No. 19-825

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
PETITIONER

v.

CREDIT BUREAU CENTER, LLC AND MICHAEL BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondents agree that the decision below created a split with seven other circuits on the question presented: whether a permanent injunction entered under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), may require the return of unlawfully taken money to injured victims. Br. in Opp. 2, 14. They do not deny that the issue is recurring; that its resolution is vitally important to the effective enforcement of the FTC Act; or that allowing the law to mean one thing in some circuits and something else in others causes substantial uncertainty and spurs wasteful, time-consuming litigation. See Pet. 12-13, 25. They also agree that the Court's decision in No. 18-1501, *Liu* v. *SEC*, will not resolve the question, and that this case is the best vehicle to decide it. Br. in Opp. 17-20.

In the face of those compelling reasons for this Court's review, respondents argue largely that the Court should simply allow the issue to "percolate" in the courts of ap-

peals. But courts have been considering this issue for more than three decades, and eight of them have already decided it; further consideration is unnecessary. Respondents' position boils down to the implausible assertion that the circuit split will disappear when seven courts of appeals reverse their existing precedent after reading the decision below. Br. in Opp. 14-16. There is no reason to think that will happen. One court has already denied rehearing en banc on this issue despite a concurring panel opinion urging review for reasons similar to those in the decision below. Other courts will likely continue to follow their existing precedent; several have already considered and rejected arguments accepted below. And even if respondents were right that seven courts of appeals would abandon their precedents en masse, that would take years, if not decades. In the meantime, the Commission and the consumers it protects would be left in an untenable position. The circuit split warrants the Court's review now.

The decision below is wrong. As explained in the petition, the word "injunction" has been understood to include orders requiring the return of unlawfully obtained property since the founding of the Republic. That understanding had been endorsed by this Court and applied in the lower courts when Congress enacted Section 13(b). And nothing in the FTC Act suggests that Congress intended something other than the historical understanding. To the contrary, Congress deliberately created multiple enforcement tools, each tailored to its particular purpose and cabined by appropriate procedures. Pet. 20-22. The court of appeals' decision upsets Congress's design by treating those tools as if they must be identical, dismissing them as redundant if they overlap, and ignoring Congress's express direction to the contrary. This Court's review is necessary to correct

the court of appeals' error and restore the uniformity of federal law.

A. The Question Presented Merits Review Now.

1. Respondents agree that the court of appeals' decision "that section 13(b)'s permanent-injunction provision does not authorize monetary relief," Pet App. 40a, conflicts with the decisions of seven other courts of appeals. Br. in Opp. 14; see Pet. 11-13.

The issue is important and recurring. The return of illegally obtained funds to consumers as part of a permanent injunction is essential to the effective enforcement of the FTC Act and other laws enforced by the Commission, and the Commission brings dozens of cases seeking such relief every year. Pet. 12-13. Respondents do not disagree. Nor do they deny that a failure to restore uniformity would leave the FTC Act meaning one thing in one circuit and something else in others, perpetuate uncertainty, and spur unnecessary and expensive litigation as parties seek to take advantage of the Seventh Circuit's outlier holding. See Pet. 25.

2. Respondents also agree that this case is ideally suited to resolve the question presented.

a. This case presents a superior vehicle to the other two petitions presenting the same question. As explained in the Solicitor General's response in *Publishers Business Services* v. *FTC*, petitioners there waived the issue by failing to raise it properly below. 19-507 Br. in Opp. 4. This case is also preferable to No. 19-508, *AMG Capital Management* v. *FTC*. As Respondents suggest (Br. in Opp. 19-20), the facts here more closely resemble those in typical 13(b) cases than *AMG*, and the briefing is more fully developed in this case.

b. Respondents agree further that there is no need to await the outcome of *Liu*, which presents a different question from this case. Br. in Opp. 16-17. *Liu* involves whether an order directing disgorgement of a defendant's ill-gotten gains to the Treasury constitutes "equitable relief" under the securities laws, not whether a statute that authorizes a permanent injunction allows an order to repay consumer victims. See Pet. 24. The cases involve different statutory language ("permanent injunction" versus "equitable relief"), different forms of relief (repayment of consumer losses versus disgorgement to the Treasury), and different statutes (the FTC Act versus the securities laws). The Court's decision in *Liu* is unlikely to affect the outcome in this case.

3. The question presented has been addressed by eight courts of appeals and needs no further percolation.

a. When the Court encounters "frontier legal problems," it sometimes allows the courts of appeals consider the matter further, which can lead to "a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); see also *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (Stephens, J., respecting the denial of certiorari) ("further consideration of the . . . problem by other courts will enable us to deal with the issue more wisely"). This is not such a case. The question presented has been considered over more than three decades in eight circuits. Percolation will not lead to any greater elucidation of the issues or a more-informed decision by the Court.

b. Nor will further consideration in the courts of appeals resolve the circuit split. Respondents suggest (Br. in Opp. 14-16) that other courts will reverse themselves now that the Seventh Circuit has overruled *FTC* v. *Amy Travel*

Service, Inc., 875 F.2d 564 (1989). That contention is far-fetched.

The courts of appeals are not bound by the decisions of their sister circuits. The decisions holding that Section 13(b) authorizes injunctions to repay consumers will remain the law of the respective circuits unless they are overruled en banc or countermanded by this Court. Wholesale en banc reversal of those decisions is extraordinarily unlikely. Respondents wrongly contend (Br. in Opp. 15) that other courts "uncritically accepted" *Amy Travel*, but despite later citations to that case, the consensus view of Section 13(b) that emerged was grounded this Court's decisions: *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). See, *e.g.*, *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365-366 (2d Cir. 2011); *FTC* v. *Ross*, 743 F.3d 886, 890-891 (4th Cir. 2014). *Porter* established that "nothing 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." 328 U.S. at 399. It is counterintuitive that every court that relied on *Porter* will now determine, as the Seventh Circuit did, that it is "obvious" that "[r]estitution isn't an injunction." Pet. App. 12a.

Moreover, many courts have already rejected the Seventh Circuit's reasoning in overturning *Amy Travel*. Three circuits have rejected the argument that the availability of monetary relief under Section 19 of the FTC Act precludes the injunctions that order the return of unlawful proceeds.

Compare Pet. App. 16a with *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016); *Bronson Partners*, 654 F.3d at 366-367; *Security Rare Coin*, 931 F.2d at 1315. Those courts held instead that Section 19's savings clause renders that reading untenable, a position rejected by the Seventh Circuit. See Pet. App. 18a-19a.

The Eighth Circuit also rejected the argument (accepted below, Pet. App. 15a-16a) that Congress could not have contemplated injunctions that order monetary relief under Section 13(b) because that provision does not use language such as "other and further equitable relief" found in Section 5(*l*) of the FTC Act. *Security Rare Coin*, 931 F.2d at 1314-1315. The court correctly reasoned that under *Porter* and *Mitchell*, the district court may exercise the full scope of its equitable power unless the statute expressly limits the scope of that jurisdiction, which Section 13(b) does not. *Ibid.*

Similarly, two circuits have rejected the Seventh Circuit's central premise that this Court's decision in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), upended the traditional understanding of permanent injunctions as encompassing restitution. In *United States* v. *Rx Depot, Inc.*, the Tenth Circuit held that *Meghrig* did not overrule or limit "*Porter*'s and *Mitchell*'s general rule that a grant of equity jurisdiction enables courts to order any form of equitable relief." 438 F.3d 1052, 1057 (2006). *Meghrig*, the court explained, "merely demonstrates that a statute's particular characteristics may preclude application of the rule." *Ibid.* The Third Circuit likewise found no "indication, either in *Meghrig* or since, that the Court has abandoned the holdings of *Porter* and *Mitchell*." *United States* v. *Lane Labs-USA, Inc.*, 427 F.3d 219, 232 (2005).

Respondents' speculation that other circuits "may be willing to revisit" their precedents (Br. in Opp. 15-16) also ignores structural considerations that make restoring uniformity of the law highly improbable. The law could change only if: the FTC brings a Section 13(b) lawsuit leading to a monetary judgment; the defendant appeals; the appellate panel affirms the judgment; the appellant successfully petitions for rehearing en banc; and the en banc court overturns existing law. The chance that those events will transpire in each of seven circuits is zero. Indeed, the Ninth Circuit recently rejected an en banc rehearing petition in *FTC* v. *AMG Capital Management, LLC*, 910 F.3d 417, 429 (2018), without any judge calling for a vote, even though two judges on the panel urged the court to overturn its existing precedent on Section 13(b). 19-508 Pet. App. 118a-119a.

Even if further percolation could eventually resolve the circuit split, it would persist for years. The previously unanimous body of Section 13(b) precedent took more than 30 years to develop, from the Ninth Circuit's 1982 decision in *H.N. Singer* to the Fourth Circuit's 2014 decision in *Ross*. There is no reason to think that the reverse process would take less time, if it happened at all. In the meantime, the uncertainty caused by the circuit split would burden consumers, the Commission, and the courts. The FTC Act would give consumers less protection from some illegal scams than others, based solely on where the scam operated. Defendants would continue trying to force their cases into courts favorable to them. The time to resolve this matter is now.

B. The Court of Appeals' Decision is Wrong.

The circuit split, the importance of the question, and the superiority of this case as a vehicle are sufficient reasons to grant review. Beyond that, the decision below is incorrect for the reasons set forth in the petition, and respondents do not show otherwise.

1. Respondents repeat the court of appeals' *ipse dixit* assertions that by its "plain text," a "'permanent injunction' is not a monetary award," and that an injunction can involve only forward-looking relief. Br. in Opp. 9-11. As the Commission showed, however, it is deeply rooted in the common law and has long been understood by this Court that an "injunction" can include monetary remedies meant to undo harm caused by a defendant's conduct. Pet. 13-15. As the Court explained in *Porter*, the return of illegally acquired funds is "clearly a part of the subject matter of a suit for an injunction." 328 U.S. at 399.

Although Section 13(b) expressly authorizes an injunction without qualification, respondents characterize the return of illegally obtained funds as an "implication," which they claim "is rebutted" by the lack of affirmative authorization for monetary relief in Section 13(b). Br. in Opp. 10. There is nothing implied about the monetary remedy; it is an inherent aspect of the express authority to issue an injunction. As the Court explained in *Mitchell*, the authority to issue an injunction includes monetary relief unless Congress indicates otherwise "in so many words, or by a necessary and inescapable inference."[1] 361 U.S. at 291.

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[1] Respondents also seek to distinguish the prohibitory part of the district court's injunction and the order to repay consumers, characterizing the former as the "injunction" and the latter as a "monetary judgment." Br. in Opp. 10 n. 5. But the district court entered just one order, with both commands. Pet. App. 100a-134a.

The principles set forth in *Porter* and *Mitchell* were actively being applied in the courts when Congress enacted Section 13(b). See Pet. 16-17. Congress therefore is presumed to know the meaning of its chosen statutory language. Since then, Congress has repeatedly signaled its acceptance of the judiciary's reading of Section 13(b), and has even acknowledged in a Senate Report that the Commission may "obtain consumer redress" under Section 13(b). S. Rep. No. 103-130, at 15-16 (1993); see Pet. 16-17.

2. Respondents reliance on the "structure" of the FTC Act, Br. in Opp. 11-12, does not reflect a coherent understanding of the statute.

As explained in the petition, Congress provided the Commission with multiple ways to fulfill its mission to protect consumers from unfair and deceptive acts or practices. Pet. 20-22. Each enforcement pathway is tailored to provide appropriate judicial guardrails on the Commission's authority to determine that particular conduct is illegal. *Ibid.*

Where the Act gives the Commission *greater* authority to determine that particular conduct is illegal (through rulemaking or an administrative enforcement proceeding and cease-and-desist order), it checks that power by providing procedural safeguards to judicial enforcement of the Commission's decrees, such as the statute of limitations on Section 19 actions. See 15 U.S.C. 57b(d). Similarly, Section 5(*l*) of the Act supports the Commission's administrative enforcement authority by providing limited judicial remedies against those who violate a cease-and-desist order, but only after the order has become final through judicial review (or the expiration of the time to seek judicial review). 15 U.S.C. 45(*l*); 15 U.S.C. 45(g).

Unlike the administrative enforcement and rulemaking paths, Section 13(b) only allows the Commission to *allege* that particular conduct is illegal. To obtain a permanent injunction (and the return of consumers' funds), the Commission must prove its case to the satisfaction of a federal district court.

Although respondents recognize that Congress provided the Commission with multiple enforcement tools useful in different situations, they nevertheless contend that provisions designed to support separate tools must be worded the same. Br. in Opp. 3, 11-12.

Thus, they argue that the authority to enter a permanent injunction under Section 13(b) cannot encompass the return of consumer losses because Section 19 contains "language authorizing a monetary award" whereas Section 13(b) does not. *Id.* at 11-12. But Congress anticipated that question and incorporated into Section 19 (enacted after Section 13(b) became law) a savings clause stating: "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. 57b(e). Respondents' claim also ignores *Mitchell*'s holding that Congress need not say more to authorize the return of funds when it has already authorized an injunction. 361 U.S. at 291.

Respondents next argue that the word "injunction" in Section 13(b) cannot encompass the return of consumer losses because Section 5(*l*) provides, in a civil-penalties action to enforce a final cease-and-desist order, the authority to obtain a "mandatory injunction" and also "other and further equitable relief." 15 U.S.C. 45(*l*). Again, that argument is contrary to *Mitchell*, which held that no additional language is required. 361 U.S. at 291. The argument also compares statutory apples and oranges: the word "injunc-

tion" in Section 5(*l*) is not used in the same way as in Section 13(b). An action under Section 5(*l*) primarily involves the payment of civil penalties for violation of a final cease-and-desist order. 15 U.S.C. 45(*l*). It also allows for a "mandatory injunction"; that is, an order that requires a positive act, or other relief the district court finds appropriate to enforce a Commission order. That language is not comparable to Section 13(b), where a "permanent injunction" is the primary authorized relief.

Respondents next complain that the Commission's reading of Section 13(b) allows an order requiring the return of consumer losses without providing notice that particular conduct is illegal through a Commission rulemaking or cease-and-desist order. Br. in Opp. 12-13. But Congress balanced the Commission's authority to declare conduct illegal with the courts' authority to craft remedies. In a Commission rulemaking or administrative enforcement action, the Commission itself declares conduct illegal. Under Section 13(b), by contrast, the Commission must convince a court with "proper proof" that the defendant's conduct is unlawful. 15 U.S.C. 53(b). Defendants are free to argue (and often do) that the conduct alleged does not fit within an established prohibition or that the established restrictions provide constitutionally inadequate notice.

Lastly, respondents claim that *Porter* and *Mitchell* cannot be used "to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure." Br. in Opp. 13-14 (quoting Pet. App. 33a). But it is the court of appeals' analysis that ignores the traditional understanding of the term "injunction," nullifies Section 19's savings clause, and upsets the balance of decisionmaking authority inherent in the structure of the FTC Act. There is no reason why Congress would have wanted

those who violate the FTC Act to the detriment of consumers to profit from their misconduct.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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