt to ascertain the anticompetitive effects of a two-sided platform since this Court's decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). There, the Court recognized for the first time that "[t]wo-sided platforms differ from traditional markets in important ways" as a matter of economics, *id.* at 2280, and failing to "accurately assess" and account for these complex differences risks "'chill[ing] the very conduct the antitrust laws are designed to protect,'" *id.* at 2287 (citation omitted). *American Express*, however, involved claims under Section 1 of the Sherman Act.

The case against Surescripts thus combines *American Express*'s novelty with a particularly murky aspect of Section 2 law. Rather than taking on these cutting-edge antitrust issues in-house—through administrative proceedings designed to develop and clarify uncertain areas of the law—the FTC has chosen to litigate in federal court under Section 13(b) so that it can try to hit the monetary relief jackpot.

By increasingly relying on Section 13(b) over the past decade, the FTC has abandoned any pretense that it views equitable monetary relief as a form of "ancillary relief" under Section 13(b), "adjunct" to its authority to seek an injunction. 19-825 Pet. 11-12 (citations omitted). Instead, monetary relief is now often the primary purpose of the suit. In *Shire ViroPharma*, for example, the FTC sought equitable monetary relief "five years *after* Shire had stopped its allegedly illegal conduct." 917 F.3d at 159 (emphasis added). Although the FTC threw in a request for injunctive relief by speculating that Shire could engage in similar conduct in the future, *see id.* at 160, it was obvious that the FTC's real mission was to extract "hundreds of millions of dollars" from Shire for its "past illegal [conduct]," "even if [the FTC could not] obtain a forward-looking behavioral injunction," FTC Br. 41-46, *Shire ViroPharma*, 917 F.3d 147 (No. 18-1807), 2018 WL 3101438. Indeed, the FTC even floated the idea that it could bring a "*standalone* claim for equitable monetary relief," without seeking an injunction at all. *Shire ViroPharma*, 917 F.3d at 160 n.19 (emphasis added).

The FTC's approach to Section 13(b) in antitrust cases has thus taken a 180-degree turn. First it refrained from seeking monetary relief altogether; then it restrained itself to "exceptional" cases involving only "clear" violations; and now it treats such relief as the main event in ordinary cases. The FTC's erratic treatment of Section 13(b), especially since it tossed aside its own guidance in 2012, reinforces that monetary relief was never part of that statute—and that the FTC has overreached in exercising its invented authority.

II. The FTC's Antitrust Authority Confirms That Section 13(b) Does Not Authorize Monetary Relief

The FTC's role in antitrust enforcement—and its application of Section 13(b) to antitrust cases—provide additional reasons to conclude that "injunction" does not mean monetary relief. Allowing the FTC to seek monetary relief under Section 13(b) would upend the statutory scheme and undermine the careful balance Congress struck when deciding how, when, and by whom the antitrust laws should be enforced. And by focusing on headline-grabbing monetary awards under Section 13(b), the FTC is neglecting its duty to develop the antitrust laws as an expert agency in administrative adjudications.

1. Although the FTC's understanding of Section 13(b) has changed dramatically in recent years, the statute itself has remained the same. And as a matter of the statutory interpretation, the FTC's pursuit of monetary relief under Section 13(b) is untenable.

As AMG and Credit Bureau Center have explained, the text of Section 13(b) leaves no doubt that it is limited to forward-looking, prospective relief. *See* 19-508 Pet'rs Br. 19-25; 19-825 Resp'ts Br. 13-26. The statute authorizes courts to enter "injunction[s]." 15 U.S.C. § 53(b). As this Court has long held, the "sole function of an action for injunction is to forestall future violations," entirely "unrelated to punishment or reparations for those past." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952). Injunctions—whether mandatory or prohibitory—do not "contemplate[]" monetary relief such as disgorgement or "equitable restitution." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996).

The rest of Section 13(b) confirms that the text means what it says and authorizes *injunctions*—and no more. By its terms, Section 13(b) can be utilized only if a party "*is* violating, or *is about to* violate," the law. 15 U.S.C. § 53(b)(1) (emphasis added). That limitation makes clear that Section 13(b) is focused on preventing ongoing or imminent violations of law—not on rectifying past wrongs. Interpreting Section 13(b) to authorize retrospective monetary relief is fundamentally inconsistent with the text's forward-looking focus. *See AbbVie*, 2020 WL 5807873, at *33 ("Disgorgement deprives a wrongdoer of *past* gains, meaning that even if a wrongdoer's conduct is not imminent or ongoing, he may have gains to disgorge." (citation omitted)). Indeed, the FTC's interpretation produces the bizarre result that Section 13(b) authorizes monetary relief to redress ongoing violations ("is violating") and future violations ("is about to violate"), but *not* completed violations.

It is inconceivable that Congress grounded the FTC's authority to seek a backwards-looking remedy in a provision that requires an ongoing or future violation. Especially given that Congress *did* expressly authorize the FTC to seek such remedies in *other* remedial provisions, *see supra* at 6, there is no sound reason to interpret Section 13(b) to authorize anything other than forward-looking, injunctive relief. *Cf., e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015) ("[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" (citation omitted)).

2. The FTC's interpretation of Section 13(b) also overrides the important limitations Congress has placed on antitrust suits by private parties. Unlike

its consumer-protection authority under the FTC Act, which is generally exclusive, the FTC shares its antitrust enforcement authority with private plaintiffs. *See* 15 U.S.C. § 15 (authorizing private suits under the Clayton Act). These private-plaintiff suits are restricted in several respects, including through limitations periods, penalty caps, and strict pleading and proof requirements. The FTC has openly admitted that it seeks monetary relief under Section 13(b) as a way around these "legal difficulties." 68 Fed. Reg. at 45,822.

a. Many of these "difficulties" are imposed by the antitrust statutes. For example, suits under the Clayton Act (including private actions and actions by the Department of Justice) are subject to a four-year limitations period. 15 U.S.C. § 15b. The FTC has declared that because Section 13(b) lacks a statute of limitations, it can obtain monetary relief on behalf of consumers when "statutes of limitations" would otherwise bar their private suits. 68 Fed. Reg. at 45,822.[10] While the absence of a "statute of limitations" in Section 13(b) should serve as a "striking" indication that it does not authorize retrospective monetary relief, *Meghrig*, 516 U.S. at 486, the FTC views that absence as a means of circumventing *other* limitations periods applicable to statutes that *do* authorize monetary relief.

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[10] The FTC has taken a similar position with respect to its consumer-protection authority, overriding the three-year limitations period for obtaining monetary relief under Section 19 of the FTC Act, 15 U.S.C. § 57b(d), by asserting that Section 13(b) is not subject to any limitations period. *See, e.g.*, *FTC v. Dantuma*, 748 F. App'x 735, 739 (9th Cir. 2018), *pet. for cert. filed sub nom. Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (Oct. 18, 2019).

The FTC also claims the ability to bulldoze "the specific penalties prescribed in applicable laws" when, in the FTC's view, "equity" requires something heavier. 68 Fed. Reg. at 45,822. It is therefore unsurprising that, year after year, the amount of money the FTC obtains in disgorgement dwarfs the amount it obtains in statutorily authorized civil penalties. *See* FTC, *Stats & Data 2019* (2019) ($1.2 billion in disgorgement, $143.8 million in penalties);[11] FTC, *Stats & Data 2018* (2018) ($254.0 million in disgorgement, $7.2 million in penalties);[12] FTC, *Stats & Data 2017* (2017) ($5.3 billion in disgorgement, $176.0 million in penalties).[13]

b. The FTC has also admitted that its expansive interpretation of Section 13(b) is designed to evade "Supreme Court jurisprudence" in antitrust cases, which the FTC finds too "burdens[ome]" for plaintiffs. 77 Fed. Reg. at 47,071.

The FTC thus believes that seeking disgorgement on behalf of consumers may be appropriate when "indirect purchasers are precluded from suit" under the *Illinois Brick* doctrine. 68 Fed. Reg. at 45,822; *see supra* at 12-13. But doing so undermines the foundations for the doctrine itself: Allowing the FTC to pursue disgorgement alongside private plaintiffs "'open[s] the door to duplicative recoveries'" and risks shortchanging the direct purchasers, who are the "preferred" private plaintiffs under the antitrust

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[11] https://www.ftc.gov/reports/annual-highlights-2019/stats-and-data.

[12] https://www.ftc.gov/reports/annual-highlights-2018/stats-and-data.

[13] https://www.ftc.gov/reports/annual-highlights-2017/stats-and-data.

laws. *Illinois Brick*, 431 U.S. at 731, 746 (citation omitted); *see* Park & Wolfram, *supra*, at 9-12.

Faced with this dilemma, the FTC has tried to devise an atextual solution to salvage its atextual remedy. According to the FTC, courts might coordinate remedies among private and public suits, such that the monetary relief obtained by private parties can be set off against the amounts obtained by the FTC. 68 Fed. Reg. at 45,822-23. This solution suffers from several problems, *see* Park & Wolfram, *supra*, at 11-13, among them the fact that set off would not operate between amounts received by similarly situated parties—the amount received by the FTC on behalf of *indirect* purchasers would be set off against amounts received in private suits by *direct* purchasers.

The FTC has also bristled at recent cases from this Court that supposedly make it "more difficult for plaintiffs to win antitrust cases." Joshua D. Wright, Commissioner, FTC, *The Federal Trade Commission and Monetary Remedies* 14-15 (July 19, 2013).[14] As one former Commissioner explained, the cases "most commonly cited" in this vein—*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007); and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009)—impose pleading and proof standards on private plaintiffs designed to "separate anticompetitive conduct" from

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[14] https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf.

conduct that is "benign" or even "procompetitive." Wright, *supra*, at 15-16, 22.

To the extent those standards impose higher "burdens on plaintiffs," 77 Fed. Reg. at 47,071, those burdens reflect the Court's acknowledgement that lax or economically unsound pleading and proof standards can "over-deter[] conduct that is procompetitive"—and thereby undermine the very goals of the antitrust laws. Wright, *supra*, at 18-23; *see, e.g.*, *Trinko*, 540 U.S. at 414 ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" (citation omitted)). That concern does not disappear simply because the plaintiff is an agency rather than a private party. In any event, the FTC's disagreement with this Court's antitrust jurisprudence certainly does not give it license to rewrite Section 13(b).

3. Devoting resources to seeking retrospective remedies under Section 13(b) has also led the FTC away from its primary mission—using its expertise to *prospectively* identify and stop anticompetitive and unfair practices through administrative proceedings. *See supra* at 5-8.

According to the FTC, Section 13(b) "cedes to the court the determination whether there has been a violation." 19-825 Pet. 22. The FTC says this as if it is what Section 13(b) intended. It is not. Particularly in novel or complex cases, the courts are often left to navigate the issues on their own while the FTC is "relegated to damage control." Maureen K. Ohlhausen, Commissioner, FTC, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission* 10-11 (Apr. 20, 2016)

(Ohlhausen, *Disgorgement*).[15] That is not how the system is supposed to work: The FTC's "traditional role"—the role envisioned by Congress—is "to look forward rather than backward, to articulate the law where the law is uncertain, and to seek relief that is prospective and remedial rather than retrospective and punitive." *Cardinal Health*, 2015 WL 1849040, at *8 (Ohlhausen, Comm'r, dissenting) (quoting *Mylan* Leary Dissent); *see AbbVie*, 2020 WL 5807873, at *32-34. Jumping to seeking monetary relief in court to punish retrospective conduct has led the FTC further and further away from that "special mission." *Cardinal Health*, 2015 WL 1849040, at *8 (Ohlhausen, Comm'r, dissenting).

The recent spate of Section 13(b) "pay-for-delay" cases provide a perfect example. *See supra* at 19. As noted above, the outcome in those cases turns on a rule-of-reason analysis rife with legal and economic "complexities" that will "'vary with the circumstances.'" *Actavis*, 570 U.S. at 159 (citation omitted); *see id.* at 173 (Roberts, C.J., dissenting) (wishing the courts "[g]ood luck" in applying this "unruly rule of reason").

This analysis has proven difficult for courts to undertake on their own. In the first post-*Actavis* case to go to trial, the district judge admitted that he "did not try this case very well" because he had operated under a "major misconception" about how *Actavis* applied to the various "alleged reverse payment settlements" at issue. *In re Nexium (Esomeprazole) Antitrust Litig.*, 309 F.R.D. 107, 110-12 (D. Mass. 2015), *aff'd*, 842 F.3d 34 (1st Cir. 2016). The FTC then

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[15] https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf.

swooped in on appeal, filing an amicus brief in support of neither party in which it argued that the district court had erroneously "conflat[ed]" fundamental antitrust concepts and then "invit[ed]" the court of appeals "to provide greater clarity" on those concepts. *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 59 (1st Cir. 2016). The FTC has repeated this exercise in cases across the country, scrambling "to rectify misconceptions" with amicus briefs "that the agency might have nipped in the bud by proceeding administratively." Ohlhausen, *Disgorgement* 11; *see, e.g.*, FTC Amicus Br. 2, *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132 (3d Cir. 2017) (Nos. 15-3559, 15-3591, 15-3681 & 15-3682), 2016 WL 1040063 ("While this brief takes no position on the ultimate merits of the case, it addresses four fundamental legal errors in the district court's rule-of-reason analysis.").

By focusing resources on extracting "seductive[ly]" large monetary payouts under Section 13(b), the FTC is increasingly shirking its "special mission" to prospectively develop antitrust law "where the law is uncertain." *Mylan* Leary Dissent. That was plainly not Congress's intent in authorizing injunctive relief under Section 13(b).

4. In addition to undermining its own mission, the FTC's pursuit of monetary relief under Section 13(b) also undermines the antitrust laws themselves. As the FTC's own counsel of record in this Court has previously explained, the FTC's ever-expanding pursuit of monetary relief in antitrust cases raises the "troubling" prospect of "substantially chill[ing] efficient business practices that are not well understood by enforcers." Alden F. Abbott, *FTC*

Monetary Remedies Policy and the Limits of Antitrust 1, Antitrust Source (Dec. 2012).[16]

As a matter of basic economics, market participants "shap[e] their behavior to align with legal rules" in light of potential penalties for violating them. *Cardinal Health*, 2015 WL 1849040, at *9 (Wright, Comm'r, dissenting). In the antitrust context, the legal rules tend to move from black-and-white to gray very quickly, producing a "system characterized by imperfect information and inevitable error[s]" by regulators like the FTC. Abbott, *supra*, at 5. The "more costly" of these errors is a "false positive"—i.e., the "mistaken prosecution of procompetitive behavior." *Id.* at 5 & n.26 (citing Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984)). But because the FTC has historically operated within a framework of prospective "'cease-and-desist order[s] (rather than damages for past action),'" the "potential chilling effect on private conduct arising from mistaken prosecutions by the FTC has been rather limited." *Id.* at 5 (citation omitted). Private actors have thus felt relatively comfortable in experimenting with innovative efficient business practices.

The consequences of a mistaken prosecution increase exponentially, however, when it carries the potential for millions—or in some cases *billions*—of dollars in disgorgement or restitution. The FTC's unrestrained interpretation of Section 13(b) as enabling it to seek monetary relief, even in cases involving "novel theories of competitive harm," deters private actors from "engag[ing] in novel profit-seeking

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[16] https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_full_source.pdf#page=14.

business conduct" that is ultimately "procompetitive." *Id.* at 4-5, 8. The uncertainty created by this amorphous remedy, compounded by the absence of any discernible standards, thus "threatens to impose substantial economic costs on private actors and to reduce general economic welfare." *Id.* at 4.

Once upon a time, the FTC was at least somewhat sensitive to this concern, pledging to invoke Section 13(b) to seek monetary relief only in "exceptional" cases involving "clear" antitrust violations. 68 Fed. Reg. at 45,821. But that self-restraint has fallen completely by the wayside. *See supra* at 17-21. Now, the FTC's view is that *any* case in which it can conceivably persuade a court to find a violation is a "proper case" for seeking monetary relief under Section 13(b).[17] That is not the law.

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AMG and Credit Bureau Center have shown that allowing the FTC to seek monetary relief under Section 13(b) violates the text, structure, and history of that statute—and makes no sense in consumer protection cases. The antitrust context only confirms that result. This Court should reject the FTC's power grab and hold that Section 13(b) is limited to true injunctive relief.

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[17] *See* FTC Opp. to Mot. to Dismiss 13, *FTC v. Surescripts, LLC*, No. 19-cv-1080 (D.D.C. Aug. 23, 2019) (ECF No. 34), 2019 WL 8370773 (arguing that relief under Section 13(b) is warranted in "any case in which a law enforced by the FTC has been violated and equitable remedies are needed to make harmed consumers whole").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in No. 19-508 should be reversed, and the judgment of the court of appeals in No. 19-825 should be affirmed.

Respectfully submitted,

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