

IN THE SUPREME COURT OF THE UNITED STATES

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AMG CAPITAL MANAGEMENT, LLC; BLACK CREEK CAPITAL CORPORATION;  
BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC;  
SCOTT A. TUCKER; PARK 269 LLC; AND KIM C. TUCKER,

*Petitioners,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

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APPLICATION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

AMG Capital Management, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC, Level 5 Motorsports, LLC, Scott A. Tucker, Park 269 LLC, and Kim C. Tucker (“Petitioners”) respectfully request a 30-day extension of time, to and including October 18, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *FTC v. AMG Capital Management, LLC*, No. 16-17197 (9th

Cir.). The court of appeals entered judgment on December 3, 2018, and denied rehearing and rehearing en banc on June 20, 2019. Unless extended, the time for filing a petition for a writ of certiorari will expire on September 18, 2019. Under this Court’s Rule 13.5, this application is being filed at least 10 days before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1). A copy of the court of appeals’ opinion is attached as Exhibit 1, and a copy of the court of appeals’ order denying rehearing en banc is attached as Exhibit 2.

As explained below, the extension is necessary to permit counsel of record—who was not retained until after merits briefing in the Ninth Circuit—to familiarize himself with the voluminous record, to determine whether to file a petition for a writ of certiorari, and, if one is to be filed, to see to its preparation and submission. Counsel of record also has been heavily engaged with the press of other matters.

1. This case concerns whether § 13(b) of the Federal Trade Commission Act—the text of which addresses only the Federal Trade Commission’s authority to seek *injunctive* relief, see 15 U.S.C. § 53(b)—authorizes the Commission to obtain equitable *monetary* relief. In 1914, Congress enacted the FTC Act, which created the Federal Trade Commission and gave it the power to “prevent” persons from “using unfair methods of competition in commerce.” Pub. L. No. 203, ch. 311, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)). Congress later expanded the FTC’s mandate. Current § 5 of the FTC Act further “empower[s]

and direct[s] [the Commission] to prevent” persons from using “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §45(a)(2).

The FTC Act provides the Commission with various administrative tools for carrying out its mission. See 15 U.S.C. §45(b) (administrative adjudication), §57a(a)-(j) (rulemaking authority and procedures). Over time, Congress addressed perceived gaps in the Commission’s enforcement powers by granting it authority to pursue certain relief in district court. In 1973, Congress amended §13(b) of the FCT Act to authorize the Commission to obtain injunctive relief to prevent harm to consumers “pending the issuance of a complaint by the Commission” and until that complaint is resolved. See Trans-Alaska Pipeline Authorization Act, §408(f), Pub. L. No. 93-153, 87 Stat. 584, 592 (1973) (codified as amended at 15 U.S.C. §53(b)). Where the Commission “has reason to believe” a person “is violating, or is about to violate” §5, §13(b) authorizes it to seek a “temporary restraining order or a preliminary injunction” in district court to “enjoin” the allegedly offending “act or practice.” 15 U.S.C. §53(b). The Commission may obtain that relief if it can show that, “weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” *Ibid.* Section 13(b) also states that, “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Ibid.*

“Although” the text of §13(b) “mentions only injunctive relief,” the Ninth Circuit and seven other circuits have interpreted that section as authorizing a far

broader range of remedies for §5 violations. *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). They have held that §13(b) “also empowers district courts to grant ‘any ancillary relief necessary to accomplish complete justice,’ including restitution.” *Ibid.* (quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)).<sup>1</sup> Overruling its prior precedent, however, the Seventh Circuit recently rejected that interpretation of the statute and held “that section 13(b) does not authorize restitutionary relief.” See *FTC v. Credit Bureau Ctr., LLC*, — F.3d —, 2019 WL 3940917, at \*1-2 (7th Cir. Aug. 21, 2019).

2. Scott Tucker operated businesses that provided short-term loans to consumers over the Internet. Ex. 1, Op. at 5. In 2012, the Commission filed suit against Mr. Tucker and his businesses. *Id.* at 6. The amended complaint alleged that their practices violated §5 of the FTC Act. *Ibid.* In particular, the Commission alleged that their disclosures to consumers did not convey the terms of the loans with sufficient clarity. *Id.* at 6-7. Invoking §13(b) of the FTC Act, the Commission sought preliminary and permanent injunctions, as well as disgorgement of “ill-gotten-monies.” *Id.* at 7.

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<sup>1</sup> See also *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App’x 155, 158 n.2 (3d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996).

The district court bifurcated the case into a liability phase and a relief phase. Ex. 1, Op. at 7. During the liability phase, the court granted the Commission summary judgment, holding that Mr. Tucker violated §5. *Ibid.* At the relief phase, the court entered a permanent injunction barring Mr. Tucker from engaging in similar lending activities. *Ibid.* It also ordered Mr. Tucker and his businesses to pay around \$1.27 billion as “equitable monetary relief.” *Ibid.*

3. Mr. Tucker appealed, and the Ninth Circuit affirmed. Ex. 1, Op. at 20.

Challenging the relief entered, Mr. Tucker urged that §13(b), which states only that district courts may enter “injunction[s],” does not authorize the Commission to seek “equitable monetary relief.” Ex. 1, Op. at 15-16 (brackets in original). The court of appeals acknowledged that “Tucker’s argument has some force,” but stated that “it is foreclosed by our precedent.” *Id.* at 16. The Ninth Circuit has “repeatedly held that §13 ‘empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.’” *Ibid.* (quoting *Commerce Planet*, 815 F.3d at 598).

Judge O’Scannlain filed a special concurrence, which Judge Bea joined, “to call attention to [the Ninth Circuit’s] unfortunate interpretation of the Federal Trade Commission Act.” Ex. 1, Op. at 22. The concurring judges urged that the court’s interpretation of “§13(b)’s authorization of ‘injunction[s]’ to empower district courts to compel defendants to pay monetary judgments styled as ‘restitution’” “is no longer tenable.” *Ibid.* The opinion explains that “the text and struc-

ture of the statute unambiguously foreclose such monetary relief.” *Ibid.* And it describes how this Court’s “recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), undermines” the Ninth Circuit’s rationale for allowing restitution under §13(b), casting doubt on whether it “is an ‘equitable’ remedy at all.” *Ibid.* The concurring judges urged the court to “rehear this case en banc.” *Ibid.*

4. On June 20, 2019, the court of appeals denied Mr. Tucker’s petition for rehearing en banc. Ex. 2.

5. Petitioners respectfully request that an extension of time be granted. The additional time is needed to determine whether to file a petition for a writ of certiorari and, if one is to be filed, to see to its preparation and submission. Counsel of record was not retained until after the case was fully briefed in the Ninth Circuit. Counsel requires additional time to review the extensive record and the complex issues involved. Counsel of record also has been heavily engaged with the press of other matters.<sup>2</sup> Petitioners therefore respectfully request a 30-day extension of time within which to file a petition for a writ of certiorari.

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<sup>2</sup> These include an oral argument in *TCL Communication Technology Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, No. 18-1363 (Fed. Cir.), held on August 7, 2019; oppositions to a motion for leave to file a successive petition for rehearing and a motion to stay the mandate in *VirnetX Inc. v. Cisco Systems, Inc.*, No. 18-1197 (Fed. Cir.), filed on August 19, 2019; a reply brief in *SAS Institute, Inc. v. World Programming Ltd.*, Nos. 19-1290(L), -1300 (4th Cir.), filed on August 23, 2019; opening and reply submissions in *In re Certain Digital Video Receivers & Related Hardware & Software Components*, Inv. No. 337-TA-1103 (ITC), due on August 29 and September 10, 2019; a response brief in *Genentech, Inc. v. Amgen Inc.*, No. 19-2156 (Fed. Cir.), due on September 4, 2019; an amicus brief in

Respectfully submitted.

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September 3, 2019

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*Conversant Wireless Licensing S.A.R.L. v. Apple Inc.*, No. 19-2039 (Fed. Cir.), due on September 16, 2019; a petition for a writ of certiorari due in this Court on September 25, 2019; and an opening brief in *Esparraguera v. Department of the Army*, No. 19-2293 (Fed. Cir.), due on October 21, 2019.