

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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AMG CAPITAL MANAGEMENT, LLC,)
ET AL.,)
 Petitioners,)
 v.) No. 19-508
FEDERAL TRADE COMMISSION,)
 Respondent.)
- - - - -

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FEDERAL TRADE COMMISSION,)

Respondent.)

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Washington, D.C.

Wednesday, January 13, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

MICHAEL PATTILLO, ESQUIRE, Fernandina Beach, Florida;
on behalf of the Petitioners.

JOEL R. MARCUS, ESQUIRE, Washington, D.C. ;
on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-508, AMG
5 Capital Management versus the Federal Trade
6 Commission.

7 Mr. Pattillo.

8 ORAL ARGUMENT OF MICHAEL PATTILLO

9 ON BEHALF OF THE PETITIONERS

10 MR. PATTILLO: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The FTC Act's test, structure, and
13 purpose make clear that when Section 13(b)
14 authorizes the Commission to seek a permanent
15 injunction, it means just that, a permanent
16 injunction as traditionally understood. It does
17 not mean injunctions and all equitable relief or
18 injunctions and monetary relief for past harms.

19 Three features of the Act make that
20 especially clear. First, 13(b) is limited to
21 cases where someone is violating or is about to
22 violate the Act. That limit to ongoing or
23 imminent violations would make no sense if 13(b)
24 authorized retrospective monetary relief for
25 past harms.

1 Second, where the Act allows relief
2 beyond injunctions, it says so. Section 5(1)
3 authorizes an injunction and further equitable
4 relief as appropriate. That language would have
5 been pointless if the word "injunction" itself
6 implied all equitable relief.

7 Third, another provision, Section 19,
8 authorizes monetary relief for past consumer
9 injury. But it provides safeguards, including a
10 statute of limitations, a heightened proof
11 requirement, and notice to victims. Those
12 limits would be meaningless if they could be
13 evaded under 13(b).

14 Even if there were a presumption that
15 mentioning a specific type of equitable relief
16 meant all equitable relief, and there should not
17 be, those three features overcome it.

18 To be clear, the Commission can get
19 retrospective relief for consumer harm, but it
20 must invoke Section 19, the mechanism Congress
21 provided for that purpose. That makes sense.
22 Because the Act's prohibitions are broad and
23 general, Congress, since 1914, made agency
24 processes the primary enforcement mechanism so
25 the agency can apply its expertise and give

1 businesses notice on what is prohibited.

2 Section 13(b), by contrast, is a
3 narrow supplement for threatened harm where the
4 Commission must come to court to stop the
5 conduct quickly. Where there is more time, like
6 for backward-looking remedies, there was no
7 reason for Congress to bypass agency
8 responsibilities to provide guidance.

9 CHIEF JUSTICE ROBERTS: Mr. Pattillo,
10 one of the issues with your reading of the
11 statute is that it was passed roughly 50 years
12 ago, and in the intervening years, there's been
13 a significant change in how this Court
14 interprets statute -- statutes.

15 Back when this one was passed, we had
16 a pretty free-wheeling approach. You know, we
17 weren't as confined to the specific language.
18 You sort of look at what Congress had in mind
19 and -- and figured out the meaning in light of
20 that.

21 And, of course, today, we have a more
22 disciplined approach, you know, I think more
23 suited to our role under the Constitution. But
24 shouldn't we construe this statute in the
25 environment in which Congress passed it in light

1 of the, as I said, more free-wheeling approach?

2 And I think there'd be a lot more
3 leeway to your friend on the other side argument
4 about an expansive reading of some of the
5 language.

6 So why -- why do we sort of adopt a --
7 I don't know what it is -- a view that -- that
8 is current today but wasn't current back then?

9 MR. PATTILLO: Your Honor, I have two
10 responses to that question. The first is that
11 this Court rejected a very similar argument in
12 Alexander v. Sandoval. The argument was made
13 that, listen, at the time that Title VI of the
14 Civil Rights Act was enacted, the Court at that
15 time followed what you referred to as the more
16 free-wheeling approach to implying causes of
17 action and implied remedies.

18 And the Court said, be that as it may,
19 you know, we have since sworn off that method of
20 statutory interpretation and we decline, you
21 know, one -- one last drink. And I think that
22 that applies equally here. Whether or not that
23 was the motive at the time 13(b) was enacted,
24 the reasoning of Alexander versus Sandoval --

25 CHIEF JUSTICE ROBERTS: Yeah, no, I --

1 MR. PATTILLO: -- holds --

2 CHIEF JUSTICE ROBERTS: -- I know
3 that's -- I know that's what we said. Maybe I
4 just don't find that so -- so compelling.
5 It's -- it's -- it's -- you know, we try to look
6 at language as it was understood in other
7 contexts when we're interpreting provisions.
8 You know, we go back to the, you know, 1860
9 treatise and say what did that mean back then,
10 and we don't look at a contemporary dictionary.

11 Do you have any argument besides what
12 we said in Sandoval?

13 MR. PATTILLO: Yes, I do. The theory
14 that Congress somehow thought permanent
15 injunction carried with it all equitable relief
16 when it enacted 13(b) itself defies the three
17 features I mentioned in my opening.

18 In the very same legislation that it
19 enacted 13(b), Congress expressly authorized an
20 injunction and other further equitable relief in
21 Section 5(1). So that cannot be reconciled with
22 the notion that Congress somehow thought the
23 word "injunction" itself automatically included
24 all equitable relief a la Porter's method of
25 interpretation, much like the --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

6 Counsel, let's -- continuing along the
7 lines of the Chief Justice, let's assume that we
8 did note have Sections 5 and 19 and -- but you
9 still have the same language that we have in 13.

10 Would -- would it be reasonable to say
11 that Congress legislated against -- in that
12 case, in that instance, against the backdrop of
13 cases like Porter and Mitchell, and, if so, then
14 how would that change your argument?

15 MR. PATTILLO: This Court looks to how
16 equitable terms are traditionally understood,
17 and permanent injunctions traditionally exclude
18 monetary relief as compensation for past harm,
19 as Great-West noted. And, here, the -- the
20 phrase 13(b) itself refers to a permanent
21 injunction.

22 And you wouldn't ordinarily think of a
23 one-time order to turn over property as a
24 permanent -- as a permanent injunction, and so
25 the -- the specific language used in 13(b)

1 itself, even without reference, but also 13(b)
2 is limited to cases of imminent or ongoing harm.

3 And it wouldn't have made any sense to
4 authorize retrospective -- to -- to -- to link
5 the authority for retrospective monetary relief
6 to the availability of imminent or ongoing harm.
7 Consumers don't become more or less worthy of
8 redress for their injuries depending on whether
9 or not the conduct is ongoing.

10 JUSTICE THOMAS: So, with that
11 argument, how would you address or deal with the
12 19th Century intellectual property cases that
13 allowed monetary relief incident to the
14 injunction?

15 MR. PATTILLO: All of those cases
16 involve a situation where there was -- the
17 parties had a general right to seek all
18 equitable relief, and that is simply not the
19 case here. This case, 13(b) is just limited to
20 injunctions, so whether or not the other relief
21 of an accounting might be available where all
22 equitable relief is available to the plaintiff,
23 that's not the case here.

24 Injunction means injunction in 13(b),
25 and we know that and it's limited by the three

1 features of the Act that I've mentioned.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: Good morning. Here,
6 I thought the briefs were very good in this
7 case. Blue brief, I think you're right. Red
8 brief, I think you are right. They can't both
9 be right, that's right. All right. You see
10 that's the old joke, but that's where I am.

11 So I'm pretty familiar with the
12 arguments and I see which way do we go, and the
13 argument, it seems to me, that's against you --
14 and I'll put the other half to the other side.

15 The argument that's against you is
16 simply this to me: Law isn't perfect. Courts
17 make mistakes. We make mistakes too. And this,
18 if it is a mistake, has been around for 50 years
19 and there's a pretty uniform interpretation
20 before the Seventh Circuit.

21 And if we never say let bygones be
22 bygones, I mean, we're going to be here to
23 Marbury v. Madison and beyond. So too much time
24 has passed, water under the bridge, good-bye.
25 Why doesn't that apply?

1 MR. PATTILLO: Well, Your Honor, this
2 is the first time that the Court was called
3 to -- to step in to -- to resolve this conflict,
4 and the mode of interpretation has -- has
5 changed over -- over time, and when the courts
6 of appeals took this approach during --

7 JUSTICE BREYER: Oh, just wait. For
8 my question, I'm assuming you're right on all
9 that, okay? My question is still -- it's close,
10 and still the lower courts at least have been
11 uniform for 50 years. We cannot undo everything
12 that was in your opinion or mine or somebody
13 else's decided not perfectly and may be wrong.
14 That's what I just asked.

15 MR. PATTILLO: Well --

16 JUSTICE BREYER: So why wouldn't I
17 follow that very basic principle about courts
18 and how the judiciary has to function in a
19 society that's continuously changing?

20 MR. PATTILLO: There are now two
21 courts of appeals, one on either side -- or,
22 excuse me, on -- there are courts of appeals on
23 either side. There are now two courts of
24 appeals that have rejected the notion that 13(b)
25 carries with it all monetary relief, and there's

1 simply no rule that the first court of appeals
2 to issue its ruling on a particular version of
3 the law wins. And so there's no reason to give
4 a -- a presumption to the -- the courts of
5 appeals that decided it first.

6 JUSTICE BREYER: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: Mr. Pattillo, could I
9 ask you about the practicalities of -- of this
10 case. Have some of the money in question here
11 already been distributed to the victims of this
12 scheme?

13 MR. PATTILLO: Yes. My understanding
14 is that around 500 million dollars has been
15 distributed.

16 JUSTICE ALITO: If we rule in your
17 favor, what will happen with respect to those
18 individuals? Will they be required to return
19 that money?

20 MR. PATTILLO: I honestly don't know.
21 I would be surprised if -- if that is the
22 result. One option would perhaps be for -- the
23 Commission would have to repay us out of -- out
24 of the federal Judgment Fund, which, you know,
25 is a reservoir that exists for paying

1 liabilities of the United States. I suppose it
2 would be up to the Commission to decide whether
3 the United States bears the burden of its error.

4 JUSTICE ALITO: What is the
5 relationship between the -- the order in
6 question here and the forfeiture order that was
7 issued in the Southern District of New York in
8 Tucker's criminal case? There, he was, as I
9 understand it, required to return 3 billion
10 dollars. Is that -- does that encompass the
11 amount of money that's involved here?

12 MR. PATTILLO: There is -- my
13 understanding is that there is some overlap
14 between the assets that were at issue. I mean,
15 it -- Mr. Tucker just had -- had one pool of --
16 of resources, and to date, my understanding is
17 that the Commission and the Southern District
18 have been divvying up the different
19 responsibilities.

20 But it's also worth noting here that
21 the order in this case encompasses --
22 encompasses money paid by innocent parties, such
23 as Mrs. Tucker and Park 269, which were never
24 alleged to have been -- and that amount is over
25 27 million dollars. They were never alleged to

1 have participated in any wrongdoing. And so
2 those assets certainly couldn't be subject to
3 the criminal forfeiture as well.

4 JUSTICE ALITO: Let me turn back
5 briefly to basically the same question that the
6 Chief Justice asked. If -- I mean, most of the
7 members of Congress are not lawyers. That was
8 true when this provision was enacted. And even
9 those who were lawyers, perhaps like me, never
10 heard the word "equity" when they were in law
11 school.

12 So suppose one of those members said,
13 well, here, we're going to authorize the
14 Commission to seek an injunction, so I'm going
15 to look at the most recent edition of Black's
16 Law Dictionary, which defines an injunction in
17 part as a judicial process operating in personam
18 and requiring a person to whom it is directed to
19 do or refrain from doing a particular thing.

20 If the member read that definition,
21 wouldn't they think that it would authorize
22 exactly what was done here?

23 MR. PATTILLO: Perhaps there --
24 injunctions are broad and flexible, and,
25 certainly, as -- as the Court explained in

1 Great-West, with lawyerly inventiveness, just
2 about any order could be framed in terms of
3 injunction -- of an injunction.

4 But this Court has held that it --
5 it's not just what Black's Law Dictionary says.
6 It's how the terms are traditionally understood
7 in equity. And permanent injunctions
8 traditionally exclude monetary relief as
9 compensation for past harm.

10 JUSTICE ALITO: All right.

11 MR. PATTILLO: The fact that the
12 Commission --

13 JUSTICE ALITO: Thank -- thank you. I
14 -- I think --

15 CHIEF JUSTICE ROBERTS: Justice --

16 JUSTICE ALITO: -- my time has
17 expired.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, you argue
21 that there would be no reason for Congress to
22 provide for monetary remedies under Section 19
23 if the FTC could obtain disgorgement under
24 13(b). But it makes sense to me that the FTC
25 might sometimes want to establish new rules

1 through agency adjudications that are binding on
2 absent parties and to which courts will defer.

3 So the more important question for me
4 is -- and I hope you can answer it -- is, why
5 would Congress authorize the FTC to seek a
6 permanent injunction if no other equitable
7 remedies were available? It seems that under
8 your understanding of the statute, why would the
9 FTC ever pursue a permanent injunction under
10 13(b) rather than a cease-and-desist order that
11 could lead to monetary relief? It could --

12 MR. PATTILLO: The answer is that --

13 JUSTICE SOTOMAYOR: Go ahead.

14 MR. PATTILLO: -- sometimes -- I'm
15 sorry. The answer is that 13(b) is a -- it's a
16 narrow supplement to the overall FTC Act, which
17 is -- which almost every other single provision
18 is about or in service of administrative
19 processes. 13(b) exists for situations where
20 there is threatened or ongoing harm, and it
21 allows the Commission to come to court to stop
22 the conduct quickly --

23 JUSTICE SOTOMAYOR: But it could do
24 that --

25 MR. PATTILLO: -- in order to get --

1 JUSTICE SOTOMAYOR: -- it could do
2 that with a temporary injunction, and so it
3 doesn't need to do it with a permanent
4 injunction. And if it's barred from getting
5 permanent relief and remedies, why would it ever
6 seek a permanent injunction?

7 MR. PATTILLO: It would -- it just --
8 if it -- if -- there's no need if it's a routine
9 case where the agency doesn't need to
10 pronounce -- as is its statutory obligation, to
11 define whether or not -- apply its expertise and
12 define whether particular conduct is prohibited.
13 The -- the permanent injunction path through
14 district court might be a -- a quicker and more
15 expedient remedy.

16 But the fact is that the -- the Act's
17 prohibitions are broad in general. And Congress
18 made agency processes the primary enforcement
19 mechanism. And its job is to apply its
20 expertise --

21 JUSTICE SOTOMAYOR: So why -- why even
22 give it a permanent injunction when it wasn't,
23 according to your reading, able to recover
24 anything else under that process?

25 It could always do a temporary

1 injunction and stop impend -- and stop impending
2 harm that way and then always have to pursue
3 administrative process to get monetary relief.
4 It makes no sense to me.

5 MR. PATTILLO: Because sometimes that
6 would be -- that would be good enough.
7 Sometimes just stopping the conduct is a
8 sufficient remedy in and of itself. There won't
9 always need to be consumer redress in every
10 case. And, in fact, you know, for most of
11 the -- most of the FTC's early history, it had
12 no authority to seek consumer redress whatsoever
13 until it was enacted in -- in Section 19.
14 Stopping the conduct was its primary
15 responsibility.

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

17 JUSTICE KAGAN: Mr. Pattillo, I'd like
18 to go back to the Chief Justice's first
19 questions about which approach we're supposed to
20 use, our old approach, which was very liberal in
21 finding rights and remedies, or our new
22 approach, which is decidedly not.

23 And you said, well, Alexander v.
24 Sandoval, and the Chief asked you to put that --
25 the Chief Justice asked you to put that aside.

1 And I'd like you to put that aside as well. I
2 think it's at least arguably very different.

3 Do you have a -- a theoretical
4 argument for why it is that we should be using
5 the new approach? Because I would have thought
6 that the whole idea behind the new approach is
7 that what matters most is what Congress thinks
8 about a question, not what the Court thinks
9 about it, and that that would suggest, well,
10 we're supposed to be looking at what Congress
11 thought in 1973 given the backdrop of all of our
12 precedents.

13 MR. PATTILLO: Well, as I mentioned,
14 the -- the words of the statute are the law.
15 The words of the statute tell you what Congress
16 intended. And even under the old approach, what
17 -- if we're trying to discern whether Congress
18 thought that -- you know, that injunction
19 actually meant all relief, all we need to know
20 is that at the same time that Congress enacted
21 13(b), it also enacted Section 5(1). And at
22 that time --

23 JUSTICE KAGAN: So that --

24 MR. PATTILLO: -- it expressed the --

25 JUSTICE KAGAN: -- that's an argument

1 -- I mean, that's an argument on a different
2 point, the point about what Congress would have
3 understood back then, but -- but I take that to
4 be assuming my premise, which is that the very
5 issue is -- I mean, the thing we're supposed to
6 be figuring out is what Congress would have
7 assumed back then, isn't it?

8 MR. PATTILLO: Yes, but I think we --
9 in -- in under -- in trying to think what
10 Congress understood about Porter and Mitchell,
11 we have to look at what else Porter and Mitchell
12 said, and notwithstanding Porter and Mitchell's
13 broad language, Congress also would have known
14 that Porter and Mitchell said you have to look
15 at the entire statute --

16 JUSTICE KAGAN: Well, in -- in just --

17 MR. PATTILLO: -- and you have to see
18 the --

19 JUSTICE KAGAN: Sorry, Mr. Pattillo.
20 In -- in -- in -- in just two years before
21 Congress enacted this legislation, the Second
22 Circuit, you know, obviously, an important
23 circuit when it comes to these matters, held
24 that the FTC had power to seek restitution
25 because its statute said that the agency could

1 seek an injunction, the exact same question as
2 is -- as -- as we're confronting.

3 And the Second Circuit relies on
4 Porter, relies on Mitchell, relies on all the
5 old cases that you say are distinguishable, and
6 -- and said yes, an injunction includes
7 restitution according to Supreme Court law on
8 the subject.

9 So doesn't that suggest that the FTC
10 has a pretty good point about what Congress
11 understood in 1973?

12 MR. PATTILLO: No, I don't think so.
13 If -- if the -- if Congress were looking to what
14 Porter held, Porter acknowledged that it was
15 looking to see whether an implied remedy was --
16 it had to look and see if the implied remedy was
17 consistent with the statutory scheme. And
18 Porter found that even though there was nothing
19 that precluded an implied restitution remedy, it
20 said, look, there is another section of the
21 Emergency Price Control Act and that provision
22 addresses damages. So the fact that the -- that
23 the statute elsewhere mentions damages
24 supersedes the possibility that there could be
25 an implied damages remedy.

1 JUSTICE KAGAN: Thank you, Mr.
2 Pattillo.

3 MR. PATTILLO: So, if Congress wanted
4 --

5 JUSTICE KAGAN: Thank you very much.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch.

8 JUSTICE GORSUCH: Good morning,
9 counsel. I'd like your help with a -- a
10 line-drawing problem. I -- I -- I think you
11 agree that an injunction can be used to provide
12 certain forms of equitable relief, including
13 restitution perhaps, an accounting, requiring a
14 freezing of assets or handing over a thing of
15 value, but -- but it's -- it -- it can't go this
16 far.

17 How would you have us draw that line
18 and describe it?

19 MR. PATTILLO: I think it's a -- I
20 think it's a fairly simple line, and we can look
21 to how Justice Story described it. There's a
22 difference between -- there's a difference
23 between the initial determination as to who owns
24 the property, whether property should be
25 returned, and that principle is articulated in

1 terms of other equitable doctrines, such as
2 restitution.

3 Now there were instances in the past,
4 and these were, you know, more the -- certainly,
5 more the exception than the rule, where an
6 injunction might use -- be used to enforce that
7 prior decree, where -- where someone had already
8 been given the award of restitution that
9 determines the property right.

10 And then, if there was some other
11 reason why an additional coercive remedy was
12 needed, the injunction might issue to force
13 that. As Justice Story explained in his
14 treatise, that type of injunction was issued
15 "after a decree in the nature of an execution to
16 enforce the underlying decree." And that's
17 completely different from what the Commission
18 seeks here.

19 The Commission doesn't seek to use an
20 injunction to enforce a right to restitution.
21 It doesn't have a right to restitution under
22 13(b). It -- it's trying to -- to bootstrap
23 that. And so I -- I think that the distinction
24 at equity was actually pretty clear.

25 JUSTICE GORSUCH: Thank you, counsel.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Chief
4 Justice.

5 And good morning, counsel. Your
6 argument here is strikingly similar to the
7 argument advanced in the dissent in Porter by
8 Justice Rutledge, joined by Justices Reed and
9 Frankfurter, and the dissent in Mitchell written
10 by Justice Whittaker, joined by Justices Black
11 and Clark.

12 The Rutledge dissent, Justice Rutledge
13 dissent in Porter, for example, said Congress
14 could not have been ignorant of the remedy of
15 restitution. It knew how to give remedies it
16 wished to confer. There was no need to add this
17 one, nor do I think it did so. It did not give
18 it expressly. That kind of argument.

19 What do we do with Porter and Mitchell
20 if we decide this case in your favor? In other
21 words, how should we write the opinion with
22 respect to those cases?

23 MR. PATTILLO: This Court doesn't need
24 to overrule Porter and Mitchell any more than it
25 needed to do so in Meghrig, which held that in

1 the context of RCRA, "injunction" did not mean
2 all equitable relief.

3 Neither Porter nor Mitchell involved a
4 statute with the three features that I mentioned
5 at the outset. In neither case did Congress
6 elsewhere authorize an injunction and other and
7 further equitable relief, making it clear that
8 Congress didn't presume that an injunction
9 carried with it all equitable relief.

10 Neither Porter nor Mitchell addressed
11 a statute limited to ongoing or threatened
12 violations, which is the sort of thing that an
13 injunction would address but is totally
14 inconsistent with backwards-looking monetary
15 relief.

16 And neither statute in Porter or
17 Mitchell provided the very same monetary relief
18 in a separate provision -- here, that's Section
19 19 -- subject to various protections like a
20 statute of limitations that would be rendered
21 entirely meaningless if the Commission could
22 implicitly get the same relief under 13(b)
23 instead.

24 So Porter and Mitchell are entirely
25 distinguishable based on the statutory scheme.

1 JUSTICE KAVANAUGH: And picking up on
2 one of Justice Breyer's questions, when you have
3 the combination of Porter and Mitchell plus some
4 maybe broad, you would say too tangential, but
5 some Congressional ratification argument and all
6 the court of appeals for a number of years
7 interpreting it in the FTC's favor, at some
8 point, does all that combine, do you think, to
9 get us to a point of leave well enough alone?

10 I mean, certainly, stability in the
11 law is important. And when you have Porter and
12 Mitchell plus ratification plus courts of
13 appeals, at some point, does that kick in?

14 MR. PATTILLO: I -- I don't think so.
15 Long-standing error doesn't make it any less
16 error. The statute is still the statute, and
17 now that the issue is before this Court, it's
18 the Court's duty to give the correct
19 interpretation of the statute, notwithstanding a
20 long history of error.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Counsel, let's say
25 that we agree with you about 13(b). Your

1 client, I don't understand you to be arguing
2 that he has clean hands. I mean, he's been
3 convicted, he has the dubious distinction of
4 being the subject of an episode of "Dirty Money"
5 on Netflix.

6 But you -- you suggested in your brief
7 that because of the safeguards of Section 19, in
8 particular, you know, the -- the reasonable man
9 standard, knowing and understanding that the
10 conduct was deceptive, that the FTC couldn't
11 have gotten a monetary remedy from him under 19.

12 So is -- is it your position that if
13 we adopt your view, there's no way for the FTC
14 to get the ill-gotten gains back from someone
15 who has violated the law like your client?

16 MR. PATTILLO: I'm sorry, I didn't
17 mean to suggest that the FTC could not have
18 proven its case under Section 19, although I --
19 I do think there is a substantial question about
20 that.

21 In the -- in Judge Bea's dissent in
22 the decision below, he noted that, you know, the
23 three judges on the Ninth Circuit have looked at
24 the disclosures and they thought that they were
25 accurate and they were not deceived by that.

1 But notwithstanding that, the fact is
2 that, you know, the decision here doesn't just
3 affect my client, it doesn't just affect, you
4 know, payday lenders. As our amici, the
5 Chamber, has pointed out and as, you know,
6 this -- the sweep of the FTC Act is about as
7 broad as you can get, reaching into every single
8 area of commerce, and it's precisely because the
9 prohibitions of the Act are so broad in general
10 that it's important to hold the Commission to
11 its primary responsibility of, you know, telling
12 businesses what the law is prospectively instead
13 of running to court instead, you know, trying to
14 seek retrospective monetary relief.

15 JUSTICE BARRETT: Thank you, counsel.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, Mr. Pattillo.

18 MR. PATTILLO: The question here is
19 whether 13(b)'s reference to "permanent
20 injunction" mean permanent injunction or whether
21 it instead means all equitable relief and money
22 for past harms.

23 The three features of the Act that
24 I've discussed confirm that "injunction" is
25 limited to an injunction as that term was

1 traditionally understood.

2 To be any clearer, Congress would have
3 to take the absurd step of saying, and by
4 "injunction," we mean only injunction, not other
5 remedies. But this Court does not impose and
6 never has imposed any such requirement.

7 The FTC Act, moreover, is striking in
8 its consistent focus on agency processes to
9 prospectively define prohibited conduct. Yet,
10 under the Commission's view, the single
11 sentence, second-level proviso in 13(b)
12 authorizing permanent injunctions, is virtually
13 all the statute it needs.

14 The Commission can get all the
15 injunctions and monetary relief it wants without
16 the burdens of the administrative processes that
17 were its very reason for being. That cannot be
18 right. The Court should return the Commission
19 to the limits that Congress placed on its
20 authority.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Marcus.

24

25

1 ORAL ARGUMENT OF JOEL R. MARCUS
2 ON BEHALF OF THE RESPONDENT

3 MR. MARCUS: Thank you, Mr. Chief
4 Justice, and my it please the Court:

5 The Petitioners are asking you to rule
6 that when Congress allowed the Commission to
7 enforce the FTC Act in federal court, it
8 intended that the Court would merely stop the
9 violations while letting the violator keep his
10 stolen money.

11 Such a ruling would radically depart
12 from the foundational principle of equity
13 recognized just last term in Liu that wrongdoers
14 should not profit from their own wrongdoing.

15 It would also profoundly deviate from
16 the understanding of injunctive remedies that
17 was embedded in the law when Congress enacted
18 Section 13(b), as many of the Court's questions
19 have recognized.

20 Courts of equity have recognized since
21 before the founding that the equitable power to
22 issue an injunction inherently includes the
23 power to order the return of unlawful gains. As
24 the Court summed it up in Porter, nothing is
25 more clearly the subject of a suit for an

1 injunction than the recovery of that which has
2 been illegally acquired and which has given rise
3 to the necessity for injunctive relief.

4 Sections 19 and 5(1) of the Act, which
5 provide remedies when the Commission chooses to
6 enforce the Act administratively, do not create
7 an unmistakable inference that Congress intended
8 to limit traditional equitable powers when the
9 Commission chooses instead to proceed in court.
10 Section 19 expressly says otherwise in the
11 savings clauses. Section 5(1) serves a
12 fundamentally different role in the Act than
13 Section 13(b), and its language reflects its
14 function.

15 A cease-and-desist order works like a
16 prohibitory injunction. Congress therefore had
17 to specify the additional remedies it wanted for
18 a violation. It did not need to do that in
19 Section 13(b) but could instead invoke its
20 understanding of the traditional equitable
21 powers of injunction without the need for
22 elaboration.

23 Together, the -- Sections 9 --
24 Sections 13(b), 19, and 5(1) work in harmony to
25 give the Commission a choice between effective

1 enforcement pathways that can provide meaningful
2 relief to victimized consumers.

3 CHIEF JUSTICE ROBERTS: Counsel, a lot
4 of the cases you -- you cite in support of a
5 broad reading of injunction -- injunction and
6 equitable powers -- in fact, I think most of
7 them involve courts, not agencies. And -- and
8 courts have broad inherent equitable power. You
9 -- you don't sort of parse and construe their
10 authority very carefully, at least I don't think
11 so. But this involves an agency, and an agency
12 only has the authority delegated to it by
13 Congress. And I'm not sure we can assume that
14 those precedents involving courts apply so
15 smoothly in the context of an agency.

16 MR. MARCUS: Well, certainly, the
17 agency has whatever power Congress has accorded
18 it, which is exactly why Congress had to be more
19 specific when it was talking about remedies for
20 the agency's own adjudicatory orders.

21 But Section 5 -- I'm sorry, Section
22 13(b) says the Commission may seek and the court
23 may grant a permanent injunction. So what
24 Congress is saying there is that the Commission
25 can invoke the courts' equitable authority. And

1 that then puts the issue squarely within the
2 courts' authority, as you just alluded to.

3 CHIEF JUSTICE ROBERTS: Well, I'm not
4 sure that follows. I mean, "the agency can seek
5 and the court can enforce" doesn't mean that the
6 same authority that a court has the agency has;
7 just that the court can enforce whatever
8 authority the agency has.

9 MR. MARCUS: It doesn't say "enforce";
10 it says "grant." And the court can enforce
11 under a different provision, Section 5, the
12 Commission's own orders. But what Section 13(b)
13 is doing is it's giving the Commission the
14 ability to go to court to seek the relief that a
15 court can grant. This is no different than what
16 the price administrator did in Porter or the
17 Department of Labor in --

18 CHIEF JUSTICE ROBERTS: The -- your
19 friend on the other side makes the point that
20 "injunction" appears in the United States Code
21 throughout the code hundreds of times. And is
22 your position that, whenever it does, a broader
23 range of equitable powers is conferred on an
24 agency?

25 MR. MARCUS: Well, again, it's not

1 that the power is conferred on the agency; it's
2 that the court has inherent powers. Now, in --
3 in many cases, it -- it may be appropriate in --
4 in conjunction with an injunction to engage in
5 other types of equitable remedies, but it's not
6 always appropriate. These are case-by-case
7 determinations.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Mr. Marcus, Section 13(b)(1) says that
14 whenever the Commission has reason to believe
15 that a person, partnership, or corporation is
16 violating or is about to violate any provision
17 of law. That seems to suggest that that
18 provision is focused on forward-looking,
19 preventing a -- a future or a present action.
20 It seems that what you're doing here is using it
21 for something that has already happened. Would
22 you be kind enough to reconcile your approach
23 with the language of 13(b)?

24 MR. MARCUS: I'd be happy to, Justice
25 Thomas. "Is or is about to" echoes the standard

1 for the grant of an injunction. For example,
2 the -- typically, an injunction requires there
3 to be ongoing or expected conduct, and -- but
4 once the court's equity jurisdiction has been
5 properly invoked, the court can order associated
6 remedial relief. And that's what happened in
7 all of the 19th Century intellectual property
8 cases. And, in fact, in the Root case in
9 particular, the Court said your injunction --
10 I'm sorry, your patent has expired. Therefore,
11 you can't seek an injunction and you cannot get
12 a naked monetary remedy.

13 But, here, there was ongoing conduct
14 at the time the FTC sued. The court granted an
15 injunction. And the question is, once the court
16 has had its authority triggered, once the court
17 has exercised that authority, can it also engage
18 in the traditional mechanisms of injunctive
19 relief? And I think the answer in centuries of
20 law is pretty clear.

21 JUSTICE THOMAS: Would you just take a
22 minute and explain again why -- from my
23 perspective, it seems as though what you're
24 doing here fits more comfortably under Section
25 19. But would you explain why the Commission

1 chooses to use Section 13 rather than Section 19
2 again?

3 MR. MARCUS: Certainly. Well, it --
4 for one thing, it is easier to use Section 13 in
5 many respects than it is in Section 19. But,
6 also, there are many cases where it doesn't take
7 a lot of Commission expertise to explain why a
8 particular act is deceptive. And, here,
9 certainly, it did not take the agency or even
10 the U.S. Attorney's Office for that matter to
11 explain to Scott Tucker that misleading people
12 about the terms of their loan was a deceptive
13 act. So, when the Commission feels that it
14 doesn't need to expound on the -- the meaning
15 and boundaries of the FTC Act, it can bring
16 cases under Section 13.

17 Now, keep in mind, when it does that,
18 it gives up a bunch of stuff. It gives up the
19 ability to find its own facts. It gives up the
20 somewhat broader remedies that Section 19
21 allows, including -- Section 19 allows us to sue
22 in state court, as well as federal court.

23 And so each -- it's a little bit like
24 the choice between rulemaking and adjudication
25 in, you know, Bell Aerospace. Congress wanted

1 the Commission to have flexibility to choose
2 between enforcement pathways. They both --

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: History matters. I
6 think Justice Brandeis, when he started, was
7 faced with a business community that was very
8 suspicious of the FTC's power and thought it
9 would be abused and a progressive community that
10 thought it's absolutely necessary to bring bad
11 business practices under control. So they
12 compromised.

13 The compromise was you've got to do
14 what the FTC says, but before it tells you to do
15 something, it will find that what you're doing
16 now is wrong. It will find that. It will be a
17 cease-and-desist order, later expanded under
18 Moss-Magnuson, I think, to include violation of
19 a rule.

20 So Section 5, cease-and-desist order
21 or violation of a rule, ha, damage of some kind.
22 Nineteen, the same thing. And now we have right
23 in the middle 13, no protection like that
24 whatsoever. Do not worry, says the FTC, we will
25 only use it in exceptional cases.

1 Ha! In 2012, they repeal that. And
2 now, 10 years later, after this has been in
3 effect for a few years, I read that 100 cases
4 under this provision are in the court, compared
5 with 10 or 12 under the regular cases.

6 And you say it's just obvious, we're
7 going to get those people who think their bad
8 conduct is obvious. Look at Skechers. Look at
9 the Cardinal case. Go back to the famous Unburn
10 case. Add substantiation.

11 People wouldn't know that it is an
12 unfair practice that a chiropractor who was
13 married to a wife who had some income from the
14 company and therefore is a conclusion as to the
15 muscle toning of the company should be
16 discounted. And that's the kind of case they're
17 bringing now.

18 Now do you see my point? On the one
19 hand, it's well-established law in the lower
20 court. On the other hand, if we interpret it
21 your way, we -- we -- we say your fears,
22 business community, were absolutely right. It
23 is now up to the FTC. Before you know the thing
24 is wrong, they hit you with bad damages.

25 This case? Perhaps you're right. But

1 Skechers, Cardinal, even Unburn, build strong
2 bodies eight ways, that was Wonder Bread. They
3 only did it six ways. I mean, you see, it's
4 giving the FTC -- that -- you get my point. Now
5 I'd like to hear an answer.

6 MR. MARCUS: I do get your point,
7 Justice Breyer, and the answer is that in 1914
8 when the -- when the Commission was created
9 there was a bargain struck. And in 1973 when
10 consumer fraud became rampant in the economy and
11 people were complaining about the toothless FTC,
12 there was a new bargain struck where the
13 Commission could go into court and seek remedies
14 in court as a litigant in the first instance.

15 Courts are, of course, bound by
16 principles of constitutional due process and
17 notice. And if the court concludes that the --
18 that the chiropractor couldn't possibly
19 understand what was required of him, it will
20 find that a remedy is not available.

21 Many of the cases that you're
22 referring to, though, Justice Breyer, actually
23 involve settlements that were made with the
24 Commission in the course of administrative
25 proceedings. These things do get complicated.

1 But those are companies that agreed to settle.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: In answer to Justice
4 Thomas's question, well, his -- your answer to
5 Justice Thomas's question leads me to ask this:
6 If the activity here had ceased before this
7 order was entered, would the court have been
8 able to enter it?

9 MR. MARCUS: Well, so if the activity
10 had ceased and it was -- there was no
11 possibility that it could have resumed again,
12 then the answer is typically no. Of course
13 there are some people who, when the FTC starts,
14 you know, inquiring about them, they stop for
15 the time being, only to resume again later. But
16 if --

17 JUSTICE ALITO: Why would Congress --
18 why would Congress draw that line? Why would it
19 provide a restitution remedy when there is still
20 ongoing activity, but no restitution remedy when
21 all of the harm has already been completed?

22 MR. MARCUS: Well -- well, because the
23 -- the remedy goes along with the injunctive
24 remedy. It's inherent in the injunction that
25 the court can issue. And that's what the

1 Congress has traditionally done. It's what it
2 did in the 19th Century patent and copyright
3 cases.

4 JUSTICE ALITO: What would the policy
5 -- what would be the policy justification for
6 doing that? Why would Congress draw that line?

7 MR. MARCUS: I can't tell you why
8 Congress would want to have a less-than-complete
9 remedy, but it's -- it's something that Congress
10 does quite often. I does -- it is still to this
11 day in the Securities and Exchange Act cases.
12 It requires -- it -- there is an about to
13 requirement -- before they can get the equitable
14 relief.

15 JUSTICE ALITO: We asked Mr. Pattillo
16 questions about how this provision would have
17 been understood in 1973. His brief cites
18 comments made by a former FTC official,
19 Mr. FitzGerald, that addresses that directly.
20 And they are pretty damaging to your position.

21 Mr. FitzGerald says that when 13(b)
22 was enacted nobody on the Commission imagined
23 that it would become an important part of its --
24 the Commission's consumer protection program.

25 But the Commission decided that

1 Section 19 was too time consuming, so it
2 wanted -- it looked for a workaround and
3 "neither the text of 13(b) nor its legislative
4 history disclosed a basis to argue for broad
5 equitable relief. Commission's attorneys
6 thought these arguments were not going to
7 succeed but, to their surprise, they were
8 successful."

9 And you don't say anything about
10 Mr. FitzGerald. Do you want to say something
11 about him now?

12 MR. MARCUS: I'd be happy to, Justice
13 Alito. Mr. FitzGerald for one thing is not
14 Congress. So the question is what Congress
15 understood. And there was a huge body of law
16 indicating that Congress understood what it was
17 doing.

18 But beyond that, what Mr. FitzGerald's
19 article does indicate is that in the 1970s, at
20 the time when people were complaining that the
21 FTC was lackadaisical about enforcement, the
22 Commission's mindset was all about a rulemaking,
23 making broad rules to govern large industrial
24 sectors. And it did take a little while for the
25 Commission's mindset to change from a rulemaking

1 to an enforcement perspective.

2 But once it did, it vigorously started
3 invoking Section 13(b) and, as has been pointed
4 out by the questioning, courts for 40 years now
5 have accepted those things. And before the FTC
6 even did this, courts had been accepting the
7 exact same arguments in the SEC context.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel, how do
12 you explain Section 5(1), which was passed at
13 the same time as Section 13(b), and separately
14 authorizes mandatory injunctions and further
15 equitable relief?

16 Why would Congress use a different
17 language for injunctive relief in one section,
18 and just stop at "injunctive relief," and in the
19 other add "and further equitable relief," in a
20 different section?

21 MR. MARCUS: Well, the textual
22 differences in the two provisions reflect --
23 they're functional differences. Section 5(1) is
24 used to enforce cease and desist orders, the
25 administrative orders. And -- and so there

1 already basically is an injunction on the books.
2 And it's an injunction that doesn't come with
3 any traditional remedies.

4 So Congress had to say exactly what
5 remedies it wanted. And that's why it's limited
6 to mandatory injunctions and other equitable
7 relief. But in Section 13 Congress didn't need
8 to do that. It could rely on, could piggyback
9 on, all of the traditional remedies inherent in
10 a permanent injunction, which is different from
11 a mandatory injunction. And so, you know, you
12 could look at it that, in fact, what Congress
13 wanted to make sure of was that, no matter how
14 the Commission proceeded, whether it proceeded
15 by administrative, by a cease and desist order,
16 or whether it went into court as a litigant,
17 that each time consumers were harmed they would
18 have the opportunity to get redress for their
19 victimization.

20 JUSTICE SOTOMAYOR: Now, I'm following
21 up slightly on Justice Alito's question.
22 Legislative history is not unimportant to me.
23 What am I to make of the fact that I saw nothing
24 in the history of this bill suggesting that
25 Congress understood that Section 13(b)

1 authorizes monetary awards?

2 Quite to the contrary, the prior
3 versions of what became Section 19 triggered
4 extensive debate because there wasn't money
5 damages available, and Section 19 was passed to
6 remedy what was perceived as a fault in the bill
7 as it existed.

8 So what am I missing in terms of the
9 absence of anything to do with this issue before
10 Congress?

11 MR. MARCUS: Well, you are correct,
12 Justice Sotomayor, that the legislative history
13 does not -- 13(b) itself does not explicitly
14 address money. But there is a presumption that
15 Congress legislates against the backdrop of the
16 law. And the backdrop of the law of injunction
17 really couldn't be clearer.

18 Now, when it comes to Section 19, the
19 debate about monetary remedies in Section 19 had
20 to do with the Commission's own ability to order
21 monetary remedies in its own administrative
22 process as part of a cease and desist order.
23 The -- as Section 19 was being debated, the
24 Ninth Circuit ruled in the Heder case, which is
25 cited in our brief, that the Commission could

1 not order monetary remedies in its own
2 proceedings and that's why money was front and
3 center in Congress's mind.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: Mr. Marcus, it seems
6 to me that the best argument against your
7 position, and -- and it's a strong one, comes
8 from Section 5 and Section 19, which have these
9 protections in them that Section 13 do not, that
10 there has to be a repeated violation, that there
11 has to be a certain kind of mens rea and so
12 forth.

13 And -- and it -- it does seem as
14 though your interpretation of Section 13 makes
15 those pretty much entirely irrelevant. I mean,
16 you say, well, this is a choice. There are two
17 pathways of different kinds of administrative
18 action.

19 But what -- what -- what seems
20 significant about those two pathways as you've
21 led them -- as you've laid them out, is that one
22 is so clearly better from the agency's
23 perspective. And so I'm wondering if that's the
24 kind of choice that Congress really gave to the
25 agency.

1 MR. MARCUS: Well, Justice Kagan, the
2 -- I think that the core of the answer goes back
3 to what Justice Breyer was describing in his
4 answer to me, which was a fear of Congress that
5 an agency would have too much power, and if
6 Congress gave the Commission the ability to
7 address economy-wide practices in -- in -- under
8 fairly broad terms, and it was concerned that
9 the agency was going to declare novel practices
10 to be deceptive or unfair or anticompetitive.

11 And so Congress was understandably
12 concerned and, therefore, included procedural
13 protections in, in -- you know, in -- in -- in
14 the provisions regarding relief for agency
15 processes.

16 JUSTICE KAGAN: But that's exactly why
17 we should maintain the integrity of those
18 protections rather than your interpretation,
19 which essentially makes them irrelevant.
20 Despite that Congress once thought that, but we
21 don't have to deal with that any more.

22 MR. MARCUS: It -- it doesn't make
23 them irrelevant. It just makes one pathway more
24 attractive in certain instances than another,
25 but if the Commission does encounter a novel

1 practice or if the Commission wishes to make its
2 own fact-finding in -- in particularly
3 complicated cases or difficult cases, then it
4 can do that only in the administrative pathway.

5 So it's not just -- it's not just a
6 freebie. The Commission has to give something
7 up when it decides to go to federal court. It
8 just so happens that, you know, there's a lot of
9 cases that we deal with that are not
10 particularly complicated and that do not require
11 a lot of explanation of what deception is.
12 There are scams that run amok all over the
13 place.

14 JUSTICE KAGAN: If you could --

15 MR. MARCUS: It's happening right now.

16 JUSTICE KAGAN: Just going back to
17 Justice Breyer's numbers, I mean, can you give
18 me any sense of the empirics of this, how often
19 the FTC uses the cease-and-desist order route as
20 opposed to the go-to-court route?

21 MR. MARCUS: I don't have exact
22 numbers for you, Justice Kagan, but in most
23 antitrust cases, the Commission uses the
24 administrative route. Of -- in at least several
25 cases a year, the Commission uses the

1 administrative route in consumer protection
2 cases, but there's no question that the agency
3 brings far more cases in court than it does in
4 the administrative process.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch --

7 MR. MARCUS: But, again, that largely
8 reflects the --

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Oh, counsel, finish
12 your answer. I'm -- I'm interested.

13 MR. MARCUS: Oh, thank you. That
14 largely reflects the -- the kind of basic
15 deceptiveness of much of the stuff that we deal
16 with on the consumer protection side.

17 JUSTICE GORSUCH: Well, let -- let's
18 focus on the consumer protection side because I
19 think the antitrust side, there are a lot more
20 standards out there that -- that people are
21 familiar with. But -- but Justice Breyer really
22 does remind us of -- of the history here. The
23 FTC was set up in part to enact rules about
24 deceptive conduct. It chose not to go that
25 route, preferred an enforcement route. And --

1 and recognizing that a term like "deceptive
2 practices" in Section 5 is not exactly
3 self-defining -- it may lack some of the
4 substance that we now have, at least under the
5 Sherman Act in the antitrust context -- laid out
6 a bunch of protections in Section 19 before your
7 money can be taken away.

8 We've all kind of wandered around this
9 question, but is -- isn't -- I think our core
10 concern is you're rendering that -- those
11 protections superfluous, that there's very
12 little incentive for the agency to ever comply
13 with them, and it's just a -- another step away
14 from what Congress had anticipated would be a
15 regulatory regime that's never materialized.

16 MR. MARCUS: Well, certainly, Justice
17 Gorsuch, Congress did seem to recognize the
18 issue, and that's why it included savings
19 clauses in Section 19. You know, I -- I don't
20 see much other explanation for very broad
21 provisions that clearly on their face say this
22 is in addition to other remedies and you can't
23 use the existence of this provision to interpret
24 other remedies.

25 JUSTICE GORSUCH: Let -- let me put

1 the question a different way: What incentive
2 does the Commission have today to use Section
3 19?

4 MR. MARCUS: The Commission has the
5 incentive that I've discussed, which are if it
6 wishes to engage in its own fact-finding and
7 use -- and draw its own legal conclusions to
8 address novel conduct --

9 JUSTICE GORSUCH: Yes, but it -- it's
10 inherently difficult, and Section 13 is so
11 comparatively easy. What -- what incentive
12 remains to do that? I know it can, but why
13 would it? Just as it can come up with rules
14 defining what unfair trade practices are but --
15 but chooses not to do so.

16 MR. MARCUS: Well, it -- well, it
17 does. I mean, so it -- it doesn't do it as
18 often, but it does do it. And so that proves
19 that there are cases where the Commission thinks
20 we need to take this one. This one's difficult
21 enough. This one's uncertain enough. This one
22 requires our application of agency expertise,
23 and the Commission has to give up all that when
24 it goes to federal court.

25 Now, some would say that it's actually

1 better to have a commission litigating cases in
2 federal court than it is to have the Commission
3 making broad-based rules that may apply to
4 non-parties.

5 JUSTICE GORSUCH: Thank you, counsel.

6 MR. MARCUS: So --

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Chief
10 Justice, and good morning, Mr. Marcus. Good to
11 be with you again.

12 I want to pick up on Justice Alito's
13 question and Mr. FitzGerald's article, which
14 I've read. You obviously put forward good
15 arguments on Porter and the Court's precedent
16 and Congress's intent as well as the body of
17 court of appeals cases, but it seems that the
18 problem you have is the text. And in that
19 sense, this case really is a separation of
20 powers case.

21 I -- I worked in the Executive Branch
22 for many years so I understand how this happens.
23 When you're in the Executive Branch or an
24 independent agency, you want to do good things
25 and prevent or punish bad things, and sometimes

1 your statutory authority is borderline. And it
2 could be war policy or immigration or
3 environmental or what have you, but with good
4 intentions the agency pushes the envelope and
5 stretches the statutory language to do the good
6 or prevent the bad.

7 The problem is -- is this results in a
8 transfer of power from Congress to the Executive
9 Branch to decide whether to exercise this new
10 authority. That's a particular concern, at
11 least for me, with independent agencies. So --
12 and why isn't the answer here for the agency to
13 seek this new authority for Congress for us to
14 maintain the principle that separation of
15 powers, that the agency should stick to the
16 authority in the -- in the text and not -- and
17 not go beyond that?

18 A 30,000-foot question. Interested in
19 your responses to that.

20 MR. MARCUS: Well, so, again, the
21 question, the real question, is what was
22 Congress's intent when it gave the Commission
23 the authority to seek a permanent injunction in
24 federal court. And if it intended to accord the
25 agency the -- the ability to go ask the court

1 for all of the inherent equitable remedies, then
2 I think that resolves your concerns about
3 separation of powers issues.

4 And, you know, again, it -- it
5 couldn't be clearer that -- that Congress,
6 legislating against the backdrop of injunctions,
7 would have had the intent to accord all the
8 traditional equitable remedies.

9 And, you know, this is not a -- this
10 is not a new question. Even, you know, in the
11 California versus American Stores cases we cited
12 in our brief, the Court held that "injunction"
13 as used in the Clayton Act indicates Congress's
14 intention that traditional principles of equity
15 govern the grant of injunction -- of injunctive
16 relief.

17 And so, you know, ultimately, I -- I
18 think the -- the -- your concern is a valid one
19 but is resolved if you look at what Congress
20 would have understood the words to mean when it
21 used them. And there was in fact a common
22 understanding of what "injunction" meant in
23 1973.

24 JUSTICE KAVANAUGH: I appreciate it,
25 Mr. Marcus. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Counsel, the damages
4 award here or the money at stake here was \$1.3
5 billion and then the \$27 million collected from
6 Mr. Tucker's wife. And when Justice Alito asked
7 Mr. Pattillo how much of that had been
8 distributed to the victims, he said about \$500
9 million. So I -- I take it the rest of that is
10 in the Treasury, or does the FTC have it right
11 now?

12 MR. MARCUS: So I'm -- I've glad you
13 asked that question, Justice Barrett. I will
14 get you a clarification on what Mr. Pattillo
15 said because the money that has actually been
16 distributed from consumers comes from a
17 different defendant, not Tucker, not
18 Mrs. Tucker, not any of the Petitioners before
19 this Court. It comes from a bank that settled
20 separately with the government and agreed to a
21 restitution remedy in the criminal case, that
22 the Justice Department then turned over to the
23 FTC to distribute to consumers. So none of that
24 money is the judgment in his particular case.

25 JUSTICE BARRETT: So what happens or

1 has happened to the judgment, the money flowing
2 from the judgment, in this particular case?

3 MR. MARCUS: So right now there's some
4 money that is being held in an account
5 separately for -- for redress, should the
6 Commission ultimately wind up with the ability
7 to distribute --

8 JUSTICE BARRETT: How much money --

9 MR. MARCUS: -- that money.

10 JUSTICE BARRETT: -- in that account
11 compared to the 1.3 billion?

12 MR. MARCUS: I don't know the exact
13 number. But it's tens of millions. It's a --
14 it's a lot of money.

15 JUSTICE BARRETT: But this is what I'm
16 -- I'm getting at. It seems to me that
17 equitable remedies attempt to restore the
18 plaintiff to the position in which the plaintiff
19 stood before the plaintiff was defrauded. This
20 money isn't traceable back to the FTC. And the
21 money that's gained isn't all being distributed
22 to the plaintiffs. So it seems like it
23 functions almost more like a fine. It doesn't
24 really seem analogous to say restitution to me.

25 MR. MARCUS: Well, I'm -- I'm not sure

1 that's quite correct, because the point here is
2 that it's a -- it's an equitable remedy meant to
3 restore the victims to the place that they were
4 in before they were ripped off.

5 JUSTICE BARRETT: But if the victims
6 don't get the money, or if all of the money is
7 not traceable to the victims, then -- then all
8 of the money is not remedying that wrong.

9 MR. MARCUS: Well, no, we know -- we
10 know who the victims were and we know how much
11 they were -- we know how much was stolen from
12 each of them. It's just a matter of collecting
13 the money, figuring out from this case whether
14 we are allowed to give back the money, and then
15 basically cutting checks to everybody. Right
16 now the money is being held in safekeeping.

17 JUSTICE BARRETT: So the full \$1.3
18 billion will be distributed to the victims?

19 MR. MARCUS: As much of it as we can
20 get, yes. We're not going to get \$1.3 billion.
21 A lot of it was spent and it doesn't exist any
22 more, and, you know, Tucker is now
23 judgment-proof for the most part. But there
24 were bank accounts, houses, race cars, whatever,
25 assets that were seized and are being held

1 basically in trust.

2 JUSTICE BARRETT: Thank you, counsel.

3 My time has expired.

4 CHIEF JUSTICE ROBERTS: A minute to
5 wrap up, Mr. Marcus.

6 MR. MARCUS: Thank you, Chief Justice.
7 I want to reiterate that a court with the power
8 of injunction sits as a -- a court of equity.
9 And one thing that the Court should not overlook
10 is the basic principle of equity that wrongdoers
11 have to give back the money that they took
12 unlawfully and AMG asks the Court to disregard
13 that principle. But the Court should have that
14 principle firmly in mind when it decides this
15 case.

16 It should uphold the history and
17 tradition, and affirm once again that a
18 permanent injunction includes the power to
19 restore victim money that was wrongfully taken
20 from them. And I don't think that -- that
21 anything in Sections 19 or 5(1) rise to the
22 level of an unmistakable inference, which is the
23 standard that is required under Porter.

24 So the Court should affirm the
25 judgment below. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. Rebuttal, Mr. Pattillo.

3 REBUTTAL ARGUMENT OF MICHAEL PATTILLO
4 ON BEHALF OF THE PETITIONERS

5 MR. PATTILLO: I heard the Commission
6 say that this case should be decided by looking
7 at Congress's intent when it enacted 13(b). And
8 the way we determined Congress's intent is by
9 looking at the words on the page.

10 Congress used the word "injunction"
11 with a clear historical meaning. Even if in
12 certain cases like Porter and Mitchell that term
13 might be construed to carry with it other
14 equitable remedies, we know that's not the case
15 here.

16 Even under Porter and Mitchell, Porter
17 and Mitchell make clear that you must look at
18 the statute and ask if another feature impliedly
19 precludes broader relief. The Commission
20 suggests that standard isn't met here. But all
21 we have to do is look at Porter.

22 In Porter the existence of another
23 provision providing a damages remedy was
24 sufficient for the Court to conclude that it
25 should not also imply that same damages remedy

1 into the provision at issue. That is precisely
2 what the Commission is trying to do here. It is
3 trying to get precisely the same relief that
4 would have been available under 5(1),
5 injunctions and other equitable relief.

6 It's trying to get precisely the same
7 relief available under Section 19 but without
8 complying with any of its safeguards. I heard
9 the Commission say that sometimes pathways --
10 one pathway might be more attractive. Well, of
11 course it's going to be more attractive for the
12 Commission to proceed under Section 13 than
13 Section 19 where it doesn't have to comply with,
14 for example, the heightened proof requirement,
15 where it doesn't have to comply with the
16 limitations period. I -- I didn't hear a single
17 response to why Congress would have intended to
18 allow the same relief under two pathways, yet
19 only provides protections in one but not the
20 other.

21 And the absence of a limitations
22 period is something that Meghrig pointed out.
23 It would be truly striking for a statute to
24 award retrospective monetary relief but not
25 include a statute of limitations. That applies

1 equally here.

2 But even more so when you consider
3 what the Commission's core mission is here.
4 Here the Commission first investigated this
5 conduct, it first asked Mr. Tucker about his
6 disclosures in 2002. Yet, subject to no
7 limitations period, it sat on its hands for a
8 decade.

9 Now, if it were following the
10 prescriptions that Congress provided, in 2002,
11 if it thought that there was something wrong
12 with the disclosures, it should have gone in
13 then. It should have thought to bring a stop to
14 it. It could have gone -- it should have gone
15 to administrative processes to make clear that
16 this particular remedy -- or excuse me, that
17 these particular disclosures, which are
18 widespread throughout the industry, were, in
19 fact, not acceptable and a violation of the 5(1)
20 act. But it didn't do that. And this case
21 shows precisely why holding the Commission to
22 its core mission of providing prospective
23 monetary -- prospective guidance to business
24 about what conduct is prohibited is so
25 important. It's exactly what Congress intended.

1 And the entire structure of the -- of the
2 Commission's mission is being altered by it
3 choosing to go down the easy path of racking up
4 huge judgments under 13(b) without the
5 protections that Congress provided under Section
6 19.

7 If there are no further questions, I
8 would ask that the judgment of the Court of
9 Appeals be reversed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 11:07 a.m., the case
13 was submitted.)

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