No. 13-1426

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 57(b), entitled "Temporary restraining orders; preliminary injunctions," authorizes the Federal Trade Commission (FTC) to "bring suit in a district court of the United States to enjoin" violations of "any provision of law enforced by" the FTC. It further provides that the district court may, upon "a proper showing," grant a preliminary injunction and a permanent injunction.

The question presented is whether § 13(b) authorizes the FTC to seek, and a district court to grant, monetary remedies against those found to have violated the FTC Act.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting limited and accountable government and the rule of law.

This case concerns an issue of significant importance to WLF—whether federal courts may assert authority to provide "equitable" relief not encompassed within the express remedial authority Congress chose to grant in a comprehensive regulatory regime. WLF has appeared in numerous federal proceedings involving the scope of administrative agency and judicial authority. *See, e.g.*, *Utility Air Regulatory Group v. EPA*, __ U.S. ___, 2014 WL 2807314 (June 23, 2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

This case asks whether federal courts are limited to awarding the relief Congress has specifically provided in a carefully tailored statute, or whether they instead may supplement that relief with other equitable relief they deem appropriate. The appeals court adopted the

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondent with notice of WLF's intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

latter approach and held that the FTC may file suit to obtain, and the federal courts may award, a broad range of monetary equitable relief, including restitution and disgorgement, under § 13(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 53(b). It so held, even though that carefully tailored statute enumerates only three types of permissible relief: temporary restraining orders, preliminary injunctions, and permanent injunctions. WLF is concerned that federal agencies not be permitted to exercise powers that Congress cannot plausibly be understood to have granted.

STATEMENT OF THE CASE

Petitioner Kristy Ross was employed from 2002 to 2008 by Innovative Marketing, Inc. (IMI), an Internet-based company later determined by the FTC to have engaged in a fraudulent scheme to market worthless computer security software to more than one million consumers. WLF makes no effort to defend IMI's conduct, or that of Ross to the extent that she played a role in directing IMI's activities. WLF's sole concern is the district court judgment ordering Ross to pay $163 million in restitution.

The FTC filed suit against Ross in 2008 in U.S. District Court for the District of Maryland, alleging that her activities at IMI constituted "unfair or deceptive acts or practices" in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a). The complaint asserted jurisdiction under § 13(b) of the FTC Act and sought injunctive relief as well as restitution and disgorgement of ill-gotten funds.

Ross's principal defense was that she did not play a significant managerial role in IMI's affairs (she was 22 years old in 2002 and was associated with IMI because she was romantically involved with the firm's founder) and thus should not be held responsible for IMI's activities. Her ability to enter evidence in her own defense was hampered, however, because she chose not to testify for fear that her testimony might be used against her in criminal proceedings. Following a non-jury trial, the district court entered judgment in favor of the FTC on all counts. Pet. App. 17a-51a. It enjoined Ross from engaging in any deceptive marketing activities and it held her jointly and severally liable for $163 million in "consumer redress." *Id.* at 51a.

The Fourth Circuit affirmed. *Id.* at 1a-16a. The court quoted a single sentence from § 13(b) ("in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction") and conceded that "the statute's text does not expressly authorize the award of consumer redress." *Id.* at 4a-5a. It nonetheless concluded that "precedent dictates" that a congressional grant of power to issue injunctive relief should be presumed to include authorization to issue the full range of equitable remedies, including restitution and disgorgement. *Id.* at 5a. In support of that conclusion, the court cited two decisions of this Court: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

The Fourth Circuit included a "See also" citation to a D.C. Circuit decision that interpreted *Porter* and *Mitchell* far more narrowly than did the Fourth Circuit and that, based on its narrower interpretation,

construed a different federal statute as not authorizing monetary equitable remedies. *Id.* at 6a (citing *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir.), *cert. denied*, 546 U.S. 960 (2005)). The appeals court did not, however, attempt to distinguish *Philip Morris* or explain why it disagreed with the D.C. Circuit's understanding of *Porter* and *Mitchell*. Nor did the court include any reference to *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), a decision that includes this Court's most recent explication of *Porter* and *Mitchell*.

The appeals court stated that although it was not "entirely unpersuaded" by Ross's argument that the language and structure of the FTC Act demonstrated that Congress did not intend to permit an award of monetary remedies under § 13(b), it ultimately rejected the argument. *Id.* at 7a-8a. The court explained that its decision was based on practical considerations: "A ruling in favor of Ross would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court precedent pointing in the other direction." *Id.* at 8a. The appeals court also upheld, as not clearly erroneous, the district court's finding that Ross had sufficient "control" of IMI to hold her responsible for the company's actions. *Id.* at 16a.

SUMMARY OF ARGUMENT

The appeals court authorized relief nowhere authorized in § 13(b) of the FTC Act— restitution. The court conceded that "the statute's text does not expressly authorize the award of consumer redress." Pet. App. 5a. Instead, it argued that Congress's decision to grant courts authority to "issue a permanent

injunction" implicitly carries with it the *further* authority to afford *virtually any* form of relief that can be characterized as "equitable" in nature. *Ibid.*

But that sort of in-for-an-inch in-for-a-million-dollars reasoning is impossible to reconcile with fundamental principles of statutory construction. It is contrary to this Court's construction of very similar language in another comprehensive regulatory statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972. See *Meghrig*, 516 U.S. at 484. It is contrary to the D.C. Circuit's construction of similar language in yet another federal statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* See *Philip Morris*, 396 F.3d at 1200. It is contradicted by § 13(b)'s legislative history. It is inconsistent with the FTC Act's structure, which provides carefully calibrated remedies for proceedings under each of the Act's provisions, including restitution in court proceedings instituted under § 19, 15 U.S.C. § 57b, but *not* in court proceedings instituted (as here) under § 13(b).

Just last week, the Court's opinion in *Utility Air* emphasized the important role that courts must play in preserving the separation of powers among the three branches of government by ensuring that federal administrative agencies do not arrogate to themselves powers not conferred by Congress. The Court explained that were it to recognize an unauthorized assertion of power by EPA, "we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully executes' them." *Utility Air*, 2014 WL 2807314 at *13

(quoting U.S. Const., Art. II, § 3). Review is warranted in this case to determine whether the FTC's assertion of powers not specified in its statutory mandate constitutes a similarly severe blow to the Constitution.

Review is particularly warranted because the FTC's invocation of § 13(b) to seek monetary remedies has increased significantly during the past several years. For nearly a decade following adoption of § 13(b) in 1973, the FTC never asserted that the statute authorized it to seek any remedy other than injunctive relief. It was not until the early 1980s, in conjunction with its decision to increase its efforts to combat fraudulent marketing schemes, that the FTC first claimed that § 13(b) authorized it to seek monetary remedies for the benefit of consumers injured by such schemes. In the past several years, the Commission has vastly expanded its efforts to obtain monetary remedies, to include cases far afield from fraudulent marketing. It now routinely invokes § 13(b) in lawsuits designed to obtain monetary remedies in antitrust cases, in suits in which it alleges that a business has inadequately protected consumer information from data breaches, and in suits in which manufacturers of legitimate products are alleged to possess insufficient substantiation for their advertising claims. The recent ballooning in the Commission's assertion of broad § 13(b) powers over a wide range of enforcement activities provides an additional basis for the Court's attention.

The Petition provides an ideal vehicle for addressing the FTC's broad jurisdictional claim, a claim that has been subjected to widespread criticism by legal scholars. A final judgment has already been entered

against Ross; she has no other recourse if the Petition is denied. Section 13(b) was the sole basis for the FTC's request for, and the district court's grant of, a $163 million restitution judgment. Accordingly, if the Court agrees with Ross's interpretation of § 13(b), the monetary judgment cannot stand. Moreover, her ability to defend herself was prejudiced by the FTC's decision to proceed against her in federal court under § 13(b) rather than to seek restitution through the administrative proceedings provided for under § 19. Finally, as explained in detail in the Petition, the enormous pressure that most businesses face to settle claims asserted against them by the FTC means that it is highly unlikely that, if the Court denies the Petition, the Court will have another similar opportunity in the foreseeable future to address the legal issue so cleanly raised herein. Nor are the lower courts likely to correct their erroneous interpretation of § 13(b) on their own, as the Fourth Circuit's deference to 30 years of federal appellate decisions attests.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted to Resolve the Conflict Between the Decision Below and this Court's Decisions, and Because the Text, Structure, and History of the FTC Act Preclude Restitution Under § 13(b)

Statutory construction begins with statutory text. Courts properly presume that the "legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). "[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the

words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993).

In light of the importance of statutory text, it is surprising that the appeals court paid such scant attention to the text of § 13(b). The court based its holding that § 13(b) authorizes an award of monetary remedies not on an analysis of any portion of the statutory text but rather on its conclusion that that construction was mandated by this Court's 1946 decision in *Porter* and its 1960 decision in *Mitchell*. Pet. App. 5a-7a. But those decisions addressed entirely different statutes, and their holdings were based on statute-specific factors.

The text of § 13(b) is in considerable tension with the meaning ascribed to it by the Fourth Circuit. It provides in relevant part:

> **Temporary restraining orders; preliminary injunctions.** Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become

> final, would be in the interest of the public–
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond. . . . *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

As the Fourth Circuit conceded, the statute makes no provision for an award of monetary relief. The only forms of relief specifically referenced in § 13(b) are a temporary restraining order, a preliminary injunction, and a permanent injunction. The title of the subsection ("Temporary restraining orders; preliminary injunctions") is a further indication that Congress, in adopting § 13(b), did not intend to give the FTC the power to seek monetary relief, or to give the federal courts jurisdiction to grant such relief. Moreover, § 13(b)(2) indicates that Congress contemplated that the FTC would proceed administratively against those it concluded had violated the FTC Act, and would use § 13(b) proceedings to prevent further violations while administrative proceedings went forward.

An examination of the structure of the entire FTC Act confirms that reading of § 13(b). For example,

§ 19(b) authorizes the FTC to seek, and gives federal courts jurisdiction to grant, a broad range of remedies that are "necessary to redress injury to consumers" incurred as a result of violations of the FTC Act, including "the refund of money or return of property." However, § 19(a)(2) provides that the FTC may bring a § 19 action only after it has completed administrative proceedings and "issued a final cease and desist order." Moreover, § 19 provides defendants with several procedural protections absent from § 13(b), including a three-year statute of limitations and a provision requiring the FTC to show that the act "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." § 19(a)(2), 15 U.S.C. § 57b(a)(2). Those limitations on suits seeking restitution would be superfluous if the FTC were free to seek restitution in any action filed under § 13(b).

A further indication of the limited scope of relief authorized under § 13(b) is found in § 5(*l*), 15 U.S.C. § 45(*l*). That provision, first adopted in 1938, permits the FTC to bring an action for violation of a final order of the FTC. If a district court finds that the defendant has violated a final order, the statute explicitly grants the court authority "to grant mandatory injunctions and such *other and further equitable relief* as they deem appropriate." *Ibid.* (emphasis added). In other words, § 5(*l*) demonstrates that when Congress intended to authorize courts hearing FTC matters to grant forms of equitable relief other than injunctions (for example, restitution or disgorgement, both of which are forms of equitable relief), it knew how to do so and said so explicitly. The implication to be drawn from §§ 5(*l*)

and 19 is clear: the failure of § 13(b) to mention any form of relief other than injunctive relief is a strong indication that Congress did *not* intend § 13(b) to authorize courts to issue monetary equitable relief.

A. The Decision Below Misconstrued *Porter* and *Mitchell* and Conflicts with This Court's Decision in *Meghrig*

In arriving at its decision, the Fourth Circuit discussed none of the statutory provisions cited above. Instead, it concluded that because § 13(b) gives federal courts jurisdiction to grant injunctive relief, *Porter* and *Mitchell* require a finding that § 13(b) authorizes courts to issue all forms of equitable relief, including restitution and disgorgement. Pet. App. 5a (stating that "Congress's invocation of the federal district court's equitable jurisdiction brings with it the full power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.") (citing *Porter*, 328 U.S. at 399).

The Fourth Circuit has badly misconstrued both *Porter* and *Mitchell*, neither of which involved the FTC Act. *Porter* held that the Emergency Price Control Act (EPCA) authorized the federal government to seek restitution from landlords who collected rents in excess of the permissible maximums established during World War II. The Court opined that when a statute grants some equitable powers to a federal district court, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."

Id. at 398. *Porter* might plausibly be cited for the proposition that when a federal statute's jurisdictional grant is ambiguous, the presumption cited above can in a close case tip the balance in favor of construing the grant broadly. But *Porter* had no need to apply such a presumption because, as the Court recognized, EPCA *explicitly* provided broad equitable powers to the federal court: it expressly authorized district courts to issue a "permanent or temporary injunction, restraining order, *or other order*." *Id*. at 397 (emphasis added). Unlike the FTC Act, no "other provision of the [EPCA] expressly or impliedly preclude[d] a court from ordering restitution." *Id*. at 403. *Porter* could not be more different from this case.

The Fourth Circuit sought to downplay the importance of *Porter*'s reliance on EPCA's "other orders" language by noting that *Mitchell* adopted *Porter*'s rationale despite the absence of the "magic words" contained in EPCA. Pet. App. 6a. *Mitchell* addressed the meaning of § 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 217, which provided federal district courts with jurisdiction to "restrain violations" of the FLSA. The Fourth Circuit observed that even though § 17 did not expressly authorize courts to award reimbursement of lost wages and did not include "the 'other order' language, [*Mitchell*] held that ordering reimbursement was nonetheless permissible under the holding of *Porter*." Pet. App. 7a. The appeals court concluded therefrom that "*Mitchell* broadened *Porter*'s applicability" and that it mandated a conclusion that a statute authorizing *some* exercise of equitable powers should be construed as authorizing courts to order restitution and disgorgement in the absence of an

explicit prohibition on such powers. *Ibid*.

To the contrary, *Mitchell* never asserted that it was broadening *Porter*, and it cannot plausibly be interpreted as having done so. *Mitchell* did not arrive at its interpretation of § 17 based on any presumptions, but rather on its conclusion that the FLSA's statutory purposes could not be achieved unless employees discharged for reporting violations of the FLSA were granted the remedy of backpay relief. FLSA enforcement depended largely on "complaints received from employees," and "[e]ffective enforcement could only be expected if employees felt free to approach [government] officials with their grievances." *Mitchell*, 361 U.S. at 292. Here, in contrast, there is no plausible basis for suggesting that enforcement of the FTC Act is similarly dependent on consumer complaints, or that consumers would be deterred from registering valid complaints if restitution were unavailable under § 13(b).

Unlike in *Mitchell*, moreover, finding equitable restitution unavailable in FTC actions filed under § 13(b) would not prevent the FTC from obtaining compensation for aggrieved consumers. The FTC would still be entitled to initiate administrative proceedings and then, after entering a cease and desist order, file an action for restitution under § 19.

Any lingering ambiguity as to the meaning of *Porter* and *Mitchell* was eliminated by *Meghrig*, a 1996 decision in which the Court disavowed the notion that a federal judge should feel free to infer jurisdiction to grant whatever remedies (s)he deems appropriate to serve the ends of justice. It expressly rejected the

argument that "district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress." *Meghrig*, 516 U.S. at 487.

Meghrig held that 42 U.S.C. § 6972(a)—which "authorizes district courts '*to restrain* any person who has contributed or is contributing to the past or present handling . . . of any solid or hazardous waste'"—does not permit award of backward-looking relief, such as "equitable restitution." *Id*. at 484. "Under a plain reading of th[e] remedial scheme," the Court explained, the phrase "to restrain" authorizes courts to impose "a prohibitory injunction, *i.e.*, one that 'restrains' a responsible party from further violating RCRA." *Ibid.* The statute, the Court further held, "is not susceptible of the [contrary] interpretation," because it does not "contemplat[e] the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Ibid.* *Meghrig* effectively forecloses the claim that authority under § 13(b) "to enjoin any . . . act or practice [that violates the FTC Act]" encompasses disgorgement of ill-gotten gains or restitution for past harms.

The respondent and the United States (which argued as *amicus curiae* in support of the respondent) both asserted in *Meghrig* that federal courts retained inherent authority to provide equitable restitution for RCRA cleanup costs, citing *Porter*. Rejecting that theory, the Court stated, "[W]here Congress has provided elaborate enforcement provisions for remedying the violations of a federal statute, . . . it cannot be assumed that Congress intended to authorize

by implication additional judicial remedies." *Id.* at 487-88 (citations omitted).

Surprisingly, the appeals court never discussed *Meghrig*, despite Ross's repeated citations to the decision in her Fourth Circuit brief. The conflict between *Meghrig* and the decision below is readily apparent. The decision below is premised on the conclusion that district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them, while *Meghrig* rejected that premise. Review is warranted to resolve the conflict. especially because, as *Utility Air* recognized, preserving the Constitution's separation of powers requires courts to be vigilant in guarding against unauthorized assertions of power by federal administrative agencies of the sort alleged here.

B. The Fourth Circuit's Understanding of *Porter* and *Mitchell* Conflicts with a Decision from the D.C. Circuit

Review is also warranted to resolve the conflict between the decision below and the D.C. Circuit's decision in *Philip Morris*. The two decisions are based on sharply conflicting understandings of the meaning and continued viability of *Porter* and *Mitchell*.

Philip Morris relied on *Meghrig* to hold that 18 U.S.C. § 1964(a), which authorizes district courts to "prevent and restrain" violations of RICO, does *not* authorize district courts to order RICO violators to disgorge ill-gotten gains. The court explained that RICO's "prevent and restrain" language limits

jurisdiction to "forward-looking remedies that are aimed at future violations," while "[d]isgorgement, on the other hand, is a quintessentially backward looking remedy focused on remedying the effects of past conduct to restore the status quo." *Philip Morris*, 396 F.3d at 1198. The Court said that *Porter* and *Mitchell* were inapplicable because they were based on this Court's interpretation of the statutes at issue (the EPCA in *Porter* and the FLSA in *Mitchell*), not on any general presumption that Congress intends to authorize monetary remedies. *Id.* at 1197-99. Rejecting the contention that *Porter* mandated that "we should find disgorgement available because Congress has not taken it away," the court said that "the Supreme Court considered [and dismissed] a similar argument in *Meghrig*." *Id*. at 1199.

In sharp contrast, the decision below failed even to discuss *Meghrig* and instead cited *Porter* and *Mitchell* for the proposition "because there is no affirmative and clear restriction on the equitable powers of the district court, ordering monetary consumer redress is an appropriate equitable adjunct to the district court's injunctive power." Pet. App. 7a. Review is warranted to resolve the federal appeals courts' sharply conflicting understandings of this Court's case law.

C. Congress Has Not Acquiesced in Court Decisions Accepting the FTC's Interpretation of § 13(b)

The Fourth Circuit is correct that the federal appeals courts that have addressed the scope of § 13(b) have concluded that it grants district courts jurisdiction

to award restitution. But most of those decisions predate the Court's 1996 decision in *Meghrig*. Neither of the two recent decisions—the decision below and *FTC v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011)—included any consideration of *Meghrig*.[2]

Moreover, the Second Circuit's expansive interpretation of § 13(b) was based in substantial part on its erroneous belief that no other statutory provision provides the FTC with the means to recover ill-gotten funds from those who violate the FTC Act. The court stated that § 19 was not an alternative; it interpreted § 19 as authorizing the FTC to seek monetary relief only *after* the defendant has violated a previously issued cease-and-desist order—thereby "allowing merchants who knowingly engage in fraud at least one free shot at violating the Act." *Id.* at 367. That "one free shot" interpretation is a clear misreading of § 19; the statute is generally understood as authorizing the FTC, once it issues a cease-and-desist order, to sue to recover restitution for the acts that were the basis for the order. The FTC acknowledged that understanding of § 19 in its Fourth Circuit brief, at 57-58.[3] In light of the

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[2] In its brief below, the FTC also cited a 2010 First Circuit decision. But that decision did not address the propriety of monetary relief as a § 13(b) remedy and instead focused on how disgorgement should be calculated. *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010).

[3] Indeed, the FTC asserted that remedies available under § 19 were broader than those available under § 13(b). *Ibid.* The FTC's objection to use of § 19 has always been its cumbersomeness, not inadequate remedies. As explained by former FTC Commissioner Timothy Muris, use of § 19 to obtain restitution

shortcomings in both of the post-*Meghrig* appeals court decisions that have addressed the availability of monetary remedies under § 13(b), review by this Court is warranted, particularly in light of the conflict between those two decisions and *Philip Morris* with respect to the meaning of *Porter* and *Mitchell*.

In the court below, the FTC argued that Congress should be deemed to have acquiesced in the FTC's interpretation of § 13(b), stating that seven federal appeals courts have accepted that interpretation over the past 30 years. FTC Br. at 51. The Court has routinely rejected arguments that endorsement can be inferred from Congress's silence following lower court decisions adopting a particular interpretation of a federal statute. Indeed, in rejecting EPA's broad interpretation of its regulatory authority under the Clean Water Act, the Court said, "[A]bsent . . . *overwhelming evidence* of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality) (emphasis in original)(quoting *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 n.5 (2001)). Similarly, the Court rejected arguments that

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would require the FTC to: (1) file a § 13(b) action to obtain a preliminary injunction (to prevent the defendant from hiding his assets); (2) initiate administrative proceedings at which the FTC seeks to establish that the defendant engaged in unfair or deceptive acts or practices in violation of the FTC Act; and (3) return to federal court to obtain relief under § 19. J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act* (hereinafter, "Muris"), 79 Antitrust L.J. 1, 9 (2013).

Congress ratified court decisions interpreting Title VI of the Civil Rights Act of 1964 by enacting minor amendments to the statute without expressly disavowing those decisions. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("[W]hen, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.") (citations omitted).

Congress has not comprehensively revised the FTC Act in 40 years. It adopted a minor, venue-related revision to § 13(b) in 1994 but did not address the scope of relief under § 13(b). Under those circumstances, there is no basis for inferring that Congress acquiesced in the FTC's assertion of authority to seek monetary remedies under the statute.[4]

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[4] Still less persuasive is the FTC's citation to an isolated statement in the report of a Senate committee regarding the proposed 1994 amendments. *See* FTC Fourth Circuit Br. at 59. In an off-hand comment bearing no relationship to the proposed amendments, the report stated that § 13(b) authorizes the FTC "to obtain consumer redress." S. Rep. No. 103-130 at 16 (Aug. 24, 1993). The views expressed by several Senators in 1993 have little bearing on what Congress intended when it adopted § 13(b) in 1973. Of considerably more relevance is the legislative history *preceding* adoption of §§ 13(b) and 19. That history is set out more fully in the Petition and in Muris. It demonstrates that: (1) §§ 13(b) and 19 were considered in tandem in the early 1970s because many had concluded that the FTC lacked adequate enforcement tools; (2) § 13(b) was intended to authorize the FTC to move quickly to bring an immediate end to unfair and deceptive acts affecting commerce, while § 19 was intended to provide the FTC with a means of

II. Review Is Warranted in Light of the FTC's Significantly Increased Use of Its Alleged Restitution Authority Under § 13(b)

When the FTC in the early 1980s first began to assert the power to seek monetary penalties under § 13(b), it did so *solely* for the purpose of obtaining monetary relief from those plainly guilty of intentionally defrauding consumers. Courts that upheld the FTC's assertion of such power often did so based on their understanding that the FTC intended to use its power to combat consumer fraud. *See, e.g., FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991). Review is warranted not only because the FTC's use of § 13(b) to exact monetary remedies has increased during the past several years, but also because the FTC is now seeking to use that power with respect to conduct far afield from the consumer fraud cases that first gave rise to the Commission's assertion of expanded powers.

The FTC now routinely seeks monetary relief under § 13(b) when it files lawsuits asserting violations of the antitrust laws. For example, in a November 2013 brief opposing a motion to dismiss an action filed against a pharmaceutical company for settling patent litigation under terms the FTC deemed anticompetitive, the FTC asserted that the district court possessed jurisdiction under § 13(b) to order disgorgement of billions of dollars in unjustly earned profits. *FTC v. Cephalon*, No. 08-2141 (E.D.Pa.), Dkt. 241. Indeed, the

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obtaining monetary remedies; and (3) for many years following adoption of §§ 13(b) and 19, the FTC did not assert authority under § 13(b) to seek monetary remedies. *See* Muris, *supra*, at 1-11.

FTC has been undertaking a jihad in recent years—thus far with quite limited success—against drug companies that entered into so-called "reverse-payment" patent litigation settlements, and has sought to obtain monetary relief under § 13(b) against settling parties. One such FTC lawsuit recently came before the Court, albeit the propriety of monetary remedies sought by the FTC was not the question presented. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

The FTC also regularly seeks monetary remedies under § 13(b) in cases alleging that businesses engaged in unfair and deceptive trade practices by failing to adopt internal policies sufficient to ensure the security of personal data received from consumers. *See, e.g., FTC v. Wyndham Worldwide*, __ F. Supp. 2d __, 2014 WL 134 9019 (D.N.J. April 7, 2014) (restitution sought for data breaches involving hotel reservation information); *FTC v. Lifelock, Inc.*, No. 10-530 (D.Ariz.) (defendant ordered to pay $35,000,000 in restitution for failing to "employ reasonable and appropriate measures to protect personal information"). It also regularly seeks § 13(b) monetary remedies against companies that sell legitimate products but whose advertising includes claims that the FTC alleges are inadequately substantiated. *See, e.g., FTC v. Lights of America, Inc.*, No. 10-1333 (C.D. Cal., Jan. 15, 2014) ($21 million award for less-than-fully-substantiated claims regarding light output of advertised light bulbs); *FTC v. Sketchers U.S.A., Inc.*, No. 12-1214 (N.D. Ohio 2012) ($40 million restitution award for unsubstantiated advertising claims that footwear was good for, *inter alia*, toning and strengthening lower-body muscles); *FTC v. Reebok Int'l Ltd.*, No. 11-2046 (N.D. Ohio 2011) ($25 million

restitution award for similar unsubstantiated advertising claims for footwear).

III. The Petition Provides an Ideal Vehicle for Addressing the Scope of Remedies Available Under § 13(b)

Review is also warranted because it provides an ideal vehicle for addressing the jurisdiction of federal courts to grant monetary remedies in § 13(b) actions, an issue that has been percolating in the lower courts for 30 years. The issue is cleanly raised by the Petition: § 13(b) was the sole basis of the FTC's request for, and the district court's grant of, a $163 million restitution judgment. Accordingly, if the Court agrees with Ross's interpretation of § 13(b), the monetary judgment cannot stand. And the issue is outcome determinative: Ross will have no alternative means of challenging the monetary award if the Court decides the issue against her.

Moreover, Ross's request for review should not be ignored based on a no-harm-no-foul rationale; *i.e.,* that the result would have been the same if the FTC had proceeded against her administratively, obtained a final cease-and desist order, and then sought restitution under § 19. To the contrary, Ross was severely prejudiced by the FTC's decision to proceed against her under § 13(b). The FTC initiated proceedings against Ross in 2008. Had it proceeded administratively, § 19(d)'s three-year statute of limitations would have barred any award for conduct pre-dating 2005; but under § 13(b), the FTC sought and obtained restitution dating back to 2002. Moreover, because the suit against

Ross proceeded under § 13(b), she was unable to require the FTC to meet the standard of proof established by § 19(a): a showing that "the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." Finally, Ross's ability to submit evidence at trial was severely hampered by her very reasonable conclusion that she risked criminal charges if she testified. *See, e.g.,* Pet. App. 36a. Introducing exculpatory evidence would have been far easier for Ross in an administrative proceeding. *See, e.g.,* 16 C.F.R. § 3.43(b) (hearsay evidence is admissible in FTC proceedings provided that "it is relevant, material, and bears satisfactory indicia of reliability.").

Finally, although the FTC regularly asserts an expansive view of its § 13(b) powers in court proceedings, the scope-of-remedies issue is unlikely to again reach the Court in the foreseeable future given the unwillingness of most businesses to challenge the FTC's authority. As the Petition explained, companies with continuing operations cannot afford the adverse publicity and potentially bankrupting consequences of a trial and/or adverse verdict in an FTC lawsuit. Accordingly, virtually all § 13(b) actions are settled soon after they are filed. WLF is unaware of any other pending case that could serve as an alternative vehicle for addressing the issue—an issue that, as the Petition well documents, has raised concerns among numerous legal scholars, including a former FTC Commissioner. And as the Court recently emphasized in *Utility Air*, issues (as here) involving alleged efforts by federal agencies to assert power not delegated to them by Congress are particularly deserving of the Court's

attention because allowing Executive Branch overreach to go unchecked can strike a "severe blow" to separation-of-powers principles.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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