

No. 19-507

IN THE

Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ED
DANTUMA ENTERPRISES, INC., EDWARD
DANTUMA, DRIES DANTUMA, DIRK DANTUMA,
JEFF DANTUMA, and BRENDA SCHANG,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The FTC concedes the circuit split created by the Seventh Circuit's landmark decision in *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) warrants this Court's review. BIO.4. Indeed, the FTC has now sought this Court's review in that case, highlighting the extraordinary importance of the circuit split. But the FTC's opposition brief in this case offers a series of contradictory and misleading reasons, including an erroneous waiver argument, why this Court should deny review here or, alternatively, hold it pending this Court's decision in *Liu v. SEC*, No. 18-1501, in which this Court granted certiorari on November 1, 2019. The FTC's arguments only underscore why review of this case is vital now.

Since filing its brief in opposition on December 13, the FTC has totally retracted its argument to hold the case pending *Liu*. The FTC's *Credit Bureau* petition seeks this Court's review "notwithstanding the grant of certiorari in *Liu*" and concedes that the answer to *Kokesh's* question of whether SEC disgorgement is a penalty "will not resolve whether Section 13(b) authorizes district courts" to award monetary relief. Pet. at 11, *FTC v. Credit Bureau Ctr, LLC*. The FTC insists that the circuit split over § 13(b) "is distinct from the question in *Liu*, will not be resolved in that case, and warrants independent review." *Id.*

The FTC's about-face is not surprising. Even its brief in opposition in this case notes that the SEC and FTC statutory schemes are "not identical," and the purported implied remedies the FTC has urged courts to read into § 13(b) will not "necessarily rise and fall" together with this Court's decision in *Liu*. BIO.7-8. Delaying review of an exceptionally important circuit

split never made sense. Were this Court *only* to decide in *Liu* that SEC-style disgorgement is a penalty beyond district court equity powers, the circuit split over whether district courts can continue inferring monetary relief into § 13(b) would remain. *Credit Bureau* holds § 13(b) forecloses *any* monetary relief. And it reached that conclusion based on § 13(b)'s text and the structure of the FTC Act *without* addressing *Kokesh's* penalty question.

The SEC's statutory scheme is demonstrably different than the FTC Act. District courts have Congressional authority to fashion "equitable remedies" in SEC enforcement actions. The SEC stakes its claim to disgorgement in large part on that statutory grant. In sharp contrast, the FTC Act's injunction statute, § 13(b), grants no such authority. The FTC's decades-long project of gradually expanding implied remedies under § 13(b) to the point of including practically any relief the FTC's desires has depended on the statutory text not mattering. Essential separation-of-powers issues and the continued vitality of *Porter* and *Mitchell* are at stake in this petition. That is not necessarily true of *Liu*. The parties now agree on the urgency of this Court's review of the circuit split. And PBS's case is the best vehicle for it.

The FTC's argument for denying the petition outright is the same meritless waiver contention the SEC tried unsuccessfully against the petitioners in *Liu*. The FTC baselessly contends PBS supposedly forfeited the right to challenge implied monetary remedies under § 13(b) when, seven years ago, PBS failed to predict the massive changes in the law brought on by *Kokesh* and *Credit Bureau*. But the Ninth Circuit decided PBS's *Kokesh* and textualist

challenges under § 13(b) on the merits, without any mention of waiver. PBS *did* object to § 13(b) monetary relief, both in the Ninth Circuit and the district court. And, as in *Liu*, PBS's petition raises a pure question of law based on *Kokesh* and *Credit Bureau*, decisions that did not exist during the district court litigation. The issue was preserved, and this case remains the perfect vehicle to review the circuit split.

I. The FTC has retracted its argument to hold this case pending *Liu*.

The FTC has taken a completely different tack since filing its opposition brief. It now concedes *Liu* will not decide the circuit split created by *Credit Bureau* and advocates for this Court's immediate review because of the extraordinary importance of the issue. See *Credit Bureau* Pet. at 1, 11. This Court should therefore treat as withdrawn the opposition brief's request to have this case held pending *Liu*.

II. It is essential for this Court to decide the circuit split under the FTC Act.

This case should not in any event be held pending *Liu*. Having to argue by analogy from a SEC decision is how PBS ended up with an affirmed \$23.8 million judgment in the first place. The Ninth Circuit was quick to distinguish *Kokesh* in the decision below. See Pet. App. 3a. Forcing PBS to extrapolate from a different statutory framework once *Liu* is decided is likely to leave the circuit split unresolved. That may have been the FTC's original preference—to leave the split in place and allow it to continue bringing enforcement actions in FTC-friendly circuits. But that is not a reason to hold this case. It is grounds for granting the petition. Cf. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051,

2066 (2019) (Kavanaugh, J., concurring) (rejecting an argument under the Hobbs Act that would obviate circuit splits over agency interpretations of the law, observing “[t]he Government would prefer to choke off all litigation at the pass. But circuit splits and this Court’s review happen all the time with all kinds of federal laws.”).

The question presented in *Liu* is “[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as ‘equitable relief’ for a securities law violation even though this Court has determined that such disgorgement is a penalty.” Br. of Pet’rs i, *Liu v. SEC*, No. 18-1501 (U.S. Dec. 16, 2019). PBS raises a similar issue as its second question, Pet. i., and it is undoubtedly relevant. But it is a separate issue apart from the text-based question of whether § 13(b) allows monetary relief. *Credit Bureau* recognized that difference, noting “[b]ecause we hold that section 13(b) doesn’t authorize monetary relief, we have no need to consider Brown’s alternative arguments that the Commission can’t pursue penalties or legal—as distinct from equitable—restitution under section 13(b).” *Credit Bureau*, 937 F.3d at 786 n.4 (citing *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O’Scannlain, J., concurring)). Were this Court to confine its holding in *Liu* to the penalty question presented, implied remedies under § 13(b) could continue as long as they were not penalties, and the circuit split over the interpretation of § 13(b) would remain.

This is not to say that *Liu* excludes text-based arguments. To be sure, the petitioners in *Liu* challenge the SEC’s statutory authority to recover disgorgement. See *Liu* Reply Br. for Pet’rs 1 (“Nowhere has Congress explicitly empowered the

SEC to obtain disgorgement in judicial proceedings”). And *Kokesh* suggests that whether SEC statutes allow equitable disgorgement, and whether SEC disgorgement is actually equity, are linked questions. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017) (reserving review of “whether courts *possess authority* to order disgorgement in SEC enforcement proceedings” and “whether courts have properly applied disgorgement principles in this context.”) (emphasis added). But as the FTC concedes, the SEC statutes and FTC Act have materially different statutory provisions and structures. See BIO.7-8.

The Securities Act of 1933 and Securities Exchange Act of 1934 allow forward-looking injunctions similar to § 13(b). 15 U.S.C. § 77t(b) (authorizing district court injunctions whenever “any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter”), § 78u(d)(1) (same). But the ’34 Act additionally allows that “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). Section 13(b) has no “equitable relief” provision.

The SEC has argued that disgorgement is implied in this statutory grant of “any equitable relief.” See *Liu* BIO.5-7. The FTC in contrast has argued, against all logic, that it is the *lack* of a specific grant of equitable relief from Congress in § 13(b) actions that somehow broadens a court’s equity powers. See Oral Arg. at 21:30-26:14, *FTC v. Credit Bureau*, No. 18-2847 (7th Cir. April 17, 2019).¹ Even if the decision in

¹ Available at http://media.ca7.uscourts.gov/sound/2019/cm.18-2847.18-2847_04_17_2019.mp3 (last visited December 18, 2019).

Liu unequivocally rejects the SEC’s argument that “equitable remedies” includes disgorgement, the FTC will *still* argue its equity powers under § 13(b) are broader.

Other differences in the statutes make it unlikely the decision in *Liu* would decide the § 13(b) split. The ‘34 Act, for example, expressly authorizes disgorgement in certain SEC administrative proceedings, 15 U.S.C. § 78u-2(e), while the ‘33 Act authorizes civil monetary penalties, 15 U.S.C. § 77u(d). The FTC Act by contrast allows the FTC to recover monetary relief in district court actions under the procedurally intensive provisions of § 19, which specifically disallows penalties. *See* 15 U.S.C. § 57b(b). The rulings against § 13(b) monetary relief emphasize this careful balance between § 13(b)’s forward-looking injunction, § 19’s monetary remedies and procedures, and § 5’s administrative remedies. *See Credit Bureau*, 937 F.3d at 783–84; *AMG*, 910 F.3d at 431–32 (O’Scannlain, J., concurring). That analysis does not exactly fit under the SEC’s framework.

The stakes are also different. On November 18, 2019, the United States House of Representatives passed legislation “[t]o amend the Securities Exchange Act of 1934 to allow the Securities and Exchange Commission to seek and Federal courts to grant disgorgement of unjust enrichment, and for other purposes.” H.R. 4344, 116th Cong. (2019).² This legislation has been referred to the Senate. If passed and signed into law, the amendment could limit this Court’s forthcoming ruling in *Liu* to an outdated statutory scheme.

² Available at <https://congress.gov/bill/116th-congress/house-bill/4344/text> (last visited December 19, 2019).

Invariably, distinctions from the *Liu* decision would follow. The lower courts' struggles to interpret and apply *Kokesh* provide a discouraging preview of how the FTC and some courts are likely to view a ruling in *Liu* that potentially strikes down SEC disgorgement. The FTC succeeded before in getting courts in § 13(b) actions to dismiss *Kokesh*'s penalty analysis as distinguishable, if not utterly irrelevant. See, e.g., Pet. App. 3a; *AMG*, 910 F.3d at 427 (holding “[b]ecause *Kokesh* and *Commerce Planet* are not clearly irreconcilable, we remain bound by our prior interpretation of § 13(b).”); *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98, 137 (E.D. Pa. 2018) (limiting *Kokesh* because it “did not involve section 13(b) but instead dealt with federal securities law”). It is optimistic in the extreme to expect the FTC and the same courts that cast aside *Kokesh*'s penalty analysis to apply the eventual decision in *Liu* to § 13(b) case law.

The circuit split is too important, and too fundamentally tied to the unique text and structure of the FTC Act, to leave it either unresolved completely or, worse, in a fog of questions and distinctions about *Liu*'s applicability to the FTC Act. For the circuit split to be decided, therefore, this Court must decide it directly under § 13(b).

III. PBS's case remains the perfect vehicle to decide the split.

The FTC conspicuously singles this case out, with misleading contentions about PBS's defenses below, as a supposed improper vehicle. The FTC notably does not make the same claim in the companion case seeking review of the circuit split, *FTC v. AMG*, No. 19-508. That makes no sense. The Ninth Circuit dealt with the merits of the *Kokesh* and § 13(b) challenges as much in PBS's appeal as it did in *AMG*, using

exactly the same reasoning. *Compare* Pet. App. 3a with *AMG*, 910 F.3d at 426–27. But the FTC apparently prefers to litigate the circuit split in the scandalous backdrop of *AMG*'s “large-scale” billion-dollar payday loan scheme, see *AMG* BIO.2, rather than PBS's family-owned magazine subscription business. Or, the FTC prefers to litigate the circuit split on its own terms in *Credit Bureau*, through its newly filed petition seeking review from the Seventh Circuit. That relieves the FTC of having to defend upfront the Ninth Circuit's extreme version of § 13(b) monetary relief, and Judge O'Scannlain's blistering criticism of that precedent.

But PBS's odyssey from a manageable \$191,212 award against four PBS petitioners to a mammoth \$23.8 million judgment against all seven makes this case a uniquely ideal vehicle to review the circuit split. The Ninth Circuit's vacatur of the original award, based on supposed violations of court-made rules governing § 13(b) monetary awards, makes clear that purported district court “equity powers” under § 13(b) are a fiction in the Ninth Circuit. See *FTC v. Publishers Bus. Serv's, Inc.*, 540 Fed. Appx. 555, 556–57 (9th Cir. 2013). The vacatur demonstrates firsthand just how radically the Ninth Circuit has rewritten the statute, as the court deems any deviation from the detailed rules and procedures the Ninth Circuit self-legislated for § 13(b) monetary relief an abuse of discretion. *Id.* This bald intrusion into the legislative process is what makes the federal issues posed by the circuit split so important. See *I.N.S. v. Chadha*, 462 U.S. 919, 958 (1983) (“the carefully defined limits on the power of each Branch must not be eroded”).

The FTC now seeks to use that original \$191,212 award as purported evidence that PBS forfeited their chance at review. The SEC tried almost exactly the same waiver argument in *Liu*. *Liu* BIO.12 (“Petitioners have waived—or, at the very least, forfeited—the broad contention that the Commission categorically lacks authority to seek disgorgement in enforcement actions.”). But for all the same reasons this Court properly reviewed *Liu*, the Court should review this case.

The FTC spent six pages of its Ninth Circuit brief arguing that PBS supposedly waived their *Kokesh* and textual challenges to § 13(b) monetary relief. FTC C.A. Br. at 26-34, No. 17-15600 (9th Cir. Oct. 30, 2017). The Ninth Circuit nonetheless decided PBS’s challenges on the merits, an implicit rejection of the waiver contentions. Pet. App. 2a-3a. An issue actually decided on the merits by an appeals court is inarguably ripe for this Court’s review. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992).

The FTC misleadingly cites language from the decision below relating to the supposed necessity of a cross appeal from the original judgment. BIO.7. But the Ninth Circuit’s cross appeal discussion related to a different issue entirely—an early summary judgment ruling on § 5 liability. *See* Pet. App. 6a. That the Ninth Circuit found a waiver of that particular argument but addressed PBS’s legal challenges to § 13(b) monetary relief on the merits only proves the FTC’s waiver contentions failed below.

It is beyond dispute that PBS challenged § 13(b) monetary relief both in the Ninth Circuit, *see* Pet. App. 2a-3a, and in the district court, *see* PBS Br. on Damages at 22-24, No. 2:08-cv-00620, ECF No. 316 (D. Nev. July 19, 2016) (“There is no authorization of

monetary relief [under § 13(b)], and decisions that have expanded the text to permit it offend basic principles of statutory construction.”). The FTC has to reach back to the earliest stages of the case to make its waiver argument. BIO.7. But even in the first appeal, the individual PBS petitioners argued that, should the Ninth Circuit vacate the judgment, it should not grant “joint and several liability,” as “[m]aking the individuals personally liable for gross revenue” impermissibly “transforms the relief from essentially equitable relief to money damages.” PBS C.A. Br. at 37-38, No. 11-17270, ECF No. 24 (9th Cir. Apr. 13, 2012). For support, PBS cited the then-leading case on equitable relief, *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002). These arguments laid the foundation for PBS’s later *Kokesh* and § 13(b) text-based challenges.

The FTC neglects to mention that its appeal of the first judgment resulted in a vacatur of an extremely favorable judgment for PBS. Four of the original defendants were found to have *zero* liability, while the other petitioners had their liability limited to the lowest proposed alternative. *See FTC v. Publishers Bus. Serv’s, Inc.*, 2:08-CV-00620-PMP, 2011 WL 7462205, at *2 (D. Nev. July 25, 2011). After the Ninth Circuit vacated that judgment and remanded the case, PBS expounded on its arguments from the appeal, directly challenging Ninth Circuit precedent on § 13(b) monetary relief. PBS thus preserved the issue. *See Yee*, 503 U.S. at 534 (“[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”).

As in *Liu*, this case presents “a quintessential question of law considered by the Ninth Circuit de

novo and ripe for this Court’s review.” *Liu*, Reply Br. of Pet. at 10. The Ninth Circuit decided PBS’s *Kokesh* and § 13(b) challenges on the merits precisely because they were “purely legal” issues “fully briefed” by the parties. The Ninth Circuit does not treat such wholly legal questions as waivable. See *Bullock v. Berrien*, 688 F.3d 613, 618 (9th Cir. 2012).

Nor are arguments based on new law waivable. See *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 543 (9th Cir. 2013). *Kokesh* was years from being decided at the time of the first appeal, and the circuit split created by *Credit Bureau* came two years after *Kokesh*. The contention that PBS forfeited arguments explicitly based on these intervening decisions is meritless.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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