

No. 19-914

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IN THE  
**Supreme Court of the United States**

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CREDIT BUREAU CENTER, LLC AND MICHAEL BROWN,  
PETITIONERS

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE FEDERAL TRADE COMMISSION  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), authorizes the Commission to file two different types of lawsuits. First, the Commission may seek a preliminary injunction to halt illegal conduct while the agency undertakes an administrative adjudication, so long as it issues an administrative complaint within 20 days of obtaining the preliminary injunction. Second, the Commission may seek a permanent injunction directly in federal court without initiating the administrative process. In such cases, the Commission sometimes secures a preliminary injunction to prevent harm to the public pending final judgment on the merits.

The question presented is:

Whether the Commission must issue an administrative complaint within 20 days of a district court's grant of a preliminary injunction when that relief is granted in a lawsuit seeking a permanent injunction.

II

**PARTIES TO THE PROCEEDING BELOW**

The caption contains the name of all the parties in the court of appeals.

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**OPINIONS BELOW**

The opinion of the court of appeals (19-825 Pet. App. 1a-63a) is reported at 937 F.3d 764.<sup>1</sup> The opinion of the district court (19-825 Pet. App. 65a-99a) is reported at 325 F. Supp. 3d 852.

**JURISDICTION**

The judgment of the court of appeals, accompanied by a denial of rehearing en banc, was entered on August 21, 2019. On November 18, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 18, 2020, and the petition was

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<sup>1</sup> Petitioners did not file an appendix; we refer to the appendix to the FTC's petition in No. 19-825.

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

Pertinent provisions of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, are reproduced in the appendix to the petition in No. 19-825 at pages 135a-143a.

### STATEMENT

The factual and statutory background of this case is set forth in full in the petition in No. 19-825. We provide additional detail here as necessary.

1. In Section 13(b) of the FTC Act, Congress authorized the Commission to file two distinct types of lawsuits in federal district court. First, the Commission may seek a “temporary restraining order or preliminary injunction” to enjoin conduct pending completion of an administrative proceeding at which the Commission will determine the legality of the conduct. If the district court grants the provisional relief, Section 13(b)’s “first proviso” requires the Commission to file an administrative complaint within 20 days of the court’s order; if no complaint issues, the order “shall be dissolved by the court, and be of no further force or effect.” 15 U.S.C. 53(b). At the conclusion of an administrative proceeding, the Commission may issue a “cease-and-desist” order prohibiting the conduct in question. 15 U.S.C. 45(b).

Second, Section 13(b) authorizes standalone lawsuits seeking a permanent injunction without going through the administrative process. The statute states: “*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. 53(b). A Senate Report explained that this “second proviso” allows the Commission to “seek

a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order.” S. Rep. No. 93-151, at 31 (1973).

When the Commission sues for a permanent injunction under the second proviso of Section 13(b), it sometimes also seeks a preliminary injunction or a temporary restraining order to stop ongoing conduct that is harming the public. In such cases, the preliminary relief is not sought to support an administrative proceeding under the first part of Section 13(b). Rather, it is sought to restrain ongoing conduct under Federal Rule of Civil Procedure 65. As the Ninth Circuit has explained, “because the district court has the power to issue a permanent injunction . . . it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards and are sought in accordance with Rule 65(a).” *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (1982). As the Eleventh Circuit put it, preliminary injunctions in such cases are “relief ancillary to the Commission’s complaint for permanent injunction.” *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434-1435 (1984).

2. The Commission sued petitioners directly in federal court under the second proviso of Section 13(b). Acting under Rule 65, the district court first entered a temporary restraining order and then a preliminary injunction halting petitioners’ unlawful conduct. After proceedings on summary judgment, the court then entered a permanent injunction enjoining their unlawful conduct and awarding monetary relief of \$5.2 million, to be used to compensate injured consumers as “restitution.” 19-825 Pet. App. 88a-89a.



3. The court of appeals reversed the monetary award, overruling its own precedent and creating a split with seven other circuits, thus prompting the Commission's petition in No. 19-825. In the same opinion, the court affirmed the permanent injunction entered by the district court. 19-825 Pet. App. 2a, 10a. It did not directly address petitioners' claim that the Commission was required to issue an administrative complaint within 20 days of the preliminary injunction, apparently lumping that issue together with a number of others the court described as "an assortment of drive-by arguments, all of which are too underdeveloped to establish an abuse of discretion." *Id.* at 10a. The court noted elsewhere in its opinion that "[u]nder section 13(b) of the [FTC Act], the Commission can forego any administrative adjudication" and "directly pursue" a preliminary or permanent injunction in federal court, *id.* at 11a-12a; and that the permanent injunction provision is not "tied to the subsequent initiation of an administrative proceeding," *id.* at 15a.

### ARGUMENT

The "conditional cross-petition" is an odd pleading. For one thing, it is not conditioned on anything at all, but is a timely petition on the narrow issue of whether the Commission was required to issue an administrative complaint in this case. See Sup. Ct. R. 12.5. For another, much of the pleading addresses not that issue, but the merits of the issue presented in No. 19-825, which petitioners agree "[t]his Court should resolve." Pet. 35.

Nevertheless, the new issue raised by petitioners does not merit this Court's review. The court of appeals' acknowledgement that the Commission may pursue a permanent injunction under Section 13(b) without invoking the administrative process is both correct and consistent

with the decisions of every other court of appeals that has considered that question.

#### **I. THE CROSS-PETITION SHOULD BE DENIED.**

Three courts of appeals have directly addressed whether the Commission is required to initiate administrative proceedings when seeking a permanent injunction under Section 13(b), and all three agreed that it is not.

In *FTC v. H.N. Singer, Inc.*, the Ninth Circuit observed that Section 13(b) “does not on its face condition the issuance of a permanent injunction upon the initiation of administrative proceedings.” 668 F.2d 1107, 1110 (1982). After reviewing the legislative history, the court held that Section 13(b) authorizes “permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings.” *Id.* at 1111.

Considering the same question, the Seventh Circuit noted that “Congress clearly intended that” preliminary relief under the first part of the statute and permanent injunctions under the second proviso “each be governed by a separate statutory provision.” *United States v. JS & A Group, Inc.*, 716 F.2d 451, 456 (1983). “Had Congress intended the initiation or not of an administrative cease and desist proceeding to affect the ability of the Commission to seek permanent injunctive relief, it undoubtedly would have included language similar to that found in the provision governing preliminary injunctive relief.” *Ibid.*

The Eleventh Circuit likewise held that “Congress did not limit the court’s powers under the final proviso of § 13(b) and as a result [a district court’s] inherent equitable powers may be employed to issue a preliminary injunction . . . during the pendency of an action for permanent injunctive relief.” *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431,

1434 (1984). It therefore did not matter that “no administrative complaint [had] been filed.” *Ibid.*

No court of appeals has disagreed. To the contrary, in addition to the courts that have directly addressed the issue, the courts of appeals collectively have affirmed permanent injunctions under Section 13(b)’s second proviso in scores of cases in which the Commission did not also bring an administrative complaint.

The courts’ uniform view of the question presented is not surprising given the language, structure, and logic of the statute. To begin with, the second proviso of Section 13(b), authorizing suits for permanent injunctions, is set off from the preceding part of the statute by a colon and the phrase “Provided further,” which suggests by itself that the proviso is intended to grant authority beyond that granted earlier in the statute. As this Court has recognized, a proviso may “state a general, independent rule.” *Alaska v. United States*, 545 U.S. 75, 106 (2005). Thus, the principal part of Section 13(b) grants the Commission and the court certain powers while the second proviso grants *additional* power. See *Republic of Iraq v. Beaty*, 556 U.S. 848, 858 (2009).

The operation of the statute makes that interpretation of its wording clear. Section 13(b) supports two pathways by which the Commission may pursue its charge to prevent unfair methods of competition and unfair or deceptive acts or practices. The end point of each path is an order permanently halting the illegal conduct: either a cease-and-desist order entered by the Commission following an administrative adjudication or a permanent injunction issued by the district court following a judicial proceeding. See 15 U.S.C. 45(b), 53(b).

By its plain text, the first part of Section 13(b), including the requirement to issue an administrative complaint, supports the administrative path. When the Commission chooses to pursue a cease-and-desist order through the administrative process, Section 13(b) supports that process by authorizing district courts to take action the Commission cannot take on its own: halting the illegal conduct (and protecting the public) right away. It expressly authorizes preliminary relief “pending the issuance of [an administrative] complaint,” and specifies how long such relief is to remain in effect. To ensure that the Commission starts its adjudication process within a reasonable time, the statute specifies that if an administrative complaint is not filed within 20 days of the order, the preliminary relief order “shall be dissolved by the court.” 15 U.S.C. 53(b). Otherwise, the order remains in effect until the administrative complaint “is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final.” *Ibid.* The first part of the statute thus tailors preliminary relief to the needs of the administrative process.

That kind of tailoring is not necessary for the permanent injunction path and it would make no sense to apply the administrative complaint provision to that path. Doing so would sap the permanent injunction proviso of its independent meaning. A permanent injunction serves the same function as a cease-and-desist order and would be redundant if a cease-and-desist order already had been entered.

When the Commission chooses to sue directly in district court for a permanent injunction, the court does not need a separate authorization for preliminary relief because it already possesses that power under Federal Rule of Civil Procedure 65. Nor did Congress need to specify how long

preliminary relief in such a case should remain in effect, because any preliminary relief that the court orders will merge into its final order. Nor is there any parallel need to ensure that the adjudication starts within a reasonable time: the Commission will have already started the adjudicative process by filing a complaint seeking a permanent injunction. That explains why Congress did not include in the second proviso, as it did in the first, any statutory consequence for a failure to issue an administrative complaint.

Petitioners' reading of Section 13(b) as allowing the Commission to seek a permanent injunction only "during the administrative process" (Pet. 23) or *after* it "has pursued an administrative complaint, [and] obtained a cease-and-desist order" (Pet. 28) cannot be squared with the operation of Section 5 of the FTC Act.<sup>2</sup> Section 5 specifies that the permanent relief at the end of the administrative path is a cease-and-desist order. 15 U.S.C. 45(b). The statute does not allow the Commission to abandon an administrative course partway through and seek a permanent judicial injunction instead. See *ibid*. It sets procedures for *Commission* adjudication, factfinding, and issuance of a cease-and-desist order. Section 13(b)'s second proviso, by contrast, provides for *judicial* adjudication and factfinding in support of a permanent injunction. They are separate tracks with no way contemplated under the statutes to switch between them. That is underscored by the functional similarity of the ultimate relief authorized. A permanent injunction serves the same function as a cease-and-desist order and would be redundant if a cease-and-desist order

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<sup>2</sup> See also Pet. 18-19 (arguing that a permanent injunction may only issue in the "same case" brought in support of an administrative adjudication).

already had been entered. Requiring the Commission to enter the administrative process when it wishes to seek a permanent injunction would foreclose the grant of a permanent injunction and nullify the statutory authority to seek and obtain one.

## **II. THE CROSS-PETITION PROVIDES NO REASON TO DENY THE PETITION IN NO. 19-825.**

The Commission's petition in No. 19-825 shows that the court of appeals erred and split the circuits when it held that Section 13(b) does not authorize an injunction that orders the return of unlawfully obtained funds. The petitioners did not file an opposition to that petition and now concede that "this case presents a circuit split on whether Section 13(b) provides implied authority to allow the FTC to seek restitution and disgorgement." Pet. 19; see also Pet. 34. Indeed, they effectively acquiesce to certiorari in No. 19-825, contending that "[t]his Court should resolve the circuit split on the FTC's power to seek consumer redress." Pet. 35.

Although the petitioners also address the merits of that question, nothing in the cross-petition undermines the circuit split or the need for this Court's review.

1. The Seventh Circuit's decision unsettled a longstanding, uniform judicial interpretation of Section 13(b). The statute now means one thing in that circuit and something else in seven others. The issue is recurring and critically important to the Commission's enforcement of laws that protect consumers and competition. Petitioners do not contest that compelling reason to grant the petition in No. 19-825.

2.a. Instead, petitioners devote much of their petition to arguments supporting the court of appeals' interpretation

of Section 13(b). Whether or not that decision was correct, however, this Court’s review is necessary to repair the uniformity of federal law. And petitioners’ arguments fail in any event.

They first contend that because Sections 19(b) and 5(m)(1)(B) of the FTC Act expressly allow monetary remedies for certain violations, while Section 13(b) authorizes only a “permanent injunction,” Section 13(b) cannot be read to provide for monetary relief. Pet. 5-9, 23-24, 30.

As the Commission explained, however, it has long been understood by this Court and the common law that the plain meaning of “injunction” includes monetary remedies meant to undo harm caused by a defendant’s conduct. See 19-825 Pet. 13-15. Thus, a statute that authorizes permanent injunctions does not need to authorize separately an order for the return of money. As this Court put it, “nothing 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.” *Porter v. Warner Holding Co.*, 326 U.S. 395, 399 (1946); accord *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960).<sup>3</sup> Congress would have understood as much when it enacted Section 13(b) in 1973, and it has ratified that understanding several times since then. See 19-825 Pet. 16-18.<sup>4</sup>

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<sup>3</sup> Petitioner tries to distinguish *Porter* on the ground that the statute at issue there allowed a “permanent or temporary injunction, restraining order, or *other order*.” 326 U.S. at 397 (emphasis added). But the Court rejected an identical claim in *Mitchell*, holding instead that *Porter* rested on longstanding equitable principles and not on the “other order” clause. *Mitchell*, 361 U.S. at 291.

<sup>4</sup> To the degree that the Court considers floor statements on the bill that became Section 19, they do not help petitioners. Pet. 26. The

Petitioners are wrong that the holding of *Porter* was “dramatically limited” by the Court’s decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). Pet. 13-14. *Meghrig* involved different statutory language and a non-government plaintiff, factors that greatly restrict its relevance here. See 19-825 Pet. 18-20. Indeed, the Court has continued to rely on *Porter*, including as recently at 2015, when, acting as a court of equity under its original jurisdiction, it awarded a monetary judgment in a dispute between two States. The Court noted that “[w]hen federal law is at issue and ‘the public interest is involved,’ a federal court’s ‘equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.’” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (quoting *Porter*, 328 U.S. at 398). Nor is Section 19 of the FTC Act remotely comparable to the remedial scheme at issue in *Meghrig*. In particular, Section 19 provides that its remedies “are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law” and that nothing in the provision “shall be construed to affect any authority of the Commission under any other provision of law.” 15 U.S.C. 57b(e).

Petitioners also claim incorrectly that allowing monetary recovery under Section 13(b) renders procedural protections in the administrative process and in Section 19 “largely pointless.” Pet. 30. In fact, as the Commission explained in its petition, Sections 13(b) and 19 create distinct enforcement mechanisms that allocate power between the Commission and the courts differently while maintaining procedural safeguards appropriate for each methodology. 19-825 Pet. 21-22. When the Commission sues under

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statements relied on describe the section as “important new authority,” but they shed no light on Section 13(b).



Section 13(b), it relinquishes its own enforcement authority and the deference due its factfinding. When it proceeds under Section 19, by contrast, the Commission applies its expertise, through adjudication or rule, to determine that particular conduct is illegal, but at the cost of satisfying procedural requirements. Congress gave the Commission a choice between enforcement mechanisms, and each provision remains independently meaningful.<sup>5</sup>

b. Although the court of appeals did not address the issue, petitioners claim that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), shows that Section 13(b) does not authorize monetary judgments. The argument is that money collected in Section 13(b) cases is “disgorged to the [T]reasury,” and thus under *Kokesh* must be considered a penalty that may not be ordered by a court sitting in equity. Pet. 32-33. In reality, as we have explained, nearly all funds collected from defendants in Section 13(b) cases are returned to injured consumers and are not sent to the Treasury. See 19-825 Pet. 5-6, 23-24 & nn. 3, 7, 8. And the judgment in this case in particular directs that the money be used to compensate injured consumers as “restitution.” 19-825 Pet. App. 88a-89a.

Petitioners nevertheless contend that Commission records show that it refunds to consumers only about half of the funds it collects. Pet. 32. That is incorrect. Petitioner relies on Commission reports that include not only funds collected in Section 13(b) cases (which are overwhelmingly returned to consumers) but also substantial filing fees paid by applicants for merger approvals and penalties collected by the Commission (which are paid to the Treasury). The

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<sup>5</sup> The same is true of Section 5(m)(1)(B), which allows penalties for violation of an administrative cease-and-desist order, but cedes that relief to a court after fulfilling certain procedural obligations.

Commission has recently published on its website data on its receipt and disposition of funds in Section 13(b) cases.<sup>6</sup> Those data show that over the past four calendar years, the Commission has distributed to consumers funds representing an average of over 95% of the amount it recovered in 13(b) cases during those years.

Finally, petitioners assert that regardless of how the Commission disposes of Section 13(b) judgments generally, the money in *this* case will be remitted to the Treasury because the per-victim redress would be less than \$5 and therefore below the \$10 threshold that the Commission typically applies for distributing refunds. Pet. 33. That too is incorrect. In fact, the Commission has preliminarily determined that the funds recovered from the petitioners would permit an average refund of about \$31 to 62,500 eligible consumer victims. That calculation is based on a pro-rata division of slightly more than \$2 million recovered from the petitioners, after deducting administrative costs and excluding refunds of less than \$10.

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<sup>6</sup><https://www.ftc.gov/enforcement/cases-proceedings/refunds/data-refunds-consumers>.

**CONCLUSION**

The petition should be denied.

Respectfully submitted.

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