

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**

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 Disclosure Statement in the brief in opposition remains accurate.

RELATED PROCEEDINGS

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

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INTRODUCTION

This Court’s decision in *Liu v. SEC*, 591 U.S. ___ (2020), confirms that the Seventh Circuit correctly held Section 13(b) of the Federal Trade Commission Act does not authorize a monetary judgment awarding profits. *Liu* recognized that “equity practice” referred to such an order by “various labels,” slip op. at 6, but none of those labels was an “injunction”—the only relief authorized by Section 13(b).

Certiorari should be denied to allow other circuits an opportunity to correct their outdated contrary precedent in light of the Seventh Circuit’s persuasive

reasoning and this Court’s more recent guidance in *Liu* and other cases.

ARGUMENT

A. *Liu* Confirms That The Decision Below Was Correct.

This case concerns whether a monetary judgment of a wrongdoer’s profits is an “injunction” within the meaning of Section 13(b) of the FTC Act. *See* 15 U.S.C. § 53(b) (FTC authorized to “seek, and after proper proof, the court may issue, a permanent injunction”). The Seventh Circuit correctly recognized that the plain meaning of the term “injunction” does not extend to such an award. Pet. App. 12a (“[S]tatutory authorizations for injunctions don’t encompass other discrete forms of equitable relief like restitution.”).

Liu confirms that the Seventh Circuit was right. In *Liu*, the Court surveyed “works on equity jurisprudence” to determine how courts treated orders “to strip wrongdoers of their ill-gotten gains.” *Liu*, slip op. at 6. The Court found that such awards went “by different names.” *Id.* at 5-7. Critically, however, none of those names was “an injunction” or a “permanent injunction,” which is all that Section 13(b) allows. *Id.* (referencing “disgorgement,” “restitution,” and “an accounting”). Thus, the Court’s discussion of equitable practice in *Liu* corroborates the Seventh Circuit’s straightforward conclusion that “[r]estitution isn’t an injunction.” Pet. App. 12a.¹

¹ *Liu* also confirms that the District Court erred by imposing joint and several liability, by failing to ensure that any profits would be returned to consumers, and by using “revenue” as the

B. The Petition Should Be Denied.

Nothing in the balance of the *Liu* opinion counsels in favor of granting the FTC’s petition—either for plenary consideration or to vacate and remand.

1. The Court’s analysis in *Liu* addresses whether a monetary profits judgment is “equitable.” *See Liu*, slip op. at 6-9. That is an altogether different question from whether such a judgment is an “injunction.” And there is no need to wonder whether the Seventh Circuit agrees that the two issues are separate: It said so, twice, in the decision under review. *See* Pet. App. 27a n.3 (stating it is “a wholly different question * * * whether the implied restitution remedy is equitable or legal”); *id.* at 40a n.4 (“Because we hold that section 13(b) doesn’t authorize monetary relief, we have no need to consider Brown’s alternative arguments that the Commission can’t pursue penalties or legal—as distinct from equitable—restitution under section 13(b).”). Thus, there is nothing to be gained by granting the petition, vacating, and remanding to the Seventh Circuit in light of *Liu*.

In that respect, this case is differently situated from the two petitions raising similar questions out of the Ninth Circuit. *See AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (U.S. Oct. 18, 2019); *Publishers Bus. Servs., Inc. v. FTC*, No. 19-507 (U.S. Oct. 18, 2019). In those cases, the Ninth Circuit declined to

basis for the monetary judgment and refusing to deduct “business expenses.” *Compare* Pet. App. 90a-93a, *with Liu*, slip op. at 14-20. In light of the Seventh Circuit’s determination that the entire monetary award was unauthorized, however, the decision under review did not address these issues.

overturn its longstanding precedent allowing monetary judgments under Section 13(b). But two judges questioned the vitality of that rule, in part because they were unsure whether such an award qualified as “equitable.” See *AMG Capital Mgmt., LLC v. FTC*, 910 F.3d 417, 433 (9th Cir. 2018) (O’Scannlain, J., specially concurring). Regardless of whether *Liu* bears on *that* question, it does not undermine the Seventh Circuit’s separate conclusion that a profits judgment is not an “injunction.” Thus, even if the Court GVRs *AMG* and *Publishers Business Services*, it should deny this petition.

2. In reaching its conclusion, the Seventh Circuit rejected the FTC’s expansive reading of this Court’s decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). *Porter*, the Seventh Circuit explained, “cannot be used as * * * a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure.” Pet. App. 33a. That reading draws on this Court’s decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), which clarified that, in the presence of “elaborate enforcement provisions, * * * it cannot be assumed that Congress intended to authorize by implication additional judicial remedies.” Pet. App. 31 (quoting *Meghrig*, 516 U.S. at 487-488).

Liu’s discussion of *Porter* fully comports with the Seventh Circuit’s reading of the case. *Liu* recognized that the *Porter* Court was concerned with “a ‘comprehensiv[e]’ grant of ‘equitable jurisdiction,’” and thus authorized the full panoply of equitable remedies. *Liu*, slip op. at 7 (quoting *Porter*, 328 U.S. at 398). The provision of the FTC Act at issue here is not a similarly “comprehensive grant” of equitable

jurisdiction; it authorizes only a “permanent injunction.” 15 U.S.C. § 53(b). Thus, the Seventh Circuit correctly held that *Porter* does not salvage the FTC’s reading of the Act.

* * *

In short, nothing in *Liu* provides a reason to grant the FTC’s petition in this case. On the contrary, *Liu* confirms that the Seventh Circuit correctly held that a monetary profits judgment is not an “injunction.” Other courts, reading the Seventh Circuit’s persuasive opinion and *Liu* in tandem, are likely to agree, allowing any current split among the courts of appeals to work itself out. At a minimum, the Court should not take up this question until those courts have had an opportunity to revisit their precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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