No. 23-853

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 United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

ALLISON D. DANIEL
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
202.888.6881
ADaniel@pacificlegal.org

OLIVER J. DUNFORD
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
916.503.9060
ODunford@pacificlegal.org

Counsel for Petitioners

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REPLY

The district court entered judgment against Petitioners in the amount of $5,260,671.36 pursuant to Section 13(b) of the Federal Trade Commission Act. But the court of appeals vacated this award after this Court held unanimously that Section 13(b) authorizes only "purely injunctive, not monetary, relief." *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 75 (2021). Upon the Commission's motion to amend the judgment, the district court entered the "same" monetary judgment "for the same reasons, and for the same victims" under Section 19 of the FTC Act "as it did under section 13(b)."

Section 13(b), however, cannot support the district court's award. The correct reading of Section 13(b), set forth in *AMG*, provides no basis for "equitable monetary relief ...." 593 U.S. at 70. And the previously broad reading of Section 13(b) contrasts with Section 19's limited relief, which is allowed only "as [a] court finds necessary to redress injury to consumers ... resulting from the rule violation or the unfair or deceptive act or practice ...." 15 U.S.C. § 57b(b). Therefore, under Section 19, there "may be no redress without proof of injury caused by those practices, and the relief must be necessary to redress the injury." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) (cleaned up).

Here, the Commission offered no proof of injury, and the district court made no finding of necessity. Instead, the court imposed an award equal to CBC's gross receipts (less certain deductions)—contrary to both Section 19's express preclusion against "exemplary or punitive damages," 15 U.S.C. § 57b(b), and this Court's decisions in *Kokesh v. SEC*, 581 U.S. 455 (2017), and *Liu v. SEC*, 140 S.Ct. 1936 (2020).

Ultimately, Section 19 does not allow the Commission to seek and a court to award repayment of a business's gross receipts as punishment for violating the FTC Act—and to thus impose the same remedy, for the same reasons, and for the same victims as was done under (pre-*AMG*) Section 13(b). The lower courts need clarity from this Court to establish the proper limits of Section 19 relief.

I. THE PANEL DECISION CONFLICTS WITH THIS COURT'S EQUITY JURISPRUDENCE

The Commission acknowledges that monetary relief under Section 19 is limited: "damages may not be 'exemplary or punitive.'" BIO at 8. But the Commission ignores additional limiting language in Section 19 and claims that the monetary award here is a form of restitution that "falls comfortably within" the non-exemplary/non-punitive range of relief. *Id.* It does not, as Section 19 and *Liu* and *Kokesh* show.

Under Section 19, a court may "grant such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. § 57b(b). Therefore, Section 19 does not authorize sweeping equitable power to order the disgorgement of profits, App. 44a, or to grant the Commission broad discretion over unused "equitable relief," *id*. 45a–46a.

Longstanding equity practice confirms as much. "Redress" is the "receiving [of] satisfaction for an injury sustained," *Black's Law Dictionary* 1444 (Rev. 4th ed. 1968);[1] it may be restitutionary or penal. "Res-

[1] Section 19 was codified in 1975. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, tit. II, § 206, Pub. L. No. 93-637, 88 Stat. 2183, 2193 (1975) (codified as amended 15 U.S.C. § 57b)

titution" is the "[a]ct of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage, or injury; and indemnification." *Id.* at 1477. And "penal" means "[p]unishable; inflicting a punishment; containing a penalty, or relating to a penalty." *Id.* at 1289. Because Section 19 is limited to "redress" without "the imposition of any exemplary or punitive damages," it unmistakably permits only restitutionary redress "to make consumers whole." *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) (footnote omitted).

Full equitable relief allowing remedies beyond consumer redress, as was available under the previous but erroneous reading of Section 13(b), stretches far beyond the restitutionary purpose of Section 19. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (explaining, in pre-*AMG* decision, that FTC need not return money to customers in Section 13(b) action). Had Congress intended for the FTC to have a full range of equitable tools under Section 19, it "could just have said so." *Kloeckner v. Solis*, 568 U.S. 41, 52 (2012). It did not.

To the contrary, Section 19 limits the outer bounds of equitable relief. It allows a court to "grant such relief as the court finds necessary to redress injury to consumers," but "nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages." 15 U.S.C. § 57b(b).

The Commission contends that the court of appeals "correctly read Section 19's bar on 'exemplary or punitive' damages to refer to damages that go beyond those

necessary to make the victim whole." BIO at 9 (emphasis added). But that begs the question, since the district court here did not "find[]" that the amount awarded was in fact "necessary to redress injury to consumers." 15 U.S.C. § 57b(b). Instead, the district court entered the "same" monetary judgment "for the same reasons, and for the same victims ... via Section 19 as it did under section 13(b)." App. 82a–83a. And under Section 13(b), the district court had purportedly "order[ed] equitable relief in the amount of consumer losses." *FTC v. Credit Bureau Ctr., LLC*, 325 F.Supp.3d 852, 868 (N.D. Ill. 2018) (*CBC I*) (citations omitted).

But even that's not accurate, since the Commission provided no proof of, and the district never determined, the consumers' actual losses. Instead, applying Section 13(b), the Commission simply totaled the amount customers spent, subtracting refunds and chargebacks and settlement payments by co-defendants, and the court imposed that amount as disgorgement. *See* App. 44a at IX.A. (ordering judgment of $5,260,671.36 as "equitable monetary relief"). *See CBC I*, 325 F.Supp.3d at 869. And even after this Court's decision in *AMG*, the district court signed off on the "same" judgment. App. 82a; *see id*. 44a–46a.

This award thus mirrors the punitive disgorgement in *Kokesh*. As there, the relief here was "imposed by the courts as a consequence for violating … public laws." 581 U.S. at 463. It was "ordered without consideration of a defendant's expenses that reduced the amount of illegal profit," which means it "d[id] not simply restore the status quo[but] le[ft] the defendant worse off." *Id.* at 466 (citation omitted); *see also Liu*, 591 U.S. at 83 (holding disgorgement cannot exceed the gains made by a business "when both the receipts

and payments are taken into the account") (internal quotation omitted). That relief is, as *Kokesh* explained, punitive. Indeed, it is the very definition of "penal." *See Black's Law Dictionary* 1444. This is true even with the Seventh Circuit's removing from the district court's order the sentence providing for disgorgement. App. 14a.

Trying to distinguish *Kokesh* and shrug off an inconvenient aspect of the Seventh Circuit's decision, the Commission argues that the court of appeals' revision of the district court's judgment ensures "that the money [will be] used only to 'redress injury to consumers' and therefore remains compensatory." BIO at 12. Once again, the Commission ignores the statutory prerequisite: a finding by the district court that the relief awarded is "necessary" to redress consumer injury. 15 U.S.C. § 57b(b); *see also Figgie*, 994 F.3d at 605 (explaining, under Section 19, there "may be no redress without proof of injury" and the "relief must be necessary to redress the injury"). The district court thus erred by approving the exact same disgorgement order without calculating actual losses or requiring the FTC to return money to customers. *See CBC I*, 325 F.Supp.3d at 869. As a result, the court's calculation is wholly separate from any notion of consumer redress and operates as a penalty. *See Kokesh*, 581 U.S. at 465–67.

The Commission also unconvincingly attempts to explain away *Liu* and the rule that stems from it. *Liu* "set forth a rule applicable to all categories of equitable relief." *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021). For example, when the Consumer Financial Protection Bureau sought to collect a defendant's "gross receipts" under a statute that allows a court to grant "any appropriate legal or

equitable relief," the Seventh Circuit vacated the more than $21 million award. *Id.* at 711 (analyzing 12 U.S.C. § 5565(a)). The reason was simple: *Liu* does not allow equitable relief based on gross receipts. *Id.* Instead, a court must calculate "based on net profits." *Id.* at 710. The award ordered here fails the requirements in *Liu*.

As the Commission notes, *Liu* indeed recognizes an exception: "when the 'entire profit of a business or undertaking' results from the wrongdoing, a defendant may be denied 'inequitable deductions.'" *Liu*, 591 U.S. at 92 (citation omitted). Critically, however, this "exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains 'under another name.'" *Id.* (citation omitted). Here, the Commission and the lower courts never even considered whether this exception could apply. *Liu* is instead dismissed out of hand because "the language of Section 19 differs significantly from the statutory text that the Court construed in *Liu*." BIO at 10; *FTC v. Credit Bureau Ctr., LLC*, 81 F.4th 710, 718 (7th Cir. 2023) (*CBC IV*).

Not so. In *Liu*, the statute at issue provided: "[i]n any action or proceeding brought or instituted by the [SEC] under any provision of the securities laws, the [SEC] may seek, and any Federal court may grant, any equitable relief that may be *appropriate or necessary for the benefit of investors*." 15 U.S.C. § 78u(d)(5) (emphasis added). This Court held that the SEC may seek disgorgement through its power to award "equitable relief" under §78u(d)(5) so long as the award did not exceed the wrongdoer's net profits and was "awarded for victims." *Liu*, 591 U.S. at 75. Therefore, "courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5)" because "[a] rule

to the contrary that 'makes no allowance for the cost and expense of conducting a business would be 'inconsistent with the ordinary principles and practice of courts of chancery.'" *Id.* at 91–92 (cleaned up) (citations omitted).

If anything, the language in §78u(d)(5)—requiring relief for the "benefit of investors"—is even broader than Section 19's. Thus, the Commission (BIO at 10) gets things precisely backwards when it argues that Section 19 exceeds the outer bounds of general equitable relief. First, other courts say the opposite. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (Section 19 "expressly limits a court's equitable jurisdiction.") (citation omitted); *FTC v. Publishers Business Servs., Inc.*, 540 F. App'x 555, 557 (9th Cir. 2013) (unpublished) (Section 19 "explicitly limits recoverable monies…."). Second, the language of the statutes themselves is clear: Section 19's language ("redress injury to consumers") grants less power than the broad language in *Liu* ("equitable relief" "for the benefit of investors"). *Liu*, 591 U.S. at 87.

Many remedies might "benefit" investors but fall short of "redress." *See id.* at 87–88 (stating that a benefit might include, for example, paying whistleblowers). Yet even in *Liu* this Court held that disgorgement amounts to a penalty when based on gross receipts. *Id.* at 75, 78–79. Section 19's more limited language—and its express prohibition on "exemplary or punitive damages"—does not permit the monetary judgment awarded here.

The Commission's focus on the remedy Congress authorized, while ignoring the express limitation on that remedy, is evasion of the law, *cf.* BIO at 12, and that is what this Court must correct.

II. THE SEVENTH CIRCUIT HAS CREATED AN IMPORTANT SPLIT WITH THE NINTH AND ELEVENTH CIRCUITS

Unable to overcome the clear text of Section 19 and the decisions of this Court, the Commission is left talking around the seminal precedent on the application of Section 19, the Ninth Circuit's decision in *Figgie*, to say there is no conflict between the circuits. BIO at 13. The Commission chides the Petitioners for focusing "on the Ninth Circuit's disallowance of one aspect of the remedy that the district court had described as 'indirect redress,'" *id.* (quoting *Figgie*), as if it were a minor detail.[2] But that one aspect is precisely the crux of the circuit split.

Figgie held that "there may be no redress [under Section 19] without proof of injury caused" by defendant's practices. 994 F.2d at 605. And it explained that the FTC cannot use "[u]nclaimed money from the redress fund" for "indirect redress" because there is "no basis for allowing the Commission to keep money in excess of" processing claims from injured customers. *Id.* at 607. In other words, *Figgie* says that payments

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[2] The Commission also contends that Petitioners forfeited the issue whether indirect redress is available under Section 19 by failing to raise it in the district court. BIO at 14. But Petitioners responded to the Commission's theory of forfeiture in their reply brief, *see* CBC C.A. Reply Br. 9–12; and, following *AMG*, Petitioners challenged the application of Section 19, *see FTC v. Credit Bureau Ctr., LLC*, No. 17-cv-194, 2021 WL 4146884, at *5–7 (N.D. Ill. Sept. 13, 2021) (*CBC III*). Thus, they did not forfeit the issue. In any event, the Seventh Circuit modified the district court's order because it awarded indirect redress that "sweeps beyond the statute." *CBC IV*, 81 F.4th at 719. It would seem unusual for the court of appeals to do that based on an issue that the Commission argues Petitioners did not raise.

to anyone other than consumers or others who experienced injury amount to "extraordinary provision[s]" that "cannot be characterized as 'redress'" because the "word connotes making amends to someone who has been wronged." *Id.* at 607.

As explained previously, Pet. at 15–17, the Seventh Circuit here reached the opposite conclusion. The court affirmed a judgment that never required proof of injury, allowed the Commission to decide for itself whether direct redress to consumers is "wholly or partially impracticable," and permitted the FTC to distribute any remaining money for indirect redress—"other equitable relief (including consumer information remedies) as it determines to be reasonably related to [Petitioners'] practices alleged in the Complaint." App. 45a at IX.D. But the "[d]istribution of money after redress is completed—or where it is impracticable—even for purposes 'reasonably related' to [a defendant's] unlawful practices is precluded under *Figgie*." *FTC v. Consumer Def., LLC*, No. 2:18-CV-30 JCM, 2022 WL 18106047, at *3 (D. Nev. Dec. 30, 2022) (citing *Figgie*, 994 F.2d at 607).

Additionally, *Figgie* of course recognized Section 19's express allowance for "corrective advertising in its 'public notification' clause." 994 F.2d at 607; BIO at 14. But *Figgie* ruled that a monetary judgment for other equitable relief without explicit spending limitations is prohibited. *Id.* at 607–08. In fact, the Ninth Circuit instructed the district court to "modify its order to provide for refund to [the seller] of any funds not expended for authorized purposes." *Id.* at 608; *see also FTC v. Zaappaaz, LLC*, No. 4:20-CV-02717, 2024 WL 1237047, at *10 (S.D. Tex. Mar. 21, 2024) ("Funds must be returned to Defendants, less the FTC's costs

to administer the refund process, if they remain unclaimed 120 days after consumers are notified."); *FTC v. Am. Screening, LLC*, No. 4:20-CV-1021 RLW, 2022 WL 2752750, at *12 (E.D. Mo. July 14, 2022) (citations omitted) (implementing similar plan under similar circumstances). The Seventh Circuit's opinion contains no such instruction.

The Eleventh Circuit accepted *Figgie's* understanding of Section 19 and its express limitations on a court's equitable jurisdiction. *Gem Merch.*, 87 F.3d at 469–70 (citing *Figgie*) (discussing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). While the Commission is right that *Gem Merchandising*'s holding on Section 13(b) is no longer good law after *AMG*, BIO at 15, its interpretation of Section 19 is certainly still relevant. Unlike the Seventh Circuit, the Eleventh appears committed to tying a district court's remedies under Section 19 to that which is "necessary to redress injury to consumers." *FTC v. Simple Health Plans LLC*, 58 F.4th 1322, 1329 (11th Cir. 2023) (quoting 15 U.S.C. § 57b(b)) (analyzing whether a temporary asset freeze and receivership are necessary to redress consumers' injuries).

The Commission's attempt to align the Seventh Circuit's opinion here with the Ninth Circuit's conclusion in *Figgie* and the Eleventh Circuit's acceptance of *Figgie* fails. The Seventh Circuit's opinion—the first court of appeals' decision interpreting Section 19 since *AMG*—fractures 30 years of consistent interpretation regarding the Commission's statutory powers under Section 19, signaling a significant shift in legal understanding. This Court should correct that shift and resolve this split among the courts of appeal to ensure consistent application of Section 19 and this Court's precedent.

III. THE FTC'S END-RUN AROUND *AMG CAPITAL* PRESENTS AN ISSUE OF PARAMOUNT IMPORTANCE

This case exemplifies the execution of the Commission's intent to utilize Section 19 to bypass *AMG*: the FTC sought the same remedy under Section 19 as it previously did under Section 13(b), and the Seventh Circuit sanctioned the move. The Commission (BIO at 15–16) has no adequate response.

And this case is not an isolated incident; it's part of the FTC's ongoing efforts to circumvent the *AMG* decision. While some attempts have failed, others, like this one, have succeeded, leaving lower courts grappling with conflicting approaches regarding the substitution of Section 19 for Section 13(b). This unsettling trend should deeply concern the Court, as the Commission's strategy undermines its authority and disregards legal constraints this Court only recently put into place.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

ALLISON D. DANIEL
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, VA 22201
202.888.6881
ADaniel@pacificlegal.org

OLIVER J. DUNFORD
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
916.503.9060
ODunford@pacificlegal.org

Counsel for Petitioners