No. 19-508

IN THE
Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

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

BRIEF FOR PETITIONERS

PAUL C. RAY
PAUL C. RAY, CHTD
8670 West Cheyenne Ave.
Suite 120
Las Vegas, NV 89129
(702) 823-2292
paulcraylaw@gmail.com

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
SARAH J. NEWMAN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

(Additional Counsel Listed on Inside Cover)

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

JENNIFER E. FISCHELL
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022
(212) 607-8160

MATTHEW J. FISHER
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

Counsel for Petitioners

QUESTION PRESENTED

The Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§41 *et seq.*), generally "empower[s] and direct[s]" the Federal Trade Commission "to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(2). By its terms, §13(b) of the Act authorizes the Commission to seek "preliminary injunction[s]" and, "in proper cases," "permanent injunction[s]." 15 U.S.C. §53(b). The question presented is:

Whether §13(b) of the Act, by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners 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 were defendants in the district court and appellants in the court of appeals.

Respondent Federal Trade Commission was the plaintiff in the district court and the appellee in the court of appeals.

AMG Services, Inc., Red Cedar Services, Inc. d/b/a 500FastCash, SFS, Inc. d/b/a OneClickCash, LeadFlash Consulting, LLC, Partner Weekly, LLC, Muir Law Firm, LLC, Timothy J. Muir, Don E. Brady, Robert D. Campbell, Troy L. LittleAxe, MNE Services, Inc. d/b/a Ameriloan d/b/a UnitedCashLoans d/b/a USFastCash d/b/a Tribal Financial Services, and Nereyda M. Tucker *ex rel.* Blaine A. Tucker were defendants in the district court.

ETS Ventures, LLC, El Dorado Trailer Sales, and Dale E. Becker were interested parties in the district court.

Americans for Financial Reform, Deborah Moss, and First Premier Bank were intervenors in the district court.

First International Bank & Trust was an objector in the district court.

Thomas W. McNamara was a receiver in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners AMG Capital Management, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC, Level 5 Motorsports LLC, and Park 269 LLC hereby certify that each has no parent corporation and that no public company holds 10% or more of their stock.

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BRIEF FOR PETITIONERS

INTRODUCTION

The Federal Trade Commission Act ("FTC Act" or "Act"), 15 U.S.C. §§41 *et seq.*, "empower[s] and direct[s]" the Federal Trade Commission "to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." *Id.* §45(a)(2). The provision of the Act at issue here—§13(b)—authorizes the Commission to seek "preliminary injunction[s]" and, "in proper cases," "permanent injunction[s]." *Id.* §53(b). This case concerns whether that provision also authorizes the Commission to demand restitution and other monetary relief. The answer is emphatically "no."

The text of §13(b) "mentions only injunctive relief." *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). No one would ordinarily refer to restitution or similar monetary relief as a "preliminary injunction" or "permanent injunction." To the contrary, as traditionally understood, injunctions could not be used to compel restitution or payment of monetary relief. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210-211 (2002); *Lacassagne* v. *Chapuis*, 144 U.S. 119, 124 (1892). This Court has thus observed that statutory schemes that authorize parties to seek injunctive relief do not, as a matter of "plain reading," "contemplate[] the award of * * * 'equitable restitution.'" *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 484 (1996). Likewise, §13(b)'s "text does not expressly authorize the award of [monetary] consumer redress." *FTC* v. *Ross*, 743 F.3d 886, 890 (4th Cir. 2014).

By contrast, other sections of the FTC Act do expressly authorize monetary relief. Section 19, for example, authorizes the Commission to seek remedies in district court "to redress injury to consumers," including "the refund of money or return of property, [and] the payment of damages." 15 U.S.C. §57b(b). But §19 places important limits on that relief, making it available only where the defendant had fair notice that its conduct was prohibited. See *id.* §57b(a). The Commission cannot render those limits a nullity by seeking monetary relief under §13(b)—which nowhere authorizes such relief—instead.

The Commission's protestation that compliance with §19's requirements for monetary relief will impair its mission is unavailing. Congress did not authorize the Commission to demand whatever relief it chooses by whatever means it deems expedient. Congress balanced various considerations, including fairness, notice, and re-

pose. The FTC Act's text defines that balance: The Commission is empowered "to carry into effect legislative policies embodied in the statute" *only* "in accordance with the legislative standard therein prescribed." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 628 (1935). It "possess[es] only such powers as are granted by statute." *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598 (1934). For many years following § 13(b)'s enactment, the Commission acted within that provision's limited scope. Over time, however, the Commission came to disregard § 13(b)'s text, improperly using it to extract billions of dollars in monetary payments, when § 13(b) by its terms authorizes only injunctions. The Court should put a stop to that now, and return the Commission to the limits Congress imposed on its authority.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-40a)[1] is reported at 910 F.3d 417. The district court's opinion on liability (Pet. App. 41a-73a) is reported at 29 F. Supp. 3d 1338, and its opinion on monetary relief (Pet. App. 74a-116a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment (Pet. App. 1a-40a) on December 3, 2018, and denied rehearing (Pet. App. 118a-119a) on June 20, 2019. On September 3, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to October 18, 2019. Petitioners filed the petition on that date, and the Court granted the petition on July 9, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] All references are to the petition appendix in *AMG Capital Management, LLC, et al.* v. *Federal Trade Commission*, No. 19-508.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Trade Commission Act, 15 U.S.C. §§41 *et seq.*, are set forth in the petition appendix (Pet. App. 120a-139a), and in the appendix to this brief (App., *infra*, 1a-20a).

STATEMENT

I. STATUTORY FRAMEWORK

A. The Federal Trade Commission Act Authorizes the Commission To Prohibit Certain Conduct

1. Enacted in 1914, the Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§41 *et seq.*), created the Federal Trade Commission and gave it the power to "prevent" persons from "using unfair methods of competition in commerce." §5, 38 Stat. at 719. The FTC Act sought "to secure higher standards of conduct, by rules that will be laid down by this commission and sustained by the court." 51 Cong. Rec. 13,116 (1914) (remarks of Sen. Newlands).

In 1938, Congress broadened the Commission's mandate. It expanded the scope of §5 to "empower[] and direct[] [the Commission] to prevent" persons from using "unfair or deceptive acts or practices in commerce." Wheeler-Lea Act of 1938, Pub. L. No. 75-447, ch. 49, §3, 52 Stat. 111, 111-112 (codified as amended at 15 U.S.C. §45(a)). Courts have construed the Commission's authority under §5 broadly to encompass any practices "'likely to mislead consumers acting reasonably under the circumstances.'" Pet. App. 7a.

As originally enacted, the Act was focused on "prevent[ing]" such misconduct. §5, 38 Stat. at 719. The FTC Act empowered the Commission "to stop in their incipiency acts and practices which, when full blown, would

violate" the law, "as well as condemn as 'unfair methods of competition' existing violations of them." *FTC* v. *Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-395 (1953). The Commission could "declar[e]" conduct to be an unfair method of competition, "whether it was completely full blown or not." *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966). The FTC Act did not at that time authorize the Commission "to inflict punishment" or to compensate victims "for any injury alleged to have resulted from the matter charged." *FTC* v. *Gratz*, 253 U.S. 421, 432, 434-435 (1920) (Brandeis, J., dissenting).

2. The FTC Act provides the Commission administrative tools for declaring particular conduct prohibited. Section 5 authorizes the Commission to conduct an adjudication before an administrative law judge if it "ha[s] reason to believe" someone "has been or is using any unfair method of competition or unfair or deceptive act or practice." 15 U.S.C. §45(b). If, after a hearing, the Commission decides that "the act or practice in question is prohibited," it must make a written report and issue a "cease and desist" order. *Ibid.* That order becomes final if it survives judicial review in a federal court of appeals. *Id.* §45(c), (g). The purpose of a cease-and-desist order is not "to punish or fasten liability on [violators] for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *FTC* v. *Cement Inst.*, 333 U.S. 683, 706 (1948).

The Commission also has rulemaking authority to "define with specificity acts or practices which are unfair or deceptive" within the meaning of §5. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, §202(a), 88 Stat. 2183, 2193-2198 (1975) (codified as amended at 15 U.S.C. §57a). The Commission must provide notice, seek comments,

and provide an opportunity for an informal hearing. 15 U.S.C. § 57a(b)(1). The agency must also publish a "statement of basis and purpose" that explains the "prevalence of the acts or practices treated by the rule," and the "manner and context in which such acts or practices are unfair or deceptive." *Id.* § 57a(d).

B. Congress Grants the Commission Authority To Seek Certain Relief in District Court

1. *Congress Adds § 13(a) in 1938 To Authorize "Temporary Injunction[s]" and "Restraining Order[s]" in Food, Drug, and Cosmetics Cases*

When Congress originally enacted the FTC Act, the Commission could not stop a person from continuing to violate the Act until after the Commission completed an administrative hearing. In 1938, Congress addressed that perceived deficiency in part by enacting § 13(a). § 4, 52 Stat. at 115. Under the new § 13(a), the Commission could seek injunctive relief in district court to halt false advertising of food, drugs, devices, and cosmetics while administrative proceedings were pending. *Ibid.* Section 13(a), however, was limited to "temporary injunction[s]" and "restraining order[s]." *Ibid.*

2. *Congress Inserts New § 13(b) in 1973 To Authorize "Preliminary Injunction[s]" and "Permanent Injunction[s]" in "Proper Cases"*

More than three decades later, Congress enacted § 13(b) to extend the Commission's "authority to obtain preliminary injunctive relief" beyond food, drug, device, and cosmetics cases so the Commission could "prohibit anti-competitive practices, deception and unfair methods of competition" in other contexts "when they are found to be taking place." 119 Cong. Rec. 22,980 (1973) (remarks of Sen. Jackson). Section 13(b) sought to ensure "prompt enforcement" in that broader range of cases. Trans-

Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. IV, §408(f), 87 Stat. 576, 592 (1973) (codified as amended at 15 U.S.C. §53(b)).

Titled "Temporary restraining orders; preliminary injunctions," §13(b) provides that, where the Commission "has reason to believe" that a person "is violating, or is about to violate" a law enforced by the Commission, and that "enjoining" such act "pending the issuance" and resolution "of a complaint by the Commission" is in the public interest, the Commission may seek "a temporary restraining order or a preliminary injunction" in district court. 15 U.S.C. §53(b). The Commission must 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 provides that, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Ibid.*

In the same 1973 legislation, Congress amended §5(*l*) of the Act, which concerns district court enforcement of final Commission cease-and-desist orders. The Act previously had authorized the "United States" to bring a "civil action" to recover "penalt[ies]" from anyone who "violates" such a final order of the Commission. §3, 52 Stat. at 114. The 1973 legislation authorized the Commission to pursue such penalties as well. See §408(g), 87 Stat. at 592 (codified as amended at 15 U.S.C. §56(a)). And it expanded the remedies available under §5(*l*), authorizing district courts to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." §408(c), 87 Stat. at 591 (codified as amended at 15 U.S.C. §45(*l*)).

3. *Congress Adds § 19 in 1975 To Authorize Monetary Remedies To Redress Consumer Injury—Subject to Specific Safeguards*

In 1975—two years after enacting § 13(b)—Congress amended the FTC Act again to add a new provision, § 19. Section 19 authorizes the Commission to seek monetary and other remedies "to redress injury to consumers," subject to specific safeguards. § 206(a), 88 Stat. at 2201-2202 (codified as amended at 15 U.S.C. § 57b). Section 19 authorizes a court "to grant such relief as [it] finds necessary," including "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b).

Relief under § 19, however, does not become available whenever there is a § 5 violation. It is available only where the Commission (1) shows that there is an existing Commission rule identifying the conduct as an "unfair or deceptive act[] or practice[]," 15 U.S.C. § 57b(a)(1); or (2) has previously issued a "cease and desist order" to the defendant and then proves in court that a "reasonable man would have known under the circumstances" that the conduct "was dishonest or fraudulent," *id.* § 57b(a)(2). Actions under § 19 are subject to a three-year limitations period in most circumstances. *Id.* § 57b(d).

In the same 1975 legislation, Congress expanded the Commission's authority to seek penalties. Section 5(*l*) had authorized penalties against persons who violate a final cease-and-desist order against *them*. 15 U.S.C. § 45(*l*); see p. 7, *supra*. The 1975 amendments added § 5(m), which authorizes civil penalties against others who engage in conduct previously identified as prohibited. See § 205(a), 88 Stat. at 2200-2201 (codified as amended at 15 U.S.C. § 45(m)). Section 5(m)(1)(A) allows the Commission to seek penalties against any person who "vio-

lates any rule" previously promulgated by the Commission "respecting unfair or deceptive acts or practices." 15 U.S.C. §45(m)(1)(A). And §5(m)(1)(B) permits civil penalties against any person who engages in conduct previously identified as "unfair or deceptive" in an administrative adjudication that resulted in a "final cease and desist order," even if the person was not a party to that proceeding. *Id.* §45(m)(1)(B). In both circumstances, the person must have acted with "actual knowledge" the act is "unfair or deceptive" and prohibited by the Commission. *Id.* §45(m)(1)(A), (B).

C. The Commission Persuades the Courts of Appeals That §13(b) Authorizes Monetary Relief

"[I]n the eight years" following §13(b)'s enactment, the Commission scarcely employed it for any purpose beyond seeking preliminary injunctions. D. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, Antitrust, Summer 2004, at 43, 43. As documents posted on the Commission's website attest, "no one" within the Commission "imagined," back when §13(b) was enacted, that it "would become an important part of the Commission's consumer protection program." D. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 1 (Sept. 23, 2004) (hereinafter FitzGerald, *Genesis*), https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

Deeming §19's procedures for obtaining monetary relief too "time consuming," however, the Commission developed a legal strategy to press §13(b) as an "alternative[]." D. FitzGerald, *Injunctions, Divestiture and Disgorgement* 12-13, Panel at the FTC 90th Anniversary Symposium (Sept. 23, 2004) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_events/

ftc-90th-anniversary-symposium/040923transcript007.pdf). As one document on the Commission's website observes, the Commission wanted a "shortcut." FitzGerald, *Genesis*, *supra*, at 12. So the Commission began urging courts to read "equitable monetary relief" into §13(b), even though §13(b) authorized only injunctions. "When the early [§13(b)] cases were proposed, many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized only injunctive relief." *Id.* at 22. As one former FTC official observed, "[n]either the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief." *Ibid.*

Invoking this Court's 1946 decision in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, however, the Commission ultimately persuaded numerous courts that §13(b)'s reference to "injunction[s]" should be read to encompass monetary relief, such as restitution. See *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 6, 15 (1st Cir. 2010); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC* v. *Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 570-572 (7th Cir. 1989), overruled by *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC* v. *H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *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). As result, the Commission has funneled the bulk of its enforcement efforts into its "13(b) Fraud Program," rather than using §19 or administrative channels. Spiegel, *supra*, at 43.

II. Proceedings Below

This case arises from the Commission's ongoing campaign to use §13(b) to obtain monetary relief without

meeting the requirements for such relief under other provisions of the FTC Act.

A. Proceedings in the District Court

Petitioner Scott Tucker managed several businesses owned by Native American tribes (the "lenders") that provided short-term loans to consumers over the Internet. See Pet. App. 4a, 42a-43a, 77a-78a, 87a-88a. For years, the lenders offered so-called "Delaware Model" loans—loans that authorized automatic renewal without a borrower taking any affirmative action. C.A. App. 1362, 1366, 1534-1535, 1544, 1660-1662. Those loan products were not unique. C.A. App. 1660-1661. Across the industry, online companies regularly offered loans that included the same automatic-renewal feature. See C.A. App. 1659-1662. And they provided borrowers with the same disclosures the lenders provided regarding the loans' terms. See C.A. App. 1710-1712, 1788-1849.

The Commission initiated an investigation into Mr. Tucker and the lenders in late 2002. See C.A. App. 2120. For 10 years, the Commission took no action. During that time, it did not inform Mr. Tucker or the lenders of any specific concerns. In 2012, however, the Commission filed suit, alleging violations of §5 of the FTC Act. Pet. App. 5a-6a. As relevant here, the Commission sued Mr. Tucker and the lenders. C.A. App. 206-210. It sued several other businesses owned by Mr. Tucker—AMG Capital Management, LLC, Black Creek Capital Corporation, Broadmoor Capital Partners, LLC, and Level 5 Motorsports, LLC—on a "common enterprise" theory. Pet. App. 93a-94a. And it sued Mr. Tucker's wife, Kim Tucker, and Park 269 LLC (an entity owned by Ms. Tucker that in turn owned her family home), as so-called "[r]elief [d]efendants." Pet. App. 94a-96a. All defendants but the lenders are petitioners here.

According to the Commission, the terms of the loans were not disclosed to consumers with sufficient clarity. Pet. App. 6a & n.3. Invoking § 13(b), the Commission sought preliminary and permanent injunctions. C.A. App. 223. The Commission also sought "restitution" and "disgorgement" as remedies under § 13(b), *ibid.*, as Ninth Circuit precedent permitted, see *H. N. Singer*, 668 F.2d at 1113.

The complaint was the first time the Commission specified the conduct it found objectionable. The parties involved in the allegedly offending practices promptly agreed to cease them, stipulating to a preliminary injunction. See C.A. App. 227. But they contested liability under § 5 and the further relief requested under § 13(b). See C.A. App. 197-199.

The district court granted the Commission summary judgment on liability, finding that the loan disclosures violated § 5. Pet. App. 6a, 60a-62a, 72a. While the disclosures were technically accurate, the court found the "net impression" was misleading. Pet. App. 56a-62a.

By the time the district court issued its ruling on relief, petitioners were the only "remaining defendants" in the suit. Pet. App. 77a. In addition to a permanent injunction, Pet. App. 97a-98a, the court ordered "monetary equitable relief in the form of restitution and disgorgement," Pet. App. 98a, 103a-104a. Over petitioners' objections, the court accepted the Commission's calculation of "consumer loss between 2008 and 2012" as more than a billion dollars—$1,317,753,577. Pet. App. 100a, 104a.

The court held Mr. Tucker and his business entities "jointly and severally liable for restitution in the amount of $1,266,084,156." Pet. App. 104a. The court further ordered Ms. Tucker and Park 269 LLC to collectively "dis-

gorg[e]" over $27 million. Pet. App. 96a. Ms. Tucker and Park 269 LLC had not been accused of wrongdoing, but the court asserted "broad authority under the FTC Act" to order them to pay money as "[r]elief [d]efendants." Pet. App. 94a-96a. The court further ruled that the Commission need not pay the funds it recovers to consumers. It could instead deposit the money in the Treasury if it "decide[d] that direct redress" is "impracticable." Pet. App. 108a-109a.

B. The Court of Appeals' Decision

The Ninth Circuit affirmed. Pet. App. 19a. The court first held that the district court properly granted summary judgment on liability. Pet. App. 14a. It concluded that "the Loan Note was likely to deceive a consumer acting reasonably under the circumstances." *Ibid.* Judge Bea disagreed. In a concurrence, he explained: "[W]e, a panel of three judges, have read and understood the terms of the Loan Note. We have not been deceived. Yet, we hold that the Loan Note is likely to deceive the average consumer *as a matter of law*." Pet. App. 39a. In his view, "precedent" permitting that result is "wrong." Pet. App. 40a. "Courts should reserve questions such as whether the Loan Note is 'likely to deceive' for the trier of fact." *Ibid.*

The Ninth Circuit affirmed the award of monetary relief as well. Pet. App. 15a-19a & n.5. The court agreed that § 13(b) "provides only" for "'injunction[s],'" and does not expressly authorize "'equitable monetary relief.'" Pet. App. 15a (brackets in original). The court acknowledged that "Tucker's argument"—that §13(b) does not authorize monetary remedies—"has some force," but explained that "it is foreclosed by our precedent." *Ibid.* The Ninth Circuit had "repeatedly held that," "by 'authorizing the issuance of injunctive relief,'" "§ 13 'empowers

district courts to grant any ancillary relief necessary * * *, including restitution.'" Pet. App. 15a-16a (quoting *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)).

Two panel members—Judge O'Scannlain joined by Judge Bea—concurred specially "to call attention to [the Ninth Circuit's] unfortunate interpretation of the Federal Trade Commission Act." Pet. App. 23a. They urged that interpreting "§ 13(b)'s authorization of 'injunction[s]'" as "empower[ing] district courts to compel defendants to pay monetary judgments styled as 'restitution'" "is no longer tenable." *Ibid.* (brackets in original). The "text and structure of the statute," they observed, "unambiguously foreclose such monetary relief." *Ibid.* The Ninth Circuit's "invention of this power wrests from Congress its authority to create rights and remedies." *Ibid.*

The concurring judges urged the Ninth Circuit to "rehear this case en banc," Pet. App. 23a, but the court denied rehearing, Pet. App. 118a-119a.

This Court granted review on July 9, 2020.

SUMMARY OF ARGUMENT

I. Section § 13(b) of the FTC Act provides that, where the Commission "has reason to believe" a person "is violating, or is about to violate" a law the Commission is charged with enforcing, the Commission may seek a "temporary restraining order," a "preliminary injunction," or—"in proper cases"—a "permanent injunction." 15 U.S.C. § 53(b). The Commission's view that § 13(b) also authorizes any and all equitable remedies, including restitution, is untenable.

A. Any effort to read § 13(b) as authorizing monetary relief cannot be reconciled with plain text. Section 13(b)

authorizes the Commission to seek only one form of relief—an "injunction." 15 U.S.C. §53(b). Nowhere does it purport to grant the Commission the power to seek monetary relief such as restitution. That should be dispositive. Restitution is not an injunction. Where Congress intended in the FTC Act to authorize further equitable relief beyond injunctions, it said so expressly, as in §5(*l*).

When a statute references the term "injunction," that term should be understood as limited to how it was typically understood in equity. Reading §13(b) as authorizing all equitable remedies sets the term "injunction" on its head. Injunctions traditionally are focused on *prospective* relief. They are aimed at preventing future injuries, not redressing past harms. Restitution, by contrast, is a form of *retrospective* relief. In equity, restitution is used to restore to the plaintiff particular funds or property in the defendant's possession. That is the opposite of the forward-looking relief that the term "injunction" typically contemplates. Indeed, injunctions traditionally excluded monetary relief.

Section 13(b), moreover, authorizes the Commission to "bring suit" only where a person "is violating, or is about to violate," laws the Commission enforces. 15 U.S.C. §53(b). The fact that §13(b) does *not* authorize suit based solely on past harms undermines any notion that Congress intended it to encompass retrospective monetary relief like restitution.

B. The Commission's reading of §13(b) makes hash of the FTC Act's broader statutory scheme.

Section 13(b) plays a specific role in the FTC Act's scheme—enjoining ongoing and future violations of the Act. Congress expressly authorized monetary relief to

redress past "injury to consumers"—including rescission of contracts, refunds, and the return of property—in § 19, which it added just two years after § 13(b). 15 U.S.C. § 57b(b). There would have been no need for Congress to authorize "the refund of money or return of property" through § 19, *ibid.*, if § 13(b) already empowered courts to grant monetary relief, including restitution. The Commission's reading of § 13(b) renders § 19 practically superfluous.

Section 19, moreover, imposes important preconditions to monetary relief, including prior notice that the conduct is proscribed and a three-year limitations period. Section 13(b) contains no comparable safeguards. Reading §13(b) to encompass monetary relief licenses the Commission to bypass the express protections Congress built into § 19 by seeking otherwise identical relief under § 13(b) instead.

C. Interpreting § 13(b)'s reference to "injunctions" as authorizing all equitable relief, including restitution, defies this Court's precedents.

Invoking *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and its progeny, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the Commission has persuaded numerous courts that § 13(b)'s reference to "injunction[s]" should be read to encompass monetary relief, such as "restitution." But the provision at issue in *Porter* expressly authorized not only "'injunction[s],'" but also "'other order[s],'" which encompasses restitution. 328 U.S. at 397. Section 13(b), by contrast, mentions only "injunction[s]." And in *Porter* and *Mitchell*, the Court found that no *other* provision of the statutes expressly authorized additional equitable remedies so as to expressly or impliedly preclude a court from ordering restitution or other equitable relief under the provisions

at issue. But here, both § 5 and § 19 expressly provide for restitution and other equitable relief, foreclosing the notion that § 13(b)'s authority to seek an "injunction" impliedly authorizes those other forms of relief as well.

Regardless, this Court has long rejected *Porter*'s view of implied remedies. Where *Porter* once assumed that "all the inherent equitable powers of the District Court are available" unless "restrict[ed]" by "a clear and valid legislative command," 328 U.S. at 398, the Court now takes the opposite approach. Today, the Court limits remedies to those expressly provided in the statutory text. Indeed, in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), this Court rejected the argument that, under *Porter*, it was required to construe a statute that expressly authorized injunctive relief as impliedly authorizing restitution. *Meghrig* is all but controlling here.

D. Limiting § 13(b) to its text enforces—rather than impairs—the statutory scheme Congress created. The Commission may still seek restitution or other monetary relief to return funds to consumers. But it must do so under §19, consistent with the substantive and procedural protections Congress imposed for such relief. Requiring the Commission to abide by § 19's restrictions, moreover, encourages the Commission to perform its primary statutory role: defining prohibited conduct for the public, in advance, through administrative processes. Allowing the Commission to proceed straight to court under § 13(b)—and obtain large monetary awards without that prior notice—encourages the agency to abdicate its responsibility to issue guidance and instead to seek after-the-fact adjudications that particular conduct is "unfair or deceptive" under § 5.

II. Even if § 13(b) authorizes monetary remedies, the monetary award in this case is still improper. If § 13(b)

authorizes monetary relief on the theory that the term "injunction" invokes the court's *equitable jurisdiction*, then that authority must be limited to *equitable monetary relief*. But the district court here did not award equitable monetary relief. The relief ordered here "is indistinguishable from a request 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money'—essentially an 'action[ ] at law.'" Pet. App. 33a (O'Scannlain, J., concurring) (quoting *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002)). The award tests the bounds of equity practice in other ways as well. It did not account for the petitioners' legitimate expenses. It allowed the money recovered to be deposited in Treasury funds instead of being disbursed to affected consumers. And it held petitioners jointly and severally liable for restitution. For those reasons too, the judgment cannot be sustained. See *Liu* v. *SEC*, 140 S. Ct. 1936, 1946, 1950 (2020).

ARGUMENT

Section 13(b) of the FTC Act, by its terms, authorizes the Commission to seek one form of relief—an injunction. Section 13(b) provides that, where the Commission "has reason to believe" a person "is violating, or is about to violate" a law the Commission is charged with enforcing, the Commission may seek a "temporary restraining order," a "preliminary injunction," or—"in proper cases"—a "permanent injunction." 15 U.S.C. § 53(b). Section 13(b) thus authorizes injunctions—not restitution, not monetary remedies. Despite that clear text, the Ninth Circuit and other courts have construed § 13(b) as authorizing any and all equitable remedies, including restitution and disgorgement. That view is untenable. It does not merely rewrite the term "injunction" to mean "all equitable relief." It defies the remainder of the FTC Act.

Where Congress sought to reach beyond injunctions to authorize all equitable relief—or monetary relief like restitution or refunds—Congress did so expressly. Allowing the Commission to seek that relief under §13(b) instead makes hash of the FTC Act's statutory scheme and contravenes this Court's precedent.

I. Section 13(b) Does Not Authorize Monetary Relief Such As Restitution

A. Section §13(b)'s Plain Text Authorizes "Injunction[s]," Not Restitution and Other Monetary Relief

"As in all statutory construction cases," this one must "begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). It should also end there: Because §13(b) is clear, the Court "must enforce [its] plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). "When the words of a statute are unambiguous," the "'judicial inquiry is complete.'" *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).

1. "[B]y its terms," §13(b) "authorizes only injunctions." *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 775 (7th Cir. 2019). Section 13 is titled "Temporary restraining orders; preliminary injunctions." 15 U.S.C. §53(b). Section 13's body also limits authorized relief: It provides that, where the Commission "has reason to believe" a person "is violating, or is about to violate" laws enforced by the Commission, the Commission may seek a "temporary restraining order," a "preliminary injunction," or ("in proper cases") a "permanent injunction." *Ibid.* That should be dispositive here. An injunction is an injunction—a particular type of equitable "judicial process," subject to traditional limitations, "whereby a party

is required to do a particular thing, or to refrain from doing a particular thing." 2 J. Story, *Commentaries on Equity Jurisprudence* §861 (9th ed. 1866); Injunction, *Black's Law Dictionary* 626 (2d ed. 1910) (similar); 1 J. High, *A Treatise on the Law of Injunctions* §1 (2d ed. 1880) (similar).[2] "Restitution isn't an injunction." *Credit Bureau*, 937 F.3d at 771. "Injunction" does not mean "all forms of equitable relief."

The FTC Act itself makes that clear. For example, §5(*l*) addresses the remedies that may be imposed for violations of final Commission cease-and-desist orders. The "district courts," it provides, "are empowered to grant mandatory injunctions *and such other and further equitable relief* as they deem appropriate" to redress those violations. 15 U.S.C. §45(*l*) (emphasis added). Section 13(b) does not include authority to grant injunctions *and* "further equitable relief." Section 13(b) is limited to injunctions alone.

The omission "is conspicuous." *Credit Bureau*, 937 F.3d at 773. "[W]hen Congress has included" a term "explicitly" in one section, courts "cannot assume that it meant to do so by implication" in a different section. *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 140 S. Ct. 768, 777 (2020). Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (quotation marks omitted); see also pp. 25-

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[2] In other words, it is an order "directing the defendant to act, or to refrain from acting in a specified way," D. Dobbs, *Handbook on the Law of Remedies* §2.10 (1973), *i.e.*, "a means by which a court tells someone what to do or not to do," *Nken* v. *Holder*, 556 U.S. 418, 428 (2009).

29, *infra* (contrasting § 13(b) with § 19, which authorizes monetary remedies such as "the refund of money or return of property, [and] the payment of damages," 15 U.S.C. § 57b(b)). That presumption is especially powerful here: Congress enacted § 5(*l*) and § 13(b) together in the same amendments. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. IV, § 408(c), (f), 87 Stat. 576, 591-592 (1973).

Congress, moreover, regularly distinguishes injunctions from restitution and other forms of equitable relief. Where Congress seeks to authorize "injunctions" *and* other forms of equitable relief, it authorizes both expressly.[3] That forecloses the Ninth Circuit's view that Congress, by authorizing "injunction[s]" in § 13(b), also impliedly authorized "'any ancillary relief necessary to accomplish complete justice.'" *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). This Court "usually" does not "read into statutes words that aren't there." *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). "It's a temptation" that the Court is "doubly careful to avoid when Congress has (as here) included the term in question elsewhere in the very same statut[e]." *Ibid.*

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[3] See, *e.g.*, 7 U.S.C. § 13a-1(b), (d)(3) (authorizing CFTC to seek "equitable remedies including * * * restitution" in addition to "permanent or temporary injunction[s]"); 15 U.S.C. § 6103(a) (authorizing a State to "bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing," and "to obtain * * * restitution"); 15 U.S.C. § 3414(b)(4) (authorizing FERC to seek "a mandatory injunction commanding any person to comply with any applicable provision of law * * * or ordering such other * * * equitable relief as the court determines appropriate, including * * * restitution"); see also Pet. App. 25a-26a (listing statutes).

2. The Ninth Circuit's effort to read §13(b) authority for "injunction[s]" as authority to impose all equitable remedies, Pet. App. 15a-16a, does not merely rewrite the statute. It sets the term "injunction" on its head. When a statute "reference[s]" the term "injunction," that term should be understood as "a statutory limitation to injunctive relief" as "typically" available in "equity." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 211 n.1 (2002); see also *Liu* v. *SEC*, 140 S. Ct. 1936, 1947 (2020) ("'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes'" (brackets in original)).

In equity, injunctions are traditionally a "form of *prospective* relief." *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975) (emphasis added). As this Court explained more than a century ago, the "function of an injunction is to afford preventive relief." *Lacassagne* v. *Chapuis*, 144 U.S. 119, 124 (1892); see 1 High, *supra*, §23 (stating that injunctions "afford preventive relief only"). Injunctions thus "deal[] primarily" with the "future," not the "past." *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928); see *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 (1965) (injunctions "look[] to the future"). Injunctions thus may be imposed when there is "a 'cognizable danger of recurrent'" harm, *Kansas* v. *Nebraska*, 574 U.S. 445, 466 (2015), such as a "threatened or probable act" that "might cause * * * irreparable injury," *Pub. Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952).

By contrast, it is "not" the "function of an injunction * * * to redress alleged wrongs which have been committed already." *Lacassagne*, 144 U.S. at 124. Injunctions are not intended "to correct injuries," "to restore parties to rights of which they have already been deprived," or

"to procure relief for past injuries." 1 High, *supra*, §23. Injunctive relief adresses "a continuing violation or the likelihood of a future violation," not "past infractions." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 109 (1998); see also 11A C. Wright *et al.*, *Federal Practice & Procedure* §2942 (3d ed.). Indeed, "[t]o employ [an injunction] for the correction or redress of wrongful acts would be a perversion of the remedy." T. Spelling, *A Treatise on the Law Governing Injunctions* §21 (1926).

The relief ordered here—restitution—is precisely the sort of redress for past wrongs *not* contemplated by the term "injunction." Traditionally, equity employed "restitution" "to restore to the plaintiff particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214. Restitution "ordinarily" operated through imposition of "a constructive trust or an equitable lien." *Id.* at 213. Courts would "order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Ibid.* Courts have sometimes used "restitution" to mean "disgorgement," a remedy "[e]quity courts have routinely" employed to "deprive[] wrongdoers of their net profits from unlawful activity." *Liu*, 140 S. Ct. at 1942-1943. Either way, restitution or disgorgement, unlike an injunction, is a form of *retrospective* relief. It is a "*return* or *restoration* of what the defendant *has gained* in a transaction." 1 D. Dobbs, *Law of Remedies* §4.1(1) (2d ed. 1993) (emphasis added). It restores to the injured person money or property he lost, and restores defendants to their pre-misconduct state by denying them their ill-gotten gains. That is the opposite of the forward-looking, "preventive relief" that the term "injunction" traditionally contemplates. *Lacassagne*, 144 U.S. at 124.

Consistent with that, injunctions traditionally *excluded* monetary relief. Historically, injunctions were writs "issued from a court of equity commanding a person to do an act or acts *other than the payment to the complainant of a sum of money*, or not to do an act or acts specified therein." 1 R. Foster, *A Treatise on Federal Practice, Civil and Criminal* § 205 (4th ed. 1909) (emphasis added); see *Great-West*, 534 U.S. at 210-211 (explaining that "an injunction to compel the payment of money past due under a contract * * * was not typically available in equity"). This Court thus has long held that "[a]n injunction *will not be used* to take property out of the possession of one party and put it into that of another." *Lacassagne*, 144 U.S. at 124 (emphasis added).

Those principles pervade this Court's precedents. This Court has long distinguished an "injunction" and "restitution" as different "categories of relief." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993). For example, in the sovereign-immunity context, the Court has distinguished between "an injunction that governs [a state] official's future conduct," which is not barred by the Eleventh Amendment, and an "award[of] retroactive monetary relief" in the form of restitution, which is barred. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103, 106 (1984); see also *Edelman* v. *Jordan*, 415 U.S. 651, 666-668 (1974). This Court has contrasted an "injunction against expenditure" of money "to be spent" with "restitution * * * of that portion of * * * money which [had been] expended." *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 774-775 (1961). And—as explained in more detail below (at 37-40)—the Court has held that a statutory provision authorizing a party to seek "a mandatory injunction" or "a prohibitory injunction" does not "contemplate[ ] the award of * * * 'equitable restitution.'"

Meghrig, 516 U.S. at 484. While most any claim for relief "can, with lawyerly inventiveness, be phrased in terms of an injunction," *Great-West*, 534 U.S. at 211 n.1, restitution and other orders to pay money are emphatically outside the traditional understanding of the term "injunction"—and thus beyond § 13(b) as well.

3. Section 13(b)'s other requirements confirm that understanding. Section 13(b) authorizes the Commission to "bring suit" only where a person "is violating, or is about to violate" laws the Commission enforces. 15 U.S.C. § 53(b). Section 13(b) thus addresses ongoing or prospective conduct, "match[ing] the forward-facing nature of injunctions." *Credit Bureau*, 937 F.3d at 772; see *Warth*, 422 U.S. at 515. The fact that § 13(b) does *not* authorize suit based solely on past harms, see *FTC* v. *Shire Viropharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019), undermines any notion that Congress intended it to encompass retrospective monetary relief like restitution. Restitution is a "*return* or *restoration* of what the defendant *has gained* in a transaction." 1 Dobbs, *Law of Remedies* § 4.1(1) (emphasis added). It would be "illogical" for Congress to authorize suits for such relief only in situations "of ongoing or imminent unlawful conduct." *Credit Bureau*, 937 F.3d at 772-773.

B. The Commission's Contrary Reading Destroys the FTC Act's Structure and Defies Its History

A "wider look" at the FTC Act's "structure gives * * * even more reason for pause" before reading § 13(b) to authorize restitution and other monetary relief. *Romag Fasteners*, 140 S. Ct. at 1495. Such a reading of § 13(b) does violence to the FTC Act's structure. It renders entire provisions irrelevant. And it makes express protections impotent. Congress *did* authorize retroactive monetary remedies in the FTC Act. It did so in § 19, sub-

ject to specific limits and protections. It did not authorize that relief in § 13(b), which lacks those safeguards.

1. Section 13(b) plays a clear and specific role. By authorizing the Commission to bring suit where a person "is violating, or is about to violate" laws the Commission enforces, 15 U.S.C. § 53(b), § 13(b) provides a mechanism for "enjoining ongoing and imminent future violations" of the FTC Act, *Credit Bureau*, 937 F.3d at 774; see p. 25, *supra*. The FTC Act *also* provides a mechanism for redressing *past* violations. But it does so *not* in § 13(b). Instead, it authorizes that relief in a separate provision, § 19, added just two years after § 13(b) was enacted. See p. 8, *supra*. Section 19 provides that district courts "shall have jurisdiction" in certain circumstances "to grant such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. §57b(b). "Such relief may include," among other things, "rescission or reformation of contracts," and "the *refund of money or return of property*." *Ibid.* (emphasis added).

Section 19 thus makes it especially clear that § 13(b) does not contemplate restitution or other monetary relief: It expressly provides the relief the Ninth Circuit attempted to blue-pencil into § 13(b). This Court "'presume[s]'" that Congress "'intends its amendment[s] to have real and substantial effect[s].'" *Intel*, 140 S. Ct. at 779. There would have been no need for Congress to amend the FTC Act to authorize "the refund of money or return of property" to consumers through § 19, 15 U.S.C. § 57b(b), if the authority to issue "injunction[s]" under § 13(b) already "empower[ed] district courts to grant 'any ancillary relief necessary,'" including monetary "restitution," for past violations of the FTC Act, *Commerce Planet*, 815 F.3d at 598. Indeed, reading § 13(b) to authorize monetary relief renders much of § 19 "entirely re-

dundant." Pet. App. 29a (O'Scannlain, J., concurring). "[T]he canon against surplusage" is at its "strongest" where, as here, "an interpretation would render superfluous another part of the same statutory scheme." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

2. The Ninth Circuit's construction also eviscerates protections Congress deliberately interposed as preconditions to monetary or restitutionary relief under § 19. The Commission's primary statutory mission has always been to "declare" what practices are "unfair," *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321 (1966), and "to ban [those] specific practices *for the future*," *FTC* v. *Cement Inst.*, 333 U.S. 683, 706 (1948) (emphasis added); see pp. 4-5, *supra*. When Congress expressly authorized the Commission to seek monetary remedies in § 19, it limited that relief to situations where the defendants would have fair notice that the FTC Act proscribes their conduct. First, the Commission can obtain relief under § 19 if it shows the conduct violated an existing "rule," promulgated under the Commission's rulemaking authority, "respecting unfair or deceptive acts or practices." 15 U.S.C. § 57b(a)(1). Alternatively, the Commission can go through an administrative adjudication, issue a "cease and desist order which is applicable" to the defendant, and prove in district court that a "reasonable man would have known under the circumstances" that the conduct at issue "was dishonest or fraudulent." *Id.* § 57b(a)(2).

Other FTC Act provisions authorizing monetary relief impose similar requirements. As noted above, § 5(*l*) authorizes extensive relief against anyone "who violates" an administrative cease-and-desist order issued against them by the Commission "after it has become final." 15 U.S.C. § 45(*l*). Among other things, courts may issue injunctions and "further equitable relief as they deem ap-

propriate in the enforcement" of the final cease-and-desist order. *Ibid.* Actual notice is inherent in that requirement: To violate the order, a person must engage in the same conduct the Commission already ordered them to cease and desist. Section 5(m) similarly provides for monetary penalties where the defendant engages in conduct that has been declared unlawful by a Commission rule, *id.* §45(m)(1)(A), or has been declared unlawful by a final Commission cease-and-desist order directed at another, *id.* §45(m)(1)(B). But that relief, too, is limited to instances where the person acted with "actual knowledge" that the act is "unfair or deceptive" and prohibited by the Commission. *Id.* §45(m)(1)(A), (B).

Reading §13(b) to authorize the same relief—restitution, refunds, return of property—renders those requirements of knowledge and notice meaningless. Under §13(b), the Commission may seek relief "[w]henever [it] has reason to believe" there is a violation of "any provision of law enforced by the [Commission]." 15 U.S.C. §53(b)(1). That includes §5's general prohibition against "unfair or deceptive acts or practices in or affecting commerce," *id.* §45(a)(2), a potentially vague and expansive category.[4] Yet §13(b) contains no notice requirement. This Court should not read §13(b) so as to create an end-run on the safeguards—knowledge and notice—Congress made preconditions to monetary relief elsewhere. "It would be unsound * * * for a statute's *express* system of enforcement to require notice * * * while a

[4] Under that "consumer-friendly standard," the Commission is not required "to [prove] actual deception." Pet. App. 7a (quotation marks and alterations omitted). That, too, is difficult to reconcile with basic restitution principles, which generally require that the defendant actually have "wrong[ed]" the "claimant." *Restatement (Third) of Restitution and Unjust Enrichment* §44 & cmt. a (2011).

judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998).

Finally, § 19 includes a statute of limitations. "No action may be brought by the Commission under [§ 19] more than 3 years after" the "rule violation" or "unfair or deceptive act or practice" at issue. 15 U.S.C. § 57b(d). That limitations period helps ensure the "prompt resolution of disputes," *Hardin* v. *Straub*, 490 U.S. 536, 542 n.10 (1989), and protects "'vital'" public interests in repose, *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1641 (2017). Section 13(b), by contrast, "contains no statute of limitations," and courts have declined to impose one. *FTC* v. *Dantuma*, 748 F. App'x 735, 739 (9th Cir. 2018); see *Credit Bureau*, 937 F.3d at 783. Allowing the Commission to seek monetary relief under § 13(b) renders § 19's time limit—and the values it preserves—meaningless.

3. This case demonstrates the consequences of allowing the Commission to proceed under § 13(b), rather than § 19—total evasion of § 19's safeguards. When the lenders here were conducting their business using the "Delaware Model" of loan renewal, no existing Commission rule provided notice that the Commission deemed that conduct an "unfair or deceptive act[ ] or practice[ ]." 15 U.S.C. § 57b(a)(1). The Commission was not required to issue a "cease and desist order" and then prove in court that a "reasonable man would have known under the circumstances" that the conduct "was dishonest or fraudulent." *Id.* § 57b(a)(2). Those requirements have special salience. The supposedly unfair and deceptive practices that resulted in liability here were widespread in the industry. See p. 11, *supra*. Yet by proceeding under § 13(b), the Commission was able to obtain a judgment of more

than $1 billion based on an after-the-fact determination that the "'net impression' of the representation[s]" at issue "would be likely to mislead" a reasonable consumer. Pet. App. 7a.

By proceeding under § 13(b), moreover, the Commission circumvented § 19's statute of limitations. The Commission initiated an investigation into the allegedly unlawful lending practices here in late 2002, but waited *10 years* to bring suit. See p. 11, *supra*. In that time, the Commission never notified petitioners of particular concerns, and gave them no opportunity to take corrective action. *Ibid.* It then obtained monetary relief based on years of conduct that would have been precluded under § 19's three-year limitations period. See Pet. App. 100a.

Surely Congress did not craft limits on monetary relief in § 19 with the intention of having the Commission evade them at will by seeking the same relief under § 13(b). Cf. *Middlesex Cnty. Sewage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) (holding that where Congress has provided "elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens"); *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005) (holding that "more expansive remedy under § 1983" is unavailable to redress violations of federal statutory rights where Congress provided "more restrictive remedies" in the statute itself). It was settled long ago that courts must "interpret [each] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Reading § 13(b)'s reference to "preliminary injunction[s]" and "permanent injunction[s]" to somehow mean "any and all relief that might be granted in equity, including

restitution and monetary relief," deprives the FTC Act of any semblance of coherence or symmetry.

4. Confronted by those clear indications that § 13(b) authorizes only injunctions—and is not an end-run around § 19's requirements—the Commission has pointed to § 19's savings clause. See *Credit Bureau* Pet. 21. That provision states:

> Remedies provided in [§ 19] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in [§ 19] shall be construed to affect any authority of the Commission under any other provision of law.

15 U.S.C. § 57b(e). But the savings clause cannot bear the weight the Commission assigns it.

First, the savings clause "preserves only those remedies that exist." *Credit Bureau*, 937 F.3d at 775. The provision "says only that Section 19 does not limit preexisting authority; it tells us nothing about *what* preexisting authority existed." J. Beales III & T. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 26 (2013). It is highly doubtful Congress intended § 19's savings clause to preserve a reading of § 13(b) under which the term "injunction" encompasses restitution and other monetary remedies. Congress enacted § 19 long before any court had read an implied restitution remedy into § 13(b). See pp. 8, 10, *supra*. Nor had any court or the Commission read such authority into the then-similarly worded § 13(a)—a provision on which § 13(b) was modeled—which had authorized "injunction[s]" since 1938. See pp. 6-7, *supra*.

Second, § 19's savings clause does not to refer to other provisions in the FTC Act at all. It states that § 19's

remedies are "in addition to, and not in lieu of, any other remedy or right of action provided by *State or Federal law*," 15 U.S.C. §57b(e) (emphasis added)—not to other remedies or rights of action within "this title" or "this Act." This Court has explained that, where a statute contains such a broadly worded savings clause, it is "doubtful" such a reference to "'other'" provisions of law is meant to "include[ ] the very statute in which this statement was contained." *Middlesex Cnty.*, 453 U.S. at 15-16. Instead, the savings clause's general reference to "State or Federal law" merely clarifies that the Commission's authority under §19 does not displace authority to seek relief under other statutes, such as the Clayton Act. See 15 U.S.C. §21(a) (authorizing the Commission to enforce compliance with certain provisions in the Clayton Act).

Finally, the Commission's "understanding of the saving[s] clause runs against more than a century of interpretive practice." *Credit Bureau*, 937 F.3d at 775. This Court has emphasized that a savings clause cannot be read in a way that causes a statute to "destroy itself." *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); accord *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507-508 (1913); *Am. Tel. & Tel. Co.* v. *Cent. Off. Tel., Inc.*, 524 U.S. 214, 227-228 (1998). Yet that is precisely what the Commission's reading of §13(b) does—it destroys Congress's carefully calibrated enforcement regime by eliminating the safeguards imposed for monetary relief and rendering §19 largely superfluous. See pp. 25-31, *supra*.

C. The Commission's Construction Contravenes Precedent

1. *"Injunction" in § 13(b) Means "Injunction" Under the Textual Analysis That* Porter *and* Mitchell *Require*

The courts of appeals uniformly agree that the text of § 13(b) "does not expressly authorize the award of [monetary] consumer redress." *FTC* v. *Ross*, 743 F.3d 886, 890 (4th Cir. 2014). Yet many—including the Ninth Circuit below—have accepted the Commission's argument that § 13(b) *implicitly* authorizes the Commission to seek restitution and other monetary relief. See p. 10, *supra*. Invoking this Court's 1946 decision in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946)—which did not involve the FTC Act—the Commission has convinced those courts that, where Congress authorizes the Commission to seek an "injunction," they should hold that "the legislative branch's *real* intent" is to authorize "the full measure of * * * equitable jurisdiction." *Ross*, 743 F.3d at 890-891 (emphasis added); see, *e.g.*, *Commerce Planet*, 815 F.3d at 598-599; *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365-367 (2d Cir. 2011); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996).

Porter and its progeny, however, cannot sustain that expansive view of § 13(b). *Porter* concerned § 205(a) of the Emergency Price Control Act of 1942. 328 U.S. at 396. That provision expressly authorized the Administrator of the Office of Price Administration to seek a "'permanent or temporary injunction, restraining order, or other order'" against landlords who violated the Act's ceilings on rents. *Id.* at 397. The Court held that § 205 authorized the Administrator to seek "restitution of rents collected by a landlord in excess of the permissible maxi-

mums" under §205(a). *Id.* at 396. The Court stated that, by authorizing an injunction, the statute invoked the district court's "equitable" "jurisdiction," making "all the inherent and equitable powers of the District Court * * * available for the proper and complete exercise of that jurisdiction," including restitution. *Id.* at 398. "Only in that way," the Court stated, "can equity do complete rather than truncated justice." *Ibid.* Looking to the statute's text, the Court stated that "the language of §205(a) admits of no other conclusion." *Id.* at 399. "[T]he term '*other order*,'" the Court explained, "contemplates a remedy other than that of an injunction." *Ibid.* (emphasis added). "An order for the recovery [of] restitution * * * may be considered a proper 'other order' * * *." *Ibid.*

Critically, *Porter* emphasized that a statute's invocation of one particular equitable remedy cannot carry with it all the powers of "equitable jurisdiction" if the statute, "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." 328 U.S. at 398. For that reason, the Court found that another provision of the Emergency Price Control Act, which authorized a tenant to sue for damages, "provide[d] an exclusive remedy relative to damages," and "supersedes th[e] possibility" that "damages might properly be awarded by a court of equity in the exercise of its jurisdiction under 205(a)." *Id.* at 401. But "[r]estitution," the Court explained, "differs greatly from the damages and penalties which may be awarded" under other provisions of the Act. *Id.* at 402. Thus, it concluded that no "other provision" of the Act "expressly or impliedly preclude[d] a court from ordering restitution." *Id.* at 403.

Fourteen years later, in *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the Court applied *Porter* to give §17 of the Fair Labor Standards Act

("FLSA") an expansive construction. Section 17 empowered courts to "restrain violations" of the FLSA's prohibition on firing employees for reporting workplace violations. 29 U.S.C. §217. Invoking *Porter*, the Court held that §17 also authorized courts "to order reimbursement for loss of wages caused by an unlawful discharge." 361 U.S. at 289, 291-292, 296. The Court, however, was careful to assess whether other provisions of the FLSA precluded implying a reimbursement remedy in §17. But it found "no indication in the language of the [statute], or in the legislative history," that other provisions in the FLSA precluded that relief. *Id.* at 294.

That same analysis leads to the opposite result here. Unlike the statute at issue in *Porter*, §13(b) mentions only "injunction[s]"; it does not include the "other order" language the Court invoked as expressly "contemplat[ing] a remedy other than * * * an injunction." 328 U.S. at 399. More fundamentally, in *Porter* and *Mitchell*, the Court found no other provision of the statutes expressly authorized additional equitable remedies so as to "expressly or impliedly preclude[] a court from ordering restitution" or other monetary remedies under the provisions at issue. *Id.* at 403; cf. *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 351-352 (1984). But the FTC Act does just that, repeatedly. Where Congress wished to provide equitable remedies beyond injunctions, it did so expressly. In §5(*l*), Congress authorized "mandatory injunctions *and such other and further equitable relief* as [courts] deem appropriate." 15 U.S.C. §45(*l*) (emphasis added). Congress's omission of authority for "equitable relief" beyond "injunctions" in §13(b), enacted in the same legislation as §5(*l*), speaks volumes. See *Nken*, 556 U.S. at 430; pp. 6-7, 19-21, *supra*.

Likewise in § 19, Congress went beyond § 13(b)'s authority to bring actions for injunctions against anyone who "is violating, or is about to violate" laws enforced by the Commission. 15 U.S.C. § 53(b). Section 19 authorizes the Commission to seek "such relief as the court finds necessary to redress" past "injury to consumers," including "rescission or reformation of contracts," and "the refund of money or return of property." 15 U.S.C. § 57b(b). Construing § 13(b) to authorize restitution would render § 19, added two years after § 13(b), essentially pointless. See pp. 25-27, *supra*. And reading § 13(b) to provide such relief would render important substantive and procedural limitations in § 19 virtual nullities. See pp. 27-31, *supra*. Simply put, here there is *every* reason to believe § 13(b)'s reference to injunctive relief provides authority for just that—injunctive relief—and not more.

2. *This Case Is Controlled Not by* Porter *and* Mitchell*, but by Text and* Meghrig

In any event, this Court long ago rejected the supposed principle some courts have drawn from *Porter*—that, by mentioning injunctions, Congress impliedly authorized the Commission to pursue "the full measure" of "equitable jurisdiction," *Ross*, 743 F.3d at 890-891, including "payment of restitution," *Commerce Planet*, 815 F.3d at 599. To the contrary, the Court now takes the sensible approach that, when Congress authorizes only particular types of relief in a statute, the judiciary should respect Congress's choice and may not imply additional remedies on the theory they are not proscribed.

When *Porter* was decided, "the Court followed a different approach to recognizing implied causes of action" and remedies. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017). Under that "*ancien regime*," *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001), "the Court assumed it to

be a proper judicial function to 'provide such remedies as [were] necessary to make effective' a statute's purpose," *Ziglar*, 137 S. Ct. at 1855 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). The Court considered it the duty of "the federal courts 'to adjust their remedies so as to grant'" relief the court found "'necessary'" to redress a statutory violation, whether or not that relief was mentioned in statutory text. *Borak*, 377 U.S. at 433; see *id.* at 434 (citing *Porter* and *Mitchell*).

The Commission's efforts to interpret § 13(b)'s reference to "injunction[s]" as implicitly authorizing other forms of equitable relief are "a relic of that *ancien regime*." Pet. App. 37a (O'Scannlain, J., concurring). Whatever force there may once have been to the view that courts should extend remedies beyond those expressly authorized "so as to accord full justice," *Porter*, 328 U.S. at 398, its time has passed. This Court "abandoned that understanding" of implied remedies in the 1970s, and has "not returned to it since." *Alexander*, 532 U.S. at 287. Where *Porter* once assumed that "all the inherent equitable powers of the District Court are available" unless "restrict[ed]" by "a clear and valid legislative command," 328 U.S. at 398, the Court now takes the opposite approach when considering remedies "not explicit in the statutory text itself," *Ziglar*, 137 S. Ct. at 1855. Now, "separation-of-powers principles are or should be central to the analysis." *Id.* at 1857. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create" a particular remedy—not to assume that judges may employ any remedy not expressly foreclosed. *Alexander*, 532 U.S. at 286-287.

Meghrig v. *KFC Western, Inc.*, 516 U.S. 479 (1996), is instructive. There, this Court declined to imply additional remedies (remedies remarkably similar to those

implied below) into otherwise clear statutory text. The question in *Meghrig* was whether "'equitable restitution'" was available under the Resource Conservation and Recovery Act of 1976 ("RCRA"), which authorizes district courts "'to restrain any person who has contributed or who is contributing to the past or present handling * * * of any solid or hazardous waste.'" *Id.* at 482 & n.* (quoting 42 U.S.C. §6972(a)). The government, citing *Porter*, urged that district courts had "inherent authority to award any equitable remedy" that was not "expressly taken away from them" by the statute. *Id.* at 487. The Court refused to find an implied restitution remedy in that provision. "Under a plain reading of th[e] remedial scheme," courts could impose either "a mandatory injunction" or "a prohibitory injunction." *Id.* at 484. But neither of those remedies, the Court explained, "contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Ibid.*

The Court contrasted the RCRA with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601 *et seq.*, which addresses analogous toxic-waste issues, *Meghrig*, 516 U.S. at 485. Unlike the RCRA, CERCLA expressly authorizes monetary relief. See 42 U.S.C. §9607(a)(4). "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under [the] RCRA does not provide that remedy." *Meghrig*, 516 U.S. at 485. Because Congress had "provided 'elaborate enforcement provisions' for remedying the violation" of those statutes, it could not "'be assumed that Congress intended to authorize by implication additional judicial remedies.'" *Id.* at 487-488. The Court

therefore refused to follow the *Porter* "line of cases." *Id.* at 487.

Meghrig should make this an *a fortiori* case. "Every one of *Meghrig*'s reasons for refusing to find restitutionary authority in the RCRA applies with equal force to section 13(b)" of the FTC Act. *Credit Bureau*, 937 F.3d at 783. Like the RCRA, § 13(b)'s plain text does not authorize restitution or other monetary relief. See pp. 19-20, *supra*. It authorizes only injunctions. 15 U.S.C. § 53(b). Moreover, while § 13(b) does not mention other equitable or monetary remedies, § 5(*l*) and § 19 of the FTC Act authorize them expressly. See pp. 20-21, 25-27, *supra*. And § 19, in authorizing monetary relief, imposes safeguards not found in § 13(b). See pp. 27-31, *supra*. Because "Congress has provided 'elaborate enforcement provisions' for remedying the violation" of the FTC Act, "'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies'" in § 13(b). *Meghrig*, 516 U.S. at 487-488.

The Commission may argue that *Meghrig* is inapposite because it "involved a private plaintiff, not * * * a government enforcement action." *Credit Bureau* Pet. 19. Not so. *Porter* stated that, when "the public interest is involved in a proceeding," a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." 328 U.S. at 398. But as the case *Porter* cited for that proposition acknowledged, disputes between private parties can nevertheless involve "matter[s] of public concern." *Virginian Ry. Co.* v. *Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). *Meghrig* involved "the cleanup of toxic waste sites," 516 U.S. at 483—as much a matter of public interest as the conduct the Commission has challenged in this lawsuit. Yet the Court still held that it was improper to authorize

a restitutionary remedy where the statute referred only to injunctive relief. *Id.* at 487-488. The same is true here.

Finally, the Commission claims that Congress ratified *Porter*'s interpretive approach when it enacted § 13(b) in 1973. See *Credit Bureau* Pet. 16. But this Court has rejected similar efforts to retroactively reinvigorate implied remedies. See *Alexander*, 532 U.S. at 287-288. Besides, to the extent legislative history is relevant, it confirms Congress meant what it said—that it intended to authorize the Commission "to obtain either a preliminary or permanent injunction * * * to *bring an immediate halt* to unfair or deceptive acts or practices." S. Rep. No. 93-151, at 30 (1973) (emphasis added). The Report nowhere says Congress intended § 13(b) not merely to authorize injunctions to "halt" the offending conduct, but also to provide restitutionary and monetary relief nowhere mentioned in § 13(b)'s text.

Congress, moreover, modeled § 13(b) not on *Porter* but on former § 13(a), Wheeler-Lea Act of 1938, Pub. L. No. 75-447, ch. 49, § 4, 52 Stat. 111, 115 (codified as amended at 15 U.S.C. § 53(a)). That provision had, since 1938, authorized injunctions against false advertising of food, drugs, devices, and cosmetics while administrative proceedings were pending. *Ibid.*; see p. 6, *supra*. Section 13(b) was intended to "preserve the Commission's authority to seek injunctive relief in that area, while also conferring this authority upon the Commission in other proceedings involving consumer fraud." S. Rep. No. 90-1311, at 2 (1968). In the 35 years between § 13(a)'s enactment and the addition of § 13(b), the Commission never suggested that *§ 13(a)* reached beyond injunctions to authorize any and all equitable remedies. Likewise, for nearly a decade after 13(b)'s enactment in 1973, the Commission

made no suggestion that its similar language did so. See D. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, Antitrust, Summer 2004, at 43, 43. And if Congress thought it had given the Commission authority to seek the full panoply of equitable relief in §13(b) in 1973, it would have had little reason to authorize the Commission to seek the equitable remedies of "rescission or reformation of contracts" and "the refund of money or return of property" two years later in §19, 15 U.S.C. §57b(b). See *Grupo Mexicano de Desarrollo, S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 325 (1999) (explaining that "rescission of * * * contract[ ]" is an "equitable remed[y]"); 1 Dobbs, *Law of Remedies* §4.1(1) (describing equitable restitution as the "return" of property).

Nor did this Court endorse the Commission's interpretation of *Porter* last Term in *Liu* v. *SEC*, 140 S. Ct. 1936 (2020). In *Liu*, the Court recognized that, under *Porter*, "'[o]nce [a court's] equity jurisdiction has been invoked'" in a statute, "'a decree compelling one to disgorge profits . . . may properly be entered.'" 140 S. Ct. at 1943 (quoting *Porter*, 328 U.S. at 398-399). But *Liu* addressed a statute expressly invoking full equitable jurisdiction, authorizing "*any* equitable relief that may be appropriate or necessary." 15 U.S.C. §78u(d)(5) (emphasis added). That provision by its terms authorizes the remedy of disgorgement historically recognized in equity. 140 S. Ct. at 1942-1946.

This case presents the converse of *Liu*. The question in *Liu* was whether a statute's broad grant of equitable authority encompassed a specific remedy (disgorgement). The issue here is whether §13(b)'s authorization of a particular equitable remedy (injunctions) should be construed to authorize the full panoply of equitable reme-

dies. *Liu*'s passing reference to *Porter* did not address that fundamentally different question.

D. Limiting § 13(b) to Its Text Enforces—Rather Than Impairs—the Statutory Regime

Because the text is inescapable, this Court need not address questions of policy, which are better directed to Congress. See *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018). Nevertheless, the Commission has urged that the availability of a remedy "that requires the defendant to return illegally obtained funds to consumers is essential to the effective enforcement of the FTC Act." *Credit Bureau* Pet. 12. But the Commission's authority to seek that relief is not in doubt. All agree that the Commission may seek "the refund of money or return of property," among other monetary remedies, under § 19. 15 U.S.C. § 57b(b). Limiting § 13(b) to its text will not deprive the Commission of the "full panoply of enforcement tools" needed to carry out its mission. *Kokesh*, 137 S. Ct. at 1640. It will simply ensure that the Commission abides by the substantive and procedural protections Congress built into § 19 for obtaining monetary relief (including notice that the conduct is unlawful and agency action within the limitations period). *Credit Bureau*, 937 F.3d at 784; see 15 U.S.C. § 57b(a)(2); pp. 27-31, *supra*.

The Commission's plea that it "depends heavily on Section 13(b) in carrying out its mandate to protect consumers," including by seeking "the return of illegally obtained funds," *Credit Bureau* Pet. 5, is thus of no consequence. The Commission pressed its atextual reading of § 13(b) on the courts not because it lacked adequate statutory remedies, but because it considered complying with § 19's requirements for obtaining monetary relief—including first conducting an "administrative case"—too "time consuming" and "inefficient." D. FitzGerald, *In-*

junctions, Divestiture and Disgorgement 12, Panel at the FTC 90th Anniversary Symposium (Sept. 23, 2004) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040923transcript007.pdf); see pp. 9-10, *supra*. Any argument that "great harm will result" to the Commission's enforcement program if it must conduct the statutorily prescribed administrative adjudication, before seeking monetary relief in district court under § 19, "is only an argument of inconvenience which assails the wisdom of the legislation" Congress enacted. *Abilene Cotton Oil Co.*, 204 U.S. at 447. It "affords no justification for so interpreting the statute as to destroy" the requirements Congress imposed on the Commission as preconditions to monetary relief. *Ibid.*

Far from promoting the statutory scheme, the Commission's approach undermines it. When Congress authorized the Commission to proscribe and prevent unfair trade practices, it anticipated that the Commission would clarify the conduct the Commission deemed unfair by enacting rules and issuing cease-and-desist orders. See *Atl. Refin. Co.* v. *FTC*, 381 U.S. 357, 367-368 (1965); pp. 5-6, *supra*. Congress tasked the Commission with using its administrative tools "to ban specific practices for the future," putting the public on notice of prohibited conduct. *Cement Inst.*, 333 U.S. at 706. Allowing the Commission to proceed straight to court under § 13(b)—and obtain large monetary awards without that prior notice—encourages the agency to abdicate its responsibility to issue guidance in favor of after-the-fact adjudications that particular conduct is "unfair or deceptive" under § 5. 15 U.S.C. § 45(a)(1).

The Commission's boast that it has convinced courts to order defendants to "return[ ] billions of dollars to con-

sumers" through "Section 13(b) cases," *Credit Bureau* Pet. 5, merely proves why the Commission should be confined to the authority that the FTC Act's text actually provides. As an "agenc[y] charged with administering [a] congressional statute[ ]," both the Commission's "power to act and how [it is] to act are authoritatively prescribed by Congress." *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013). The Commission "possess[es] only such powers as are granted by" the FTC Act. *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598 (1934). The Commission thus has been acting "ultra vires" by "improperly" extracting billions of dollars from defendants under §13(b), a provision that authorizes only "injunction[s]." *Arlington*, 569 U.S. at 297. That overreach should end now.

II. The Monetary Award Here Is Improper Even If §13(b) Authorizes Equitable Monetary Remedies

This case illustrates the dangers that arise when courts, departing from remedies authorized in statutory text, consult their own views of appropriate relief. The courts of appeals that have interpreted §13(b) to authorize monetary relief have done so based on *Porter*'s theory that, "[b]y empowering courts to issue injunctive relief," the statute "invokes the equitable jurisdiction of the court." *Bronson Partners*, 654 F.3d at 366. For all the reasons above, that view cannot be sustained. But the Ninth Circuit's approach and the decision below cannot stand regardless. Deeming itself free from the traditional limits of equity, the Ninth Circuit has held that it may—and in this case did—authorize a monetary award that exceeds the traditional bounds of "equitable restitution." See Pet. 26-29; see also Pet. i (asking "the

scope of the limits or requirements for" monetary relief to the extent § 13(b) authorizes it).

A. The Second Circuit has reasoned that, "because the availability of restitution under § 13(b) of the FTC Act, to the extent it exists, derives from the district court's *equitable jurisdiction*, it follows that the district court may award only *equitable restitution*." *FTC* v. *Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) (emphasis added). By contrast, the Ninth Circuit has "expressly rejected the argument that § 13(b) limits district courts to traditional forms of equitable relief." Pet. App. 17a. Citing *Porter*, the Ninth Circuit holds that the implied power to grant all equitable relief "includes the power to award complete relief even though the decree includes * * * monetary relief that would traditionally be viewed as 'legal'" rather than equitable. *Commerce Planet*, 815 F.3d at 602 (quotation marks omitted).

Whatever else may be said of that view, it cannot survive this Court's decision last Term in *Liu*. In *Liu*, the relevant statute expressly empowered the SEC to seek "*any equitable relief* that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5) (emphasis added). In analyzing the scope of relief available under that provision, the Court reiterated the "familiar" rule that statutes expressly providing for "equitable relief" authorize only "those categories of relief that were *typically* available in equity." *Liu*, 140 S. Ct. at 1942 (quotation marks omitted). The Court thus held that, while authorized relief included disgorgement, that remedy was circumscribed by "longstanding equitable principles" that, among other things, prohibited payment "in excess of a defendant's net profits from wrongdoing." *Id.* at 1946.

That rule applies *a fortiori* here. It cannot be that the agency is bounded by traditional equitable principles where, as in *Liu*, a statute expressly invokes the full scope of a court's equitable jurisdiction by authorizing "any equitable relief," 15 U.S.C. § 78u(d)(5), but the court is unleashed to award even "monetary relief that would traditionally be viewed as 'legal,'" *Commerce Planet*, 815 F.3d at 602, where the statute is alleged to invoke the court's equitable jurisdiction *impliedly* by authorizing one species of equitable relief—"injunction[s]." If the Court accepts the Commission's premise that § 13(b)'s reference to "injunction" somehow brings with it authority to impose "any equitable relief," *Liu* requires that it must limit § 13(b) to "'those categories of relief that were *typically* available in equity.'" 140 S. Ct. at 1942.

B. As Judge O'Scannlain's concurrence acknowledged, the "restitution" putatively awarded "under § 13(b)" in this case "is not a form of equitable relief," for multiple reasons. Pet. App. 30a. The remedy does not resemble the basic definition of equitable restitution as "restor[ing] to the plaintiff particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214. Instead, the relief ordered here "is indistinguishable from a request 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money'—essentially an 'action[] at law.'" Pet. App. 33a (O'Scannlain, J., concurring) (quoting *Great-West*, 534 U.S. at 213).

Nor does it fit the concept of equitable restitution as a means to "strip wrongdoers of their ill-gotten gains." *Liu*, 140 S. Ct. at 1942. *Liu* made clear that any award of monetary relief "in excess of a defendant's net profits from wrongdoing" would "transform[] an equitable remedy into a punitive sanction." *Id.* at 1942, 1946. The

Ninth Circuit did not limit the Commission's recovery to anything close to net profits. The court of appeals held that "[r]estitution may be measured by * * * 'the full amount lost by consumers rather than limiting damages to a defendant's profits.'" Pet. App. 99a (quoting *FTC* v. *Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)). The district court did not account for petitioners' "legitimate expenses." *Liu*, 140 S. Ct. at 1950. The Commission thus obtained a $1.27 billion award for "restitution," supposedly calculated in terms of "the full amount lost by consumers," Pet. App. 103a-104a, that was more than triple the amount that petitioners had allegedly "received," C.A. App. 1491.

But that is not all. The award of "restitution" below reflects other characteristics *Liu* called out as "test[ing] the bounds of equity practice." 140 S. Ct. at 1946. For example, the district court allowed the money recovered "to be deposited in Treasury funds instead of [being] disburse[d] * * * to victims." *Ibid.*; Pet. App. 108a-109a. The court held Mr. Tucker and his businesses "jointly and severally liable for restitution," Pet. App. 104a, which is inconsistent with traditional equitable limits, *Liu*, 140 S. Ct. at 1946. And the court ordered Mr. Tucker's wife, Kim Tucker, and Park 269 LLC (an entity owned by Ms. Tucker that in turn owned her family home), to collectively "disgorg[e]" over $27 million when neither had been accused of wrongdoing. Pet. App. 96a. The court ruled it had "broad authority under the FTC Act" to order them to pay money as so-called "[r]elief [d]efendants." Pet. App. 94a-96a. Having liberated itself and the Commission from statutory limits on relief, the Ninth Circuit then took the further step of eliminating the traditional limitations of equity. But *Liu* requires that, even where equitable relief is statutorily authorized,

courts must "ensure the [resulting] award" is "limited" so as to conform with traditional principles of "equitable relief." 140 S. Ct. at 1940. For that reason, too, the judgment below cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL C. RAY
PAUL C. RAY, CHTD
8670 West Cheyenne Ave.
Suite 120
Las Vegas, NV 89129
(702) 823-2292
paulcraylaw@gmail.com

MATTHEW J. FISHER
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
SARAH J. NEWMAN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

JENNIFER E. FISCHELL
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160

Counsel for Petitioners

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

1. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, provides:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly

filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partner-

ship, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for

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[1] So in original. Probably should be "clause".

leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a

copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such

order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been

affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the At-

torney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final

cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against

such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

2. Section 13 of the Federal Trade Commission Act, 15 U.S.C. § 53, provides:

§ 53. False advertisements; injunctions and restraining orders

(a) Power of Commission; jurisdiction of courts

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation

to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided*, *however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Com-

mission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Service of process; proof of service

Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications

Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

3. Section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57b, provides:

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. 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, the court may grant relief under subsection (b).

(b) Nature of relief available

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.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which

case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.