No. _____

In The
Supreme Court of the United States

CREDIT BUREAU CENTER, LLC, AND MICHAEL BROWN,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2018 the Federal Trade Commission obtained a punitive disgorgement award against the Petitioners, a small credit-repair company and its owner. The judgment ordered Petitioners to surrender the company's total gross revenue, without any reduction for legitimate business expenses, pursuant to Section 13(b) of the Federal Trade Commission Act (FTC Act). *FTC v. Credit Bureau Ctr., LLC*, 325 F.Supp.3d 852, 869–70 (N.D. Ill. 2018). This Court ultimately granted review of that very decision, to address the use of Section 13(b). *See FTC v. Credit Bureau Ctr., LLC*, 141 S.Ct. 194 (July 9, 2020).

The case was consolidated with *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021), and this Court unanimously held that Section 13(b) does not "authorize[] the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement."

On remand, however, the FTC asked the district court to "reimpose the prior judgment pursuant to section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57(b)." *FTC v. Credit Bureau Ctr., LLC*, No. 17-cv-194, 2021 WL 4146884, at *1 (N.D. Ill. Sept. 13, 2021). In its opinion granting that request, the district court allowed the "FTC [to] seek[] the same remedy, for the same reasons, and for the same victims … via section 19 as it did under section 13(b)." *Id*. at *11.

Now, before this Court for a second time, Petitioners present the following question:

Whether Section 19 of the FTC Act, 15 U.S.C. § 57b(b), which prohibits the award of "any exemplary or punitive damages," empowers the Commission to

seek and a court to award disgorgement of a business's gross receipts as punishment for violating the Act, and therefore impose the same remedy, for the same reasons, and for the same victims under Section 19 as was done under Section 13(b).

PARTIES TO THE PROCEEDING

Petitioners Credit Bureau Center, LLC, and Michael Brown were the Defendants-Appellants in the proceedings below.

Respondent Federal Trade Commission was the Plaintiff-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of the business.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

FTC v. Credit Bureau Center, LLC, 325 F.Supp.3d 852 (N.D. Ill. 2018)

FTC v. Credit Bureau Center, LLC, 937 F.3d 764 (7th Cir. 2019)

FTC v. Credit Bureau Center, LLC, 141 S.Ct. 194 (July 9, 2020) (granting certiorari and consolidating with No. 19-508, *AMG Cap. Mgmt. LLC v. FTC*)

FTC v. Credit Bureau Center, LLC, 141 S.Ct. 810 (Nov. 9, 2020) (vacating writ of certiorari)

FTC v. Credit Bureau Center, LLC, No. 17-cv-194, 2021 WL 4146884 (N.D. Ill. Sept. 13, 2021)

FTC v. Credit Bureau Center, LLC, 81 F.4th 710 (7th Cir. 2023), petition for rehearing en banc denied (Nov. 3, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Credit Bureau Center, LLC, and Michael Brown, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The district court's Memorandum Opinion and Order and Modified Final Judgment reimposing the previously vacated disgorgement judgment against Petitioners were unpublished. The Memorandum Opinion can be found at *FTC v. Credit Bureau Ctr., LLC*, No. 17-cv-194, 2021 WL 4146884 (N.D. Ill. Sept. 13, 2021), and is included at Appendix 55a–84a. The Modified Final Judgment is included at Appendix 16a–54a. The Seventh Circuit's opinion affirming the judgment is published at *FTC v. Credit Bureau Ctr., LLC*, 81 F.4th 710 (7th Cir. 2023). The Seventh Circuit's published opinion and its unpublished order denying *en banc* review are included at Appendix 1a–15a and 85a, respectively.

JURISDICTION

The district court issued a judgment against Petitioners on June 26, 2018. After a timely appeal, the Seventh Circuit issued a decision affirming the judgment in part, vacating the judgment in part, on August 21, 2019. On July 9, 2020, this Court granted certiorari and consolidated the matter with No. 19-508, *AMG Capital Management LLC v. Federal Trade Commission*. On November 9, 2020, this Court vacated the writ. On September 13, 2021, following this

Court's opinion in *AMG Capital*, the district court issued a renewed judgment against Petitioners. They timely appealed, and the Seventh Circuit affirmed on August 30, 2023. The Seventh Circuit denied a timely petition for *en banc* rehearing on November 3, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 57b(b) provides:

> The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

INTRODUCTION

In vivid terms this case asks whether the Federal Trade Commission, and by extension the lower courts, can simply ignore this Court's decisions. Petitioners, Credit Bureau Center, LLC, and its owner Michael Brown,[1] have already been before this Court, successfully challenging an unlawful disgorgement judgment obtained by the Federal Trade Commission. Almost four years later they return, in precisely the same circumstances as before. Indeed, they face the *identical* monetary judgment against them, imposed, once again, without any lawful basis. How? The FTC and the lower courts insist that this Court's prior decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67 (2021), is meaningless.

This Court knows too well the FTC's history of using power it was never given while lower courts looked the other way. As the Court recognized in this very case, for decades the Commission unlawfully sought punitive disgorgement awards under Section 13(b) of the Federal Trade Commission Act. These so-called equitable awards ordered forfeiture of a defendant's gross earnings, irrespective of legitimate expenses, and made payable to the Commission for distribution as the agency deemed fit.

After the Commission obtained one such award from Credit Bureau, this Court granted a writ of certiorari and consolidated it with *AMG Capital*. *See* 141 S.Ct. 194 (July 9, 2020). After argument, this Court

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[1] Both Credit Bureau and its owner are parties to this proceeding and Petitioners in this Court. For ease of reference, this Petition refers to both collectively as "Credit Bureau" unless the context requires otherwise.

unanimously rejected the FTC's longstanding practice as being fundamentally incompatible with traditional equitable powers. *AMG Cap.*, 593 U.S. at 70. Along the way, this Court pointedly rebuffed the Commission's arguments that Section 13(b) allowed disgorgement simply because the "Commission presently uses § 13(b) to win equitable monetary relief directly in court with great frequency" and the "courts of appeals have, until recently, consistently accepted its interpretation." *Id.* at 74, 81. Inertia is no substitute for legitimacy.

One might have thought that the Commission would have been somewhat humbled by this Court's rebuke. But that was not the case.

Undeterred, the Commission tried to justify reimposition of an identical punitive award under a long-neglected part of the FTC Act, Section 19. That provision, which allows the Commission to seek "consumer redress," but not "any exemplary or punitive damages," had always been understood to allow for restitution, made payable to those directly affected by unlawful business practices. After all, that was the understanding the Commission advanced as it pled for this Court to bless its more significant Section 13 powers. *See AMG Cap.*, 593 U.S. at 77 ("More than that, the latter provision (§ 19) comes with certain important limitations that are absent in § 13(b).").

Breaking with traditional understanding, this Court's equity jurisprudence, and splitting with non-Seventh Circuit precedent, the district court accepted the FTC's post-hoc justification of its already vacated judgment against Credit Bureau. It once again issued a punitive award of more than $5 million. And, without acknowledging its break with other circuits, a

panel of the Seventh Circuit blessed that judgment. It is as though *AMG Capital* simply never happened.

This Court should once again grant review and make clear that this Court's precedents mean what they say.

STATEMENT OF THE CASE

"This appeal is the latest chapter in a complicated case that has had a long and winding journey through the federal courts, including a trip to the Supreme Court and back." *FTC v. Credit Bureau Ctr., LLC*, 81 F.4th 710, 713 (7th Cir. 2023).

In 2017, the FTC brought suit against Credit Bureau Center, LLC, its owner Michael Brown, Danny Pierce, and Andrew Lloyd. The Commission alleged that Credit Bureau deceptively marketed credit-monitoring services in violation of Section 5 of the FTC Act and the Restoring Online Shoppers' Confidence Act. Pierce and Lloyd, meanwhile, were alleged to have routed business to Credit Bureau, making their own deceptive statements in the process. Ultimately, Pierce and Lloyd settled the charges with the FTC, and on the Commission's motion, the district court entered summary judgment against Credit Bureau and Mr. Brown. *FTC v. Credit Bureau Ctr., LLC*, 325 F.Supp.3d 852, 869–70 (N.D. Ill. 2018) (*CBC I*).

The FTC then sought a judgment to disgorge Credit Bureau's gross revenue pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). More specifically, the FTC sought an order directing Credit Bureau and Mr. Brown to pay to the agency $5,260,671.36, which it calculated as "the amount of revenue obtained through traffic that Pierce directed to CBC: $6,832,435.81," minus "the amount of refunds

CBC paid to customers ($414,860.77), chargebacks that customers successfully obtained ($394,903.68), and the amount already paid by Pierce and Lloyd in settlement of their claims ($762,000), for a net of $5,260,671.36." *CBC I*, 325 F.Supp.3d at 869. Credit Bureau objected, arguing that any award should deduct legitimate business expenses, and reflect only net profits traced to the unlawful practices. The district court granted the FTC's request, however, refusing to "set off business expenses [or] the loss of CBC revenue." *Id.* at 870.

On appeal, the Seventh Circuit reversed, holding that "section 13(b)'s permanent-injunction provision does not authorize monetary relief." *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 786 (7th Cir. 2019) (*CBC II*). Because that holding overruled a prior decision from that court, it was circulated to its active members pursuant to Seventh Circuit Rule 40(e). Three judges dissented from the denial of rehearing *en banc* following that procedure. *See id.* at 786 (Wood, C.J., dissenting).

The Commission sought certiorari, which this Court granted. *FTC v. Credit Bureau Ctr., LLC*, 141 S.Ct. 194 (2020). This case was then consolidated with one from the Ninth Circuit, *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018). Ruling in the Ninth Circuit's case, this Court unanimously held that Section 13(b) does not "authorize[] the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *AMG Cap.*, 593 U.S. at 70. The judgment against Credit Bureau was therefore unlawful.

In an attempt to salvage the judgment, the FTC asked the district court to "reimpose the prior judgment pursuant to section 19 of the FTC Act, 15 U.S.C. § 57(b)." *FTC v. Credit Bureau Ctr., LLC*, No. 17-cv-194, 2021 WL 4146884, at *1 (N.D. Ill. Sept. 13, 2021) (*CBC III*). In its opinion granting that request, and reimposing the identical disgorgement award of $5,260,671.36, the district court was defiant—rejecting any argument "that the FTC must trace particular funds," or that "the restitution amount has been improperly calculated" for the same reasons in its original opinion based on Section 13. *Id.* at *10. The district court said it was allowing the "FTC [to] seek[] the same remedy, for the same reasons, and for the same victims … via section 19 as it did under section 13(b)." *Id*. at *11.

The district court then issued an identical judgment to the first, "in the amount of Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36) … in favor of the Commission against Defendants, jointly and severally, as equitable monetary relief." Appendix 44a at IX.A. The judgment further ordered payment directly to the Commission. *Id.* at IX.B. "All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, with the Court's prior approval, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines

to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement." Appendix 45a at IX.D.

Credit Bureau appealed once more, and a panel of the Seventh Circuit issued a published decision on August 30, 2023. *FTC v. Credit Bureau Ctr., LLC*, 81 F.4th 710 (7th Cir. 2023) (*CBC IV*). The panel affirmed the "reinstated" disgorgement award, modifying the judgment only to excise the portion of the judgment ordering excess funds to be "deposited to the U.S. Treasury as disgorgement," but affirming it in all other respects. *Id.* at 719.

Credit Bureau timely moved for *en banc* rehearing, which the Seventh Circuit denied. Credit Bureau now petitions this Court to issue a writ of certiorari.

REASONS TO GRANT THE PETITION

This Court should grant review for three different reasons. First, the Seventh Circuit's decision allowing punitive disgorgement of gross receipts as "equitable monetary relief" conflicts with this Court's binding equity jurisprudence, as set out in *Kokesh v. SEC*, 581 U.S. 455 (2017), and *Liu v. SEC*, 140 S.Ct. 1936 (2020). Second, the Seventh Circuit's decision created a circuit split with the leading case interpreting Section 19, *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Critically, the Seventh Circuit's decision is the first court of appeals' decision interpreting Section 19 *since* this Court's *AMG Capital* decision, and it marks a rejection of 30 years of consistent interpretation of the Commission's statutory powers under Section 19. Third, as this Court's prior review of this very case illustrates, the scope of available remedies in FTC enforcement actions presents an issue of exceptional importance worthy of further review. More profoundly, as currently situated, this case asks whether the Commission and the lower courts can simply *refuse* to follow this Court's decisions.

I. The Panel Decision Conflicts with This Court's Equity Jurisprudence

Most obviously, the Seventh Circuit's decision is irreconcilable with this Court's decisions in *Kokesh v. SEC*, 581 U.S. 455 (2017), and *Liu v. SEC*, 140 S.Ct. 1936 (2020). In *AMG Capital*, this Court rejected the Commission's use of disgorgement as a statutory matter, without needing to wade into the limits set by its equity jurisprudence. *See* 593 U.S. at 79. But as the petitioners in that case had pointed out, and the lower court had recognized, the FTC's disgorgement practice was inconsistent with the limits recognized in *Kokesh*

and *Liu*. *See* Brief for Petitioners, *AMG Cap. Mgmt., LLC v. FTC*, No. 19-508, 2020 WL 5846149 (U.S.), at *18 (Sept. 25, 2020) ("The award tests the bounds of equity practice in other ways as well. It did not account for the petitioners' legitimate expenses [and i]t allowed the money recovered to be deposited in Treasury funds instead of being disbursed to affected consumers."); *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 433 (9th Cir. 2018) (O'Scannlain, J., concurring) ("Under the Supreme Court's decision in *Kokesh v. SEC* … restitution under § 13(b) would appear to be a penalty—not a form of equitable relief."). But the renewed judgment against Credit Bureau, purportedly under Section 19, now squarely presents that conflict.

Despite the clear limits on *equitable* awards, the district court's judgment, which the panel affirmed, penalized Credit Bureau "in the amount of Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36) … as *equitable monetary relief*." Appendix 44a at IX.A. That relief represented all of Credit Bureau's gross receipts—not merely net profits. *See CBC IV*, 2023 WL 5604291, at *5 ("The judge reinstated the original award—a total of $5,260,671.36, which equals the revenue Brown obtained through traffic that Pierce directed to the websites minus refunds already paid, chargebacks customers obtained, and a settlement paid by Pierce and Lloyd."); *accord CBC I*, 325 F.Supp.3d at 869 (original calculation of disgorgement award).

But equitable relief may not order "disgorgement beyond ... net profits from wrongdoing." *Liu*, 140 S.Ct. at 1940. Indeed, a judgment becomes "punitive"—*not*

equitable—when it goes beyond "return[ing] the defendant to the place he would have occupied had he not broken the law." *Kokesh*, 581 U.S. at 465. "Denial of" a deduction of costs "by making the defendant liable in excess of net gains, results in a punitive sanction." *Id.* at 466. Yet the award here was calculated after the court refused to "set off business expenses [or] the loss of CBC revenue." *CBC I*, 325 F.Supp.3d at 870. By affirming a purportedly *equitable* judgment that exceeded Credit Bureau's net proceeds, the panel decision simply rejected the limits of equity practice set out by this Court.

Start with the language of the statute. Section 19 (15 U.S.C. § 57b(b)) provides that a court may

> grant such relief as the court finds necessary to redress injury to consumers … resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

As Credit Bureau argued, this text authorizes remedies that are necessarily narrower than the maximum available at equity. Indeed, as the Ninth and Eleventh Circuits recognize, because Section 19 is limited to "redress" without "the imposition of any exemplary or punitive damages," it unmistakably permits only restitutionary redress consistent with the laws of equity. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469

(11th Cir. 1996) (Section 19 "expressly *limits* a court's equitable jurisdiction.") (emphasis added); *accord FTC v. Publishers Bus. Servs. Inc.*, 540 F. App'x 555, 557 (9th Cir. 2013) (unpublished) (Section 19 "explicitly limits recoverable monies.").

But the Seventh Circuit affirmed the judgment even though it exceeded net revenues. The panel acknowledged that the judgment against Credit Bureau was "the revenue Brown obtained through traffic that [a codefendant] directed to the websites minus refunds already paid, chargebacks customers obtained, and a settlement paid by [two co-defendants]." *CBC IV*, 81 F.4th at 718. It made no allowances for operating expenses or other costs. *See id.* But "equitable relief" "must mean something more than depriving a wrongdoer of his net profit," or it would be "meaningless." *Liu*, 140 S.Ct. at 1948.

How then did the panel justify affirming the judgment? It distinguished *Liu* because it dealt with a different statute, such that "respecting Congress's remedial decision required cabining relief to the traditional scope of the remedies available in equity." *CBC IV*, 81 F.4th at 718. The Seventh Circuit insisted, however, that "Section 19 is not so limited; it permits all forms of redress to make consumers whole, including 'the refund of money.'" *Id.* "Because the monetary award consists of direct consumer redress in the form of refunds—a form of relief expressly permitted by the statute—it need not be measured by net profits and tracing is not required." *Id.*

The Seventh Circuit's decision is wrong in two key respects. First, its legal conclusion that Section 19 reaches *further* than equity would allow ignores the statute's explicit prohibition of "exemplary or punitive

damages." *See* 15 U.S.C. § 57b(b). As both *Liu* and *Kokesh* teach us, equity is distinct from punishment, and equity does not allow one to "be punished by paying more than a fair compensation to the person wronged." *Liu*, 140 S.Ct. at 1943 (citation omitted); *see also Kokesh*, 581 U.S. at 464 (judgment is a "penalty" when it "is not compensatory"). Amazingly, the panel decision never once referenced this statutory language, even as it concluded that the limits adhering to "equitable relief" did not apply to Section 19. *See CBC IV*, 81 F.4th at 718–19. So, whether viewed through the lens of equity practice or simply as a statutory limitation on "exemplary or punitive damages," Section 19 cannot lawfully result in a judgment ordering payment beyond Credit Bureau's net proceeds.

Second, the Seventh Circuit's assertion that the judgment here was anything other than an equitable award is flatly belied by the judgment itself. While the panel struck a single line from the modified final judgment, which had ordered that any "money not used for such equitable relief [] be deposited to the U.S. Treasury as disgorgement," it otherwise affirmed the judgment. *CBC IV*, 81 F.4th at 719. But that leaves in place the judgment's explicit statement that it was issuing *equitable* relief pursuant to Section 19, not a "legal" judgment under the statute. The district court's modified final judgment issued a "permanent injunction and other *equitable relief*," and issued its "Judgment in the amount of Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36) … in favor of the Commission against Defendants, jointly and severally, as *equitable monetary relief*." Appendix 44a at IX.A (emphasis added). Indeed, the judgment directs that "[a]ll money paid to the Commission pursuant to

this Order may be deposited into a fund administered by the Commission or its designee to be used for *equitable relief*, including consumer redress and any attendant expenses for the administration of any redress fund." Appendix 45a at IX.D (emphasis added). And the judgment further empowers the FTC to "apply any remaining money for such other *equitable relief* (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint." *Id.* (emphasis added). Certainly the district court judgment *claimed* to provide equitable relief, which, of course, is limited by the principles espoused in *Liu*.

II. The Seventh Circuit Has Created an Important Split with the Ninth and Eleventh Circuits

The Seventh Circuit's decision is the first time a court of appeals has decided the scope of Section 19 *since* this Court decided *AMG Capital*. But the prevailing understanding of Section 19, which informed this Court's decision in *AMG Capital*, was established 30 years ago by the Ninth Circuit in *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir. 1993). That understanding has since been accepted by the Eleventh Circuit, and, in fact was the impetus for the FTC's expansive reading of Section 13(b). *See Gem Merch. Corp.*, 87 F.3d at 469 (acknowledging *Figgie*'s understanding of Section 19 and concluding that "section 13(b) has no such limitation"). *Figgie* thus remains the leading precedent on Section 19 in courts across the country. *See, e.g.*, *FTC v. Simple Health Plans LLC*, 58 F.4th 1322, 1329 (11th Cir. 2023) (citing *Figgie* and accepting the Commission's concession "for purposes of this appeal" that the FTC "will not seek disgorgement to

the Treasury" under Section 19); *FTC v. Zaappaaz, LLC*, No. 4:20-cv-2717, 2023 WL 5020618, at *15 (S.D. Tex. June 9, 2023), *report and recommendation adopted sub nom.* 2023 WL 5018433 (S.D. Tex. Aug. 3, 2023) (applying *Figgie*); *FTC v. Am. Screening, LLC*, No. 4:20-cv-1021, 2023 WL 1388050, at *4 (E.D. Mo. Jan. 31, 2023) (following *Figgie* and holding that "Section 19 does not, however, authorize disgorgement that exceeds redress to consumers"); *FTC v. ACRO Servs. LLC*, No. 3:22-cv-00895, 2023 WL 351202, at *5 n.6 (M.D. Tenn. Jan. 20, 2023) (citing *Figgie* and noting that "Courts have similarly found that disgorgement is not available under Section 19"); *FTC v. Superior Prod. Int'l II, Inc.*, No. 2:20-cv-02366, 2022 WL 4378715, at *15 n.23 (D. Kan. Sept. 22, 2022) ("Use of any remaining funds by Plaintiff for purposes other than consumer redress exceeds the scope of Section 19(b) of the FTC Act."). That is, until the Seventh Circuit decision in this case simply cast aside the Ninth Circuit's reasoning without even mentioning *Figgie*. In the process, the law has now become hopelessly muddled.

Section 19 authorizes relief *only* "as the court finds necessary to redress injury to consumers." 15 U.S.C. § 57b(b). In interpreting that language, the Ninth Circuit held that "there may be no redress without proof of injury caused" by a defendant's practices. *Figgie*, 994 F.2d at 605. Section 19 sought "only to authorize redress *to consumers* and others for 'injury resulting' from the trade practice." *Id.* at 607 (emphasis added). The FTC could *not* use "[u]nclaimed money from the redress fund" for "'indirect redress' in the form of ... donations to non-profit" organizations, because there is "no basis for allowing the Commission to keep money in excess of what it reasonably spends to find

purchasers of the [product], advertise to them the availability of the money ... and process their claims and reimburse them." *Id.* at 607. There, as here, the FTC argued that it should be permitted "to keep the money because it is in the nature of disgorgement." *Id.* And there, as here, the argument ran afoul of Section 19 because "requiring Figgie to pay the Commission the excess would ... not mak[e] redress to the consumers who bought" the product. *Id.* Indeed, the court made clear that refunds should be given only "to those buyers who make a valid claim for such redress." *Id.* at 606 (internal citation omitted).

The Seventh Circuit reached a diametrically different conclusion. The judgment it affirmed contains the same problematic directives that *Figgie* rejected. Indeed, the judgment still provides that the Petitioners "shall, immediately upon receiving notice of this Order, remit the funds *to the Commission* by electronic funds transfer or otherwise in accordance with directions provided by a representative of the Commission." Appendix 44a at IX.B (emphasis added). Furthermore, Petitioners' money "may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund[.]" Appendix 45a at IX.D. But the order also allows the FTC to "decide[] that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed" and to then "apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to [Petitioners'] practices alleged in the Complaint." *Id.* In other words, the judgment is paid to the FTC, for the agency's use towards "indirect redress,"

which the *Figgie* court held to be impermissible. *See* 994 F.2d at 606–07.

Not only did the Seventh Circuit thus create a significant circuit split concerning the scope of Section 19, but the context in which it acted raises dire warning signs about the continued stability of the law. As the Eleventh Circuit recognized nearly 30 years ago, *the reason* for the expansive and unlimited view of Section 13(b)'s equitable-disgorgement remedy was the recognition that Section 19's statutory remedies included limits on "punitive or exemplary" damages. *See Gem Merch. Corp.*, 87 F.3d at 469. This Court understood that history as well, noting in *AMG Capital* that "the latter provision (§ 19) comes with certain important limitations that are absent in § 13(b)." 593 U.S. at 77. But the Seventh Circuit's approach discards all of this context, not to mention the text of the statute, and simply revives Section 13(b)'s unlawful disgorgement regime under the guise of Section 19.

III. The FTC's End-Run Around *AMG Capital* Presents an Issue of Paramount Importance

This case is not just a request for error correction. Instead, the Court faces the Commission's systematic effort to evade the outcome in *AMG Capital* and the Seventh Circuit's acquiescence in the attempt. This Court must not allow its precedent to be so easily cast aside.

Consider first the FTC's own recognition of the limits Congress set out in Section 19. When it lobbied this Court to preserve the Commission's (prior) use of "§ 13(b) to obtain monetary relief," so it could meet its "policy-related" objectives, the FTC and its many

amici insisted that Section 19 was no substitute for disgorgement practice. *AMG Cap.*, 593 U.S. at 82. The day after this Court's decision, Acting Chairwoman Rebecca Kelly Slaughter didn't mince words about the agency's views of its remaining statutory authorities:

> In *AMG Capital*, the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior[.] … With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.

Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC (Apr. 22, 2021).[2]

A month later the Commission implemented Plan B. Incoming Chair Lina M. Kahn made no secret of the Commission's intent to use Section 19 as a way of getting around the *AMG Capital* decision. *See* Chair Lina M. Khan, *Memorandum to Commission Staff and Commissioners, Vision and Priorities for the FTC*, 1 (Sept. 22, 2021) ("Using our full set of tools and authorities—including rulemaking and research in addition to adjudication—will be critical, especially post-*AMG*.")[3]; *accord* Former Commissioner Rohit Chopra,

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[2] *Available at* https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital (Slaughter Statement).

[3] *Available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

The Case for Resurrecting the FTC Act's Penalty Offense Authority, 13 n.37 (Oct. 29, 2020) ("As the FTC faces threats to its authority to seek equitable relief [from the grant of certiorari in *AMG*], the agency should consider pursuing this alternative form of relief in more cases.").[4]

This case, of course, is an example of the Commission's execution of its plan. The FTC asked the district court below to simply swap Section 19 for Section 13, and the court explicitly said it was allowing the "FTC [to] seek[] the same remedy, for the same reasons, and for the same victims … via section 19 as it did under section 13(b)." *CBC III*, 2021 WL 4146884, at *11. *That* is the analysis blessed by the Seventh Circuit. *See CBC IV*, 81 F.4th at 719.

This case isn't the only example of the FTC's ongoing efforts to evade the *AMG* decision though. These efforts have sometimes failed. *See, e.g., FTC v. Noland*, No. 20-cv-00047, 2021 WL 5493443, at *4 (D. Ariz. Nov. 23, 2021) (When the FTC demands payment "that [] goes beyond redressing injury to consumers and provides a potential windfall to consumers," it violates Section 19's text.); *FTC v. Zurixx, LLC*, No. 2:19-cv-713, 2021 WL 5179139, at *3, *8 (D. Utah Nov. 8, 2021) (Section 19 gives the FTC "more limited" powers than Section 13, and "the FTC cannot equate the total amount of [sales] in the statutory period with consumer injury," instead it must prove specific losses to consumers.), *affirmed* No. 22-4042, 2023 WL 2733500, at *6 (10th Cir. Mar. 31, 2023). But as this case illustrates, sometimes the FTC's tactics succeed.

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[4] *Available at* https://www.ftc.gov/public-statements/2020/10/case-resurrecting-ftc-acts-penalty-offense-authority.

Lower courts now must wrestle with the "differing approaches" taken by "[r]ecent cases" concerning whether Section 19 is a substitute for the former use of Section 13. *See Zaappaaz, LLC*, 2023 WL 5020618, at *15. Meanwhile the regulated public faces an agency that insists nothing has changed.

The destabilizing consequences of the Commission's strategy should be deeply concerning to this Court. For decades, the FTC unlawfully obtained *billions* of dollars in judgments that were never authorized by law, while most circuit courts turned a blind eye. *See AMC Capital*, 593 U.S. at 73–74. Yet, as Acting Commissioner Slaughter implied, the Commission thought it was unseemly to rule in "favor of scam artists and dishonest corporations," merely because the *law* required it. *Slaughter Statement*. "But words are how the law constrains power." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Id.*

Certainly, the Commission knows the stakes. As two recently departed Commissioners recognized, Section 19 is not a substitute for Section 13 and using it this way defies this Court. *See Resident Home, LLC; Analysis of Proposed Consent Order To Aid Public Comment*, 86 Fed. Reg, 58,279, 58,283 (Oct. 21, 2021) (Dissenting Statement of Commissioners Phillips and Wilson) (citing *Figgie*, 994 F.2d at 606–07, and saying, "Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act—remedies that, in fairness to the agency, were

blessed by appellate courts for decades—the Commission now votes to accept monetary remedies not permitted by Section 19."). Indeed, they predicted that if the agency "continue[s] to flout the limits of [its] authority, the Commission should fully expect additional rebukes from the courts." *Id.* They were surely right on that score.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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