Nos. 19-508 & 19-825

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, ET AL.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

CREDIT BUREAU CENTER, LLC, ET AL.
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

**On Writ of Certiorari
to the United States Courts of Appeals
for the Seventh and Ninth Circuits**

**BRIEF FOR *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONERS
AMG CAPITAL MANAGEMENT, LLC, ET AL. AND
CREDIT BUREAU CENTER, LLC, ET AL.**

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TABLE OF CONTENTS

Table of Authorities iii
Interest of Amicus Curiae 1
Summary of Argument 1
Argument 4
I. The FTC's "Expansion" of Section 13(b) Violates the Separation of Powers. 4
A. Congress Created a Multi-Step Process for the Recovery of Money Damages 4
B. The FTC Rejects Congress's Statutory Scheme. 6
C. The FTC Uses Test Cases to Expand Its Section 13(b) Powers. 8
D. Inapposite Precedent Cannot Override a Statute's Plain Language. 10
E. FTC Pursuit of Monetary Awards Cannot Be Squared with Recent Precedent. 13
F. FTC's Section 13(b) Power-Grab Deserves No Deference. 15
II. The FTC's Pursuit of Monetary Awards Violates Constitutional Rights and Evades Venerable Procedural Protections 15
A. Collateral Damage: A Case Study. 16
B. The FTC's Abuse of Section 13(b) Threatens Constitutional Rights. 22
1. The FTC Uses Section 13(b) to Circumvent the Fourth Amendment. 22

2. Pursuing Damages Under the Guise of Equity Deprives Defendants of their Seventh Amendment Jury Trial Right. 24

3. The FTC's Pursuit of Money Damages Undermines the Sixth Amendment. 26

4. The FTC's Misuse of Section 13(b) Is Contrary to Values Protected by the Fifth and Eighth Amendments. 27

C. Abrogation of the Burden of Proof Opens the Door to The FTC's Abuse of Section 13(b). 27

1. FTC "Deception" Cases Require no Actual Deception or Injury. 28

2. The First Element to Secure a Preliminary Injunction is Automatically Satisfied. 30

III. Stare Decisis Does Not Shield FTC's Overreach 33

Conclusion 35

TABLE OF AUTHORITIES

Page(s)

Cases

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 34

City of Arlington v. Federal Communications Comm'n, 569 U.S. 290 (2013) 10

Clarke v. White, 37 U.S. 178 (1838) 28

Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018) 15

Federal Communications Comm'n v. Fox TV Stations, Inc., 567 U.S. 239 (2012) 15

Federal Trade Comm'n v. AMG Capital Mgmt., LLC, 910 F.3d 417 (9th Cir. 2018)) 2, 29

Federal Trade Comm'n v. Consumer Def., Ltd. Liab. Co., 926 F.3d 1208 (9th Cir. 2019) 31

Federal Trade Comm'n v.
Credit Bureau Center, LLC,
937 F.3d 764 (7th Cir. 2019)........................*passim*

Federal Trade Comm'n v. Dalbey,
No. 11-1396, 2012 WL 1694602
(D. Colo. May 15, 2012)..8

Federal Trade Comm'n v. Figgie Int'l, Inc.,
994 F.2d 595 (9th Cir. 1993)................................30

Federal Trade Comm'n v. Hornbeam Special
Situations, LLC,
No. 1:17-cv-3094-TCB, 2018 U.S. Dist.
LEXIS 204340 (N.D. Ga. Oct. 15, 2018)................2

Federal Trade Comm'n v. John Beck
Amazing Profits, LLC,
865 F. Supp. 2d 1052 (C.D. Cal. 2012)..........29, 30

Federal Trade Comm'n v. Pantron I Corp.,
33 F.3d 1088 (9th Cir. 1994)................................30

Federal Trade Comm'n v.
Shire Viropharma, Inc.,
917 F.3d 147 (3rd Cir. 2019)..........2, 12, 13, 15, 32

Federal Trade Comm'n v.
Southwest Sunsites, Inc.,
665 F.2d 711 (5th Cir. 1982)..............................4, 6

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559 F.3d 924 (9th Cir. 2009)................................29

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Vylah Tec LLC,
378 F. Supp. 3d 1134 (M.D. Fla. 2019) 22

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Vylah Tec LLC,
No. 17-228, 2018 WL 4328218
(M.D. Fla. Sept. 11, 2018) 16

Federal Trade Comm'n v. Warner Commc'ns
Inc.,
742 F.2d 1156 (9th Cir. 1984) 32

Federal Trade Comm'n v. World Travel
Vacation Brokers, Inc.,
861 F.2d 1020 (7th Cir. 1988) 31

Feltner v.
Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 25

Fifth Third Mortg. Co. v. Kaufman,
934 F.3d 585 (7th Cir. 2019) 28

Finnegan v. Leu,
456 U.S. 431 (1982) 11

Food & Drug Administration v.
Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 11

Great-West Life & Annuity Insurance Co. v.
Knudson,
534 U.S. 204 (2002) 25, 26

Groh v. Ramirez,
540 U.S. 551 (2004) 23

Heater v. Federal Trade Comm'n,
503 F.2d 321 (9th Cir. 1974) 5

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 33

Humphrey's Executor v. United States,
295 U.S. 602 (1935) 3, 14

John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank,
510 U.S. 86 (1993) 34

Knoll Associates, Inc. v. Federal Trade Comm'n,
397 F.2d 530 (7th Cir. 1968) 22

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 11

Louisiana Public Service Commission v. Federal Communications Comm'n,
476 U.S. 355 (1986) 4, 10

Luis v. United States,
136 S. Ct. 1083 (2016) 26

Massachusetts v. Sheppard,
468 U.S. 981 (1984) 23

Mazurek v. Armstrong,
520 U.S. 968 (1997) 31

Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.,
341 U.S. 246 (1951) 28, 29

Parsons v. Bedford,
28 U.S. (3 Pet.) 433 (1830) 24, 25

Payne v. Tennessee,
501 U.S. 808 (1991) 34

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 11, 12, 13

Railway Labor Executives Ass'n v. National Mediation Board,
29 F.3d 655 (D.C. Cir. 1994) 10

Resort Car Rental Sys., Inc. v. Federal Trade Comm'n,
518 F.2d 962 (9th Cir. 1975) 30

Securities and Exchange Comm'n v. Liu,
591 U.S. ____ (2020) 14

Seila Law, LLC v. Consumer Financial Protection Bureau
580 U.S. ____ (2020) 14

Sessions v. Dimaya,
138 S. Ct. 1204 (2018) 26

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 15

Timbs v. Indiana,
139 S. Ct. 682 (2019) 27

United States v. Melvin,
730 F.3d 29 (1st Cir. 2013) 15

United States v. Philip Morris USA, Inc.,
396 F.3d 1190 (D.C. Cir. 2005) 11

Whitman v.
American Trucking Associations,
531 U.S. 457 (2001) 11

Winter v. NRDC, Inc.,
555 U.S. 7 (2008) 31, 33

Constitutions

U.S. Const. amendment IV 22

U.S. Const. amendment VII..................................... 24

Statutes

15 U.S.C. § 45 6

15 U.S.C. § 45(c) 6

15 U.S.C. § 45(g) 6

15 U.S.C. § 52 4

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15 U.S.C. § 57b(a)(1) 6

15 U.S.C. § 57b(a)(2) 5, 6, 8

15 U.S.C. § 57b(b) 6

15 U.S.C. § 57b(d) 8

15 U.S.C. § 57b(e) 5

Federal Trade Commission Act 1, 32

FTC Act Section 5(a) 29, 32

FTC Act Section 13(b) .... *passim*

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) 5

Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) 4

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Rules

Supreme Court Rule 37.3 1

Other Authorities

A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, Fed. Trade Comm'n, http://bit.ly/2lrPuGq 8

37 Am. Jur. 2d Fraud and Deceit § 464.................... 28

David M. FitzGerald, FTC 90th Anniversary Symposium: Session on "Injunctions, Divestiture and Disgorgement" (Sept. 23, 2004) 7

David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* at 21–22 (Paper, FTC 90th Anniversary Symposium) (Sept. 23, 2004) 8, 9

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Federal Trade Commission, Operating Manual § 11.5.7 6

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF AMICUS CURIAE

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals, in part, by defending the individual rights and economic freedoms that are essential to ensuring that all members of society have an equal opportunity to thrive. As part of this mission, it appears as an *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because its team members have represented defendants in Federal Trade Commission ("FTC") enforcement actions, including the case study discussed below, and observed the unjust real-world impacts on targets.

SUMMARY OF ARGUMENT

The FTC is an agency of limited statutory authority. But accumulated, small imprecisions in interpreting the Federal Trade Commission Act

[1] All parties have consented to the filing of this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

("FTCA") have resulted a body of law that is decoupled from statutory text and Congressional intent. As one federal district noted, "meta-textual pontifications seem good in the short run, but a long journey on even a narrowly wrong heading can be ruinous."[2] Course correction began in the Third Circuit in *Shire Viropharma*, the need for it was pointedly identified in Judge O'Scannlain's special concurrence in *AMG*, and finally tackled head-on by the Seventh Circuit in *Credit Bureau Center*. This "wrong heading" can be traced largely to an increasingly broad reading of *Porter v. Warner Holding Company*, in which statutory authority to seek an "order enforcing compliance" has blossomed into extra-statutory awards under statutory schemes that include no such grant.

Compounding these doctrinal errors is the accretion of caselaw in which the standard of proof applied to FTC claims has been degraded to allow elements of FTC's claims to be simply presumed. Taken together, these expansions and presumptions have constructed a shadow jurisprudence in which the FTC may achieve a multi-million dollar damages award by merely demonstrating that a statement was made, without showing reliance or actual injury—and despite opposition by the very consumers that the FTC alleges were harmed. The surreal result is the FTC's practice of depriving consumers of products and services that they want, value, and paid for because the FTC substitutes its judgment for the judgment of the buyer, declaring certain products off-limits to

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[2] *FTC v. Hornbeam Special Situations, LLC*, No. 1:17-cv-3094-TCB, 2018 U.S. Dist. LEXIS 204340, at *16 (N.D. Ga. Oct. 15, 2018).

certain buyers and seeking the dissolution of lawful businesses. Section 13(b) authorizes none of that.

To achieve this strange new world, the FTC has conscripted well-intentioned courts to transmogrify the limited function of Section 13(b)—restraining conduct pending administrative proceedings—into expansive power to impose receiverships, shut down businesses, and seize personal assets. The FTC has convinced courts to bless its invented Section 13(b) powers via a long-term litigation strategy to methodically advance atextual legal arguments in "test cases" involving egregious facts.

Once the FTC got its foot in the door by convincing one district court to reinterpret Section 13(b), it expanded its powers by suing in cases with easy facts and then citing that precedent to incrementally develop caselaw. Until the Seventh Circuit took a stand in *Credit Bureau Center,* this calculated litigation strategy worked; courts accepted the FTC's newly claimed power because other courts had done so (relying largely on *dicta*), without analyzing Congress's grant of powers to the FTC. But these successes cannot alter Section 13(b)'s text and should not be permitted to stand. Neither the plain language nor the legislative history of the FTCA support this expansion of administrative power nor can this Court's jurisprudence in *Humphrey's Executor* be squared with the FTC's aggressive positioning of itself as a law enforcement agency that imposes personal liability on individual defendants.

ARGUMENT

I. THE FTC'S "EXPANSION" OF SECTION 13(B) VIOLATES THE SEPARATION OF POWERS.

A. Congress Created a Multi-Step Process for the Recovery of Money Damages.

The FTC is a creature of statute and it has only those powers that Congress conferred upon it. *See La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986).

In 1938, Congress enacted Section 13, for the first time delegating to the FTC authority to seek preliminary (*but not permanent*) injunctive relief for violations of Section 12 of the FTCA, 15 U.S.C. § 52, which prohibits deceptive advertising related to food, drugs, devices, services, or cosmetics. Wheeler-Lea Act, Pub. L. No. 447, § 13(a), 52 Stat. 111, 115 (1938) (codified at 15 U.S.C. § 53(a)). This stopgap allowed the FTC to temporarily halt such practices pending completion of the administrative process.

In 1973, Congress amended Section 13 to authorize the FTC to immediately stop additional deceptive practices by seeking a temporary restraining order ("TRO") or preliminary injunction in federal court pending completion of the administrative process. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(b), (f), 87 Stat. 576, 591–92 (1973) (codified at 15 U.S.C. § 53(b)); *see, e.g.*, *Fed. Trade Comm'n v. Sw. Sunsites, Inc.*, 665 F.2d 711, 720 (5th Cir. 1982). Congress also added a "proviso" authorizing issuance of a "permanent injunction" in "proper cases." 15 U.S.C. § 53(b).

In 1974, the Ninth Circuit held that the FTC could not obtain restitution through an administrative

cease-and-desist order. *See Heater v. Fed. Trade Comm'n,* 503 F.2d 321, 323–24 (9th Cir. 1974) (rejecting the FTC's attempt to impose monetary liability "*before giving notice* that the prior conduct was within the statutory purview" (emphasis added)). Then, in 1975, against the backdrop of *Heater*—and *before* the FTC first claimed that Section 13(b) authorized "equitable monetary relief"—Congress responded by enacting Section 19 of the FTCA.[3]

Section 19 for the first time provided the FTC with statutory authorization to obtain "restitution" and other backward-looking remedies under limited circumstances, subject to a three-year statute of limitations. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 206(a), 88 Stat. 2183, 2201 (1975) (codified at 15 U.S.C. § 57b); *cf. Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 773 (7th Cir. 2019) ("The absence of similar language in section 13(b) is conspicuous."); Ward, *supra*. Congress thus balanced the FTC's desire to obtain monetary relief against basic fair-notice due process principles: To recover damages, the FTC would have to prove that "a reasonable man would have known under the circumstances" that the conduct subject to the cease-

[3] Contrary to the FTC, Section 19 does not express any intention of Congress expanding the agency's injunction powers under Section 13. *See* 15 U.S.C. § 57b(e); *see also Credit Bureau Ctr., LLC*, 937 F.3d at 774–75. Instead, its purpose was to preserve the FTC's litigating position in *Heater*. *See* Peter Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions*, 41 Am. U. L. Rev. 1139, 1193–94 (1992).

and-desist order "was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2).

Congress also imposed procedural hurdles. Unless the FTC first used its Magnuson-Moss rulemaking authority to ban an "unfair or deceptive" act or practice, *id.* § 57b(a)(1), it could only obtain money damages under Section 19 through a multi-step process: first, obtaining a final cease-and-desist order against an alleged violator through its in-house administrative process, *id.* §§ 45, 57b(a)(2); and next, subject to judicial review, *id.* § 45(c), and only after the order became final, *id.* § 45(g), obtaining monetary relief if it also could prove a reasonable person would understand such conduct to be dishonest or fraudulent. *Id.* § 57b(a)(2),(b); *see Sw. Sunsites, Inc.*, 665 F.2d at 719 ("[A] consumer redress action [i]s a continuous two-phase process, the first phase being administrative adjudication, and the second judicial determination of appropriate redress[.]"); *cf. Credit Bureau Ctr., LLC*, 937 F.3d at 784 ("Section 13(b) also lacks a central feature of the FTCA provisions that expressly permit monetary relief: a notice requirement.").

B. The FTC Rejects Congress's Statutory Scheme.

Initially, the FTC seemingly accepted that Section 19 authorized consumer redress, but Section 13(b) did not. Compelling evidence of this can be found in a version of the FTC's Operating Manual predating "judicial precedents regarding permanent injunctions under [Section] 13 (b)." Fed. Trade Comm'n, Operating Manual § 11.5.7, *available at* http://bit.ly/2lfBqjz. The manual draws a sharp distinction between "[c]onsumer redress following the

issuance of a final adjudicated cease and desist order under FTCA § 19(a)(2)," *id.* § 11.1.1.5, and "[t]emporary and permanent injunctions under FTCA § 13." *Id.* § 11.1.1.6. Yet, it says nothing about disgorgement, restitution, or any other "equitable monetary relief" under Section 13(b). Nor does it mention "asset freezes" or "receivers."

But the FTC eventually balked at Section 19's procedural hurdles and sought a shortcut. As a former FTC official would later highlight, "the problem" with Section 19 was the procedural protections Congress provided respondents:

> You needed three separate lawsuits to get final relief. You had to bring a preliminary injunction in federal court and you had to bring a complete Section 5 case, administrative case, all the way through, and then you have to go for a Section 19 case. That is time consuming, and it is very inefficient.
>
> So, actually by . . . [1982], the Commission was already looking at alternatives, because at the very tail end of Section 13(b) . . . there are 14 key words . . . .
>
> [T]oday those 14 words are the basis for the 13(b) program. This legislative history doesn't mention very much about what that little proviso was intended to do, except that it was thought that, well, the Commission could go to court in routine fraud cases and get a permanent injunction[.]

David M. FitzGerald, FTC 90th Anniversary Symposium: Session on "Injunctions, Divestiture and Disgorgement" (Sept. 23, 2004) (transcript available at http://bit.ly/2kW0VWS).

Until recently, the FTC's website echoed this: "Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one step." *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Fed. Trade Comm'n, http://bit.ly/2lrPuGq (archived March 1, 2019). This shortcut also relieved it of Section 19's *scienter* requirement and three-year statute of limitations. *See* 15 U.S.C. § 57b(a)(2), (d).[4]

C. The FTC Uses Test Cases to Expand Its Section 13(b) Powers.

How is it that the FTC convinced courts to adopt its policy preferences over those mandated by Congress? A former Assistant Director for Litigation in the Bureau of Consumer Protection ("BCP"), who was a key architect of the FTC's expansion of its Section 13(b) powers, has offered insights into the FTC's long-term strategic litigation campaign to invade the legislative domain. He advised:

- "*Step cautiously when proceeding boldly*. In exploring its Section 13(b) authority, the Commission moved warily, selecting cases with compelling facts . . . before pursuing a more ambitious agenda." *See* David M. FitzGerald,

[4] Courts have held that Section 13(b) actions are not subject to *any* statute of limitations. *See, e.g.*, *Fed. Trade Comm'n v. Dalbey*, No. 11-1396, 2012 WL 1694602, at *2–3 (D. Colo. May 15, 2012).

The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act at 21–22 (Paper, FTC 90th Anniversary Symposium) (Sept. 23, 2004), *available at* http://bit.ly/2kUIIcf.

- "*Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there*, however, research into the case law interpreting statutes conferring *similar injunctive authority on other agencies led to the* Porter *line of cases*, providing critical support for a broad interpretation of Section 13(b)." *Id.* at 22 (emphasis added).
- "*Being out of the spotlight can be an advantage*[.]" *Id.*
- "*Don't let naysayers discourage pursuit of a promising theory or approach*. When the early cases were proposed, *many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized only injunctive relief*." *Id.* (emphasis added).

Echoing this, a former FTC Chairman and Director of the BCP explained: "Admittedly, this use of Section 13(b) was something of a 'stretch.' . . . [T]here was some internal opposition, arguing, with considerable force, that the 1975 amendments provided the exclusive road to financial relief." J. Howard Beales & Timothy Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 2 (2013).

The FTC proceeded anyway, like a fox toward the henhouse, with staggering success.[5] According to the FTC, in 2017 alone it obtained $5.29 billion in awards, without including amounts suspended due to defendants' inability to pay. *See Stats & Data 2017 – Annual Highlights 2017*, Fed. Trade Comm'n, http://bit.ly/2mwz7sj (last visited Sept. 22, 2020). This was obtained without the safeguards Congress granted defendants under Section 19.

D. Inapposite Precedent Cannot Override a Statute's Plain Language.

The FTC's mansion of favorable Section 13(b) precedent is built upon statutory quicksand. There is no textual foundation for its claimed Section 13(b) powers. Agencies only possess powers Congress *affirmatively chooses* to delegate to them. *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Congress did not do so here. That should end the matter. Congress is not required to expressly negate an agency's claimed administrative powers. *See Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Nor is there any indication in Section 13(b)'s sparse legislative history that Congress intended to provide the FTC broad authority to obtain "equitable monetary relief" or even considered the possibility. *See* Beales & Muris, *supra*, at 4 ("[T]here is no hint in the legislative history that Congress intended to grant the FTC broad authority to seek monetary relief when

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[5] *But see City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 307 (2013) ("The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority.").

it enacted Section 13(b).”). The watchdog of congressional intent didn't bark here. *See Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1982). Otherwise, there would have been no reason to enact Section 19, a more specific statute, only two years later. A contrary result renders Section 19 a nullity and does violence to the statutory scheme. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *see also United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005).

Undeterred, the FTC uncovered elephantine new powers hidden in the mousehole of Section 13(b)'s permanent-injunction proviso. *But see Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). The vehicle the FTC used was judicial precedent interpreting other statutes enforced by other agencies (in particular, a seventy-year-old Supreme Court case, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)).[6] It effectively admits this. *See, e.g.*, FTC Opp'n to Pet. for Reh'g En Banc at 10–11, *Fed. Trade Comm'n v. Publishers Bus. Servs.*, No. 17-15600 (9th Cir. filed Dec. 20, 2018) (“*Porter* and *Mitchell* form the foundation of this Court's long established holding that equitable monetary relief is available under Section 13(b)[.]”).

But judicial precedent interpreting different statutes (enforced by different agencies) cannot override plain language and structure. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S.

[6] Appellate courts have primarily relied on *Porter* as authority for this expansion of FTC's powers. *See Credit Bureau Ctr., LLC*, 937 F.3d at 775–82.

618, 640 (2007) (rejecting "analogies to other statutory regimes").

Moreover, *Porter* should be viewed in context and its holding read as consistent with the statutory scheme on which it was based. Congress gave the Price Controls Board broad powers under the Emergency Price Control Act to limit profiteering in wartime. Unlike Section 13(b)'s provision for injunctive relief only, Section 205(a) authorized the Administrator to seek "an order enjoining such acts or practices, *or for an order enforcing compliance* with such provision" and, accordingly, authorized a court to grant a "permanent or temporary injunction restraining order, *or other order*[.]" *Porter*, 328 U.S. at 397 (emphasis added). Section 205(a) thus provided for an order separate from and in addition to an injunction. Moreover, to obtain such an order, the Administrator was not limited to pursuing the *prospective* relief that would be constituent with an injunction, but also could show "that such person has engaged . . . in any . . . acts or practices" prohibited by the Act. Thus, the relief authorized by the Act was both forward-looking *and backward-looking*, allowing for an "other order" that could be based on past violations.

These are not technocratic distinctions. The backward-looking provision in *Porter* stands in stark contrast to the purely prospective *injunctive* relief authorized by Section 13(b). "Under Section 13(b) of the FTC Act, the FTC must plead that [defendant] 'is' violating or 'is about to' violate the law" otherwise, "[t]he FTC . . . fails to state a claim upon which relief can be granted." *Fed. Trade Comm'n v. Shire ViroPharma,* 917 F.3d 147, 161 (3rd Cir. 2019). The

Administrator in *Porter* did not have this limitation; and thus when the Court in *Porter* said that it could grant monetary relief as either: (1) "complete relief even though the decree includes that which might be conferred by a court of law;" or (2) "an order appropriate and necessary to enforce compliance with the Act," 328 U.S. at 399–400, neither theory was limited to prospective relief as imposed by Section 13(b). Nevertheless, *Porter* has been used to justify essentially unrestricted ancillary relief—whether equitable or legal in nature.

E. FTC Pursuit of Monetary Awards Cannot Be Squared with Recent Precedent.

The expansive use of *Porter* to justify monetary awards is inconsistent with more recent decisions that have relied on the text of a statute and respect for the separation of powers to provide necessary guardrails to agency action.

For example, in *Federal Trade Commission v. Shire ViroPharma, Inc*., the Third Circuit rejected the FTC's proposed interpretation, which depended on long-ceased conduct, holding that the text of the provision was unambiguous and applied to only current or future conduct. 917 F.3d at 156. "FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language." *Id*. at 159.

The holding in *Shire*, that injunctive relief under §13(b) is limited to the prospective relief of stopping current or imminent action cannot be squared with retrospective monetary awards that depend wholly on past actions that are not addressed by §13(b).

Similarly, in *Sec. & Exch. Comm'n v. Liu*, 591 U.S. ____ (2020), the question was whether authorization to seek "other equitable relief" in §78u(d)(5) could be read to allow for disgorgement. This Court held that the allowance for equitable relief only authorizes a disgorgement award that conforms to traditional equitable principles, limiting any award to net profits. Critically, unlike §78u(d)(5), Section 13(b)'s text solely authorizes an "injunction"—and does not mention or allow for "other equitable relief," such as a disgorgement aware of net profits.

Finally, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court distinguished *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in part on the basis that, unlike the FTC of 1935, the CFPB's "enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*." 580 U.S. ____ (2020). If *Humphrey's Executor* retains any relevance to today's FTC, it must stand for the proposition that the FTC does not have such extensive law enforcement powers or be overruled.

Taken together these cases reinforce that the FTC's power is limited to that conferred by Congress, consistent with the Constitution's separation of powers. Accordingly, FTC authority must be limited to the discrete authority granted by §13(b): solely prospective prohibitory injunctive relief against current or imminent unlawful behavior.

F. FTC's Section 13(b) Power-Grab Deserves No Deference.

The FTC may seek to elide the lack of textual basis for its claimed 13(b) powers by averring "congressional ratification" based on "subsequent legislative history." This should be rejected out-of-hand. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part).

This Court should also reject any attempt by the FTC to trot out the old adage that remedial statutes should be broadly construed. *See, e.g.*, *Shire,* 917 F.3d at 158; *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). If anything, Section 13(b) should be *narrowly* construed to protect defendants' due process rights. *See Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (due process requires fair notice).

The FTC's slow accretion of power has gone too far and gone on too long. It is time for this Court to prune back the agency's overreach and stop the real-world harm this overreach has caused.

II. THE FTC'S PURSUIT OF MONETARY AWARDS VIOLATES CONSTITUTIONAL RIGHTS AND EVADES VENERABLE PROCEDURAL PROTECTIONS.

"[T]he love of money is the root of all evil[.]" *United States v. Melvin*, 730 F.3d 29, 35 (1st Cir. 2013) (citing 1 Tim. 6:10). So too here.

The FTC's quests for extra-statutory monetary awards has resulted in parallel body of jurisprudence in which constitutional violations and procedural protections are routinely overlooked. The following

case study reads like a law school exam in issue spotting.

A. Collateral Damage: A Case Study.

Vylah Tec LLC and two sister entities (together, "V-Tec") were Florida start-ups. V-Tec had two principal income streams: (1) servicing pre-paid technical support contracts for buyers of electronic devices from shopping channels; and (2) sales of third-party security software, utility software, and data-backup services, or discrete remote support services. *Fed. Trade Comm'n v. Vylah Tec LLC*, No. 17-228, 2018 WL 4328218, at *1 (M.D. Fla. Sept. 11, 2018).

On May 1, 2017, the FTC filed an *ex parte* complaint under seal, alleging deceptive practices in selling "unneeded" software and support services. There was no allegation that the service contracts were deceptive nor that the associated technical support was inadequate.

Also under seal, the FTC filed an *ex parte* motion for a TRO with an asset freeze and appointment of a receiver. Because the FTC sought joint and several liability, and a monetary award that exceeded the funds in the company bank accounts, the defendants' personal assets were frozen, "to preserve the status quo."

The following day, the court granted the TRO—again under seal. The order included the following provisions relating to the FTC's monetary demand:

- A freeze on all assets (company and personal), including assets of non-defendant third parties that might benefit any defendant;

- A credit freeze on all defendants, including credit cards;
- Transfer of all company assets ("Receivership Estate") and records to the Receiver;
- Receiver authority to liquidate assets, discontinue the business, and break contracts;
- Receiver and FTC authority to search the business premises, including plenary access to documents (physical or electronic); and,
- Authority to employ law enforcement in entering and searching the premises.

The TRO also provided for Receiver compensation from the Receivership Estate.

On the morning of May 3, 2017, the Receiver, with FTC representatives, and the Fort Myers Police Department ("FMPD") raided V-Tec's offices.[7] Police officers with the FTC investigator entered first, commanding employees to step away from their computers and put their hands up.[8]

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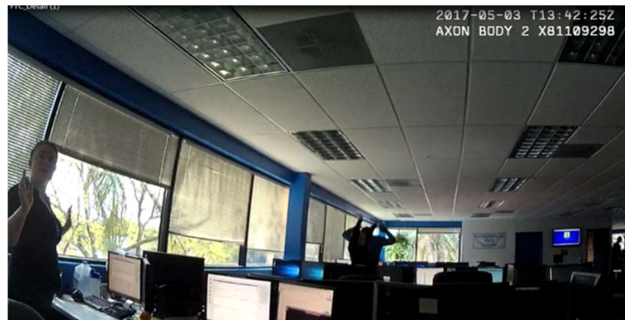
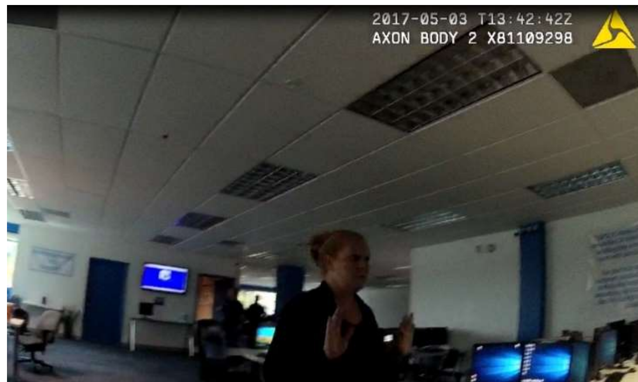
[7] Asked whether it typically involves local law enforcement in accessing a business, the FTC confirmed that "it's not unusual to retain law enforcement support for the purpose spelled out in the temporary restraining order." ECF No. 270-1 at 250:5–6, 11–17.

[8] Photographs excerpted from FMPD body-cam footage, found at trial exhibit DX-B; also available here: *FTC Raids Private Business Without Notice or Chance to Defend – Body Cam Footage One*, YouTube, https://youtu.be/Y8GQfodWJyE (last visited Nov. 11, 2019); *FTC Raids Private Business Without Notice or Chance to Defend – Body Cam Footage Two*, YouTube, https://youtu.be/7_MOp7rl74I (last visited Sept. 22, 2020).





One officer told employees they were being detained.

Shortly thereafter, the Receiver, FTC attorneys, and support staff entered the V-Tec offices. They shut down security cameras and compelled employees to open secure locations. The employees were detained

for hours in a small vestibule, interviewed individually in a separate room, and asked to sign statements. No attorneys were present on behalf of V-Tec or any employee.

The FTC investigator(s) retrieved information from V-Tec's computers and cloud storage.

During the raid, FTC litigation counsel read computer screens and documents and explored offices

that had been secured. No court had issued a warrant to enter or search V-Tec's offices.

Following the raid, some V-Tec computers were imaged and electronic copies made of documents in cloud storage. Those files were placed on hard drives and provided to the FTC litigation counsel, who searched them without limitation, without a warrant, and without privilege screening. The Receiver, likewise, had plenary access to the records, which he searched, identifying potential evidence. The Receiver retained all computers for the duration of the litigation.

The defendants' personal assets were frozen, including a jointly owned marital bank account and home. The marital assets remained frozen during seventeen months of litigation, until a successful appeal to the Eleventh Circuit and denial of the FTC's post-appeal motion to reinstate the freeze mandated their release. During that time, defendants' personal assets could not be used to pay the mortgage nor could the house be sold or the mortgage refinanced because of the asset and credit freezes.

The Receiver transferred over $670,000 from the corporate defendants' bank accounts into the Receivership account. In light of the personal asset freeze, the court intermittently released $80,000 for living expenses and attorney fees.[9] However, after the asset freeze, but before defense funds were released, FTC counsel shared with the Receiver that she had spoken with an attorney who was considering representing the defendants "if he can get paid." She

[9] Litigation continued for over two years, involving thousands of hours of attorney services.

had responded to prospective counsel's inquiry that, "the defendants need to complete their financial statements before [the FTC] could even consider his request," and that they "also encouraged Defendants' Stipulation to the Preliminary Injunction." ECF No. 312-2 at 2. Without access to payment, it is not surprising that the attorney did not assume the defense. The following week, $10,000 was released to retain defense counsel.

Shortly after seizing the businesses, the Receiver determined that these previously profitable businesses could not be run profitably and recommended to the court that the businesses remain closed. Because the sole purpose of the receivership was to preserve assets to satisfy the FTC's monetary demand, the court agreed. As a result, the prepaid service contracts of over one million customers were nullified and those customers were denied, without notice, the services they had purchased. To defendants' knowledge, no customer was ever compensated by the Receiver or the FTC for being dispossessed of a prepaid service contract.[10]

There was no allegation against the prepaid service contracts—indeed plaintiffs conceded early on that the revenue from the shopping channel contracts was "clean." But the rationale for the FTC's monetary demand, which began at $1.8 million and grew to $3.4 million repeatedly changed. *See* Mem. Op. & Order,

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[10] Sadly, this example of consumers being deprived of prepaid contracts by the FTC is not unique. *See, e.g.*, Mem. of Points and Authorities in Support of Mot. to Intervene on Behalf of 3,802 Students of Online Trading Academy, ECF 235-1, No. 8:20-cv-00287 (S.D. Cal. May 21, 2020).

ECF No. 405 at 8–10. After trial, the court denied the monetary claim and entered judgment of $0.00. *Fed. Trade Comm'n v. Vylah Tec LLC*, 378 F. Supp. 3d 1134, 1143 (M.D. Fla. 2019).

By then, however, there was little left except roughly $497,000 in the bank account held by the Receiver, who submitted a request for fees in excess of that amount.

The court granted the Receiver a reduced amount of $318,000 in fees plus $138,000 for his attorney, for a total of $456,000 payable from the Estate and ordered him to wrap up the receivership and return the remaining funds. Instead, the Receiver filed a request for additional payment. In the end, only $34,500 was returned to defendants. Had the FTC prevailed at trial, the result would have been unchanged—the Receiver still would have claimed the bulk of the estate, leaving virtually nothing for "restitution."

B. The FTC's Abuse of Section 13(b) Threatens Constitutional Rights.

As illustrated above, the FTC's use of Section 13(b) in pursuit of headline-grabbing monetary judgments undermines defendants' constitutional rights.

1. The FTC Uses Section 13(b) to Circumvent the Fourth Amendment.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. amend IV, and it applies to the FTC. *Knoll Assocs., Inc. v. Fed. Trade Comm'n*, 397 F.2d 530, 536 (7th Cir. 1968).

This Court has held that the warrant itself—not merely supporting documents—must state with particularity the things to be seized such that the description is available for inspection by the person whose premises is to be searched. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). Any "warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). This Court has never allowed the Fourth Amendment to be nullified or circumvented simply by appointing a receiver to seize the premises before a general search is conducted.

The evils of general warrants go to the heart of the Founding. Yet now, courts routinely issue general warrants in FTC enforcement actions; they just call them TROs with appointment of a receiver. Although the Fourth Amendment prohibits general searches and seizures, a shadow jurisprudence has developed allowing the FTC to evade the warrant requirement.

For instance, the V-Tec TRO authorized the Receiver to:

> Take exclusive custody, control, and possession of all Assets, Documents, and electronically stored information . . ., wherever situated.
>
> . . . [and]
>
> Cooperate with reasonable requests for information or assistance from any state or federal law enforcement agency.

ECF No. 9 at 13, 14, and 18.

The Receiver and the FTC, using armed law-enforcement officers, entered V-Tec's offices and seized defendants' records before defendants knew the TRO had issued and without a warrant. They demanded access to secured locations and information from V-Tec's employees while denying them contact with their employers or benefit of counsel. The Receiver then excluded defendants from their documents and data, seizing the onsite computers and changing passwords to block access to remotely stored electronic documents. This bore no resemblance to the particularity required by the Fourth Amendment.

The FTC searched V-Tec's records, fishing for evidence of wrongdoing, without limitation on what or where they could search, or who could see it. The TRO thus acted as a general warrant issued to the FTC, acting as investigator and prosecutor.

Because the Receiver was appointed to maintain the *status quo* to preserve assets—having no investigative or prosecutorial duties—these Fourth Amendment violations flowed directly from the FTC's monetary demand.

2. Pursuing Damages Under the Guise of Equity Deprives Defendants of their Seventh Amendment Jury Trial Right.

By labeling their monetary demand as "equitable" relief, the FTC deprives defendants of their Seventh Amendment right to a jury trial. *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

The Seventh Amendment preserves the right to trial by jury in "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. "Suits at common law," as used in

the Seventh Amendment, comprise "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Parsons*, 28 U.S. at 447. "The Seventh Amendment thus applies . . . to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (cleaned up). Whether an FTC action is equitable or legal requires an examination of "both the nature of the statutory action *and the remedy sought*." *Id.* (emphasis added). Because deception cases sound in fraud—a classic legal action—the second inquiry is paramount.

The FTC camouflages its demand for legal damages by labeling it "restitution, the refund of monies paid, and disgorgement of ill-gotten gains." But using "restitution" interchangeably with "disgorgement" misconstrues the law. Whether restitution is legal or equitable depends on the nature of the remedy sought. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *see generally* John E. Villafranco & Daniel S. Blynn, *Consumer Redress Under Section 13(b) of the FTC Act: Correcting the Record*, Regulatory Focus (Nov. 2010) (explaining the difference between equitable and legal restitutions, and FTC's history of seeking *ultra vires* legal damages in Section 13(b) actions), http://bit.ly/2JZrBiO. Restitution may be equitable "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's

possession." *Great-W. Life & Annuity Ins. Co.*, 534 U.S. at 213. With a fungible asset like money, such traceability would be rare.

By contrast, legal restitution applies when the plaintiff seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id*. at 213 (citation omitted). In the V-Tec case, the FTC sought joint and several liability from individuals. In other words, the agency didn't care where the money came from or whether it could be traced. This is the very definition of restitution at law.

The Seventh Amendment's protection of the jury trial right is crucial in cases like these. Without recourse to a jury, the slippery slope of ever-expanding agency power will never reach bottom.

3. The FTC's Pursuit of Money Damages Undermines the Sixth Amendment.

As illustrated above, the FTC uses Section 13(b) to freeze *untainted* assets to effectively deny defendants' ability to meaningfully defend themselves, placing enormous pressure on them to settle. This Court has held that in criminal cases "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). As a matter of fairness, the same *should* hold true here. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

4. The FTC's Misuse of Section 13(b) Is Contrary to Values Protected by the Fifth and Eighth Amendments.

The FTC's use of Section 13(b) to transfer companies' assets to receivers is in tension with the values protected by the Fifth and Eighth Amendments. *Cf. Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). For example, in the V-Tec matter, no monetary judgment was imposed. Yet of the $670,000 seized by the Receiver, only 5% was returned. In addition to dissipating 95% of the corporate assets, the Receiver rendered nugatory over one million service contracts and razed a going concern, including services the FTC conceded were lawful. Whether this wholesale destruction of value and transfer of assets is better described as a deprivation of property under the Fifth Amendment or an excessive fine under the Eighth Amendment is beside the point. It was wrong.

C. Abrogation of the Burden of Proof Opens the Door to The FTC's Abuse of Section 13(b).

When the FTC pursues a TRO or a preliminary injunction with an asset freeze, that pursuit is based on the notion that consumers have been deceived and injured as a result. The implication is that the elements of fraud, including damages, are likely to be proven thus meriting the extraordinary remedy of a preliminary injunction. But a comparison of the elements necessary to prove fraud and secure a TRO in a private action and the corresponding process in an FTC enforcement action show this analogy to be a fiction. Because the five elements of fraud are reduced to three in an enforcement action and then those three elements routinely presumed to be the satisfied, the

"likelihood of success on the merits" necessary to obtaining an TRO is essentially presumed as well. Thus, five elements of fraud and four elements essential to a PI, are telescoped into one, leaving an effectively automatic process (often invoked *ex parte*) that rests on the simple identification of "a statement" and presumes the rest.

1. FTC "Deception" Cases Require no Actual Deception or Injury.

It is black letter law that "[w]hen fraud is alleged, the burden of proof as to each element of fraud is on the party asserting the fraud. The failure of the party alleging fraud to prove any one of the essential elements of fraud prevents the party from prevailing and precludes recovery." 37 Am. Jur. 2d Fraud and Deceit § 464. Where multiple frauds are alleged, proof is independently required for each alleged instance of fraud unless the acts are "connected with, or form a part of" the others. *Clarke v. White*, 37 U.S. 178, 178 (1838).

In cases of common law fraud the elements are largely equivalent and include: "(1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Fifth Third Mortg. Co. v. Kaufman*, 934 F.3d 585, 588 (7th Cir. 2019) (Illinois law). In any case, "[i]njury is an essential element of remediable fraud. 'Deceit and injury must concur.'" *Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 254 (1951) (citation omitted).

Not so in a "deception" claim brought by the FTC where the five elements of fraud are reduced to three. Under Section 5(a) of the FTCA, "[a]n act or practice is deceptive if 'first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *Fed. Trade Comm'n v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (citation omitted). The "deceit and injury," required by *Montana-Dakota Utilities Co.* disappear, eliminating three elements: knowledge, intent, and injury.

It would appear at first glance that the two remaining elements of "a false statement of material fact" and "action by the other party in reliance on the truth of the statement" are retained. Not so. Instead, the first element is expanded into two: a representation and materiality. And the element of reliance—which requires an actual act to have taken place—is replaced by "likely to mislead"—which requires nothing more than a little imagination and the willingness to speculate on the thought processes of presumed victims. *See also Fed. Trade Comm'n v. AMG Capital Mgmt., LLC,* 910 F.3d 417, 437–38 (9th Cir. 2018) (Bea, J., specially concurring) (opining that "likely to deceive" determination should not be made at summary judgment stage).

But even these "elements" are a chimera. First, lest there be any doubt whether a "representation" is the equivalent of a "*mis*representation," the case law is clear that the statement in question need not be false. *See, e.g., Fed. Trade Comm'n v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1066 (C.D. Cal. 2012). Nor does it need to expressly claim

anything; it may be merely suggestive, including "language which relatively few consumers would interpret as making a particular representation." *Id.* at 1066 (citation omitted). And, if in doubt, "[a]dvertising capable of being interpreted in a misleading way should be construed against the advertiser." *Resort Car Rental Sys., Inc. v. Fed. Trade Comm'n*, 518 F.2d 962, 964 (9th Cir. 1975).

Second, allegations that a statement is "likely to mislead" need never confront the reality of proven reliance or the lack thereof because "[n]either actual damage to the public nor actual deception need be shown." *Resort Car Rental Sys., Inc.*, 518 F.2d at 964. If the claim is express, materiality is presumed. *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1095–96 (9th Cir. 1994) ("Express product claims are presumed to be material"). And, if a consumer purchased the defendant's product, reliance is presumed. *Fed. Trade Comm'n v. Figgie Int'l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993).

What then is left of the ostensibly three-point burden that the FTC must satisfy? A single element: a statement that *could be* construed as misleading. Materiality is presumed, reliance is presumed, and deception is presumed. Damages need not be shown, and the knowledge and intent elements of fraud are not required.

2. The First Element to Secure a Preliminary Injunction is Automatically Satisfied.

As troubling as presumed liability may seem at the merits stage, the real impact comes when the FTC goes to court seeking a TRO with a PI shortly to follow. "It frequently is observed that a preliminary

injunction is an extraordinary and drastic remedy[.]" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). But the imposition of a PI is not extraordinary when the FTC is the plaintiff—and it is easy to see why. Much like the vanishing elements of fraud, the requirements to obtain a preliminary injunction evaporate.

Under the traditional rubric, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). By contrast, when the FTC is plaintiff, this four-part test is reduced to two parts: "[i]n determining whether to grant a preliminary injunction under section 13(b), a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities."" *Fed. Trade Comm'n v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (citation omitted). Even after this Court's decision in *Winter*, courts continue to hold that, unlike everyone else, FTC need not show likely irreparable harm. *E.g., Fed. Trade Comm'n v. Consumer Def., Ltd. Liab. Co.*, 926 F.3d 1208, 1212–14 (9th Cir. 2019).

In practice, these two elements are equivalent to no elements. As shown above, by merely identifying a statement that could be construed as misleading, the FTC is presumed to have satisfied all the elements to succeed in a deception claim, rendering "likelihood to succeed on the merits" satisfied by the mere identification of a statement.

The second element fares no better. Although nominally requiring a balancing of the equities, because "Section 13(b) places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction." *Fed. Trade Comm'n v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). And, because in many cases the FTC files the motion for TRO *ex parte* and under seal, with no adverse party to challenge the allegations or even provide context, how could the FTC lose?

Even so, the damage caused by the routine granting of a TRO would be constrained if the FTC were confined to the prospective relief available under §5(a).[11] A TRO pausing ongoing or imminent violations of the FTCA during the time period in which an administrative process is pending would not impose the severe and often irremediable damage caused by the appointment of a receiver and broad asset freeze.

But there is a morbid logic to inserting a damages claim into the process of "balancing the equities." If a potentially multi-million (or even billion) dollar damages award is at stake, then the scale tilts automatically in favor of the injunction, asset freeze, and appointment of a receiver to "preserve" those assets. The larger the monetary demand, the greater the "equities" weigh in favor of the TRO. An amplified monetary demand also provides the expedient of swamping any offsetting interests that customers,

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[11] *See Shire*, 917 F.3d at 155.

employees, vendors, and the general public have in the target business. If the number is big enough, the "particular regard" the courts of equity should pay "for the public consequences in employing the extraordinary remedy of injunction" is nullified. *Winter*, 555 U.S. at 24.

Finally, a ruinous cycle ensues in which the demand for monetary relief becomes a litigation tactic. By making a massive estimate of damages, the FTC can secure the asset freeze that makes it impossible for the defendant to mount a defense, continue serving customers, and satisfy the myriad of demands necessary to preserve the business. Faced with certain ruin given the run of presumptions in favor of the FTC and the risk of judgment on personal assets against the defendant, the FTC wins by default. As the proverb says, "the kingdom was lost, and all for the want of a horseshoe nail."[12] Here, of course, the horseshoe nail is the lack of adherence to the text of the statute.

III. STARE DECISIS DOES NOT SHIELD FTC'S OVERREACH.

The FTC is not a legislative body, but instead must implement Congress's intent. It has not done so here. Its litigation preferences must yield to Section 13(b)'s actual text. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). If the FTC wants to expand its enforcement options, it must convince Congress, not the judiciary. *See id.* at 1726.

The FTC will likely seek to justify its overreach by pointing to a line of federal appellate court decisions mistakenly (and uncritically) accepting its wayward

[12] https://nationalproverbryday.co.uk/poem/for-want-of-a-nail/

Porter-based arguments, as it has done before. *See also Credit Bureau Ctr., LLC*, 937 F.3d at 775 ("Unsurprisingly, the [FTC] wagers nearly all of its case on *stare decisis*[.]"). But longstanding statutory misapplication of Section 13(b) does not set such error in stone. *See, e.g.*, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177, 191 (1994), *superseded on other grounds by* 15 U.S.C. § 78t(e) (1995) (overruling sixty years of allowance of a statutory cause of action because Congress had not expressly provided for it).

Because much Section 13(b) precedent rests on mistaken reliance on FTC's wayward *Porter*-based arguments unsupported by any textual foundation, *any* presumption in favor of *stare decisis* should be deemed rebutted. *See Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). FTC's *ultra vires* preference for seeking monetary damages under Section 13(b) also burdens federal courts with litigation that belongs in FTC's administrative process, notwithstanding FTC's use of Section 13(b) for budget justification purposes. *See, e.g.*, FTC FY 2020 Congressional Budget Justification, p.7, https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy_2020_cbj.pdf (highlighting to Congress monetary judgments obtained). Nor can FTC's litigation positions interpreting Section 13(b) save it. No deference is due where, as here, the agency's interpretation is contrary to the statute's plain language and structure. *See also John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109 (1993).

Despite the FTC convincing other courts to bless its accumulation of extra-statutory authority, this Court has never accepted the FTC's purported Section 13(b) powers. Nor should it.

CONCLUSION

The Court should rule in favor of the Petitioners, reverse the Ninth Circuit, and affirm the Seventh Circuit.

Respectfully submitted,

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