

**In the Supreme Court of the United States**

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

*v.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

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

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**BRIEF OF ILLINOIS, ALASKA, CALIFORNIA,  
COLORADO, CONNECTICUT, DELAWARE,  
DISTRICT OF COLUMBIA, HAWAII, INDIANA,  
IOWA, MAINE, MARYLAND, MASSACHUSETTS,  
MICHIGAN, MINNESOTA, NEBRASKA, NEVADA,  
NEW JERSEY, NEW MEXICO, NEW YORK, NORTH  
CAROLINA, OHIO, OREGON, PENNSYLVANIA,  
RHODE ISLAND, SOUTH DAKOTA, VERMONT,  
VIRGINIA, WASHINGTON, AND WISCONSIN AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENT**

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## INTERESTS OF AMICI CURIAE

The States of Illinois, Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia (collectively, the “amici States”) submit this brief in support of Respondent Federal Trade Commission (“FTC”) to urge affirmance of the court of appeals. The amici States have a significant interest in protecting the welfare and financial security of their residents and businesses, which includes protecting them from unfair methods of competition and unfair and deceptive trade practices. The question in this appeal—whether the FTC has authority to make victims of those unlawful practices whole by seeking restitution under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b)—directly affects that interest.

The FTC’s authority to seek restitution under Section 13(b) benefits the amici States and their residents. When the FTC obtains restitution awards, it is able to directly provide redress to victims of anticompetitive, unfair, or deceptive trade practices, many of whom live or work in the amici States. In fact, in 2019 alone, the FTC returned over \$136 million to consumers across the country.<sup>1</sup> In addition to redressing the

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<sup>1</sup> See Fed. Trade Comm’n, FTC Refunds to Consumers, <https://tabsoft.co/2ULLKxu> (last updated Dec. 1 2020) [hereinafter FTC Refunds]. All websites were last visited on December 4, 2020.

specific harms to defrauded consumers, the FTC's enforcement efforts benefit the amici States by promoting fair and competitive markets.

Furthermore, the amici States' own enforcement efforts are fortified by having a strong federal partner in the FTC. Although the States play a vital role in policing anticompetitive, unfair, and deceptive trade practices, the FTC is an important partner in those efforts. Stripping the FTC of its authority to seek restitution under Section 13(b) would weaken its efforts to combat unfair and deceptive practices, which, in turn, would frustrate federal-state collaboration and require States to divert resources away from other consumer-protection efforts to perform the duties previously fulfilled by the FTC.

## SUMMARY OF ARGUMENT

The amici States are home to millions of consumers who rely on state and federal regulators to pursue perpetrators of anticompetitive, unfair, and deceptive trade practices, and remedy the losses associated with such practices. To accomplish this task, regulators typically seek relief that requires the defendants to not only cease the illegal conduct but also provide restitution to victims by returning the proceeds of the unlawful scheme. See FTC Br. at 8-9.

For decades, lower courts have recognized that the FTC may seek such relief under Section 13(b). See, e.g., Pet. App. 15a-17a; *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365-367 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1109-1111 (9th Cir. 1982). These decisions are based on the principle that “all the inherent equitable powers of the District Court” attach to a statute authorizing injunctive relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In fact, as this Court recognized, “[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.” *Id.* at 399. Only recently have courts begun to depart from those principles to conclude that Section 13(b) precludes the FTC from seeking the return of defendants’ ill-gotten gains. See *FTC v. AbbVie, Inc.*,

976 F.3d 327, 379 (3d Cir. 2020); *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 767 (7th Cir. 2019).

For all of the reasons explained by the FTC, this Court should uphold the longstanding and commonsense conclusion that the FTC possesses the authority to seek restitution under Section 13(b). The amici States write separately, however, to highlight the significant benefits that authority has conferred on the States and their residents, which would be lost if Section 13(b) were interpreted as precluding the FTC from seeking restitution.

There are currently three principal avenues through which FTC and state regulators may remedy anticompetitive, unfair, and deceptive trade practices: (1) state enforcement actions; (2) Section 13(b) actions initiated by the FTC alone; and (3) collaborative actions between the FTC and the States, which are brought under Section 13(b) and the States' own anti-trust and unfair and deceptive trade practices statutes. Stripping the FTC of its authority to seek restitution under Section 13(b) would weaken two of those three avenues, leaving the state enforcement actions as the primary source of restitution.<sup>2</sup> Although the States devote considerable effort and resources to these actions, their residents and businesses are best protected when the FTC is also able to pursue relief in

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<sup>2</sup> Although the FTC also may seek restitution in district court under Section 19 of the FTC Act, it may do so only if the defendant has violated one of the FTC's own rules or after finding that the defendant's conduct was unfair or deceptive at an administrative hearing. 15 U.S.C. §§ 57b(a), (b). That limitation makes it an inadequate substitute for Section 13(b) litigation. See *infra* pp. 19-20; FTC Br. at 38-47.

standalone actions under Section 13(b) and when the States are able to partner with the FTC in collaborative endeavors. The amici States thus urge this court to confirm the FTC's Section 13(b) authority to seek restitution by affirming the decision below.

## ARGUMENT

### **I. The FTC's Authority To Seek Restitution Directly Benefits The Amici States And Their Residents.**

The FTC's ability to seek restitution benefits the amici States and their residents because it enables the FTC—in addition to state regulators and law enforcement authorities—to obtain and return funds to victims of anticompetitive, unfair, and deceptive practices. Although each State authorizes its attorney general (or other state agency) to seek restitution to remedy anticompetitive, unfair, or deceptive practices,<sup>3</sup> the States also benefit from the FTC's independent authority to investigate and redress violations of federal law. Indeed, from fiscal year 2016 through fiscal year 2019, the FTC secured the return of more than \$10 billion to more than 9 million consumers in every State, the District of Columbia, and Puerto Rico.<sup>4</sup> Depriving the States' residents and

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<sup>3</sup> Nat'l Consumer Law Center, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, at 28 (2018), <https://bit.ly/3kI0hVz> [hereinafter NCLC Report]; Richard A. Leiter & William S. Hein & Co., *Antitrust*, 50 State Statutory Surveys: Business Organizations: Consumer Protection (2016).

<sup>4</sup> See FTC Refunds, *supra* note 1. This figure includes refunds sent by the FTC and refunds administered by defendants or other agencies.

businesses of these funds would allow perpetrators of anticompetitive, unfair, and deceptive practices to profit from their wrongdoing and require States to fill the gap left by the FTC's inability to make victims whole.

Unfair and deceptive trade practices are a serious problem in the United States. In the past five years, the FTC has received nearly 7 million reports of consumer fraud.<sup>5</sup> In the first half of 2020 alone, consumers reported losing approximately \$1 billion to such practices.<sup>6</sup> And scammers continually develop new techniques to deceive consumers—for example, as of August 2020, the FTC had received over 175,000 complaints of fraud related to the Covid-19 pandemic.<sup>7</sup>

Although States devote considerable effort and resources to eliminating these practices and protecting their residents and businesses, the FTC's authority to seek restitution is a critical supplement to those efforts. For example, because the FTC has nationwide jurisdiction, it is able to efficiently obtain redress for consumers affected by unlawful activity spanning multiple States. For a state regulator to pursue an action against a defendant located in another State, it

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<sup>5</sup> Fed. Trade Comm'n, FTC Consumer Sentinel Network, Trends Over Time, <https://tabsoft.co/35M23Rx> (last updated Oct. 16, 2020).

<sup>6</sup> Fed. Trade Comm'n, FTC Consumer Sentinel Network, Losses & Contact Methods, <https://tabsoft.co/3pLuOFK> (last updated Oct. 16, 2020).

<sup>7</sup> Karen Hobbs, Asst. Dir., Div. of Consumer & Bus. Edu., Fed. Trade Comm'n, COVID-19 Report Data "On the Daily" (Aug. 25, 2020), <https://bit.ly/3lOdGgn>.

usually must show that the defendant's conduct affected consumers within its borders. See, e.g., *Rensin v. State*, 18 So. 3d 572, 576 (Fla. Ct. App. 2009); *State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1, 6-7 (Iowa 1997); *Consumer Protection Div. v. Outdoor World Corp.*, 603 A.2d 1376, 1382-1383 (Md. Ct. Spec. App. 1992); *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 302 (Wash. 1972). By contrast, the FTC may pursue actions against fraudsters operating anywhere in the United States, including via a single action against a defendant operating in multiple States. See 15 U.S.C. § 53(a); *FTC v. Ams. for Fin. Reform*, 720 F. App'x 380, 383 (9th Cir. 2017); *FTC v. Educare Centre Servs., Inc.*, 414 F. Supp. 3d 960, 967 n.2 (W.D. Texas 2019). Without the FTC acting to obtain restitution for consumers nationwide, every State touched by an incident of cross-border wrongdoing would need to file suit or risk leaving victims uncompensated and wrongdoers inadequately deterred.

And in practice, the FTC has used its authority to seek restitution to remedy the negative effects of deceptive practices and monopolies throughout the country. For example, last year the FTC put a stop to an alleged scam responsible for billions of illegal and unwanted robocalls across the nation.<sup>8</sup> Through four separate settlements in federal district courts in California, Florida, and Utah, the FTC obtained judgments requiring the defendants to pay restitution and

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<sup>8</sup> Press Release, Fed. Trade Comm'n, FTC Crackdown Stops Operations Responsible for Billions of Illegal Robocalls (Mar. 26, 2019), <https://bit.ly/3qcWfJ3>.

liquidate their assets.<sup>9</sup> The FTC also recently obtained more than \$17 million in restitution from a group of international defendants who allegedly misled consumers located throughout the country into purchasing their online business coaching courses.<sup>10</sup> Because this action involved international actors and online activity spanning multiple States, the FTC was uniquely well suited to pursue these actions.

The FTC has obtained similar results in the anti-trust context. In 2015, for example, the FTC obtained an injunction requiring the nationwide drug manufacturer Cephalon, Inc. to repay \$1.2 billion to the victims of an alleged anticompetitive scheme orchestrated to prevent the generic equivalent of a sleep-disorder drug from entering the market.<sup>11</sup> The compensated victims, who are located throughout the United States, included drug wholesalers, pharmacies, and insurers.<sup>12</sup>

In another example, the FTC sued Cardinal Health, Inc., over its alleged monopolization of 25 local drug markets in 18 different States.<sup>13</sup> By dominating those

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<sup>9</sup> *Ibid.*

<sup>10</sup> Press Release, Fed. Trade Comm'n, Defendants Responsible for International Business Coaching Operation to Pay More Than \$17 Million in FTC Settlements (Feb. 13, 2020), <https://bit.ly/3nJYhy2>.

<sup>11</sup> Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics (May 28, 2015), <https://bit.ly/3kGExJO>.

<sup>12</sup> *Ibid.*

<sup>13</sup> Press Release, Fed. Trade Comm'n, Cardinal Health Agrees to Pay \$26.8 Million to Settle Charges It Monopolized 25 Markets

local markets, Cardinal Health allegedly forced hospitals and clinics to pay inflated prices for its radiopharmaceuticals, which are drugs essential to diagnosing heart disease and other conditions.<sup>14</sup> Those inflated prices in turn caused “demonstrable consumer harm” and allowed Cardinal Health “to amass substantial ill-gotten gains.”<sup>15</sup> As part of a settlement with the FTC, Cardinal Health agreed to pay \$26.8 million in restitution to the injured competitors.<sup>16</sup> Because of its nationwide jurisdiction, the FTC was able to efficiently seek restitution on behalf of injured parties in multiple States.

Finally, in those circumstances where the FTC Act is broader than a State’s antitrust or unfair and deceptive trade practices statutes, the FTC’s ability to seek restitution ensures that a State’s residents are made whole. For example, some States’ unfair and deceptive practices statutes have limited reach with respect to certain businesses—such as the insurance industry or real estate businesses—while the FTC Act does not.<sup>17</sup>

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for the Sale of Radiopharmaceuticals to Hospitals and Clinics (Apr. 20, 2015), <https://bit.ly/32XVdGC>.

<sup>14</sup> *Ibid.*

<sup>15</sup> Fed. Trade Comm’n, Statement of the Federal Trade Commission in the Matter of Cardinal Health, Inc., FTC File No. 101-0006, at 5 (Apr. 17, 2015), <https://bit.ly/3nF0Wcf>.

<sup>16</sup> Press Release, Fed. Trade Comm’n, *supra* note 13.

<sup>17</sup> *Compare, e.g.*, 815 Ill. Comp. Stat. 505/10b(6) (exemption for “false, misleading, or deceptive information by an insurance producer . . . unless the insurance producer has actual knowledge of the false, misleading, or deceptive character of the information”) and Ind. Code §§ 24-5-0.5-2(a)(8), 24-5-0.5-4(c) (exemption for

In short, the FTC, acting alone, has returned significant amounts of restitution to victims of anticompetitive, unfair, and deceptive trade practices under Section 13(b). In addition to securing funds for consumers and businesses located in the amici States, these efforts enable state regulators to pursue other unlawful conduct. Indeed, the presence of multiple regulators pursuing restitution allows each regulator to focus their efforts on different schemes to broaden the range of conduct that is investigated and prosecuted. If the FTC were unable to seek restitution, the burden of recovering restitution in all cases would fall to the States, which would require them to either redirect resources or leave some of their residents and businesses exposed to fraudulent conduct without relief. The FTC's authority to seek restitution is thus an important supplement to state action.

The combined efforts of federal and state regulators, moreover, create a powerful deterrent effect. Those who seek to take advantage of the States' most vulnerable residents or exploit their market dominance could be emboldened if there were one less regulator with the authority to deprive them of the fruits of their illegal enterprises. As this Court has recog-

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real property transactions unless defendants possessed "intent to defraud or mislead") *with FTC v. Travelers Health Ass'n*, 362 U.S. 293, 297-299 (1960) (applying the FTC Act's prohibition on unfair and deceptive practices to the insurance industry) *and FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989) (FTC need not "prove subjective intent to defraud" or "actual knowledge of material misrepresentations" to seek restitution) *overruled on other grounds*, *Credit Bureau Center*, 937 F.3d at 778-779, 782-786.

nized, restitution deters unlawful conduct because individuals and businesses are more likely to comply with the law if they face the possibility of being compelled to return their illegal gains. *Porter*, 328 U.S. at 400. Without restitution, wrongdoers can benefit from their “increased . . . market share” and “handsome profits,” *Warner-Lambert Co. v. FTC*, 562 F. 2d 749, 761 n.60 (D.C. Cir. 1977), allowing them to perpetrate new schemes or further distort markets. In turn, such practices would erode consumer confidence and further deter competition, potentially destabilizing the States’ free and fair markets. See *United States v. Naftalin*, 441 U.S. 768, 775 (1979) (fraud harms “the confidence of the prospective investor”) (internal quotations omitted); *United States v. Melvin*, 918 F.3d 1296, 1300 (11th Cir. 2011) (in securities context, deterring fraud serves “important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry”) (internal quotations omitted). Restitution thus promotes fairer and more stable markets by reassuring consumers and honest businesses that wrongdoers will not profit from their ill-gotten gains.

## **II. The FTC’s Ability To Obtain Restitution Is Critical To Federal-State Collaboration In Combating Anticompetitive, Unfair, And Deceptive Trade Practices.**

In addition to providing direct benefits to consumers and businesses in the amici States, the FTC is a crucial partner to the States in combating anticompetitive, unfair, and deceptive practices and ensuring that markets remain fair and competitive. The States and the FTC regularly work together to ensure that

consumers and businesses are made whole when they fall victim to such unlawful conduct. If the FTC lacks authority to seek restitution, the States would lose the ability to avail themselves of the FTC's critical resources in pursuing full relief for their residents in cases where the States and the FTC would ordinarily work together.

**A. The FTC's resources and expertise can be critical to investigating sources of restitution.**

State-FTC collaboration often begins at the investigatory stage, before enforcement actions are filed. To seek restitution under the FTC Act and its state analogues, regulators must prove the extent of the defendants' unlawful gains.<sup>18</sup> Doing so frequently requires analysis of complex financial records, which may not be well kept. The FTC's resources and expertise may be crucial to such investigations. See Pet. App. 17a (noting that restitution award was based on FTC analysis of defendant's loan management software); *Direct Mktg. Concepts*, 624 F.3d at 15 (stating that FTC "introduced ample evidence of [defendant's] proceeds" to

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<sup>18</sup> See, e.g., Pet. App. 17a; *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68-69 (2d Cir. 2006); *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 131 (Cal. Ct. App. 2009); *State v. Macko*, No. HHDCV126031858S, 2016 WL 4268383, at \*11 (Conn. Super. Ct. Aug. 1 2016); *Outreach Housing, LLC v. Office of the Attorney General*, 221 So. 3d 691, 697-698 (Fla. Dist. Ct. App. 2017); *People ex rel. Vacco v. Appel*, 685 N.Y.S.2d 504, 505 (N.Y. App. Div. 1999); see also Restatement (3d) Restitution, § 51(5)(d) (2011) ("A claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain.").

establish restitution amount, despite records being in “disarray”).

Indeed, in practice, such collaborative investigations have proved effective in securing restitution. As one example, the initial, joint investigations by Illinois and the FTC into alleged phantom debt collectors led to the entry of preliminary injunctions freezing the defendants’ assets and appointing receivers to ensure that those assets would be used to provide restitution to consumers.<sup>19</sup> As a result, Illinois and the FTC ultimately secured permanent injunctions awarding consumers across the country approximately \$15 million in restitution.<sup>20</sup> In another example, a joint investigation into an alleged scheme falsely promising to recover money that consumers lost in timeshares and other investments resulted in the FTC securing more than \$2.8 million in restitution and Florida securing additional restitution for Florida residents, specifically.<sup>21</sup>

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<sup>19</sup> Preliminary Injunction with Asset Freeze & Other Equitable Relief, *FTC v. Stark Law, LLC*, No. 1:16-cv-03463 (N.D. Ill. July 11, 2016), ECF No. 82 at 11-12, 17-26; Preliminary Injunction with Asset Freeze & Other Equitable Relief, *FTC v. K.I.P., LLC*, No. 1:15-cv-02985 (N.D. Ill. Apr. 21, 2015), ECF No. 31 at 9-11, 16-24.

<sup>20</sup> Press Release, Ill. Attorney Gen., Attorney General Madigan & FTC Reach \$9 Million Settlement with Phantom Debt Collector (Oct. 31, 2017), <https://bit.ly/2IVnHJP>; Stipulated Final Judgment & Order for Permanent Injunction & Other Equitable Relief, *FTC v. K.I.P., LLC*, No. 1:15-cv-02985 (N.D. Ill. Nov. 3, 2015), ECF No. 57 at 7.

<sup>21</sup> Final Order of Permanent Injunction & Monetary Judgment Against Defendants Consumer Collection Advocates Corp. & Michael Robert Ettus, *FTC v. Consumer Collection Advocates Corp.*,

In other circumstances, the States rely on information uncovered during FTC investigations, as well as expert analyses conducted by the FTC, to obtain additional restitution for their residents, as Illinois did when it relied on information first uncovered and analyzed by the FTC to secure an additional \$3 million in restitution from Herbalife, Inc., for an alleged multilevel marketing scheme that falsely promised consumers that they could get wealthy selling its products.<sup>22</sup> Another benefit of efficiently using resources in this manner is that it enables regulators to uncover and remedy a broader range of unlawful conduct. For example, the FTC's leadership in pursuing the Herbalife investigation allowed Illinois to use its resources to pursue other investigations. These included investigations that resulted in a \$3.5 million settlement with an alleged predatory lender and a \$4.5 million settlement with a drug manufacturer for allegedly deceiving consumers about the dangers of opioids.<sup>23</sup>

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No. 0:14-cv-62491-BB (S.D. Fla. Sept. 28, 2015), ECF No. 81 at 6; Consent Final Judgment & Order for Permanent Injunction Against Defendants Consumer Collection Advocates Corp. & Michael Ettus, *Office of the Attorney General Dep't of Legal Affairs, State of Fla. v. Consumer Collection Advocates Corp.*, No. CACE-14-021035 (Fla. Cir. Ct. June 21, 2016), Filing #43035157, <https://bit.ly/3kLmToq>; Press Release, Fed. Trade Comm'n, FTC Halts Advance Fee Recovery Scheme Targeting Victims of Timeshare Resale and Investment Scams (Nov. 20, 2014), <https://bit.ly/3ILOHvK>.

<sup>22</sup> Press Release, Ill. Attorney Gen., Attorney General Madigan Announces Additional \$3 Million Herbalife Settlement (July 15, 2016), <https://bit.ly/3lQrhDN>.

<sup>23</sup> Press Release, Ill. Attorney Gen., Madigan Reaches \$3.5 Million Settlement With Lender for Selling Product With Hidden,

Without the authority to seek restitution, however, defendants would undoubtedly object to any FTC investigation into their finances as irrelevant. See 15 U.S.C. § 57b-1(c)(1) (authorizing FTC to issue civil investigative demands for any information “relevant to unfair or deceptive acts or practices . . . or to antitrust violations”). Already, some targets of FTC investigations have filed independent lawsuits attempting to cut short such financial investigations based on the Seventh and Third Circuit’s holdings that the FTC lacks authority to seek restitution under Section 13(b), see *AbbVie*, 976 F.3d at 379; *Credit Bureau Center*, 937 F.3d at 767.<sup>24</sup> Stripping the FTC of its authority to seek restitution would thus jeopardize its investigations into possible sources of restitution, on which States rely.

**B. The FTC is a crucial partner in securing restitution through litigation and settlements.**

Curtailing the FTC’s authority under Section 13(b) would also deprive the States of an important partner in negotiating settlements and securing large restitution awards once investigations have concluded. For

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Sky-High Interest Rates (Oct. 6, 2016), <https://bit.ly/32ZfCv6>; Press Release, Ill. Attorney Gen., Madigan Reaches \$4.5 Million Settlement With Drugmaker Insys for Deceptively Selling & Marketing Highly Addictive Opioid Painkiller (Aug. 18, 2017), <https://bit.ly/2ISE7Ty>.

<sup>24</sup> See, e.g., First Amended Complaint, *Complete Merchant Solutions, LLC v. FTC*, No. 2:19-cv-00963-HCN-DAO (D. Utah July 28, 2020), ECF No. 56 at 19, 34-35, 38, 41; Complaint for Declaratory & Injunctive Relief, *OTA Franchise Corp. v. FTC*, No. 1:20-cv-00802 (N.D. Ill. Feb. 4, 2020), ECF No. 1 at 1-2, 5, 19-20, 22.

example, over the past decade, Illinois—along with other States in many instances—has collaborated with the FTC to jointly pursue civil actions resulting in more than \$50 million in restitution.<sup>25</sup> In one such case, Illinois, Ohio, and the FTC together secured \$20 million in restitution for victims of an alleged scheme offering individuals free online credit scores, only to then charge monthly fees without their consent.<sup>26</sup> With the proceeds of that judgment, the FTC was able to issue payments to nearly 150,000 individual consumers.<sup>27</sup> More recently, the FTC collaborated with Connecticut and Pennsylvania to secure more than \$1.7 million in restitution for victims of an alleged tech support scam that falsely told consumers that

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<sup>25</sup> See, e.g., Press Release, Ill. Attorney Gen., *supra* note 20 (\$9 million); Stipulated Final Judgment & Order for Permanent Injunction & Other Equitable Relief, *FTC v. K.I.P.*, *supra* note 20 (\$6.4 million); Press Release, Ill. Attorney Gen., Madigan, FTC & States Announce Settlement to Ban Global Pyramid Scheme, Refund Members (May 13, 2014), <https://bit.ly/2KstLdX> (\$7.75 million); Stipulated Order for Permanent Injunction & Monetary Judgment, *FTC v. One Techs., L.P.*, No. 3:14-cv-05066 (N.D. Cal. Nov. 18, 2014), ECF No. 8 at 8 (\$22 million); Stipulated Final Judgment & Order for Permanent Injunction & Other Equitable Relief as to Defendants Lifelock and Davis, *FTC v. Lifelock, Inc.*, No. 2:10-cv-00530 (D. Ariz. Mar. 9, 2010), ECF No. 2 at 8 (\$11 million).

<sup>26</sup> Stipulated Order for Permanent Injunction & Monetary Judgment, *FTC v. One Techs., L.P.*, No. 3:14-cv-05066 (N.D. Cal. Nov. 18, 2014), ECF No. 8 at 8-9; see also Press Release, Federal Trade Comm'n, FTC to Return Almost \$20 Million to Consumers Lured by Credit Monitoring Scheme (Sept. 27, 2016), <https://bit.ly/3nEfQQ3>.

<sup>27</sup> Fed. Trade Comm'n, Office of Claims & Refunds Annual Report, at 3 (2017), <https://bit.ly/3fdVCcW>.

their computers were infected with viruses.<sup>28</sup> And earlier this year, the FTC worked with Florida to secure more than \$1 million in restitution for victims of a deceptive scam that allegedly sent “mailers that looked like invoices from government agencies to newly established businesses.”<sup>29</sup>

Similar collaborations also occur in antitrust actions. For instance, in 2017, the FTC, joined by Alaska, Maryland, New York, Texas, and Washington, sued a pharmaceutical manufacturer over its acquisition of a competing product, which it allegedly used to increase the price of treatment for infant seizures, multiple sclerosis, and other serious conditions from \$40 to more than \$34,000 per vial.<sup>30</sup> The FTC and its state collaborators negotiated a \$100 million settlement from the manufacturer.<sup>31</sup>

In fact, State-FTC collaboration often extends beyond individual lawsuits to nationwide enforcement campaigns. For example, in 2017, Colorado, Florida, Illinois, Kansas, Maryland, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Washington, and the District of Columbia partnered with the FTC

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<sup>28</sup> Press Release, Fed. Trade Comm’n, FTC Sends Refunds to Tech Support Scam Victims (Feb. 25, 2020), <https://bit.ly/3kUIw5P>.

<sup>29</sup> Press Release, Fed. Trade Comm’n, FTC Sends More Than \$1 Million in Refunds to Victims of Labor Law Poster Scam (July 16, 2020), <https://bit.ly/3pMvdrt>.

<sup>30</sup> Press Release, Fed. Trade Comm’n, Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), <https://bit.ly/3kKheyU>.

<sup>31</sup> *Ibid.*

to launch a coordinated effort targeting deceptive student loan debt relief that involved 36 separate lawsuits.<sup>32</sup> That effort has resulted in more than \$1 million in restitution checks being mailed out this year alone.<sup>33</sup> In 2018, the FTC, along with Arizona, Delaware, Florida, Indiana, Missouri, New York, Tennessee, and Texas, announced Operation Main Street, a coordinated effort to pursue scammers calling small businesses falsely claiming to be collecting on past-due bills for online directory listings, search engine optimization services, web design, or web hosting.<sup>34</sup> This campaign resulted in 24 criminal and civil actions being filed by both the FTC and state regulators across the United States and the entry of a \$4.6 million judgment in a federal district court in Illinois.<sup>35</sup> And earlier this year, the FTC, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, New Mexico, North Carolina, North Dakota, New York, Ohio, South Carolina, and Washington announced Operation Corrupt Collector, a coast-to-coast enforcement effort involving more

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<sup>32</sup> Press Release, Fed. Trade Comm'n, FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams (Oct. 13, 2017), <https://bit.ly/2IHBh47>.

<sup>33</sup> Press Release, Fed. Trade Comm'n, FTC Sends More Than \$1 Million in Refunds to Victims of Student Loan Debt Relief Scam (July 9, 2020), <https://bit.ly/3pIPkqD>.

<sup>34</sup> Lesley Fair, Fed. Trade Comm'n, Operation Main Street Targets Scams Against Small Business (June 18, 2018), <https://bit.ly/32XNus0>.

<sup>35</sup> *Ibid.*; Press Release, Fed. Trade Comm'n, FTC Obtains Court Order Barring U.S. and Canadian Scammers from Marketing, Selling Internet-Related Services and Misrepresenting Their Relationship with Consumers (Dec. 18, 2018), <https://bit.ly/3lZcaI4>.

than 50 civil and criminal actions designed to crack down on deceptive debt collection practices.<sup>36</sup> This effort has so far yielded judgments totaling \$25.5 million in restitution.<sup>37</sup>

It would be difficult to obtain similar collaborative successes through Section 19 of the FTC Act, 15 U.S.C. § 57b. Although the FTC also has authority to seek restitution under Section 19, the FTC may only initiate an action in federal district court under that provision in two circumstances: (1) if a defendant has violated one of the FTC's rules, or (2) if a defendant violates an FTC cease-and-desist order issued after an administrative hearing. *Id.* § 57b(a). Neither of these avenues is a sufficient alternative to joint State-FTC actions under Section 13(b).

As to the first, the FTC's rules cover a narrower range of misconduct than most state statutes' broad prohibitions on unfair or deceptive trade practices. Indeed, many of those rules apply to specific industries or practices rather than a wide range of unfair or deceptive conduct. See, e.g., 16 C.F.R. §§ 310.3 (telemarketing), 423.5 (textile clothing), 444.2 (credit practices). Thus, collaboration would be restricted to those narrow circumstances when a defendant violates both an FTC rule and state law.

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<sup>36</sup> Lesley Fair, Fed. Trade Comm'n, Operation Corrupt Collector Cracks Down on Illegal Debt Collection Tactics (Sept. 29, 2020), <https://bit.ly/3m0kdop>.

<sup>37</sup> Press Release, Fed. Trade Comm'n, Operators of Phantom Debt Scheme Permanently Banned From Debt Collection under Settlement with FTC (Dec. 11, 2019), <https://bit.ly/2Ksnuip>.

As to the second, States are unable to intervene in FTC adjudicatory proceedings as of right. See 16 C.F.R. § 3.14(a) (“Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor.”). Accordingly, to ensure that they can secure restitution for their residents, States would likely be compelled to pursue parallel proceedings in state court while an FTC adjudication is pending, resulting in duplicative efforts by both regulators and defendants, as well as risking inconsistent results. Alternatively, States would have to wait until administrative proceedings concluded before filing suit, giving perpetrators of unfair or deceptive practices time to dissipate their assets and other sources of restitution, which is the very problem that Section 13(b) is designed to avoid. See *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 718-720 (9th Cir. 1982).

By contrast, by partnering with the FTC to seek restitution under Section 13(b), the States are able to act quickly and efficiently, ensuring that victims recover the funds that rightfully belong to them. Losing the FTC as a collaborator would leave States without a strong federal counterpart to assist in securing restitution necessary to make their residents and businesses whole.

**C. The States and their residents benefit from the FTC’s resources and expertise in administering large restitution awards.**

Once the States and FTC secure restitution awards, the States benefit from the FTC’s well-developed methods of administering and dispensing those

awards to consumers. To distribute refunds, the FTC's Office of Claims and Refunds collects information on affected consumers and mails checks directly to them.<sup>38</sup> Before doing so, the FTC checks its distribution lists against the National Change of Address System, which records change-of-address notices submitted to the U.S. Post Office.<sup>39</sup> If a check is returned as undeliverable, the FTC performs an address search to determine whether a consumer has a more recent address.<sup>40</sup> And the FTC regularly audits this process to ensure that only those entitled to restitution receive it.<sup>41</sup>

As a result, the FTC mailed \$1 billion in refunds to affected consumers between 2016 and 2019.<sup>42</sup> And it did so efficiently, spending only 2% of that sum on administrative costs.<sup>43</sup> The FTC's well-developed refund process has helped to ensure that the amici States' residents actually receive the redress to which they are entitled in an efficient manner, and at minimal cost to the States. But without the authority to seek restitution, the FTC would have no reason to maintain this central, federal method of efficiently distributing restitution to victims across the nation. Instead, the burden of overseeing refund systems, which require

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<sup>38</sup> Fed. Trade Comm'n, Office of Claims & Refunds Annual Report, *supra* note 27, at 2.

<sup>39</sup> See Fed. Trade Comm'n, 2018 FTC Annual Report on Refunds to Consumers, at 4 (2018), <https://bit.ly/32XX66a>.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> FTC Refunds, *supra* note 1.

<sup>43</sup> *Ibid.*

substantial time, labor, and resources, would fall on the States.

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In enacting Section 13(b), Congress intended the FTC to have expansive authority to redress the injury caused by anticompetitive, unfair, and deceptive practices throughout the marketplace. To give that intent full effect, the FTC must be able to return ill-gotten gains to victims of such practices through restitution. Without such authority, consumers and businesses in the amici States will be deprived of what is rightfully theirs, wrongdoers will be allowed to profit from their illegal conduct, and markets will become less fair and competitive.

**CONCLUSION**

The decision below should be affirmed.

Respectfully submitted,

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