No. 19-508

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL CONSUMER LAW CENTER, UC BERKELEY CENTER FOR CONSUMER LAW AND ECONOMIC JUSTICE, CENTER FOR CONSUMER LAW AND EDUCATION, HOUSING CLINIC OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL, AND PROFESSOR CRAIG COWIE AS *AMICI CURIAE* IN SUPPORT OF FEDERAL TRADE COMMISSION

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*[2] joining this brief are consumer organizations and law school clinics, centers, and scholars with an interest in the analysis that should guide this Court in determining whether courts may continue to order redress to consumers in cases the Federal Trade Commission ("FTC") brings under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b).

The **Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School** is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. Many of the Clinic's clients face unfair and deceptive practices from actors subject to FTC scrutiny, such as "foreclosure rescue" scammers. The FTC has assisted the Clinic's clients by preventing these practices and obtaining redress for violations of consumer protection laws.

The **National Consumer Law Center** ("NCLC") is recognized nationally as an expert in consumer credit issues. For more than 50 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Briefs filed by the *amici* do not represent any institutional views of the law schools and universities with which the *amici* are affiliated.

twenty-one volume Consumer Credit and Sales Legal Practice Series, including, *inter alia*, Unfair and Deceptive Acts and Practices (2016 9th ed.). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers, and to promote protections against such practices. NCLC frequently appears as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country. NCLC has also acted as the FTC's designated consumer representative in promulgating important consumer protection regulations and includes a former FTC Commissioner as a current member of its Board of Directors. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws.

The **UC Berkeley Center for Consumer Law & Economic Justice** is a law school research and advocacy center dedicated to ensuring safe, equal, and fair access to the marketplace. The Center works through courts, legislative bodies, and administrative agencies – including the FTC – on a wide range of issues affecting low-income consumers.

The **Center for Consumer Law and Education**, a Joint Partnership between West Virginia University College of Law and Marshall University, coordinates the development of consumer law, policy, and education research to support and serve consumers in West Virginia and across the nation. The Center brings together scholars, practitioners, and students to empower, lead, and educate our communities.

Professor Craig Cowie is an Assistant Professor of Law and Director of the Blewett Consumer Law &

Protection Program at the University of Montana Alexander Blewett III School of Law. He teaches and writes on the enforcement of consumer laws.

SUMMARY OF ARGUMENT

A district court's exercise of its power to award accounting remedies under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b)("Section 13(b)"), is consistent with longstanding notions of a court acting in equity to do "complete justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-400 (1946). When the public interest is served, as is the case in Section 13(b) enforcement actions, these equitable powers are even more crucial.

Courts have used their equitable power to provide redress in significant cases of consumer fraud targeting vulnerable populations, such as veterans, the elderly, and disabled consumers. Federal courts routinely approve Section 13(b) settlements that incorporate an accounting for profits, enabling the defrauded consumers to receive a measure of justice. Injunctions alone cannot repair the financial or other harm already suffered by the consumers and they do not deter future bad actors who may have spent years profiting from fraud.

Throughout the four decades that the FTC has brought Section 13(b) actions, nearly all courts have utilized their equitable powers to protect the public interest by providing consumers relief through accounting for profits. Congress knew that courts were exercising these equitable powers when it amended the Federal Trade Commission Act in 1994, but chose not to limit the courts' powers in those amendments. Absent a "clear and valid legislative

command" to the contrary, Congress does not impliedly impinge on the equitable powers of a court. *Porter*, 328 U.S. at 398. Consumer redress through Section 13(b) actions, as envisioned by Congress and provided by the court, continues to protect American consumers and promote a fair marketplace. Stripping the courts of their equitable power to provide redress would create perverse market forces that would expose vulnerable populations to fraud while putting lawful market actors at a competitive disadvantage.

ARGUMENT

I. Once a court's equitable powers have been invoked in any way, the court has all equitable powers to do complete justice.

A. It is well-established that equity jurisdiction is meant to allow for complete justice.

One of equity's traditional purposes is to allow courts to afford complete justice to wronged parties. *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) (explaining that "the great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.").

Consequently, courts have traditionally used their historic equitable powers to provide harmed parties more complete justice. In *Stevens v. Gladding*, 58 U.S. 447, 450 (1855), for example, the defendant purchased a copperplate of a map, and used the plate to create and sell copies of the map. Although the plaintiff no longer owned the plate itself, the plaintiff still owned the copyright to the map. *Id.* at 453.

The plaintiff sued, seeking general relief as well as the remedies available at law for copyright infringement, including a payment of $1 per unlawful copy. *Ibid.* This Court held that the lower court's equitable powers did not extend to providing the requested relief. *Id.* at 454. However, because the plaintiff had prayed for general relief and because the "right to an account of profits is incident to an injunction in copy and patent-right cases," the Court remanded to the lower court to "take an account of the profits received by the defendants from the sales of the map." *Id.* at 455. The district court had the power to "award complete relief," which includes accounting for profits, because its equitable jurisdiction has "properly been invoked for injunctive purposes." *Ibid.* Any ruling to the contrary would contradict the precedent established by this Court.

Accordingly, this Court held in *Porter v. Warner Holding Co.*, 328 U.S. at 398-400, that "securing complete justice" is one of the "great principles of equity." Further, this Court upheld that, once "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief." *Ibid*.

It is broadly established that courts in equity have the power to provide complete relief, so Congress presumably takes this into account when it invokes equitable powers in a statute. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). In this case, the Petitioners ask this Court to do the exact opposite: assume Congress lacked an understanding of equitable powers when it authorized courts to award injunctive relief in Section 13(b). Such an assumption would undermine the centuries-old understanding of

equity, encompassing as it does the ability to grant equitable monetary relief.

Moreover, this Court has already ruled that it would interpret Congress's references to an equity court as "cognizant of the historic power of equity to provide complete relief." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). There this Court explained that, when Congress invokes a court's equitable powers to remediate violations of law, Congress "must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."

B. Complete justice is particularly important when the public interest is served through the exercise of the full range of equitable powers.

Complete justice is especially crucial when equitable jurisdiction serves the public interest. Without complete justice, and accounting remedies specifically, wrongdoers emerge financially unscathed, with only an order to shut down their current scheme. Without complete justice, then, the only consequence to scamming the public is being told to stop. In order to provide wrongdoers with an incentive to follow the law, many courts and Congress have acknowledged that the FTC's work for the public interest requires courts to exercise their full range of equitable powers, including accounting remedies.

This Court outlined this principle in *Porter*: where "the public interest is involved . . . those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." 328 U.S. at 398. This

principle is particularly relevant when courts provide relief to protect vulnerable consumers, as compared to, for instance, the Securities and Exchange Commission's protection of largely sophisticated investors. *See Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936 (2020). It is crucial that district courts be able to use their equitable powers in FTC actions to provide complete justice, by, *inter alia*, awarding monetary relief, to vulnerable consumers harmed by defendants' unlawful conduct.

Porter highlights this public interest consideration. There, the district court's complete powers in equity allowed the court to award complete relief: refunds to tenants who were overcharged in violation of federal law. For this reason, this Court explained, accounting remedies "may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. *White v. Sparkill Realty Corp.*, 280 U.S. 500 (1930); *Lacassagne v. Chapuis*, 144 U.S. 119 (1892)." *Id.* at 399. Without the ability to award accounting for profits, equity courts cannot grant complete justice, because injunctive relief only prevents future behavior and cannot recover "that which has been illegally acquired." *Ibid.*

A court relied on *Porter* and the emphasis on public interest in order to allow the Federal Savings and Loan Insurance Corporation to seek accounting for profits for illegal lending practices and improper financial accounting. In *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987), the court ruled that it had equity jurisdiction under FSLIC statutes, which permitted the FSLIC "to suspend or

remove directors or officers . . . who have violated laws, rules or regulations or who have engaged in any unsafe or unsound practices. 12 U.S.C. § 1730(g)(1)." *Id.* at 562. The court ruled that this removal power "and other flexible remedies available to FSLIC reinforces [the] view that FSLIC is entitled to have access to equity jurisdiction." *Ibid.* Because the FSLIC's work also served the public interest, the court ruled that "equity's powers to aid FSLIC in its endeavors are even broader than for private claims. Thus, we hold that its general equitable powers give the district court the authority to freeze assets when necessary, as here, to preserve meaningful equitable remedies." *Id.* at 563.

Congress acknowledged the FTC's public interest work and the importance of the full range of equity when it enacted Section 13(b). When discussing the standard of proof the FTC must meet, Congress explained that because the FTC focuses on public interest work, it should be able to access a "public interest" standard of equity: "The intent is to maintain the statutory or 'public interest' standard which is now applicable, and not to impose the traditional 'equity' standards . . . the standards of the public interest measure the propriety and the need for injunctive relief." H.R. Rep. No. 93-624, pt. 2, at 2527 (1973) (Conf. Rep.). By invoking courts' equitable powers through injunctive relief and instituting a "public interest standard," Congress established its intent that the FTC should enjoy a more flexible equity standard. *Ibid.*

In the 1994 amendments to the Federal Trade Commission Act, Congress referred again to the public interest, stating that "The FTC has used its Section 13(b) injunction authority to counteract

consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." S. Rep. No. 103-130, at 16 (1993).

C. District courts can grant accounting remedies within their own powers under equity jurisdiction, regardless of the FTC's powers.

The FTC does not, and has not historically, relied on its own authority under Section 13(b) to seek accounting remedies. Rather, the FTC has relied on district courts using their own equitable powers, invoked by equity jurisdiction under Section 13(b), to administer "ancillary relief," including accounting for profits. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir.), *cert. denied*, 479 U.S. 828 (1982); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982).

Petitioners' argument focuses on the FTC's own ability to obtain accounting remedies, which is not at issue. *Brief for Petitioners* at 10. Rather, the question is whether a district court can use its full powers to grant accounting remedies to the FTC, once the court's equity powers have been invoked. While the "savings clause" in Section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57b(b) ("Section 19"), could preserve the authority of the Commission itself, courts have interpreted the "savings clause" to, at minimum, affirm that Congress "never intended to restrict the equitable jurisdiction apparently granted to the district court by §13(b)." *Singer,* 668 F.2d at 1113 (9th Cir.); *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016); *F.T.C. v. USA Fin., LLC*, 415 F. App'x 970, 976 (11th Cir. 2011). Congress

never explicitly limited courts' traditional equitable powers, so it "gave the district court authority to grant any ancillary relief necessary to accomplish complete justice" when it "gave the district court authority to grant a permanent injunction" in Section 13(b). *Singer*, 668 F.2d at 1113 (9th Cir.).

II. Equitable relief is essential to making victims of fraud whole again.

Equitable relief awarded by courts in Section 13(b) actions allows victims of unfair or deceptive practices to be made whole again. In many cases, courts have used their historical equitable powers to provide complete justice when injunctive relief alone would not. The ability to put money back into the hands of those who have been defrauded is particularly consequential for the elderly, veterans, and others in vulnerable positions who are often specifically targeted by these scams. Through orders and settlements, courts have been able to return more than $975 million to consumers who have been harmed, and awarded $10 billion in judgments for consumers through defendant-administered redress programs. *Oversight of the FTC, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 116th Cong. 3 (2020) (statement of The Honorable Joseph Simons, Chairman, FTC) ("Simons Statement").

Scams have continued, and in some ways worsened, in the COVID-19 pandemic. *Ibid.* For example, while the FTC has long targeted government imposter scams, some businesses have been fraudulently impersonating the Small Business Administration and making misleading claims about federal loans or other relief. *Id.* at 14. The FTC has

also brought significant enforcement actions against companies for alleged child privacy violations, Press Release, FTC, *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law* (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations (last accessed Dec. 6, 2020), and for aggressive robocall and telemarketing schemes. Simons Statement, *supra*, at 3 ("Through the first nine months of FY2020, the FTC has received more than 2.7 million complaints about unwanted calls, including 1.9 million complaints about robocalls. The FTC has used all the tools at its disposal to fight these illegal calls and has brought 148 enforcement actions against 502 corporations and 398 individuals to date.").

The FTC's actions on behalf of veterans include a recent multi-million dollar settlement with the University of Phoenix and its parent corporation after allegations of deceptive and misleading advertising that enticed students to enroll in programs with false promises of nonexistent opportunities. Press Release, FTC, *FTC Obtains Record $191 Million Settlement from University of Phoenix to Resolve FTC Charges It Used Deceptive Advertising to Attract Prospective Students* (Dec. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-obtains-record-191-million-settlement-university-phoenix ("Univ. of Phoenix, Press Release") (last accessed Dec. 6, 2020). The University of Phoenix is the biggest recipient of post-9/11 GI Bill monies since the program's inception, and the university ads specifically targeted many military consumers, military spouses, and veterans. *Ibid.*; Compl., *FTC v. The Univ. of Phoenix,*

Inc., & Apollo Education Group, Inc., No. CV-19-5772-PHS-ESW (D. Ariz. Dec. 10, 2019), https://www.ftc.gov/system/files/documents/cases/university_of_phoenix_ftc_v_uop_complaint_signed.pdf. The University had claimed it provided "the right opportunities" to help veterans "rise through the ranks of civilian life," and that its corporate partners offered hiring programs for student veterans, even though those specific opportunities did not exist. *Id.* The FTC alleged that the advertisements misrepresented many important factors a student would consider in deciding which school to attend: the companies its graduates worked for, the curriculum, and its corporate relationships. *Ibid.* The court-approved settlement enabled students to receive relief from the defendants that had misled them, through consumer redress and debt cancellation. Stipulated Order for Permanent Injunction and Monetary Relief, *FTC v. The Univ. of Phoenix, Inc., & Apollo Education Group, Inc.*, No. CV-19-5772-PHS-ESW (D. Ariz. Dec. 19, 2019) https://www.ftc.gov/system/files/documents/cases/de_15_stipulated_order_for_permanent_injunction_and_monetary_judgment.pdf. The Department of Veterans Affairs has since said it would stop approving students for GI Bill benefits to the University of Phoenix and other universities based on the information uncovered by the FTC. Kery Murakami, *GI Bill Enrollments to Be Halted at 5 Universities*, Inside Higher Ed (Mar. 10, 2020) https://www.insidehighered.com/news/2020/03/10/va-cracks-down-temple-phoenix-and-three-others-misleading-prospective-students.

The University of Phoenix was not alone in targeting military members with deceptive

advertising. A district court also recently ordered redress for consumers targeted by an Illinois-based operator of post-secondary schools, who falsely represented in illegal telemarketing schemes that its schools were affiliated with or recommended by the military. Press Release, FTC, *Operator of Colorado Technical University and American InterContinental University Will Pay $30 Million to Settle FTC Charges it Used Deceptive Lead Generators to Market its Schools*, (Aug. 27, 2019) https://www.ftc.gov/news-events/press-releases/2019/08/operator-colorado-technical-university-american-intercontinental (last accessed Dec. 6, 2020).

Consumers who legitimately try to help veterans are also harmed by deceptive and illegal schemes. The FTC has uncovered numerous veterans charity scams that preyed upon consumers' patriotic sentiments, which purport to donate money to disabled veterans, veterans fighting cancer, and fund medical care, suicide prevention, and retreats for veterans recuperating from stress. Press Release, FTC, *FTC and States Combat Fraudulent Charities That Falsely Claim to Help Veterans and Servicemembers* (July 19, 2018) https://www.ftc.gov/news-events/press-releases/2018/07/ftc-states-combat-fraudulent- charities-falsely-claim-help ("Veterans Charities Press Release"); *See also* Press Release, FTC, *FTC, States Continue Fight against Sham Charities; Shut Down Operations That Falsely Claimed to Help Disabled Police Officers and Veterans* (Mar. 28, 2019) https://www.ftc.gov/news-events/press-releases/2019/03/ftc-states-continue-fight-against-sham-charities-shut-down ("Disabled Police Officers Press Release"). The scams operated under seemingly legitimate names like "American

Disabled Veterans Foundation," "Help the Vets," "Saving Our Soldiers" and "Veterans of America," and accumulated over $20 million in consumer donations in three years. *Ibid.* Despite most of this money being funneled to the organizer of the scam himself, the solicitations to consumers claimed that "for thousands of disabled veterans who served in Iraq and Afghanistan, giving an arm and a leg isn't simply a figure of speech – it's a harsh reality. . . . Your $10 gift will mean so much to a disabled veteran." Veterans Charities, Press Release. The schemes also falsely claimed that donations were tax-deductible, despite lacking charitable status, and engaged in millions of illegal robocalls. *Ibid.*

Then-acting secretary for the U.S. Department of Veterans Affairs, Peter O'Rourke, explained the impact of these sham charities: "Not only do fraudulent charities steal money from patriotic Americans, they also discourage contributors from donating to real Veterans' charities." Mike Snider, *Dozens of fake charities scammed donations for veterans then pocketed the cash*, USA Today (Jul. 19, 2018) https://www.usatoday.com/story/money/business/2018/07/19/charity-call-help-vets-scam-so-were-many-others-ftc/797959002/ (last accessed Dec. 6, 2020). Court approved settlements have allowed some of the ill-gotten gains to be donated to legitimate veterans charities. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC & State of Missouri v. Disabled Police Sheriffs Foundation, Inc. et al.,* No. 4:19-CV-00667-SPM (E.D. Missouri, Apr. 30, 2019) https://www.ftc.gov/system/files/documents/cases/172_3128_dpsf_proposed_order.pdf; Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC & Office of the Att'y General, State of*

Fla. v. American Veterans Found., Inc., et al., No. 8:19-cv-744-T-33TGW (M.D. Fla., Mar. 28, 2019) https://www.ftc.gov/system/files/documents/cases/172_3163_avf_order_3-28-19.pdf; *See also* Veterans Charities, Press Release; Disabled Police Officers, Press Release.

The elderly are also targeted by such schemes and are often lured into investing money into worthless products. This past year, consumers over age 60 reported financial losses of more than $440 million. FTC, Protecting Older Consumers 2019-2020, 3 (Oct. 18, 2020) https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf. The elderly are more likely to suffer greater financial losses than younger consumers, with a median loss of $1,600 in 2019. *Ibid.*

One such scheme that targeted older adults and those with disabilities, collected $3 million from consumers by offering them grant money. Press Release, FTC, *Operators of Phony Grant Scheme Banned From Selling Grants and Telemarketing* (Mar. 5, 2019) https://www.ftc.gov/news-events/press-releases/2019/03/operators-phony-grant-scheme-banned-selling-grants-telemarketing (last accessed Dec. 6, 2020) ("Phony Grant Scheme, Press Release"). The FTC alleged that the company frequently referred to the availability of "stimulus grants" to people struggling with medical expenses or debt, or looking to make home improvements. Compl., *FTC v. Hite Media Group, et al.,* No. CV-18-02221-PHX-SPL, ¶ 24 (D. Ariz. July 17, 2018) https://www.ftc.gov/system/files/documents/cases/matter_1723157_premium_grants_complaint.pdf. According to the

complaint, "elderly or disabled consumers, veterans, single mothers" were told they were eligible for thousands in grant money based on these identities alone. *Id.* at ¶ 26. The FTC alleged that the companies misrepresented the success rates in obtaining grant money, what the "grants" were (*i.e.*, that businesses provided them as tax write offs) and charged upfront fees purportedly for the expenses associated with securing grant money and running training sessions to complete grant applications. *Id.* at ¶¶ 24, 35. Court orders enabled refunds to these consumers. Order, *FTC v. Hite Media Group LLC, et al.*, No. CV-18-0221-PHX-SPL (D. Ariz. Feb. 26, 2019) https://www.ftc.gov/system/files/documents/cases/premium_grants_hite_media_group_llc_amazing_app_llc_and_michael_ford_hilliard_order_3-5-19.pdf; *See also* Phony Grant Scheme, Press Release.

Elderly consumers have also been defrauded by those making misleading health claims. In May, the FTC began mailing 22,581 refund checks to consumers nationwide who bought health products from NatureCity, LLC, which, according to the FTC's complaint, deceived customers by stating that two of its products were effective treatments "to a range of conditions affecting seniors." Press Release, FTC, *FTC Sending Refund Checks Totaling More Than $470,000 to Consumers Defrauded by Misleading Health Claims for TrueAloe and AloeCran Supplements* (May 26, 2020) https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sending-refund-checks-totaling-more-470000-consumers (last accessed Dec. 6, 2020); *See also* Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. NatureCity LLC, et al.*, No. 9:19-cv-81387-KAM (S.D. Fla. Oct. 15, 2019) https://www.ftc.gov/system/

files/documents/cases/naturecity_-_stipulated_order.pdf. The FTC alleged that, in reality, the claims were unsupported by evidence and misleading. NatureCity had marketed its products with ads claiming there were multiple clinical studies showing the power of the products – there were not – and making other unsupported claims on the products' effect on cholesterol, joint stiffness, ulcers, acid reflux, and other conditions common to elderly consumers. Compl., *FTC v. NatureCity LLC, et al.*, No. 9:19-cv-81387-KAM (S.D. Fla. Oct. 10, 2019) https://www.ftc.gov/system/files/documents/cases/naturecity_-_complaint.pdf. NatureCity also failed to disclose that it had paid for product testimonials. Press Release, FTC, *Aloe Vera Supplement Seller Barred from Making Misleading Health Claims* (Oct. 16, 2019) https://www.ftc.gov/news-events/press-releases/2019/10/aloe-vera-supplement-seller-barred-making-misleading-health (last accessed Dec. 6, 2020).

The FTC also obtained consumer refunds for those defrauded by the marketers of a supposed arthritis and joint pain supplement called Synovia. The FTC alleged that the company "claimed to sell a miracle supplement" and "used fake testimonials and fake doctor endorsements." Press Release, FTC, *FTC Stops Marketers from Making False Arthritis Treatment Claims* (Dec. 5, 2019) https://www.ftc.gov/news-events/press-releases/2019/12/ftc-stops-marketers-making-false-arthritis-treatment-claims (last accessed Dec. 6, 2020). The complaint also alleged that the company targeted consumers with ads like one that showed an older man who "*gave away* his walker" after using Synovia (emphasis in original), and another with a man who "no longer

needs his walker at age 74." Compl., *FTC v. A.S. Research, LLC, et al.*, No. 1:19-cv-03423 (D. Colo. Dec. 5, 2019) https://www.ftc.gov/system/files/documents/cases/1_-_complaint.pdf. A federal district court approved an order that included $800,000 for consumer redress. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. A.S. Research LLC, et al.*, No. 19-cv-03423-PAB-KMT, 2020 BL 281313 (D. Colo. July 23, 2020).

Elderly consumers have also been targeted by multi-million dollar telemarketing frauds. In 2015, a federal district court ordered equitable monetary relief in redress for seniors against entities that used telemarketing services to claim to sell fraud protection, legal protection, and pharmaceutical benefit services. Final Order for Permanent Injunction and Monetary Judgment as to Defendant Ari Tietolman, *FTC v. First Consumers, LLC, et al.*, No. 14-1608 (E.D. Pa. Feb. 19, 2015) https://www.ftc.gov/system/files/documents/cases/150312firstconsumers_tietolmanorder.pdf; Final Order for Permanent Injunction and Monetary Judgment as to Corporate Defendants First Consumers LLC; Standard American Marketing Inc.; Powerplay Industries LLC; 1166519075 Québec Inc. d/b/a Landshark Holdings Inc.; and 1164047236 Québec Inc. d/b/a/ Madicom Inc., *FTC v. First Consumers LLC, et al.*, No. 14-1608 (E.D. Pa., Feb. 19, 2015) https://www.ftc.gov/system/files/documents/cases/150312firstconsumers_defsorder.pdf; *See also* Press Release, FTC, *Court Orders Ringleader of Scam Targeting Seniors Banned From Telemarketing* (Mar. 12, 2015) https://www.ftc.gov/news-events/press-releases/2015/03/court-orders-ringleader-scam-

targeting-seniors-banned ("Ringleader of Scam Targeting Seniors, Press Release"); Press Release, FTC, *FTC Stops Mass Telemarketing Scam That Defrauded U.S. Seniors and Others Out of Millions of Dollars* (Mar. 31, 2014) https://www.ftc.gov/news-events/press-releases/2014/03/ftc-stops-mass-telemarketing-scam-defrauded-us-seniors-others-out (last accessed Dec. 6, 2020). The services ranged from $187 to $397, and the telemarketers often were able to obtain seniors' bank account information, sometimes convincing them they were affiliated with banks or governments. Ringleader of Scam Targeting Seniors, Press Release. The entities then illegally withdrew money from the consumers' accounts; amounting to over $20 million between May 2011 and December 2013.

These sorts of scams continue. In June 2020 the FTC filed a complaint against eleven Florida-based entities also alleging a fraudulent robocalling scheme targeting financially-distressed and elderly consumers. Press Release, FTC, *Scammers Who Use Robocalls to Target Cash-Strapped Consumers Banned from Selling Debt Relief Services and Telemarketing* (July 24, 2020) https://www.ftc.gov/news-events/press-releases/2020/07/scammers-who-used-robocalls-target-cash-strapped-consumers-banned (last accessed Dec. 6, 2020). The defendants allegedly employed illegal telemarketing calls, including to consumers on the National Do Not Call Registry, and tried to trick the consumers into providing personal financial information. The complaint further alleges that consumers who did not buy the services later discovered the defendants applied for one or more credit cards in the consumers' names without the consumers' consent. *Ibid.*

Courts' access to historic equitable powers when the FTC brings enforcement actions under Section 13(b) is necessary to both stop the future harm to the same or other consumers but also to ensure that victims of fraud or deceptive practices do not suffer the ongoing harm of having lost money that they paid to defendants in response to defendants' deceptive acts and practices.

III. Court's equitable powers can only be curtailed by specific limitations

A. Congress must limit courts' equitable powers expressly, which it did not do in Section 13(b).

This Court has explained that authority to issue a permanent injunction — such as that found in Section 13(b) — carries with it the authority to use "all the inherent equitable powers" of the district court "for the proper and complete exercise of that jurisdiction," including the power to award monetary relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Moreover, where, as here, the matter involves furthering the public interest, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*

The "full scope" of equitable jurisdiction applies unless Congress has "in so many words, or by a necessary and inescapable inference, restrict[ed] the court's jurisdiction in equity." *Ibid.* Indeed, a key tenet of statutory interpretation is that when federal statutes authorize equitable relief, a court may presume that Congress intended to permit the panoply of traditional powers, absent a clear

statement in a statute's text or legislative history to the contrary. Not a single word of the Federal Trade Commission Act limits a court's traditional equity powers, nor does the legislative history intimate Congress intended to do so.

For nearly two centuries, this Court has recognized that "the great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836). However, doubtful construction is precisely what Petitioners aim to accomplish here by reading phantom text into the Federal Trade Commission Act to curtail the equitable powers of the courts — something Congress never intended to do as evidenced by a lack of a clear statement in the text to do so, a savings clause contained within the statutory scheme, legislative history to the contrary, and meaningful legislative acquiescence for nearly four decades.

Petitioners claim that monetary relief under Section 13(b) is precluded by an alleged clear command from Congress to limit monetary relief, camouflaged in Section 19. Their argument is that because Section 19 expressly authorizes various forms of monetary relief in some instances, Congress could not have intended to authorize the same relief in Section 13(b). *Brief for Petitioners* at 16. Many lower courts have rejected that contention, holding instead that Section 19 is not a "clear ... legislative command" precluding courts from exercising "their full range of equitable powers under section 13(b)." *See, e.g.*, *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996), *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366-67 (2d Cir. 2011); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d

1312, 1315 (8th Cir. 1991); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

A Senate report from the enacting Congress explains that the FTC may proceed directly in district court when "it does not desire to expand upon the prohibitions of the FTC Act," in which case bypassing the administrative process will be a better use of "Commission resources ... and cases can be disposed of more efficiently." S. Rep. No. 93-151, at 30-31 (May 14, 1973). As Congress found, "[v]ictimization of American consumers should not be ... shielded" while awaiting the results of an administrative adjudication that could drag on for "several years." *Ibid.*

This Court has stated that "Congress can normally be presumed to have knowledge" of the interpretations of relevant terms. *See Lorillard v. Pons*, 434 U.S. 575 (1978). And indeed, by the time Congress enacted Section 13(b) in 1973, courts had already followed *Porter* and *Mitchell* to conclude that provisions of the securities laws authorizing courts to grant an injunction also authorized equitable monetary relief. *See SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir. 1971) (collecting cases). Congress would have expected the new statute to be construed the same way, given the judicial assumption that, "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010).

The statutory structure of the Federal Trade Commission Act presents two distinct avenues of adjudication, reflected by the legislative history. The guidance provided in Section 19 exists to direct an alternative path of administrative adjudication distinct from solely litigation in district court. As

such, Section 19 contains a savings clause that plainly states Congress did not want to limit other clauses of the Federal Trade Commission Act, 15 U.S.C. § 57b(e), and by contrast, nothing in the Federal Trade Commission Act states that Congress intended to strip, *sub silentio*, the courts' equitable powers to provide restorative relief in conjunction with its power to enjoin unlawful conduct pursuant to Section 13(b).

B. Courts have consistently interpreted Section 13(b) to invoke all their equitable powers, including consumer redress, and Congress has ratified this interpretation.

Many courts have exercised their equitable powers to order consumer redress in cases brought by the FTC under Section 13(b). Years after courts began interpreting Section 13(b) to encompass an accounting for profits, Congress ratified the practice twice: once in 1994, and again in 2006.

Both the House and Senate were aware of these cases when they made significant amendments to the Federal Trade Commission Act in 1994, including amending Section 13(b) itself. *See* H.R. Rep. No. 103-138, at 2 (1993) ("In appropriate cases, the Commission may file suit in Federal district court to obtain preliminary and permanent injunctive relief, redress for injured consumers, or disgorgement of ill-gotten gains. See 15 U.S.C. § 53(b)."). Not only did Congress let the judicial decisions stand, but the Senate recognized that Section 13(b) authorizes the FTC to "go into court ex parte to obtain an order freezing assets, and ... also ... to obtain consumer

redress." S. Rep. No. 103-130, at 15-16 (Aug. 24, 1993).

Despite this knowledge, when it amended Section 13(b) in 1994, Congress did not amend the section to prohibit courts from ordering accounting for profits or other non-injunctive equitable relief in cases brought by the FTC under Section 13(b). Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10(a)(2), 108 Stat. 1691 (1994) (codified at 15 U.S.C. 53(b)). Instead Congress actually expanded the venue and service of process provisions of that section. *See ibid*. When Congress reenacts a statute that has been given a consistent judicial interpretation, "[s]uch a reenactment, of course, generally includes the settled judicial interpretation." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (*Scalia, J.*).

In 2006, Congress relied on courts' equitable jurisdiction again in the context of FTC enforcement, this time in the realm of cybersecurity and cross-border fraud. U.S. SAFE Web Act of 2006, Pub. L. 109-455, § 3, 120 Stat. 3372 (Dec. 22, 2006) (amending 15 U.S.C. § 45(a)(4)(B)). Congress wanted to prevent "the more unscrupulous players out there [from] spoil[ing] the field for all the good actors that are just trying to make cyberspace more efficient." *Regarding Spyware, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 406 (2005) (statement of The Honorable Conrad Burns, U.S. Senator from Montana) (sponsoring the bill).

At the time, Congress was certainly aware of courts providing "consumer redress or disgorgement of ill-gotten profits" through Section 13(b) actions, as expressly stated in Congressional testimony from the

chairman of the FTC to senators who introduced and sponsored the bill. *Regarding Spyware, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 406 (2005) (statement of The Honorable Deborah Majoras, Chairman, FTC). After courts in scores of cases had awarded monetary relief under Section 13(b), Congress expressly codified the widespread judicial understanding when it authorized courts to impose "[a]ll remedies available to the Commission . . . including restitution to domestic or foreign victims" in actions against cross-border unfair practices. U.S. SAFE Web Act of 2006, Pub. L. 109-455, § 3, 120 Stat. 3372 (Dec. 22, 2006) (amending 15 U.S.C. § 45(a)(4)(B)).

By stark contrast, Congress intervened after it disapproved of relief courts provided under the Fair Labor Standards Act ("FLSA"). Section 15 of the FLSA made it unlawful to fail to pay minimum and overtime wages. Fair Labor Standard Act of 1938, Pub. L. 75-718, § 15, 52 Stat. 1060 (June 25, 1938) (codified at 29 U.S.C. § 215). Section 16 created a private right of action allowing recovery of the unpaid wages. *Id.* at § 216(b) (1938). Section 17 provided that courts may "restrain violations" of section 215. *Id.* at § 217 (1938). Prior to 1949, a number of courts ordered restitution in the amount of unpaid overtime wages in cases brought by the Wage and Hour Administrator under 29 U.S.C. § 217 to "restrain violations" of § 215, and even referenced the public interest at issue. *Walling v. Miller*, 138 F.2d 629 (8th Cir. 1943); *Walling v. O'Grady*, 146 F.2d 422 (2d Cir. 1944); *McComb v. Frank Scerbo & Sons*, 177 F.2d 137 (2d Cir. 1949).

In response, Congress expressly amended the FLSA to prohibit courts from using their equitable

powers to order such restitution in cases brought under Section 217, referring specifically to the decision in *Frank Scerbo & Sons*. Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 15, 63 Stat. 910, 919-20 (1949) (amending §217 to provide, "The district courts . . . shall have jurisdiction, for cause, shown, to restrain violations of section 15: *Provided*, that no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."); H.R. Conf. Rep. No. 81-1453, at 32 (1949). 29 U.S.C. §§ 216(c), 217 (Supp. 1951). Moreover, Congress amended section 216 to allow the Wage and Hour Administrator to seek broader relief but only in specific circumstances. Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 14, 63 Stat. 910, 919 (1949) (adding 29 U.S.C. § 216(c)); H.R. Conf. Rep. No. 81-1453, at 32 (1949). Congress's reaction to FLSA illustrations that Congress can and will prevent courts from using all their equitable powers, if that is Congress's intent.

Indeed, when Congress has wanted to limit the FTC's powers, it has not hesitated to do so. For example, in the 1994 amendments to the Federal Trade Commission Act, Congress codified limitations on the FTC's ability to find acts and practices unfair. Pub. L. No. 103-312, § 9 (adding 15 U.S.C. § 45(n)); S. Rep. No. 103-130, at 12-13.

In the case of the FTC and Section 13(b), however, Congress has for many decades witnessed courts order complete justice for consumers through refunds and has never intervened, except in 1994 to

affirm courts' ability to grant redress to consumers through litigation brought by the FTC. Congress has not excluded accounting for profits from remedies the FTC can seek under Section 13(b) or that courts can provide, strongly suggesting that allowing the FTC to seek an accounting for profits against fraudsters like Scott Tucker under Section 13(b) aligns with congressional intent.

C. Section 13(b), as envisioned by Congress and interpreted by the courts, ensures complete justice for American consumers and legitimate market actors.

Congress's refusal to curtail district courts' equity powers in the original or subsequent amendments to the Federal Trade Commission Act is evident by the very text and structure of the statute, the original legislative history, and the subsequent dialogue between courts and Congress. When courts began using their equitable powers to protect vulnerable consumers in line with Congress's delegation in the Federal Trade Commission Act, Congress time and again blessed this interpretation. As such, this Court should not amend the statute to insert text, as Petitioners suggest, and should not ignore decades of dialogue between the lower courts and Congress to prevent expedient consumer redress via Section 13(b) enforcements. American consumers[3]

[3] The FTC and district courts have even protected government agencies and the judiciary. Under the backdrop of further enforcement actions, the FTC recently settled an unfair practices complaint against the online video conferencing platform, Zoom, for failing to encrypt its video to the levels it advertised to consumers. In the midst of this pandemic, many

rely on this remedial statute and its access to the full force of a court's remedial measures. Incomplete justice against deceptive practices only serves to mar the reputation of legitimate members of the free market and perpetuate harm against the American public.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals' decision should be affirmed.

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lower courts have actually turned to Zoom to ensure continued access to justice. Press Release, FTC, *FTC Requires Zoom to Enhance its Security Practices as Part of Settlement* (Nov. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/11/ftc-requires-zoom-enhance-its-security-practices-part-settlement (last accessed Dec. 6, 2020).

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