No. 22-958

IN THE

Supreme Court of the United States

ANDRIS PUKKE, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

Petitioners seek review primarily because the Fourth Circuit split from the Seventh and Tenth Circuits by rejecting petitioners' contention that, under the Due Process Clause, the district court was required to receive evidence and make "elaborate and reliable factfinding" (*Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833-834 (1994)) before imposing civil contempt sanctions of $120.2 million and $172 million on them for violating an injunction in another case. The Fourth Circuit held it was sufficient that the district court "presided over both" cases and concluded that the harms caused by petitioners' contempt and their wrongful conduct on the merits were "indeed the same" (Pet. App. 52a).

Respondent Federal Trade Commission ("FTC") opposes the petition on the grounds that the Fourth Circuit properly deviated from the due process requirements of the Seventh and Tenth Circuits because the harm petitioners inflicted by their "TSR Contempt" was "indeed the same" as the harm they inflicted by their violations of the FTC Act. Brief for the Federal Respondent in Opposition ("Opp.") at 5-6. The FTC also claims that the district court held a three-week trial at which petitioners "had a full opportunity to participate in that trial and to call their own witnesses," and that the district court issued an opinion on the merits of over 100 pages that contained "'comprehensive'" findings.'" Opp. at 8-9. Therefore, the FTC contends that this petition is nothing more than a "fact-bound challenge" to the district court's decision. *Id.* at 9.

The FTC's opposition is factually and legally groundless. It is ***impossible*** for the harm caused by petitioners' "TSR Contempt" to be "indeed the same" as the harm caused by their FTC Act violations. Furthermore, during the trial below, the FTC did not present ***any*** evidence regarding the nature or amount of the contempt sanctions. The district expressly decided in its opinion that it was "unnecessary" for it to make ***any*** findings about the contempt sanction. The FTC did not even seek a contempt sanction of $120.2 million until ***seven months after*** the trial ended, and the district court did not summarily impose it until ***five months later***. Finally, the FTC does not even address petitioners' other contention that, because of *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), they were unlawfully denied access to their own money to hire trial counsel.

Petitioners must reply.

A. THE CONTEMPT SANCTIONS WERE NOT SUPPORTED BY ANY EVIDENCE OR BY ANY FACTFINDING

The FTC's opposition is based upon false factual implications and assertions.

First, the FTC contends that the Fourth Circuit properly broke ranks from the Seventh and Tenth Circuits by not engaging in elaborate factfinding to support its contempt sanctions. The FTC says the Fourth Circuit correctly held that the district court's contempt sanction of $120.2 million, which was exactly the same as its vacated award of $120.2 million in equitable monetary relief under section 13(b) of the FTC Act, was "'carefully justified'"

because the district court determined that "'the harm from [petitioners'] contumacious conduct is ***indeed the same*** as the harm caused by their FTC Act violations (emphasis added).'" Opp. at 5-6.

However, based on the district court's own findings, it is literally ***impossible*** for the harm caused by petitioners' TSR violations under the FTC Act to be "indeed the same" as the harm caused by their "TSR Contempt." The district court held that, "'the measure of equitable monetary relief'" for petitioners' violations of the FTC Act "'is the amount consumers paid for lots, less any refunds already made to the consumers.'" Pet. App. 269a. Because petitioners' FTC Act violations affected all consumers who purchased lots at Sanctuary Belize, the district court accepted the FTC's expert testimony that the $138.7 million all consumers paid for their lots was the proper starting point for determining the amount of equitable monetary relief it should award. *Id.* at 272a-273a. The district court subtracted sales taxes and other amounts that it decided should not be included in that award, leaving an equitable monetary award of $120.2 million. *Id.* at 273a-274a.

But in its discussion of petitioners' TSR violations, the district court acknowledged that, under 15 C.F.R. § 310.6(b)(3), face-to-face sales are exempt from the TSR. Pet. App. 238a. Petitioners contended that all the Sanctuary Belize sales were face-to-face and that, as a result, they were exempt from the TSR.

The district court noted the FTC's counter-argument that "some consumers did in fact purchase Sanctuary Belize lots sight unseen and, as such, the sale was

'completed' and payment 'required' before a face-to-face meeting, hence the exemption does not apply." Pet App. 238a. The district court said that, "[b]ased on the evidence the Court has heard, it does find that ***some*** consumers did purchase lots sight unseen (emphasis added)." *Id.* Although the district court did not quantify the number of consumers subject to the TSR, it cited a "marketing script" which claimed that lot purchasers had an option to "'[p]urchase a home site sight unseen (23% of our owners have done this).'" *Id.* at 238a-239a. The district court was "satisfied that as to sales that were concluded sight unseen (perhaps as many as 23%), the sale was unquestionably 'complete' and payment 'required,' which means that the [TSR] exemption does not apply." *Id.* at 239a.

This Court has held that the measure of a contempt sanction is the amount necessary to "compensate the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-304 (1947). Because petitioners' "TRS Contempt" was based on their TSR violations, the district court was required but failed to determine how many consumers were affected by those violations and what losses they sustained as a result of them. Even if one accepts the district court's unproven, triple-hearsay guess that "perhaps as many as 23%" of Sanctuary Belize lot purchasers were affected by petitioners' TSR violations, that means at least 77% of them were not affected and suffered no losses at all.

Therefore, the Fourth Circuit should have followed the Seventh and Tenth Circuits and engaged in elaborate factfinding to justify its contempt sanctions against petitioners.

Second, the FTC states in the second and third full sentences on page 5 of its Opposition that the district court, in its Memorandum Opinion of August 28, 2020, made findings to support an award to the FTC of "$120.2 million in equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. 53(b)." In the fourth sentence, the FTC says "[t]he court ***then*** awarded the Commission the same sum, $120.2 million, as a sanction for contempt of court … [and] clarified that the two $120.2 million judgments are 'not cumulative' but 'are merely alternative measures of the same damages (emphasis added).'" By co-joining these sentences and using the word "then" in the fourth sentence, the FTC implies that the grant of equitable monetary relief and the imposition of the contempt sanction happened at or near the same time and both were based on the same evidentiary findings.

That is ***not*** what happened. Although the district court did rule in its Memorandum Opinion of August 28, 2020, that petitioners were in contempt for violating the telemarketing provisions of the *AmeriDebt* injunction – what it called the "TSR [Telemarketing Sales Rule] Contempt" – the district court did ***not*** impose ***any*** sanctions on them in that opinion. Pet. App. 276a-279a.[1] Indeed, the FTC did not submit ***any*** evidence at trial regarding the amount of the sanction that should be imposed for this "TSR Contempt." Instead, the district court held that, "because any compensatory remedies for the TSR Contempt would be duplicative of the restitution ordered for violations of the FTC Act in the present proceeding, the Court finds it ***unnecessary to determine*** the exact amount of compensation to paid"

1. Petitioners erroneously cited to Pet. App. 269a-272a in their petition. Pet. 5 n. 21.

by petitioners for TSR Contempt (emphasis added)." Pet App. 279a.

It was only on September 11, 2020, ***seven months after the trial*** and also after this Court granted *certiorari* in *AMG Capital Management*, that the FTC, realizing it might lose the equitable monetary relief of $120.2 million the district court had awarded it under section 13(b) of the FTC Act, took action on the contempt sanction. On that date, the FTC filed a "Response Regarding the Proposed *De Novo,* Default, and Contempt Orders" asking the district court to include in its contempt order against petitioners a sanction of $120.2 million."[2] Without a shred of evidentiary support, the FTC baldly asserted that ""the FTC included the $120.2 million figure in the contempt order because the harm from the defendants' FTC Act violations was the same as the harm from their contemptuous conduct," so that "[e]ven if the Supreme Court were to rule against the FTC in its upcoming decisions … neither *Liu* nor *AMG* will have any practical effect on this case."[3]

Four months later, on January 13, 2021, the district court granted the FTC's request and summarily imposed a sanction of $120.2 million on petitioners for the "TSR Contempt." Pet. App. 67a-69a. The district court did not make ***any*** new factual findings to support this sanction. Instead, it said it "agrees with the FTC that the harm from Defendants' contumacious conduct is indeed the same as the harm caused by their FTC Act violations," and that "a monetary sanction alternative to the damages

2. Dist. Ct. ECF Dkt. No. 1027.

3. Dist. Ct. ECF Dkt. No. 1027 at 7.

caused by their violations of the FTC Act is appropriate for the injuries to purchasers caused by the TSR Contempt --$120.2 million." *Id.* at 69a.

Third, in an attempt to respond to petitioners' argument that the district court imposed the contempt sanctions against them without receiving evidence and without giving them an opportunity to contest the FTC's claims, the FTC makes several sham assertions. The FTC says that the district court "held a 'three-week bench trial' on the Commission's claims;" petitioners "had a full opportunity to participate in that trial and to call their own witnesses;" the district court "did not reject any specific attempt by petitioners to introduce evidence;" and petitioners "had a full opportunity to cross-examine the Commission's witnesses and to respond to legal arguments." Opp. at 8-9.

However, the FTC did not call a single witness during the three-week bench trial to testify about the nature or amount of the contempt sanctions and did not introduce a single piece of documentary regarding any specific sanction. The truth, as already noted, is that the FTC made no effort at trial to support the nature or amount of any contempt sanction. Consequently, there were no witnesses on this subject for petitioners to cross-examine or to rebut with their own witnesses at trial, and there was no evidence and no legal arguments regarding the nature or amount of the contempt sanctions for petitioners to confront or rebut.

Fourth, the FTC states that, "[i]n 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.'" Opp. at 9. This is the most outrageous of the FTC's false assertions.

The FTC cites "Pet. App. 272a-273a" in support of this statement. Opp. at 9. However, those are the pages of the district court's Memorandum Opinion of August 28, 2020, in which the district court determined ***not*** the amount of the contempt citations but the amount of "'***monetary consumer redress' under Section 13(b) of the FTC Act*** (emphasis added)." As already repeatedly noted, the district court made ***no*** independent calculation in its Memorandum Opinion or elsewhere of the amount that should be awarded as a contempt sanction. Although this flies in the face of the due process protections required by the Seventh and Tenth Circuits, the Fourth Circuit affirmed the district court's sanction.

B. UNDER *AMG* PETITIONERS WERE UNLAWFULLY DEPRIVED OF ACCESS TO THEIR OWN MONEY TO HIRE TRIAL COUNSEL

The FTC has completed missed petitioners' argument that, given this Court's decision in *AMG Capital Management*, they were unlawfully deprived of access to their own money to hire trial counsel, and were forced to defend themselves *pro se*. Pet. 14-15. Instead, the FTC mistakenly frames petitioners' argument as a challenge to the district court's orders freezing their assets and property and denying them access to those assets and property for the purpose of hiring trial counsel. Opp. at 10-13.

Petitioners' argument is based on the principle of retroactivity adopted by this Court in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). In *Harper*, this Court held that, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97. In *AMG Capital Management*, this Court interpreted section 13(b) of the FTC Act to bar the FTC from seeking or obtaining equitable monetary relief. The present case, in which the district court froze petitioners' assets and property and denied them access to their own money to hire trial lawyers, was pending on direct review when *AMG Capital Management* was decided. Under *Harper*, the rule of federal law announced in *AMG Capital Management* must be applied retroactively to nullify the district court's freeze order.

Therefore, as petitioners' have argued, they were unlawfully denied access to their own money to hire counsel to represent them at trial. They were unlawfully forced to defend themselves *pro se*. That is an independent reason for the grant of this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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