

No. 19-914

IN THE
Supreme Court of the United States

CREDIT BUREAU CENTER, LLC AND
MICHAEL BROWN,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,
Cross-Respondent.

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

**REPLY BRIEF IN SUPPORT OF CONDITIONAL
CROSS-PETITION FOR A WRIT OF
CERTIORARI**

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition remains accurate.

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INTRODUCTION

The decision below correctly held that the monetary judgment sought by the Federal Trade Commission (FTC) in this case exceeded the agency's statutory authority. But it failed to recognize the true extent of the FTC's arrogation of power. Section 13(b) of the FTC Act conditions the agency's authority to seek an injunction on its initiation of an administrative enforcement action against a defendant. This straightforward limit on the FTC's authority was ignored by both the agency and the courts in this

case. If the Court grants certiorari to consider whether the term “permanent injunction” in Section 13(b) encompasses a monetary judgment, it should grant this conditional cross-petition to address the separate question whether the FTC must initiate administrative proceedings prior to obtaining a permanent injunction. The Court should consider both the petition and cross-petition without holding them for a decision in *Liu v. Securities & Exchange Commission*, No. 18-1501, which is unlikely to resolve either question.

ARGUMENT

1. This conditional cross-petition raises an important question, separate from the question presented in the FTC’s petition in No. 19-825, regarding the FTC’s enforcement authority. The agency has long interpreted Section 13(b) to empower it to file “standalone lawsuits seeking a permanent injunction without going through the administrative process.” FTC Opp. Br. 2.

That reading cannot be squared with the statutory text. Section 13(b) of the FTC Act states that the agency may seek “a temporary restraining order or a preliminary injunction” when it “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].” 15 U.S.C. § 53(b). It then lists two provisos. The first states: “*Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect.” *Id.* The second states:

“*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Id.*

The FTC interprets Section 13(b)’s second proviso as a standalone grant of authority to seek a permanent injunction *without* filing an administrative complaint. That interpretation is contrary to the plain text of the statute. The language “*Provided further*” refers back to the same proceeding where the agency sought a temporary restraining order or preliminary injunction—not a completely new proceeding—and thus requires the agency to file an administrative complaint *prior* to obtaining a permanent injunction.

The FTC’s primary counterargument is that the phrase “provided further” signals an independent cause of action. FTC Opp. Br. 6 (quoting *Alaska v. United States*, 545 U.S. 75, 106 (2005)). The very case the agency cites, however, states that it is “customary to use a proviso to refer *only to things* covered by a preceding clause.” *Alaska*, 545 U.S. at 106 (emphasis added). And there is good reason to think that is what Congress intended here: First, Congress specified in Section 13(b) that the FTC “may bring suit” to seek a temporary restraining order or preliminary injunction. 15 U.S.C. § 53(b). It did not repeat that language when authorizing the FTC to seek a permanent injunction, indicating that the agency may seek a permanent injunction only *after* seeking a temporary restraining order or preliminary injunction in the same proceeding. *See id.* Second, Section 13(b) contains two provisos. The first proviso is plainly linked to the agency’s authority to seek a temporary restraining order or prelimi-

nary injunction; the second proviso—which authorizes the agency to seek a permanent injunction—should be interpreted in a parallel manner.¹ The authority the FTC cites for its position consists of three 1980s circuit court opinions that give short shrift to the statutory text and structure. *See* FTC Opp. Br. 5-6.

The agency also protests (at 8) that Congress could not have intended to grant it authority to seek a permanent injunction while an administrative proceeding is ongoing, but that argument is a non-starter. There is nothing implausible about such a reading: There are many scenarios—such as a particularly lengthy administrative proceeding, or an injunction as to a limited matter—where the agency may seek a permanent injunction in parallel with the administrative process.

The agency’s interpretation of Section 13(b), moreover, eviscerates the regulatory scheme that Congress enacted. By requiring the FTC to file an administrative complaint, Congress ensured that the agency would proceed through rulemaking or admin-

¹ The FTC’s assertion (at 3) that its authority to seek a permanent injunction under Section 13(b) permits it to seek a *preliminary* injunction without initiating an administrative proceeding further demonstrates the FTC’s willingness to ignore clear statutory text. Section 13(b) plainly states that if an administrative complaint is not filed within 20 days, a preliminary injunction obtained by the FTC “shall be dissolved.” 15 U.S.C. § 53(b). In this case, however, the agency sought and obtained a preliminary injunction against Cross-Petitioners, despite never initiating administrative proceedings. *See* Cross-Pet. 17-18. The FTC then obtained a permanent injunction following the preliminary injunction—all without statutory authority.

istrative adjudication, obliging the agency to give content to the Act's broad statutory text over time. *See* 15 U.S.C. § 45(a)(1) (prohibiting, without defining, “[u]nfair methods of competition”). The agency's reading of the statute allows it to bypass those administrative procedures, effectively surrendering its authority for elaborating on the Act's prohibitions to the judiciary.

The FTC is correct that there is no split on this issue, and that it ordinarily might not attract the Court's attention for that reason. The FTC is also correct that this question is separate and distinct from the question presented in the FTC's petition in No. 19-825. To the extent the Court grants certiorari to interpret the meaning of the term “permanent injunction” in Section 13(b), however, it should also consider the extent to which the FTC has flouted another important textual limitation on its authority, which requires the FTC to initiate administrative proceedings prior to obtaining a final injunction. *Cf. FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 159 (3d Cir. 2019) (“The FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language.”). There is nothing “odd” about this cross-petition, contrary to the FTC's assertion (at 4): In the proceedings below, the FTC obtained a permanent injunction that places significant lifetime conditions on Cross-Petitioners' future business activities—without initiating an administrative proceeding, as required by statute. The injunction is improper and should not stand.

2. There is no reason to hold this cross-petition for *Liu*. The question presented seeks to overturn the

FTC's erroneous interpretation of specific language in the FTC Act, and will therefore be unaffected by *Liu*'s interpretation of a different provision governing a separate agency. See Pet'rs' Br. i, *Liu*, No. 18-1501 (U.S. Dec. 16, 2019).

Likewise, *Liu* is unlikely to answer the question presented in the FTC's petition. At issue in *Liu* is whether the particular type of "disgorgement" employed by the SEC is a form of "equitable relief." *Id.* At issue in the FTC's petition, in contrast, is whether the agency's authority to seek "a permanent injunction" under Section 13(b) includes the authority to obtain a monetary judgment, in light of the FTC Act's elaborate statutory scheme, which authorizes monetary judgments only in specific circumstances. See FTC Pet. I, *FTC v. Credit Bureau Ctr., LLC*, No. 19-825 (U.S. Dec. 19, 2019); see also Pet. App. 15a-17a, *FTC*, No. 19-825 (U.S. Dec. 19, 2019). In the decision below, the Seventh Circuit did not address the "second-order question" whether the monetary judgment in this case is "equitable or legal," describing it as a "wholly different" issue from the meaning of the term "permanent injunction" in Section 13(b). Pet. App. 27a n.3, *FTC*, No. 19-825. Sending this case back to the Seventh Circuit would thus serve no purpose. *Liu* offers no cause to postpone the resolution of either petition in this case.

The FTC claims (at 9) that Cross-Petitioners "effectively acquiesce" to certiorari in its petition. That is wrong. Cross-Petitioners agree that there is a split with respect to the question presented in the FTC's petition, but do not concede that the Court must resolve that split now. To the contrary, other circuits should be given an opportunity to respond to the

persuasive arguments adopted by the Seventh Circuit below. Indeed, two Ninth Circuit judges called for en banc review of this issue *before* the Seventh Circuit's decision here, indicating that other circuits may be willing to revisit their precedent in light of the new circuit split. *See FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., joined by Bea, J., specially concurring) (calling for en banc review). The Court should therefore deny certiorari in the FTC's petition in No. 19-825 and all others currently presenting a similar question.²

If the Court is interested in addressing the question presented in the FTC's petition, however, Cross-Petitioners urge the Court to grant certiorari in this case, rather than *AMG Capital Management v. FTC*, No. 19-508. Unlike the panel decision in *AMG*, the Seventh Circuit's decision below provides a thorough analysis of the question presented and states that its ruling would not be affected by the issue at stake in *Liu*. *See* Pet. App. 14a-20a, 27a n.3, *FTC*, No. 19-825. This case would thus serve as a better vehicle to resolve the question presented in the FTC's petition, to the extent the Court chooses to forgo further percolation on this issue.

² Cross-Petitioners reserve their responses to the FTC's arguments on the merits of No. 19-825 for a brief in opposition, if this Court requests one.

CONCLUSION

If the Court grants the FTC's petition (No. 19-825), this conditional cross-petition should also be granted.

Respectfully submitted,

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