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 OF *AMICI CURIAE* FORMER FEDERAL TRADE COMMISSION OFFICIALS IN SUPPORT OF RESPONDENT

DAVID C. VLADECK
*Counsel of Record*
RACHEL L. FRIED
GEORGETOWN UNIVERSITY
LAW CENTER
CIVIL LITIGATION CLINIC
600 New Jersey Ave. NW
Washington, DC 20001
(202) 661-6614
vladeckd@georgetown.edu

*Counsel for Amici Curiae*

DECEMBER 2020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**

**Other Authorities**

# BRIEF OF *AMICI CURIAE* FORMER FEDERAL TRADE COMMISSION OFFICIALS IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICI CURIAE*

*Amici* are former Federal Trade Commission (FTC) officials who had substantial experience overseeing FTC enforcement cases.[1] Joan Z. Bernstein served as Director of the FTC's Bureau of Consumer Protection from 1995 to 2001. M. Eileen Harrington served as Executive Director of the FTC from 2010 to 2012, and as Acting Director of the Bureau of Consumer Protection in 2009. Mary K. Engle served as Associate Director, Advertising Practices Division, of the Bureau of Consumer Protection from 2001 to 2020. C. Lee Peeler served as Deputy Director of the Bureau of Consumer Protection from 2001 to 2006. Jessica Rich served as Director of the Bureau of Consumer Protection from 2013 to 2017, as Deputy Director of the Bureau of Consumer Protection from 2009 to 2011, and as Associate Director of Financial Practices from 2011 to 2013. Teresa Schwartz served as Deputy Director of the Bureau of Consumer Protection from 1995 to 2001. Mozelle W. Thompson served as Commissioner of the FTC from 1997 to 2004. David C. Vladeck served as Director of the Bureau of Consumer Protection from 2009 to 2012. Joel Winston served as Associate Director, Division of Financial Practices, from 2000 to 2005 and 2009 to 2011; and as

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Associate Director, Division of Privacy and Identity Protection, from 2005 to 2009. We submit this brief because the resolution of this case could have a profound impact on the FTC's ability to obtain compensatory redress for injured consumers.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The FTC's core mission is set out in Section 5(a) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a), which directs the FTC to "prevent" "unfair or deceptive acts or practices" and "unfair methods of competition." Enforcement actions challenging Section 5 violations are typically brought under Section 13(b) of the Act, 15 U.S.C. 53(b), which authorizes the FTC to file cases in federal district court and empowers courts to issue preliminary and permanent injunctions.

The question in this case is whether Section 13(b) allows district courts to enter injunctions requiring defendants to return monies illegally acquired from consumers. For the past four decades, circuit courts uniformly relied on *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288 (1960), and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), to hold that Section 13(b)'s broad grant of injunctive authority carries with it "all the inherent equitable powers of the District Court," including the power to order compensatory redress. *E.g.*, *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (quoting *Porter*, 328 U.S. at 398). Applying these rulings, courts have ordered wrongdoers to refund billions of dollars to consumers.

And for the past four decades, Congress has consistently approved the FTC's use of Section 13(b) to obtain compensatory redress. Congress even amended

the FTC Act to facilitate Section 13(b) consumer redress cases. Congress has also conferred additional enforcement powers on the FTC, including the right, in some cases, to seek damages and civil penalties. These provisions complement, but do not displace, Section 13(b). Make no mistake, Section 13(b) remains the FTC's most important enforcement tool: It is the *only* provision of the FTC Act that enables the FTC both to enjoin violations of Section 5 (mainly frauds and scams) *and* to secure compensatory redress for injured consumers in the same proceeding.

Given this unbroken, decades-long history, the key question is what has changed? The text of Section 13(b) has not changed. Congress's approval of the FTC's use of Section 13(b) for compensatory redress has not changed. And the salience of *Mitchell* and *Porter*, the cases that established the legal backdrop for Section 13(b)'s enactment, has not changed.

Petitioners nonetheless contend that Congress did not understand the law it enacted in 1973 and that every Circuit Judge on the pre-2019 cases upholding the FTC's right to use Section 13(b) for compensatory redress failed to see the limits petitioners now ask this Court to impose on Section 13(b).

Petitioners attempt to answer the "what has changed" question by advancing two related arguments uniformly rejected in prior cases, but resurrected in Judge O'Scannlain's concurrence in this case, 910 F.3d 417, 429, and then adopted by the Seventh Circuit in *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (2019). Neither has merit.

*First*, petitioners contend that the courts and Congress have for decades misread Section 13(b). But petitioners' textual arguments are curiously acontextual. When Congress enacted Section 13(b), this

Court's rule was (and remains today) that "the comprehensiveness of [courts'] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 291 (quoting *Porter*); *accord Liu v. SEC*, 140 S. Ct. 1936, 1946–47 (2020) (reaffirming rule). Petitioners cannot point to any "clear and valid legislative command" denying or limiting equitable authority under Section 13(b) because Congress issued no such command. And petitioners cannot show any meaningful distinction between the statutes at issue in *Mitchell* and *Porter* and Section 13(b).

Petitioners' fallback contention, that Congress intended Section 19 of the FTC Act, 15 U.S.C. 57b, enacted two years after Section 13(b), to provide the sole tool for compensatory redress, is also deeply flawed. It ignores the reality that Section 19's scope is limited, *i.e.*, it is unavailable in many Section 5 violation cases, including those in which the challenged practices are unfair or deceptive, but not demonstrably "fraudulent or dishonest." It renders meaningless Section 19's declaration that its remedies are "in addition to, and not in lieu of, any other remedy or right of action" available to the Commission. It is also oblivious to Congress's repeated approval of the FTC's use of Section 13(b) to obtain consumer redress. And if taken seriously, the contention hollows out Section 13(b). Unless Section 13(b) authorizes equitable remedies, including the appointment of receivers, accountings, and the imposition of asset freezes, the FTC would have little power to prevent asset dissipation and consumer redress would often be a fantasy. And without equitable remedies, the FTC would have no reason to pursue permanent injunctions under Section 13(b), when cease and desist orders would provide the same relief

*and* lay the groundwork for substantial civil penalties and equitable remedies. *See* 15 U.S.C. 45(*l*) & (m).

*Second*, petitioners assert that the precedential force of *Mitchell* and *Porter* has been eroded by the Court's decisions limiting equitable remedies. That argument also misses the mark because petitioners rely only on cases where Congress specified the remedies available under the statute, and either explicitly "or by a necessary and inescapable inference" restricted equitable remedies. *Porter*, 328 U.S. at 398. There is, of course, no "legislative command" in Section 13(b) limiting the equitable authority of district courts. Just last Term this Court in *Liu* relied on *Porter* to reaffirm that compensatory redress remains an equitable remedy available to district courts in federal agency litigation absent a legislative command to the contrary. *Liu*, 140 S. Ct. at 1943, 1946–47. This Court has never questioned the vitality of the holdings of *Mitchell* and *Porter*. And petitioners do not argue that those decisions should now be abrogated or abandoned.

For these reasons, *amici* urge the Court to affirm the judgment below.

## ARGUMENT

This brief focuses on two points set out in the FTC's more comprehensive submission that warrant particular emphasis. First, for forty years, Congress, the FTC, and the courts have all endorsed the FTC's use of Section 13(b) to provide compensatory redress to injured consumers. Petitioners cite no change in the law, let alone a change that would justify overturning this shared understanding. Second, petitioners' contention that Section 13(b) does not authorize equitable remedies cannot be reconciled with the Court's rulings in *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288

(1960), and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), or with this Court's affirmation of the *Porter* doctrine in *Liu v. SEC*, 140 S. Ct. 1936 (2020). Petitioners ignore the force of *stare decisis*, but in any event there is no basis to overrule these decisions.

## I. Section 13(b) Authorizes Compensatory Redress.

Justice Oliver Wendell Holmes famously wrote that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). *Eisner* is a statutory construction case, and in the preceding sentence Justice Holmes relies on "the interpretation of language by its traditional use – on the practical and historical ground" to find that the tax at issue "always has been regarded as the antithesis of a direct tax." *Id.*

In this case, there are also pages of history that demonstrate that Section 13(b) "always has been regarded" as conferring authority on courts to order compensatory redress. This history includes Congress's enactment of Section 13(b) and its decades-long approval of the FTC's use of Section 13(b) to obtain consumer redress; the FTC's longstanding practice of bringing Section 13(b) cases to repatriate illegally obtained monies to consumers; and, prior to 2019, the unanimous rulings, spanning nearly four decades, by eight circuit courts, that Section 13(b) conferred authority on district courts to order compensatory redress.

### A. Congress and Section 13(b).

**1.** Section 5 of the FTC Act directs the Commission to "prevent" "[u]nfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. 15 U.S.C. 45(a). Before 1973, the FTC

lacked redress authority. The FTC enforced the Act's prohibitions through administrative proceedings, but the only available remedies were forward-looking cease and desist orders. The FTC could ask the Attorney General to challenge order violations and seek civil penalties under Section 5(*l*), 15 U.S.C. 45(*l*), but those penalties did not provide redress for injured consumers. *See Heater v. FTC*, 503 F.2d 321, 325 n.16 (9th Cir. 1974) (noting that before the 1973 amendments, "those sufficiently unscrupulous or reckless to engage in conduct clearly forbidden by the Act may do so until a cease and desist order is entered, escaping with the fruits of the violation. In many situations … a violation of the Act may be quite profitable.").[2]

Congress took steps to close this gap. First, Congress added Section 13(b), 15 U.S.C. 53(b), to the FTC Act to authorize the Commission to file cases in district court whenever the Commission has reason to believe that a party is violating or about to violate any provision of law enforced by the Commission. Section 13(b) authorizes the court to impose preliminary relief, including a preliminary injunction or temporary restraining order, provided that the FTC files an administrative action against the defendant within twenty days of the imposition of the preliminary relief. Section 13(b) also empowers courts to issue permanent injunctions in "proper cases."

At the time of Section 13(b)'s enactment, it was settled law that a federal agency's statutory authority

---

[2] For an overview of the FTC's initial use of Section 13(b) to obtain consumer redress, *see* J. Howard Beales III and Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2174-77 (2015).

to seek injunctive relief carried with it "all the inherent equitable powers of the District Court," including the power to order compensatory redress. *Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 291 (quoting *Porter*). The *Porter* Court reaffirmed the longstanding principle that "[t]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* This principle applied with full force to Section 13(b) when Congress enacted it in 1973. Accordingly, Section 13(b)'s grant of equitable authority empowers courts to order not only interim equitable relief—*e.g.*, the appointment of receivers, accountings and asset freezes—but also equitable relief in the form of restitution and rescission.[3]

This understanding of Section 13(b) is in keeping with the interpretive canon that "Congress legislates against the backdrop of existing law." *See, e.g.*, *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019). The "existing law" in 1973 consisted of *Mitchell* and *Porter*, each of which drove home that Congress's bestowal of permanent injunctive power authorized district courts to impose equitable remedies. *Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 291 (quoting *Porter*).

Nothing in the text of Section 13(b) diminishes the longstanding principle stated in *Porter* and *Mitchell*. As discussed above, Section 13(b) permits the FTC to

---

[3] *See*, *e.g.*, *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (*per curiam*) (holding that district courts have "the inherent power of a court of equity to grant ancillary relief, including freezing assets and appointing a Receiver, as an incident to [their] express statutory authority to issue a permanent injunction under Section 13 of the Federal Trade Commission Act").

seek both preliminary and permanent injunctions. The permanent injunction provision states: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. 53(b). As *Porter* and *Mitchell* establish, the grant of injunctive power on district courts also conveys the power to order equitable remedies.

Petitioners argue that Section 13(b)'s permanent injunction provision authorizes permanent injunctions and nothing more. Under petitioners' theory, because Section 13(b) does not authorize equitable remedies, a permanent injunction could do no more than prohibit wrongful conduct. Petitioners never explain why, under their theory, a permanent injunction would be preferable to a cease and desist order. There is no sensible answer. FTC cease and desist orders serve the same purpose as court orders, but the FTC, not a court, dictates the terms, and the FTC can use both punitive and coercive sanctions to force compliance, not just the coercive tools available to district courts in civil contempt. *See*, *e.g.*, *Int'l Union, UMW v. Bagwell*, 512 U.S. 821, 827–32 (1994).

The FTC's tools to force compliance are formidable. Sections 5(*l*) and 5(m) of the Act authorize courts to impose equitable remedies for cease and desist order violations *and* punitive sanctions in the form of civil penalties, where "each day of continuance of such failure or neglect [to comply with a Commission order] shall be deemed a separate offense." Petitioners' interpretation renders Section 13(b)'s permanent injunctive provision surplusage, yet another reason to reject petitioners' reading of the FTC Act. *See*, *e.g.*, *Kungys*

*v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.).[4]

**2.** *Heater* held that the FTC has no power to award consumer redress in cease and desist orders. 503 F.2d at 326–27. In 1975, in the wake of the *Heater* ruling, Congress added Section 19 to the Act to fill voids Sections 5(*l*) and 13(b) left open. Section 5(*l*) provides for civil penalties for violations of cease and desist orders; it does not authorize redress for consumers injured by the initial violation. And Section 13(b) provides for consumer redress but does not authorize courts to impose damages or civil penalties.

Section 19 provides additional remedies that Congress saw fit to impose where (a) a party violates an FTC rule, or (b) a party's violation of a cease and desist order involves a practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent." 15 U.S.C. 57b. Section 19 permits courts to impose damages as well as compensatory redress in these circumstances. But Section 19 does not authorize injunctive relief or civil penalties. Because of the limited nature of Section 19's remedies, Congress was careful to ensure that Section 19 added to, not displaced, remedies available under Sections

---

[4] Petitioners' argument that the FTC can seek an asset freeze during an administrative proceeding collides with petitioners' main argument that all equitable remedies—including asset freezes, the appointment of receivers, and compensatory redress—are unavailable under Section 13(b). There is no textual support for petitioners' claim that equitable relief is available when the FTC seeks preliminary relief but not when the FTC seeks a permanent injunction. In any event, to obtain an asset freeze, the FTC must satisfy Section 13(b)'s demanding standards, which require "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."

5(*l*) or 13(b) by specifying that Section 19's remedies are "in addition to, and not in lieu of, any other remedy or right of action" available to the Commission. *Id.* 57b(e).

Notwithstanding Section 19's preservation-of-rights clause, petitioners argue that Congress intended Section 19 to be the FTC's *only* route to consumer redress. But petitioners fail to muster support for such a consequential claim.

Petitioners first argue that the FTC would have no need for Section 19 if it could get complete restitutionary relief through Section 13(b). Brief for Petitioners at 26–27 [hereinafter Pet'rs' Br.]; *see also FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 783 (7th Cir. 2019). This argument shortchanges Section 19. As explained above, Section 19 does more than authorize consumer redress. Section 19 is not, under the FTC's reading of the Act, irrelevant.[5]

Section 19, however, is not a suitable vehicle for consumer redress in the mine run of FTC violations. The only recourse Section 19 adds for Section 5 violations is after-the-fact; once an FTC cease and desist order becomes final (which entails a full trial on the merits, followed by the right to appeal to the Commission and then to a court of appeals), the FTC may file suit in district court to seek redress and damages. And to obtain redress, the FTC has to prove that the violation of a cease and desist order or FTC rule involved "dishonest or fraudulent" conduct, a showing that may require additional litigation in court, thus

---

[5] *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust. L.J. 1, 3 (2013), for an explanation of why petitioners' argument that Section 19 "provided the exclusive road to final relief" fails.

impeding the FTC's ability to get redress back into consumers' pockets. *See*, *e.g.*, *FTC v. Figgie Int'l*, 994 F.2d 595, 603 (9th Cir. 1993) ("[T]he Commission's findings describing an 'unfair or deceptive' trade practice under Section 5 do not necessarily describe a 'dishonest or fraudulent' one under Section 19.").

Petitioners' Achilles' heel is that Section 19, without the backstop of Section 13(b)'s equitable remedies, especially asset freezes, would be of limited value, if not useless because assets would likely be dissipated. For that reason, the only way petitioners can make a coherent argument under Section 19 is to reimage Section 13(b). Under petitioners' theory, Section 13(b) must authorize equitable remedies, including asset freezes, when the FTC seeks *preliminary* relief, but must not authorize equitable remedies when the FTC seeks a *permanent* injunction. There is no textual support for bifurcating Section 13(b) in this way, and the claim is at war with the *Porter/Mitchell* line of cases that address equitable *remedies*, not interim relief.

Petitioners next argue that permitting the FTC to obtain consumer redress under Section 13(b) discourages the Commission from issuing rules and using administrative adjudication to set norms that provide guidance to the detriment of industry. Pet'rs' Br. at 43. This argument suffers from two flaws. First, its premise—that Congress did not intend for the FTC to obtain consumer redress for proven violations of the FTC Act—is wrong. *See* Section 1.A.1, *supra*. When Congress enacted Section 13(b), it understood that cease and desist orders are integral to the FTC's policy-making function. *See* S. Rep. No. 93-151, at 30–31 (1973). Nevertheless, Congress enacted Section 13(b)'s permanent injunction provision knowing that the FTC might opt to bring some enforcement actions,

especially those with significant consumer loss, in district court pursuant to Section 13(b), rather than proceed administratively.

Second, history refutes petitioners' speculation that Congress was somehow concerned that the FTC might neglect its policymaking function. Both before and after Section 19's enactment, the FTC has decided hundreds of cases administratively, including cases presenting novel or substantial issues. *See*, *e.g.*, *In re POM Wonderful, LLC*, 155 F.T.C. 1 (2013), *aff'd as modified*, 777 F.3d 478 (D.C. Cir. 2015) (FTC order clarifying policy on health claim substantiation); *In re 1-800 Contacts*, 2018 WL 6078349 (F.T.C. 2018) (FTC order resolving antitrust case alleging anticompetitive practices in the online contact lens market).

Petitioners also contend that Section 19's requirement that the FTC prove that a practice "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent" is an essential precondition to redress, lacking in Section 13(b). Pet'rs' Br. at 26–27. For that reason, petitioners intuit, with no textual support, that Congress must have intended for victims to retrieve illegally scammed funds only where the perpetrator had sufficient "notice" that his or her practice was against the law. Pet'rs' Br. at 27, 28.

That argument is misplaced for many reasons. For one, petitioners' argument wrongly belittles the significant burden of proof the FTC must meet to prove a violation of Section 5. The FTC's burden of proof under Section 13(b) is at least comparable to Section 19's "reasonable man" standard. To establish liability, the FTC must prove, *inter alia*, that the individual "was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high

probability of fraud and intentionally avoided learning the truth." *Commerce Planet*, 815 F.3d 593, 600 (9th Cir. 2016) (citations omitted).

Finally, in rejecting the identical argument, the Second Circuit underscored that petitioners' reading of "Section 19 would impose an untenable restriction on Section 13(b) given that '[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.'" *FTC v. Bronson Partners, LLC*, 654 F. 3d 359, 367 (2d Cir. 2011) (quoting *Porter,* 328 U.S. at 399).

### B. Congress's Oversight of the FTC's Use of Section 13(b) To Obtain Redress.

The interaction between Congress and the FTC over the past four decades demonstrates not only that Congress was aware that the FTC interpreted Section 13(b) to invoke the equitable authority of district courts, but also that Congress approved of that use and applauded the FTC's success in returning ill-gotten gains.

**1.** The first extended discussion of the FTC's use of Section 13(b) to obtain equitable relief in court, including compensatory redress, took place during the FTC's 1983 Senate reauthorization hearing. *Federal Trade Commission Reauthorization: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 98th Cong. 47–49 (1983) [hereinafter S. Hearing (1983)]. At that point, the FTC's fraud program, instituted by Timothy Muris, then-Director of the FTC's Bureau of Consumer Protection, was an expanding part of the FTC's enforcement program. The FTC's reliance on Section 13(b) to obtain consumer redress had been validated the previous year by the Ninth Circuit's ruling

in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112–13 (9th Cir. 1982).

In response to a question posed by Senator Packwood about the FTC's legislative priorities, FTC Commissioner and former Chair Michael Pertschuk explained that the FTC was using Section 13(b)'s injunctive authority in consumer protection cases and showcased the Ninth Circuit's decision in *Singer*, "which upheld the district court's preliminary injunction freezing assets, and finding that the court had the authority ultimately to grant the recission of consumer contracts." S. Hearing (1983) at 48. Commissioner Pertschuk urged the FTC to expand the use of Section 13(b) to antitrust and deceptive advertising cases and praised Chairman James C. Miller and Bureau Director Muris for having "recognized the potential of 13(b)" and "having encouraged more aggressive use of the Commission's authority under that section." *Id.* at 48–49.

**2.** The next significant interaction between the FTC and Congress came in 1993, when Congress substantially amended the FTC Act, in part to strengthen the FTC's ability to obtain consumer redress under Section 13(b). The FTC informed Congress that a major obstacle "in combating consumer fraud is its inability to sue multiple defendants in a variety of jurisdictions." S. Rep. 103-130, 1st Sess. 1993 at 15–16 (1993). In response, the Committee recognized that "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." *Id.* The Committee added that the "FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill

should assist the FTC in its overall efforts." *Id.* Congress thereafter enacted the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 12, 108 Stat. 1961 (1994), to, *inter alia*, expand the venue and service of process provisions of Section 13 so that the Commission could bring a single lawsuit against all defendants involved in an illegal transaction.[6]

**3.** Many other congressional hearings included discussions of the FTC's use of Section 13(b) for redress. For instance, in the 2007 Senate Reauthorization hearing, FTC Chairwoman Deborah Majoras began her opening statement by highlighting that "[d]uring the past 3 fiscal years, our consumer protection work has produced more than 250 court orders requiring defendants to pay more than $1.2 billion in consumer redress." *Federal Trade Commission Reauthorization: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 100th Cong., 1st Sess. 2 (Sept. 17, 2007).

Similarly, in the 2008 Senate Reauthorization Hearing, FTC Chairman William Kovacic emphasized that the FTC "has often used Section 13(b) of the FTC Act, particularly, to obtain restitution for consumers in consumer protection cases. In the past decade, the Commission has brought over 600 consumer protec-

---

[6] Congress's 2006 Amendment to the Act underscores its ongoing commitment to consumer redress under Section 13(b). That amendment added a provision to the Safe Web Act providing that "[a]ll remedies available to the Commission with respect to unfair and deceptive acts and practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims." U.S. Safe Web Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (2006).

tion law enforcement actions using Section 13(b) under the FTC Act, through which courts have ordered approximately $3 billion in redress for injured consumers." *Federal Trade Commission Reauthorization: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 100th Cong., 2nd Sess. 16 (Apr. 8, 2008) (prepared statement).

In 2010, during the economic downturn, the Senate Committee on Commerce, Science and Transportation held hearings on "The Role of the FTC in Protecting Consumers." In the first hearing, FTC Chairman Jon Leibowitz highlighted the success of Section 13(b) redress cases against financial institutions, noting that "[o]ver the past 5 years, the FTC has filed over 100 actions [under Section 13(b)] against providers of financial services, and in the past 10 years, the Commission has obtained nearly half a billion dollars in redress for consumers of financial services." *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers*, *Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong., 2nd Sess. 8 (Feb. 4, 2010).

In the second hearing, former FTC Chairman Muris recounted the history of the FTC's use of Section 13(b):

> We created the FTC's modern anti-fraud program in 1981 when I was Director of the Bureau of Consumer Protection. The development of a vibrant anti-fraud program at the FTC is a major success story. Fortunately, the legal tools for such a program already existed; in 1973, Congress had amended the FTC Act in Section 13(b) to allow the Commission to sue in Federal district court and obtain strong

> preliminary and permanent injunctive relief, including redress for defrauded consumers.
>
> * * *
>
> Almost from the inception of the §13(b) program, the Commission has not only halted fraudulent schemes, but also pursued consumer redress and other potent equitable remedies to benefit consumers. Very early in the §13(b) consumer protection cases, the Commission obtained, as ancillary to issuance of permanent injunctions, provisional remedies such as a freeze of assets, expedited discovery, an accounting, and the appointment of a receiver on the ground that these remedies would insure the effectiveness of any final injunction ordered.

*Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers–Part II, Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. of the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong., 2nd Sess. 55–56 (Mar. 17, 2010).[7]

Many additional hearings before and since have explored the FTC's use of Section 13(b) to provide redress to injured consumers, but *amici* have not found *any* instance where Congress has expressed doubt about the FTC's authority to obtain consumer redress

[7] The FTC files annual reports with Congress. *FTC Annual Reports*, Federal Trade Commission, https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports (last visited Nov. 20, 2020). These reports detail the FTC's enforcement efforts and lay out the consumer redress the FTC has obtained for consumers. As one example, the 1982 report notes that for cases filed that year, up to nearly $45 million may be returned to consumers in redress. Annual Report 1982, at 11.

under Section 13(b). Nor, apparently, have petitioners found any such evidence. Had Congress disagreed with the FTC and the courts, it of course could have acted, and it would not have strengthened the FTC's authority to obtain redress in 1994. And if Congress intended Section 19 to deny redress authority under Section 13(b), it could have said so, but instead Congress explicitly preserved all additional remedies. A page of history speaks volumes, and petitioners' claim here cannot be squared with this history.

### C. For Nearly Four Decades, Courts Uniformly Held that Section 13(b) Authorizes Compensatory Relief.

**1.** Since Section 13(b)'s enactment, defendants have repeatedly challenged the authority of courts to order compensatory relief. Until the Seventh Circuit's ruling in *Credit Bureau*, every one of the eight circuit courts to rule on the issue rejected these challenges, and in every case, the court was unanimous. The Ninth Circuit was the first to rule. In *Singer*, the Ninth Circuit held that compensatory relief is available in Section 13(b) cases. 668 F.2d at 1112–13. *Singer*, like the seven circuits that followed, anchored its rulings on the decisions in *Porter* and *Mitchell*, which held that equitable power is inherent in the grant of injunctive authority. 668 F.2d at 1112–13. For that reason, until the Seventh Circuit's ruling, courts had held that Section 13(b), which authorizes injunctions, permits courts to order equitable relief, including compensatory redress, in FTC enforcement cases. All of these cases were decided *after* Section 19 was added to the FTC Act.[8]

---

[8] *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564 (7th Cir. 1989); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir.

*Porter* held that Section 205(a) of the Emergency Price Control Act of 1942, which authorized the Administrator of the Office of Price Administration to seek a "permanent or temporary injunction, restraining order, or other order," empowered district courts to order not only prospective injunctive relief, but also to compel the return of illegally exacted rents. 328 U.S. at 399. The Court stated that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. The Court added that:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

*Id.*; *accord, e.g., California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990); *see also Weinberger v. Romero-Barcela*, 456 U.S. 305, 313–15 (1982).

---

1991); *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010); *Bronson Partners*, 654 F.3d 359 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014). *Cf. FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711,717-24 (5th Cir. 1982) (holding that courts may impose equitable remedies under Section 13(b) but reserving the compensatory redress question). District courts in two of the remaining circuits—the D.C. and Fifth Circuits—have reached the same conclusion. *See*, *e.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008).

Turning to compensatory redress, the Court ruled that the "comprehensiveness of this equitable jurisdiction" encompasses the authority to require the reimbursement of unlawful rents. *Porter*, 328 U.S. at 398–99. Restitution, the Court observed, is "within the highest tradition of a court of equity." *Id.* at 402. The Court also emphasized that because "the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398.

*Mitchell* relied on *Porter* to hold that the Fair Labor Standards Act, which authorizes district courts to "restrain violations" of the Act, 29 U.S.C. 217, empowers courts to award back-pay to employees who have been unlawfully discharged. 361 U.S. at 296. In response to the employer's argument that an order compelling back pay would be a "penalty" and thus beyond the court's equitable power, the Court held that "the public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only." *Id.* at 293. The Court also echoed *Porter*, noting that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92.

Until 2019, every circuit court to address the Section 13(b) question unanimously applied *Porter* and *Mitchell* and concluded that Section 13(b)'s grant of injunctive authority invokes the district courts' equitable power which includes, but is not limited to, authorizing restitution, rescission, or other forms of compensatory redress. *See supra* note 11.

**2.** This Court's decision in *Liu* takes precisely the same approach as the pre-2019 circuit court rulings and thus explicitly rejects petitioners' effort to entomb the core holdings of *Porter* and *Mitchell.* To start, *Liu* ratifies *Porter*'s holding that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398. *Liu* embraces *Porter*'s ruling that the conferral of injunctive authority "invokes a court's equity jurisdiction, and thus 'a decree compelling one to disgorge profits … may properly be entered.'" 140 S. Ct. at 1943 (citing *Porter*, at 398-99). That is precisely the theory that provides the foundation for redress under Section 13(b).

*Liu* thus takes the wind out of petitioners' sails. To be sure, there are significant differences between Section 13(b) and the statute at issue in *Liu*. But there is no significant difference between Section 13(b) and Section 205(a) of the Emergency Price Control Act. Both statutes authorize broad injunctive relief; neither limits the equity jurisdiction that attaches. And the statute at issue in *Mitchell*, 29 U.S.C. 217, is even more sparse; it simply authorizes courts to "restrain violations" of the Fair Labor Standards Act.[9]

The FTC has successfully sought compensatory redress under Section 13(b) for nearly four decades. Until last year, courts uniformly agreed with the

---

[9] *Porter* added that its judgment could also be supported by the "other order" language. The Court in *Mitchell* found that the "other order" holding was independent of its holding on the equitable nature of the remedy, which was based on "the language of the statute" conferring injunctive authority, that provided "affirmative confirmation of the power to order reimbursements." 361 U.S. at 291.

FTC's construction of Section 13(b), relying on the foundation laid in *Porter* and *Mitchell*. *Liu*'s reaffirmance of those cases dispels any question that the inherent equitable powers of the district courts are not displaced unless Congress says so, either "explicitly, or by a necessary and inescapable inference." *Porter*, at 398. Here, Congress has been explicit that the courts have read Section 13(b) correctly, and Congress's approbation should end this case.

Last, but hardly least, *Liu* holds "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief." 140 S. Ct. 1936, 1940 (2020). That holding applies with equal force to compensatory redress under Section 13(b) because the FTC seeks only "restitution of amounts that were paid to the defendant directly by the consumers." *See*, *e.g.*, *Bronson Partners*, 654 F.3d at 374. *Liu* stresses that:

> [A] remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts. In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that encompassed a "comprehensiv[e]" grant of "equitable jurisdiction." *Id.*, at 398. "[O]nce [a District Court's] equity jurisdiction has been invoked" under that provision, the Court concluded, "a decree compelling one to disgorge profits ... may properly be entered." *Id.* at 398–399.

140 S. Ct. at 1943. Again, all the FTC asks a court to do is restore injured consumers to the *status quo ante*, by returning to consumers only the amounts that were paid to the defendant directly by the consumers.

Justice Holmes's wisdom that a page of history is worth a volume of logic is especially apt in this case. There is nothing new about the FTC's use of Section 13(b) for a cause that has deep roots in equity doctrine. Equity has never favored the wrongdoer; and equity has always stood ready to order restitution of monies acquired by fraud. These principles underlie the FTC's decades-long use of Section 13(b) to force wrongdoers to return their ill-gotten gains. This Court should affirm the ruling below.

## II. Petitioners Err in Attacking the Soundness of *Porter* and *Mitchell*.

Petitioners argue that whatever force *Porter* and *Mitchell* once had, more recent cases limiting equity jurisdiction have eroded their persuasive force, and thus they can no longer support the reading of Section 13(b) embraced by the FTC, Congress, and prior court decisions. Pet'rs' Br. at 17, 24-25, 36-39. Petitioners' argument suffers from two flaws. First, petitioners have it backwards. The decisions petitioners rely on are wholly consonant with *Porter* and *Mitchell*, which recognize that Congress may limit or exclude equitable jurisdiction. Second, petitioners ignore the principles of *stare decisis*, and only by ignoring those principles can the petitioners so blithely seek to retire two mainstay precedents.[10]

[10] Petitioners and their allies make the far-fetched claim that restitution is not an injunction. "Nothing is more clearly part of the subject matter for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 328 U.S. at 399; *accord Weinberger*, 456 U.S. at 311–14 (and cases cited therein).

### A. There is No Valid Legislative Command Limiting Section 13(b)'s Equity Jurisdiction.

Petitioners rest their arguments mainly on two cases that they claim undermine the reasoning of *Porter* and *Mitchell*. Pet'rs' Br. at 17, 24–25, 36–39. But the cases petitioners cite involve the interpretation of statutes in which Congress provided "clear and valid legislative command[s]" limiting the district courts' equity jurisdiction. *Porter*, 328 U.S. at 398. Far from being *limitations* on *Porter* and *Mitchell*, these cases are *applications* of *Porter's* and *Mitchell*'s principles.

First, petitioners contend that the Court in *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), displaced *Porter*'s holding that, absent a contrary legislative command, Congress invokes the full measure of a district court's equitable jurisdiction when it authorizes injunctive relief. *See* Pet'rs' Br. at 17, 38–39. That argument misreads *Meghrig*.

*Meghrig* held that the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA) did not authorize a private party, KFC, to recover the costs of a past clean-up of toxic waste. The Court did not frame its decision as a departure from *Porter*, as petitioners claim. Pet'rs' Br. at 38–39. Rather, the Court found that Congress, in RCRA and related legislation, firmly signaled that it did not intend for RCRA to authorize private parties to invoke the Act to recover past cleanup costs. *See*, *e.g.*, 516 U.S. at 484. Among other reasons, the Court noted that the citizen suit provision of RCRA permitted suits where, but only where, the "disposal of any solid or hazardous waste … *may present* an *imminent* and substantial endangerment to health or the environment," and

that RCRA provided only injunctive relief, not damages. *Id.* (emphasis in original). KFC's claim met neither condition.

The Court also emphasized that "if RCRA were designed to compensate private parties for their past cleanup efforts, it would be a wholly irrational mechanism for doing so" because, due to RCRA's notice provision, "[t]hose parties with insubstantial problems, problems that neither the State nor the Federal Government feel compelled to address, could recover their response costs, whereas those parties whose waste problems were sufficiently severe as to attract the attention of Government officials would be left without a recovery." *Id.* at 486-87.

Fairly read, the *Meghrig* Court applied *Porter*'s holding that equity jurisdiction may be displaced by a "clear and valid legislative command," 328 U.S. at 398, and concluded that "Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Meghrig*, 516 U.S. at 487.

Petitioners' reliance on *Meghrig* underscores the weakness of their claim. The contrast between *Meghrig* and the FTC's use of Section 13(b) could not be sharper. For one thing, the damages remedy KFC sought was *legal*, not *equitable*, in nature. The relief the FTC seeks under Section 13(b), restitution or recission, falls within the heartland of equity. Only in a small minority of cases—where consumer redress is impossible or infeasible—do disgorged funds go to the Treasury. For another, the Court's opinion in *Meghrig* drives home the stark incongruity between the relief KFC requested and RCRA's statutory goals. The relief the FTC seeks under Section 13(b) directly advances the goals Congress set for the FTC, namely, to protect

consumers in the marketplace. And finally, the *Meghrig* Court applies *Porter*'s analysis in explaining why RCRA cannot be read to authorize private party damage actions.[11]

Nor does petitioners' reliance on *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), fare any better. *Great-West* involved a provision of the Employee Retirement Income Security Act authorizing private parties to file civil actions seeking injunctions and "other appropriate equitable relief." 29 U.S.C. 1132(a)(3). The question was whether Congress intended "equitable relief" to include the petitioners' request for a *contractual* remedy. The Court said "no": "[P]etitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity." 534 U.S. at 210. And the Court added that "[a] claim for money due and owing under a contract is 'quintessentially an action at law.'" *Id.* (citing *Wal-Mart Stores, Inc. v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000) (Posner, J.)).[12]

---

[11] It is not clear whether petitioners argue that *Meghrig* overruled *Porter*, or that *Meghrig* rejected *Porter* as irrelevant to construing the RCRA provision at issue in that case. *See* Pet'rs' Br. at 38–39 ("The Court [in *Meghrig*] therefore refused to follow the *Porter* 'line of cases.'" (citing *Meghrig*)). Either way, petitioners mischaracterize *Meghrig* as rejecting *Porter* outright rather than concluding, consistent with *Porter*, that Congress intended to restrict the equitable remedies available in RCRA citizen suits. Petitioners' arguments—not only about *Meghrig*, but also that a statute authorizing injunctions cannot also authorize restitution orders—conflict with *Porter* and *Mitchell* and would, if accepted, render those cases dead letters.

[12] Petitioners also contend that *Great-West* imposes a tracing requirement on equitable remedies, which the FTC cannot meet. Pet'rs' Br. at 23, 46. This contention is also wrong and has been

*Porter* and *Mitchell* remain good law. The cases petitioners rely on apply *Porter* and *Mitchell*, not displace them. As *Liu* holds, *Porter* and *Mitchell*'s holding that a grant of injunctive authority carries with it "all the inherent equitable powers of the District Court," including the power to order compensatory redress, remains the law. 140 S. Ct. at 1943.

### B. *Stare Decisis* Further Refutes Petitioners' Argument.

The linchpin of petitioners' argument is that the Court's reasoning in *Porter* and *Mitchell*, which for decades has guided lower courts to interpret Section 13(b) to authorize compensatory relief, is flawed and should now be rejected. As we have already explained, that argument is meritless, as underscored by this Court's continued reliance on *Porter*. *See*, *e.g.*, *Liu*, 140 S. Ct. at 1943.

But even if the Court were to take petitioners' argument seriously, it should be rejected. The Court does not sweep away longstanding precedent lightly. "Overruling precedent is never a small matter." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015)). And "[a]dherence to precedent is 'a foundation stone of the rule of law.'" *Id.* (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014)).

Petitioners' argument here is especially problematic because petitioners have not asked Congress to

---

uniformly rejected in the lower courts. The best refutation of this argument is Judge Lynch's opinion in *Bronson Partners*, 654 F.3d at 370–75. *See also Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937) (and cases cited therein).

rectify what they claim is an error. As this Court emphasized in *Kimble*, "unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." 576 U.S. at 456. To be sure, petitioners have eschewed that path because Congress has at every turn approved of the FTC's use of Section 13(b) to obtain compensatory redress. But Congress's approval of the FTC's interpretation of Section 13(b) is an argument against the Court's intervention, not in support.

Finally, petitioners ask this Court to overrule not a single case, but a long line of precedents—"each one reaffirming the rest and going back 75 years or more." *Kisor*, 139 S. Ct. at 2422-23. This Court decided *Porter* in 1946, but *Porter* has been cited approvingly by this Court dozens of times, and *Porter* relied on cases going back to 1836. 328 U.S. at 398 (quoting *Brown v. Swan*, 35 U.S. 497 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."). Abandoning *Porter* would inevitably cast doubt on many other settled constructions of the reach of equity jurisdiction and thus destabilize the law. *Cf. Kisor*, 139 S. Ct. at 2422.

Petitioners provide no basis for this Court to set aside *Porter* and *Mitchell*, and the decision below should be affirmed.

## CONCLUSION

For the reasons stated above, *amici* respectfully request that the Court affirm the judgment below.

Respectfully submitted.

DAVID C. VLADECK
*Counsel of Record*
RACHEL L. FRIED
GEORGETOWN UNIVERSITY
LAW CENTER
CIVIL LITIGATION CLINIC
600 New Jersey Ave. NW
Washington, DC 20001
(202) 661-6614
vladeckd@georgetown.edu

*Counsel for Amici Curiae*

DECEMBER 2020