

No. 23-853

In the Supreme Court of the United States

CREDIT BUREAU CENTER, LLC, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. 8401-8405, prohibits certain practices with respect to Internet sales. ROSCA states that violations of those prohibitions are to be treated as violations of a Federal Trade Commission (FTC or Commission) rule regarding unfair or deceptive acts or practices. Section 19 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 57b, authorizes the Commission to sue persons who violate FTC rules respecting unfair or deceptive acts or practices, and to obtain relief necessary to redress consumer injury, including the "refund of money." The question presented is as follows:

Whether Section 19 of the FTC Act authorizes an award of monetary relief in an amount equal to consumer loss, to be used for direct redress to consumers, for injuries caused by violations of ROSCA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 81 F.4th 710. A prior opinion of the court of appeals is reported at 937 F.3d 764. The opinion of the district court (Pet. App. 55a-84a) is not published in the Federal Supplement but is available at 2021 WL 4146884. A prior opinion and order of the district court is reported at 325 F. Supp. 3d 852.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2023. A petition for rehearing was denied on November 3, 2023 (Pet. App. 85a). The petition for a writ of certiorari was filed on February 1, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interplay between the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, which prohibits unfair or deceptive practices in or affecting commerce, see 15 U.S.C. 45(a)(1), and the Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. 8401-8405, which prohibits certain practices in the sale of goods and services via the Internet. As relevant here, ROSCA regulates the use of "negative option features." 15 U.S.C. 8403. Those features exist when a seller construes a customer's failure to affirmatively reject an offer of goods or services as an acceptance of the offer. See *ibid.*; 16 C.F.R. 310.2(w). ROSCA prohibits the use of such features absent clear disclosure of the material terms of the transaction, express informed consent before the consumer is charged, and the provision of a "simple mechanism for a consumer to stop recurring charges." 15 U.S.C. 8403. ROSCA expressly incorporates the FTC Act's enforcement provisions and states that ROSCA violations "shall be treated" as violations of Federal Trade Commission (FTC or Commission) rules regarding unfair or deceptive acts or practices. 15 U.S.C. 8404(a).

Two distinct FTC Act provisions authorize the Commission to sue in federal district court to enforce the FTC Act and ROSCA. First, Section 13(b) of the FTC Act authorizes the Commission to sue for a "permanent injunction" barring violations of any laws within the agency's purview. 15 U.S.C. 53(b). Second, Section 19 of the FTC Act authorizes the Commission to sue for "such relief as the court finds necessary to redress injury to consumers" resulting from a defendant's violation of an FTC rule respecting unfair or deceptive acts or practices. 15 U.S.C. 57b(b); see 15 U.S.C. 57b(a)(1).

Section 19 specifies that “[s]uch relief may include * * * the refund of money or return of property, the payment of damages, and public notification respecting the rule violation”; but it precludes the “imposition of any exemplary or punitive damages.” 15 U.S.C. 57b(b).

2. Petitioner Michael Brown is the owner of petitioner Credit Bureau Center, LLC, a credit-monitoring business. Pet. App. 1a-2a. Between 2014 and 2017, petitioners operated a scam that cheated some 150,000 consumers out of nearly \$7 million by using a negative option feature. *Id.* at 57a. Using several functionally identical websites, petitioners offered consumers a “free credit report and score,” but when customers applied for the ostensibly free report, they were automatically enrolled in a credit-monitoring service that cost \$29.94 per month. *Id.* at 4a (citation omitted). The only information provided on the websites about those charges was buried in fine-print disclaimers that referred to an unspecified “membership” subscription. *Ibid.* Petitioners lured consumers to their websites by posting on Craigslist fake ads for desirable rental apartments. When prospective tenants emailed to inquire about the properties, Brown’s subcontractor posed as the landlord and directed the prospective tenants to petitioners’ websites to obtain a credit report. *Ibid.*

3. In 2017, the FTC sued petitioners and their affiliated marketers under Section 13(b) and ROSCA, alleging that their practices violated the FTC Act’s ban on unfair or deceptive acts or practices and ROSCA’s restrictions on the use of negative option features in Internet marketing. Pet. App. 57a. The Commission sought both a permanent injunction barring further violations and equitable restitution to consumers. *Ibid.*

The district court granted summary judgment for the FTC on both the deception claim and the ROSCA claim. See 325 F. Supp. 3d 852, 858-866. Relying on binding circuit precedent that had approved such remedies under Section 13(b), the court entered a permanent injunction and a monetary judgment for \$5.2 million in equitable restitution, which the court found was the full amount of consumer losses. *Id.* at 867-869 (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.), cert. denied, 493 U.S. 954 (1989)). To calculate the monetary award, the court started with the total amount of revenue received from consumers who were directed to petitioners' websites through the false Craigslist ads (\$6.8 million), and it then deducted refunds, chargebacks, and amounts recovered from settling codefendants. *Id.* at 867-869.

4. The court of appeals affirmed the grant of summary judgment and the permanent injunction but vacated the monetary award. 937 F.3d 764. The court overruled *Amy Travel* and held that Section 13(b) does not authorize monetary relief. See *id.* at 782-786. In reaching that conclusion, the court distinguished Section 13(b) from Section 19, noting that Section 19 expressly authorizes monetary relief. See *id.* at 771, 773-774.

5. The FTC petitioned for a writ of certiorari to review the court of appeals' decision with respect to the availability of monetary relief under Section 13(b). See Pet. i, No. 19-825. This Court initially granted the petition and consolidated it with the petition in *AMG Capital Management, LLC v. FTC*, No. 19-508. See 141 S. Ct. 194. The Court later deconsolidated the petitions, however, and vacated the prior order granting the petition in this case. See 141 S. Ct. 810. The Court subse-

quently held in *AMG* that monetary relief is not available under Section 13(b). *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021). The Court then denied the pending petition in this case. 141 S. Ct. 2614.

6. After the court of appeals issued its mandate, the FTC moved in the district court to amend the judgment under Federal Rule of Civil Procedure 59(e) based on the intervening change in controlling law. Pet. App. 58a-59a. Because the district court had granted the Commission summary judgment as to petitioners' liability on the FTC's ROSCA claim, the Commission asked the court to reimpose the monetary judgment under Section 19 based on the established ROSCA violations. *Id.* at 59a-60a.

The district court granted the FTC's motion and denied petitioners' countermotion to deny modification. Pet. App. 55a-84a. The court "award[ed] the same consumer redress" that it had previously awarded, "this time under ROSCA and section 19" rather than under Section 13(b). *Id.* at 84a. The judgment requires petitioners to pay \$5,260,671.36 to the FTC, to be "deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund." *Id.* at 45a; see *id.* at 44a-45a. If direct redress proves impracticable or money is left over after redress is completed, the judgment states that, "with the Court's prior approval, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies)" that are "determine[d] to be reasonably related" to petitioners' unlawful practices. *Id.* at 45a. The district court's judgment also provided that "[a]ny

money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement.” *Ibid.*

7. The court of appeals modified the judgment in part and otherwise affirmed. Pet. App. 1a-15a. As relevant here, the court held that the FTC was entitled to seek reinstatement of the judgment based on Section 19, in light of the change in law announced in the court of appeals’ prior decision and confirmed in *AMG*. *Id.* at 10a-11a. The court explained that “permitting the Commission to enforce ROSCA through section 19—unlike section 13(b)—does not undermine the remedial structure that Congress created in the [FTC Act].” *Id.* at 11a. Rather, allowing such relief ensures “respect [for] Congress’s decision to use the Act’s enforcement mechanisms to implement ROSCA.” *Id.* at 11a-12a.

The court of appeals also rejected petitioners’ challenges to the amount of the judgment. Pet. App. 12a-13a. Citing *Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020), petitioners argued that the amount of the award could not exceed petitioners’ “net profits from wrongdoing.” Pet. App. 12a. The court rejected that argument, holding that such limits do not apply to relief awarded under Section 19. The court explained that the monetary remedies addressed in *Liu* reflected the “traditional scope of the remedies available in equity,” whereas “Section 19 is not so limited.” *Id.* at 13a. The court observed that, while the statute at issue in *Liu* referred only to “equitable relief” without further specificity, Section 19 “permits all forms of redress to make consumers whole, including ‘the refund of money.’” *Ibid.* The court therefore held that the monetary remedy the district court had ordered was “expressly permitted by the statute” and “need not be measured by net profits.” *Ibid.*

The court of appeals concluded, however, that the district court's "judgment contain[ed] one error that require[d] correction." Pet. App. 14a. As the FTC had acknowledged on appeal, Section 19 does not authorize disgorgement of funds to the Treasury, because that remedy does not redress injury to consumers. *Id.* at 14a-15a. Accordingly, the court struck from the judgment the sentence providing for disgorgement and affirmed the judgment as modified. *Id.* at 15a.

8. Petitioners sought rehearing en banc, which was denied without any active judge requesting a vote. Pet. App. 85a.

ARGUMENT

Petitioners contend (Pet. 9-17) that the court of appeals erred in affirming the monetary judgment against them under ROSCA and Section 19 of the FTC Act. That argument lacks merit, since ROSCA and Section 19 expressly authorize the type of monetary relief that the courts below ordered here. The decision below does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that Section 19 authorized the district court to award a full refund to consumers to redress injury resulting from petitioners' ROSCA violations. Section 19(a)(1) authorizes the Commission to sue any person who "violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices." 15 U.S.C. 57b(a)(1). And Congress directed that any violation of ROSCA "shall be treated as a violation of a rule under * * * the [FTC] Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." 15 U.S.C. 8404(a). Taken together, those two statutory provisions unambiguously authorize the FTC

to sue in district court to seek relief for ROSCA violations.

Section 19(b), in turn, specifies the relief that is available in such an action. The district court has “jurisdiction to grant such relief as the court finds necessary to redress injury to consumers * * * resulting from the rule violation.” 15 U.S.C. 57b(b). Section 19(b) authorizes relief including, but not limited to, “the refund of money,” “the payment of damages,” and “public notification respecting the rule violation,” with the caveat that damages may not be “exemplary or punitive.” *Ibid.* The judgment here falls comfortably within that provision. The amount of the monetary judgment was calculated to “appropriately refund[] to customers the amount that has not yet been returned by [petitioners].” Pet. App. 13a. That form of “direct consumer redress” is precisely the type of relief authorized by the statute. *Ibid.*

Petitioners attempt (Pet. 10-11) to avoid that straightforward conclusion by characterizing the monetary award as “punitive.” But the monetary award here is a form of “restitution,” which is compensatory in nature. Pet. App. 12a. It simply requires petitioners to refund the money they obtained from consumers through their illegal and deceptive practices. By contrast, exemplary or punitive damages are “damages on an increased scale, awarded to the plaintiff over and above” those that would “compensate” the plaintiff. *Black’s Law Dictionary* 467 (Rev. 4th ed. 1968); see *Black’s Law Dictionary* 491 (11th ed. 2019) (defining punitive or exemplary damages as “[d]amages awarded in addition to actual damages”).

A judgment requiring a wrongdoer to return money that it obtained through illegal conduct is not punitive.

See *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993) (holding that an award is punitive under Section 19 where it “exceed[s] redress to consumers,” and that wrongdoers may be required to “restore the victim to the status quo”) (citation omitted), cert. denied, 510 U.S. 1110 (1994). Indeed, a contrary understanding would render Section 19’s text self-defeating, as it would authorize the “refund of money” that the court here imposed while simultaneously precluding it as “punitive.” 15 U.S.C. 57b(b). See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (“[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.”). Rather than construing Section 19 in that incoherent manner, the court of appeals correctly read Section 19’s bar on “exemplary or punitive” damages to refer to damages that go beyond those necessary to make the victim whole.

2. The court of appeals’ decision does not conflict with any decision of this Court or another court of appeals.

a. Petitioners contend that the decision below is at odds with this Court’s decisions in *Liu v. SEC*, 140 S. Ct. 1936 (2020), and *Kokesh v. SEC*, 581 U.S. 455 (2017), and that it would allow circumvention of this Court’s decision in *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021). Contrary to that contention, the court of appeals’ decision is consistent with each of those precedents.

In *Liu*, this Court addressed a statute authorizing the Securities and Exchange Commission (SEC) to obtain “equitable relief” in actions to enforce the securities laws. 140 S. Ct. at 1940 (quoting 15 U.S.C. 78u(d)(5)). Because “Congress did not define what falls

under the umbrella of ‘equitable relief,’” the Court defined that term based on “whether a particular remedy falls into ‘those categories of relief that were *typically* available in equity.’” *Id.* at 1940, 1942 (citation omitted). In looking to “equity jurisprudence,” the Court determined that “courts restricted the remedy to an individual wrongdoer’s net profits to be awarded for victims.” *Id.* at 1942.¹

Petitioners argue (Pet. 10-14) that the monetary award here violates that principle because it is based on petitioners’ receipts—*i.e.*, the money they unlawfully took from consumers—rather than on their net profits. But as the court of appeals correctly recognized, the language of Section 19 differs significantly from the statutory text that the Court construed in *Liu*. Pet. App. 13a. Rather than simply incorporating traditional equitable principles, Section 19 lists particular types of available relief and “permits all forms of redress to make consumers whole, including ‘the refund of money.’” *Ibid.* (quoting 15 U.S.C. 57b(b)). The plain meaning of “refund” encompasses the full amount consumers paid—not the amounts they paid minus some deduction for the costs petitioners incurred in running their illegal scheme. See, *e.g.*, *Webster’s New Collegiate Dictionary* 972 (1975) (defining “refund” to mean “to return (money) in restitution, repayment, or balancing of accounts”) (emphasis omitted); *Webster’s New World Dictionary* 1194 (2d ed. 1974) (defining “refund” to mean “to give back or pay back (money, etc.); repay”) (emphasis omitted). The *Liu* Court’s construction of a

¹ The Court in *Liu* recognized that, under 15 U.S.C. 78u(d)(5), a wrongdoer may be denied deductions for expenses where the “‘entire profit of a business or undertaking’ results from the wrongdoing.” *Liu*, 140 S. Ct. at 1950 (citation omitted).

different statute therefore provides no basis for narrowing the relief that Congress authorized.

Petitioners also miss the mark in arguing (Pet. 10-11) that under *Liu*, a monetary award can never be deemed equitable if it exceeds net profits. In limiting its analysis to remedies “typically available in equity,” 140 S. Ct. at 1942 (citation omitted), the Court did not hold that a full “refund of money” is outside the scope of equity where Congress has specifically authorized that remedy, as it has done here. Indeed, *Liu*’s relevance is particularly limited in this case because Section 19 expressly permits both equitable remedies (*e.g.*, “rescission or reformation of contracts”) and “damages,” which are “the classic form of *legal* relief.” *Mertens v. Hewitt Ass’n*, 508 U.S. 248, 255 (1993). See Pet. App. 8a, 13a. The structure of Section 19 suggests that Congress viewed a “refund of money” as an equitable remedy distinct from “damages.” But the salient point is that the statute specifically authorizes a “refund of money”—with no deductions—however that remedy is characterized.

Petitioners’ reliance on *Kokesh* (Pet. 9-11, 13) is likewise misplaced. In that case, the Court held that SEC disgorgement claims are subject to the five-year statute of limitations in 28 U.S.C. 2462, which applies to certain claims for the enforcement of a civil “penalty.” *Kokesh*, 581 U.S. at 457.² Petitioners suggest (Pet. 13) that, because the Court classified disgorgement as a penalty for purposes of that statute of limitations, the refund that the district court awarded here must be impermissibly punitive under Section 19. But that reasoning ignores

² Section 19 includes its own statute of limitations that does not refer to claims for a penalty. See 15 U.S.C. 57b(d).

the text of Section 19 and its specific authorization of consumer refunds. See pp. 7-8, *supra*.

In any event, the judgment issued here differs from the disgorgement award that the Court considered in *Kokesh*. The Court there held that SEC disgorgement qualified as a penalty because “in many cases, SEC disgorgement is not compensatory,” with some funds “dispersed to the United States Treasury” rather than to victims. *Kokesh*, 581 U.S. at 464, 465. Here, by contrast, the court of appeals revised the district court’s judgment to ensure that the money is used only to “redress injury to consumers” and therefore remains compensatory. Pet. App. 14a (quoting 15 U.S.C. 57b(b)).

Petitioners fare no better in arguing (Pet. 17-21) that the FTC is seeking to “evade” *AMG* and that the court of appeals “acquiesce[d] in the attempt.” The sole issue in *AMG* was whether monetary relief was available under Section 13(b). In concluding that it was not, the Court relied in part on the fact that Section 19 specifically authorizes the Commission to seek monetary relief, including the “refund of money.” *AMG*, 593 U.S. at 77 (quoting 15 U.S.C. 57b(b)). And the Court emphasized that “[n]othing” in its opinion “prohibits the Commission from using its authority under * * * § 19 to obtain restitution on behalf of consumers.” *Id.* at 82. Here, Section 19 and ROSCA unambiguously authorize monetary consumer redress for petitioners’ unlawful conduct. Granting relief that Congress has specifically authorized effectuates rather than evades the law. Pet. App. 11a-12a.

b. Petitioners are likewise wrong in asserting (Pet. 14-17) a conflict among the circuits. Petitioners contend that the court of appeals’ decision is at odds with precedent in the Ninth and Eleventh Circuits. In fact, both

those courts have recently issued decisions construing Section 19 consistently with the decision below. See *FTC v. Simple Health Plans, LLC*, 58 F.4th 1322, 1328, 1329 (11th Cir. 2023) (recognizing that Section 19’s “potential remedies are broader, or at least different” from those in Section 13(b), and that Section 19 provides for “the refund of money”); *FTC v. Elegant Sols., Inc.*, No. 20-55766, 2022 WL 2072735, at *3 (9th Cir. June 9, 2022) (holding that “the district court properly awarded monetary relief” under Section 19 “based on a calculation of consumer loss, as opposed to a calculation of net unlawful profits”).

The particular decisions on which petitioners rely are not to the contrary. In *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993), for example, the defendants sold home heat detectors, misrepresenting to consumers that the devices provided effective warnings in case of fire. *Id.* at 599-601. The Ninth Circuit held that Section 19 entitled purchasers to “receive full refunds” of the amounts they had paid for the products, explaining that “Section 19(b) does not limit its remedies to the amount of the unjust enrichment” the seller had obtained. *Id.* at 606; see *id.* at 607. That is the same approach that the district court and the court of appeals took here.

Petitioners focus (Pet. 15-17) on the Ninth Circuit’s disallowance of one aspect of the remedy that the district court had described as “indirect redress”: a provision stating that any funds not claimed by consumers could be distributed to nonprofit fire-safety organizations. *Figgie*, 994 F.2d at 607. The Ninth Circuit held that such a provision could not accurately be “characterized as ‘redress,’” and therefore “exceed[ed] the statutory limitation on the remedy.” *Ibid.* Petitioners

contend that the monetary judgment here is similarly flawed because it provides that, if there are funds that cannot be distributed to consumers, “with the Court’s prior approval, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to” petitioners’ unlawful practices. Pet. App. 45a. Petitioners’ attempt to equate those two remedial orders fails.

As an initial matter, petitioners forfeited that argument by failing to raise it in the district court. See Gov’t C.A. Br. 36-38. In any event, the argument is meritless. In contrast to *Figgie*, the monetary judgment here does not provide for payments to nonprofits or other non-consumers. Rather, it specifically refers to “consumer information remedies,” Pet. App. 45a, which Section 19 plainly allows, see 15 U.S.C. 57b(b) (authorizing “public notification” of the rule violation); *Figgie*, 994 F.2d at 607 (“Section 19(b) expressly contemplates corrective advertising in its ‘public notification’ clause.”). As for the “other equitable relief” that the judgment in this case contemplates, such relief is permitted only with the prior approval of the district court. Pet. App. 45a. Petitioners offer no reason to think that the district court would approve any remedy not authorized by Section 19, and if it did, petitioners could appeal to challenge that remedy. Petitioners’ speculation that the lower courts in this case might someday permit redress funds to be used for improper purposes cannot create a conflict with the Ninth Circuit.

There is likewise no merit to petitioners’ argument (Pet. 14, 17) that the court of appeals’ decision conflicts with *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996). *Gem Merchandising* was not a Section

19 case, but instead involved a pre-*AMG* award of monetary relief under Section 13(b). The Eleventh Circuit held that under Section 13(b), a court could order disgorgement of a defendant's ill-gotten gains to the Treasury. *Id.* at 470. In doing so it distinguished *Figgie* on the grounds that Section 13(b) does not prohibit exemplary or punitive damages, as Section 19 does. *Id.* at 469-470. The *Gem Merchandising* court's holding that Section 13(b) authorizes monetary awards is no longer good law in light of *AMG*. And its discussion of Section 19 does not conflict with the decision below because the court of appeals here excised the part of the district court's judgment that would have remitted excess funds to the Treasury, thereby removing the only portion of the judgment that could be deemed punitive. See Pet. App. 14a-15a.

3. Petitioners additionally assert (Pet. 17-21) that some current or former members of the Commission have made statements that petitioners view as reflecting an intent to use Section 19 to evade the limits the *AMG* Court placed on Section 13(b). But those statements simply indicate that, because *AMG* disapproved an enforcement approach on which the FTC had long relied, the Commission must identify and invoke other authorities (such as Section 19) in order to obtain monetary relief going forward. See Pet. 18-19. Those statements do not reflect any intent to evade *AMG*, particularly given this Court's own emphasis on the textual differences between Sections 13(b) and 19. See *AMG*, 593 U.S. at 77; p. 12, *supra*.

Petitioners also cite (Pet. 20-21) the dissenting statement of two Commissioners who viewed a particular consent order as "exceed[ing] any reasonable estimate of injury" to consumers. 86 Fed. Reg. 58,279, 58,283

(Oct. 21, 2021). But that statement does not suggest that the monetary judgment here is unlawful. On the contrary, the judgment in this case was calculated to precisely reflect the amount of consumer loss and is unambiguously authorized by Section 19 and ROSCA. See 325 F. Supp. 3d at 867-869; Pet. App. 84a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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