Nos. 19-508, 19-825

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

CREDIT BUREAU CENTER, LLC,

Respondent.

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

BRIEF OF THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF AMG CAPITAL MANAGEMENT, LLC AND CREDIT BUREAU CENTER, LLC

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, non-profit association representing the country's leading biopharmaceutical research companies. PhRMA's members are devoted to developing innovative medicines, treatments, and vaccines which save, prolong, and improve the quality of the lives of countless individuals around the world every day. Over the past two decades, these member companies have contributed nearly $1 trillion to the research and development of new medicines. In the interest of ensuring a robust, competitive, and efficient marketplace for its members, PhRMA has previously submitted briefs as *amicus curiae* in cases involving the FTC's enforcement activity with respect to the biopharmaceutical industry. *See, e.g.*, Brief for PhRMA as Amicus Curiae Supporting Appellees/Cross-Appellants, FTC v. AbbVie Inc., 2020 WL 5807873 (3d Cir. Sept. 30, 2020) (Nos. 18-2621, 18-2748, 18-2758); Brief for PhRMA as Amicus Curiae Supporting Respondents, FTC v. Actavis, 570 U.S. 136 (2013) (No. 12-416).

The question presented in this case—whether Section 13(b) of the FTC Act can be properly read to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus* or their counsel made such a monetary contribution. Counsel for all parties have consented to the filing of amicus briefs.

encompass monetary judgments—is of substantial concern to PhRMA and its members. The FTC's current interpretation of Section 13(b) engenders both market uncertainty and a risk of disproportionate liability, seriously jeopardizing PhRMA's mission of fostering efficient investment and innovation for patients. PhRMA members rely on the FTC to provide tailored, consistent guidance on unfair and deceptive business practices. But through its imposition of significant monetary remedies without the commensurate protections required by the plain language of the FTC Act, the FTC threatens to upend a statutory scheme that protects and facilitates efficient investment by lawful market actors. PhRMA's members have been the subjects of the FTC's assertions of monetary remedy authority, and the organization is uniquely positioned to provide insight into the real-world consequences of the Agency's interpretation of Section 13(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

PhRMA agrees with the AMG and Credit Bureau Center parties that the legal theory underlying the FTC's position on Section 13(b) has become untenable. PhRMA's concern is not only that the Agency's reading of the FTC Act is problematic, but that the Agency's resort to Section 13(b) to permit monetary recovery is without any meaningful limiting principle. The Agency's indiscriminate demand for substantial monetary payments in cases of all kinds creates uncertainty and unwarranted burden for companies, and may inhibit their efficient provision of information, goods, and services to consumers due to the excessive

and unpredictable risks threatened by the FTC's policy.

In contrast, the enforcement framework that Congress *did* provide furthers the underlying purpose of the FTC Act: that the Agency serve as an expert, specialized body, and that it be subject to an appropriate second "screen" before monetary remedies come into play. This screen, the "dishonest or fraudulent" provision of Section 19, is a necessary check on the Agency's ability to seek monetary remedies, and is effectively read out of the process by the Agency's reliance on Section 13(b).

ARGUMENT

I. THE FTC'S UNRESTRAINED INTERPRETATION OF SECTION 13(B) IMPOSES SUBSTANTIAL COSTS ON LEGITIMATE COMPANIES AND DETERS LAWFUL COMPETITIVE BEHAVIOR

It has become routine for parties engaging with the Agency under both its competition and consumer protection missions to encounter very substantial demands for monetary payments as part of settlements of Agency enforcement actions as well as remedies sought in litigation. This practice creates unfair and unjustified problems for PhRMA and its members not only because of the magnitude of these demands—which is staggering—but perhaps more importantly, the indiscriminate nature of the demands. The Agency appears to make no distinction between *types*

of cases and other relevant circumstances in determining whether a monetary recovery would be appropriate in its view. To the contrary, the Agency has affirmatively stated that equitable monetary remedies should be broadly available in both competition and consumer protection cases, and, as discussed further *infra,* has rejected a number of reasonable guidelines for the imposition of these remedies.[2] In response, several dissenting Commissioners have observed that "firms subject to our jurisdiction have no meaningful guidance on when they will be forced to disgorge their profits."[3] Apart from a formalistic invocation of its duty to protect consumers, there is no apparent pattern to these monetary demands that might be attributable to equitable principles, despite the ostensibly equitable nature of these monetary remedies.

For example, under the banner of its competition mission, the Agency has demanded and obtained very substantial payments in cases in which the underlying legal theory was far from settled and where the defendants had a well-founded belief that the conduct was lawful. The "reverse payment" cases provide a

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[2] *See* Press Release, Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf.

[3] Press Release, Fed. Trade Comm'n, Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright on *FTC v. Cephalon, Inc.* (May 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/645501/150528cephalonohlhausenwright1.pdf.

pointed example. In these cases, the Agency alleged that an incumbent pharmaceutical manufacturer who exercised its patent rights in accordance with the special procedures of the Hatch-Waxman Act was in fact paying a generic competitor not to enter the market.[4] The Agency has obtained some of its largest 13(b) payments under this theory.[5] The Agency's theory of liability, however, was far from clear from the outset, and was in fact rejected in its first visit to an appellate court,[6] and in several other appellate courts thereafter.[7] The controversy was eventually resolved by this Court, but even then, the standard of liability imposed was (appropriately) the "rule of reason," introducing further fact-specific considerations into the liability analysis. *See Actavis*, 570 U.S. at 156. Subjecting law-abiding companies to dramatic financial consequences under such an uncertain legal regime is an

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[4] *See, e.g.*, *FTC v. Actavis, Inc.*, 570 U.S. 136, 140 (2013); *FTC v. AbbVie, Inc.*, 107 F. Supp. 3d 428, 430 (E.D. Pa. 2015); *see also* Complaint, FTC v. Allergan plc (N.D. Cal. Jan. 23, 2017) (No. 17-cv-00312).

[5] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go to Purchasers Affected by Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill ($1.2 billion award).

[6] *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005).

[7] *See In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 216 (2d Cir. 2006) (applying "scope of the patent" rule to permit reverse payment settlement); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008) (same).

excessive exercise of agency authority that may discourage otherwise pro-consumer behavior. [8]

Similarly, in consumer protection cases, commentators have pointed to several areas in which automatic recourse to substantial monetary payments appears unwarranted. Advertising substantiation cases are one such example.[9] Determining what claims an advertisement makes and how consumers perceive and interpret such claims are complicated enough. But the next question in an advertising case, the degree of substantiation required for particular claims, is a complex, case-specific issue[10] that may require evaluation of sophisticated scientific principles and technical research, as well as testimony from experts in various scientific fields. Cases like these present an opportunity for the FTC to apply its expertise through administrative litigation (*see* Section II, below) and produce opinions that provide guidance to the business community as well as consumers on how

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[8] The size of these payments is comparable to those the Department of Justice often obtains in criminal price-fixing conspiracies, which involve the most egregious per se illegal conduct under the antitrust laws. *Compare, e.g.*, U.S. Dep't of Justice, Antitrust Division Update 2020 (June 23, 2020) (identifying criminal penalties from $100 to $195 million), *with* Fed. Trade Comm'n, *supra* n.5 ($1.2 billion award), *and* Fed. Trade Comm'n, 2019 Annual Highlights (Apr. 23, 2020) ($191 million award against deceptive advertising by for-profit school).

[9] *See* J. Howard Beales III & Timothy J. Muris, *The Obama FTC Departed from Its Predecessors to the Detriment of Consumers*, 31 Antitrust 66, 68 (2017); *see also* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 G.W. L. Rev. 2157, 2200–04 (2015).

[10] *See, e.g.*, *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

to assure advertising is truthful and informative. Cease and desist orders are the appropriate and traditional remedy in such cases.

Instead, by bringing the majority of their advertising cases directly in federal district court under Section 13(b) and immediately seeking massive monetary awards, the FTC has dramatically altered the enforcement environment and parties' expectations. Cases of clear fraud aside, the Agency also targets law-abiding companies that have a good-faith basis for the belief in the truth of their claims. But how a fact-finder will ultimately evaluate the adequacy of their evidence remains a troubling and difficult question, and adding the prospect of substantial monetary sanctions—indeed, costs that could threaten the viability of the company going forward—to the decision calculus may lead a company away from making the claims and in doing so giving consumers products and information that could be beneficial.[11]

At one time, the Agency acknowledged and attempted to mitigate these concerns by articulating prosecutorial guidelines. Responding in part to an outcry following the Agency's reliance on Section 13(b)

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[11] *See* Beales & Muris, *The Obama FTC Departed from Its Predecessors*, *supra* n.9, at 68 (explaining that the FTC's aggressive stance toward advertising substantiation claims "will likely leave most consumers in relative ignorance about useful product information, the opposite of what the Commission should accomplish").

to obtain $100 million in the *Mylan* case,[12] the Commission issued the Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,821 (Aug. 4, 2003) (the "Policy Statement"). The Policy Statement dealt with three key areas of concern:

> *1. Clear Violation*: The Agency stated it would seek monetary remedies "when, based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal." 68 Fed. Reg. at 45,821. This standard, the Agency said, would serve a deterrence goal and appropriately focus the Agency on removing ill-gotten gains from actors who had a reasonable expectation that their conduct would be found to be unlawful.
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> *2. Reasonable Basis for Calculating the Remedy*: The Agency assured the public that it would "not seek restitution unless it can offer a reasonable gauge of the amount of injury from a violation." 68 Fed. Reg. at 45,822. Recognizing the uncertainty that would result from damage awards untethered to any predictable basis for "calculating the amount of the disgorgement or restitution to be ordered," *id.*, the Policy Statement sought to assure market actors that the Agency would exercise its 13(b) authority in a measured and transparent way.

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[12] *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 32 (D.D.C. 1999); *see also FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1, 4 (D.D.C. 1999).

> *3. Value of Commission Participation in Litigation*: Perhaps most importantly, the Agency stated that its exercise of monetary remedy authority would be constrained by "the interest in avoiding duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury." 68 Fed. Reg. at 45,823. Numerous parties had complained that with the proliferation of private litigation and enforcement actions by State Attorneys General, defendants were subjected to potential multiple and duplicative monetary awards, in addition to the added litigation costs and burdens of duplicative actions. To address that concern, the Agency made clear that it would evaluate whether its participation would add anything of additional value to consumers that the other available legal actions could not provide.

Although the Policy Statement did not eliminate all concerns surrounding the FTC's use of Section 13(b), the Agency's adoption of these guidelines was a significant signal to the business community that it would try to act in a reasonable, prudent and predictable manner. The abrupt withdrawal of the Policy Statement in 2012 was therefore a significant setback. *See* Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070, 47,070 (Aug. 7, 2012) (asserting that "existing law" provides "sufficient

guidance on the use of monetary equitable remedies").[13] The Agency abandoned the reasonable guidelines of the original Policy Statement, and indeed any articulated guidelines. Monetary recoveries under Section 13(b) dramatically increased in size and number after this action in 2012.[14]

The problems that the Commission addressed in the original Policy Statement, however, remain. The problem of duplicative litigation discussed in the third factor, for example, is a recurring issue. Although in theory courts could permit set-offs or credits to reduce the likelihood of multiple, duplicative payments, the additional cost and administrative burden of dealing with the problems of parallel litigation is significant. As discussed in the following section, this unwarranted burden on lawful behavior could be reduced if the FTC focused its efforts on the enforcement tools

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[13] *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Remarks at the 18th Annual Competition Law and Policy Workshop in Florence, Italy (July 19, 2013) (after withdrawal of the Policy Statement, "the absence of guidance creates uncertainty within the business community, which will undoubtedly affect firms' behavior in ways that are unpredictable and will unnecessarily run the risk of harming the consumers we are charged with protecting").

[14] M. Sean Royall et al., *Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority*, 34 Antitrust 54, 54 & n.1 (2019) (describing, after the rescission of the Policy Statement, "a $1.2 billion settlement with Teva Pharmaceutical Industries in a matter involving pay-for-delay allegations; up to $1.2 billion in a settlement with Volkswagen relating to allegedly misleading claims about "clean diesel"; at least $575 million in a settlement with Equifax relating to a 2017 data breach; and $448 million in a district court judgment against AbbVie for alleged antitrust violations").

given to it by Congress, rather than asserting additional ones.

II. THE STATUTORY SCHEME ESTABLISHED BY CONGRESS IS SUFFICIENT TO ADDRESS THE GOVERNMENT'S ENFORCEMENT CONCERNS

The parties have ably and amply demonstrated that Section 13(b) does not support the creation of an independent monetary enforcement mechanism not specified in the terms of the statute. PhRMA agrees. The use of Section 13(b) to erect such an alternative enforcement scheme is particularly problematic when Congress did, in fact, provide a straightforward enforcement process in the Act. This roadmap was provided in Section 5 of the original Act and refined and re-affirmed by Congress since that time, particularly in the 1973 and 1975 amendments to Sections 5, 13(b) and 19.[15] The enumerated enforcement plan supports the Agency's purpose and mission to provide guidance in complex or new areas. It also reflects, in

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[15] *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. IV, 87 Stat. 576, 591–92 (1973) (amendment permitting "other and further equitable relief" for violations of cease-and-desist orders); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 92-637, tit. II, 88 Stat. 2183, 2193–201 (1975) (enacting 15 U.S.C. § 57b to permit restitution for violations of FTC rules). As the Seventh Circuit recognized in the decision below, "[i]f Section 13(b) permitted restitution as a general matter, Congress would have no reason to enact Section 57b, which authorizes restitution under narrower circumstances." *FTC v. Credit Bureau Ctr.*, 937 F.3d 764, 774 (7th Cir. 2019).

Section 19, a reasonable compromise in the fierce debate about the Agency's ability to seek monetary relief.[16]

The core of the administrative adjudication process is a hearing before an Administrative Law Judge. This hearing is governed by Section 5(b) of the FTC Act and the rules set forth in Part 3 of the Agency's Rules of Practice.[17] The Agency has devoted a substantial amount of time and effort over the past two decades to improving these rules to make the adjudication process more efficient and productive.[18] For example, the rules now specify that the hearing must begin 5 months after the Agency issues a complaint in cases where the Agency is also seeking a preliminary injunction under Section 13(b) (most often invoked, for example, in a merger case), or 8 months in all other cases.[19] The rules also specify time limits for appeals to the full Commission, oral argument, and issuance

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[16] After Section 13(b) was enacted, significant public debate arose as to whether the FTC should be granted the authority to obtain monetary awards. *See* Beales & Muris, *The Obama FTC Departed from Its Predecessors*, *supra* n.9, at 68–69. Congress expressly *declined* to allow "open-ended" monetary relief, opting instead to permit such relief under the narrow conditions of an administrative adjudication and with the additional "dishonest or fraudulent" test. *Id.* at 69; *see also* 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, 33 (2013).

[17] 15 U.S.C. § 45(b); 16 C.F.R. pt. 3.

[18] *See, e.g.*, Amendments to 16 C.F.R. pts. 3, 4 at 76 Fed. Reg. 52,249 (Aug. 22, 2011); 74 Fed. Reg. 20,205 (May 1, 2009); 74 Fed. Reg. 1804 (Jan. 13, 2009); 66 Fed. Reg. 17,622 (Apr. 3, 2001); 63 Fed. Reg. 7526 (Feb. 13, 1998).

[19] 16 C.F.R. § 3.11(b)(4).

of a Commission decision.[20] In general, the amendments to the rules have greatly expedited the administrative adjudication process, while still allowing the Commission to fulfill its intended role as an expert agency providing guidance in difficult cases.

The FTC Act provides two specific opportunities for federal courts to support this process, before and after the administrative adjudication. In appropriate cases, when the Agency has reason to believe that a potential defendant "is violating, or is about to violate any provision of law enforced by the Federal Trade Commission," it may seek a preliminary injunction under Section 13(b). (Indeed, the title of this section is "Temporary Restraining Orders; preliminary injunctions"). Such a preliminary injunction can include asset freezes and other steps necessary to preserve the possibility of effective relief at the conclusion of the administrative adjudication process.[21] In consumer protection matters, this relief may be appropriate when there is a serious risk that a wrongdoer will dissipate or hide assets that would be part of an eventual judgment. In merger cases, such an order typically states that the status quo should be preserved pending administrative litigation because it may be infeasible to unwind a transaction that has

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[20] 16 C.F.R. § 3.51(a); 16 C.F.R. §§ 3.52(b), (d), (h).

[21] *See FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 719 (5th Cir. 1982) ("[S]uch an order may be required to preserve the status quo so that an ultimate decision by the Commission may be effective." (citation omitted)).

closed in the interim if it is later found to be unlawful.[22]

At the conclusion of the administrative adjudication process, including all appeals, if the Commission has issued a cease and desist order finding that the practices at issue were "unfair or deceptive" as provided in Section 5(a) of the Act, the Commission may then seek further, monetary relief from a federal district court under Section 19(a)(2) of the Act. Significantly, in such an action the Commission must demonstrate that the conduct at issue not only violated Section 5(a) of the Act, but was conduct "which a reasonable man would have known under the circumstances was dishonest or fraudulent."[23] As the Commission noted in the original Policy Statement, the equitable purpose of a monetary award is best served when the actor had reason to expect at the time of the conduct that it was likely unlawful and could be clawed back. Section 19 accordingly provides a final guardrail that gives the federal district court an opportunity to determine whether monetary relief is

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[22] *See, e.g.*, *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 43 (D.D.C. 2002) (granting preliminary injunction because merger could not be efficiently undone); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) (identifying risk that the "eggs will be irreparably scrambled" absent preliminary injunctive relief); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (noting "practical difficulties of undoing the merger" and "risk of serious anti-competitive harm in the interim" as reasons to grant preliminary injunction).

[23] 15 U.S.C. § 57b(a)(2).

truly appropriate under the circumstances of the case.[24]

These provisions of the FTC Act lay out a well-considered and complete path for FTC enforcement actions: preliminary injunctions if needed to preserve the status quo, a tightly-controlled administrative trial and appeal, and then measured attention to the question of damages. The Agency has invested substantial resources towards making this process viable. In the cases where it has availed itself of the process that Congress intended, the Agency has produced a number of landmark opinions that had significant influence on the law.[25] Against this statutory and historical backdrop, "there is no reason to believe that . . . [holding the Agency to a literal interpretation of the Act] unnecessarily restricts the FTC's ability to address wrongdoing."[26] As courts have recognized, precluding restitution under Section 13(b) would not "eviscerate" the FTC Act; rather, such an interpretation giving Congress's words their intended meaning "harmonizes" the FTC Act's multiple enforcement provisions.[27]

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[24] *See also* Section 5(l), 15 U.S.C. §45(l) (permitting action for civil penalties for violation of cease and desist order).

[25] *See, e.g.*, *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd,* 416 F.3d 29, 31 (D.C. Cir. 2005) (test for horizontal restraints); *In the Matter of Chevron Corp.*, 140 F.T.C. 100 (2005) (limits of *Noerr-Pennington* doctrine).

[26] *See FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 158–59 (3d Cir. 2019) (construing "is violating or about to violate" language in 13(b) literally).

[27] *FTC v. AbbVie, Inc.*, 2020 WL 5807873, at *32 (3d Cir. Sept. 30, 2020).

CONCLUSION

For the foregoing reasons, as well as those reasons set forth in the non-governmental parties' briefs, the Ninth Circuit's judgment in *AMG Capital Management* should be reversed, and the Seventh Circuit's judgment in *Credit Bureau Center* should be affirmed.

Respectfully submitted,

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