

No. 19-825

IN THE
Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

CREDIT BUREAU CENTER, LLC AND
MICHAEL BROWN,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the term “permanent injunction” in Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), authorizes the district courts to grant monetary judgments, in light of the text and structure of the FTC Act.

RULE 29.6 DISCLOSURE STATEMENT

Credit Bureau Center, LLC is wholly owned by Michael Brown and is not a parent company or a subsidiary of any other company.

RELATED PROCEEDINGS

To counsel's knowledge, there are no related proceedings.

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BRIEF IN OPPOSITION

INTRODUCTION

The Court should deny the petition to allow further percolation of the question presented. At issue in this case is whether the term “permanent injunction” in Section 13(b) of the FTC Act authorizes the district courts to enter monetary judgments. In 1989, the Seventh Circuit concluded that it did, reasoning that the statute should be interpreted to “grant any ancillary relief necessary to accomplish complete justice.” *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (internal quotation marks omitted). That decision served as the foundation for

several other circuits to hold that Section 13(b) permits monetary awards. *See* Pet. App. 26a-27a.

In the decision below, the Seventh Circuit overruled *Amy Travel*, concluding that it was inconsistent with this Court's approach to statutory interpretation, which looks to the text and structure of the statute to set the boundaries on agency authority. *See id.* at 12a-20a, 32a-40a. Applying that approach, the Seventh Circuit read Section 13(b) "to mean what it says": The district courts may grant a permanent injunction under Section 13(b), but may not grant monetary relief. *Id.* at 17a. The Seventh Circuit's decision is correct, and it is likely to persuade other circuits to reexamine their precedents, which rely in part on the Seventh Circuit's now-overruled decision in *Amy Travel*. The Court should thus deny the petition to permit further percolation on the brand-new circuit split created by this case.

Respondents agree with the FTC that the Court should not hold the petition for *Liu v. SEC*, No. 18-1501, which asks this Court to determine whether "disgorgement" is a form of "equitable" relief permitted by the Exchange Act. *See* FTC Pet. 23-24. In the decision below, the Seventh Circuit expressly declined to address whether the monetary award at issue here is "equitable" or "legal," Pet. App. 40a n.4; the Court's decision in *Liu* is thus unlikely to affect the outcome of this case. There is no basis for holding or remanding the petition in light of *Liu*.

Respondents urge the Court to deny the petition. If the Court chooses to decide the question presented now, however, this case is a better vehicle to address that question than other pending petitions. The decision below offers a detailed analysis of the statu-

tory interpretation question at issue, *Liu* does not present an obstacle to the Court’s analysis, and the FTC supports certiorari in this case, where it has exercised its independent litigating authority.

STATEMENT

A. Statutory Framework

The FTC Act instructs the agency to “prevent persons, partnerships, or corporations” from using “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). This broad language is tempered by clear statutory limits on the FTC’s enforcement authority, which permit the agency to act through one of three mechanisms. *See* Pet. App. 10a-12a.

First, under Section 18 of the FTC Act, the agency may promulgate “rules which define with specificity acts or practices which are unfair or deceptive.” 15 U.S.C. § 57a(a)(1)(B). This enforcement mechanism allows the agency to “preemptively resolv[e] whether certain conduct violates” the FTC Act. Pet. App. 11a. Prior to issuing a rule, the FTC must publish notice, seek comments, and provide an opportunity for an informal hearing. 15 U.S.C. § 57a(b)(1). The agency must also issue a “statement of basis and purpose” that explains “the prevalence of the acts or practices treated by the rule” and the “manner and context in which such acts or practices are unfair or deceptive.” *Id.* § 57a(d).

After adopting a rule, the agency “may commence a civil action to recover a civil penalty” under Section 5 of the FTC Act against any person or entity that violates an FTC rule “with actual knowledge or knowledge fairly implied” that its actions are “pro-

hibited by such rule.” *Id.* § 45(m)(1)(A). The agency may also file a civil suit under Section 19 of the FTC Act, which authorizes a court “to grant such relief” as it “finds necessary to redress injury to consumers,” including “rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages,” but it may not award “any exemplary or punitive damages.” *Id.* § 57b(b). The statute of limitations for Section 19 actions is three years. *Id.* § 57b(d).

Second, under Section 5 of the FTC Act, the FTC may bring an action before an administrative law judge, who may issue a “cease and desist” order prohibiting the conduct at issue. 15 U.S.C. § 45(b). After the cease-and-desist order becomes final, the FTC may file a civil action under Section 5 of the FTC Act seeking a “civil penalty” for each violation of the order, including against parties who are not named in the order but who have “actual knowledge” that their actions are “unfair or deceptive” under the order. *Id.* § 45(l), (m). In an action to enforce a cease-and-desist order under Section 5, the “courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate.” *Id.* § 45(l).

Under Section 19 of the FTC Act, the agency may also commence a civil action against any entity that engages in conduct prohibited by a cease-and-desist order, from which relief may be granted if the FTC “satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent.” *Id.* § 57b(a). As noted, under Section 19, the agency may

seek a variety of remedies, including the refund of money or property and the payment of damages, provided that it does so within the three-year limitations period. *Id.* § 57b(b), (d).

Third, under Section 13(b) of the FTC Act, when the agency “has reason to believe” that “any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by” the FTC, the agency may seek a temporary restraining order or preliminary injunction. 15 U.S.C. § 53(b). After the temporary restraining order or preliminary injunction is granted, the FTC must file an administrative complaint within 20 days, or “the order or injunction shall be dissolved by the court and be of no further force and effect.” *Id.* “[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Id.* Section 13(b) does not specify a statute of limitations. *See id.*

Congress thus created three distinct paths—each with different requirements—for the FTC to fulfill its statutory mandate. To obtain a monetary judgment, the FTC must either promulgate a rule or obtain a cease-and-desist order, ensuring that a party has notice and an opportunity to cease prohibited conduct *before* liability is imposed. To obtain a permanent injunction, in contrast, the FTC may file an enforcement action in district court against a party that “is violating, or is about to violate, any provision of law enforced by” the FTC.

B. Procedural History

Respondent Michael Brown owned and operated Credit Bureau Center, LLC, a web-based credit report and monitoring service. Pet. App. 1a. In

2017, the FTC initiated this enforcement action against Credit Bureau Center and Brown under Section 13(b) of the FTC Act, alleging that Credit Bureau Center's websites misled consumers by advertising a free credit report and then charging consumers a monthly fee for credit monitoring services. *Id.* at 3a-5a. The FTC acknowledged that Credit Bureau Center's website advised consumers of the fee, but claimed that it improperly did so in a "smaller font." *Id.* at 3a. The FTC also alleged that Brown was responsible for the conduct of two independent contractors, who induced consumers to sign up for Credit Bureau Center's services through deceptive Craigslist advertisements. *Id.* at 4a-5a.¹

The FTC sought a permanent injunction imposing lifetime conditions on Brown's participation in the credit-monitoring industry and placing other significant restrictions on Brown's business activities and the activities of future business partners, in addition to requiring Brown to comply with ongoing reporting requirements. *Id.* at 5a, 110a-115a, 130a-132a.² The agency also sought a monetary judgment against Brown and Credit Bureau Center in excess of \$5 million. *See id.* at 5a, 91a-92a. Respondents opposed the monetary judgment on the ground that Section 13(b) authorizes only permanent injunctions, not monetary awards. *See id.* at 5a. The District Court

¹ The independent contractors, who were named in the enforcement action, subsequently settled with the FTC. *See* Pet. App. 69a.

² The FTC first sought and obtained a temporary restraining order and preliminary injunction under Section 13(b), without filing an administrative complaint. *See* Pet. App. 5a, 69a.

rejected Respondents' argument, citing the Seventh Circuit's decision in *Amy Travel*, which had interpreted Section 13(b) to permit district courts to enter monetary judgments. *See* Pet. App. 88a-90a. The District Court awarded the FTC \$5.2 million in "equitable monetary relief," in addition to entering the permanent injunction requested by the agency. *Id.* at 88a, 106a, 126a.³

The Seventh Circuit affirmed the permanent injunction but reversed the monetary judgment. *Id.* at 2a-3a. The court began its analysis "with the text of section 13(b)." *Id.* at 14a. Describing the monetary judgment as "restitution," the court found it "obvious" that "[r]estitution isn't an injunction." *Id.* at 12a. The Seventh Circuit emphasized that Section 13(b) provides a "forward-facing" remedy to address "ongoing or imminent harm," rather than a backward-looking remedy, such as restitution. *Id.* at 14a. It also emphasized that Congress expressly authorized the FTC to seek monetary awards and broader forms of equitable relief under other provisions of the FTC Act, which the agency declined to utilize in this case. *See id.* at 16a-17a. The Seventh Circuit con-

³ Respondents also challenged the monetary judgment on other grounds, including that the funds were not traceable, that the judgment did not deduct Respondents' expenses, and that the monetary award was penal in nature and did not require all funds to be distributed to consumers. *See* Pet. App. 5a, 89a-93a; *see also id.* at 127a (directing that undistributed funds are "to be deposited to the U.S. Treasury as disgorgement"). The Seventh Circuit did not address any of these arguments on appeal, instead dispositively ruling that Section 13(b) does not permit any kind of monetary award. *See id.* at 40a n4.

cluded that the FTC’s remedy under Section 13(b) “is limited to injunctive relief.” *Id.* at 17a.

In ruling for Respondents, the court overturned its earlier decision in *Amy Travel*, which relied on “an exploration of statutory purpose” as the “polestar in cases raising interpretive questions about the scope of statutory remedies.” *Id.* at 32a; *see also id.* at 3a n.1 (noting Seventh Circuit procedure permitting panel to overrule circuit precedent after circulating opinion to the full court). The Seventh Circuit explained that this Court has subsequently “‘abandoned’ its prior understanding that judges must ‘be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute,’” concluding that it is “now well settled that Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action.” *Id.* at 32a-33a (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Chief Judge Wood, joined by Judges Rovner and Hamilton, dissented from the denial of rehearing en banc, and would have upheld *Amy Travel*. *See id.* at 41a-43a, 57a.

The FTC filed this petition for certiorari, and the Court requested a response.⁴

⁴ Respondents filed a conditional cross-petition, No. 19-914, raising an independent question regarding the agency’s authority under Section 13(b) to seek a permanent injunction without filing an administrative complaint. The cross-petition is pending before the Court.

ARGUMENT**I. THE COURT SHOULD DENY THE PETITION TO PERMIT FURTHER PERCOLATION OF THE QUESTION PRESENTED.**

The decision below is correct. Unlike earlier decisions addressing the question presented, the Seventh Circuit analyzed the plain text and structure of the FTC Act, rather than attempting to divine congressional purpose. The Seventh Circuit’s opinion is compelling, and it is likely to be adopted by other circuits. This Court should deny the petition to permit further percolation of the question presented.

A. The Decision Below Is Correct.

The Seventh Circuit correctly interpreted Section 13(b) to permit district courts to issue permanent injunctions, but not monetary awards.

The plain text of Section 13(b) authorizes district courts to grant a “permanent injunction.” 15 U.S.C. § 53(b). A “permanent injunction” is not a monetary award. It is “a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing.” 2 Joseph Story & W. H. Lyon, Jr., *Commentaries on Equity Jurisprudence* § 1181, at 549 (14th ed. 1918). “[S]tatutory authorizations for injunctions don’t encompass other discrete forms of equitable relief like restitution.” Pet. App. 12a. “Injunctive relief” instead “constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.” *Id.* (quoting *Owner-Operator Indep. Drivers Ass’n v. Landstar Sys., Inc.*, 622 F.3d 1307, 1324 (11th Cir. 2010)). As this Court held in *Meghrig v. KFC West-*

ern, Inc., 516 U.S. 479 (1996), the “plain reading” of a remedial scheme authorizing a party to seek an “injunction” does not “contemplate[] the award of * * * ‘equitable restitution.’” *Id.* at 484; *see* Pet. App. 12a.

The FTC does not “seriously argue” that the term “injunction” authorizes monetary judgments. Pet. App. 12a. It instead “contends that section 13(b) *implicitly* authorizes restitution.” *Id.* at 12a-13a.⁵ That “implication” is rebutted, however, by the text of Section 13(b)—which nowhere even suggests that the court may order monetary relief—and by the structure of both Section 13(b) and the FTC Act as a whole.

Section 13(b) addresses forward-looking relief, permitting the agency to seek temporary restraining orders, preliminary injunctions, and permanent injunctions. *See* 15 U.S.C. § 53(b). It authorizes the

⁵ The FTC characterizes the issue in this case as whether “Section 13(b) authorizes district courts to enter injunctions that include monetary relief.” FTC Pet. 11. In the proceedings below, however, the FTC *separately* requested “equitable monetary relief” and “equitable relief in the form of a permanent injunction.” Pet. App. 86a; *see id.* at 88a (“In addition to the permanent injunction, the FTC seeks relief from [Respondents] in the amount of consumer losses.”). And the District Court separately entered a “monetary judgment” and a permanent injunction. *Compare* Pet. App. 126a, *with id.* at 110a, 111a, 112a, 116a, 117a, 119a, 121a, 122a, 127a, 128a (instructing that Respondents are “permanently restrained and enjoined” from certain actions). In the Seventh Circuit, the agency argued that Section 13(b) implicitly authorizes restitution, not that restitution is an injunction. *See* Pet. App. 12a-13a; *see also* FTC Br. 27-28, 55-62, No. 18-2847 (7th Cir. Mar. 12, 2019), ECF No. 42.

agency to act *only* when there is a current or imminent violation, requiring the FTC to demonstrate that a person or entity “is violating, or is about to violate” a “provision of law enforced by the [FTC].” *Id.* And it requires the district courts to “weigh[] the equities and consider[]” the FTC’s “likelihood of ultimate success,” which are factors relevant to injunctions, not monetary awards. *Id.* As the Seventh Circuit held, “[r]equiring ongoing or imminent harm matches the forward-facing nature of injunctions,” whereas an award of money is “a return or restoration of what the defendant has gained in a transaction.” Pet. App. 14a (quoting 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1), at 551 (2d ed. 1993)). Permitting the FTC to seek a monetary award under Section 13(b) “would condition” the agency’s “ability to secure restitution for past conduct on the existence of ongoing or imminent unlawful conduct”—an “illogical” result. *Id.*

The structure of the FTC Act similarly undermines the FTC’s position. 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) (internal quotation marks omitted). Here, Section 19 of the FTC Act authorizes the district court to award “such relief as the court finds necessary,” including “the *refund of money or return of property*,” when a party violates an FTC rule adopted through notice and comment rulemaking. 15 U.S.C. § 57b(b) (emphasis added). Section 13(b), in contrast, does not contain any language authorizing a monetary award. If Congress had intended to grant the district courts

authority to enter monetary judgments under Section 13(b), it would have said so. It didn't. *See* Pet. App. 16a.

Nor does the word “injunction” in Section 13(b) impliedly include other forms of equitable relief. In Section 5 of the FTC Act, Congress authorized the district courts to “grant mandatory injunctions and such *other and further equitable relief* as they deem appropriate” when enforcing an administrative cease-and-desist order. 15 U.S.C. § 45(l) (emphasis added). If the word “injunction” in the FTC Act impliedly included other forms of equitable relief, Congress would have had no need to specify in Section 5 that the district courts may *also* grant “such other and further equitable relief as they deem appropriate.” *Id.*; *see* Pet. App. 15a-16a.

Where Congress authorized the district courts to award monetary relief under the FTC Act—or forms of equitable relief beyond an injunction—it ensured that affected parties are given “fair notice, either through cease-and-desist orders or rules that define with specificity prohibited acts,” and it placed a three-year statute of limitations on such actions. Pet. App. 16a-17a (internal quotation marks omitted); *see also id.* at 36a. “This framework counterbalances” the FTC Act’s “amorphous ‘unfair or deceptive practices’ standard.” *Id.* at 16a.

The FTC’s interpretation of Section 13(b), in contrast, permits the agency to obtain a substantial monetary award *without* first providing notice that the challenged conduct is prohibited—and without any statute of limitations—in contravention of the carefully calibrated statutory scheme created by Congress. *See id.* at 17a (“Reading an implied resti-

tution remedy into section 13(b) makes these other provisions largely pointless.”). The FTC frequently proceeds under Section 13(b) precisely because it has interpreted that provision to have a far broader scope than Congress intended, allowing the agency to bypass important procedural protections that Congress afforded defendants. See FTC Pet. 12-13 (complaining that its authority is more limited under Sections 5 and 19 of the FTC Act).⁶

The agency’s reliance on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), is misplaced. See FTC Pet. 4-5. As the Seventh Circuit explained, “[w]hatever strength *Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used” as “a license to categorically recognize all ancillary

⁶ Section 19 of the FTC Act states that the “[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.” 15 U.S.C. § 57b(e). The FTC submits that this provision “explains away the tensions that its reading of section 13(b) otherwise creates.” Pet. App. 18a. The Seventh Circuit correctly rejected that argument, concluding that the agency’s “reading of section 13(b) effectively nullifies § 57b,” and that Section 19 “preserves only those remedies that exist” but “does not inform the question whether section 13(b) contains an implied power to award restitution.” *Id.* at 19a. The Seventh Circuit also correctly rejected the FTC’s grab bag of additional arguments. See, e.g., *id.* at 19a-20a (rejecting agency’s congressional ratification argument); *id.* at 36a-38a (rejecting agency’s claim that the courts’ equitable powers “turn on the identity of the parties involved”). The FTC cites (at 15-16) *California v. American Stores Co.*, 495 U.S. 271 (1990), but that decision predated *Meghrig* and involved a different statutory scheme. See *id.* at 275.

forms of equitable relief without a close analysis of statutory text and structure.” Pet. App. 33a. Here, that analysis demonstrates that Congress did *not* intend for the district courts to issue monetary judgments under Section 13(b). *See id.* at 33a-36a (holding that “[e]very one of *Meghrig’s* reasons for refusing to find restitutionary authority * * * applies with equal force to section 13(b).”).

In short: The decision below is correct. It follows from the clear text and structure of the FTC Act, rather than an “implication” found nowhere in the Act. It applies basic principles of statutory interpretation, rather than departing from those principles. And it makes sense: If Congress had intended to grant the FTC authority under Section 13(b) to seek millions—and in some cases billions—of dollars, it would have said so. Instead, Congress granted the agency authority to seek monetary damages through other enforcement mechanisms, which the FTC declined to utilize in this case.

B. Further Percolation Is Warranted.

The FTC is correct that the Seventh Circuit’s ruling created a split with other circuits. But the divergence in authority is fresh, and other circuits are likely to change their position in light of the Seventh Circuit’s persuasive analysis.

Amy Travel was the first court of appeals decision to hold that the FTC has authority under Section 13(b) to obtain a monetary judgment. *See* Pet. App. 25a-26a. The Seventh Circuit reasoned in *Amy Travel* that “because section 13(b) gives a court authority to grant a permanent injunction, the statute by implication gives authority to grant any ancillary relief necessary to accomplish complete

justice.” 875 F.2d at 571 (internal quotation marks omitted). This “complete justice” approach to statutory interpretation has since been rejected by this Court and many others, which now adhere to a “more limited understanding of judicially implied remedies,” and are “especially reluctant to tamper with the enforcement scheme” designed by Congress “by extending remedies not specifically authorized by its text.” Pet. App. 31a (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)).

In the decision below, the Seventh Circuit overruled *Amy Travel*—and in doing so, undermined other circuit court decisions that cite *Amy Travel* as persuasive authority. See, e.g., *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011) (citing *Amy Travel*); *FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014) (citing *Amy Travel*); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (citing *Amy Travel*); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (citing *Amy Travel*); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) (citing *Gem Merchandising*, which in turn cites *Amy Travel*). Each of those circuits may be willing to revisit its precedent now that *Amy Travel* is no longer good law. See Pet. App. 26a, 39a (“[M]ost circuits adopted their position by uncritically accepting [the Seventh Circuit’s] holding in *Amy Travel*” without examining “whether reading a restitution remedy into section 13(b) comports with the [FTC Act’s] text and structure.”).

Panels in both the Fourth and Ninth Circuits, moreover, have questioned their precedent in this area. In *Ross*, the Fourth Circuit conceded that the

defendant’s “arguments about how the structure, history, and purpose of the [FTC] Act weigh against the conclusion that district courts have the authority to award consumer redress” are “not entirely unpersuasive.” 743 F.3d at 891. The court declined to credit those arguments, however, in part because it would “create a circuit split.” *Id.* at 892. In light of the split created by the Seventh Circuit’s opinion in this case, the Fourth Circuit may choose to reexamine its precedent. Similarly, in *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018), *petition for cert. filed*, No. 19-508 (U.S. Oct. 18, 2019), two of the three judges in the *majority* explicitly stated that they disagreed with Ninth Circuit precedent permitting district courts to award monetary judgments under Section 13(b). *See id.* at 429 (O’Scannlain, J., joined by Bea, J., specially concurring). The Ninth Circuit’s decision in *AMG* predated the Seventh Circuit’s decision below; the Ninth Circuit may now be willing to reconsider its precedent en banc.

Given the Seventh Circuit’s persuasive opinion—and the shaky foundation underlying other circuits’ precedent—further percolation is warranted. The Court should deny the petition.

II. THE COURT SHOULD DENY THE PETITION, RATHER THAN HOLDING OR REMANDING IN LIGHT OF *LIU*.

In March of this year, the Court heard argument in *Liu v. SEC*, No. 18-1501. At issue in *Liu* is whether the phrase “any equitable relief that may be appropriate or necessary” in Section 21(d)(5) of the Exchange Act authorizes district courts to grant “disgorgement.” Resp. Br. 5, *Liu*, No. 18-1501 (U.S.

Jan. 15, 2019) (internal quotation marks omitted). At issue in this case, in contrast, is whether the phrase “permanent injunction” in Section 13(b) of a different act altogether, the FTC Act, authorizes the district courts to enter a monetary judgment. Those questions are distinct, and the Court’s decision in *Liu* is unlikely to affect the outcome in this case.

If the Court holds in *Liu* that the phrase “any equitable relief” includes some forms of monetary relief, it will not answer the question presented here. The Seventh Circuit concluded that Section 13(b) “does not authorize monetary relief” *at all*, regardless of whether it is considered “legal” or “equitable.” Pet. App. 40a & n.4. The court below thus had “no need to consider” whether the monetary award sought by the FTC was a form of legal or equitable relief. *Id.*; *see also id.* at 27a n.3 (describing that issue as a “wholly different,” “second-order question”). The Court’s disposition of *Liu* will not affect the Seventh Circuit’s ruling below; there is accordingly no need to hold the FTC’s petition for *Liu* or to remand this case to the Seventh Circuit following the Court’s decision in *Liu*.

If this Court concludes in *Liu* that the phrase “any equitable relief” does *not* include monetary relief, moreover, it would merely serve as an alternative basis for upholding the decision below. There would be no need to return this case to the Seventh Circuit; the Court should instead simply deny the petition, which reached the correct result under a different legal analysis.

The Solicitor General’s recommendation to hold two petitions out of the Ninth Circuit for *Liu* does not warrant a different approach. *See* U.S. Br., *AMG*

Capital Mgmt., LLC v. FTC, No. 19-508 (U.S. Dec. 13, 2019); U.S. Opp. Br., *Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (U.S. Dec. 13, 2019). In *AMG*, the petitioner argued that the FTC “improperly use[d] Section 13(b) to pursue penal monetary relief under the guise of equitable authority.” 910 F.3d at 426 (internal quotation marks omitted). The Ninth Circuit rejected that argument as “foreclosed” by circuit precedent, which holds that Section 13(b) empowers the district courts to grant any form of ancillary relief. *Id.* In *Publishers Business Services*, the Ninth Circuit similarly held that Section 13(b) “grants district courts the power to impose equitable remedies, including restitution and disgorgement of unjust gains.” *FTC v. Dantuma*, 748 F. App’x 735, 737 (9th Cir. 2018). This Court’s resolution of *Liu* could cast doubt on the Ninth Circuit’s position in *AMG* and *Publishers Business Services*. But it will not affect the Seventh Circuit’s decision here, which explicitly declined to address whether the monetary award at issue was equitable or legal (and whether the statutory scheme permits “disgorgement”).

Respondents agree with the FTC that this Court should not hold the petition for *Liu*, see FTC Pet. 22-23, and would further urge the Court to simply deny the petition rather than remanding for further consideration in light of *Liu*, which will not affect the outcome here.

III. IF THE COURT IS INTERESTED IN GRANTING THE QUESTION PRESENTED, THIS CASE PRESENTS A BETTER VEHICLE THAN *AMG*.

Further percolation is warranted on the question presented. See *supra* pp. 14-16. If the Court decides

to address that question now, however, it should grant certiorari in this case rather than *Publishers Business Services, Inc. v. FTC*, No. 19-507, or *AMG Capital Management, LLC v. FTC*, No. 19-508. Petitioners did not properly preserve the issue in *Publishers Business Services*, see U.S. Opp. Br. 7, No. 19-507, and this case presents a superior vehicle over *AMG*, for four reasons.

First, the Court has the benefit in this case of the Seventh Circuit's considered views on the issues at stake, in addition to a lengthy dissent from the denial of rehearing en banc. The unanimous panel opinion carefully explains why its reasoning accords with the statutory text and better adheres to this Court's precepts of statutory construction. See Pet. App. 1a-40a. Chief Judge Wood's opinion dissenting from the denial of rehearing en banc ventilates the opposing position. *Id.* at 41a-63a. All of this stands in contrast to *AMG*, where the panel viewed the question presented as controlled by circuit precedent, which two members of the panel questioned but faithfully applied. Pet. App. 16a-17a, *AMG*, No. 19-508.

Second, as discussed above, this Court's disposition of *Liu* could call into question the Ninth Circuit's decision in *AMG*. See *supra* pp. 17-18. There is no such vehicle problem here, where the Seventh Circuit held that Section 13(b) did not authorize the monetary judgment in this case—regardless of whether that judgment is considered “equitable” or “legal.” See Pet. App. 40a n.4.

Third, the facts in *AMG* are outside the mainstream of FTC cases, as the petitioners in *AMG* acknowledge. See Pet. 11, *AMG*, No. 19-508 (describ-

ing monetary award as “unprecedented”). The conduct at issue in *AMG* persisted with the FTC’s knowledge for nearly a decade, *see id.* at 7, and the FTC ultimately sought—and obtained—a monetary award of over a billion dollars, *id.* at 8. The facts of this case are more like the mine-run FTC case, making it a better vehicle for addressing the question presented.

Fourth, unlike in *AMG*, the FTC has chosen to exercise its independent litigating authority in this case and is a full party. *See* FTC Pet. 1 n.1. The Court would benefit from the agency’s familiarity with the statute it administers. The Solicitor General could, of course, participate as amicus, as it has in other cases where an agency files a separate brief. *See, e.g.*, U.S. Amicus Br., *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. June 16, 2017).

Respondents urge the Court to deny certiorari. Congress provided the FTC with express statutory procedures to obtain monetary judgments and equitable relief to protect consumers—procedures that remain fully open to the agency following the Seventh Circuit’s decision. But if the Court decides that now is the appropriate time to resolve the circuit split created by the decision below, Respondents submit that this case is a better vehicle than other pending petitions raising the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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