

No. 19-507

In the Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), empowers a district court to award equitable monetary relief in a civil enforcement action brought by the Federal Trade Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 748 Fed. Appx. 735. The order of the district court granting the Commission's motion for judgment (Pet. App. 45a-62a) is not published in the Federal Supplement but is available at 2017 WL 451953.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2018. A petition for rehearing was denied on June 19, 2019 (Pet. App. 63a). On September 5, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 2004 to 2008, petitioners operated a deceptive telemarketing scheme. Pet. App. 1a. Petitioners would call consumers “and tell them that they would get a ‘surprise’ if they participated in a survey.” *Id.* at 46a. “The surprise was that [petitioners] were selling the consumer magazine subscriptions.” *Ibid.* “[F]ast-talking sales representatives” would use “confusing and misleading” scripts to give the consumer the impression that he “was receiving free magazines,” when in fact “the consumer was agreeing to pay hundreds of dollars in magazine subscription fees.” *Ibid.* When consumers refused to pay, petitioners “engaged in misleading and abusive collections practices,” including “falsely tell[ing] consumers their accounts could not be canceled” and making “harassing and threatening phone calls.” *Id.* at 46a-47a. Petitioners obtained nearly \$24 million through their scheme. *Id.* at 60a.

2. In 2008, the Federal Trade Commission (FTC) brought this civil enforcement action in federal district court, charging petitioners with violating the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, and other consumer-protection laws. Pet. App. 1a-2a, 45a. The district court awarded the FTC summary judgment on liability. *Id.* at 47a.

The district court initially ordered petitioners to pay \$191,219 in equitable monetary relief. Pet. App. 2a, 47a. The FTC appealed, arguing that the court had applied the wrong legal standard in calculating the monetary award. *Id.* at 47a-48a. Petitioners did not cross-appeal, and they did not argue before the district court or the court of appeals that the district court lacked authority to award monetary relief. *Id.* at 50a. To the contrary, petitioners stated that “it was well within the District

Court's discretion to choose a monetary remedy rooted in the facts of this case." 11-17270 C.A. Doc. 22, at 35 (Apr. 13, 2012); see *id.* at 29. The court of appeals, agreeing with the FTC's contention that the district court had miscalculated the monetary award, vacated the judgment and remanded the case to the district court for a recalculation. Pet. App. 47a-48a.

3. On remand, the district court awarded the Commission approximately \$23.8 million in equitable monetary relief. Pet. App. 60a. For the first time, petitioners contested the court's authority to award monetary relief. The court held that petitioners' argument was "foreclosed by controlling authority" from the Ninth Circuit holding that "[d]istrict courts have the authority under Section 13(b) of the FTC Act to 'grant any ancillary relief necessary to accomplish complete justice, including restitution.'" *Id.* at 50a (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), cert. denied, 137 S. Ct. 624 (2017)). The court further held, in the alternative, that petitioners had "waived this argument" by failing to "appeal [the] prior order entering a monetary award against them" and by failing to "raise the issue in their briefs opposing the FTC's appeal before the Ninth Circuit." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-7a. As relevant here, the court rejected petitioners' contention that the FTC lacked the authority to obtain monetary relief in a civil enforcement action. *Id.* at 2a-3a. The court invoked Section 13(b) of the FTC Act, which provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction," 15 U.S.C. 53(b).

The court of appeals explained that it had “repeatedly held that Section 13(b) of the FTC Act grants district courts the power to impose equitable remedies, including restitution and disgorgement of unjust gains.” Pet. App. 3a. The court rejected petitioners’ request to revisit those precedents in light of this Court’s holding in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that disgorgement of money obtained in violation of federal securities laws qualified as a penalty for purposes of federal statutes of limitations. In that regard, the court of appeals noted the *Kokesh* Court’s statement that “nothing in [its] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement.” Pet. App. 3a (quoting *Kokesh*, 137 S. Ct. at 1642 n.3) (brackets omitted).

DISCUSSION

The question whether Section 13(b) of the FTC Act authorizes district courts to award equitable monetary relief has divided the courts of appeals and would ordinarily warrant this Court’s review. In this case, however, petitioners have failed to preserve the contention that district courts lack such authority. In addition, the Court recently granted the petition for a writ of certiorari in *Liu v. SEC*, cert. granted, No. 18-1501 (Nov. 1, 2019), to decide whether district courts may award disgorgement to the Securities and Exchange Commission (SEC) under analogous provisions of the securities laws. In light of petitioners’ failure to preserve their argument, the Court should deny the petition. In the alternative, in light of the overlap between this case and *Liu*, the Court should hold this petition pending the disposition of *Liu*.

1. The FTC Act prohibits “[u]nfair methods of competition” and “unfair or deceptive acts or practices” in

or affecting commerce. 15 U.S.C. 45(a)(1). The statute empowers the FTC to enforce that prohibition through administrative proceedings in which the agency may order violators to cease and desist from unlawful practices. See 15 U.S.C. 45(b). In addition, Section 13(b), which Congress added to the FTC Act in 1973, authorizes the FTC to enforce that prohibition through civil actions in federal district court. See 15 U.S.C. 53(b). As relevant here, Section 13(b) states that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” *Ibid.*

Like almost every other court to consider the issue, the Ninth Circuit has held that a district court’s authority under Section 13(b) to award a permanent injunction includes the authority to award restitution and other forms of monetary relief. See, e.g., *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), cert. denied, 137 S. Ct. 624 (2017); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982). In reaching that conclusion, the Ninth Circuit has primarily relied on this Court’s decisions in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). In those cases, the Court stated that a legislative grant of authority to “enjoin[]” statutory violations presumptively encompasses the power to order a violator “to disgorge profits * * * acquired in violation” of the relevant statutory provisions. *Porter*, 328 U.S. at 398-399. The Court also stated that, “[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief.” *Mitchell*, 361 U.S. at 291-292. The Ninth Circuit has concluded that, because Congress enacted

Section 13(b) against the backdrop of those decisions, the equitable power “to enjoin future violations” conferred by Section 13(b) “carries with it the inherent power to deprive defendants of their unjust gains from past violations.” *Commerce Planet*, 815 F.3d at 599.

In contrast, Judge O’Scannlain concluded in a special concurrence in a companion case to this one that Section 13(b) does not authorize a district court to award restitution. See *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429-437 (9th Cir. 2018), petition for cert. pending, No. 19-508 (filed Oct. 18, 2019). Judge O’Scannlain stated that “‘injunction’ means only ‘injunction’” and does not include monetary relief such as restitution. *Id.* at 430. He also concluded that his interpretation “makes good sense in the context of the ‘overall statutory scheme,’” reasoning that, “[w]hile § 13(b) empowers the Commission to stop *imminent* or *ongoing* violations, an entirely different provision of the FTC Act allows the Commission to collect monetary judgments for *past* misconduct.” *Id.* at 431 (citation omitted). Finally, Judge O’Scannlain stated that, under this Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), “restitution under § 13(b) would appear to be a penalty—not a form of equitable relief.” *AMG Capital*, 910 F.3d at 433.

2. The question whether Section 13(b) authorizes a district court to award the FTC monetary relief such as restitution has divided the courts of appeals. In addition to the Ninth Circuit, seven other courts of appeals have held that Section 13(b) authorizes a district court to award the FTC monetary remedies. See *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890-892

(4th Cir.), cert. denied, 574 U.S. 819 (2014); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1432-1434 (11th Cir. 1984) (per curiam).

The Seventh Circuit previously reached the same conclusion. See *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, cert. denied, 493 U.S. 954 (1989). Recently, however, that court overruled its prior circuit precedent and concluded that Section 13(b) does not authorize an award of restitution. See *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). The Seventh Circuit recognized that its decision “creates a circuit split.” *Id.* at 767 n.1.

3. Petitioners have forfeited their current argument that the district court lacked authority to grant the FTC monetary relief. Pet. App. 50a. As the district court explained, petitioners did not cross-appeal the court’s initial monetary award, and they did not argue on the FTC’s appeal that the court lacked the authority to award monetary relief. *Ibid.* The Ninth Circuit has “repeatedly held that [it] ‘need not * * * consider a new contention that could have been but was not raised on the prior appeal,’” and “that even parties who were satisfied with the district court’s judgment must file a cross-appeal to preserve issues for review in subsequent appeals following a remand.” *Id.* at 6a (citation omitted).

In addition, this Court recently granted the petition for a writ of certiorari in *Liu* to decide whether analogous provisions of the securities laws authorize an award of disgorgement to the SEC. The relevant statutory schemes are not identical, and the FTC’s and the

SEC's authority to seek monetary relief will not necessarily rise and fall together. Nevertheless, the question presented in this case and the question presented in *Liu* overlap. For example, the petitioners in this case describe (Pet. 3) "disgorgement in * * * SEC enforcement actions" as "analogous" to the award of monetary relief here. Conversely, the petitioners in *Liu* have argued that "[t]he issue [t]here [wa]s significant * * * not only to the statutory limits of the SEC's enforcement powers, but also to the appropriate limits on the power of other agencies," including "the FTC." Pet. at 19-20, *Liu, supra* (No. 18-1501).

In light of petitioners' failure to preserve the issue on which they seek review, this Court should deny the petition. In the alternative, in light of the overlap between this case and *Liu*, the Court should hold this petition pending the disposition of *Liu*.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the disposition of *Liu v. SEC*, cert. granted, No. 18-1501 (Nov. 1, 2019), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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