

No. 19-508

In the Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

<i>FTC v. Amy Travel Serv., Inc.</i> , 875 F.2d 564 (7th Cir.), cert. denied, 493 U.S. 954 (1989)	6
<i>FTC v. Bronson Partners, LLC</i> , 654 F.3d 359 (2d Cir. 2011)	6
<i>FTC v. Commerce Planet, Inc.</i> , 815 F.3d 593 (9th Cir. 2016), cert. denied, 137 S. Ct. 624 (2017)	3, 4, 5
<i>FTC v. Credit Bureau Ctr., LLC</i> , 937 F.3d 764 (7th Cir. 2019).....	6
<i>FTC v. Direct Mktg. Concepts, Inc.</i> , 624 F.3d 1 (1st Cir. 2010)	6
<i>FTC v. Freecom Commc’ns, Inc.</i> , 401 F.3d 1192 (10th Cir. 2005).....	6
<i>FTC v. H. N. Singer, Inc.</i> , 668 F.2d 1107 (9th Cir. 1982).....	4
<i>FTC v. Ross</i> , 743 F.3d 886 (4th Cir.), cert. denied, 574 U.S. 819 (2014).....	6
<i>FTC v. Security Rare Coin & Bullion Corp.</i> , 931 F.2d 1312 (8th Cir. 1991)	6
<i>FTC v. United States Oil & Gas Corp.</i> , 748 F.2d 1431 (11th Cir. 1984)	6
<i>Kokesh v. SEC</i> , 137 S. Ct. 1635 (2017)	3
<i>Mitchell v. Robert DeMario Jewelry, Inc.</i> , 361 U.S. 288 (1960).....	5

IV

Case—Continued:	Page
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946).....	5

Statutes:

Federal Trade Commission Act,	
15 U.S.C. 41 <i>et seq.</i>	2
15 U.S.C. 45(a)(1).....	4
15 U.S.C. 45(b).....	4
15 U.S.C. 53(b) (§ 13(b)).....	2, 3, 4, 5, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 910 F.3d 417. The order of the district court (Pet. App. 41a-73a) is reported at 29 F. Supp. 3d 1338. The amended order of the district court (Pet. App. 74a-116a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2018. A petition for rehearing was denied on June 20, 2019 (Pet. App. 118a-119a). On September 3, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners engaged in a large-scale deceptive-lending scheme involving short-term, high-interest payday loans to consumers. Pet. App. 4a-5a. The loan documents contained “large prominent print” informing the borrower that he would incur only a single finance charge. *Id.* at 61a. But terms that were “scattered throughout the fine print * * * create[d] a process under which” the loan would automatically be renewed, and “multiple finance charges w[ould] be automatically incurred,” unless the borrower took “affirmative action” to opt out. *Id.* at 61a; see *id.* at 68a. For example, the loan documents “g[ave] the impression that a \$300.00 loan * * * w[ould] only cost borrowers \$90.00, when in fact, unless borrowers read the fine print and t[ook] the necessary steps to opt out of the renewal plan, such a loan w[ould] incur \$675.00 in fees.” *Id.* at 61a. Between 2008 and 2012, petitioners made more than 5 million loans, obtaining approximately \$1.27 billion in unjust renewal finance charges. *Id.* at 4a-5a, 15a.

2. In 2012, the Federal Trade Commission (FTC) brought this civil enforcement action in federal district court, charging petitioners with violating the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, and other consumer-protection laws. Pet. App. 5a-6a. The district court awarded the FTC summary judgment on liability. *Id.* at 41a-73a. As relevant here, the court ordered petitioner Scott Tucker to provide restitution for \$1.27 billion in consumer losses. *Id.* at 74a-116a.

3. The court of appeals affirmed. Pet. App. 1a-40a. As relevant here, the court rejected petitioners’ contention that the FTC lacked the authority to obtain monetary relief in a civil enforcement action. *Id.* at 15a-17a. The court invoked Section 13(b) of the FTC Act, which

states that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction,” 15 U.S.C. 53(b). The court explained that it had “repeatedly held that § 13 ‘empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.’” Pet. App. 15a (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), cert. denied, 137 S. Ct. 624 (2017)). The court also rejected petitioners’ request to revisit those precedents in light of this Court’s holding in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that disgorgement of money obtained in violation of federal securities laws qualified as a penalty for purposes of federal statutes of limitations. The court of appeals noted the *Kokesh* Court’s statement that “[n]othing in [its] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement.” Pet. App. 16a (quoting *Kokesh*, 137 S. Ct. at 1642 n.3).

Judge O’Scannlain, joined by Judge Bea, specially concurred to urge the court of appeals to rehear the case en banc and to hold that Section 13(b) does not authorize monetary relief. Pet. App. 23a-37a. In Judge O’Scannlain’s view, Section 13(b)’s authorization to issue an “injunction” “anticipates that a court may award relief to prevent an *ongoing* or *imminent* harm—but not to deprive a defendant of ‘unjust gains from *past* violations.’” *Id.* at 24a (citation omitted). Judge Bea also specially concurred, expressing the view that the lawfulness of petitioners’ practices raised an “inherently factual” issue that was ill-suited for resolution at summary judgment. *Id.* at 38a; see *id.* at 38a-40a.

The court of appeals denied rehearing en banc with no judge requesting a vote. See Pet. App. 118a-119a.

DISCUSSION

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

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

Like almost every other court to consider the issue, the Ninth Circuit has held that a district court's authority under Section 13(b) to award a permanent injunction includes the authority to award restitution and other forms of monetary relief. See, e.g., *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), cert. denied, 137 S. Ct. 624 (2017); *FTC v. H. N. Singer, Inc.*,

668 F.2d 1107, 1112 (9th Cir. 1982). In reaching that conclusion, the Ninth Circuit has primarily relied on this Court's decisions in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). In those cases, the Court stated that a legislative grant of authority to "enjoin[]" statutory violations presumptively encompasses the power to order a violator "to disgorge profits * * * acquired in violation" of the relevant statutory provisions. *Porter*, 328 U.S. at 398-399. The Court also stated that, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief." *Mitchell*, 361 U.S. at 291-292. The Ninth Circuit has concluded that, because Congress enacted Section 13(b) against the backdrop of those decisions, the equitable power "to enjoin future violations" conferred by Section 13(b) "carries with it the inherent power to deprive defendants of their unjust gains from past violations." *Commerce Planet*, 815 F.3d at 599.

In contrast, Judge O'Scannlain concluded in his special concurrence below that Section 13(b) does not authorize a district court to award restitution. See Pet. App. 23a-37a. Judge O'Scannlain stated that "'injunction' means only 'injunction'" and does not include monetary relief such as restitution. *Id.* at 24a. He also concluded that his interpretation "makes good sense in the context of the 'overall statutory scheme,'" reasoning that, "[w]hile § 13(b) empowers the Commission to stop *imminent* or *ongoing* violations, an entirely different provision of the FTC Act allows the Commission to collect monetary judgments for *past* misconduct." *Id.* at 26a (citation omitted). Finally, Judge O'Scannlain

stated that, under this Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), “restitution under § 13(b) would appear to be a penalty—not a form of equitable relief.” Pet. App. at 30a.

2. The question whether Section 13(b) authorizes a district court to award the FTC monetary relief such as restitution has divided the courts of appeals. In addition to the Ninth Circuit, seven other courts of appeals have held that Section 13(b) authorizes a district court to award the FTC monetary remedies. See *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir.), cert. denied, 574 U.S. 819 (2014); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1432-1434 (11th Cir. 1984) (per curiam).

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

3. This Court recently granted the petition for a writ of certiorari in *Liu* to decide whether analogous provisions of the securities laws authorize an award of disgorgement to the SEC. The relevant statutory schemes are not identical, and the FTC’s and the SEC’s authority to seek monetary relief will not necessarily rise and

fall together. Nevertheless, the question presented in this case and the question presented in *Liu* overlap. For example, the petitioners in this case state (Pet. 32) that “[t]he importance of the question presented * * * extends beyond the [FTC] and the FTC Act”; that “[o]ther federal agencies rely on their statutory authority to obtain injunctive relief to pursue * * * restitution, disgorgement, and other forms of monetary relief”; and that this case could “shed light on the propriety of a number of other federal agencies’ enforcement regimes.” Conversely, the petitioners in *Liu* have argued that “[t]he issue [t]here [wa]s significant * * * not only to the statutory limits of the SEC’s enforcement powers, but also to the appropriate limits on the power of other agencies,” including “the FTC.” Pet. at 19-20, *Liu, supra* (No. 18-1501). The Court therefore should hold this petition pending the disposition of *Liu*.

CONCLUSION

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

Respectfully submitted.

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DECEMBER 2019