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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Section 13(b) is clear: Where a person "is violating, or is about to violate" the FTC Act, "the Commission may seek * * * a permanent injunction." 15 U.S.C. § 53(b). Restitution and monetary relief are not a "permanent injunction." The Commission concedes that, "[a]s Congress's own creation, the Commission could have only the authority conveyed to it by statute." Resp.Br. 40. Here, § 13(b) conveys authority for "the Commission [to] seek" a "permanent injunction." Section 13(b) does not also authorize the Commission—which suffers no loss from the misconduct it alleges—to demand restitution putatively owed to third parties § 13(b) never mentions. And

§13(b) stands in stark contrast to *another* provision—enacted in the same legislation—that authorizes the Commission to seek an injunction "*and* * * * other and further equitable relief." 15 U.S.C. §45(*l*) (emphasis added).

The Commission's position defies §13(b)'s structure. Section 19 expressly authorizes monetary relief, but imposes important preconditions, including prior notice that the conduct is proscribed and protections for third parties. The Commission would convert §13(b) into an implied route to the same relief, but strip away those safeguards. The Commission also never explains why, if §13(b) encompasses retrospective monetary relief, Congress would limit that provision to cases where the defendant "is violating, or is about to violate" the FTC Act, excluding cases where the violation is complete.

The Commission instead argues that, where *equity courts* had jurisdiction to issue injunctions, they also "had the power to order restorative" monetary relief "incident" to the injunction—*i.e.*, ancillary jurisdiction to "'decree complete relief.'" Resp.Br. 18, 20 (quoting *Alexander* v. *Hillman*, 296 U.S. 222, 242 (1935)). But §13(b) is not about the jurisdiction of equity courts. It specifies *the Commission's* power to "*seek*" particular relief—namely, an injunction. And the Commission misconstrues the "complete relief" maxim it invokes. Under it, equity courts with jurisdiction over equitable claims could also exercise *concurrent jurisdiction* to decide legal issues between the parties. That maxim does not give parties *substantive rights* to additional relief they do not otherwise have. The maxim thus cannot authorize the Commission to demand relief beyond the "permanent injunction" that §13(b) authorizes. And the Commission's argument that monetary relief may be awarded "'adjunct

to,'" "incident to," or "ancillary to" an injunction, see Resp.Br. 12, 32, only confirms that such relief is not *itself* injunctive relief.

By the Commission's reasoning, *any* reference in *any* statute to *any* equitable remedy would authorize a party to pursue *every* remedy that exists at equity and at law, unless Congress expressly states otherwise. That cannot be right. Where Congress specifies the right to an injunction, that term "must mean *something* less than *all* relief." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993).

ARGUMENT

I. SECTION 13(b) DOES NOT AUTHORIZE MONETARY RELIEF

A. The Term "Permanent Injunction" Does Not Encompass Retrospective Monetary Relief Like Restitution

1. Section 13(b) states that "the Commission may seek" a "permanent injunction." 15 U.S.C. §53(b). The term "permanent injunction" does not mean "restitution," "all forms of equitable relief," or "monetary relief."

Section 5(*l*), enacted in the same legislation as §13(b), see Pet.Br. 7, makes that clear: It authorizes "injunctions" *and* "other and further equitable relief," 15 U.S.C. §45(*l*). And §19, enacted two years later, authorizes the Commission to request equitable and legal monetary relief such as "the refund of money" and "payment of damages." *Id.* §57b(b). If Congress had meant §13(b) to authorize relief beyond injunctions, it would have included similar language in §13(b) as well. But §13(b) authorizes the Commission to seek a permanent injunction, *not* such injunctions *and* "further equitable relief." Where "'Congress includes particular language in one section of

a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Nken* v. *Holder*, 556 U.S. 418, 430 (2009). The Commission cannot deny that, as a matter of text, Congress understood "permanent injunction" to be distinct from "monetary relief" and "equitable relief" generally.

2. The Commission responds that, "[w]hen Congress uses a statutory term like 'injunction' with a long-established legal understanding, the term 'brings the old soil with it.'" Resp.Br. 20 (quoting *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019)). That is true—but it undermines the Commission's expansive view. Myriad authorities attest that the "prospective" nature of injunctive relief is incompatible with awarding monetary relief for past harms. Pet.Br. 22-25. The Commission tries to dismiss those authorities as "simply not[ing] in passing that injunctions are prospective," without foreclosing their use to award retrospective monetary relief. Resp.Br. 31. But this Court has plainly stated that "[t]he function of an injunction is to afford preventive relief, *not* to redress alleged wrongs which have been committed already." *Lacassagne* v. *Chapuis*, 144 U.S. 119, 124 (1892) (emphasis added); see also T. Spelling, *A Treatise on the Law Governing Injunctions* § 21 (1926).

Accordingly, "[a]n injunction *will not be used* to take property out of the possession of one party and put it into that of another." *Lacassagne*, 144 U.S. at 124 (emphasis added). Traditionally, injunctions encompass judicial commands "*other than* the payment to the complainant of a sum of money." 1 R. Foster, *A Treatise on Federal Practice, Civil and Criminal* § 205 (4th ed. 1909) (emphasis added). Neither the Commission nor its *amici* iden-

tify *one* case where a court ordered the payment of money as compensation for past harms via an injunction.

3. The Commission urges (at 29-30) that injunctions "have * * * been used to order the return of money," invoking *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, however, a first injunction was issued to *restrain* a state official from collecting an allegedly illegal tax on the bank. *Id.* at 836-838. The official's agent collected the tax anyway, entering the bank and taking $100,000 "in specie and bank notes." *Id.* at 836. The agent gave the currency to the state treasurer, who kept it "separate from the other funds of the treasury." *Id.* at 833. The bank then obtained a second injunction "to restrain" the treasurer "from paying * * * away" the property in his "possession." *Id.* at 869, 871. But when it came to *returning* the property, the court ordered "*restitution* of the specific sum" the treasurer held. *Id.* at 871 (emphasis added). *Osborn* confirms "injunction" and "restitution" are distinct.

Nor can the Commission find support in Dobbs's statement that "'some restitution is compelled by resort to a form of injunction.'" Resp.Br. 30 (quoting 1 D. Dobbs, *Law of Remedies* § 1.1, at 7 (2d ed. 1993)). Dobbs explains that injunctions are used for that purpose only when a case "require[s] coercive intervention" in the face of defiance, such as "order[ing] the defendant to reconvey" specific property to the plaintiff. 1 Dobbs, *supra*, § 4.1(1), at 556. Indeed, the cases cited by the Commission and its *amici* all involved the turnover of specifically identifiable property that rightfully belonged to the plaintiff.[1] While § 5(*l*)'s express authority for "mandatory

[1] See *Stribley* v. *Hawkie* (1744) 26 Eng. Rep. 961, 961; *Huguenin* v. *Baseley* (1808) 33 Eng. Rep. 722, 722-723; *Memphis Grocery Co.* v. *Trotter*, 7 So. 550, 550 (Miss. 1890); *Comm'rs of Wash. Cnty.* v. *Sch.*

injunctions" theoretically might encompass such relief, 15 U.S.C. §45(*l*), *§13(b)'s* authorization of a "permanent injunction" does not, *id.* §53(b). No one would think of a one-time order to turn over property as a "permanent injunction." Regardless, the Commission does not seek turnover of specific property under §13(b) here. Where a party does not seek the return of "particular funds or property in the defendant's possession" that could be "traced" to the plaintiff—but instead seeks to "impose personal liability on the defendant"—the remedy "is *not*" considered "equitable" relief at all, much less an injunction. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213-214 (2002) (emphasis added).

4. That leaves the Commission's assertion that "[t]reatises have * * * recognized for centuries that injunctions may serve restorative purposes." Resp.Br. 30. But those same treatises stress that injunctions are "generally preventative, * * * rather than restorative." 2 J. Story, *Commentaries on Equity Jurisprudence* §862 (1836); see also 1 H. Joyce, *A Treatise on the Law Relating to Injunctions* §2a (1909) (same). Injunctions may be "restorative" in that, by "prohibit[ing] the *continuance* of" an offending act, they will at the same time "compel[] the defendant to restore the thing to its original situation." 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* §1337 (1883) (emphasis added). But injunctions remain prospective relief; they do not provide compensation for past wrongs. Pet.Br. 22-24.

California v. *American Stores Co.*, 495 U.S. 271 (1990), demonstrates the point. There, the Court held that

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Comm'rs, 26 A. 115, 116-117 (Md. 1893); *Cain* v. *Cain*, 20 N.Y.S. 45, 45-46 (Sup. Ct. N.Y. Cnty. 1892); *Ex parte Chamberlain*, 55 F. 704, 705, 709 (C.C.D.S.C. 1893); *In re Tyler*, 149 U.S. 164, 191 (1893).

"divestiture is a form of injunctive relief within the meaning of § 16" of the Clayton Act. *Id.* at 275. The Court explained that, while divestiture may be backward-looking or restorative insofar as it orders the defendant "to rescind an unlawful purchase of stock or assets," *id.* at 295, it prospectively "prevent[s]" further "harm" to consumers that otherwise "persists" as a result of an illegal merger, *id.* at 282. The same cannot be said of the purely retrospective monetary relief the Commission seeks under § 13(b).

B. Equity Courts' Ancillary Jurisdiction Does Not Expand § 13(b)'s Scope

Unable to show that the term "injunction" *itself* encompasses monetary relief, the Commission urges that "[e]quity courts have always had the power to order restorative remedies as * * * *incident to* an injunction." Resp.Br. 18 (emphasis added). Whenever a party sought an injunction, the Commission asserts, the court was empowered to "'decree complete relief,'" including monetary relief. *Id.* at 20 (quoting *Alexander*, 296 U.S. at 242). "Congress," the Commission insists, "drew upon" the "understanding that a court with the power to enter an injunction may award restorative relief necessary to achieve complete justice." *Id.* at 17. The notion that Congress understood authority to seek an injunction as authority to seek any and all relief is fanciful. See pp. 14-19, *infra*. The Commission's position defies statutory text and misconstrues the "complete relief" maxim regardless. This Court has previously rejected efforts to invoke the maxim to expand statutory remedies.

1. *Equity's Power To Award "Complete Relief" Cannot Expand* the Commission's *§ 13(b) Authority*

The Commission argues that, because a "'*court in equity*'" could exercise jurisdiction to "'award monetary restitution as an adjunct to injunctive relief,'" Resp.Br. 19 (quoting *Tull* v. *United States*, 481 U.S. 412, 424 (1987)) (emphasis added), the *Commission's* authority to "seek * * * a permanent injunction" under § 13(b) must extend beyond seeking injunctions as well. That fails. Section 13(b) is not about *courts'* equity jurisdiction. It defines *the Commission's* authority. It says "*the Commission may seek* * * * a permanent injunction." 15 U.S.C. § 53(b) (emphasis added). It is part of the FTC Act, not the Judicial Code. As an agency within the executive branch, the Commission "possess[es] only such powers as are granted by statute." *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598 (1934); see Resp.Br. 40. Where the Act authorizes remedies beyond a "permanent injunction," it does so expressly, as in § 5(*l*), which authorizes injunctions *and* "further equitable relief," and § 19, which authorizes retrospective monetary relief. The Commission cannot rewrite § 13(b) to authorize permanent injunctions *and* any other relief it might want.

The Commission fundamentally misunderstands the "complete relief" maxim regardless. That maxim does not empower parties to seek, or courts to award, relief the law does not otherwise authorize. As the Commission acknowledges, the power to award monetary relief adjunct to an injunction reflects the "broader rule of equity that 'when a court of equity *has jurisdiction* over a cause *for any purpose*, it may *retain the cause for all purposes* and proceed to a final determination of all the matters at

issue' so as to reach 'a *complete adjudication*.'" Resp.Br. 19 (quoting 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* §181 (1881)) (emphasis added); see also J. High, *A Treatise on the Law of Injunctions* §451 (1873); *Camp* v. *Boyd*, 229 U.S. 530, 551-552 (1913); *Alexander*, 296 U.S. at 242. In other words, where a claim for "'purely equitable relief'" invokes the equity court's "'exclusive jurisdiction,'" the court also has "'*concurrent jurisdiction*'" to make "'a complete adjudication'" and "'establish *purely legal rights* and grant legal remedies which would otherwise'" require resort to a court of law. *United States* v. *Union Pac. Ry. Co.*, 160 U.S. 1, 52 (1895) (quoting 1 Pomeroy, *supra*, §181) (emphasis added). This Court has thus described equity courts' concurrent jurisdiction as "ancillary jurisdiction." *Montanile* v. *Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 148 (2016). But that *jurisdiction* does not give parties new *rights to relief* the law does not otherwise provide.

To the contrary, the purpose of concurrent jurisdiction was *efficiency*—"complete and final relief in a single action in respect of all matters between the same parties growing out of the same general transaction." 1 Joyce, *supra*, §10. Allowing equity courts to provide *legal* relief ancillary to equitable remedies spared the parties "the double expense and trouble of an action at law" in addition to the equitable case. 1 Pomeroy, *supra*, §237; see also High, *supra*, §451 (purpose of rule is "to afford complete redress, without compelling a resort to law").

The maxim the Commission invokes thus does not expand the relief a plaintiff can seek. Concurrent jurisdiction affords relief beyond an injunction only where parties *otherwise* had a right to that further relief:

> The concurrent jurisdiction embraces all those civil cases in which the primary right * * * of the complaining party sought to be maintained, enforced, or redressed, is one which is cognizable by the law, and in which the remedy conferred is of the same kind as that administered, under the like circumstances, by the courts of law—being ordinarily a recovery of money in some form.

1 Pomeroy, *supra*, §139. But where a party did not otherwise have a right to monetary relief (in law or equity), the maxim did not authorize equity courts to invent such an entitlement merely because the party got an injunction.

The accounting remedy, on which the Commission's case depends, illustrates the point. *Jesus College* v. *Bloom* (1745) 26 Eng. Rep. 953, explained that, where a landlord sought an injunction against ongoing waste by a tenant, an equity court could also order an account for past harms. *Id.* at 953-954. But that was permissible because the landlord otherwise had a right to a "damages" remedy in "an action at law." *Ibid.* The equity court's power to award "a complete decree" was based "merely upon the maxim of preventing multiplicity of suits." *Ibid.* The Commission's patent cases (Resp.Br. 21-22) rest on the same principle: The basis for allowing an accounting in a suit for injunction was as "*a substitute for damages*" the patentee *otherwise had a right to pursue* in a court of law. *Root* v. *Ry. Co.*, 105 U.S. 189, 215 (1882) (emphasis added).

The "complete relief" maxim thus cannot help the Commission. The Commission acknowledges that, "[a]s Congress's own creation, [it] could have only the authority conveyed to it by statute." Resp.Br. 40. Section 13(b) plainly states the extent of the authority conveyed:

"[T]he Commission may seek" an "injunction." 15 U.S.C. § 53(b). It does not say the Commission is entitled to sue for compensation for injuries suffered by others, or restitution of funds it never lost. *Cf. Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). *If* a statute entitled the Commission to sue for specified relief at law or equity, the complete-relief maxim would give equity courts *jurisdiction* to grant that relief as well. But it does not mean courts can rewrite a statute entitling the agency only to a "permanent injunction" to create a right to monetary remedies to which the agency is not otherwise entitled.

This Court has rejected the argument that the complete-relief maxim expands remedies beyond those expressly authorized by statute. In *Montanile*, the Court held that ERISA's authorization of "equitable relief" under § 502(a)(3) does not authorize a plaintiff to seek a money decree against general assets—a form of legal relief. 577 U.S. at 147-148. The Court acknowledged that "[e]quity courts could award" that type of legal relief "as part of their ancillary jurisdiction to award complete relief." *Id.* at 148. But it "rejected the argument that 'equitable relief' under § 502(a)(3) means 'whatever relief a court of equity is empowered to provide in the particular case at issue,' including ancillary legal remedies." *Id.* at 147 (quoting *Mertens*, 508 U.S. at 256).

While the Commission invokes *Mertens* and *Great-West* as recognizing that equity courts could grant "'all relief'" (including "'legal remedies'") "once [the courts'] jurisdiction [was] properly invoked," Resp.Br. 32, those cases *rejected* the view that a statutory reference to "equitable relief" *authorizes* such ancillary relief. *Mer-*

tens, 508 U.S. at 257-258 & n.8; *Great-West*, 534 U.S. at 209-210. They confirm that, where a statute authorizes "'[e]quitable' relief," that term "must mean *something* less than *all* relief.'" *Mertens*, 508 U.S. at 258 n.8. If a broad statutory authorization of "equitable relief" does not encompass additional remedies over which equity courts could assert ancillary jurisdiction, § 13(b)'s more limited authorization of a "permanent injunction" does not do so either.[2]

2. *Early Patent and Copyright Cases Do Not Support Expanding § 13(b)*

Citing early patent and copyright cases, the Commission argues that, "[f]or more than 150 years, the Court has construed statutes authorizing an 'injunction'" as "includ[ing] the power to grant restorative monetary remedies." Resp.Br. 20-21. In cases under the 1819 and 1836 patent and copyright statutes, this Court held that, in a suit for an injunction, "the court could also award monetary relief in the form of an accounting." *Id.* at 21 (citing, *e.g.*, *Stevens* v. *Gladding*, 58 U.S. 447, 455 (1855)). The Commission states that "[n]either statute referred to any equitable remedy other than an 'injunction.'" *Ibid.* But the Commission misreads the statutes' text and this Court's cases.

None of those cases concerned a federal agency that was limited to seeking only relief Congress specified by statute. More fundamentally, the relevant statutes were *not* limited to "injunctions." The 1819 Act broadly pro-

[2] Decisions in other contexts confirm that the right to an injunction does not open the door to all other remedies. For example, it "is established practice" for "federal courts to issue injunctions to protect" constitutional rights. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). Yet *damages* are not always available for violations of those rights. See, *e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855-1857 (2017).

vided that federal courts "shall have original cognisance, *as well in equity as at law, of all actions*" under the patent and copyright laws. Act of Feb. 15, 1819, Pub. L. No. 15-19, 3 Stat. 481, 481 (emphasis added). The 1836 Act likewise stated that patent suits "*shall be originally cognizable, as well in equity as at law*," in federal courts. Act of July 4, 1836, Pub. L. No. 24-357, §17, 5 Stat. 117, 124 (emphasis added). They expressly gave federal courts jurisdiction over claims for infringement.

Both statutes *mentioned* injunctions. See 3 Stat. at 481; §17, 5 Stat. at 124. But this Court explained that they had "conferred upon the courts of the United States" not just authority to issue an injunction, but "*general equity jurisdiction*." *Tilghman* v. *Proctor*, 125 U.S. 136, 144 (1888) (emphasis added); see *Stevens*, 58 U.S. at 455 (describing the 1819 Act as conferring "the usual and known jurisdiction exercised by courts of equity"). That general jurisdictional grant was necessary because, before 1819, no statute authorized federal courts to decide patent-infringement suits absent diversity jurisdiction. *Root*, 105 U.S. at 193. The acts did not "'enlarge or alter the powers of the court,'" but merely "'extend[ed] its jurisdiction to parties not before falling within it'"—giving federal courts jurisdiction to enforce the substantive rights to relief previously asserted in state courts. *Ibid.*

The Commission invokes this Court's statement in *Stevens* that "'[t]he right to an account of profits is incident to the right to an injunction.'" Resp.Br. 21 (quoting *Stevens*, 58 U.S. at 455). But this Court later made clear that the right to an accounting did not *derive from* the right to an *injunction itself*—it derived from an equity court's general authority to resolve *equitable and legal issues* in a single case. The question in *Root* was whether

a party could bring "a bill in equity for a naked account of profits and damages against an infringer of a patent." 105 U.S. at 215. The Court held that such a bill "cannot be sustained." *Id.* at 215-216. It held that a plaintiff must seek "*some*" form of purely equitable relief to "secure[ ] * * * his standing in court," *id.* at 216 (emphasis added); only then could the plaintiff invoke the equity court's ancillary jurisdiction to "administer[ ] an entire remedy and complete justice," *id.* at 214. The Court acknowledged that "the most general ground for equitable interposition is" a request for an "injunction" prohibiting further infringement. *Id.* at 216. But the Court explained "that grounds of equitable relief may arise, *other than by way of injunction*," that could give an equity court jurisdiction over the patentee's claims in the first instance. *Ibid.* (emphasis added).

The early patent and copyright cases thus do not support reading a statutory authorization of an "injunction" to create a right to ancillary monetary remedies. The cases merely apply the "complete relief" principle of jurisdiction discussed above: Where the law entitles a party to both injunctive relief and damages, an equity court can assert jurisdiction to grant both. See pp. 7-12, *supra*. That does not mean that, where the law entitles an agency to an injunction, courts may invent a right to monetary relief that Congress did not grant.

C. The Commission's Reading of § 13(b) Defies the FTC Act's Structure and History

The Commission is correct that "Congress created two alternative pathways for adjudicating violations of the Act: administrative proceedings before the Commission and permanent-injunction litigation in federal court." Resp.Br. 38-39. But those two alternative pathways are pathways to *different relief*. Section 13(b) states what

relief the Commission "may seek" by initiating proceedings directly in district court: an "injunction." 15 U.S.C. § 53(b). Alternatively, § 19 specifies the pathway for the Commission to obtain remedies "to redress injury to consumers," including "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." *Id.* § 57b(b).

Section 19, moreover, imposes important preconditions to monetary relief for violations of the FTC Act. The Commission must conduct an administrative adjudication, "satisfy the court" that a reasonable person would know the conduct was "dishonest or fraudulent," 15 U.S.C. § 57b(a)(2), comply with the statute of limitations, *id.* § 57b(d), and notify alleged victims of "the pendency of [the] action," *id.* § 57b(c)(2). The Commission's arguments that Congress intended § 13(b) to implicitly authorize the very same remedies expressly authorized in § 19, without imposing those requirements, defy the FTC Act's structure and history—not to mention common sense.

1. The Commission cannot explain why, if Congress intended to open a direct judicial pathway to retrospective monetary relief in § 13(b), it would have required such efforts to be "incident" to an action for an injunction. Resp.Br. 18. Consistent with the forward-looking nature of injunctive relief, § 13(b) authorizes the Commission to "bring suit" only where a person "is violating, or is about to violate" laws the Commission enforces. 15 U.S.C. § 53(b). It would be "illogical" for Congress to limit the Commission's authority to seek *retrospective* monetary redress for consumers to situations involving "ongoing or imminent unlawful conduct." *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 772-773 (7th Cir. 2019).

2. Congress, moreover, does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is hard to imagine a bigger elephant than "'*all* relief available' in equity," including ancillary "legal" relief, Resp.Br. 53-54, hiding in the mousehole of a provision authorizing the Commission to seek a "permanent injunction." Indeed, such authority would be hidden within a secondary proviso—a second "Provided * * * [t]hat" clause—in a paragraph authorizing the Commission to "bring suit * * * to enjoin [an allegedly unlawful] act or practice" "pending the issuance" and resolution of an administrative "complaint by the Commission." 15 U.S.C. §53(b), (b)(2). It makes no sense to read that proviso as silently authorizing relief *far beyond* the injunctive relief—"enjoin[ing an] act or practice"—that is §13(b)'s express focus. The Commission's construction, moreover, hides an entire herd of elephants: On its view, every mention of an "injunction" in the U.S. Code would entitle the plaintiff to all equitable *and* legal relief.

The Commission responds that "Congress did not need to spell out the parameters of the judicial pathway because it could piggyback on the centuries of established law of injunctions." Resp.Br. 39. That fails for the reasons given above. See pp. 3-14, *supra*. But the notion that Congress *intended* §13(b)'s mention of a permanent injunction to authorize the Commission to seek restitution approaches the farcical. When Congress intends to authorize equitable or other monetary relief in *addition* to an injunction, it says so expressly. See Pet.Br. 21 & n.3 (citing statutes). In the very legislation that added §13(b), Congress authorized courts to "grant mandatory injunctions" for violations of Commission cease-and-desist orders, "*and* such other and further equitable relief as they deem appropriate." 15 U.S.C. §45(*l*) (em-

phasis added). Congress's omission of that language from § 13(b) speaks volumes. See *Nken*, 556 U.S. at 430.[3]

Even if the legislative history suggests that "Congress understood that it was opening a separate enforcement pathway" in § 13(b), Resp.Br. 26, there is no suggestion Congress understood the § 13(b) "pathway" to encompass monetary remedies. The Senate Report the Commission cites says the opposite: The provision would give the Commission "the ability, in the routine fraud case, to *merely seek a permanent injunction* in those situations in which it does not desire to further expand upon the prohibitions of the [FTC] Act." S. Rep. No. 93-151, at 31 (1973) (emphasis added).

If it were so obvious that Congress intended § 13(b) to be a pathway to monetary relief, surely the Commission—the agency charged with administering the FTC Act—would have understood that immediately. But the Commission nowhere denies its officials long had the opposite understanding, seeing no basis in § 13(b)'s text or legislative history to argue that the provision authorized monetary remedies. See Pet.Br. 9-10.

3. There is, moreover, no reason why Congress would have needed to authorize "the refund of money or return of property" by enacting § 19, 15 U.S.C. § 57b(b), if it had already authorized the Commission to seek those remedies when enacting § 13(b) two years earlier. Pet.Br. 25-27. The Commission cites no evidence Congress thought § 13(b) already offered those remedies, but wanted to expand their availability through an adminis-

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[3] The Commission argues that the *injunctive* relief authorized by § 13(b) and § 5(*l*) serve distinct purposes. Resp.Br. 48-49. That is no answer: When Congress authorized relief *beyond* injunctions, it said so expressly.

trative pathway under § 19. More important, the Commission cannot explain why, if Congress intended two pathways to the same relief, it would have provided rigorous substantive and procedural protections—including notice to injured parties—in only one of those pathways. See Pet.Br. 27-29. The Commission claims Congress "had to define * * * how administrative adjudication would work." Resp.Br. 40. But § 19 does not define administrative adjudication—it addresses the circumstances under which the Commission can seek relief *in district court*, after an administrative adjudication is complete. See 15 U.S.C. § 57b.

The Commission errs in speculating that Congress provided additional protections in § 19 because "it authorized monetary judgments based solely on an administrative agency's determination of legality." Resp.Br. 44. Section 19 does *not* allow monetary remedies "based solely on an administrative agency's determination of legality." Section 19 relief may *follow* either a cease-and-desist order or a rule promulgated by the Commission. 15 U.S.C. § 57b(a). But cease-and-desist orders are subject to review in the federal courts of appeals, *id.* § 45(b), and the violation of a regulation must be litigated in district court under § 19. The Commission cannot explain why Congress would have demanded clear notice to defendants as a precondition to monetary relief—and notice to injured parties—under § 19, but omitted those requirements from § 13(b).

The Commission claims Congress did not need § 19's limits in § 13(b) because courts would exercise an "equitable duty to prevent unjust monetary awards" in § 13(b) actions, where "the Commission is treated like any litigant that must prove both a substantive violation and the appropriate redress." Resp.Br. 44. That makes no

sense. Section 19 proceedings are also brought in district court, so Congress could have relied on the courts' "equitable duty" in that context, too. Yet Congress deemed it necessary to specify that monetary remedies are not appropriate for violations of the Act under § 19 unless the Commission proves that "a reasonable man would have known under the circumstances" that the challenged practice "was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2). The Commission cannot explain why, having cabined the court's authority under § 19, it would allow a court to award the same remedies under § 13(b) upon a mere showing that a person "is violating" a law enforced by the Commission. *Id.* § 53(b). The Commission's suggestion that the minimum *constitutional* standard for notice is an adequate substitute for § 19's rigorous standard, Resp.Br. 44-45, requires no response.

Nor can the Commission explain away the fact that, where § 19 imposes a statute of limitations for monetary relief, 15 U.S.C. § 57b(d), § 13(b) contains none. To suggest that courts can "take concerns of repose into account in the exercise of their equitable discretion," Resp.Br. 44, is no answer. The Commission argued the opposite below. C.A.App. 1492-1493. "If Congress had intended" § 13(b) to afford monetary remedies, "the absence" of a limitations period "would be striking." *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 486 (1996).

4. The Commission retreats to § 19's savings clause, claiming it proves § 19 "was not meant to limit remedies available" under § 13(b). Resp.Br. 45. The point is not that § 19 rescinded authority previously granted in § 13(b). The point is that it would have been nonsensical for Congress to authorize monetary relief in § 19, subject to rigorous substantive and procedural protections, while granting the Commission authority to obtain the same

relief, without those protections, in §13(b). See Pet.Br. 32. A savings clause cannot be read in a way that causes a statute to "destroy itself." *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

5. Finally, the Commission urges that Congress ratified lower court understandings when it amended the FTC Act in 1994 and 2006. Resp.Br. 27-28. But the key language providing for "permanent injunction[s]" remains unchanged from 1973. Neither amendment concerned courts' interpretations of §13(b). The 1994 amendment included a discrete change concerning venue and service of process—it "did not change the remedies available" under §13(b). *FTC* v. *AbbVie Inc.*, 976 F.3d 327, 377 (3d Cir. 2020). And the 2006 amendment extended already "available" remedies, "including restitution to domestic or foreign victims," to claims "involving foreign commerce." 15 U.S.C. §45(a)(4). The amendment's "reference to restitution" does not implicate §13(b) because "the availability of restitution under Sections 5 and 19" was "well-settled." *AbbVie*, 976 F.3d at 377; see also *Credit Bureau*, 937 F.3d at 775.

"Nothing that Congress has done since [1973] has altered the meaning" of "injunction" under §13(b) through amendment or reenactment. *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966-967 (2017); see *Alexander* v. *Sandoval*, 532 U.S. 275, 292-293 (2001) (requiring "comprehensive[ ] revis[ion]" to draw inferences from other amendments). The Commission's claim of "implied amendment[ ]" fails. *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

D. Precedent Requires Adhering to §13(b)'s Text

Lacking support in §13(b)'s text, the Commission turns to *Porter* v. *Warner Holding Co.*, 328 U.S. 395

(1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). Neither case bears the weight the Commission places on them.

1. Unlike § 13(b), the provision at issue in *Porter* authorized not only "'injunction[s],'" but also "'other order[s],'" which encompasses restitution. 328 U.S. at 397; see Pet.Br. 33-34. The Commission claims the outcome in *Porter* "did not turn on the phrase 'other order,'" and that *Mitchell* "directly rejected" such an argument. Resp.Br. 33. But *Porter* stressed that "the term 'other order' contemplates a remedy other than that of an injunction," including "[a]n order for the recovery [of] restitution." 328 U.S. at 399. Section 13(b), by contrast, contains no textual basis for monetary remedies. The provision in *Mitchell*, moreover, concerned the jurisdiction of "District Courts," not the scope of agency authority to demand relief. *Mitchell*, 361 U.S. at 289; see p. 8, *supra*.

Critically, in both *Porter* and *Mitchell*, the Court examined the entire statutory scheme and concluded that no "other provision" provided for restitution and thus "expressly or impliedly preclude[d] a court from ordering restitution" pursuant to the provision authorizing injunctive relief. *Porter*, 328 U.S. at 403; see *Mitchell*, 361 U.S. at 294 (same). Here, the opposite is true. In the FTC Act, both § 5(*l*) and § 19 expressly provide for restitution and other equitable relief. See 15 U.S.C. §§ 45(*l*), 57b(b). Congress's failure to include similar language in § 13(b) precludes this Court from blue-penciling that relief into § 13(b). See Pet.Br. 35-36; pp. 3-4, 16-17, *supra*.

2. This Court, moreover, has long since rejected *Porter*'s and *Mitchell*'s approach to statutory construction. See Pet.Br. 36-37. Where *Porter* assumed that "all the inherent equitable powers of the District Court are

available" unless "restrict[ed]" by a "clear and valid legislative command," 328 U.S. at 398, the Court now limits remedies to those expressly provided in the statutory text. See Pet.Br. 37. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"—not to employ any remedy not expressly foreclosed. *Sandoval*, 532 U.S. at 286-287. Nor can the Commission persuasively argue that, "[w]hen Congress enacted Section 13(b)," "it relied on" *Porter*'s and *Mitchell*'s expansive judicial implication of remedies. Resp.Br. 25. Whatever the view of implying extra-statutory remedies when § 13(b) was enacted in 1973, this Court, "[h]aving sworn off the habit of venturing beyond Congress's intent," should "not accept [the Commission's] invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

That principle applies with extra force where, as here, the statute addresses agency authority. As an administrative agency, the Commission is empowered "to carry into effect legislative policies embodied in the statute" *only* "in accordance with the legislative standard therein prescribed." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 628 (1935). As the Commission acknowledges, "'the determinative question is . . . what Congress has said [the Commission] *can do*,'" Resp.Br. 40 (quoting *Civ. Aeronautics Bd.* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961)) (emphasis added), not what actions Congress has expressly forbidden.

Those principles cannot be dismissed as limited to the context of implied "'*private rights of action*,'" as opposed to implied *remedies*. Resp.Br. 34-35. This Court has broadly rejected the view that courts should "'provide such *remedies* as are necessary to make effective the con-

gressional purpose.'" *Sandoval*, 532 U.S. at 287 (emphasis added). It has explained that courts should not imply "private *remed[ies]*," "no matter how desirable that might be as a policy matter." *Id.* at 286-287 (emphasis added). And it has adhered to that view in cases involving implied remedies as well as implied causes of action. See, *e.g.*, *Great-West*, 534 U.S. at 209 (courts should be "'reluctant to tamper with'" a statutory scheme "by extending remedies not specifically authorized by its text"). Indeed, the Court has rejected the cornerstone of the Commission's argument here—the notion that an equity court's historic power "to award complete relief," *Porter*, 328 U.S. at 399; *Mitchell*, 361 U.S. at 292, means that courts can create remedies beyond those in statutory text. Pp. 11-12, *supra*.[4]

3. The Commission's efforts to distinguish *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), see Pet.Br. 37-39, demonstrate its error. In *Meghrig*, the Court refused to interpret the RCRA's reference to injunctive relief as "contemplat[ing] the award of past cleanup costs [of hazardous waste], whether these are denominated 'damages' or 'equitable restitution.'" 516 U.S. at 484. The Court contrasted that statute with a provision of CERCLA, which expressly authorized such monetary relief. *Id.* at 485. "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the

[4] The Commission contends that this Court has "relied on *Porter* and its antecedents" "many times." Resp.Br. 37 (citing *Liu* v. *SEC*, 140 S. Ct. 1936 (2020); *Kansas* v. *Nebraska*, 574 U.S. 445 (2015); *Am. Stores*, 495 U.S. 271). None of those cases held that a statutory reference to an "injunction" opened the door to monetary relief. They say nothing about the issue here.

remedies under [the] RCRA does not provide that remedy." *Ibid.*

In discussing *Meghrig*, the Commission states that, "[a]t bottom, RCRA provides a remedy for present and imminent future harm, whereas CERCLA provides for the recovery of cleanup costs. The two statutes are not different routes to the same end." Resp.Br. 36 (citation omitted). But that precisely describes § 13(b) and § 19. Section 13(b) provides a remedy for present and imminent future harm from ongoing violations in the form of injunctions. By contrast, § 19 provides for monetary remedies where the conduct is complete, subject to distinct safeguards. See pp. 17-19, *supra*. As in *Meghrig,* the two statutory provisions are not different routes to the same end.

E. Policy Arguments Are Properly Addressed to Congress

The Commission's *amici* press variations of the policy argument that the Commission's ability to obtain "restitution in appropriate Section 13(b) cases is vitally important." Truth in Advert. Br. 7; see Am. Antitrust Inst. Br. 9-21; Nat'l Consumer Law Ctr., *et al.* Br. 10-20; Open Mkts. Inst. Br. 16-19; States Br. 5-22. Whether it would be good policy to allow the Commission to circumvent § 19's requirements, and instead obtain monetary relief under § 13(b), "isn't [the Court's] call to make." *SAS Inst. Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018). "Policy arguments are properly addressed to Congress, not this Court." *Ibid.*

To that end, the Commission recently asked Congress to amend § 13(b) to authorize monetary remedies. See *Oversight of the Fed. Trade Comm'n: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 116th Cong. 3-5 (Aug. 5, 2020) (statement of the Federal Trade Commission),

available at https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf. A bill has been proposed that would amend § 13(b) to expressly authorize "restitution," "rescission," "the refund of money or return of property," and "disgorgement," without requiring the Commission to comply with § 19's heightened requirements. See S. 4626, 116th Cong. § 403 (2020).

The question, moreover, is not whether putative wrongdoers can "[k]eep" the proceeds of their misconduct. Resp.Br. 50. Victims of misconduct can sue for relief under state consumer-protection statutes. The question is whether the Commission can step into their shoes and demand relief under § 13(b). If Congress decides the Commission's proposal for § 13(b) is good policy, it can authorize it. But the Commission's view that the term "injunction" *already* authorizes it to seek monetary relief cannot be sustained.

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

Regardless, the Ninth Circuit's decision below must be reversed because it fails to comply with the "bounds of equity practice." *Liu*, 140 S. Ct. at 1946.

A. The Commission's assertion of waiver, Resp.Br. 51-52, is itself waived. The petition raised "the scope of the limits or requirements" for monetary relief "if" such relief is available under § 13(b). Pet. i. It urged that the conflict between the Second and Ninth Circuits regarding whether monetary relief under § 13(b) must comply with equitable principles "would warrant review in its own right." *Id.* at 26-29. The brief in opposition, however, never asserted waiver. Under this Court's Rule 15.2, where the brief in opposition fails to assert that a "ques-

tion [presented] is not preserved," the Court will "deem the defect waived." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985).

The Commission's waiver argument is also wrong. Petitioners challenged the award as crossing the boundary of equitable relief. See Tucker C.A.Br. 89-90; Dist. Ct. Dkt. 899 at 17-19. And everyone understood the argument to be foreclosed by Ninth Circuit precedent regardless. See Pet.App. 29a-34a.

B. The Commission's argument that the Ninth Circuit's award complies with equitable principles fares no better. After the Ninth Circuit ruled, this Court held in *Liu* that any award of monetary relief "in excess of a defendant's net profits from wrongdoing" would "transform[ ] an equitable remedy into a punitive sanction." 140 S. Ct. at 1942, 1946. The award here was not petitioners' net profits, but "the amount paid by borrowers in excess of the charges disclosed in the loan documents." Resp.Br. 52. While the Commission claims that amount "excludes legitimately charged interest," that is not the same as subtracting all legitimate costs of doing business to arrive at net profits. *Ibid.* Indeed, the amount was "triple" what "petitioners had allegedly 'received.'" Pet.Br. 47.

Liu also explained that "imposing joint-and-several * * * liability" would "test the bounds of equity practice." 140 S. Ct. at 1946. The Commission does not deny that the award here imposes joint-and-several liability, but states *Liu* left the door open in cases of "'concerted wrongdoing.'" Resp.Br. 52 (quoting *Liu*, 140 S. Ct. at 1945). The Commission claims the standard is met, but it cannot deny that the court ordered Mr. Tucker's wife, and an entity she owned that in turn owned her family home, to collectively "disgorge[ ]" over $27 million when

neither had been accused of wrongdoing. Pet.App. 96a. At a minimum, joint-and-several liability should be a matter for "the Ninth Circuit on remand." *Liu*, 140 S. Ct. at 1949.

Liu also noted that "ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims" is generally inconsistent with equity. 140 S. Ct. at 1946. The Commission concedes the award here will "go to the Treasury" if victim payments are "infeasible," Resp.Br. 53, but it cannot explain why that would be "consistent with equitable principles," *Liu*, 140 S. Ct. at 1949. Judge O'Scannlain thus observed that the "restitution" ordered in this case "bears little resemblance to historically available forms of equitable relief, and therefore [the Ninth Circuit] should lack the authority to impose it." Pet.App. 34a. He was right.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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