No. 22-958

In the Supreme Court of the United States

ANDRIS PUKKE, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court entered judgment for the Federal Trade Commission without giving petitioners an opportunity to be heard and without making sufficient factual findings to support its judgment.

2. Whether the district court denied petitioners due process by freezing assets that petitioners claim were necessary to pay for counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 53 F.4th 90. A memorandum opinion of the district court (Pet. App. 74a-297a) is reported at 482 F. Supp. 3d 373. An additional memorandum opinion of the district court (Pet. App. 67a-73a) is not published in the Federal Supplement but is available at 2021 WL 119209.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2022. A petition for rehearing was denied on December 30, 2022 (Pet. App. 298a-301a). The petition for a writ of certiorari was filed on March 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two separate, consolidated proceedings that arose out of a real-estate telemarketing scam. The Federal Trade Commission (FTC or Commission) (1) commenced an enforcement action alleging that the scam violated the Federal Trade Commission Act (FTC Act), ch. 311, 38 Stat. 717 (15 U.S.C. 41 *et seq.*); and (2) moved for civil-contempt sanctions, charging that petitioners' involvement with the scam violated a permanent injunction, entered in an earlier FTC enforcement action, that barred future deceptive telemarketing practices. After a three-week bench trial, the district court found that petitioners had violated the FTC Act, an FTC regulation, and the earlier injunction. The court issued additional permanent injunctions and ordered petitioners to pay compensatory contempt sanctions. Pet. App. 67a-73a, 74a-297a. The court also found that petitioner Pukke had not met the conditions of the earlier judgment, under which most of his monetary obligation was suspended contingent upon his cooperation with the Commission. *Id.* at 293a-295a. The court declared Pukke liable for the full original judgment of $172 million. *Ibid.* The court of appeals affirmed in part, vacated in part, and remanded. *Id.* at 1a-66a.

1. Petitioner Andris Pukke founded a company called AmeriDebt, "which turned out to be a credit counseling scam." Pet. App. 42a. In 2003, the Commission sued Pukke under Section 5(a) of the FTC Act, which forbids "deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1); see *FTC* v. *AmeriDebt, Inc.*, 373 F. Supp. 2d 558, 561 (D. Md. 2005).

Pukke settled that case with the FTC. See Pet. App. 42a. The district court entered a stipulated judgment

that enjoined Pukke from making false representations in connection with the telemarketing of any good or service. See *ibid.* The judgment also required Pukke to pay $172 million in restitution to the Commission. See *ibid.* Under the terms of the judgment, all but $35 million of that amount would be suspended if, among other conditions, Pukke "cooperate[d] fully" with the Commission's efforts to gather his assets. *Ibid.* (citation omitted). Far from cooperating, Pukke impeded the FTC's efforts so blatantly that he was jailed for civil contempt and was later convicted of obstruction of justice. See *id.* at 37a, 42a.

2. In the meantime, Pukke, along with petitioners Peter Baker and John Usher, began to operate a second scam, known as Sanctuary Belize. See Pet. App. 36a. That scam involved the use of deceptive telemarketing to induce consumers to buy real-estate lots in the Central American nation of Belize. See *ibid.* The telemarketers were "coached to 'create a sense of urgency and a fear of loss on the part of prospective purchasers.'" *Ibid.* (citation omitted). The telemarketers and other sales agents made "half a dozen material misrepresentations" to consumers: (1) "the lie that Sanctuary Belize carried no debt"; (2) "the lie that every dollar spent was reinvested in the property (when actually Pukke stole roughly $18 million from the project)"; (3) "the false promise that the completed project would have many luxury amenities"; (4) "the false promise that the project would be completed within two to five years"; (5) "the lie that [the development] boasted a healthy resale market"; and (6) "the 'crowning deception' that Pukke," a twice-convicted felon, "was not involved" in the scheme. *Id.* at 40a, 54a (citation omitted).

Those misrepresentations led consumers to purchase "over 1,000 lots," some of which were sold "more than once." Pet. App. 37a. Consumers also spent thousands of dollars on deposits for particular lots and on trips to Belize. *Id.* at 36a-37a.

3. In 2018, the FTC sued petitioners and others in federal district court, alleging that the misrepresentations outlined above had violated Section 5(a) of the FTC Act, 15 U.S.C. 45(a), and an FTC rule (the Telemarketing Sales Rule, 16 C.F.R. 310.3) that prohibits deceptive practices in telemarketing. See Pet. App. 37a-38a. The Commission also moved for civil contempt in *AmeriDebt*, arguing that the injunction in that case had forbidden petitioners from using deceptive telemarketing practices and that the Sanctuary Belize scheme had violated that injunction. See *id.* at 38a. The district court consolidated the two proceedings. See *ibid.*

The district court froze petitioners' assets to prevent their dissipation during the pendency of the case. See Pet. App. 82a-83a. The court authorized Pukke and Baker to withdraw $3000 per month from the frozen assets, however, to pay for legal and personal expenses. See *id.* at 61a. The court also authorized several one-off withdrawals—ranging from $3000 to $30,000—to cover legal expenses. See *id.* at 76a n.3. The remaining petitioner, Usher, never made an appearance and therefore neither requested nor received frozen assets for legal expenses. See *id.* at 44a.

After a three-week bench trial, the district court entered judgment for the FTC. Pet. App. 74a-297a. The court held that petitioners' misrepresentations had violated the FTC Act and the Commission's regulations. See *id.* at 77a-78a. It also found petitioners in contempt because (among other reasons) those misrepresentations

had violated the injunction issued in *AmeriDebt*. *Id.* at 78a.

The district court granted the FTC various remedies. See Pet. App. 77a-78a. As relevant here, the court awarded the Commission $120.2 million in equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. 53(b). See Pet. App. 274a. That sum represented petitioners' revenues from the fraudulent sale of the Sanctuary Belize lots, reduced by amounts the court found were not part of the purchase price. See *id.* at 268a-274a. The court then awarded the Commission the same sum, $120.2 million, as a sanction for contempt of court, explaining that "the harm from [petitioners'] contumacious conduct is indeed the same as the harm caused by their FTC Act violations." *Id.* at 68a. The court's contempt finding was based on its determination that petitioners' deceptive acts in furtherance of the Sanctuary Belize scheme had violated the *AmeriDebt* injunction. See *id.* at 67a-69a. The district court clarified that the two $120.2 million judgments are "not cumulative," but "are merely alternative measures of the same damages." *Id.* at 69a.

The district court separately ruled that Pukke owed the FTC $172 million under the *AmeriDebt* judgment. See Pet. App. 293a-294a; 2021 WL 124190, at *1-*2. The court noted that, under that judgment, Pukke would owe the Commission $35 million if he cooperated with it, but $172 million if he did not. See Pet. App. 294a. "[T]he fact of Pukke's non-cooperation with the FTC"—which was "emphatically underscored" by his obstruction-of-justice conviction for "concealing assets in *AmeriDebt*"—"trigger[ed] the $172 million judgment." *Ibid.*; see 2021 WL 124190, at *1. The court rejected as "baseless" Pukke's argument that holding him liable "for the entire

AmeriDebt judgment" would violate his "Due Process right to notice and an opportunity to be heard." 2021 WL 124190, at *2.

4. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-66a. Petitioners raised "a host of issues," prompting the court to remark that they had "throw[n] a bunch of claims at the wall to see what sticks." *Id.* at 35a, 63a. The court rejected all those arguments, with one exception: It concluded that this Court's intervening decision in *AMG Capital Management, LLC* v. *FTC*, 141 S. Ct. 1341 (2021), required vacatur of the district court's award of equitable monetary relief under the FTC Act. Pet. App. 35a, 54a-56a.

As relevant here, petitioners contended that the district court had denied them an opportunity to present evidence and had "failed to make findings" supporting its contempt sanction. Pet. App. 51a. In rejecting that argument, the court of appeals observed that the district court had "hear[d] all the evidence presented at the bench trial." *Ibid.* The court also noted that the record contained "ample proof" that petitioners had engaged in "contumacious conduct," and it concluded that the district court had "carefully justified" the $120.2 million contempt sanction. *Id.* at 51a-52a.

The court of appeals acknowledged (Pet. App. 55a) that, under this Court's decision in *AMG*, the $120.2 million monetary judgment could not be upheld as an exercise of the district court's power under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), which authorizes the court to grant an "injunction." The court explained, however, that "[v]acating that judgment does not help Pukke * * * because he already has a $120.2 million judgment against him for contempt of the telemarketing injunction" that had previously been entered

against him in *AmeriDebt*. Pet. App. 55a. The court of appeals further observed that courts "have inherent power to enforce compliance with their lawful orders through civil contempt," *id.* at 48a (citation omitted), and that "*AMG* did not impair courts' ability to enter injunctive relief under Section 13(b)," *id.* at 55a. The court concluded that "the $120.2 million order can be upheld under the contempt judgment, so *AMG* does not in fact change the bottom line." *Id.* at 55a-56a.

The court of appeals similarly rejected petitioners' challenges to the district court's pretrial order freezing their assets. See Pet. App. 60a-61a, 63a. The court concluded that the order was "an appropriate use of the [district] court's discretion, especially given the risk of Pukke diverting funds to his personal accounts." *Id.* at 63a. Petitioners argued that the asset freeze had deprived them of the money needed to pay for counsel. The court rejected that argument, observing that "the district court permitted Pukke and Baker to withdraw $3,000 per month from the [frozen] assets" and "twice unfroze $30,000 in assets for them to pay for legal counsel." *Id.* at 61a. The court of appeals found no abuse of discretion in the district court's decisions, stating that "it was perfectly reasonable for the [district] court to be cautious about dispensing money" given petitioners' "deception and dishonesty." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-14) that the district court denied them due process by purportedly ruling for the Commission without receiving any evidence and without making factual findings in support of its rulings. Petitioners also contend (Pet. 14-15) that the court's pretrial asset freeze violated their due-process right to hire counsel. The court of appeals correctly

rejected both contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The Due Process Clause of the Fifth Amendment requires a federal court to give a defendant notice and an opportunity to be heard before depriving him of property. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As the district court observed, however, petitioners' claim that the court violated that guarantee is "baseless." 2021 WL 124190, at *2.

Petitioners assert (Pet. 10) that the district court held them in contempt and found Pukke liable for the $172 million *AmeriDebt* judgment "without receiving evidence" and "without affording the[m] an opportunity to contest" the FTC's claims. The record does not support that characterization of the proceedings below. In fact, the court held a "three-week bench trial" on the Commission's claims. Pet. App. 38a. Petitioners had a full opportunity to participate in that trial and to call their own witnesses. See, *e.g.*, *id.* at 121a (noting that petitioners "presented witnesses"). Baker, for example, testified at trial. See, *e.g.*, *id.* at 128a, 170a, 188a. For his part, Pukke had "invoked his Fifth Amendment privilege against self-incrimination" in response to "effectively all questions asked of him" during pre-trial depositions, and thus was precluded from testifying on those subjects at trial. *Id.* at 196a n.45; see *Raffel* v. *United States*, 271 U.S. 494, 496-497 (1926) (explaining that a witness may not selectively invoke the privilege by testifying but refusing to submit to cross-examination related to that testimony). Apart from that, the district court did not reject any specific attempt by petitioners to introduce evidence.

Petitioners likewise had a full opportunity to cross-examine the Commission's witnesses and to respond to its legal arguments. See, *e.g.*, Pet. App. 147a n.31 (discussing "Pukke's cross-examination of the FTC's witness"); *id.* at 291a (discussing petitioners' "questions to witnesses"). The district court also assured Pukke that he could "object to evidence that the FTC has offered for whatever reason," C.A. App. 796; that he could argue that his conduct "doesn't amount to" a violation of the conditions of the *AmeriDebt* judgment, *id.* at 797; and that he could raise his legal contentions in closing argument and post-trial briefing, see *id.* at 796-797.

There also is no merit to petitioners' assertion (Pet. 10) that the district court ruled for the FTC "without making specific factual findings supporting" its rulings. As the court of appeals recounted, the district court "issued a detailed opinion of over one-hundred pages in which it set forth its comprehensive findings." Pet. App. 38a. In support of its contempt finding, the court found that "[t]here was a valid decree in the *AmeriDebt* proceeding"; that petitioners "had actual knowledge" of that decree; and that petitioners had knowingly "violated the terms of the decree" by continuing to engage in the forbidden telemarketing practices. *Id.* at 278a-279a.

In determining that $120.2 million was the appropriate contempt sanction, the district court calculated Sanctuary Belize's revenues based on the testimony of an "expert witness" who had conducted a "thorough analysis of bank statements," and it deducted amounts that it found "should not be included in the calculation." Pet. App. 272a-273a. The court likewise made appropriate findings in support of its ruling that Pukke owed $172 million under the *AmeriDebt* judgment. See *id.* at

294a. The court observed that "the $35 million figure appli[ed] only if Pukke 'cooperate[d]' with [the FTC]," and it recited facts (such as Pukke's conviction for obstruction of justice) that "conclusively establish[ed] * * * Pukke's non-cooperation." *Ibid.*

Petitioners argue (Pet. 10-14) that the decision below conflicts with the decisions in *FTC* v. *Trudeau*, 579 F.3d 754 (7th Cir. 2009), and *FTC* v. *Kuykendall*, 371 F.3d 745 (10th Cir. 2004) (en banc). That is incorrect. In *Trudeau*, the Seventh Circuit vacated an order imposing monetary sanctions for civil contempt because the order had "fail[ed] to explain how the court arrived at the [sanctions] figure." 579 F.3d at 770. In *Kuykendall*, the Tenth Circuit similarly vacated such an order because "the district court failed to provide * * * an adequate record of how it arrived at the [sanctions] figure." 371 F.3d at 764. Here, in contrast, the Fourth Circuit determined that the district court had "carefully justified" the "$120.2 million amount." Pet. App. 52a. Although petitioners assert (Pet. 14) that the district court's calculations were inadequate, that fact-bound challenge does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

2. Petitioners' challenge to the district court's pretrial order freezing their assets likewise does not warrant this Court's review.

District courts hearing claims for equitable relief have the power to issue appropriate preliminary injunctions, including injunctions that prevent defendants

from dissipating assets during the pendency of the case. See *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 324-325 (1999); *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 289 (1940); Pet. App. 63a. Petitioners suggest (Pet. 8) that the sole justification for the district court's asset freeze was to ensure that the funds would remain available to pay equitable monetary relief under Section 13(b) of the FTC Act. Petitioners further contend (Pet. 14) that, under this Court's intervening decision in *AMG Capital Management, LLC* v. *FTC*, 141 S. Ct. 1341 (2021), the FTC "was not entitled to monetary relief in this case and the district court wrongfully froze petitioners' assets." Petitioners assert that "[t]he district court's now-wrongful denial of access to petitioners' own funds was a 'structural error' of constitutional magnitude." Pet. 15 (citation omitted).

Those arguments are incorrect. As the court of appeals explained, Pukke *agreed* to the *AmeriDebt* judgment, and that judgment long ago became final. See Pet. App. 42a, 48a, 50a. In any event, nothing in *AMG* casts doubt on the portion of the *AmeriDebt* judgment that enjoined petitioners from making false representations to carry out future telemarketing scams. See *id.* at 42a. Nor does *AMG* cast doubt on the district court's authority to impose monetary sanctions for violations of that injunction. See *id.* at 48a, 55a; see also *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to * * * 'compensate the complainant for losses' stemming from the defendant's noncompliance with an injunction.") (citation omitted). Thus, whether or not the asset freeze entered in this case was justified by the prospect of equitable monetary

relief under the FTC Act, it was independently justified by the need to preserve the assets to pay potential contempt sanctions.

There is also no merit to petitioners' contention (Pet. 14-15) that the asset freeze violated their constitutional right to pay for counsel of choice. The Sixth Amendment guarantees the right to "Assistance of Counsel" only in "criminal prosecutions." U.S. Const. Amend. VI. That guarantee "does not govern civil cases." *Turner* v. *Rogers*, 564 U.S. 431, 441 (2011). And although the Due Process Clause of the Fifth Amendment protects a right to counsel in civil cases in certain limited circumstances, that right is significantly narrower than its criminal counterpart. See *id.* at 442-443.

Even in criminal cases, moreover, a court may freeze assets that a defendant would prefer to use for paying legal expenses. See, *e.g.*, *Kaley* v. *United States*, 571 U.S. 320, 322 (2014). The Sixth Amendment at most requires a court to release enough "untainted assets" to enable a criminal defendant to pay "a reasonable fee for the assistance of counsel." *Luis* v. *United States*, 578 U.S. 5, 23 (2016) (plurality opinion). The court retains responsibility for "determining how much money is needed to cover the costs of a lawyer." *Id.* at 22-23.

Those limits do not apply in civil cases, but even if they did, the district court satisfied them here by releasing enough money to allow petitioners to pay "a reasonable fee for the assistance of counsel." *Luis*, 578 U.S. at 23 (plurality opinion). As the court of appeals recounted, the district court "permitted Pukke and Baker to withdraw $3,000 per month" to pay personal and legal expenses, and "twice unfroze $30,000 in assets to pay for legal counsel." Pet. App. 61a. The district court's caution in "dispensing money" appropriately

reflected Pukke's history of "purloin[ing] funds from his previous business" and the need to compensate the victims of petitioners' misconduct. *Ibid.*

The court of appeals' decision is consistent with the decisions of other circuits, which have held that district courts in civil cases have broad discretion to "forbid or limit payment of attorney fees out of frozen assets." *CFTC* v. *Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995), cert. denied, 519 U.S. 815 (1996); see, *e.g.*, *FTC* v. *World Wide Factors, Ltd.*, 882 F.2d 344, 347-348 (9th Cir. 1989); *CFTC* v. *Morse*, 762 F.2d 60, 63 (8th Cir. 1985). Petitioners cite (Pet. 15) the Ninth Circuit's decision in *Adir International, LLC* v. *Starr Indemnity & Liability Co.*, 994 F.3d 1032 (2021), cert. denied, 142 S. Ct. 861 (2022). That decision recognized, however, that "courts have construed the due process right to retain counsel very narrowly," and that the right "does not require the release of frozen assets so that a civil defendant can hire an attorney." *Id.* at 1039.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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