No. 19-508

IN THE

# Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, *et al.*,
*Petitioners*,

—v.—

FEDERAL TRADE COMMISSION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF OPEN MARKETS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT


SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

JAY L. HIMES
*Counsel of Record*
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700
jhimes@labaton.com

*Counsel for Amicus Curiae*

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## INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

The Federal Trade Commission (FTC) is a critical public institution in the fight against corporate power and misconduct. The FTC has enforcement, investigatory, research, and policymaking powers to protect and promote fair markets. For its enforcement mission, the FTC's power to obtain monetary relief is an important remedial authority. By recovering ill-gotten gains from corporations that violate the FTC Act, the FTC helps police American markets and uphold fair competition. At a time when private antitrust enforcers face substantial procedural hurdles, preserving the FTC's full enforcement authority is essential for deterring unfair competitive practices.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

## SUMMARY OF ARGUMENT

In arguing to strip the FTC of its power to recover ill-gotten gains from lawbreakers under Section 13(b) of the FTC Act, AMG Capital Management (AMG) and its *amici* ask this Court to ignore the plain meaning of the statutory text. Section 13(b) provides that the FTC "may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). According to its settled, longstanding definition, an injunction can prohibit particular acts or practices and also mandate specific actions. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (describing an injunction as "mandatory" or "prohibitory"). Mandatory injunctions include orders to return property and money.

Besides overthrowing the established meaning of an injunction and rewriting the statutory text, the arguments of AMG and its *amici* would also encourage corporate lawbreaking at the expense of consumers, workers, rivals, and independent businesses. Corporations would receive a green light to violate the FTC Act's prohibition on unfair methods of competition and to thus profit "from the [violation] through [the] retention of its fruits." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948).[2]

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[2] If the FTC could no longer obtain monetary relief under Section 13(b), it could still prospectively prohibit unfair methods of competition through an injunction or a cease and desist order. The FTC, however, could not obtain monetary relief unless the violator subsequently breached the specific injunction or order. *See* 15 U.S.C. § 45(l) (establishing civil penalties for violation of FTC final orders). In other words, corporations would receive "one free pass" to commit an unfair method of competition. David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 Geo. Wash. L. Rev. 2101, 2116-17 (2015).

The mandatory injunction has been an essential part of the American remedies framework for centuries. Justice Joseph Story, in his then-leading treatise on equitable jurisprudence, wrote that a "Writ of Injunction may be described to be a judicial process, *whereby a party is required to do a particular thing*, or to refrain from doing a particular thing." Joseph Story, 2 *Commentaries on Equity Jurisprudence* § 861 (1st ed. 1836) (emphasis added). The mandatory injunction is an established remedy in American judicial tribunals. In an 1892 decision, the Supreme Court of Appeals of West Virginia stated, "It is now settled that injunctions are not only, as is usually the case, preventive or prohibitory, but also mandatory, commanding positive, affirmative action to be taken or done by the defendant, as mandamus does at law." *City of Moundsville v. Ohio River R.R. Co.*, 16 S.E. 514, 517 (W. Va. 1892).

Mandatory injunctions include orders to turn over improperly acquired property. Indeed, "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946). In defining "injunction," Justice Story wrote that an injunction includes "a direction to the party defendant to yield up, to quiet, or to continue, *the possession of lands or other property*, constituting the subject-matter of the decree, in favor of the other party." Story, *supra*, at § 861 (emphasis added). Federal and state courts have customarily issued injunctions ordering the defendant to return property to its rightful owner or to transfer it to the government. In an 1893 decision, the Supreme Court affirmed an injunction ordering a sheriff to

return property to a court receiver. *Ex parte Tyler*, 149 U.S. 164, 191 (1893). State courts in the nineteenth century ordered parties to return or give up property they had improperly obtained. *See, e.g.*, *Ex parte Chamberlain*, 55 F. 704 (C.C.D.S.C. 1893) (ordering property be restored to the custody of the receiver of the court.); *Cain v. Cain*, 20 N.Y.S. 45 (Sup. Ct. 1892) (ordering the defendant to deliver to plaintiff a specific chattel).

In construing the Clayton Act, this Court has held that Section 16's provision on injunctive relief permits the court-ordered sale or transfer of business assets. The divestiture of property, this Court wrote, "is a form of 'injunctive relief' within the meaning of § 16 of the Clayton Act." *California v. American Stores Co.*, 495 U.S. 271, 296 (1990). In interpreting the phrase "injunctive relief" to include divestiture orders, the unanimous Court stated, "[W]e do *not* believe the statutory language is ambiguous[.]" *Id.* at 285 (emphasis added).

Injunctions have long included orders to return money or its equivalent. Money is an appropriate and uncontroversial subject matter of an injunction. *See Story*, supra, at § 907 ("[A]n injunction will be granted to restrain the payment of money, where it is injurious to the party, to whom it belongs; or where it is in violation of the trusts, to which it should be devoted. So, it will be granted to restrain the transfer of diamonds or other valuables, where the rightful owner may be in danger of losing them."). In an 1824 ruling, the Supreme Court affirmed an injunction directing a state government to return funds that it had wrongly taken from the Bank of the United States. *Osborn v. Bank of the United States*, 22 U.S. 738, 870-71 (1824).

The *Osborn* decision was by no means exceptional. Other courts similarly issued and affirmed injunctions directing the return of funds. *See, e.g.*, *Memphis Grocery Co. v. Trotter*, 7 So. 550 (Miss. 1890) (ordering sheriff to turn over money to creditors of defendant's son); *Comm'rs Washington Cty. v. Sch. Comm'rs Washington Cty.*, 26 A. 115, 116-17 (Md. 1893) (affirming order requiring county commissioners to pay over public school money to the school treasurer). English equitable practice before the founding of the United States also provided for injunctions for money. In a fourteenth-century English case, after her would-be husband married another woman, the jilted bride-to-be sought an injunction to recover gold and currency she had given him for wedding expenses and investment. *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 557 (1986) (describing the case of *Margaret Appilgarth v. Thomas Sergeantson*). In accordance with this historical practice, the Supreme Court of Ohio wrote, "[A] decree for money will sometimes be rendered by a court of equity." *Santos v. Ohio Bureau of Workers' Comp.*, 801 N.E.2d 441, 444 (Ohio 2004).

Given the venerable history of mandatory injunctions and their broad scope, the FTC has the power under Section 13(b) to obtain monetary relief. Upholding the FTC's 13(b) authority in full would be consistent with the longstanding definition of an injunction and the Court's interpretation of the injunctive relief provision in the Clayton Act. Indeed, to deny the FTC the power to obtain monetary relief under Section 13(b), this Court would have to both disregard its own precedents and rewrite—and narrow—the established definition of an injunction. Just as the *American Stores* Court held that private

antitrust plaintiffs can seek the divestiture of unlawfully acquired property under the Clayton Act's injunctive relief section, 495 U.S. at 296, the Court here should affirm the FTC's authority to seek the transfer of acquired funds obtained in violation of Section 5 of the FTC Act. As Judge Wood wrote in a dissent on Section 13(b)'s construction, "[a]n order of divestiture is almost identical to an order requiring equitable restitution: both require the wrongdoer to turn over property that was unlawfully obtained." *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 788 (7th Cir. 2019) (Wood, J., dissenting).

The FTC's power to obtain monetary relief under Section 13(b) ensures that violators of the FTC Act do not profit from their lawbreaking. Through actions in federal court under Section 13(b), the FTC can recover the ill-gotten gains of corporations that violate the FTC Act's prohibition on "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1). On top of depriving wrongdoers of their illegally obtained profits, the FTC sends a signal to other businesses that breaking fair competition rules will have real consequences and thereby deters collusion and monopolization.

In recent years, the FTC has used its Section 13(b) power to recover the improper gains of pharmaceutical companies that, through collusive or exclusionary methods, profited at the expense of patients and health care payors. *E.g.*, Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017). The FTC filed a complaint against a branded drug company for paying a generic rival to delay market entry and ultimately reached a

settlement under which the branded company returned $1.2 billion in improperly made profits. 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). Through such collusive pay-for-delay arrangements, branded drug corporations maintain monopolistic drug prices and extract billions of dollars from the public annually. Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions 8 (2010).

With assorted procedural restrictions on private antitrust litigation, robust public antitrust enforcement by the FTC is especially critical for protecting and vindicating the public's right to fair, competitive markets. Private antitrust lawsuits today face a host of procedural obstacles, including heightened pleading and class certification standards. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). As a result, the annual filing of private antitrust lawsuits has steadily declined. *See* Syracuse Univ., *Civil Antitrust Litigation Continues to Decline*, TRAC Reports, (June 20, 2019), https://trac.syr.edu/trac reports/civil/563/. Public enforcers, like the FTC, must "take up the slack left by the increasing barriers to antitrust class actions by bringing more disgorgement suits." Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. 79, 84 (2009).

## ARGUMENT

### I. The Established Meaning of "Injunction" Empowers the FTC to Seek Court Orders to Recover Money from Wrongdoers

The FTC has the authority to obtain orders for turning over ill-gotten funds under the plain meaning of Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). Longstanding judicial authorities recognize that injunctions can be prohibitory or mandatory and can include orders to return property and money. Courts have routinely ordered defendants to undertake wide-ranging actions to cure the effects of their illegal conduct. In fashioning injunctions, this Court and state courts have directed parties to return or to transfer property and money obtained through illegal conduct. Accordingly, in addition to the support from decisions recognizing the federal courts' inherent equitable powers, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the FTC has the authority to obtain monetary relief under the plain meaning of "injunction" as used in Section 13(b).

#### A. Injunctions Can Be Commands to Undertake Specific Acts and Include Orders to Return Property and Money

While injunctions can prohibit particular acts or practices, they can also mandate specific actions. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (describing an injunction as "mandatory" or "prohibitory"); *Injunction*, Black's Law Dictionary (9th ed. 2009) (defining injunction as "[a] court order commanding or preventing an action"). A leading legal scholar on remedies has written, "The injunction is a

personal command to the defendant to act or to avoid acting in a certain way." Dan B. Dobbs, *Handbook on the Law of Remedies: Damages – Equity – Restitution* 2 (1973).

The mandatory injunction has been an essential part of the American remedies framework for centuries. Justice Joseph Story in his then-leading treatise on equitable jurisprudence wrote that a "Writ of Injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing." Joseph Story, 2 Commentaries on Equity Jurisprudence § 861 (1st ed. 1836). In his influential treatise, William Blackstone stated that injunctions can be used to compel or to prevent specific actions. 2 William Blackstone, *Commentaries* 438-39, § 3.

Using their broad and flexible injunctive powers, courts have ordered defendants to undertake a variety of affirmative actions to undo the harms of their lawbreaking. Consider a case from England in the decade after the founding of the United States. The Court of Chancery in 1785 ordered a defendant to make modifications to his real property to ensure the plaintiff received adequate amounts of water for his mill. *Robinson v. Lord Byron*, 1 Bro. C.C. 588 (1785).[3] Plaintiffs bringing suits for breach of contractual and regulatory duties can, under particular circumstances, obtain specific performance of the breaching party's obligations. *See L Series, LLC v. Holt*, 571 S.W.3d 864, 872 (Tex. App. 2019) ("[T]he remedy Holt sought and

[3] For a detailed history of mandatory injunctions in England and the United States up until the end of the nineteenth century, see Jacob Klein, *Mandatory Injunctions*, 12 Harv. L. Rev. 95 (1898).

obtained—specific performance—functions as mandatory, permanent injunctive relief").

The mandatory injunction is an established remedy in American judicial tribunals. In an 1892 decision, the Supreme Court of Appeals of West Virginia stated, "It is now settled that injunctions are not only, as is usually the case, preventive or prohibitory, but also mandatory, commanding positive, affirmative action to be taken or done by the defendant, as mandamus does at law." *City of Moundsville v. Ohio River R.R. Co.*, 16 S.E. 514, 517 (W. Va. 1892). *See also Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 688 (1949) (describing a potential injunction in the case as "either directing or restraining the defendant officer's actions").

Expansive mandatory injunctions played a central role in the federal attack on Jim Crow in the South and racial segregation across the nation. *See generally* Owen M. Fiss, *The Civil Rights Injunction* (1978). For instance, in following up on its landmark 1954 case invalidating racial discrimination in public education, the Supreme Court directed district courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

In antitrust law, private litigants can obtain mandatory injunctions to cure the effects of the defendant's exclusionary or other unfair competitive conduct. Under the Clayton Act, "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws."

15 U.S.C. § 26. In private antitrust suits, injunctive relief under the Clayton Act includes prohibitory and mandatory orders. *See California v. American Stores Co.*, 495 U.S. 271, 283 (1990) ("[O]ur precedents . . . have upheld injunctions issued pursuant to § 16 [of the Clayton Act] regardless of whether they were mandatory or prohibitory in character.").

Thus, the *American Stores* Court held that Section 16, authorizing injunctive relief, permits the court-ordered sale or transfer of business assets. The Court wrote that the divestiture of business property "is a form of 'injunctive relief' within the meaning of § 16 of the Clayton Act." *American Stores*, 495 U.S. at 296. In construing the phrase "injunctive relief" to cover divestiture orders, the unanimous Court stated, "[W]e do *not* believe the statutory language is ambiguous[.]" *Id.* at 285 (emphasis added).

In interpreting and applying the Clayton Act, the federal courts have crafted a wide range of mandatory orders. For example, the Supreme Court ordered the New York Stock Exchange to reconnect the wire service of a broker whose membership it had improperly terminated. *Silver v. New York Stock Exch.*, 373 U.S. 341, 345, 365 (1963). In a case involving exclusionary patent licensing practices, the Court directed the liable parties to withdraw from patent pools. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129-33 (1969). The lower courts have crafted a variety of mandatory injunctions in private antitrust litigation. *See, e.g.*, *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 649, 663 (2d Cir. 2015) (affirming preliminary injunction ordering a pharmaceutical company to continue selling existing formulation of branded Alzheimer's

medication on same terms and conditions); *Image Tech. Servs, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226-27 (9th Cir. 1997) (requiring Kodak to sell photocopier parts to independent service organizations or their group buying cooperatives).

Mandatory injunctions include orders to turn over improperly acquired property. As the Supreme Court wrote, "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 328 U.S. at 399. In defining "injunction," Justice Joseph Story wrote a mandatory injunction includes "a direction to the party defendant to yield up, to quiet, or to continue, *the possession of lands or other property*, constituting the subject-matter of the decree, in favor of the other party." Story, *supra*, at § 861 (emphasis added).

Federal and state courts have customarily issued injunctions ordering the defendant to return property to its rightful owner or transfer it to the government. In an 1893 decision, the Supreme Court affirmed an injunction ordering a sheriff to return property to a court receiver. *Ex parte Tyler*, 149 U.S. 164, 191 (1893). State courts in the nineteenth century ordered defendants to return or give up property they had wrongly obtained. *See, e.g.*, *Ex parte Chamberlain*, 55 F. 704 (C.C.D.S.C. 1893) (ordering property be restored to the custody of the receiver of the court); *Cain v. Cain*, 20 N.Y.S. 45 (Sup. Ct. 1892) (ordering the defendant to deliver specific chattel to a plaintiff). *See also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1283 (1989) ("An

injunction can order defendant to return specific property to plaintiff.").

Injunctions have long included orders to return money or its equivalent. Money is an appropriate and uncontroversial subject matter of an injunction. *See Story*, *supra*, at § 907 ("[A]n injunction will be granted to restrain the payment of money, where it is injurious to the party, to whom it belongs; or where it is in violation of the trusts, to which it should be devoted. So, it will be granted to restrain the transfer of diamonds or other valuables, where the rightful owner may be in danger of losing them."). In an 1824 ruling, the Supreme Court affirmed an injunction directing a state government to return funds that it had unlawfully taken from the Bank of the United States. *Osborn v. Bank of the United States*, 22 U.S. 738, 870-71 (1824).

The *Osborn* decision was by no means exceptional. Other courts similarly issued and affirmed injunctions directing the return of funds. *See, e.g.*, *Memphis Grocery Co. v. Trotter*, 7 So. 550 (Miss. 1890) (ordering sheriff to turn over money to creditors of defendant's son); *Comm'rs Washington Cty. v. Sch. Comm'rs Washington Cty.*, 26 A. 115, 116-17 (Md. 1893) (affirming order directing county commissioners to pay over public school money to the school treasurer). English equitable practice before the founding of the United States also featured injunctions for money. In a fourteenth-century English case, after her would-be husband married another woman, the jilted bride-to-be sought an injunction to recover gold and currency she had given him for wedding expenses and investment. *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539,

557 (1986) (describing the case of *Margaret Appilgarth v. Thomas Sergeantson*). In accordance with this historical practice, the Supreme Court of Ohio wrote, "[A] decree for money will sometimes be rendered by a court of equity." *Santos v. Ohio Bureau of Workers' Comp.*, 801 N.E.2d 441, 444 (Ohio 2004). *See also* Colleen Murphy, *What Is Specific About "Specific Restitution"?*, 60 Hastings L.J. 853, 864 (2008) ("[I]njunctive relief can take the form of an order to pay money.").

### B. The FTC Has the Authority to Obtain Monetary Relief Under Section 13(b)

Given the venerable history of mandatory injunctions and their broad scope, the FTC has the power under Section 13(b) to obtain monetary relief. Affirming the FTC's 13(b) authority in full would be consistent with the longstanding definition of an injunction and the Court's interpretation of the injunctive relief section in the Clayton Act. Indeed, if the Court denied the FTC the power to obtain monetary relief under Section 13(b), this holding would both disregard its own precedents and rewrite—and narrow—the settled definition of an injunction.

Section 13(b) plainly grants the Federal Trade Commission the authority to seek judicial orders compelling wrongdoers to turn over funds acquired in violation of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). In accordance with the precedent and practice described in Section I.A, injunctions are not restricted to only prohibitory orders. Injunctions include orders commanding a wide range of actions by a defendant, including turning over improperly acquired property

and funds. Affirming the FTC's power to obtain injunctions ordering defendants to give up ill-gotten gains accords with longstanding precedent and judicial practice on injunctions.

In addition to this general support, the Court's decision in *American Stores* offers specific support for preserving the FTC's Section 13(b) power. The Court held that the Clayton Act's section on injunctive permits antitrust plaintiffs to seek orders mandating divestiture of business assets if illegally acquired. Both Section 16 of the Clayton Act and Section 13(b) of the FTC Act are phrased in terms of injunctions. *Compare* 15 U.S.C. § 26 ("[A]ny person, firm, corporation, or association shall be entitled to sue for an have *injunctive* relief, . . . against threatened loss or damage by a violation of the antitrust laws." *with* 15 U.S.C. § 53(b) ("[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent *injunction*.") (emphases added).

Just as the Supreme Court held that private antitrust plaintiffs can seek the divestiture of improperly acquired property under the Clayton Act's section on injunctive relief, the Court here should affirm the FTC's authority to seek the transfer of improperly acquired funds under the FTC Act. Like the Clayton Act, the text of the FTC Act is *not* ambiguous. *See American Stores*, 495 U.S. at 285 ("[W]e do *not* believe the statutory language is ambiguous[.]"). As Judge Wood wrote in a dissent in a case construing Section 13(b), "[a]n order of divestiture is almost identical to an order requiring equitable restitution: both require the wrongdoer to turn over property that was unlawfully obtained."

*FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 788 (7th Cir. 2019) (Wood, J., dissenting).

## II. The FTC's Authority to Obtain Monetary Relief Under Section 13(b) Is Critical for Deterring Unfair Competitive Practices in the Marketplace

The FTC's authority to obtain monetary relief is essential for stopping unfair competitive practices. In recent years, the FTC used this power against collusion and monopolization by pharmaceutical corporations and led the fight for affordable prescription medications. The FTC's power to obtain monetary relief is especially important given procedural obstacles facing private antitrust lawsuits. Upholding this authority is essential to ensure that breaking competition law does *not* pay. If the plain text of the FTC Act were disregarded and the FTC thereby deprived of its monetary relief authority, corporate colluders and monopolists would receive "one free pass" to break federal antitrust law and keep their ill-gotten gains.[4] *See* David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 Geo. Wash. L. Rev. 2101, 2116-17 (2015) (warning against giving firms that engage in deceptive advertising one free pass).

The FTC's power to obtain monetary relief under Section 13(b) ensures that violators of the FTC Act do not profit from their lawbreaking. Through actions in

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[4] If the FTC could no longer obtain monetary relief under Section 13(b), it could still prospectively prohibit unfair methods of competition through an injunction or a cease and desist order. The FTC, however, could not obtain monetary relief unless the violator subsequently breached the specific injunction or order. 15 U.S.C. § 45(l).

federal court under Section 13(b), the FTC can recover the ill-gotten gains of corporations that violate the FTC Act's prohibition on "unfair methods of competition." 15 U.S.C. § 45(a)(1). On top of depriving wrongdoers of their illegally obtained profits, the FTC sends a signal to other businesses that breaking competition rules will have real consequences and thereby deters collusion and monopolization.

In recent years, the FTC has used its Section 13(b) power to recover ill-gotten profits from pharmaceutical companies that, through improper methods, profited at the expense of patients and health care payors. The Commission targeted both collusion and monopolization. *E.g.*, Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017). The FTC filed a complaint against a branded drug company for paying a generic rival to delay market entry and ultimately entered into a settlement under which the branded company returned $1.2 billion in improperly made profits. 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). Such pay-for-delay agreements constitute a form of collusion. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 154 (2013) ("[S]ettlement on the terms said by the FTC to be at issue here—payment in return for staying out of the market—simply keeps prices at patentee-set levels, potentially producing the full patent-related $500 million monopoly return while dividing that return between the challenged patentee and the patent challenger."). Branded drug

corporations maintain monopolistic drug prices and extract billions of dollars from the public every year. Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions 8 (2010).

With assorted procedural restrictions on private antitrust litigation, robust public antitrust enforcement by the FTC is critical for protecting and vindicating the public's right to fair, competitive markets. Private antitrust lawsuits face a host of procedural obstacles, including heightened pleading and class certification standards. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). These obstacles resulted in a steady decline in the annual filing of private antitrust lawsuits over the past decade. *See* Syracuse Univ., *Civil Antitrust Litigation Continues to Decline*, TRAC Reports, (June 20, 2019), https://trac.syr.edu/tracreports/civil/563/. To compensate for diminished private antitrust enforcement, the FTC must retain its full powers to enforce and remedy violations of the FTC Act. *See* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. 79, 84 (2009) (arguing that FTC and Department of Justice should "take up the slack left by the increasing barriers to antitrust class actions by bringing more disgorgement suits").

If the FTC were stripped of its full powers under Section 13(b), this would further encourage corporate collusion and monopolization at the expense of consumers, workers, rivals, and independent businesses. Empirical research has found that the deterrence of antitrust violations is *already* insufficient: breaking competition rules pays even after factoring in damages, fines, refunds, and prison

sentences for individuals. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 476 (2012) ("[W]e find that on average the total value of imposed [anti-cartel]sanctions have been only 9% to 21% as large as they should have been."). Whereas the FTC can obtain monetary relief for consumer protection violations under other provisions of the FTC Act, Section 13(b) is the FTC's only option for recovering a corporation's gains from first-time competition violations. If the Court rejects the settled meaning of an injunction and narrows Section 13(b), the FTC could obtain monetary remedies in competition matters only against repeat corporate lawbreakers that violate an injunction or cease and desist order to which they are subject. *See* 15 U.S.C. § 45(l) (establishing civil penalties for violation of FTC final orders). Under a neutered Section 13(b), corporations would have one opportunity to violate the FTC Act's prohibition on unfair methods of competition and profit "from the [violation] through [the] retention of its fruits." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948).

## CONCLUSION

The Supreme Court should affirm the Federal Trade Commission's power to obtain orders for monetary relief under Section 13(b) of the FTC Act.

Respectfully submitted,

JAY L. HIMES
*Counsel of Record*
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700
jhimes@labaton.com

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

*Counsel for Amicus Curiae*

December 7, 2020