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 OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC. IN SUPPORT OF RESPONDENT

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Interest of *Amicus Curiae*[1]

Truth in Advertising, Inc. ("TINA.org") is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, and government agencies to advance countermeasures that are effective in practice.

At the center of TINA.org's efforts is its website, www.tina.org, which aims to re-boot the consumer movement for the twenty-first century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific marketing campaigns—such as nationally advertised "Built in the USA" vans manufactured abroad and pillows and essential oils falsely marketed as able to treat chronic disease . The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates, and, when appropriate, takes up with businesses and regulatory authorities. The website is a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters

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[1] Pursuant to Rule 37.6, *amicus* affirms that no person other than *amicus* or counsel funded or made a monetary contribution intended to fund the preparation or submission of this brief, and no counsel for a party authored this brief in whole or in part. All parties have consented to the filing of *amicus* briefs.

relating to consumer fraud. TINA.org regularly draws on this expertise to advocate for consumer interests before the FTC and other governmental bodies and appear as *amicus curiae* in cases raising important questions of consumer protection law. For example, TINA.org participated as *amicus* in *FTC v. Quincy Bioscience Holding Co., Inc.*, 753 Fed.Appx. 87 (2nd Cir. 2019), which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement as clinically proven to improve memory. TINA.org also has filed briefs in numerous cases—including in this Court, *see Frank v. Poertner*, 136 S. Ct. 1453 (2016) (denying cert.)—involving proposed settlements in consumer class actions. These submissions have spotlighted economic realities particular to that setting that can yield agreements with large benefits for defendants and attorneys who negotiate them, but that slight the public interest in curbing harmful and deceptive marketing practices.

At first blush, this brief—which highlights the critical importance of court-issued monetary remedies in cases brought by the FTC and voices objections to the prohibitory-injunctions-only regime petitioners urge the Court to impose for Section 13(b) cases—might appear to be in tension with concerns TINA.org expressed in *Frank*, about settlements with large (or large-seeming) monetary relief provisions, but token forward-looking relief. There is no inconsistency. Both submissions reflect TINA.org's reality-based, "what works" approach to the false advertising problem—and commitment to regulatory and remedial measures that recognize the problem's complexity, the challenges of effectively policing for and preventing dishonest practices, and the massive damage those practices inflict unless effectively checked.

Introduction and Summary of Argument

Petitioners maintain that in granting district courts power to issue "permanent injunctions" in cases of unlawful commercial dishonesty, Congress withheld the power to include return-of-profits relief in a final decree. Thus, in a case where a federal district court finds the defendant is violating the FTC Act's bedrock prohibition against commercial deception and where traditional equitable principles support a decree that both halts the illegality and dislodges its proceeds—indeed, even in cases of brazen banditry that have long dominated courts' Section 13(b) dockets—petitioners contend Congress confined courts to "sin no more" orders.

Petitioners' proposed rule should be rejected. For centuries, Anglo-American courts have recognized that an equity court's authority to issue an injunction against ongoing unlawful, injurious activity carries with it the power to divest the wrongdoer of profits he obtained before the court caught up with him. That practice implements a universally acknowledged principle of justice that "no man should profit from his wrongdoing." More than seven decades ago, this Court, after affirming that "[n]othing is more the subject of a suit for injunctive relief than that which has been illegally acquired and which has given rise to the necessity for injunctive relief," *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946), held that courts should interpret a statutory grant of injunctive power as carrying with it this traditional "adjunct," unless Congress made a contrary intent unmistakably clear.

I. The statutory setting here and the public interests at stake attest to the soundness and continuing importance of the historical equity practices the *Porter* rule preserves and of this Court's long recognition that return-of-profits relief is an indispensable component of effective injunctive decrees.

Deceptive marketing and similar forms of commercial dishonesty are a scourge of the American economy, inflicting billions of dollars in losses to cheated consumers and distorting the efficient allocation of resources, rewarding those who hone ingenious fraudulent devices and punishing competitors focused on bringing superior products to market. Consumer fraud is a classic "market failure." And in many product markets, it is practically impossible for consumers to protect themselves against such deception.

For decades, consumer advocates and law reformers have identified—and struggled to overcome—barriers to the *legal system*'s ability to ensure that dishonesty is not a winning business model. These efforts first focused on fundamental impracticality of individual common law litigation. But in ensuing years, it has become clear that modern, more generous remedies and modes of enforcement can also fail to operate as intended.

The Section 13(b) restitution remedy at issue is a conspicuous exception to this pattern of inefficacy. This Court has recognized that enforcement regimes that do not allow for decrees that *both* halt *and* undo the unlawful behavior before the court are an exercise in futility. Return-of-profits relief, moreover, is the judicial equivalent of "light touch regulation," surgically tailored to undoing proven wrongs, while posing no threat of windfall recovery. Indeed, because relief issued under Section 13(b) may only be awarded by a court, when under traditional equitable principles, it provides further protection against unfairness. The Section 13(b) regime petitioners urge the Court to tear down also harnesses another historic hallmark of equity jurisdiction—its focus on making relief effectual, a vital priority where defendants have the means and inclination to dissipate assets and frustrate judicial remedies.

II. Petitioners do not defend the fairness of their proffered regime. They hardly could, given that every application would be a fresh violation of a fundamental principle of justice. Nor do they point to any tradition of equity courts categorically refusing to return ill-gotten gains in cases where an order prohibiting a practice was warranted—nor anywhere Congress has expressly resolved to separate these long-intertwined powers and confine a court to issuing what amounts to cease-and-desist relief. Petitioners do not seriously maintain that the ninety-third Congress resolved to do that here—claiming only that omission of the word "restitution" should or must be treated *as if* Congress expressed that intent.

Petitioners and *amici* address much briefing to a different provision of the Act—Section 19, which permits restorative relief in enforcement actions under the Commission's administrative adjudication authority. On their account, Section 19 affords protections unavailable under Section 13(b), so permitting the FTC to obtain restitution in a permanent injunction suit defies that congressional judgment. A "narrow reading" of Section 13(b), they insist, advances interests in certainty and fair notice they claim underlies that judgment.

A. On its own terms, and as supplemented with claims about connotations of "prospectivity" emanating from the term "injunction," petitioners' case for giving legal effect to the "omission" of restitutionary relief is unconvincing. And it is plainly insufficient under *Porter*. That leads petitioners and *amici* to urge dispensing with the *Porter* presumption, at least in cases where a comparable negative implication can be asserted (which is to say, *every case* it applies to), disparaging it as outmoded or even constitutionally suspect. There is nothing illegitimate about history-based canons of construction, and this one does a better job of effectuating legislative intent in this context—and of respecting the Constitution's distribution of powers—than does a generic rule treating perceived statutory omissions as purposeful.

But there is a more basic defect in petitioners' "textual" claim: Their understanding of Section 13(b) as a whole *does not*—and cannot—give comparable effect to any of the other clear expressions and salient omissions in its statutory language. Their language-based argument is thus less an invitation to follow an interpretive canon wherever it leads than to announce a "principle" good for one negative implication and one only.

B. Petitioners' legislative-judgment and anti-circumvention arguments fare no better. The premise that Section 19(a) provides a suite of substantive and procedural protections absent from Section 13(b) entails seeing limitations that Section 19's text unambiguously forecloses and overlooks protections afforded under Section 13(b) that are comparable or even stronger. And it is impossible to read Section 19(a) as setting a floor that fairness and certainty require: Section 19(e) expressly leaves in place remedies that go further and deter more than Section 13(b) ever could.

III. This Court should not credit petitioners' and *amici*'s assurances—based on the continued availability of parallel state-law remedies—that imposing their "narrow construction" of Section 13(b) would not adversely affect consumer protection. That claim ignores the central lesson of experience under consumer protection law: Remedies that are expansive on paper often prove ineffectual in practice. It takes nothing away from state enforcers to recognize that their efforts are not substitutes for those of the Commission, which has vast expertise, national jurisdiction, and global reach and is unimpeded by structural and legal complexities that challenge state-level efforts to address nationwide and global misbehavior.

ARGUMENT

I. Courts' long-recognized power to order restitution in appropriate Section 13(b) cases is vitally important to protecting consumers and the economy.

1. The central premises of modern consumer protection laws are that marketplace dishonesty is not simply deplorable in some abstract sense, but injurious—causing harms against which individual consumers and businesses cannot practically protect themselves; and that, if uncorrected, such behavior seriously impairs the efficient allocation of resources in the Nation's market economy. *See* Pitofsky, *Beyond Nader*, 90 Harv. L. Rev. 661 (1977). On this understanding, some dishonesty is ineffectual or

relatively harmless: Consumers don't expect that a random donut shop actually serves the "world's best coffee"; they can inspect and evaluate many goods for themselves; and when inexpensive, frequently purchased items fail to perform as advertised, they may switch to a competitor's product. *Id.*

But many falsehoods and misrepresentations cannot be discovered until long after purchase. When an appliance is falsely marketed to last 10 years, the consumer may not learn that claim was deceptive until it breaks down after five, and if an ordinary metal was used, not the space-age alloy claimed, the consumer may never be able to detect that deception. The same goes for goods marketed as "Made in America," products sold as organic, and health supplements claimed to contain potent, safe, or pure ingredients. Likewise, no car buyer could be expected to have detected deception when a leading automaker marketed pollution-spewing "clean diesel" vehicles, whose actual breakthrough technology was software designed to trick emissions-testing equipment. *See* https://www.propublica.org/article/how-vw-paid-25-billion-for-dieselgate-and-got-off-easy. Lying to consumers can be a highly successful business strategy.

Harms to consumers can go beyond pocket-book injury. As Judge Easterbrook's opinion in *FTC v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008), explained, when useless products are marketed with false health claims, consumers can forego therapies that might actually help. *Id.* at 863, *overruled*, *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019). (Some deceptions arguably are worse still, causing injury by concealing from consumers known dangers.)[2]

Consumers are not the only parties injured when false advertising goes unchecked. It typically costs more to produce organic goods or make products in America than it costs a dishonest competitor to affix a label saying that; it is obviously much more expensive to develop health products that are demonstrably effective in improving well-being than to lie about that.

9. These practices inflict systemic damage on the American economy. Consumer welfare is lost when money set aside to purchase needed products instead flows to sellers who lied. Bad advertising can drive out good: When consumers become suspicious of advertising claims, persuading them that an *honest* representation is true becomes more costly—a special obstacle for new market entrants, who account for a disproportionate share of innovative products, but who must rely on advertising to overcome consumer wariness. Capital is likewise misdirected to fraudulently successful businesses or toward developing detection-avoidance technologies.

In significant ways, these threats have worsened in recent years. First, the internet dramatically decreases the cost (to perpetrators) of dishonesty: Emails and online videos are essentially free, and it is cheaper to build websites that look like legitimate

[2] The Volkswagen scandal exemplifies this. Automobiles marketed to environmentally conscious consumers as win-win purchases polluted in quantities that caused thousands of additional emergency room visits. *See* Alexander & Schwandt, *The Impact of Car Pollution on Infant and Child Health: Evidence from Emissi*ons *Cheating* (revised 2019).

businesses than to fabricate brick-and-mortar operations. It has never been easier to gather data about and target vulnerable consumers. By contrast, detecting and combatting fraud have become more complex and costly: Online shoppers cannot directly inspect and compare goods before purchasing, nor complain in-person when they discover they were lied to; and it is much harder for them, and ultimately law enforcers, to unearth who perpetrated the fraud and where they are (or *were,* before the scam was exposed). Even internet-based counterstrategies can be outsmarted; on-line product reviews are not helpful if positive ones are faked by the seller or negative ones suppressed. Finally, as the many large and sophisticated frauds that triggered the 2008 financial crisis show, established national and multinational corporations are not "too big (or reputable) to lie." Dishonest practices may be simply too remunerative to resist, and behemoths that have resources to fight battles of attrition with enforcement authorities can adopt the "catch me if you can" attitude of fly-by-night grifters.

3. Because these realities are "market failures," the central determinant of whether dishonest practices can succeed—and inflict greater damage—is the efficacy of law enforcement. For two generations, courts, economists, and consumer advocates have recognized that traditional common law remedies afford remarkably ineffective consumer protection. Consumers often do not know they are victims of fraudulent marketing, and when they do, their individual injuries can be so relatively small and difficult to calculate and prove as to rule out hiring a lawyer—even before accounting for doctrinal limitations making winning a case almost impossible.

Lawsuits by competitors deprived of market share by rivals' dishonest marketing have never gained substantial traction either: Although competitors are often better positioned to detect harmful, deceptive practices, they face difficulty proving that a rival's unlawful marketing *caused* a lower-than-expected market share; in markets where dishonesty is widespread (as in cigarette sales), participants have self-interested reasons for not filing suits challenging competitors' deceptions; and the reality that litigation costs are borne by the plaintiff alone, while benefits redound to all competitors, poses a classic collective action problem (one made more difficult by the potential that *joint* efforts to sanction a misbehaving rival will raise antitrust flags, *see Fashion Originators' Guild v. FTC,* 312 U.S. 457, 468 (1941)).

Legal reforms designed to overcome these difficulties have proven unsatisfactory. Studies have found small-claims court litigation to afford few cost savings. Relaxed proof standards and enhanced individual remedies cannot overcome the basic unattractiveness of litigating complex disputes over small sums. And while class actions overcome the problem of individual consumers' inadequate incentive *to sue*, the still-modest personal stakes make them unlikely to monitor proceedings conducted in their name, leading to resolutions structured to benefit the active participants—defendants and class counsel—while doing little to rein in dishonest practices.

Similar shortcomings have afflicted the efficacy of administrative regimes, which do a better job than private enforcement of targeting the "right" defendants and avoiding opportunistic settlements.

But such regimes' efficacy in preventing unlawful practices is undermined by the historic unavailability in agency proceedings of more than "cease and desist" relief. Permitting defendants found to be engaged in unlawful activity *to retain* the fruits of the illegality not only is an affront to justice, it also ensures that public interests in eradicating such misdeeds will be thwarted. As the Court explained in *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948), in rejecting an argument that courts lacked power to order those caught violating antitrust laws to divest themselves of assets acquired in the course of that conduct:

> [A]n injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact [and] retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.

Id. 128-29.

The Court then rejected the claim that such "post hoc" relief was a judicially imposed, extra-statutory "penalt[y]":

> Like restitution [divestiture] merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public

> interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.

Id.

II. Section 13(b) is not properly read as withholding courts' historic power to order, in appropriate cases, return of profits obtained through the unlawful practices the court enjoins.

A. The text of Section 13(b) may not be construed as withholding restorative relief.

Despite petitioners' and *amici*'s appeals to fidelity to "plain language," they cannot claim that Congress *expressly* foreclosed awarding restitutionary relief when appropriate. That itself is a strike against petitioners' reading, given that Congress "knew how to" express an exclusionary intent in the FTC Act, *see* 15 U.S.C. §57b (stating that relief does not include "exemplary damages")—and the long history of awarding restitution relief in injunction suits. Nor is it claimed that the ninety-third Congress actually *made a decision* to deny federal courts the power to order wrongdoers to return ill-gotten profits in cases where, as a matter of equity and historical practice, such relief would be appropriate. Rather, petitioners propose to read the *absence* from the relevant part of Section 13(b) of an express reference to "restitution" along with the presence of "permanent injunction" *as if* Congress was presented with a menu of remedies and purposefully struck out the former. In other words, *expressio unius est exclusio alterius*. But such reliance on negative implications from statutory silence is notoriously perilous and context-dependent, and in the context of Section 13(b), it fails to yield a tenable construction.

1. First, a legislature looking for a term to implicitly convey an intent to exclude return-of-profits relief could hardly choose worse than "injunction"—except perhaps "permanent injunction," the one Section 13(b) codifies. The ordinary, legal meaning of "injunction" never has been confined "to solely prospective prohibitory relief," AFPF Br.14. Rather, an "injunction" has long been defined as "[a] court order [either] prohibiting someone from doing some specified act *or commanding someone to undo some wrong or injury*." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (quoting Black's Law Dictionary 784 (6th ed. 1990)) (emphasis added). Justice Story reversed that order, putting "requir[ing] a party *to do* a particular thing," first, 2 J. Story, Commentaries on Equity Jurisprudence § 861 (9th ed. 1866), and the 2019 edition of Black's Dictionary presents the term as an umbrella, including an "affirmative injunction" and a "reparative injunction."

Worse yet for petitioners' argument, in *California v. American Stores*, 495 U.S. 271 (1990), this Court considered—and rejected—an essentially identical thesis. Respondent claimed that the Clayton Act's text and structure established that the "injunction" authorized under Section 16 of that statute should be construed narrowly, as forbidding a divestiture remedy, which respondent described as impermissibly "post hoc," because it aimed to undo consequences of acts committed before the case got to court; in short, "divestiture is not an injunction." The Court's rejection of that argument began with its assessment of plain meaning: "[*O*]*n its face*, the simple grant of authority in § 16 to 'have injunctive relief' would seem to encompass divestiture." 495 U.S. at 281.

2 Nor do claims about the "preventative" thrust of the FTC Act or the forward-looking "focus" of injunctions, support treating "injunction" in Section 13(b) as expressing an affirmative intent to exclude historically available companions that are not "purely prospective." These claims about codifying connotations are a long way from "plain meaning interpretation." This Court recently noted that a federal statute enacted 200 years ago, authorizing relief to "*prevent* the violation of patent-rights," was interpreted from the start to support disgorgement of profits. *See Liu v. SEC*, 140 S. Ct. 1936, 1944 (2020) (emphasis added). (Indeed, the quotations cited as establishing the FTC Act's "preventative" character, Pet.Br.4-5, pre-date modern amendments providing for damages and penalties.) And had Congress meant to rule out all but "prohibitory" relief, it "knew how to" make such a distinction explicitly. Credit Bureau Br. 26. *See* 15 U.S.C. 45(l) (empowering "district courts...to grant mandatory injunctions….").

3. Notably, the statutory text actually disputed here grants courts power—in proper cases and "upon adequate proof"—to issue "*permanent* injunctions." Solely prohibitory orders likely are the norm with respect to *preliminary* injunctions—which truly are "extraordinary," in that they rest on a provisional determination rather than a violation finding, almost always before the court has heard full evidence and sometimes before the party whose conduct is restrained has been heard at all. *See* Fed. R. Civ. P. 65. *See also* Laycock, *The Death of The Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 692 (1990).

Permanent relief under Section 13(b), in contrast, may not issue until after the defendant has been fully heard on the merits, after the court has found an ongoing or imminent violation of federal law—usually one so clear as to establish liability as a matter of law, *see* p.22, *infra*—and then, only after deciding that a bare "sin no more" directive would be inadequate, contrary to priorities expressed in the statute, or otherwise inequitable. When equity courts issue *final* decrees in suits for injunction, it is much more common to include "command[s] to undo some wrong or injury"—ones that, instead of merely freezing matters at the time the court rules, address misbehavior that "could have been prevented had the defendants not [initially] outdistanced the government." *Schine*, 334 U.S. at 129.

Significantly, the provision here empowers courts to stop not only imminent violations but also an *ongoing* unlawful "practice." In such cases, what it means to be "preventative" or even "prospective" is not self-evident. In *FTC v. Southwest Sunsites*, *Inc.*, 665 F.2d 611 (5th Cir. 1982), for example, which involved a scheme to induce unsophisticated consumers to enter into installment purchase contracts for worthless land, the defrauded investors stood to forfeit any right to property *and* the money paid in unless they *continued* to make further contractual payments. The Fifth Circuit saw nothing in Section 13(b) that limited relief for the ongoing violation to an order prohibiting future fraudulent sales.

4. That the meanings of "injunction" and "restitution" are in some sense distinct, because the terms sometimes appear separately, is not the thunderbolt that petitioners' *amici* imply. That is

equally true of "divestiture." *See, e.g.*, 12 U.S.C. § 1467a (providing for "an injunction, decree,...order of divestiture, or other appropriate order"). The central question is whether such differences matter in statutory context, *i*.e., whether remedies are antagonistic or are so intertwined that one would expect an explicit grant of one to comprehend the other. Merely stating that a "[contempt penalty] is not an injunction" does not answer whether *that* remedy is included—or excluded—if absent from a provision creating an injunctive cause of action. Here, the longstanding, close, and integral connection is beyond doubt. In *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189 (1881), the Court recognized that, in patent and copyright cases, "the right to an account of profits is incident to the right to an injunction." *Id* at 194. A century later, *Tull v. United States*, 481 U.S. 412, 424 (1987), affirmed that "a court in equity may award monetary restitution as an adjunct to injunctive relief."

It is thus wrong to treat the observation that it was "beside the point" in *Nken*, that a stay order "might technically be called an injunction," 556 U.S. at 430, as announcing a general rule of narrow construction, effectively reversing *American Stores*. *Nken*'s ground for distinguishing stays from injunctions had nothing to do with the "pure prospectivity" limitation rejected in *American Stores* and renewed here, nor did *Nken* retreat from the recognition in *Root* and *Schine* of the historic connections between disgorgement, divestiture, and prohibitions as constituent parts of effective decrees. *Nken* gave the term "injunction" a narrower reading under a provision *forbidding* injunctions—thereby preserving courts' historic power to issue stays. *American Stores* gave the term an encompassing interpretation—refused to give it exclusionary effect—when, as here, it appeared in a *grant* of remedial authority.

That same contextual focus explains why the admonition against "lawyerly inventiveness," in *Great-West Life v. Knudson*, 534 U.S.204, 211 n.1, (2002), is inapposite here. That warning concerned the potential to dress in equitable garb "claim[s] for *legal relief*"—like the money due on a contract sought there, under a statute, ERISA, that uses "equitable" as a *term of limitation* on the private remedies afforded—in order to exclude individual remedies, such as damages, that can disadvantage other beneficiaries of what is essentially a common fund. As the Court highlighted in *Liu*, labeling differences among closely related or substantively identical forms of *equitable* relief are seldom statutorily significant and, as a practical matter, inescapable. *See* 140 S. Ct. at 1943.[3]

5. With varying degrees of candor, petitioners and *amici* appear to accept that their implication-based theory is insufficient under *Porter*, and instead disparage the Court's precedent as outmoded or somehow insufficiently respectful of Congress. Not so.

[3] *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), which refused to read a narrow private action provision in RCRA as authorizing the plaintiff to recover costs previously paid a third party for a prior clean-up is no more pertinent. The Court did not hold the relief unavailable because it was monetary; but because, *inter alia*, it was unrelated to "the subject matter of [that unusual] suit for injunctive relief," *Porter*, 328 U.S. at 399, "imminent" health and environmental dangers from hazardous waste. And unlike under Section 13(b), the ostensible "restitution" sought did not involve returning money defendant had obtained from the plaintiff.

Like many other canons and clear statement principles, the *Porter* rule leaves Congress in the driver's seat. Just as Congress remains free to enact a law with extraterritorial or retroactive effect or one that alters the federal-state balance, *Porter* poses no bar to legislation that withholds particular equitable powers or draws lines between ones that traditionally have operated in tandem, requiring only that Congress make clear its intent to depart from longstanding practice. Such rules *are* "traditional tools of statutory construction." *See Landgraf v. USI Film Prods*, 511 U.S. 244, 261 (1994) (refusing to treat negative implication as sufficient to overcome nonretroactivity presumption). Indeed, the *Porter* rule itself *advances* separation of powers values, by ensuring that Congress acts deliberately when altering or narrowing the Judiciary's traditional powers to adjudicate cases unquestionably within courts' jurisdiction.[4]

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[4] Despite the imprecise terminology, the concerns about "implied remedies" that petitioners invoke, appear in decisions addressing (1) private suits for (2) damages for violations of federal statutes that (3) contain no cause of action. Those features are all absent here. Creation of causes of action is not a traditional judicial power; and it risks not only misjudging congressional intent, but overriding explicit objections of the Branch invested with the "power to 'take Care that the Laws be faithfully executed,'" *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 129 (1998) (Stevens, J., concurring in judgment). And the potential that private damages will disrupt an integrated, carefully constructed statutory scheme, is far greater than with equitable restitution. The claims here involve the exercise of equitable discretion to remedy proven violations found in congressionally authorized enforcement actions, initiated by the legislatively chosen exclusive enforcement authority.

In fact, interpretive rules grounded in historic practice have much *less* Congress-disempowering potential than the ostensibly self-executing one petitioners embrace. *Porter* requires only that Congress say so when it intends to accomplish a particular, highly anomalous result. *Expressio unius*—by treating greater explicitness or specificity in different provisions and later-enacted laws as a basis for concluding that a power did not previously exist or that an earlier omission was purposeful—can alter statutory meaning after-the-fact, in ways enactors did not contemplate.

6. There is a more fundamental problem with the idea that petitioners' construction of Section 13(b) should be accepted because it rests on an especially formidable canon of construction. An argument is "rule-based" if it applies a principle *consistently* whenever similar questions arise. Petitioners' theory is not that. While marching under the banner of treating statutory omissions as purposeful, petitioners do not accept the answers that approach yields to comparable interpretive questions Section 13(b)'s text raises. And for good reason: Consistent adherence to petitioners' ostensible rule cannot produce a plausible or coherent interpretation.

To begin, Section 13(b) expressly authorizes preliminary injunctions of challenged practices but provides that such orders terminate *unless* an administrative complaint is promptly filed—in which case the provisional order stays in place until a cease-and-desist order becomes final. That should mean—on petitioners' account—that this "form of relief," Pet. Br.14, is *un*available in cases where the FTC seeks a *permanent* injunction, never initiating an administrative proceeding. But *that* would mean that a district court is without power to stop a defendant from continuing injurious—often patently unlawful—activity until final judgment. And if *that* textual answer is accepted, and the only congressionally sanctioned way to obtain effectual provisional relief is to file and pursue an administrative complaint, the *permanent* injunction remedy would be literally superfluous: The *preliminary* injunction would prevent misbehavior until a cease-and-desist order—which, like a permanent (prohibitory) injunction, is judicially enforceable—took effect. And that regime, of course, would nullify what *petitioners* present as the reason Congress provided for permanent injunctions under Section 13(b): to afford a remedy for cases where the Section 5 administrative process provides no benefit.

Likewise, even-handed application of *expressio unius* could, by extinguishing district courts' long-recognized authority to order asset freezes, frustrate what petitioners posit is the overall statutory design. They do not deny that Congress affirmatively intended for the FTC to obtain consumer redress for certain Section 5 violations, but argue that district courts may order it only through the process provided under Section 19(a). That contention is mistaken on its own terms. *See infra*. But acknowledging there are cases where monetary relief is proper requires further recognizing the need for some effectual way to stop a malefactor from dissipating the proceeds of unlawful behavior between the time he learns the FTC is on his trail and when a Section 19 decree issues. Section 13(b)'s preliminary injunction provision, however, is silent about *that* sort of relief. It speaks (only) of restraining the "practice," 15 U.S.C. § 53(b)(2), found likely to violate Section 5. This is no synthetic concern: Numerous *amici* rail against courts' exercise of this power, and maintain that extinguishing the power to "restrain[] assets for future monetary awards," Chamber Br.4, is the consequence of endorsing petitioners' position. *See* AFPF Br.7 ("Nor does [Section 13(b)] mention 'asset freezes.'"). Petitioners are understandably cagey about embracing a regime that would simultaneously render the Section 13(b) remedy superfluous *and* make their proffered substitute ineffectual against fly-by-night fraudsters. But they offer no basis for treating one particular "omission" as fatal, but these other, equally conspicuous ones, as leaving equitable powers unaffected.

B. Section 19 does not—and could not—supply a basis for interpreting Section 13(b) to withhold judicial power to award restorative relief.

The second leg of petitioners' argument is that *Section 19* requires withholding equitable monetary relief from Section 13(b) courts. That claim is an odd one out of the gate: Section 19 was enacted later, by a different Congress, and it provides, in plain words, that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." Arguments about the meaning of Section 13(b) that depend on inferences from Section 19 seem at odds with that directive. But to the extent they are permissible, petitioners' various Section 19 arguments depend on important misunderstandings of the provision's text.

1. It is simply wrong that there would be "[n]o need for" Section 19, Pet. Br.16, if Section 13(b) allows restitutionary relief. Whatever Section 13(b)'s

meaning, the FTC had no power, until Congress enacted Section 19, to obtain consumer redress in enforcement actions brought under its Section 5(b) administrative adjudication authority. Indeed, Section 19 was enacted in the aftermath of *Heater v. FTC* 503 F.2d 321 (9th Cir. 1974), a prominent decision that rejected the Commission's contention that it could order restitution under its own remedial powers. And under the long-prevailing interpretation of Section 13(b), Section 19 still relieves the Commission of the need to choose between elaborating on the meaning of "unfair and deceptive practices" and divesting wrongdoers of ill-gotten gains.

2. Petitioners propose a very different role for Section 19, as announcing Congress's judgment, rooted in fair notice and commercial certainty concerns, that restitution is impermissible absent certain "protections" and that return-of-profits relief under Section 13(b) is forbidden, because it fails to provide these. This theory, however, depends on serious misunderstandings of how Section 19(a)—and Section 13(b)—operate.

First, what the Ninth Circuit concurrence identified as Section 19(a)'s first "procedural protection[]"—the "multi-step process," whereby a Section 19 redress case "travels through an administrative hearing and appeal and then []judicial review and then a lawsuit," AFPF Br.5-6, gets things upside-down. The *protection* in that process comes at the last stage, a proceeding before an Article III judge, where the FTC is a litigant and must persuade the court that relief is warranted. The earlier stages, where the FTC has special powers, are the thing *protected against*. Indeed, one basis for the *Heater* decision was that the FTC—unlike a federal court—is not presumed to have full equitable powers, because its processes would "become suspect" as stakes rose, since the Commission acts "as both prosecutor and judge in its own [administrative] proceeding[s]," 503 F.2d at 325. *See Liu*, 140 S. Ct. at 1946-47. ("It makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings."). Congress's response to *Heater*, Section 19, did not codify a preference for administrative procedures over judicial ones—rather the opposite: It affirmed the importance of consumer redress against violators of Section 5, but also imposed the judicial check *Heater* suggested.

Section 13(b) permanent-injunction proceedings provide defendants significantly *greater* protection. Facts are found and the statute is interpreted by a court, not an agency, and decisions about relief are informed by those judicial findings. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3rd Cir. 2015). When courts encounter "ambiguity in statutes," they "generally adopt the *best* or *most reasonable* interpretation," but agencies may "adopt *any* reasonable construction," including ones "impos[ing] higher legal obligations than required by the best interpretation." *Id.* at 252. Moreover, Section 19(c)(1) directs that courts give "conclusive effect" to FTC findings in cease-and-desist proceedings. Thus, when Credit Bureau inveighs against "subjecting businesses to one-off monetary judgments based on the agency's perception of what qualifies as 'unfair or deceptive,'" Br.2-3, it is describing the mode of proceeding it insists Congress preferred, not Section 13(b).

Contrary to *amici*'s arguments, "the Act's two-part structure" does not "ensure[] that American businesses are given sufficient notice of whether their conduct violates the Act." NCLA Br.18. It is literally accurate that, under Section 19, the FTC "must obtain a final cease-and-desist order *before* it can collect a monetary judgment." Credit Bureau Br.11. Indeed, collecting restitution requires a final *court* order—as it does in Section 13(b) cases. But Section 19 relief *is not*, as this implies, confined to harms committed after a cease-and-desist order became final. Section 19(d)'s text is unambiguous that redress may be ordered for money obtained long before the Commission found a Section 5 violation, indeed years before it files an administrative complaint. 15 U.S.C. § 57b(d).

None of this is to deny that the Commission often prefers to pursue relief under Section 13(b)—or that, in practice, the cumbersome, multi-stage process does not have appeal for some defendants. There are many circumstances where the Commission has no interest particularizing the meaning of "unfair and deceptive practices," but relief is imperative. No protracted administrative proceeding is necessary to inform regulated parties that it is unlawfully deceptive to market undevelopable wasteland using pictures of beachfront lots and swaying palm trees or to certify that inexpensive coins or gems are investment-grade. *See FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996). And obtaining effective preliminary relief and relatively prompt disposition loom large when there is concern a defendant will fly-by-night or otherwise place victims' money beyond courts' remedial reach. (Such parties have a corresponding interest in postponing remedial proceedings, but that is not a "protection" Congress meant to confer.)[5]

The second alleged "procedural protection" is Section 19(d)'s statute of limitations. But as just noted, that provision *does not* limit a court to awarding three years of redress. Rather, it authorizes the FTC to pursue—and courts to order—redress for harms suffered three years before an administrative action "commenced," up through a final cease-and-desist order. That period is unpredictable and lengthy. The cease-and-desist order in *Carter Products, Inc. v. FTC*, 268 F.2d 461, 474 (9th Cir. 1959), took 16 years between complaint and finality, and despite recent FTC initiatives to impose some administrative deadlines, a process that travels through multiple levels of the federal court system is rarely speedy. Section 13(b) proceedings move more quickly; defendants will know within months of filing—sometimes much sooner—whether a restituionary remedy is seriously on the table. And while no rule limits Section 13(b) relief to a fixed number of years, were a case to arise under Section 13(b) where restitution would exceed the maximum permitted under Section 19, the limitations statute would "not apply" of its own force, but the court could consider it in fashioning a decree. *Kansas v. Nebraska*, 574 U.S. 445, 464-65 (2015) ("[b]alancing of equities

[5] The brief of SBH *amici* supplies a poignant illustration. Although TINA.org takes no position on the merits of the underlying allegations, when a business is sued as an unlawful pyramid scheme, claims by current "victims" to speak for consumer interests warrant careful scrutiny. Those individuals almost certainly stand to fare better if the business is given longer to grow than if it is shut down while they remain near the "bottom."

and hardships may lead the court to grant some equitable relief but not the full measure requested") (quoting D. Dobbs, Law of Remedies § 2.4(1), p. 92 (2d ed. 1993)).

That leaves what petitioners call Section 19(a)(2)'s "substantive limitation"—which limits disgorgement and damages awards to cases where a court finds that a "reasonable man" would know defendants' practices to be "dishonest or fraudulent." Petitioners are not wrong that that *is* a limitation; it is not impossible to imagine a situation where a cease-and-desist order would be upheld, but disgorgement relief would be denied. *Cf. Hecht Co. v. Bowles*, 321 U.S. 321, 325 (1944) (sustaining district court's denial of injunction, when there was "no doubt…of [defendant's] good faith and diligence"); 15 U.S.C. § 45(m)(1)(C) (penalty determination "shall take into account the degree of culpability… and such other matters as justice may require").

But it overstates matters to depict this as a *mens rea* or "knowledge" requirement. *See* Pet.Br.28. The statutory text makes clear that a defendant who harbors no fraudulent intent and indeed believes sincerely that his conduct is lawful under Section 5 may still be liable in damages under Section 19(a). (There surely are sellers of "ionized" bracelets and Okinawan coral who actually believe they have found a disease-curing breakthrough.) And even as an abstract matter, any gap between practices a "reasonable" person would know are "dishonest" and ones which a district court finds "deceptive" is slender.

In practice, there is likely no gap at all. Section 13(b) proceedings are governed by equitable principles, including that "a defendant's mental state is relevant to assigning an appropriate remedy." *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1496-97 (2020). As in that case, a defendant's culpable intent can be an "important consideration in determining whether an award of profits is appropriate," though "it is not inflexible precondition to recovery." *Id.*

That is what four decades of decisions under Section 13(b) indicate. Although petitioners' and *amici's* briefs abound in references to businesses who have large sums "extracted" by the FTC for practices that are "common accepted industry practices," Chamber Br.3, or for violations based on boundary-pushing interpretations of Section 5, the actual decided cases—the ones petitioners placed on the "wrong" side of the circuit conflict they asked the Court to resolve—tell a different story. They depict a rogues' gallery of defendants whose practices *every* "reasonable [person]" would recognize as "dishonest." The "substantive and procedural limitations" of Section 19(a) would not have helped the defendant in *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010), whose infomercials said "direct quotes from the New England Journal of Medicine" supported its claim that "cancer is acidosis" and would be reversed by ingesting coral pills, *id.* at 6, or the one in *FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564 (7th Cir. 1989), the circuit precedent *Credit Bureau* overruled—whose business involved peddling "vacation certificates," knowing that purchasers would pay far less booking trips without them.

Indeed, the case before the Court is no exception. Petitioners' brief strains to portray their culpability as marginal—insisting that liability was based on a bare misleading "net impression." But neither the district court nor, presumably, the jurors who convicted AMG's principal on 14 criminal counts at a 5-week trial, *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020), were persuaded that it was an honest mistake that petitioners placed highly misleading "loan terms" in the prominent "TILA [disclosure] box," but "disclosed" the reality—that borrowers who clicked "yes" were agreeing to pay an additional $675, not $90, to borrow $300—in small font and footnotes scattered on multiple pages of their website. *See* 961 F.3d at 107 (finding "overwhelming evidence that [petitioner was] aware of the unlawful nature of the activities").[6] Nor is there merit to the implication that finding deception based on a "net impression" reflects some faddish agency innovation. The Commission's second published decision, in 1916, involved thread marketed as "Kopock Silks" with the words "'is not a worm silk,' printed in minute, inconspicuous letters." *FTC v. Abbot & Co.*, 1 F.T.C. 16, 17. Any other rule would give *carte blanche* for fraud: Sugar pills could be marketed as cures for serious diseases by flashing a disclaimer in the waning moments of an infomercial that "the people in white coats were actors, not doctors." *Cf. Direct Marketing*, 621 F.3d at 12.

[6] Petitioners' *amici*'s solicitude for Section 5 defendants goes beyond AMG. PhRMA describes the settlement with Volkswagen as involving "*allegedly* misleading claims about 'clean diesel,'" Br.10 n.14 (emphasis added)—years after that corporation pleaded guilty to felony charges. https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

III. Disabling Section 13(b) enforcement would result in real and far-reaching consumer and market harm.

The adverse consequences of *accepting* the prohibitory-relief-only theory and bringing the FTC's Section 13(b) program to a halt would be real. To be sure, an FTC-disabling reading of Section 13(b) would leave in place state laws, many of which provide, unambiguously, for restitutionary remedies and other forms of relief that go further than does the FTC Act. But it does not follow that state law can do the consumer protection work the FTC program does—let alone that state law *alone* can accomplish what is currently done by both, increasingly collaboratively.

Remedies that are "robust" on paper, Credit Bureau Br.42, do not automatically translate into effective enforcement. As noted above, the basic problems that supplied the impetus for sweeping changes in consumer law in the 1960s and 1970s—that individual victims of deceptive marketing practices lack the knowledge, resources, and incentives to litigate—are stubbornly persistent. A lawsuit remains an unattractive option for a consumer who has suffered $4 in losses, even if state law might award him $8 and attorney's fees if he prevailed. Likewise, class settlements where defendants commit to creating a "$100 million fund" in exchange for a blanket release look much less impressive if the claims process is designed to minimize actual payouts. Enhancements designed to overcome *these* problems that seem sensible on their own terms can perform worse under real world conditions, where they overlap with other regimes and generate complex disputes about jurisdiction, choice of law, and class certification.

Public enforcement under state law regimes avoids many of these pitfalls, but not all. Even before the unprecedented public health crisis, state budgets were strained, and a vast array of different substantive responsibilities competed for the attention of the generalists who play a lead role in consumer protection efforts. And public enforcement does not solve the challenges of addressing misconduct that is multi-state, nationwide, or international in scope. Enforcement at the state level, particularly *effectual* enforcement, generates difficult—and litigable—questions about legislative and judicial jurisdiction, state court remedial powers, and the preclusive effects of other proceedings—not to mention protests that state regulation unduly burdens interstate commerce or poses an obstacle to federal statutory objectives.

The FTC is not similarly challenged. It has nationwide jurisdiction and an unparalleled view of the landscape. It maintains data on millions of consumer complaints and has unique statutory authority to operate across national borders. While resources for the FTC's consumer protection mission are finite, they are ample enough to do the investigations and factual development necessary to hold sophisticated corporate wrongdoers accountable for large illegalities. The Commission's mission and career staff have much more subject-matter focus than officials with primary responsibility for enforcing similar laws at the state level.

Finally, and directly contrary to petitioners' rogue-enforcer caricatures, the Commission's work is subject to substantial checks and thoughtful monitoring, including through congressional oversight, Inspector General reports, and statutorily mandated reporting obligations, and active public fora. Hundreds of pages of briefing cannot obscure the glaring reality that a rule giving the worst wrongdoers an absolute right to retain funds they took from unwitting victims will make consumers and the economy more vulnerable to harm. But it is equally true, if less obviously so, that efforts to drive the FTC off the enforcement field will only disserve the interests in fair, rational, and coherent consumer protection regulation that petitioners and *amici* ostensibly champion.

Conclusion

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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