No. 19-_____

In The

Supreme Court of the United States

CREDIT BUREAU CENTER, LLC
AND MICHAEL BROWN,

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 13(b) of the FTCA expressly authorizes the commission to "file suit" to enjoin allegedly false, misleading or deceptive trade practices with a temporary restraining order, preliminary injunction "pending the issuance of an administrative complaint" when an individual or corporation is "violating, or about to violate" the FTCA. If an administrative complaint is not filed within twenty days of issuance of temporary or preliminary injunctive relief, the injunction must be dissolved.

Section 19 provides an elaborate enforcement scheme that authorizes the FTC to file direct enforcement actions in the district court for relief including but not limited to consumer redress, refunds, restitution and an unqualified grant of full equitable "relief as the court deems necessary."

The question presented is:

Whether Section 13(b)'s second proviso providing that the FTC "may seek" a permanent injunction is an independent grant of authority to "file suit" seeking implied consumer redress remedies circumventing the elaborate enforcement scheme set by Congress?

PARTIES TO THE PROCEEDING BELOW

The cover contains the names of all the parties in the court of appeals.

RULE 14(b) COMPLIANCE

Credit Bureau Center is wholly owned by Michael Brown and is not a parent company or a subsidiary of any other company.

There are no other proceedings in state or federal courts that are directly related to the proceedings in this case.

RELATED CASES

Cross-Petitioners Credit Bureau Center, LLC and Michael Brown were the defendants in the district court proceedings and appellants in the court of appeals proceedings. The Federal Trade Commission was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings.

- *Federal Trade Commission v. Credit Bureau Center, LLC and Michael Brown*, Case No. 17-cv-00194, United States District Court for the Northern District of Illinois. Judgment entered June 26, 2018.
- *Federal Trade Commission v. Credit Bureau Center, LLC and Michael Brown*, Case Nos. 18-2847 and 18-3310. Judgment entered August 21, 2019.

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CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12(5) of the Rules of the Supreme Court of the United States, Credit Bureau Center and Michael Brown, respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-63) is reported at 937 F.3d 764. The opinion of the district court (App., infra, 64-99) is reported at 325 F. Supp. 3d 852.

JURISDICTION

The judgment of the court of appeals, accompanied by a denial of hearing en banc, was entered on August 21, 2019. On November 8, 2019, Justice Kavanaugh extended the time within which to file a petition for certiorari to and including January 18, 2020. The jurisdiction of the court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the FTC Act, 15 U.S.C. § 41 et seq., are reproduced in the Petitioner, Federal Trade Commission's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Congress adopted Section 19 of the FTC Act to provide the FTC with two distinct enforcement options. The FTC can obtain preliminary injunctive relief pending issuance of an administrative complaint under Section 45, or it can enforce rules violations by directly filing civil actions in district court for rules violations and obtain consumer redress, refund customers, and other equitable relief. Instead of availing itself of *either* option in this and other rule violation cases, the FTC pursues enforcement actions under Section 13(b), which provides for preliminary and permanent injunctive relief arguing that district courts may imply authority to use the courts' full equitable powers to order restitution. The Commission has persuaded the lower courts to interpret the second proviso of Section 13(b) allowing for entry of permanent injunctions as implicitly granting authority to disregard the first proviso's command that district courts "shall dissolve" preliminary injunctions if the FTC fails to file an administrative complaint to be internally adjudicated through the processes set out in Section 45. The two provisos are inextricably bound and must construed as a whole.

The Commission portrays Section 13(b) in a vacuum, as though Section 13(b) and 19 are different

statutes when, in fact, the text, structure and legislative history of the Act reveals that Congress adopted an elaborate administrative enforcement scheme that granted the FTC the exact same powers sought by the FTC including restitution and other equitable relief. This Court has consistently held that statutes must be construed as a whole, giving force and effect to every word and phrase in a statute and harmonizing the language based on the text of the statute rather than the Court's perception of Congressional intent. *Food & Drug Admin. v. Williamson*, 529 U.S. 120, 132-133 (2000).

In *Credit Bureau Center*, the Seventh Circuit reversed a long line of circuit precedent allowing district courts to exercise their full equitable powers to impose equitable restitution and disgorgement holding *inter alia* that the statutory language "injunction" looks to the future and is designed to deter whereas restitution is a remedy for past actions. App. at 30a-35a. Similarly, the Seventh Circuit noted that this Court has long held that district courts may not imply full equitable powers where, as here, Congress created an elaborate enforcement scheme *Id.* citing *Meghrig v. KFC Western Inc.*, 516 U.S. 479 (1996). *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 632 F.3d 1111, 1121 (9th Cir. 2011).

While the Seventh Circuit correctly held that the FTC may not seek to use Section 13(b) as authority to imply restitutionary authority, the court did not go far enough and hold that the district court erred by refusing to dissolve the preliminary injunction where, as in this case, the FTC failed to file an administrative

complaint within twenty days of the date of issuance of injunctive relief. Instead, the court held "that at least some of section 13(b)'s requirements don't apply to permanent injunctions." *See United States v. JS & A Group, Inc.*, 716 F.2d 451, 456-457 (7th Cir. 1983). In essence, the FTC contends that the courts have implied power under Section 13(b) to disregard the express Congressional command that the FTC follow the administrative adjudication procedures set out in Section 45 of the Act. The Court should grant certiorari to settle the issue on the proper interpretation of Section 13(b).

LEGISLATIVE HISTORY OF SECTION 13(b)

Section 5 of the Federal Trade Commission Act prohibits "unfair, or deceptive acts or practices" in or affecting commerce and empowers and directs the Commission to prevent such conduct. 15 U.S.C. § 45. The FTC concedes that, before 1973, the Commission enforced such proceedings through administrative proceedings, in which the remedy was issuance of an order to cease and desist from the unlawful practices. 15 U.S.C. § 45(b).

In 1973, Congress added Section 13(b) to the FTC Act which added new authority for the FTC to seek injunctive relief *pending* administrative enforcement proceedings before the Commission. Section 13(b) makes clear that the FTC may, pending the commencement of proceedings before the Commission, seek temporary restraining orders and preliminary injunctions as a "stop-gap" measure to restrain unlawful practices

pending completion of administrative proceedings. There were two provisos to this new authority. First, the district courts "shall" dissolve temporary restraining orders and preliminary injunctions if the agency failed to file administrative proceedings within twenty days of issuance of an injunction. Secondly, the agency was granted authority, in proper cases, to seek a permanent injunction to restrain unlawful acts and practices.[1]

Section 13(b), however, did not explicitly or implicitly authorize the FTC's authority to file full-fledged lawsuits imposing receiverships and pursuing document and deposition discovery, restitution, and disgorgement. Nothing in the text of the statute, nor in the legislative history provided for such a dramatic expansion of authority. Beale & Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 5-6 (2013). When Congress added Section 13(b), the provision was expected to be used for obtaining injunctions against illegal conduct pending completion of FTC administrative hearings. *See* S. REP. No. 93-151, at 30 (1973) ("The purpose of [Section 13(b)] is to permit the [FTC] to bring an immediate halt to unfair or deceptive acts or practices when . . . [a]t the present time such practices might

[1] In earlier attempts to reform the Act, Senate Bill 356, included a provision for consumer redress, injunctive relief and a statute of limitations. Beale, supra at 12. While the bill passed the Senate in November 1971 it died in committee. Congress *rejected* the consumer redress and limitations provisions but later adopted a form of injunctive relief. S. 986, 92d Cong. (1971). *Id.*

continue for several years until agency action is completed.")

In 1974, the Ninth Circuit held that the FTC could not obtain restitution through an administrative cease-and-desist order. *Heater v. Fed. Trade Comm'n*, 503 F.2d 321, 323-324 (9th Cir. 1974). In *Heater*, the Court rejected the Commission's use of rule making to expand its powers to require restitution as part of a cease-and-desist order. The *Heater* court held that the FTC's construction of the Act would have allowed the Commission to order private relief for acts which occurred before giving notice that the conduct was within the agency's statutory authority. *Id.* at 323. The *Heater* court noted "the critical issue around which the Congressional debate the . . . Act centered was the breadth of the Commission's power to define what would constitute 'unfair acts.' " *Id.* at 324. To avoid that risk, Congress limited the consequences of violating the Act to a cease-and-desist order. *Id*.

Against the backdrop of *Heater*, in 1975, Congress adopted Section 19, 15 U.S.C. § 57b, which provided the FTC with two new enforcement tools to obtain restitution as part of adjudicating complaints filed by the Commission pursuant to Section 53, or through filing lawsuits in district court for violation of rules promulgated by the Commission. This provision provided for the full range of consumer redress "including, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, . . . ; except that nothing in this subsection

is intended to authorize the imposition of any exemplary or punitive damages."

The provisions in Section 19 appear to have been the subject of a compromise balancing the FTC's desire to obtain monetary relief against basic fair notice due process principles. Unless the FTC either defined a Rule or banned an "unfair or deceptive" act or trade practice, it could not obtain monetary remedies unless it obtained a final cease-and-desist order through its internal adjudicatory process, *id.* §§ 45, 57b(a)(2). The order was subject to judicial review and upon the order becoming final, the FTC could obtain monetary damages by proof of *scienter*; i.e., that a reasonable person would have known under the circumstances that the conduct at issue "was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2). Unlike Section 13(b), Congress imposed a three-year statute of limitations that provided limitations to exercise agency authority. Alternatively the FTC can file a direct district court action under Section 19 for refunds, restitution and other equitable relief for rule violations.

While this Court need not address legislative history if the text of the statute is unambiguous, the Court may take note that Section 19 was hailed as a "radical change" with respect to the role of Government agencies in protecting the public. 120 Cong. Rec. 31,736 (1974). "Without this amendment, the [FTC's] *only* power would be to issue a cease and desist order barring further violations." 120 Cong. Rec. 31,316 (1974) (emphasis supplied). The FTC's then-Chairman Engman stated: Section 13(b) was merely a "gap-filling

measure" that *did not expand* the FTC's jurisdiction, and merely allowed the FTC to obtain injunctive relief "pending the completion of the lengthy administrative proceedings and appeals, which lead to a final cease-and-desist order. . . ." 119 Cong. Rec. 36,610 (1973) (emphasis supplied). The FTC Chairman's contemporaneous statement about the FTC's own view of the limited nature of Section 13(b) is dispositive as to the intent underlying Section 13(b).

I. The FTC Was Frustrated with its Lack of Authority to Seek Restitution under Section 13(b)

The FTC is not satisfied with the enforcement tools provided by Congress in Section 19 including the full, unqualified grant of equitable relief in district court including but not limited to restitution and other forms of consumer redress. The FTC's frustration with Section 19 stems from the fact it views this authority "of limited utility" since the FTC is only authorized to seek relief "from violations of FTC rules." FTC Petition at 12. The agency set out on a campaign to persuade the courts that Section 13(b) was a full, unqualified grant of equitable relief despite the fact Section 13 lacked the same language in Section 19 authorizing "relief may include, but shall not be limited to" or the authority to grant "such relief as the court finds necessary to redress injury to consumers." The FTC has convinced courts to ignore the elaborate enforcement scheme granted by Congress and to read "implied" authority where in fact no authority exists.

The agency understood that Section 13(b) did not grant express authority to seek restitution but decided to work around this void in the statute. At the FTC's 90th Anniversary Symposium, one of the architects of the FTC's litigation "program" described the internal agency struggle with its campaign to expand Section 13(b)'s authority and stated "When the early cases were proposed, many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized *only injunctive relief.* If the doubters had stopped the Commission from filing the cases, the Commission might never have established the full range of remedies available to it under Section 13(b)." David E. Fitzgerald, FTC 90th Anniversary Symposium: Session on "Injunctions, Divestiture and Disgorgement" (Sept. 23, 2004) (transcript available at http://bit.ly/2kWOVWS).

In something of an encore "victory lap" performance, Mr. Fitzgerald gave a separate talk where he admitted that (1) neither the text nor the legislative history of Section 13(b) provided a basis for broad equitable relief; (2) many "naysayers" within the agency believed that Section 13(b) authorized only injunctive relief; and (3) that the agency should move "warily" and select cases encouraging the courts to adopt the reasoning in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) and imply the broad equitable powers not granted by Congress. Trial Dkt. 156-6. In *FTC v. H.N. Singer, Inc.*, 668 F.3d 1107 (9th Cir. 1982), the Ninth Circuit granted the FTC's wishes and adopted the reasoning in *Porter v. Warner* and *Mitchell v. Robert De*

Mario Jewelry, Inc., 361 U.S. 288 (1960). Other circuit courts summarily adopted the reasoning in *Porter* and *Mitchell* with little, if any discussion or examination of the statute.[2]

Until recently, the FTC's publication "A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority," Fed. Trade Comm'n, http://bit.ly/2lrPuGq made clear that: "Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one step." Simply stated, the FTC's intent to expand its administrative powers reflects a view that the FTC, not Congress knows what is best for the public. This sort of administrative thought process and behavior undermines basic principles of separation of powers.

II. The Ninth Circuit Issues its Decision in *FTC v. H.N. Singer*.

The Ninth Circuit's decision in *FTC v. H.N. Singer*, 668 F.2d 1197 (9th Cir. 1982) held that the courts could imply authority to seek restitution in a statute that only spoke to injunctive relief and further held that the FTC had authority to grant whatever preliminary injunctions are justified by the usual equitable standard and are sought in accordance with Rule 65(a). The court reasoned that the proviso allowing permanent injunctions did not, on its face, condition the issuance

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[2] *See, e.g.*, *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988).

of a permanent injunction upon the initiation of administrative proceedings. In reaching its conclusions, The Court relied primarily, if not solely, on *Porter v. Warner*, 326 U.S. 395 (1946) and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960).

Singer and its progeny relied on *Porter v. Warner*, 328 U.S. 395, 398 (1946) for the proposition that Congress, when it gives district court authority to grant permanent injunction, it also grants authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference. *Singer*, 668 F.2d at 1113; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). *Porter* held that the courts' equitable power may be limited only by a clear and valid legislative command, expressed "in so many words, or by a necessary and inescapable inference." *Id.* at 398. The actual holding in *Porter*, however, has to be viewed in context. Congress granted the Price Controls Board broad powers under the Emergency Price Control Act ("EPCA") to limit profiteering during wartime. Unlike the language in Section 13(b) allowing injunctive relief only, Section 205(a) provided that the Administrator could apply for a "permanent or temporary injunction restraining order, ***or other order*** shall be granted without bond." *Id*. at 1088 (emphasis supplied). Simply stated, there was no need to *imply* Congressional

authority in *Porter* because Congress granted authority for issuance of any "other order."[3]

Additionally Porter was not analogous to this statute for multiple reasons. First, the ECPA contemplated that if private relief was not sought the Administrator could sue for damages that would be paid to the public treasury. In *Credit Bureau Center*, the court pointed out the FTC's "restitution" wasn't strictly "restitutionary" at all, in that "the award runs in favor of the Treasury, not the victims." App. 59a. In *Porter*, the statute clearly intended that funds be paid the public treasury whereas Section 13(b) does not specify whether funds are paid to consumers or to the treasury. Section 19, however, plainly specifies that the FTC may file a civil action to redress injury to consumers. Secondly, the ECPA did not provide (as in Section 13(b)), the action "shall" be dismissed if an administrative complaint was not filed within 20 days. Unlike this case, the ECPA did not provide an elaborate enforcement scheme with reticulated remedies. Finally, a specific remedy expressly granted by Congress controls over a claim of implied power.

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[3] The holding in *Porter* was based on the fact that the Board was allowed not only the authority to grant preliminary injunction relief, but the grant of authority was broadly extended "to other orders." In light of wartime exigencies, the context as well as the plain language of the statute supported this Court's conclusion. The discussion of equitable powers, however, appears to be dicta.

III. The Seventh Circuit's Decision in Credit Bureau Center and Supervening Decisions by This Court Limit the Scope of *Singer*.

The *Singer* and *Porter* decisions were "typical of their era" utilizing an interpretive approach to statutory interpretation that left the judicial branch free to craft whatever remedies necessary to effectuate their understanding of congressional intent. App. 23a. "An exploration of statutory purpose is no longer the Supreme Court's polestar in cases raising interpretive questions about the scope of statute remedies."[4] App. 32a.

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-488 (1996), the Court dramatically limited *Porter*:

> As we explained in *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 14, 101 S. Ct. 2615, 2623, 69

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[4] "*We are all textualists. That means that a judge must relate all sources of and arguments about statutory interpretation to a text the legislature has enacted.*" (emphasis supplied). William N. Eskridge Jr., Interpreting Law: A Primer on How to Read Statutes and The Constitution 81 (2016). We must look not only to the "particular statutory language at issue" but also to "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Carpenters Health & Welfare Tr. Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1067 (9th Cir. 1995). Statutory construction is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988), that relies on context to be "a preliminary determinant of meaning," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 168 (2012).

> L.Ed.2d 435 (1981), where Congress has provided "*elaborate enforcement provisions*" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under" the statute. "'[I]t 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.*'" *Id.*, at 14-15, 101 S. Ct., at 2623 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L.Ed.2d 146 (1979)). (emphasis supplied)

Meghrig analyzed the elaborate enforcement scheme as a whole comparing the language in RCRA and CERCLA to determine any implied remedies. Under this same analysis, comparing Sections 5, 13(b), and 19 provide the "elaborate enforcement provisions" in the FTC Act. Where Section 19 includes reticulated remedies and an unqualified grant of equitable relief, Section 13 identified injunctive relief pending issuance of an administrative complaint. Both Congress and the Commission understood Section 13(b) was intended as a stop-gap measure to enjoin misleading or deceptive activity pending the FTC's filing and resolution of administrative proceedings.

The FTC asserts that *Meghrig* did not undermine the principles in *Porter* or *Mitchell*. The Court need not overrule *Porter* because Section 13(b) must be read in

conjunction with the remedies provided in Section 19. Reading Sections 13(b) and 19 together, it is readily apparent that Sections 13(b) and 19 expressed that Congress intended "in so many words, or by a necessary and inescapable inference" to provide as well as condition authority to seek injunctive relief while seeking monetary remedies through Section 19. Unless the FTC chose to directly file rules violations with the district courts, it was required to file a complaint with the Commission within twenty days of the date of issuance of a temporary or preliminary injunction.

In *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 632 F.3d 1111, 1121 (9th Cir. 2011), the Ninth Circuit held that ancillary remedies including restitution and disgorgement could not be implied where, as in this case, the statute confined the court's equitable powers to injunctive relief. "*Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.*"[5] Citing *Meghrig* and *Porter*, the Court in *Owner-Operators* noted that *Porter* allowed district courts full equitable powers "unless otherwise provided by statute." *Id.* The Court concluded that the statute in *Owner-Operators* met the standard in *Porter* because the statute provided a different scheme of enforcement, listing only injunctive relief to the exclusion

[5] See *Owner-Operator Indep. Drivers Ass'n v. Landstar*, 632 F.3d 1302, 1324 (11th Cir. 2010), quoting *Owner-Operator Indep. Driver's Ass'n v. New Prime, Inc.*, 213 F.R.D. 537, 545 (W.D.Mo. 2002) ("Although disgorgement is an equitable remedy, it does not qualify as injunctive relief."), *aff'd* 339 F.3d 1001 (8th Cir. 2003), *cert. denied*, 541 U.S. 973, 124 S. Ct. 1878, 158 L.Ed.2d 467 (2004).

of other equitable remedies. App. 33a. While the statutory framework may vary from case to case, the principles of statutory interpretation in *Meghrig* apply.

IV. The Plain Language of the Statute Negates the FTC's Claim that the Statute Allows Implied Restitution and Implied Injunctive Powers.

Although Section 13(b) is a lengthy provision, it must still be viewed as a whole and all provisions of the Act harmonized to give full force and effect. This Court has long held that "in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 1 (1987) (quotations omitted). In that vein, it is significant that Section 13(b)'s controlling purpose is expressed as follows:

> Whenever the Commission has reason to believe—**(1)** that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and **(2)** that the enjoining thereof *pending the issuance of a complaint* by the Commission and *until such complaint is dismissed by the Commission* or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—(emphasis supplied)

Thus, the text indicates that Congress intended that an injunction be issued pending issuance of a complaint until dismissed or set aside by a court on review of Commission action. Subsection 2 then provides, in pertinent part, that:

> the Commission by any of its attorneys designated by it for such purpose *may bring suit in a district court* of the United States to *enjoin any such act or practice*. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction *shall be* dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission *may seek*, and after proper proof, the court may issue, a permanent injunction. (emphasis supplied)

The FTC filed a complaint in this case seeking a permanent injunction but it also sought and obtained a Temporary Restraining Order and a Preliminary Injunction. The petitioners sought dissolution of the Preliminary Injunction based on the first proviso but their motion was denied. Trial Court Dkt. 183. The Court of Appeals rejected Petitioner's contention that the plain language of the first proviso required the Court to

dismiss the complaint because the Commission failed to file an adjudicatory complaint within twenty days of issuance of the injunction. App. 9a-10a citing *United States v. JS & A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983). *Accord FTC v. H.N. Singer, Inc*., 668 F.2d 1107 (9th Cir. 1982).

The FTC contends that the second proviso somehow *nullifies* the Congressional command that the FTC file administrative complaints when it seeks temporary or preliminary injunctive relief as part of a complaint for permanent injunctive relief. However, there is no indication that Congress intended that the FTC be allowed full rein to *imply preliminary injunctive powers* where, as here, Congress explicitly directed that courts *shall dissolve* preliminary injunctive relief if the FTC failed to file administrative complaints. Simply denominating a pleading as a "Complaint for Permanent Injunction" is not a green light for the FTC to ignore the limitations placed on agency authority by Congress. Indeed, Congress itself commands that courts "shall dissolve" injunctions if the FTC fails to file administrative adjudicatory complaints.

Significantly, Congress adopted language providing that pending issuance of a complaint with the Commission, it "may bring suit" in district court for injunctive relief. Although the FTC seeks to excise and carve out the second proviso as a standalone grant of legislative authority to file suit under Section 13(b), Congress merely provided that the FTC "may seek" a permanent injunction in proper cases. The "may-bring-suit" authorization allows the FTC to file a lawsuit and

the phase "may-seek-permanent injunction" allows the FTC to seek permanent injunction within that same lawsuit. If Congress intended to authorize the FTC to independently "bring suit" for permanent injunctions, it would have said so. Thus, these two provisos cannot be treated as *separate* grants of authority, but must be harmonized to effect Congressional intent. This Court recently observed that the usual rule is that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L.Ed.2d 1 (2001). *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1626-1627 (2018).

The lower courts viewed the FTC's authority in a vacuum allowing the agency to violate Section 13(b) while simultaneously invoking its authority. The FTC correctly asserts that this case presents a circuit split on whether Section 13(b) provides implied authority to allow the FTC to seek restitution and disgorgement. Petitioner respectfully submits that certiorari should be granted on the issue of whether Congress implicitly granted authority to the FTC to circumvent and disregard the first proviso's requirement simply because the FTC seeks permanent injunctive relief under Section 13(b)'s second proviso. This Court need not reach the issue of implied authority to impose restitution under Section 13(b) because the first proviso allows the FTC to "file suit" and mandates that the injunction must be dissolved if the FTC fails to file an administrative adjudicatory complaint.

V. The Text and Structure of Section 13(b) Does Not Allow Implied Restitutionary or Implied Injunctive Authority.

This Court has made clear that, in interpreting a statute, the courts must first determine whether the language at issue has a plain and unambiguous meaning. *Robinson v. Shell Oil Co*., 519 U.S. 337, 340-341 (1997). The inquiry ceases if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Id.* The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Id*. citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). It is well established that where the statutory language is clear, the Court need not even reach arguments based on statutory purpose or legislative history. *Boyle v. United States*, 556 U.S. 938, 950 (2009). In the instant case, the Court need not resort to legislative history as Congressional intent can be gleaned from the text and structure of the statute itself. *Id.*

This Court has long held that that a statute should not be interpreted in a manner that renders any part of it ineffective. *Corley v. U.S*., 556 U.S. 303, 314 (2009); *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) ("It is a basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." (internal quotation marks and citation

omitted)). [W]e keep in mind that statutory provisions are to be read in harmony in the context of the whole statute." *In re Hougland*, 886 F.2d 1182, 1184 (9th Cir. 1989) (citing *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). In *FTC v. Raladam Co*., 283 U.S. 643 (1931), this Court held "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." *Id*. at 649.

Congress enacted Section 13(b) to provide for issuance of temporary restraining orders and preliminary injunctions as a stop gap measure to halt unlawful practices pending completion of administrative adjudication. Section 13(b) also added two provisos. This Court has long held that "the general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation" held that the *presumption* is that the proviso refers only to the primary purpose of the enacting clause. *Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2008) citing *United States v. Morrow*, 266 U.S. 531, 535 (1925). A proviso's "grammatical and logical scope is confined to the subject matter of the principal clause." *United States v. Whitridge*, 197 U.S. 135, 143 (1905). Although sometimes used to introduce independent legislation, "the presumption is that, in accordance with its primary purpose, it refers only to the provision to which it is attached." *Morrow*, 266 U.S. at 535.

Section 13(b) provides, in pertinent part: "Whenever the Commission has reason to believe. . . . (2) that the enjoining thereof *pending the issuance of a complaint by the Commission* and *until such complaint is dismissed by the Commission* . . . a temporary restraining order or a preliminary injunction may be granted without bond. . . ." (emphasis supplied). Clearly, Congress intended that the Commission file a complaint and injunctive relief could be obtained "until such complaint is dismissed by the Commission[.]" or reversed on appeal from its administrative processes.

The first proviso prevented the agency from circumventing administrative process by filing for injunctive relief but not filing a parallel administrative complaint within twenty days of issuance of injunctive relief. The "shall dissolve" language of this first proviso reflects Congressional distrust that the agency would simply file lawsuits in district courts without providing the full benefits of notice, scienter and other due process protections for individuals and corporations afforded in Section 45 proceedings. The second proviso states: "*Provided further*, That in proper cases the *Commission* may seek, and after proper proof, the court may issue, a permanent injunction." As in this case and every other case that the FTC has filed in recent years, the FTC asks for a permanent injunction but then immediately seeks a temporary restraining order and preliminary injunction.[6] Essentially, the FTC argues that the term "permanent injunction" implies the power to

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[6] *See, e.g.*, https://www.ftc.gov/system/files/attachments/quarterly-litigation-status-report/semiannual_litigation_report_6-30-19.pdf.

seek temporary and preliminary injunctive relief without filing a parallel administrative complaint under Section 13(b). This renders the first proviso and Section 19(a)1 (15 U.S. Code § 57b(a)1) to be a nullity.

Congress set a strict condition that the agency could seek preliminary injunctive relief if, but only if, it filed an administrative complaint within twenty days of issuance. Congress said what it meant and meant what it said. Congress did not intend the second proviso to be a loophole giving the FTC a green light to file lawsuits nominally asking for permanent injunctions but seeking full discovery, depositions, motions practice ultimately followed by a permanent injunction.

The text of the statute provides an option to the FTC. It can pursue administrative litigation and develop the facts of a case through that process. As a stop gap measure pending the outcome of the administrative process, it can seek preliminary injunctive relief from the district courts. At some point during the administrative process, the agency can seek a permanent injunction or pursue a cease-and-desist order and pursue enforcement under Section 19. This approach is consistent with the enforcement scheme adopted by Congress through Section 19. Section 19 and Section 5(m)(1)(B) authorized two paths for the FTC to seek monetary relief for consumers. The first allows the FTC to file a lawsuit seeking monetary damages following issuance of a cease-and-desist order by the Commission. Alternatively, Section 57b authorizes district court "civil actions" (15 U.S. Code § 57b(a)1) for refunds and other equitable relief (15 U.S. Code § 57b(b)).

Simply stated, there is no indication in Section 13(b)'s legislative history that Congress intended to, or even considered the possibility of providing the FTC authority to obtain "equitable restitution."[7] It seems unlikely that Congress would have created "standalone" enforcement powers to obtain restitution in a provision for injunctive relief and then, two years later, adopt Section 19's enforcement scheme that provides extensively for consumer redress. Nor is it likely that Congress adopted the proviso requiring dissolution of restraining orders and preliminary injunctions if the FTC could simply file a complaint seeking a "permanent injunction," and nullify Congress' directive that the FTC file parallel administrative proceedings as a condition of invoking Section 13(b)'s injunctive powers.

Finally, Section 16 of the FTC Act, 15 U.S.C. Sec. 56, specifically authorizes the Commission to represent itself by its own attorneys in five categories of cases. In pertinent part, the FTC is authorized to file suit: (1) suits for injunctive relief under Section 13 of the FTC Act, 15 U.S.C. Sec. 53; (2) suits for consumer redress under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b. Simply stated, Congress treated these provisions separately because Section 13(b) did not authorize the FTC to obtain consumer redress whereas Section 19

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[7] J. Howard Beales & Timothy Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 4 (2013)

specifically provided for restitution and other remedies.

VI. The Savings Clause in Section 19 Cannot Save Remedies That Never Existed.

The FTC also relies on the savings clause of Section 19(e) asserting that Congress didn't intend to limit the "implied" full grant of equitable relief in Section 13(b). As set out in *Credit Bureau Center*, a savings provision cannot be held to nullify specific provisions of the very statute adopted by Congress. App. 19. The Court held that the Commission's reading of Section 13(b) effectively nullifies § 57(b). Moreover, the Court proceeded to reason that even if the FTC correctly understood the purpose of a savings clause, "we couldn't infer a right to restitution in section 13(b). The saving clause preserves only remedies that exist." App. 19. Accordingly, the Court rejected this argument.[8]

VII. Congress Did Not Ratify the FTC's Misuse of Section 13(b).

This court has explained that subsequently enacted laws "shape or focus [the] meaning" of ambiguous

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[8] The apparent purpose of the savings clause was to assure that private litigants were not preempted from filing their own claims or to foreclose potential civil penalties under other provisions of the Act. H.R. CONF. REP. No. 1606, 93d Cong., 2d Sess. 41 (1974); see also Report of Senate Comm. on Commerce, S. REP. No. 151, 93d Cong., 1st Sess. 28 (1973) (accompanying S. 356) (stating that redress provision "does not in any way purport to supplant private actions by consumers").

statutes, "particularly where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). The FTC contends that the scope of Section 13(b) should be interpreted to broadly, but implicitly allow the FTC to pursue restitution whereas Section 19 specifically addresses the issue of monetary relief. When Congress granted the FTC power to seek restitution under Section 19, they described it as an "important *new* authority to the Commission" which was "quite significant." 120 Cong. Rec. 40,712 (1974) (emphasis supplied) (Sen. Moss) (noting that the legislation provided "important new authority to the Commission"); *id.* at 41,406 (Sen. Moss) (describing the provision as "quite significant").

The FTC also posits that Congress did not veto or act to stop the FTC in its campaign to expand Section 13(b) through judicial decisions. Therefore, Congress ratified its conduct. Under established canons of statutory construction, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Finley v. United States*, 490 U.S. 545, 554 (1989) *quoting Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912)). Similarly, it is well established that a party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). The FTC's ratification argument is without merit.

Consumer redress remedies were initially proposed with injunctive relief, but consumer redress remedies were not adopted. See S. 356, § 203, 93d Cong., 1st Sess. 24-25 (1973). *See* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1179 (1992). Moreover, the same Congress that adopted Section 13(b) proposed Section 19. *Ward*, at 1179. Thus, it is highly unlikely that Congress intended that Section 13(b) provided for consumer redress.

VIII. The Circuit Decisions on the First Proviso Failed to Analyze Section 13(b) as a Whole.

In *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985), the Ninth Circuit followed its prior decision in *Singer* holding that the FTC can ignore the plain language of Section 13(b) "because the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission, it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards." The *Evans* court accepted the FTC's *argument* that "proper case" included: 1) any case involving a law enforced by the FTC, or 2) any case involving a likelihood that a past violation of a law enforced by the FTC will recur. The FTC did not adopt any rules or standards defining a proper case. Instead, there is no standard because the FTC is free to pursue any case it pleases regardless of the merits. The standard for seeking a permanent injunction is set out in

Section 13 of the statute, which allows the FTC to file an action for permanent injunction with the court if it is a proper case. A "proper case" is one where the FTC has pursued an administrative complaint, obtained a cease-and-desist order and wishes to obtain a permanent injunction under Section 13(b). This interpretation applies the plain language and harmonizes the provisos in Section 13(b) with the enacting clause, which require parallel proceedings be filed by the FTC.

In *United States v. JS & A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983), the Seventh Circuit applied principles from *Singer* to conclude that Congress intended to authorize the FTC to seek permanent injunctions irrespective of whether the agency has instituted administrative proceedings. The Court reasoned that the second proviso did not contain a provision that required filing of administrative proceedings and that if Congress intended such a limitation, it would have included such language in the provision governing preliminary injunctive relief. *Id.* at 456.

The Court also considered a Senate Report that stated the second proviso would allow the courts to "seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date." S. REP. 93-151, 93d Cong., 1st Sess. 30-31 (1973). The report also suggested that the Commission would have "the ability, in the routine fraud case, to merely seek a permanent injunction in

those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently." *Id.*

The *Evans, Singer* and *JS & A Group* decisions were premised on the lower courts' view of *Warner v. Porter*. This Court's subsequent decision in *Meghrig* undermines the validity of the lower courts' reasoning in *Evan, Singer* and *JS & A Group*. These three decisions, in turn, also rely on a senate report that expands, rather than limits the FTC's power. This Court has discouraged reliance on senate committee reports because the reports "are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc*, 545 U.S. 546, 568 (2005). The FTC files virtually all its Section 5 cases as "proper cases" and has abandoned administrative adjudication. It is unlikely that Congress intended this result.

IX. The FTC's Policy of Circumventing the FTC's Enforcement Scheme Should Be Stopped.

The administrative process mandated by Congress in Section 13(b) provides significant notice and

due process protections to individuals and small businesses. Section 19 is the FTC's direct enforcement mechanism for restitution and other equitable relief without invoking the administrative process. As also noted by the circuit court, the misuse of Section 13(b) deprives litigants of the substantial protections of notice through a process requiring issuance of a cease-and-desist order and setting a standard requiring the agency to establish that a reasonable man would have, under the circumstances, known that the prohibited practice was dishonest or fraudulent. The lower court found that: "Reading an implied restitution remedy into section 13(b) makes these other provisions largely pointless. Without a clear textual signal, we cannot presume that Congress implicitly made such a consequential shift in policy." *See Whitman v. Am. Trucking Assns., Inc*., 531 U.S. 457, 468 (2001).

Decisions by the lower courts have essentially allowed the FTC to disregard Congressional limitations on obtaining preliminary injunctive relief under Section 13(b). The FTC is free to ask the court to issue a permanent injunction, but if it also seeks a preliminary injunctive relief as part of its complaint, it must comply with the conditions set by Congress—file an administrative complaint. Failure to enforce this simple statutory requirement nullifies the will of Congress and encourages the FTC to redefine the law, cut corners and try to find loopholes when it suits its purpose.

The statutory protections enacted by Congress in Sections 13(b) and 19 were the product of earlier versions of the consumer redress provisions and Section

13(b). See Ward, *infra* at 1179-1180. There was also concern that the agency should prioritize and devote its time to preventing illegal practices rather than waste its resources becoming bill collectors. When Congress adopted Section 13(b), Congress set strict conditions on the use of preliminary injunctions for a reason. It wanted to ensure that the agency would file administrative complaints. Unfortunately, the FTC decided to do an end-run around Congress.

There has not been any studied effort to determine the scope and extent of overreaching or mistakes by the FTC. In *AMG Capital Management, LLC v. Federal Trade Commission*, Nos. 19-507 & 19-508, the Cause of Action Institute filed an amicus brief that outlined conduct by the agency that appears excessive with armed law enforcement agents basically arresting employees and holding them for questioning among other things. In that case, the district court denied the monetary claim and entered judgment of $0.00. *See FTC v. Vylah Tec LLC*, 378 F. Supp. 3d 1134, 1143 (M.D. Fla. 2019) (denying disgorgement but granting permanent injunction). Over $670,000 in corporate funds were seized, with only $34,000 being returned to the owner.

Unless the district court grants some access to frozen funds, the defendant whose assets are frozen under Section 13(b) has no assets to retain counsel and defend themselves against the FTC.[9] While courts may, in *hindsight*, rule that a defendant "deserved" to lose

[9] The District Court granted limited funds for defense but denied fees to cover travel expenses and fees to counsel.

on the merits, the inability to "fight the charges" frequently dictates settlement, default or a finding of liability. The notice, statute of limitations and scienter provisions of Sections 19 and 45 were designed and calibrated to balance the need for the FTC to pursue legitimate efforts to immediately restrain unlawful behavior and, at the same time, provide protections to individuals and companies accused of unlawful conduct. Section 13(b) was designed to prohibit future conduct and therefore did not have a statute of limitations.

X. The FTC's Representations About its Record of Providing Restitution is Suspect.

As part of its petition for certiorari, the FTC represented that it provided $977 million in restitution to consumers over a three year period. FTC's Petition for Certiorari at 5. At the trial level, however, the record evidence showed that the FTC refunded barely 53% of the amounts collected, which was derived from annual reports issued by the FTC. Trial Court Dkt. 156, Exhibits 1-3, Dkt. 169 at 4. The 53% rate of restitution was undisputed by the FTC. It appears the FTC has discarded and changed their method of reporting restitution and now reports restitution collected over a three year period.[10]

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[10] To obtain an accurate picture of restitution actually paid by the FTC, it is important to analyze performance statistics both annually and over a three year period with data that explains changes in data. The public filings appear to cast the FTC in the most favorable light possible. Mark Twain is credited with saying,

The FTC fails to note that it does not return mail refund checks for amounts less than $10.00. https://www.ftc.gov/reports/bureau-consumer-protection-consumer-refunds-program-consumer-refunds-effected-july-2016-5. The FTC typically enforces a $10.00 minimum for checks and does not refund monies exceeding that amount processed for refunds. *Id*.

In this case, and other cases where consumers did not pay large sums for services rendered, the refunds would come to less than $5.00 per person not taking into account cost of administrative fees and mailing costs. This is clearly a case where funds would simply be disgorged to the treasury and is nothing more than a penalty under this Court's decision in *Kokesh v. Securities & Exchange Commission*, 137 S. Ct. 1635 (2017) ("[w]hen an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.").[11]

"There are three kinds of lies: lies, damned lies and statistics." http://www.twainquotes.com/Lies.html.

[11] In trial court proceedings, Cross-Petitioner alternatively argued that equitable monetary restitution sought by the FTC was an improper penalty under *Kokesh*. Trial Court Dkt. 205 at 23-26.

THIS COURT SHOULD GRANT CERTIORARI ON CROSS-PETITIONER'S ISSUE.

The Court should not accept the FTC's invitation to apply the second proviso to create an independent cause of action allowing the FTC to seek restitution by filing a lawsuit that allows the FTC to ignore Congressionally-imposed conditions that require the court to dissolve a temporary or preliminary injunction if the FTC fails to file an administrative adjudicatory complaint under the Act within twenty days of issuance of an injunction. The statute must be read as a whole. The two provisos are presumed to be part of the enacting provision which allows the Commission to seek preliminary injunctive relief pending issuance of an administrative complaint. The actual language of the "may-bring-suit" allows the Commission to file a lawsuit and the "may-seek" language in the second proviso allows the FTC "may seek" a permanent injunction. Simply stated, Congress allows the FTC to bring suit, obtain preliminary injunctive relief and then seek a permanent injunction. The ability to seek a permanent injunction, however, does not excuse the FTC from complying with the limitations set out in the first proviso—that it pursue administrative adjudication.

In light of *Credit Bureau Center*, there is a circuit split on whether Section 13(b) authorizes district courts to order restitution through Section 13(b)'s second proviso. This narrow issue fails to address whether a permanent injunction excuses the FTC from complying with the first proviso by filing administrative complaints within twenty days of issuance of a preliminary

injunction and will resolve issues of national importance. This Court should resolve the circuit split on the FTC's power to seek consumer redress and apply the correct principles of statutory interpretation to Section 13(b), including the presumption that courts must interpret statutory provisos as a whole unless Congress clearly states otherwise.

The use of government power to seize corporate assets and that of individual owners in civil cases should not be allowed unless Congress has explicitly authorized such seizures. The Court should grant certiorari on the issue stated by Cross-Petitioner to assure that administrative agencies act within the limits set by Congress.

CONCLUSION

The Conditional Cross Petition should be granted.

Respectfully submitted,

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