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 Court of Appeals for the Ninth and Seventh Circuits

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS IN NO. 19-508 AND RESPONDENTS IN NO. 19-825

John J. Vecchione
Counsel of Record
Richard Samp
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street, NW, Suite 450
Washington, DC 20036
(202) 869-5210
john.vecchione@ncla.legal

Counsel for Amicus Curiae

Dated: October 2, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be subject only to penalties that are both Constitutional and have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because federal administrative agencies like the Federal Trade Commission ("FTC") have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

In this instance, NCLA is particularly disturbed by the way the FTC's statutory right to obtain

---

[1]. All parties consented to the filing of this brief by filing blanket consents with this court. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

an injunction in particular instances was craftily and surreptitiously transformed, by the FTC's enforcement division, into the right to obtain any "equitable remedy" while avoiding the due process statutory procedures Congress provided for such remedies, without Congressional warrant or searching judicial supervision. It is, in its present form, a legal remedy to which a right to jury trial attaches. U.S. CONST. amend. VII. Alternatively, if it is an equitable remedy, then it is being awarded without the due process protections provided by Congress.

The current "injunction" remedy also violates Article I, § 1 of the United States Constitution, which states in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]"

SUMMARY OF ARGUMENT

It is undisputed that Section 13(b) of the FTC Act allows the FTC to obtain an injunction in certain circumstances. An injunction is forward looking and does not allow an award of damages for past injury. What the FTC calls injunctions in the two cases *sub judice* are nothing of the sort. In both the Petitioners' case (AMG Capital Management, LLC et al. ("AMG Capital")) and the Respondents' case (Credit Bureau Center, LLC et al. ("Credit Bureau")), what the FTC urges on this Court is an Order to pay money damages, joint and severally, for past actions of the FTC's targets. Not only does Section 13(b) not provide for such equitable monetary relief, but the injunctions sought by the FTC are not even equitable in nature. These "injunctions" are akin to money damages. This

Court recognized in *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002), that a grant of authority to obtain "appropriate equitable relief" did not authorize "money damages." *Id.* at 214, 218 (noting that the term "equitable relief" requires courts to "recognize the difference between legal and equitable forms of restitution"). The remedies afforded the FTC under Section 13(b) do not even extend to "all equitable relief" (as in *Great-West*); that provision is limited to "injunctions." The remedy sought in both cases is not an injunction, and the Court should reject the FTC's effort to make the word meaningless.

Worse, history and an admission by FTC officials reveal that the current remedy was created and expanded by a strategic enforcement and litigation process designed specifically to avoid the due process protections Congress placed in the FTC Act and the actual words of the statute. The FTC has used "ancillary" relief to swallow nearly the entirety of FTC enforcement and to dwarf the actual relief provided by statute. The Seventh Circuit recognized this error as emerging from its jurisprudence and corrected it. The Ninth did not. This Court should affirm the former and correct the latter.

The FTC's asserted power here derives from an enforcement strategy to press an expansive view of *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which related to war-time price controls, and to use that case and the SEC's successful application to its enforcement arsenal. *See SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92-94 (S.D.N.Y. 1970) (allowing restitution), *aff'd in pertinent part, rev'd in part*, 446 F.2d 1301, 1307-08 (2d Cir. 1971), *cert. denied.,* 404

U.S. 1005 (1971). This SEC effort was noted by this Court in *Liu v. SEC*, __ U.S. __, 140 S. Ct. 1936, 1940-41 and 1952-53 (Thomas, J. dissenting) (2020).

Finally, the concerns about Seventh Amendment jury trial rights addressed by this Court in such cases as *Granfinancier, S.A. v. Noderberg*, 492 U.S. 33 (1988), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), as well as those in *Timbs v. Indiana*, 136 S. Ct. 682 (2019)(about excessive fines), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)(about punitive damages), counsel denying or cabining the injunction remedy the FTC seeks.

ARGUMENT

I. SECTION 13(b) OF THE FTC ACT DOES NOT AUTHORIZE MONETARY RELIEF

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes FTC to file suit in federal court whenever it has reason to believe that any person or entity is violating or is about to violate the Act. Section 13(b) lists three categories of relief available to FTC: a temporary restraining order, a preliminary injunction, and a permanent injunction. A fair reading of the statute demonstrates that Congress did not authorize FTC to seek monetary relief in an action filed under § 13(b).

Federal appeals courts that have upheld FTC claims for monetary relief have reasoned that even though § 13(b) does not expressly authorize monetary relief, the grant of such authority can be inferred in light of federal courts' inherent authority to award "complete relief" once a statute has invoked the courts' equitable jurisdiction. *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011) (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 299 (1960) for the proposition that "the comprehensiveness of the district court's equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command") *also* citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (for the proposition the grant of injunctive power carries with it the power to award a money judgment).

The unsoundness of that implied-authority rationale has been thoroughly demonstrated by both AMG Capital and Credit Bureau Center, as well as by the Seventh Circuit in its decision below. No. 19-825, Pet. App. 1a-63a; Opening Brief of Credit Bureau Center, LLC and Michael Brown ("Respondents' Br.") at pp. 26-38; Brief for AMC Capital Management, LLC *et al*. ("Petitioners' Br.") at pp. 25-45. They explain that the text, context, and structure of the FTC Act all refute the notion that Congress impliedly authorized monetary relief. NCLA will not repeat those arguments here. NCLA simply notes that recent Court decisions have repeatedly cautioned against interpreting federal laws as authorizing remedies in addition to those explicitly listed in the statutory text. *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996) (holding that the Resource Conservation and Recovery Act does not authorize award of "equitable restitution" and that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it");

Sandoz, Inc. v. Amgen, Inc., 137 S. Ct. 1664, 1675 (2017) ("where, as here, a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies"); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (given ERISA's "comprehensive nature," Court expresses "especial[ ] reluctan[ce] to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text").

NCLA writes separately to focus on a claim raised by FTC for the first time in its certiorari petition: that the monetary relief it seeks is, in fact, a form of injunctive relief and thus is expressly authorized by § 13(b). This is an attempt by the FTC to expand its powers by escaping the confines of its authorizing statute. Its claim finds no support in our Nation's legal history. As the Seventh Circuit stated, "Restitution isn't an injunction." No. 19-825, Pet. App. 12a.

A. Section 13(b) Authorizes a "Permanent Injunction," but Injunctions Do Not Encompass Monetary Relief

Section 13(b)'s grant to FTC of authority to seek a temporary or permanent "injunction" against those who violate the FTC Act cannot plausibly be interpreted as expressly authorizing an award of monetary relief. The "province of the injunction is not to afford a remedy for what is past but to prevent future mischief." 1 Howard C. Joyce, *A Treatise on the Law Relating to Injunctions*, § 41 (1909). The monetary relief sought by FTC—equitable restitution for those injured by past FTC Act violations—is unquestionably a backward-looking remedy.

The Court has consistently recognized this limitation on what is meant by an "injunction." In *Great-West*, the Court held that an ERISA provision authorizing suits to "enjoin" acts that violate terms of a health/pension plan does not authorize a health-plan fiduciary to sue for restitution of funds it paid to a plan beneficiary. *Great-West,* 534 U.S. at 221. The Court explained that "statutory reference to [an injunction] must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Id.* at 211 n.1. One such limitation identified by the Court is that injunctions may not "compel specific performance of a past due monetary obligation." *Id.* at 211-12. Because a suit for restitution of funds paid by the plan fiduciary to a plan beneficiary was inconsistent with that limitation, the Court held that the fiduciary's restitution claim was not a suit to "enjoin" violations of the plan. *Id.* at 221.[2]

The FTC Act itself implicitly recognizes that the injunctive relief authorized by § 13(b) is not all-encompassing. For example, § 5(*l*) of the Act, 15 U.S.C. § 45(*l*), permits FTC to bring an action for violation of a final FTC order. If a district court finds that the defendant has violated a final order, the statute expressly authorizes courts "to grant mandatory injunctions and such *other and further equitable relief* as they deem appropriate." *Ibid.* (emphasis added).

[2] Statutory authorizations for "injunctions" are subject to this limiting construction, the Court said, to ensure that there is *some* limitation on the statutory grant. The Court explained, "Without this rule of construction, a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id.* at 211 n.1.

Section 5(*l*) thus demonstrates Congress's understanding that "injunction" is not an all-encompassing term that covers all forms of legal and equitable relief; there are "further" forms of equitable relief (*e.g.*, equitable restitution and disgorgement) not contemplated by the Act's authorization to seek an "injunction." *See also* § 19(b) of the Act, 15 U.S.C. § 57b (stating that if an individual or entity violates an FTC rule "respecting unfair or deceptive acts or practices" or engages in an unfair or deceptive act or practice "with respect to which the Commission has issued a final cease and desist order which is applicable to such person," courts are authorized to grant a broad array of equitable *and* legal remedies when it deems them "necessary to redress injury to consumers or other[s]").

Indeed, even those federal appeals courts that have construed § 13(b) as *impliedly* authorizing claims for monetary relief have recognized that Congress did not *expressly* authorize such claims by authorizing FTC to seek a temporary or permanent "injunction." *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890 (4th Cir. 2014); *Bronson Partners*, 654 F.3d at 365.

FTC contends that "it has long been understood that an injunction can provide for restitution or other forms of monetary relief to undo harm caused by the defendant's conduct." FTC Cert. Pet. at 14. But FTC has misconstrued the authorities it cites for that proposition. For example, FTC cites Joseph Story's statement that injunctions "may contain a direction to the party defendant to yield up . . . lands or other property, constituting the subject-matter of the decree, in favor of the other party." *Ibid* (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* §§ 861-62, at 154-55 (1836)). But Story never suggested that an injunction is warranted when the property "constituting the subject matter of the decree" is money. Rather, he stated no more than that mandatory injunctions may be warranted when the property at issue is unique (as is often the case with land) and that the plaintiff may seek an injunction ordering the return of his unique property in order to avoid irreparable harm.

That understanding of what constitutes an "injunction" is consistent with this Court's teachings on when injunctive relief is appropriate. The "basic prerequisites" for obtaining an injunction are demonstrating "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). FTC cannot demonstrate that it will suffer any irreparable harm if it is denied an "injunction" granting monetary relief against AMG Capital and Credit Bureau Center—particularly because *other* FTC Act provisions authorize FTC to seek monetary relief from those who violate the Act.

FTC's reliance on *Osborne v. Bank of United States*, 22 U.S. 738 (1824), is misplaced. FTC Cert. Pet. at 14. The injunction issued in that case barred future enforcement of a state tax law against the Second Bank of the United States; the injunction was not the basis of the Court's separate order directing a refund of money previously collected by state tax officials.

California v. American Stores Co., 495 U.S. 271 (1990), is similarly unhelpful to FTC. *American Stores* involved an antitrust challenge by California to the purchase of one large grocery-store chain by another. The Court held that California's proposed divestiture of the acquired chain was a form of "injunctive relief" authorized by § 16 of the Clayton Act, 15 U.S.C. § 26, to remedy an allegedly anti-competitive acquisition prohibited by the Act.

FTC asserts that the type of injunctive relief ordered in *American Stores* "is almost identical to an order requiring equitable restitution: both require the wrongdoer to turn over property that was unlawfully obtained." FTC Cert. Pet. at 16 (quoting Pet. App. 44(a), opinion of Wood, C.J., dissenting from the denial of rehearing *en banc*). FTC's "almost identical" assertion is unfounded. A corporate-divestiture order does not, as here, entail monetary relief. Moreover, it does not require a defendant to "turn over" property in a sense anything like the relief FTC seeks. Rather, divestiture merely requires a corporation to sell some portion of its assets—a sale that often entails no financial loss to the defendant.

Finally, the Court's decisions governing claims for injunctive relief against a State are closely analogous to the issue raised here—and suggest that judicial authority to issue an "injunction" does not authorize issuance of monetary relief. The Eleventh Amendment provides an unconsenting State with immunity from suit by its own citizens as well as by citizens of another State. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Court has recognized one major exception to Eleventh Amendment immunity: it does not prohibit a citizen from suing a state official in his official capacity for injunctive relief, based on a claim that the official is acting in violation of the U.S. Constitution. *Ex parte Young*, 209 U.S. 123 (1908).[3]

But the Court has made clear that the injunctive relief authorized by *Young* is limited to prospective relief. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). In particular, "a federal court's remedial power. . . may not include a retroactive award which requires the payment of funds from the state treasury." *Ibid.* In other words, although the Eleventh Amendment permits a federal court to issue an injunction to remedy a State's constitutional violation, that injunctive-relief authority does not extend to ordering the defendants to pay "equitable restitution"—an order that "is in practical effect indistinguishable. . . from an award of damages against the State," and that is "virtual[ly] certain [to] be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action." *Id.* at 669.

FTC seeks an "injunction" that includes monetary relief and is thus similarly indistinguishable from an award of damages. Because damages are a legal remedy and have never been available in equity,

---

[3] An injunction directed to a state official will affect the official's decision-making and thus will have an obvious impact on the State itself. *Young* justified this impact on state policy by reasoning that an official who acts unconstitutionally "is stripped of his official or representative character" and thus that sovereign immunity is inapplicable. *Ex parte Young,* at 160.

FTC's proposed relief is not an "injunction" authorized by § 13(b).

B. Congress Has Not Acquiesced to Lower-Court Decisions Accepting FTC's Interpretation of Section 13(b)

Noting that (until the Seventh Circuit's decision in this case) all federal appeals courts to consider the issue had interpreted § 13(b) as authorizing FTC to seek monetary relief, FTC argues that Congress should be deemed to have acquiesced to that interpretation. FTC argues that when Congress amended the FTC Act in 1994 and again in 2006, it would have revised § 13(b) to limit the scope of relief available under that statute if it disagreed with the appeals courts' interpretation. FTC Cert. Pet. at 17. FTC's suggested inference regarding congressional intent is unwarranted. The Court has routinely rejected arguments that endorsement can be inferred from Congress's silence following judicial or administrative-agency decisions adopting a particular interpretation of a federal statute. In rejecting the federal government's broad interpretation of its regulatory authority under the Clean Water Act, the Court said, "[A]bsent such *overwhelming evidence* of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality) (emphasis in original) (quoting *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169–70 n.5 (2001)).

Similarly, the Court rejected arguments that Congress ratified court decisions interpreting Title VI of the Civil Rights Act of 1964 by enacting minor amendments to the statute without expressly disavowing those court decisions. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). The Court stated:

> [W]hen, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.

Ibid (citations omitted).

Congress has not comprehensively revised the FTC Act in 45 years.[4] It adopted a minor, venue-related revision to § 13(b) in 1994 but did not address the scope of relief available under the statute. Under those circumstances, there is no basis for inferring

---

[4] And that amendment undermines the FTC here. The Ninth Circuit ruled in 1974 that the FTC was powerless to obtain restitution through its then existing administrative cease-and-desist orders. *See Heater v. FTC*, 503 F.2d 321, 323–24 (9th Cir. 1974) (cabining FTC's ability to obtain money for past injury prior to the cease-and-desist order because beyond the scope of statutory power granted). With *Heater* on the books, Congress amended the Act to include Section 19 allowing restitution *but not expanding that remedy to any other portion of the Act including Section 13.* At the time of that enactment, 1975, the FTC had never claimed the ability to obtain damages under Section 13.

that Congress acquiesced to FTC's assertion of authority to seek monetary relief under § 13(b). Still less persuasive is FTC's citation to a technical amendment to the FTC Act, enacted in conjunction with a 2006 amendment to § 5 that was adopted to give FTC new authority over certain aspects of foreign commerce. The statutory language relied on by FTC states that the new authority over foreign commerce granted by the § 5 amendment includes "[a]ll remedies available to the Commission. . . including restitution to domestic or foreign victims." Pub. L. 109-455, § 3 (codified at 15 U.S.C. § 45(a)(4)(B)). But no one contests FTC's authority to seek restitution; that remedy is explicitly authorized by § 19(b). The issue here is whether restitution is *also* authorized by § 13(b); the 2006 amendment cited by FTC is silent on that issue. That silence is damning to the FTC's argument.

In sum, the decisions of several federal appeals courts that adopted FTC's broad interpretation of § 13(b) have no role to play in construing the statute's meaning. As explained above, the relevant factors—the statute's text, context, and history—all indicate that § 13(b) does not authorize FTC to seek monetary relief from those who violate the FTC Act.

C. "Ancillary" Relief Does Not Support the FTC's Asserted Power to Obtain Millions of Dollars by Injunction

The asserted power of the FTC to obtain these damage awards can in no way be deemed "ancillary" to the injunction power of Section 13(b). The parties have well briefed why the injunction provided by 13(b) does not provide for monetary relief as well. Petitioners' Br. 19–42; Respondents' Br. 13-34. But the FTC still uses the *Porter/Mitchell* line of cases to claim this power. The sheer breadth of this "ancillary" relief undermines any FTC assertion that it is properly connected to an injunction. Such broad relief would render the very existence of other sections of the Act unnecessary.

The concept of ancillary jurisdiction "…generally involves either proceedings which are concerned with pleadings, processes, records or judgment of court in principal case or proceedings which affect property already in the court's custody." Black's Law Dictionary (4th Ed. 1951) (citations omitted). An "ancillary claim" "denotes any claim that reasonably may be said to be collateral to, dependent upon, or otherwise auxiliary to a claim asserted within federal jurisdiction in action." Black's Law Dictionary (5th Ed. 1979) (citations omitted). The parties have briefed why the agency cannot claim all the powers of a federal court under 13(b), but it is also clear that a claim for past damages is not in any way ancillary to the injunction.

The injunction provided in Section 13(b) is wholly forward looking. *FTC v. Shire Viro-Pharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019) ("Section 13(b) requires that the FTC have reason to believe a wrongdoer 'is violating' or 'is about to violate' the law. We conclude that this language is unambiguous; it prohibits existing or impending conduct. Simply put, Section 13(b) does not permit the FTC to bring a claim based on long past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation.") (citation omitted). As the Third Circuit explained, Section 13(b) is wholly unambiguous and wholly forward looking. A forward-looking injunction to prevent future wrongs cannot look back and award past damages because the 13(b) remedy and claim is completely divorced from the past and its eyes are set only on the present and future. As the Third Circuit explained, "Nor was [Sec. 13(b)] meant to duplicate Section 5, which already prohibits past conduct." *Id.* at 158.

The Third Circuit, two days before this *amicus* brief was due, issued a ruling wholly in keeping with this Court's precedent and the Seventh Circuit's opinion below. *FTC v. AbbVie Inc.,* No. 18-2621, 2020 WL 5807873, at *32 (3d Cir. Sept. 30, 2020)(vacating a $448,000,000 disgorgement award because Section 13(b) does not allow equitable remedies beyond injunctions). The unanimous panel decisively rejected the arguments the FTC made and is likely to repeat here. It noted the statutory weapons the FTC has in its enforcement toolbox, including Sections 5 and 19. *Id.* at *34. It described "a third enforcement tool," Section 13(b). *Id.* at *34. The Third Circuit stated that Sec. 13(b) "says nothing about disgorgement, which is a form of restitution, not injunctive relief." *Id.* (citations to *Liu* and *Meghrig* omitted). Determining that Section 13(b) did not explicitly empower district courts to order disgorgement, the Third Circuit noted, "[t]his interpretation is even stronger in context." *Id.* That is because, as argued by NCLA here, injunctive relief "prevents or mandates a future action." *Id.* The Court then rejected the other arguments concerning ratification by Congress and the "savings" clause. *Id.* at *34–36.

A brief look at FTC's website demonstrates clearly that the enormous sums claimed by FTC under Section 13(b) are in no way "ancillary" to the injunctive power. They are the entire point. Federal Trade Commission Fiscal Year 2021 Congressional Budget Justification, at 5, https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf

The FTC admits:

> In FY 2019, the FTC filed 49 complaints in federal district court and obtained 81 permanent injunctions and orders requiring defendants to pay more than $723.2 million in consumer redress or disgorgement of ill-gotten gains. Defendants also were required to pay approximately $137.8 million under three civil contempt orders. In addition, cases referred to the Department of Justice (DOJ) resulted in 12 court judgments imposing civil penalties of approximately $146.8 million. Furthermore, the FTC issued 21 new administrative complaints and entered 21 final administrative orders.

Id.

The use of injunction under 13(b) is over five times the amount obtained by civil contempt orders. The warping of the statute has allowed the actual processes and remedies directed by Congress to wither. The FTC uses 13(b) for the same reason Willy Sutton robbed banks: "That's where the money is." *In re Fox*, No. 06-1189 S, 2007 WL 3166775, at *2 n. 5 (Bankr. D.N.M. Oct. 26, 2007).

Under no principled use of the English language can what the FTC attempts here be termed "ancillary."

II. The FTC Obtained Its Present "Equitable" Powers by a Careful Stratagem of Avoiding Textual or Originalist Examinations of Its Claim to Them

A. The FTC Followed the SEC's Lead to Grab Powers Not Granted to It by Congress and to Avoid the Procedures Congress Provided for Awards of Equitable Relief

This Court in *Liu v. SEC* identified the SEC cases that led to its unrestrained "disgorgement" power. *Liu v. SEC*, __ U.S. __, 140 S. Ct. 1936, 1940–41 and 1952–53 (Thomas, J. dissenting) (2020). Justice Thomas noted, "It is telling that, when the SEC began seeking [disgorgement] it did so without any statutory authority." *Id*. at 1952. That case was *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92–94 (S.D.N.Y. 1970), *aff'd in pertinent part, rev'd in part*, 446 F.2d 1301, 1307-08 (2d Cir.), *cert. denied,* 404 U.S.

1005 (1971). That case drew on the *Porter/Mitchell* line of cases. The Seventh Circuit opinion below starkly laid out how this mistaken line of cases led it astray. No. 19-825, Pet. App. 20a-27a. (The Road to *Amy Travel*),[5] and how this Court's modern implied remedies jurisprudence led it back. *Id.* 26a-32a. It notes that many appellate courts followed its mistaken lead after *Amy Travel*. *Id.* at 26a ("Our approach in *Amy Travel* became the standard"). The Ninth Circuit did not so much disagree with this analysis but held that a panel decision could not change an *en banc* decision unless the command of this Court clearly conflicted with it. No. 19-508, Pet. App. 16a.

The Seventh Circuit did not stumble into error unaided. Adopting the expansionist strategy of the SEC before it, the FTC began stretching the injunctive relief provided by Section 13(b) of the FTC Act "in proper cases" to encompass new and routine claims for disgorgement and other so-called equitable remedies. It did this by willfully ignoring the statutory language and history of the FTC Act. David M. FitzGerald, a litigation attorney for the Federal Trade Commission's Office of General Counsel from 1976-1982, candidly laid out the FTC's aping of the SEC strategy. David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act (*Paper, FTC 90th Anniversary Symposium (Sept. 23, 2004), *available at* https://bit.ly/2EFgaK8. Mr. FitzGerald noted that, like the SEC, the FTC first proceeded by consent orders before bringing its claims of broad equitable powers to the courts. *Id*. at 10 ("Before the court ruled, the parties reached a settlement

---

[5] *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989).

under which the payments were placed in escrow, and […respondents] agreed to a Commission consent order that required them to forgo future payments under the contracts and pay redress to consumers.") (citing *Australian Land Title, Ltd.*, 92 F.T.C. 362 (1978)).

The FTC advanced its agenda against weak defendants, asked for broad equitable relief, beyond injunction, and got it when the defendants defaulted. *Id*. at 14 (citing *FTC v. Kazdin*, No. C79-1857 (N.D. Ohio June 26, 1980)). The FTC then used the *Porter* decision to provide cover as the SEC had. As Mr. FitzGerald explained,

> The Supreme Court and the lower federal courts have applied this reasoning in many subsequent cases, upholding the district courts' authority to employ a broad range of equitable remedies in enforcement proceedings brought by an array of administrative agencies under statutes that, like Section 13(b), expressly authorize only injunctive relief.

Id. at 16 (citing *inter alia* 15 U.S.C. § 78u(d)(1) ("giving the SEC authority to seek permanent or temporary injunctive relief against any person who is engaged in or is about to engage in acts or practices in violation of the Exchange Act")).

Mr. FitzGerald noted that all this authority (including "disgorgement") was obtained even though

> [n]either the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there, however, research into case law interpreting statutes conferring similar injunctive authority on other agencies led to the *Porter* line of cases, providing critical support for a broad interpretation of Section 13(b).

Id. at 22. He concluded that "being out of the spotlight can be an advantage" as it allowed the FTC to "pursue our efforts with little interference." *Id*.

The Petitioners' brief lays out the story related by Mr. FitzGerald. Petitioners' Br. at pp. 9–10, 42–43. NCLA urges the Court to examine this document, as it is a direct assault on this Court's jurisprudence and should give pause to any court using its equitable powers to reward such a strategy. The use of Section 13(b) was expressly expanded by the FTC to act as a "shortcut" around Section 19. *Id.* at 12. These powers were expanded expressly through defendants too weak to fight back and indeed who defaulted in the face of the FTC onslaught. *Id.* at 14. Finally, this FTC plan required the agency to *step cautiously when proceeding boldly* by obtaining favorable rulings on the boundaries of Section 13(b) "before pursuing a more ambitious agenda." *Id.* at 21–22.

It is precisely this type of stealth approach, avoiding letting the courts or the public (or Congress) know what the agency is doing to get around laws it finds troublesome that make administrative agencies the substantial threats to liberty that they are. Once the FTC obtains such an advantage, it then runs around the country arguing to courts, in effect, that whatever power it has accrued has, "a long tradition of existence." National Lampoon's Animal House (Universal Pictures 1978). In recent years, the appellate courts have begun to look at such atextually or unconstitutionally asserted powers and rein them in. *See VioPharma, supra* (determining long-asserted right to injunctions against activities long in the past not granted under Section 13(b); *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1236-1237 (11th Cir. 2018) (vacating vague and overbroad cease-and-desist order of a kind previously routinely issued by the FTC).

B. The FTC's Tactics Leave Its Targets without Due Process Protections and, Often without Adequate Counsel

This approach has not been harmless. A typical strategy of the FTC is to obtain an injunction freezing all the assets of Defendant so that it cannot obtain effective counsel. FTC argues that doing so is necessary to preserve funds for disgorgement under Section 13(b). *See, e.g., FTC v. Vylah Tec LLC,* 328 F. Supp. 3d 1326 (M.D. Fla. 2018) (upon remand court finds that wife and brother's assets should not have been enjoined); *FTC v. Vylah Tec LLC*, 378 F. Supp. 3d 1134 (M.D. Fla. 2019)(upon trial FTC, even with low standard of proof, could not present proper estimate of damages and zero dollars were awarded). In that case, an injunction issued. But if the defendants had not been represented *pro bono*, enormous joint and several liability would have been imposed upon them, because they could not have afforded to defend themselves. This same sharp dealing by FTC's improper assertions under Section 13(b) is happening to Americans in courts all over this country because of this administrative agency's improper expansion of a power. This allows it to deny its targets means to afford counsel because of presumed "ancillary" remedies down the road.

Mr. FitzGerald's final thought in his piece is to not allow "naysayers" to discourage an approach to 13(b) that he admits rests neither on the text nor the legislative history of the statute. To the contrary, it is high time for this Court to say "nay."

III. The Money Damages Here Awarded Are Legal Damages, Not Equitable Relief, and to Avoid Constitutional Dangers the Court Should Reject the FTC's Arguments

The award in both cases is for past injury. The AMG Capital Petitioners are subject to over a billion dollars of money damages in "restitution" and "disgorgement." Petitioners' Br. p. 12. Both awards are "joint and several." Both are imposed on the entire assets of the companies and individuals subject to them. The orders do not require that the moneys come from the res of ill-gotten gains. They do not require that "victims" be compensated. This approach has all the hallmarks of an action at-law, not an equitable award. As NCLA has argued, Section 13(b) does not provide for "equitable relief" of any kind save a forward-looking injunction to cease troublesome behavior while the commission seeks other redress. *See ViroPharma*, 917 F.3d at 155 (Section 13(b) added to the FTC Act "to quickly enjoin ongoing or imminent illegal conduct.") The fine for violating, for instance, a Section 5 cease-and-desist order is $10,000. *Id.*

Yet here AMG Capital stands under a "joint and several" restitution award based not on net profits but "consumer loss" of $1,266,084,156, and a separate "disgorgement" order of $27,000,000. Petitioners' Br. at 13. This total was obtained without the due process provisions Congress laid out in Sections 5 and 19 of the Act. As we have seen, Section 19 was specifically created for restitution after the Ninth Circuit's *Heater* decision.

Whatever the Court's view of the vast, broad and unmoored "injunction" power claimed by the FTC, both these awards violate its teaching in *Liu v. SEC*, ___ U.S. ___, 140 S. Ct. 1936 (2020). That case stands for the propositions that any equitable award must be based on "net profits"; not be "joint and several" but targeted at each defendant's gain; and it left open the question of whether equity requires the funds to be returned to the injured parties. *Id.* at 1945–50. The FTC may claim that it operates under a different statute than the SEC, but that redounds to the Defendants' benefit here, because there is no mention of equitable remedies, disgorgement or restitution in Section 13(b). Rejecting the FTC's claims would also avoid having to determine whether awards here are a penalty, which they cannot be under *Liu*, and whether any moneys need to be returned to victims.

It is also notable that the awards here greatly exceed the penalties denoted by Congress under Section 5. The awards are joint and several, and they are judgments against the person or corporation and not against property, as would be traditional in equity.

The Court should take into account that, whatever the FTC calls these awards, they have all the badges and incidents of an action at law. Such actions require jury trials under the Constitution. U.S. Const. Amend. VII. This Court has jealously guarded Americans' rights to such a trial when money damages are at issue. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 37, 51, 60 (1988) (even though bankruptcy proceedings were "inherently equitable," Congress may not strip a party of its Seventh Amendment rights by placing it before an administrative agency and providing jury trials in some fraudulent conveyance actions.); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (Section 1983 suit for takings is an action at law, sounding in tort and retaining a jury right). The FTC's claim here sounds in tort, deception, and fraud. But none of the protections of the Seventh Amendment, nor even the "clear and convincing" standard are required for these claims. What the FTC calls "equitable" looks, feels, and acts like an action at law. As Abraham Lincoln is said to have remarked "How many legs does a dog have if you count its tail?" The answer is "four" because calling a tail a leg does not make it so. The same is true here. The FTC wants all the benefits of a judgment at law without the protections for defendants such an action would contain.

IV. Ruling Against the FTC Here Comports with Other Precedents of the Court

In *Timbs v. Indiana*, ___U.S.__, 139 S.Ct. 682 (2019), this Court applied the Excessive Fines Clause of the U.S. Constitution to the States. In so doing it rejected Indiana's argument that traditional civil *in rem* proceedings could never fall under and be "excessive fines." *Id.* at 690. The broad interpretation of "disgorgement" pressed as civil penalty by the FTC raises "excessive fine" issues which would be completely avoided in the future if such actions were not part of the FTC's injunctive powers under Section 13(b).

Similarly, in such cases as *BMW v. Gore*, 517 U.S. 559 (1996), this court noted that civil penalties that inflict punitive sanctions many multiples in excess of any civil fine may violate the Due Process Clause of the U.S. Constitution. *Id.* at 581-582. Here the restitution and disgorgement "punitive" award is, as we have seen, many multiples of the statutory civil fine, even at the highest tier. A ruling against the FTC would forestall any future constitutional issues along these lines. *Id.* (noting ratio of compensatory to punitive of 500 to 1). That case also noted that punitive damages more than four times the amount of compensatory damages might be "close to the line" although it did not cross into "constitutional impropriety." *Id.* 517 U.S. at 581 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991)). Once again, the Court would avoid future due process challenges by holding the FTC to its statutory remedies.

CONCLUSION

The judgment of the court of appeals in No. 19-508 should be reversed. The judgment of the court of appeals in No. 19-825 should be affirmed.

Respectfully Submitted,

JOHN J. VECCHIONE
COUNSEL OF RECORD
RICHARD SAMP
MARK CHENOWETH
New Civil Liberties Alliance
1225 19th Street, NW, Suite 450
Washington, DC 20036
(202) 869-5210
JOHN.VECCHIONE@NCLA.LEGAL
Counsel for Amicus Curiae

October 2, 2020