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No. 13

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

KRISTY ROSS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), this Court held that where Congress had imposed “elaborate enforcement provisions” in one statute allowing for monetary awards, Congressional authorization for mere injunctions in a different statute did not include monetary relief. Years later, this Court denied the Government’s petition for a writ of *certiorari* after the District of Columbia Circuit applied *Meghrig* by holding that an injunction section of the RICO Act did not permit a disgorgement remedy since RICO provided elaborate enforcement provisions elsewhere for such relief. See *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005).

The question presented here is whether, following *Meghrig*, the presence of elaborate enforcement provisions authorizing monetary relief under Section 19 of the FTC Act, 15 U.S.C. § 57b, precludes interpreting monetary remedies into the purely injunctive language of Section 13(b), 15 U.S.C. § 53(b).

PARTIES TO THE PROCEEDING

Kristy Ross, an individual, is the Petitioner.
The United States Federal Trade Commission is the
Respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Not applicable.

Parties and individuals who are no longer participating in this matter (having defaulted or settled) are:

INNOVATIVE MARKETING, INC., d/b/a Winsolutions FZ-LLC, d/b/a Billingnow, d/b/a Winpayment Consultancy SPC, d/b/a BillPlanet PTE Ltd., d/b/a Revenue Response Sunwell, d/b/a Globedat, d/b/a Winsecure Solutions, d/b/a Synergy Software BV, d/b/a Innovative Marketing Ukraine; BYTEHOSTING INTERNET SERVICES, LLC; JAMES RENO, d/b/a Setupahost.net, individually, and as an officer of ByteHosting Internet Services, LLC; SAM JAIN, individually and as an officer of Innovative Marketing, Inc.; DANIEL SUNDIN, d/b/a Vantage Software, d/b/a Winsoftware, Ltd., individually and as an officer of Innovative Marketing, Inc.; MARC D'SOUZA, d/b/a Web Integrated Net Solutions, individually and as an officer of Innovative Marketing, Inc.; MAURICE D'SOUZA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kristy Ross respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit, insofar as it allowed the award of monetary remedies under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. at 1a-16a) is reported at 743 F.3d 886. The findings and conclusions of the United States District Court for the District of Maryland (App. at 17a-53a) are reported at 897 F. Supp. 2d 369.

JURISDICTION

The Fourth Circuit issued its opinion and judgment on February 25, 2014. This Petition is thus timely. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 13(b) of the FTC Act states in pertinent part: "a temporary restraining order or a preliminary injunction may be granted without bond," and "[in] proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

Section 19(b) of the FTC Act states in pertinent part:

The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be

15 U.S.C. § 57b(b).

STATEMENT OF THE CASE

This case presents a rare chance to review a nonstatutory Federal Trade Commission (“FTC”) strategy that, by the FTC’s own admission, resulted in over 300 FTC complaint-filings and over \$2 billion in consent- and litigated-judgments in the past six years alone. (App. at 54a). Just last year, a former Chair of the FTC published a scholarly analysis of this strategy and criticized its lack of an appropriate legal basis.¹ Commentators have widely criticized the strategy as one that exceeds the FTC’s statutory authority and coerces settlements by individuals and businesses alike.² The strategy, therefore, dissuades those with the greatest interest in this Court’s review from seeking its elimination. Though several circuit courts have given their imprimatur to it over the past 30 years, this case is apparently the first after *Meghrig v. KFC Western*, 516 U.S. 479 (1996), to bring the FTC’s overreaching before this Court for review.

¹ J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 26 (2013) (hereafter, “Beales & Muris”) (“[Section 19’s] enactment suggests that no such [consumer redress] authority was ever granted [in Section 13(b)].”).

² Peter C. Ward, *Restitution for Consumers under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U.L. Rev. 1139, 1191-92 (1992) (“[T]he finding that section 13(b) permits an unrestricted means of restitution creates such a conflict with section 19 that an ‘inescapable

The issue is now as fully percolated as it is likely to be. The Fourth Circuit in this case found Petitioner's arguments seeking to end the FTC's overreaching "not entirely unpersuasive," yet gave them no effect out of a stated reluctance to create a circuit split. (App. at 7a-8a). With such circuit court reasoning, it becomes increasingly unlikely that any future circuit court will be willing to rein in FTC illegality and overreaching.

In short, courts have allowed the FTC to read Section 13(b) of the FTC Act to seek monetary remedies in consumer protection cases, when that Section only contains express authorization for

inference' arises that the power to grant permanent injunctions under section 13(b) does not include the power to grant redress to consumers injured by the conduct giving rise to the injunction when the requirements of section 19 have not been satisfied."); see also George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 Wash & Lee L. Rev. 1271, 1309 (2011) ("[A] defendant might readily settle for an injunction and a moderate monetary award rather than face the prospect of defending a claim for a large claim for gross disgorgement in a district court that has previously agreed to follow the FTC's aggressive theory of monetary damages in equity."); Michael Thurman & Michael L. Mallow, *"Hid[ing] Elephants in Mouseholes": the FTC's Unwarranted Attempt to Regulate the Debt-Relief-Services Industry Using Rulemaking Authority Purportedly Granted by the Telemarketing and Consumer Fraud and Abuse Prevention Act*," 14 Tex. Rev. L. & Pol. 301, 305-15 (2010).

injunctions. Injunctions already protect the public from unfair or deceptive practices. Congress put thoughtful restraints on FTC efforts to seek monetary relief. Section 19 recites those restraints, which the FTC evades each time it seeks monetary remedies under Section 13(b) alone.³

This Court's precedents, discussed below, require first discerning the statutory purpose of the enactments in question.

I. Congress Inserted Injunctions into One FTC Act Section, and Monetary Remedies into Another

Congress added Section 13(b) to the FTC Act as part of the Trans-Alaska Oil Pipeline Authorization Act of 1973. P.L. No. 93-153, 87 Stat. 592 (1973). This section was added primarily as a bandage, allowing the FTC to enjoin defendants' deceptive practices pending an administrative proceeding. See Beales & Muris, *supra* n.1, at 6-21 (containing an extensive discussion of statutory purpose and history of the FTC Act and its amendments). Prior to this, a defendant could

³ Reporting on the Fourth Circuit decision here, the National Law Journal described this dispute as "high-stakes," since the lower court's adoption of the FTC's arguments meant that "a key part in [its] 'arsenal' . . . [escaped a] potentially devastating challenge." See Jenna Greene, *Court Lets FTC Keep Its Big Gun*, Nat'l L.J. (March 3, 2014). No one can debate the national importance of this issue.

continue to injure consumers before an FTC internal "cease and desist order" proceeding concluded.

Both the legislative history and the larger statutory scheme confirm the limited purpose of this amendment. A Senate Report addressing what was to become Section 13(b) stated:

The purpose of [Section 13(b)] is to permit the Commission to bring an *immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest*. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded. [Section 13(b)] authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under Section 5

S. Rep. No. 93-151, at 30-31 (1973) (emphasis added).⁴ In the House discussion on Section 13(b), Representative Smith noted that "[i]t is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator

⁴ Although Section 13(b) was passed as part of the Trans-Alaska Pipeline Authorization Act in 1973, it was originally introduced as part of and was discussed in the legislative history of the Federal Trade Commission Improvement Act. P.L. No. 93-637, 88 Stat. 2201 (1975).

ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision.” 119 Cong. Rec. 36608-9 (Nov. 12, 1973). Furthermore, a 1974 House Report, written just after passage of Section 13(b), set out the purpose of the amendment:

Both the Nader and ABA reports recommended that the FTC be empowered to obtain preliminary injunctions against unfair or deceptive acts or practices which are unfair or deceptive to consumers. This authority was granted by Section 408 of the Alaska Pipeline Act [Section 13(b)]

H.R. Rep. No. 93-1107, at 7716 (1974).

Former FTC Chair Timothy J. Muris, in his scholarly writing, recently criticized courts for ignoring the “rich and nuanced debate that produced the 1970’s amendments to the FTC Act,” concluding that “[n]either the FTC nor Congress thought that the changes to Section 13 solved the FTC’s need for greater remedial authority, which led to the passage of Sections 19 and 5(m)(1)(B) in 1975.” Beales & Muris, *supra* n.1, at 6. He notes that “[w]hat little debate there was evinces no indication that *anyone* understood the [Section 13(b)] provision to do anything other than confer on the agency the authority to seek injunctive relief to end practices while administrative proceedings were on-going.” *Id.* at 14-15. The FTC on its own accord decided to read this interpretation into the statute years later. *Id.* at 22-28.

Chair Muris notes that “if Section 13(b) allowed the FTC to go into court to seek consumer redress routinely, the FTC could have used Section 13(b) with or without the issuance of a cease-and-desist order.” *Id.* at 17. “Tellingly, the debate over redress did not stop.” *Id.* at 16.

In 1975, only two years after the passage of Section 13(b), Congress amended the FTC Act to include Section 19.⁵ This Section permits the FTC to bring civil actions against parties only *after* it has gone through the administrative process and issued a final cease-and-desist letter. 15 U.S.C. § 57b(b). While the relief granted in Section 13(b) cases is limited to injunctions, Section 19(b) (repeated here) explicitly *includes* monetary relief:

The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons,

⁵ Both Sections 13(b) and 19(b) were originally introduced during the same session of Congress. See S. Rep. No. 93-151, at 27-31 (Origins of Section 19(b) introduced as “Consumer Redress (section 203),” and origins of Section 13(b) introduced as “Injunctions (section 210)”). Section 19(b) was passed in 1975 as part of the Federal Trade Commission Improvement Act. P.L. No. 93-637, 88 Stat. 2183 (1975). However, the fact that both Sections were originally contemplated together provides additional evidence that Sections 13(b) and 19(b) were meant to address separate issues.

partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief *may include, but shall not be limited to*, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be

15 U.S.C. § 57b(b) (emphasis added). The difference in wording between Sections 13(b) and 19(b) is clear. Section 13(b) lays out an exhaustive list limiting relief to temporary restraining orders, preliminary injunctions, and permanent injunctions. 15 U.S.C. § 53(b). Section 19(b), in contrast, provides a *non-exhaustive* list (“such relief *may include, but shall not be limited to*”) that *explicitly* permits the FTC to seek monetary relief. 15 U.S.C. § 57b(b).

“During debates in both the Senate and the House, the members of Congress who spoke on the floor again seemed to be of the view that Section 19 was giving the FTC significant, new authority.” Beales & Muris, *supra* n.1, at 19-20. Their conduct in enacting Section 19 suggests that members of Congress were ignorant of the possibility that Section 13 (which the same Congress had just recently passed) already gave the FTC broad redress authority. *Id.* at 20. This and the rest of the “legislative history, viewed in its entirety, provides the ‘inescapable inference’ that Congress did not

intend the injunctive relief provision to swallow the monetary relief provision.” *Id.* at 21.

II. The Multi-Decade Evolution of the FTC’s Strategy to Use Section 13(b) to Seek Monetary Remedies

At first, the FTC did not seek monetary remedies under Section 13(b). But in the early 1980’s, the FTC developed what it termed the “Section 13(b) Fraud Program.” *Id.* at 22-23. The Fraud Program started by convincing the Seventh and Ninth Circuits that the “preliminary injunction” language of Section 13(b) permitted an asset freeze at the outset of litigation. *Id.* However, even acquiring Section 13(b) asset freeze powers was not enough from the FTC’s perspective. The FTC perceived that it would be a “clunky, multi-step process” to use three different actions against defendants: first, a Section 13(b) asset freeze in court; second, a Section 19 proceeding in the FTC to obtain a cease-and-desist order; and third, years later, a Section 19 court action to seek consumer redress. *Id.* The FTC thus began to rely on this Court’s precedent, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), to argue for monetary remedies as part of the inherent equitable powers “presumed” to reside within the enactment of Section 13(b). *Id.* at 24-25. This use of Section 13(b) avoided the inconvenience to the FTC of respecting Congressional limitations on FTC power inserted into Section 19: a statute of limitations, a causation requirement, and a prior cease-and-desist order requirement.

But as discussed in more detail below, “*Porter* made clear that Congress need not grant the courts full equitable jurisdiction if doing so would be inconsistent with Congress’s intended statutory scheme.” *Id.* at 25. *Meghrig v. KFC Western*, also discussed below, solidifies this conclusion. Thus, the analysis required by *Porter* and its progeny ought to have required the FTC and its chosen courts to discern Congressional intent. *Id.* Yet, courts allowing the FTC its desired Section 13(b) scope “have not considered the legislative history of Section 13(b) and the 1975 amendments to the FTC Act.” *Id.* at 26. Nor have they properly considered the manifestation of Congressional intent embodied in the respective 1973 and 1975 enactments themselves.

III. The District Court Proceedings

The FTC brought this case on December 2, 2008, alleging a scheme to “exploit[] consumers’ legitimate concerns about Internet-based threats like spyware and viruses by issuing false security or privacy warnings to consumers for the sole purpose of selling software to fix the imagined problem.” (Complaint ¶15). The Complaint alleged a “common enterprise” among several corporate entities, including Innovative Marketing, Inc. (Complaint ¶7). The FTC also named Petitioner Kristy Ross, the company’s one-time Vice President of Business Development.

The Complaint alleged violations of Section 5(a) (15 U.S.C. § 45(a)), and asserted the FTC’s power as a federal agency to bring a court action solely under Section 13(b) of the FTC Act (15 U.S.C.

§ 53(b)). (Complaint ¶1; App. at 17a). The FTC had not commenced an administrative complaint within the FTC that might have led to a cease-and-desist order under Section 5(b) (15 U.S.C. § 45(b)). Thus, the FTC had done nothing that might trigger a possibility of consumer redress under Section 19.

After several persons and entities defaulted, the district court entered default judgments on February 24, 2009. Judgment was not entered against Petitioner Ross, who by then had appeared to defend and clear her name. Eventually, all co-defendants who had not defaulted settled with the FTC, except for Petitioner Ross.

The district court denied an FTC summary judgment motion and set the matter for trial. A two-day bench trial commenced on September 11, 2012. As a consequence of prior court rulings, Ms. Ross was precluded from presenting evidence of non-deceptiveness. Only a single witness testified in person, a witness who had never met or spoken to Ms. Ross. Testimony took up only eighteen of the 242 pages of trial transcript, mostly to authenticate a document for the FTC. Most of the trial consisted of opening statements and closing arguments (the other 224 pages).

On September 24, 2012, the district court issued its judgment, along with its memorandum opinion containing findings and conclusions. The district court found Ms. Ross liable under Section 13(b) for the same \$163 million in monetary remedies as in the default judgments, and issued a permanent injunction against her involvement in computer security software. (App. at 50a-53a). The FTC immediately issued a press release boasting of

the \$163 million judgment. See Press Release, Federal Trade Commission, FTC Case Results in \$163 Million Judgment against “Scareware” Marketer (Oct. 2, 2012) (Published by the FTC at <http://www.ftc.gov/opa/2012/10/winfixer.shtm>, last visited May 16, 2014). An appeal followed.

IV. The Fourth Circuit’s Decision

Ms. Ross presented five grounds for reversal, only one of which is addressed in this Petition.⁶

The Fourth Circuit agreed with Petitioner Ross that Section 13(b)’s statutory “text does not expressly authorize the award of consumer redress.” (App. at 5a). It went on, however, to analyze the scope of the court’s equitable jurisdiction in light of *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). (App. at 5a).

Unfortunately, the Fourth Circuit failed to acknowledge that *Porter* compels that unstated equity remedies do not exist when there is a “necessary and inescapable inference” that Congress did not grant the full scope of equity jurisdiction. *Porter*, 328 U.S. at 397-98. Nor did the Fourth Circuit acknowledge that *Mitchell* restated this

⁶ Petitioner Ross does not directly petition for review of the Fourth Circuit’s decision on the standard for individual monetary liability, though it, too, is entirely absent from the plain words of the FTC Act.

principle.⁷ *Mitchell*, 361 U.S. at 291. Instead, the Fourth Circuit quoted out of context *Porter*'s statement that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." (App. at 5a). Under this seemingly higher standard, the Fourth Circuit searched for a such a "command," and claimed that it found none. (App. at 5a-7a). However, *Porter* defined how such a "command" may be embodied – as a "necessary and inescapable inference" (328 U.S. at 398) revealed through statutory purpose (328 U.S. at 400).

The Fourth Circuit also claimed that Petitioner Ross failed to present "some countervailing indication sufficient to rebut the presumption" that monetary consumer redress is allowed under Section 13(b). (App. at 5a). Instead, the Fourth Circuit created a straw man to represent Petitioner Ross's argument. The Fourth Circuit labored under the misimpression that Petitioner Ross was arguing that the absence of *Porter*'s "other order" language sealed the outcome here. The Fourth Circuit thus held that the absence of "magic words" that had permitted full equitable remedies in *Porter* (namely, the text "other order" after text about injunctions) did not suffice. (App. at 6a). The problem is, that was not Petitioner Ross's argument (as shown below).

⁷ Though Petitioner Ross cited and applied *Meghrig v. KFC Western* prominently in her briefing, the Fourth Circuit ignored that decision as well.

The Fourth Circuit proceeded to declare that this Court in *Mitchell* “significantly expanded *Porter’s* holding.” (App. at 6a). As perceived by the Fourth Circuit, even though the “other order” language from *Porter* was absent in *Mitchell*, “the Court held that ordering reimbursement was nevertheless permissible under *Porter*.” (App. at 7a). In so doing, the Fourth Circuit failed to recognize how *Mitchell* actually clarified *Porter*. The Fourth Circuit decision appears to overlook that *Mitchell* turned on analysis of “statutory purpose.” Only a “statutory purpose” analysis may properly answer the question whether Congress implies nontextual equity remedies *sub silentio* when expressly mentioning only injunctive powers. *Mitchell*, 361 U.S. at 291-92.

The Fourth Circuit gave short shrift to Petitioner’s actual arguments. Without providing their details, the Fourth Circuit labeled them “a series of arguments about how the structure, history, and purpose of the Federal Trade Commission Act weigh against the conclusion that district courts have the authority to award consumer redress.” (App. at 7a). The Fourth Circuit offered no rationale for rejecting these arguments. It indeed praised them as “not entirely unpersuasive.” (App. at 7a).

The Fourth Circuit then exhibited a rare case of jurisprudential vertigo. It recognized that respecting Petitioner Ross’s arguments would “obliterate a significant part of the Commission’s remedial arsenal . . . [and] would foresake almost thirty years of federal appellate decisions and create a circuit conflict.” (App. at 8a). By ruling against her, the Fourth Circuit actually deepened a circuit

conflict far more encompassing than a single-issue conflict, by departing from the District of Columbia Circuit's *United States v. Philip Morris* decision.

This Petition does not seek to overturn the Fourth Circuit's affirmance of liability under the FTC Act, or the entry of an injunction against Petitioner Ross. The Petition instead requests review of the statutory authority of the district court to award any monetary remedy under Section 13(b).

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Blindly Followed Prior Circuit Decisions that Incorrectly Ignored the Impact of *Meghrig* and Evidence of Statutory Purpose, Each of Which Independently Forecloses Monetary Remedies under Section 13(b)

This Court has noted that “where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress passed Section 19(b) to grant the FTC powers which it did not previously have. To assume otherwise would be to accuse Congress of passing a largely superfluous amendment after two years of legislative deliberation. See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (explaining the statutory canon that courts should not “interpret[] any statutory

provision in a manner that would render another provision superfluous,” even when “Congress enacted the provisions at different times”) (internal citations omitted).

It is also an elementary principle of administrative law that agencies have only the power that Congress grants them. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power . . . is limited to the authority delegated by Congress.”).⁸ Agencies should not read authority into statutes where none exists. “[I]f we were to ‘*presume* a delegation of power’ from the absence of ‘an express *withholding* of such power, agencies would enjoy virtually limitless hegemony” *American Bar Ass’n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (quoting *Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 571 (D.C. Cir. 1994)) (*en banc*) (emphasis in original).

Despite these foundational principles, in the 40 years since its Congressional enactment, the FTC has transformed Section 13(b) from an injunctive tool into a powerful weapon for monetary remedies and business-settlement extractions, contrary to the

⁸ In the Federalist No. 14, James Madison wrote of the limited government and enumerated powers implied under our Constitution: “In the first place it is to be remembered that the general [federal] government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects. . . .” The Federalist No. 14, at 61 (James Madison) (Cambridge Univ. Press, 2003).

specific intent of Congress and the manifest statutory purpose.

The plain text of Section 13(b) is clear, and provides only for the granting of injunctive relief. The heading of Section 13(b) is “Temporary restraining orders; preliminary injunctions.” 15 U.S.C. § 53(b). Section 13(b) uses precise wording: “a *temporary restraining order* or a *preliminary injunction* may be granted without bond,” and in the final proviso, “[in] proper cases the Commission may seek, and after proper proof, the court may issue, a *permanent injunction*.” 15 U.S.C. § 53(b) (emphasis added). The fact that Congress expressly enumerated the types of relief available precludes the reading in of monetary remedies. *See, e.g., Reyes-Gaona v. North Carolina Growers Ass’n*, 250 F.3d 861, 865 (4th Cir. 2001) (“[T]he doctrine of *expressio unius est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded”); *see also Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (“courts should not add an ‘absent word’ to a statute;” “there is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”).

Here, if Congress intended the FTC to wield all equitable remedies within its 1973 enactment of Section 13(b), it knew how to do so. Instead, it used plain, limiting language. Courts have long recognized that within such plain language, injunctions,

restitution, and disgorgement are each subspecies of the larger category of equitable remedies.⁹

Even if the intent of Section 13(b) were not clear from its plain text, the legislative history provides ample evidence of its purpose as a stopgap measure. As discussed extensively above (STATEMENT OF THE CASE, Section I), and confirmed by a former Chair of the FTC and other

⁹ Countless court decisions treat the word “injunction” as separate from “restitution” or “disgorgement,” and treat them all as subspecies of “equitable remedies.” *E.g.*, *SEC v. Jasper*, 678 F.3d 1116, 1130 (9th Cir. 2012) (“Defendant notes that ‘[f]orfeiture and penalties are legal remedies, as compared to equitable remedies like restitution, disgorgement, and injunctions.’”); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-56 (3d Cir. 2003) (plaintiff established a case or controversy as to her request for injunctive relief but failed to do so with respect to requests for restitution and disgorgement); *Tourgeman v. Collins Fin. Servs.*, 2012 U.S. Dist. LEXIS 54036, at *15 (S.D. Cal. 2012) (“Plaintiff’s Reply also concedes for the first time that he is not entitled to restitution, and thus seeks only injunctive relief on behalf of the UCL class.”); *Jackson v. Truck Drivers’ Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1136 (D. Mass. 1996) (Section 502(a)(3) provides only for “equitable relief” and a suit to recover plan losses was not “a remedy traditionally viewed as ‘equitable,’ such as injunction or restitution”).

scholars,¹⁰ Congress did not enact Section 13(b) in 1973 to empower the FTC to seek monetary remedies. It granted the power to seek monetary remedies, with significant limitations and after years of legislative debate, through the 1975 enactment of Section 19.

The FTC has enjoyed success for 30 years in arguing in the lower courts that the “injunction” remedies recited in Section 13(b) invoke any and all of the court’s inherent equity powers. The first appellate decision to infer ancillary relief (wrongly) into the clear wording of Section 13(b) was *FTC v. Singer*, 668 F.2d 1107 (9th Cir. 1982). That court found that “unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.” 668 F.2d at 1112 (*quoting Porter*, 328 U.S. at 398). It further found that “unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” *Id.* (*quoting Porter*, 328 U.S. at 398). It reasoned that because Section 19 contained a “savings clause” stating that its remedies were in addition to and not in lieu of any other remedy provided under the FTC Act, and that “[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law,” it could not be inferred that Congress had explicitly acted to restrict

¹⁰ Beales & Muris, *supra* n.1, at 6-21; Ward, *supra* n.2, at 1174-94; Thurman & Mallow, *supra* n.2, at 305-15.

the full scope of equitable remedies in Section 13(b). *Id.* at 1113.

Section 13(b) may not be construed so broadly, and may not be expanded by judicial *fiat* to play the role that Section 19 plays in the overall statutory program.

First, the savings clause should be viewed as legally irrelevant. To say that a 1975 enactment should not be interpreted to “limit” a 1973 enactment merely begs the question of what the 1973 enactment meant at the time of its passage. Section 19 should not be understood to limit the FTC’s authority to seek consumer redress under Section 13(b), but rather its existence suggests that no such authority was ever granted. Beales & Muris, *supra* n.1, at 26. A savings clause such as this one merely preserves causes of action and remedies that already existed and do not conflict. *Id.*; see also, *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 123 (1916).

Second, Congress made an express grant of power to seek monetary remedies in Section 19(b) – Section 13(b)’s sister provision. The *Singer* court’s interpretation renders Section 19(b) superfluous. See *Bilski*, 130 S. Ct. at 3228-29. By comparison, this Court in *Meghrig v. KFC Western* stated that where “Congress has provided ‘elaborate enforcement provisions’ for remedying the violation of a federal statute . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies”¹¹ 516 U.S. at 487-88.

¹¹ The Court went so far as to state that “it is an elementary canon of statutory construction that

In accord with this Court's pronouncements in *Meghrig*, Sections 13(b) and 19(b) work in concert to provide such elaborate enforcement provisions. They designate the specific types of relief granted under each, and the specific set of facts that must exist in order to grant such relief. Congress did not pass each provision ignorant of the other.

The Court of Appeals for the District of Columbia Circuit has split from the FTC-friendly circuits by recognizing the limits of inferring judicial equitable power. In *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1192 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005), the court found that the equitable remedy of disgorgement went above and beyond the equitable relief provided by the Racketeer Influenced and Corrupt Organizations Act. The court acknowledged the command of *Porter* granting courts a wide equitable berth, but was careful to read the wording of the federal statute so as not to run astray of Congressional intent. *Id.* at 1197. Stating that courts may only “assume broad equitable powers when the statutory or Constitutional grant of power is equally broad,” the court noted that the relief-granting statutory language in *Porter* was broad (the court was permitted to grant “a permanent injunction, restraining order, or other order” when deciding what relief to grant under the Emergency Price Control Act). *Id.* at 1198 (emphasis added).

where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Meghrig*, 516 U.S. at 488 (quoting *TransAmerica Mortgage Advisors, Inc., v. Lewis*, 444 U.S. 11, 19 (1979)).

Because “other order[s]” were permitted, the court found in that case it was “not a stretch” to read broad equitable relief into what the statute permitted. *Id.*; accord *Renegotiation Board v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 19 (1974) (explaining that *Porter* upheld broad equitable power “not only because of the presence of the ‘other order’ language, but because of the ‘traditional equity powers of a court.’”) (emphasis added) (citing *Porter*).¹²

The language in *Porter* differs materially from the language in *Philip Morris*, and here. Nowhere in Section 13(b) does the statutory wording permit “other order,” or “other relief.” In fact, the equitable relief granted is specifically enumerated, and only includes “temporary restraining orders,” “preliminary injunctions,” and “permanent

¹² Before the Fourth Circuit did in this case, other courts have misinterpreted *Mitchell* as rendering irrelevant the “other order” language in *Porter*, contrary to this Court’s explanation of *Porter* in *Bannerkraft*, 415 U.S. at 19. *E.g.*, *FTC v. Bronson Partners LLC*, 654 F.3d 359, 365-67 (2d Cir. 2011). Even a superficial review shows that the rationale in *Porter* for permitting wide monetary relief was based on the existence of “other order” in the list of statutory authorizations. *Porter*, 328 U.S. at 399 (“An order for the recovery and restitution of illegal rents may be considered a proper ‘other order’ on either of two theories: . . .”). Often what the lower courts cite within *Porter* when granting the FTC broad powers under Section 13(b) comes from the following paragraphs containing the two theories why “other order” language implies broad equitable powers.

injunctions.” 15 U.S.C. § 53(b). In contrast, Section 19(b) resembles the language of the statute in *Porter*, in that it expressly provides that the enumerated remedies “shall include, *but shall not be limited to*,” specific types of monetary relief. 15 U.S.C. § 57b(b). In addition, the court in *Philip Morris* engaged the canons of *noscitur a sociis* and *eiusdem generis* to find that a list of explicit remedies in a statute should only be expanded, if at all, “with remedies similar in nature to those enumerated.” 396 F.3d at 1200. Stating that the remedies explicitly provided in the statute were all directed at future conduct, the court found that disgorgement, which is meant to remedy *past harm*, could not properly be inferred as an additional equitable remedy. *Id.*

The parallels to Section 13(b) are striking. As has been stated both in the legislative history and by courts alike (including the *Singer* court, which nonetheless expanded the scope of Section 13(b)’s equitable relief to include monetary relief), the purpose of Section 13(b) is to maintain the status quo, a *forward-looking* remedy. In contrast, consumer redress is backward-looking relief intended to remedy *past* consumer harm.

Finally, like other courts before it, the Fourth Circuit’s silence on *Meghrig v. KFC Western* reveals the inadequacy of past legal analyses. The Fourth Circuit did not cite or discuss *Meghrig*, where this Court unanimously held that courts lack “equitable restitution” powers under the Resource Conservation and Recovery Act (RCRA). *Id.*, 516 U.S. at 481-88 (denying past cost recovery for waste cleanup). *Meghrig* distinguished the United States’ attempt (as *amicus curiae*) to apply *Porter* to evidence

restitutionary power within remedies that *Meghrig* labeled (*id.* at 484) a “prohibitive injunction” and a “mandatory injunction.” *Id.* at 487-88. *Meghrig* compared RCRA to the Comprehensive Environmental Recovery and Cleanup Act (CERCLA), and concluded, “Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy.” *Id.* at 485.

Meghrig’s distinction from *Porter* applies with equal force here. The Court observed, “the limited remedies described in [RCRA], along with the stark differences between the language of [the RCRA injunction] section and the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend [equitable restitution] under RCRA.” *Id.* at 487. This analysis applies fully to Sections 13(b) and 19(b). Section 13(b) remedies compare with RCRA’s injunction provisions, while Section 19(b) remedies compare with CERCLA’s explicit cost recovery provisions. To reword the key part of *Meghrig* accordingly, “Congress thus demonstrated in [Section 19(b)] that it knew how to provide for [consumer redress], and that the language used to define the remedies under [Section 13(b)] does not provide that remedy.” *Id.* at 485.

II. The Issue is Fully Percolated, With No Circuit Court Having Performed a Proper Analysis of Statutory Purpose, and With No Circuit Court Having Cited or Distinguished *Meghrig*

The monetary relief issue is fully percolated, and the decision below is already being used to stretch FTC powers even more. Just this month, the Government filed a brief in this Court citing the decision below. Brief for the Respondant in Opposition, *Publishers Business Services, Inc. v. FTC* (Case No. 13-1045) (May 2014) (“Government’s PBS Brief”). The Government’s PBS Brief boasts that “the courts of appeals have uniformly held that, upon a showing by the FTC that a defendant has engaged in ‘unfair or deceptive acts or practices’ in violation of 15 U.S.C. 45, the district courts may order not only prospective injunctive relief, but also ancillary remedies, including equitable monetary relief, to achieve complete justice.” *Id.* at 9.¹³

After spending two pages fighting this issue, the Government’s PBS Brief strangely acknowledges

¹³ Contrary to the Government’s suggestion, a longstanding statutory misapplication does not immunize such an error from this Court’s review. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177, 191 (1994), *superseded on other grounds by* 15 U.S.C. § 78t(e) (1995) (overruling sixty years of allowance of a statutory cause of action because Congress had not expressly provided for that cause of action).

that “Petitioners do not dispute that equitable monetary relief can be awarded under Section 13(b).” *Id.* at 11. As Lady MacBeth “doth protest too much,” so too does the Government.

The Government’s PBS Brief at note 1 purports to catalog the decisions of the circuit courts supporting its position. None of the Government’s authorities (nor the one additional authority cited by the Fourth Circuit below) performed the proper analysis required by *Porter* and its progeny, especially *Meghrig*. This section addresses each such circuit court decision in turn:

***FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014):** As already discussed, the *Ross* decision (this case) conducted no analysis of statutory purpose of Section 13(b), and did not cite or analyze *Meghrig*, notwithstanding that decision’s centrality to Petitioner’s arguments below.

***FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011):** The *Bronson Partners* decision does not cite or acknowledge *Meghrig*. It also erroneously states that *Mitchell* “made clear” that the *Porter* Court’s significance given to the “other order” language was not, in fact, tied to the “other order” language. 654 F.3d at 366. That is wrong, since *Porter* itself states that the monetary remedy under review “may be considered a proper ‘other order’ on either of two theories,” and goes on to state what they were. *Porter*, 328 U.S. at 399; see also *supra*, n.12; *Bannercraft*, 415 U.S. at 19 (explaining “the presence of the ‘other order’ language” as one reason why *Porter* “upheld broad equitable power.”).

The *Bronson Partners* decision nonetheless contends there to be a rationale for liberating the *Porter ratio decendi* from the “other order” language, supposedly finding that rationale in *Mitchell*. 654 F.3d at 366. But *Mitchell* did no such thing. *Mitchell* instead simply found statutory purpose evidence equivalent to *Porter*’s “other order” language in the facts at bar. *Mitchell*, 361 U.S. at 291-92 (finding that “complete relief in light of the statutory purposes” that will “give effect to the policy of the legislature” must include compensation for wrongful retaliatory discharge because “fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”). *Mitchell* observed that the monetary relief in question bolstered the statutory purposes because “[w]e cannot read the Act as presenting those it sought to protect with what is little more than a Hobson’s choice.” *Id.* at 293. In its conclusion, *Mitchell* underscored that its discernment of the power to award a particular kind of limited monetary relief (reimbursement for lost wages due to wrongful retaliatory discharge) was based on “what we have found to be the statutory purposes.” *Id.* at 296.

The *Bronson Partners* decision materially miscites *Mitchell* in this regard. It contended that *Mitchell* reads *Porter* to allow wide ancillary remedies “as necessary to afford complete relief.” 654 F.2d at 366. However, *Bronson Partners* ended the quotation too soon. *Mitchell*’s actual words are “complete relief *in light of the statutory purposes*.” *Mitchell*, 361 U.S. at 292 (emphasis added). As discussed above, the manifest statutory purpose of

Section 13(b) was *solely limited* to injunctive relief, *without* further monetary remedies.

FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 14-15 (1st Cir. 2010): *Direct Marketing Concepts* is inapposite. Appellant did not challenge the availability of monetary remedies *vel non*. Thus, the First Circuit performed no analysis of whether monetary remedies are available under Section 13(b), but rather resolved disputes as to *what kind*. *Id.*

FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005): As with *Direct Marketing*, the Tenth Circuit's decision in *Freecom Communications* did not include any challenge to the availability of monetary relief under Section 13(b). If anything, it is even less apposite since there was not any dispute as to the kinds of monetary remedies available.

FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996): As with *Direct Marketing* and *Freecom Communications*, the Appellant in *Gem Merchandising* did not challenge the availability of monetary relief under Section 13(b). *Gem Merchandising* is more akin to *Direct Marketing*, since the dispute centered solely on the *type* of monetary remedies permitted. The appellant agreed that consumer redress was allowed, but argued (unsuccessfully) that disgorgement was a penalty and not redress, and that payment into the United States Treasury was disallowed. 87 F.3d at 468-69. While the Eleventh Circuit cited *Porter* in addressing the questions presented, the court did not consider or analyze the statutory purpose of Section 13(b).

***FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)**: As with *Direct Marketing*, *Freecom Communications* and *Gem Merchandising*, the Ninth Circuit’s *Pantron I* decision contains no indication that the appellant challenged the availability of monetary relief under Section 13(b) *vel non*. Instead, with all parties apparently assuming that such relief was permissible, the *Pantron I* court addressed whether the lower court erred in finding that the FTC had not proven consumer injury caused by adjudged misrepresentations. 33 F.3d at 1102.

***FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991) (cited by decision below, but not cited in Government’s PBS Brief)**: The Eighth Circuit in *Security Rare Coin* also found the availability of monetary remedies under Section 13(b), but did not consider that Section’s statutory purpose. In a decision that predated *Meghrig*, the court concluded without much analysis that “[n]othing in the wording of the statute expressly precludes ancillary equitable relief.” 931 F.2d at 1314. While *Security Rare Coin* did address the existence of Section 19, it wrongly concluded that the savings clause in Section 19(e) nullified any significance for interpreting Section 13(b): “There can be no inference from this language that Congress intended section 19 to restrict the broad equitable jurisdiction granted to the district court by section 13(b).” *Id.* at 1315. As discussed above in Argument Section I, the savings clause cannot be read this way to brush aside parts of a comprehensive regulatory program, particularly in light of the extensive legislative history leading up to the enactment of Section 19. Like every other court,

the Eighth Circuit ignored that history, as well as the statutory purpose manifested in the respective enactments themselves.

FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571 (7th Cir.), cert. denied, 493 U.S. 954 (1989): Finally, the *Amy Travel* decision also lacks any analysis of statutory purpose, and also predates this Court's *Meghrig* decision. The Seventh Circuit relied on one of its prior decisions concerning preliminary injunctions under Section 13(b) to expand dicta concerning monetary remedies to permanent injunctions under Section 13(b). 875 F.2d at 571. In its prior decision (*FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988)), the appellant did not contest the availability of ancillary equitable remedies, including an asset freeze, under Section 13(b). Rather, the appellant contested whether a preliminary injunction proceeding was allowed at all in a case filed by the FTC under the last proviso of Section 13(b), which solely mentions permanent injunctions. *World Travel*, 861 F.2d at 1025-26 (holding that the final proviso is not limited to permanent injunctions despite its text). Thus, when the Seventh Circuit based its *Amy Travel* decision on *World Travel*, it eschewed any analysis whatsoever of statutory purpose, and gave *stare decisis* effect to previously-nondisputed dictum.

III. This Case Provides an Ideal Vehicle to Stop the FTC's Abuse of Power

For the first time since before *Meghrig*,¹⁴ this case squarely presents the question of the FTC's authority to seek monetary remedies under Section 13(b). The question has fully percolated through most of the circuit courts. It is a question of exceptional importance, rarely arising before this Court because of the immense settlement pressures imposed by the very tactics that this Petition addresses. This case also provides an opportunity for this Court to resolve an inconsistency in the circuits' application of this Court's *Porter* decision.

A. The Exceptional Importance of Confining FTC Activities to Their Proper Statutory Scope

The FTC must believe it has a green light to misuse its authority since it filed over 300 complaints under Section 13(b) seeking monetary relief between 2007 and 2013. (App. at 54a). The FTC boasts over \$2 billion in actual or potential proceeds in this period from such efforts. (App. at 54a). While the frequency and monetary consequences alone of this government overreach signal the extraordinary need for review, there is more.

Ironically, it was the Fourth Circuit that warned about agency creep, observing that "government agencies have a tendency to swell, not

¹⁴ This Court denied *certiorari* on this issue in *Amy Travel*, 493 U.S. 954 (1989).

shrink, and are likely to have an expansive view of their mission.” *Brown & Williamson Tobacco v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998), *aff’d* 529 U.S. 120 (2000) (citation omitted). The federal court system has been unusually tolerant of the FTC’s expanding mandate, based in part on “weak research” by federal courts and “sympathy” for its mission. Roach, *supra* n.2, at 1309. That tolerance has now raised alarm bells from unexpected quarters.

Having received no resistance to its nonstatutory assertion of monetary remedy powers under Section 13(b), the FTC has now expanded its activities beyond the “Fraud Program” mentioned earlier. The FTC is now using its enforcement authority under Section 13(b) against well known companies who are themselves victims of fraud. This new tack appears most prominently within the FTC’s use of Section 13(b) against retailers and hotel chains victimized by data breaches, having allegedly failed to maintain reasonable and appropriate data security for consumers’ personal information.

The District of New Jersey granted the latest green light to the FTC, over the objections of twelve substantial district court *amici*, including the Chamber of Commerce of the United States of America, the American Hotel & Lodging Association, Public Citizen, the National Federation of Independent Business and TechFreedom. *See FTC v. Wyndham Worldwide Corp.*, __ F. Supp. 2d __, 2014 U.S. Dist. LEXIS 47622, at *10 n.3 (D.N.J. 2014) (denying motion to dismiss; listing *amici*). In *Wyndham*, the hotel chain and its *amici* were unable to obtain dismissal, even though the FTC lacked express statutory authority to regulate in the data

security context, and had issued neither formal regulations on the subject nor guidance adequate to provide fair notice. *Id.* It is no stretch to realize that the FTC's self-granted authority puts legitimate, victimized companies at risk of massive monetary liabilities without any protections that Section 19 should provide. Such monetary liabilities might be sought in, at best, the outer edge of the FTC's proper area of activity.¹⁵

Circuit court decisions allowing the FTC to extract monetary remedies under Section 13(b) have now been used to justify expanding equitable relief under other injunction-only statutes. For example, the Tenth Circuit cited FTC Act cases to justify injecting monetary remedies into injunction-only provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.* *United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054-63 (10th Cir. 2006) (rejecting argument that *Meghrig* limits *Porter/Mitchell*). The Sixth Circuit did the same in *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 760-62 (6th Cir. 1999). This distinct area of federal regulatory law, outside of FTC jurisdiction, would benefit from this Court's clarification of the scope of *Porter* and *Mitchell* in view of *Meghrig*.

¹⁵ Sometimes the FTC's misuse of Section 13(b) sets in motion a sequence of events leading to the target's loss of liberty, such as has happened when a former FTC target allegedly violated a coercive consent decree, triggering contempt proceedings.

B. The Rarity of Opportunities to Review This Fully Percolated Issue

The FTC structured the Fraud Program in a way that dissuades defendants from vindicating their rights through litigation. These tactics rely on the overreaching interpretation of Section 13(b) exposed in this Petition, tactics calculated to circumvent the Congressionally-devised defendant protections of Section 19. Very few FTC litigants have ever had the capacity or courage to bring this issue before this Court.

The FTC typically begins a Section 13(b) monetary remedy action by filing it under seal, obtaining a secret asset freeze in a temporary restraining order. The FTC then allows unsealing of the complaint to begin preliminary injunction proceedings. By this point, all affected persons – usually including corporate leadership who are personally named and whose personal assets are frozen – must plead for permission from the court to partially unfreeze assets, simply to have living expenses and to retain and keep counsel.¹⁶ The FTC's high settlement rate depends on placing defendants in this coerced state. As one commentator explained:

¹⁶ Richard Newman, *FTC Enforcement Actions, Asset Freezes and Personal Liability*, Performance Mktg. Insider (Apr. 27, 2014), <http://performinsider.com/2014/04/ftc-enforcement-actions-asset-freezes-and-personal-liability/> (last visited May 16, 2014).

Settled or stipulated verdicts are very common and the rate of injunctive relief appears high. From anecdotal notes in FTC reports it appears that defendants to FTC settlements and awards are often financially unable to fund the monetary award and must seek reductions from the FTC or bankruptcy protection. Personal liability for the principals is frequently in dispute. The mass action aspects of FTC litigation discourage rescission or counter-restitution in kind. It would be reasonable to surmise that a defendant might readily settle for an injunction and a moderate monetary award rather than face the prospect of defending a claim for a large claim for gross disgorgement in a district court that has previously agreed to follow the FTC's aggressive theory of monetary damages in equity.

Roach, *supra* n.2, at 1315.

In short, litigants face immense pressure not to bring the FTC's overreach before this Court. Litigants perceive the profound reluctance of the remaining circuit courts – those that might later hear the issue as one of first impression – to create a circuit conflict (as happened here). On top of that, litigants most often proceed under extreme duress just to have defenses heard that they believe to be meritorious. This Court should seize this rare opportunity for review, as it may not come again for many decades, during which time the FTC will continue to conduct its nonstatutory activities and expand them into unexpected business areas.

C. The District of Columbia Circuit Conflicts with the Fourth Circuit Approach, In that It Excludes Monetary Relief from Injunctive-Only Statutes Where the Comprehensive Statutory Framework Includes Other Statutes that Permit It

Finally, while no direct circuit conflict exists on the issue presented, the Fourth Circuit's decision conflicts with the District of Columbia Circuit on the proper application of *Porter* and its progeny. Since the conflict is more generalized than a single-issue split, it potentially reaches many different statutory regimes, not just the FTC Act. Viewed this way, the situation at hand is jurisprudentially worse than the single-issue circuit conflicts that often motivate this Court's review.

The Fourth Circuit's decision here cited *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005), as contrary authority to its holding. (App. at 6a). Namely, the District of Columbia Circuit in *Philip Morris* held that an injunction section of the RICO Act did not permit a disgorgement remedy since RICO provided elaborate enforcement provisions elsewhere for such relief. *Id.* at 1198. The District of Columbia Circuit's understanding and application of *Porter* and *Mitchell* is hopelessly conflicted with the same understanding and application by the Fourth Circuit below. As just one example, the *Philip Morris* decision gives full weight (correctly) to this Court's identification of "other order" language as critical to the *ratio decendi* in *Porter*. *Id.* Yet the Fourth Circuit held the opposite, finding (contrary to the District of

Columbia Circuit's analysis) that *Mitchell* greatly broadened *Porter's* holding and negated the significance of the "other order" language.

In its 2005 petition for a writ of *certiorari* in *Philip Morris* (Case No. 05-92) (Government's PM Petition), the Government agreed that a circuit conflict exists that transcends subject area. There, the Government urged review because *Philip Morris* was "inconsistent with numerous decisions of other courts of appeals applying the principles of *Porter* and *Mitchell* to other statutory schemes." Government's PM Petition at 19 n.6. Not surprisingly, the Government included a citation applying Section 13(b) of the FTC Act. *Id.* (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996)).¹⁷

Only confusion can result from these opposing approaches. The conflict renders unstable the extent of nontextual, ancillary equitable remedies within federal injunction statutes. This case presents the opportunity to clarify the law and eliminate the confusion.

¹⁷ The Government also named opinions interpreting Section 332(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 332(a)); the Securities Exchange Act, 15 U.S.C. 78u(d)-(e); the Motor Carrier Act of 1980; and the Commodity Exchange Act. Government's PM Petition at 19 n.6.

IV. Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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