No. 17-1309

IN THE

Supreme Court of the United States

UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF *AMICUS CURIAE* THE ELECTRONIC TRANSACTIONS ASSOCIATION IN SUPPORT OF PETITIONER

JOHN F. COONEY
VENABLE LLP
600 Massachusetts Ave, NW
Washington, DC 20001
(202) 344-4000

LEONARD L. GORDON
Counsel of Record
MICHAEL S. BLUME
JOHN C. VAZQUEZ
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
lgordon@venable.com
(212) 307-5500

Counsel for Amicus Curiae The Electronic Transactions Association

April 16, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Several provisions of the Federal Trade Commission Act require that, before the Commission can bring a civil suit to impose monetary damages or civil penalties for violations of the Act, it must conduct an administrative adjudication; issue a cease-and-desist order or a determination that an act or practice is unfair or deceptive; and find that the accused violated the prior order or committed an act or practice previously found to be unfair or deceptive. However, a separate provision, Section 13(b) of the Act, 15 U.S.C. § 53(b), grants the Commission limited authority to bring suit to "enjoin" a statutory violation in the absence of any prior administrative adjudication.

The question presented is: Whether Section 13(b) permits the Commission to seek, and a court to impose, joint and several liability upon a defendant for the disgorgement of the entire monetary proceeds resulting from an unlawful trade practice where the defendant was not found to have perpetrated the scheme, but only to have provided substantial assistance to the primary wrongdoer; was not found to be part of a common enterprise with the perpetrators; and did not receive the funds to be disgorged, but only provided services to the perpetrators for a small fee?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Pursuant to Supreme Court Rule 37.2, the Electronic Transactions Association respectfully submits this *amicus curiae* brief in support of the grant of certiorari in this matter.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Electronic Transactions Association is the leading trade association for the payments industry, representing more than 500 companies that provide the infrastructure and services that make it possible for consumers and merchants to conduct transactions using credit cards, debit cards, and other forms of electronic payments.

The decision below represents a tremendous expansion of the regulatory burden upon payment processors, and is thus of direct and considerable interest to the Electronic Transactions Association and its members.

By holding payment processors jointly and severally liable for the fraudulent conduct of businesses that make use of payment processing services, the Federal Trade Commission in effect conscripts payment processors to police the behavior of their merchant clients, a function that payment processors are ill-positioned to perform. Holding payment processors liable for the conduct of merchants is unlikely to reduce wrongful conduct by merchants, but would impose significant costs on payment processors that would be passed on to reputable businesses, and in turn to consumers,

---

[1] *Amicus* states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. *Amicus* notified the parties of its intent to file this brief, and both Petitioner and Respondent have consented to its filing.

through higher payment processing fees. This additional risk of liability will also deter processors from doing business with small, startup, or innovative businesses, thereby advantaging large and consolidated businesses and injuring consumers.

PRELIMINARY STATEMENT

Section 13(b) of the Federal Trade Commission Act ("FTC Act") provides the Federal Trade Commission (the "Commission") the authority to seek a "preliminary injunction" or "permanent injunction" to "enjoin" violations of the FTC Act "in proper cases." 15 U.S.C. § 53(b). Although this Court has never endorsed the practice, lower courts have given an expansive interpretation to this statutory provision, finding that while Section 13(b) mentions only injunctive relief, it nonetheless empowers district courts to grant "any ancillary relief necessary to accomplish complete justice, including restitution." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016).

Petitioner Universal Processing Services is a credit card processor, whose business is to facilitate credit card payments among merchants and their customers. The district court found Universal to have provided "substantial assistance or support" to a telemarketer that used automated telephone calls to sell a "credit card interest rate reduction service," called Treasure Your Success, in violation of various statutory provisions and the Commission's Telemarketing Sales Rule, 16 C.F.R. § 310.3(b) (the "TSR").

The Commission deems the provision of "substantial assistance or support" to a violator to be an independent violation of the TSR, and on this basis found Universal had violated the TSR. Importantly, Universal was not alleged to have participated directly in the unlawful scheme. Instead, the district court found that Universal had provided Treasure Your Success with merchant accounts for processing credit card transactions despite signs that Treasure Your Success was not operating lawfully, such as high rates of "chargebacks" (*i.e.*, refunds initiated by a credit card holder's bank as a result of a payment dispute).

After a court finding that the other defendants had violated the substantive provisions of the TSR and that Universal had assisted and facilitated those violations, the Commission requested, and the district court granted, an "equitable monetary relief judgment," ordering the disgorgement of $1.7 million, a sum representing the entire amount of unjust gains that had accrued to the participants in Treasure Your Success, less chargeback refunds already remitted by Universal. And, the district court imposed this judgment jointly and severally on all defendants, including Universal.

By imposing joint and several liability for the disgorgement of all revenue realized by Treasure Your Success, the court has made Universal liable for a monetary judgment that is many times larger than the total amount of fee revenue it received for its services.

Despite the label applied to it by the court below, this is not an equitable remedy of restitution or disgorgement. Instead, this order "bears all the hallmarks of a penalty." *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017). For, as this Court explained in *Great-West Life & Annuity Insurance Co. v. Knudson*, an award of equitable restitution "must seek not to impose personal liability on the defendant but to restore to the plaintiff particular funds or property *in the defendant's possession*." 534 U.S. 204, 214 (2002) (emphasis added). Because the order of the lower court holds Universal liable for an amount beyond the fees it received, that judgment exceeds the inherent equitable authority of the court, exceeds the statutory authority granted by Section 13(b), illegally imposes a financial penalty upon Universal, and impermissibly circumvents and undermines safeguards and procedures by which Congress has limited the Commission's enforcement authority.

REASONS FOR GRANTING THE PETITION

This case presents an important legal question whether the Eleventh Circuit erred in upholding an action by the Commission that imposed a penalty on Universal Processing Services by mischaracterizing that relief as equitable disgorgement under Section 13(b) of the FTC Act, which allows the Commission no authority other than to seek an "injunction." The court of appeals unlawfully held that, based on this authority to "enjoin," the Commission could impose joint and several monetary liability on Universal, and could require Universal to pay the Commission the total amount gained by the other defendants from the illegal acts—even though the court concluded that Universal was not part of a "common enterprise" that committed the underlying violations of law, did not control any of those entities, and did not share in all the proceeds that those entities took in.

Nothing in the language of Section 13(b) grants the Commission authority to impose a disgorgement penalty on Universal on a joint and several basis, especially when, by the district court's own finding, the company was not part of a common enterprise, and when the disgorgement penalty requires Universal to "disgorge" funds received not by it but by other defendants. The Eleventh Circuit's decision conflicts with decisions of the Second, Sixth, and Seventh Circuits, which have held in the context of FTC enforcement proceedings that joint and several liability may be imposed only when the facts show that the defendant ordered to make disgorgement was interconnected with or was under common control with the other defendants. The Court should grant the Petition and resolve the recurring inter-circuit dispute about when—if ever—the Commission may impose equitable monetary relief on a joint and several liability theory.

The Eleventh Circuit's decision, however, goes beyond a mere misinterpretation of a statute. The decision culminates a decades-long, creeping expansion of the use and meaning of Section 13(b)'s grant of the power to "enjoin," propelled by a casual disregard of the proper balance between legislative and executive power. The Petition presents a question raised, but not decided, by the Court in *Kokesh v. SEC,* 137 S. Ct. 1635 (2017). There, the Court grappled with the circumstances in which an equitable disgorgement remedy entered in an agency enforcement action constitutes a "penalty," and the legal consequences of that finding. This case presents an appropriate vehicle for the Court to give further consideration to the concern articulated during its deliberations in *Kokesh*, regarding the legality of the authority frequently asserted by regulatory agencies to impose penalties in civil enforcement actions that are not based on an explicit delegation by Congress but on a court's interpretation of its supposedly "inherent" equitable power.

Finally, this case warrants review by the Court because of the substantial impact that the lower court's imposition of joint and several liability without a finding of "common enterprise" will have on companies that operate electronic payment mechanisms, and on the economy generally. The decision below essentially requires payment processors to act as insurers for the actions of the large number of enterprises that utilize their payment processing services. If processors are held jointly and severally liable for the conduct of merchant-customers, processors will have to respond to the increased risk imposed upon them by passing on this cost to merchants, and ultimately to consumers. Small businesses, entrepreneurs, and internet-based companies that are trying to make the retail process more convenient and less costly for consumers will bear a disproportionate share of the burden the Eleventh Circuit's decision imposes on payment processors.

For these reasons, the Court should grant Universal's Petition for a Writ of Certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE STATUTE AND IMPROPERLY EXPANDS THE AUTHORITY OF THE COMMISSION.

A. The Commission Has Improperly Expanded Section 13(b) to Exceed Congressional Restrictions on its Civil Enforcement Authority.

The Petition before this Court turns on the interpretation and scope of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

Section 13(b) authorizes the Commission to seek a "preliminary injunction" pending the civil or administrative adjudication of "any provision of law enforced by the Commission." It also provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id*. § (b)(2).

When enacted by Congress in 1973, this amendment to the FTC Act "was expected to be used principally for obtaining preliminary injunctions against corporate acquisitions," rather than as a consumer protection tool.[2] Indeed, while the statutory language of Section 13(b) is expansive, the Commission did not attempt to use Section 13(b) in the consumer protection context for many years after its passage—and even then only after extensive internal debate about whether this use improperly stretched the statute beyond its legislative intent. *See* Howard J. Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress under Section 13(b) of the FTC Act*, 79 Antitrust L. J. 1, 4 (2013).

There was good cause for this hesitation. The FTC Act grants the Commission a broad mandate to regulate "unfair or deceptive acts or practices." But precisely because this mandate is so broad, Congress recognized a danger that businesses would be subjected to regulatory action with little or no notice of the criteria by which their conduct might be deemed

---

[2] Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited April 10, 2018).

"unfair."[3] Accordingly, Congress counterbalanced the Commission's broad mandate with a limited and tightly proscribed set of enforcement mechanisms, designed to give businesses and industries fair warning of the standards to which they will be held before any penalty or financial liability could be imposed. This balance is often described as permitting businesses a "single bite of the apple" before monetary liability can be imposed, because as a prerequisite to any civil action for damages, the Commission must first conduct an administrative adjudication and issue a cease-and-desist order providing notice of the Commission's determination that a given practice is unfair or deceptive.[4]

Following that administrative adjudication, the Commission has three civil enforcement provisions available to it:

First, Section 5(l) authorizes the Commission to bring suit to punish a violation of a cease and desist order with the imposition of civil penalties of up to $10,000 per day and injunctive and equitable relief. 15 U.S.C. § 45(l).

Second, Section 5(m) allows the Commission to seek civil penalties from defendants who engage in conduct the Commission has determined through a prior litigated proceeding to be unfair or deceptive. 15 U.S.C.

---

[3] David M. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act (Sept. 23, 2004), at 3, *available at* www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

[4] Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority; see also* FitzGerald, at 3.

§ 45(m). The defendant in a Section 5(m) action need not have been a party to the adjudicatory proceeding, but the Commission must prove that the violator had "actual knowledge that such act or practice is unfair or deceptive and is unlawful." *Id*. In this way, Section 5(m) allows the Commission to avoid repeated adjudicatory proceedings over the same practice, but preserves the statutory "one free bite" policy that protects businesses from being subjected to penalties without notice that their behavior has been deemed unfair or deceptive.

Third, Section 19 permits the Commission to sue for consumer redress, and authorizes courts to "grant such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. § 57b. However, Section 19 only permits such remedies *after* the issuance of a final cease and desist order against the defendant—and even then only if "the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." *Id*., § 57b(a).

Together, Sections 5(l), 5(m), and 19 provide the Commission with extensive, but not unlimited, authority to seek legal and equitable remedies, including damages, civil penalties, and equitable relief. But the exercise of this authority is explicitly conditioned on the prerequisites of (1) a prior administrative adjudication, and (2) the proof of varying degrees of knowing conduct by the defendant.

Section 13(b) is altogether different. Unlike all other civil enforcement powers available to the Commission for consumer protection actions, Section 13(b) requires neither a prior administrative adjudication nor any proof of knowing conduct. In this way, it presents a considerably more expedient means for the Commission to bring a case before the courts. Recognizing this expedience, in the early 1980's the Commission began to make creative, but careful, use of Section 13(b), "warily selecting cases with compelling facts that established clear violations of well-established legal standards," so as to persuade courts to adopt an expansive interpretation of the Commission's powers under Section 13(b).[5] This effort was successful: The lower courts now routinely find that "a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it." *FTC v. Southwest Sunsites, Inc*., 665 F.2d 711, 717-18 (5th Cir. 1982).

Having succeeded in persuading the courts to adopt this broad interpretation, the Commission's use of Section 13(b) has expanded exponentially—to the point that the Commission has all but abandoned use of its other authorized enforcement mechanisms. As of December 2017, with respect to consumer protection matters, the Commission had 91 active injunctive cases under Section 13(b), zero administrative adjudications pending, and only four pending civil penalty cases.[6] However, as two former FTC enforcement officials observe, "sometimes success can encourage overreaching."[7] That is precisely what has happened

[5] *See* FitzGerald, at 21.

[6] S*ee* Federal Trade Commission Office of General Counsel, *Quarterly Federal Court Litigation Status Report* (June 30, 2017), *available at* www.ftc.gov/system/files/attachments/quarterly-litigation-status-report/2017_06_quarterly_litigation_report.pdf. Data on the Commission's administrative adjudications are available at www.ftc.gov/enforcement/cases-proceedings/adjudicative-proceedings (last visited April 10, 2018).

[7] Beales & Muris, 79 Antitrust L. J. at 4.

with respect to Section 13(b), as demonstrated by the opinion of the court below.

B. The Decision Below Improperly Expands the Scope of Remedies Available Under Section 13(b).

While the Commission's choice to pursue its consumer protection agenda through the use of Section 13(b) allows it to bring cases before the courts more quickly than it could under its other statutory provisions, that decision imposes a tradeoff on the Commission: Section 13(b) allows courts only to "enjoin" a violation, nothing more. 15 U.S.C. § 53(b).

Section 13(b) is thus unlike every other relevant civil enforcement power available to the Commission, each of which provide greater specificity about the remedial authority delegated by Congress. It is unlike Section 5(l), which allows "civil penalties," "mandatory injunctions," and "such other and further equitable relief as [courts] deem appropriate." It is unlike Section 5(m), which permits "civil penalties." And, it is unlike Section 19, which permits the Commission to seek "such relief as the court finds necessary to redress injury to consumers," including but not limited to "rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages. . . ."

As the Commission has applied Section 13(b) to more and more cases, it has responded to this inherent limitation of authority by asking courts, in increments, to stretch to an ever-wider degree the ancillary equitable remedies supposedly implied in, but not explicitly granted by, that Section. This creeping expansion started small, with, for instance, a request that the court equitably compel a defendant to notify past consumers of certain warranty rights for their purchases. *See FTC v. Virginia Homes Manufacturing Corp*. 509 F. Supp. 51, 55 (D. Md. 1981). With this toehold, the Commission then stretched, for example, to a request that the court equitably freeze assets pending the outcome of an action under Section 19 for consumer redress, so as to ensure funds would not be dissipated before the outcome of that suit. *See FTC v. Security Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1316 (8th Cir. 1991). From there, the Commission expanded its reach further by requesting that courts directly disgorge profits from defendants through an order of equitable restitution, skipping altogether a separate action for consumer redress. *See, e.g*., *FTC v. Verity Int'l, Ltd.,* 443 F.3d 48, 66 (2d Cir. 2006). And now, in the decision below, the Commission has persuaded the Eleventh Circuit to hold a defendant liable for the entire proceeds of the scheme, even though it (i) was not directly engaged in a fraudulent scheme; (ii) was not part of a common enterprise with the perpetrators; and (iii) did not receive any more than an incidental profit from providing credit card processing services to those perpetrators.

Through this effort, the Commission has led the lower courts, step after step, to stray far outside the bounds Congress set in Section 13(b), and into a complacent reliance upon sweeping and categorical *obiter dicta* pronouncements in prior opinions about the breadth of remedies available under Section 13(b). The cumulative effect of this campaign of expansion is that a statutory provision intended merely to stop anticompetitive mergers, which grants only the authority to seek an "injunction," has supplanted a carefully structured administrative regime established by Congress, and is being used by the lower courts to impose monetary judgments that are indistinguishable from legal damages or civil penalties. The Commission has thus taken the lower courts on a path this Court has deemed off-limits, most recently in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). There, this Court rejected the imposition of joint and several liability under civil forfeiture laws, holding that:

> Permitting the Government to force other co-conspirators to turn over untainted substitute property would allow the Government to circumvent Congress' carefully constructed statutory scheme, which permits forfeiture of substitute property only when the requirements of [21 U.S.C.] §§ 853(p) and (a) are satisfied. There is no basis to read such an end run into the statute.

Id. at 1634. The same principle applies with more force here, as the decision below not only allows an "end run around the statute" to require Universal to turn over untainted funds, but does so in the absence of any allegation that Universal was a part of a conspiracy or common enterprise with the primary violators.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO ADDRESS THE QUESTION LEFT OPEN BY *KOKESH* AND DELINEATE THE PROPER SCOPE OF EQUITABLE RESTITUTION.

As a result of the joint and several award entered by the court below, Universal is liable for a monetary judgment far exceeding any amount it received for its violation of the Commission's TSR—a profit that came only from fees paid to it by the primary violator. Under the principles set forth by this Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Kokesh v. SEC*, 137 S. Ct. 1635

(2017), that award is not an award of equitable disgorgement, as it was labeled by the court, but rather a penalty. There is no statutory authority for the Commission to impose a penalty under Section 13(b), and therefore the order affirmed by the Eleventh Circuit is unlawful. The decision constitutes the broadest application yet of the creeping expansion of the Commission's remedial authority.

A. An Order of Equitable Restitution Cannot Exceed the Wrongful Gain Realized by a Defendant.

As this Court stated in *Great-West Life*, "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212. "Both courts at law and equity courts made restitutionary awards and orders, but the traditional equity versions of restitution were usually distinct from the law versions." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* §2.1 (3d ed. 2018). And, as this Court has made explicitly clear, where a statute permits only equitable remedies, this inherently limits any award of restitution "to the form of restitution traditionally available in equity," meaning "the return of identifiable funds (or property) *belonging to the plaintiff and held by the defendant*." *Great-West Life*, 534 U.S. at 214 (emphasis added). At equity, "even the willful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder." Dobbs § 4.4. Therefore, equitable restitution "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property *in the defendant's possession*." *Great-West Life*, 534 U.S. at 214 (emphasis added). The order affirmed by the Eleventh Circuit violates this fundamental principle of equity, as it holds Universal liable for the payment of money that is not—and never was—in Universal's possession, but rather is or was in the possession of the actual perpetrators of the Treasure Your Success scheme.

B. By Imposing Joint and Several Liability, the Eleventh Circuit Fundamentally and Improperly Altered the Nature of the Remedy Imposed, and Deepened a Conflict Among the Circuits.

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962), this Court established that, where a money judgment is sought, the distinction between claims at law and claims at equity does not "depend upon the choice of words used in the pleadings" but requires an assessment of the nature of the claim and the theory of recovery. Regardless of the fact that the court below labeled its judgment as an equitable remedy, the imposition of joint and several liability renders Universal liable for payment of funds in excess of the amount by which it was unjustly enriched, and therefore constitutes legal damages. And because Section 13(b) does not delegate to the courts authority to impose legal damages, the judgment upheld by the Eleventh Circuit was improper.

Joint and several liability is not historically a power of the equitable courts, but rather, as this Court recognized in *Honeycutt*, "a creature of tort law." 137 S. Ct. at 1631. It provides that when two or more tortfeasors cause "a single and indivisible harm to the injured party," each of those tortfeasors "is subject to liability to the injured party for the entire harm." Restatement (Second) of Torts § 875 (1979). The purpose of this rule is to ensure that where the ability to recover from one defendant is impaired, "other defendants, rather than an innocent plaintiff

[are] responsible for the shortfall." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221 (1994). Thus, the purpose of joint and several liability is to restore the plaintiff wholly, without regard to the amount of gain any given defendant received through its tortious conduct.

This concept is fundamentally incompatible with an award of equitable restitution, because equitable restitution is unconcerned with the amount of any loss experienced by the innocent party. The Eleventh Circuit has properly recognized this limitation in prior cases under the FTC Act, holding that equitable restitution "considers only the defendants' unjust gain and ignores consumer loss." *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). In contrast to joint and several liability, the purpose of an order of equitable restitution is "not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996).

The Eleventh Circuit's decision also conflicts with decisions of its sister courts in the Second, Sixth, and Seventh Circuits, which have held in prior FTC enforcement cases that joint and several disgorgement is only appropriate where the defendants were members of a common enterprise responsible for the conduct constituting the violation, or there was evidence of control over the primary violator. *See, e.g.*, *FTC v. EMA Nationwide, Inc.*, 767 F.3d 611, 635 (6th Cir. 2014); *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964).

C. The Remedy Imposed by the Court Below Was an Impermissible Penalty Under *Kokesh*.

In *Kokesh*, this Court held that an equitable restitution order pursuant to the Securities and Exchange Act bore "all the hallmarks of a penalty." 137 S. Ct. at 1644. So too here.

The opinion in *Kokesh* confined itself to the question of whether the statute of limitations should apply to the SEC's suit for restitution, and explicitly did not reach the issue of whether the Court had the authority to award disgorgement as an equitable remedy, or whether the principles of equity were properly applied. *Id*. at 1643 n. 4. But several members of this Court expressed skepticism during oral argument about the SEC's ability to imply a right to seek disgorgement through the inherent equitable power of the Court. *See, e.g.*, Tr. of Oral Argument, *Kokesh v. SEC*, at 9:5–11 (Sotomayor, J.: "Can we go back to the authority? . . . [I]f they're not doing restitution, how could that be the basis of disgorgement?"); 31:16–23 (Roberts, C.J.: "One reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress."); 52:14–16 (Gorsuch, J.: "Well, here we don't know, because there's no statute governing [disgorgement]. We're just making it up."). That same issue of statutory authority is present here, thus presenting an ideal vehicle to reach that issue and provide much needed definition of the authority of the lower courts.

The "hallmarks" of a penalty identified in *Kokesh* are that it is imposed to vindicate a public, rather than private right; and that it is imposed to punish or deter, rather than to compensate the victim. 137 S. Ct. at 1644-45. Both factors are present here. There is no requirement that restitution paid pursuant to Section 13(b) be used for consumer redress; it can and is paid into the U.S. Treasury—a finding relied upon by this Court in *Kokesh*. *Id*. at 1644. And, the Eleventh Circuit explicitly noted in affirming the decision below that the amount of the order of restitution was "based on the defendant's unjust enrichment, not the consumer's losses. . . ." *FTC v. Universal Processing Servs.*, No. 16-17727 (11th Cir. Dec 13, 2017) at 17. And on prior occasions, the Eleventh Circuit has acknowledged that with regard to the Commission's use of Section 13(b) to seek disgorgement, "the purpose . . . is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain[,]" which thereby serves a "deterrence function." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (internal quotations omitted).

"If properly awarded, disgorgement of gains is not punitive." Dobbs, § 4.4(5). But the award upheld by the Eleventh Circuit was indeed punitive, and therefore improper. In *Tull v. United States*, 481 U.S. 412, 422 (1987), this Court held that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." Because the Commission's authority under Section 13(b) is limited to "injunctions" and whatever ancillary equitable remedies accompany them, the remedy affirmed below constitutes overreach of the regulatory powers of the Commission and the equitable powers of the court.

III. THIS CASE IS OF SUBSTANTIAL IMPORTANCE TO THE U.S. ECONOMY.

A. Payment Services Providers Are Critical to the U.S. Economy.

Electronic payment service providers supply critical infrastructure without which modern commerce would be impossible. The services and technology they provide allow a customer to present a shopkeeper with a plastic card or a mobile telephone, and moments later leave the shop with his or her purchases; or, increasingly, to click a few buttons on a computer screen and conduct business with someone they will never meet, who might be located anywhere in the world.

The importance of these transactions to the national economy is vast and growing: Two-thirds of all retail purchases in the U.S. do not involve cash, and this share is increasing.[8] Indeed, 24% of Americans report that in a typical week they make no purchases at all with cash.[9]

Payment processors are the entities that allow all of these deceptively simple-seeming transactions to occur. "Without them, the payment system as we know it would not exist."[10] At one end, payment processors

---

[8] Wendy Matheny, Shaun O'Brien, and Claire Wang, Federal Reserve Cash Products Office, *The State of Cash* (Nov. 2016), at 3, *available at* www.frbsf.org/cash/files/FedNotes-The-State-of-Cash-Preliminary-Findings-2015-Diary-of-Consumer-Payment-Choice.pdf.

[9] Aaron Smith and Monica Anderson, Pew Research Center, Online Shopping and E-Commerce (Dec. 19, 2016), at 3, *available at* www.pewinternet.org/2016/12/19/online-shopping-and-purcha sing-preferences/.

[10] Ramon P. DeGennaro, *Merchant Acquirers and Payment Card Processors: A Look Inside the Black Box*, Federal Reserve Bank of Atlanta Economic Review (2006), at 28, *available at* www.

conduct authorization, verifying that a customer's card is valid and that there are sufficient funds available to pay for the transaction. At the other end, payment processors manage the clearing and settlement process, ensuring funds are transferred from the consumer's account to the merchant's account. And in between, payment processors are responsible for managing payment disputes, conducting fraud monitoring, and managing "chargebacks," which occur when a consumer disputes a transaction directly with his or her financial institution instead of the merchant.[11]

Payment processors play a limited role in resolving disputed transactions. Credit and debit card users often have up to three months to initiate a chargeback on a disputed transaction, and there is a presumption in favor of consumers.[12] Chargebacks are generally deducted from the merchant's account immediately, and only recovered by the merchant if and when the dispute is resolved in its favor.[13] As a result, there is a limited window between when an electronic payment is initiated and when it is final and irreversible. Under the contractual terms imposed by payment card networks (*e.g.*, MasterCard or Visa), if a merchant fails during that limited window, the payment processor is liable for the amount of any chargebacks and must make a refund to the consumer.[14] Beyond that window, however, the processor is not responsible. Of course, the cost associated with accounting for this

---

frbatlanta.org/-/media/documents/research/publications/economic-review/2006/vol91no1_degennaro.pdf.

[11] *Id*.

[12] *Id*. at 34.

[13] *Id*.

[14] *Id*.

responsibility is passed on to merchants, and eventually consumers, in the form of higher payment processing fees.

The decision upheld by the Eleventh Circuit greatly exacerbates the risk posed to payment processors, by making them responsible not only for the refund of pending chargebacks, but liable as well for the entire proceeds of allegedly illegal activity by any business to which they provide processing services, and for the entire period that the business used the processing services, simply because the payment processor is solvent while the wrongdoer is not. If the decision below were to stand, the cost of processing services would increase exponentially.

B. Increased Payment Processing Costs Burden the Entire Economy, Disproportionately Harm Small Businesses, and Impair Free Market Competition.

Because payment processing is a competitive industry, providers compete on the basis of price and engage in underwriting so as to offer the lowest service fees to those businesses that pose the lowest risk of chargeback loss. For example, some businesses, like health clubs, are inherently more prone to buyer's remorse that can encourage consumers to initiate chargebacks even if there was nothing wrong with the service provided. Other business, like magazine subscriptions, pose a higher risk due only to the delay between the sale and the delivery of the product.[15]

[15] *Id*. at 34-35.

Accordingly, payment processors have strong incentives to evaluate the creditworthiness of the merchants to which they provide services.[16]

Internet-based businesses, small businesses, startup companies, and enterprises with innovative business models all pose higher chargeback risks. These enterprises are considered high risk by payment processors, and thus pay substantially higher payment processing fees. The burden of the Commission's overreach and the Eleventh Circuit's decision will thus fall hardest on these businesses, which are among the most important to the continued growth of the U.S. economy: small businesses, service industries, and innovative internet-based companies.[17] Eighty percent of all Americans (and growing) make purchases online, with roughly 50% of the growth in U.S. retail sales coming from internet and e-commerce businesses.[18] It is precisely this engine of economic growth which is most vulnerable to the Commission's unlawful use of Section13(b) to impose joint and several liability. Furthermore, there is an already extreme consolidation in the online retail market that will only be accelerated if new competitors are burdened with higher costs, particularly because the most dominant online businesses operate their own payment proces-

---

[16] *Id*. at 36-40.

[17] *See* Jeffrey A. Eisenach, *Economic Effects of Imposing Third-Party Liability on Payment Processors*, NERA Economic Consulting (July 2014), at 8, *available at* www.electran.org/wp-content/uploads/Exhibit-A-NERA-Study.pdf.

[18] Pew Research Center, at 2; *also* U.S. Census Bureau News, U.S. Department of Commerce, *Quarterly Retail E-Commerce Sales*, 4th Quarter 2017 (Feb. 16, 2018), *available at* www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

sors, and thus do not face the same increased transaction costs that would inhibit smaller competitors if the Eleventh Circuit's decision is allowed to stand.

C. Imposing Joint and Several Liability on Payment Processors Will Not Combat Fraud.

While the specter of joint and several liability for the conduct of merchants will raise processing costs for merchants who pose a "high risk" based on chargeback rates, "there is no basis for believing that a processor's ability to monitor return and chargeback transactions, and to do financial underwriting on the basis of such data, translates into the ability to make meaningful inferences about law enforcement matters" or to discern legitimate businesses from frauds.[19] "Thus, the increased compliance costs imposed on Processors by third-party liability costs would be borne by a wide group of legitimate businesses in the hope that a few illegitimate businesses might be deprived of access to the payment system."[20] This is precisely the sort of unlimited enforcement that the administrative adjudication process created by Congress through the FTC Act was intended to prevent, and further demonstrates both the impropriety of the Commission's use of Section 13(b) to circumvent that adjudicatory process, and the need for this Court to grant the Petition to address it.

---

[19] Eisenach at 7.

[20] *Id.*

CONCLUSION

This case presents an ideal vehicle for this Court to address the issues left open by its decisions in *Kokesh v. SEC*, and to provide necessary definition of the authority of the lower courts regarding the proper scope of financial liability sought by regulatory agencies under the guise of equitable relief. For all the foregoing reasons, and the reasons stated in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN F. COONEY
VENABLE LLP
600 Massachusetts Ave, NW
Washington, DC 20001
(202) 344-4000

LEONARD L. GORDON
Counsel of Record
MICHAEL S. BLUME
JOHN C. VAZQUEZ
VENABLE LLP
1270 Avenue of the Americas
New York, NY 10020
lgordon@venable.com
(212) 307-5500

Counsel for Amicus Curiae
The Electronic Transactions Association

April 16, 2018