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Is This the End of FTC Restitution and Disgorgement Under Section 13(b)?

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IS THIS THE END OF FTC RESTITUTION AND DISGORGEMENT UNDER SECTION 13(B)?

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ABSTRACT

This note argues that the Seventh Circuit's deviation from years of precedent in *FTC v. Credit Bureau* is an improper interpretation of Supreme Court precedent. For decades, Section 13(b) has allowed the Federal Trade Commission to be able to pursue equitable monetary orders in the form of restitution and disgorgement as ancillary relief to permanent injunctions. The Seventh Circuit put an abrupt end to these powers relying on Supreme Court precedent that has never been used in this manner. If this circuit split continues to exist, it will create a great disparity in the Federal

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Trade Commission's ability to bring enforcement actions against those who have wronged consumers and potentially impacts other federal agencies. This Seventh Circuit precedent must be reversed in order to preserve fairness in the marketplace and ensure consumers can be quickly and fully redressed when wrongful acts are committed.

I. INTRODUCTION

The Federal Trade Commission (FTC) is backed into a corner in which they must choose whether they want to stop a wrongful actor immediately and forgo monetary relief or give the wrongful actor the ability to continue their actions through administrative proceedings in hopes they can put a stop to it and redress those who were wrong. The question in this note is whether, given significant developments in the Supreme Court concerning federal agency remedial authority, the courts should break with wide and longstanding precedent that construed the FTC's injunctive authority to authorize restitution and disgorgement.[1] Circuit courts are now split on this issue, as the Seventh Circuit recently broke with every other circuit when reaching this question in holding that the FTC lacks authority to pursue restitution and disgorgement.

In August 2019, the Seventh Circuit Court of Appeals put a stop to the FTC's ability to pursue equitable monetary orders under Section 13(b) of the Federal Trade Commission Act (the Act), overruling thirty years of circuit precedent without an en banc hearing.[2] This decision relied on Supreme Court precedent from *Meghrig v. Kentucky Fried Chicken Western*.[3] This Supreme Court case from 1996 examined whether a citizen suit under the Resource Conservation and Recovery Act allowed for restitution for prior cleanup costs when the statute stated that there

[1] 15 U.S.C § 53(b) (2020)

[2] *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019); *cf. id.* at 786, 797 (Wood, C.J., dissenting) (noting Circuit Rule 40(e), requiring en banc review to overturn circuit precedent; "The court's refusal to rehear this case en banc has, I fear, led us into error.").

[3] *Meghrig v. KFC W., Inc*., 116 S. Ct. 1251 (1996).

needed to be imminent danger to the environment and individuals.[4] Ultimately, the Supreme Court held that because the language of the statute required an imminent risk of harm at the time the suit was filed and the statute provided an "elaborate enforcement provision," the statute could not be interpreted to allow Meghrig to recover restitution from Kentucky Fried Chicken Western for costs previously incurred to restore the property.[5] The Seventh Circuit, in its opinion, was attached to the idea that there could not be implied powers if a statute already contained an elaborate enforcement provision - ignoring that this precedent had only been applied by the Supreme Court in cases involving citizen suits for environmental protections.[6] If this Seventh Circuit position becomes law, the FTC's, and likely other federal agencies', powers would be vastly weakened, and their ability to protect consumers would dwindle.

Section 13(b) of the Act allows for the FTC to pursue preliminary and permanent injunctions against any party that violates a law the FTC has the authority to enforce.[7] For decades, the FTC pursued equitable monetary orders and injunctive relief in their actions brought under Section 13(b).[8] This power is not explicitly stated within the statute, but has been provided through case law to the FTC in order to ensure it is fully capable of exercising its powers to

[4] *Id.* at 1252.

[5] *Id.* at 1256.

[6] *Middlesex Cty. Sewerage Auth. v. Nat'l. Sea Clammers Ass'n*, 101 S. Ct. 2615, 2622 (1981) (Precedent cited by Supreme Court in *Meghrig* stating that "in recent decisions concerning the recurring question whether Congress intended to create a private right of action under a federal statute without saying so explicitly. The key to the inquiry is the intent of the Legislature.").

[7] 15 U.S.C 53(b) (2020).

[8] *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982). This is the first case where the FTC was permitted to use equitable monetary orders under 13(b). The Court states "Because the authority to issue a preliminary injunction rests upon the authority to give final relief, the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy.".

protect consumers.[9] This is a crucial power because without it, the FTC's authority under Section 13(b) is purely prohibitory and prospective, and can neither fully deter bad conduct nor redress consumers.

When the FTC pursues equitable monetary orders, it ordinarily takes the form of restitution,[10] which seeks to make those who were harmed whole again by taking money from the wrongdoer and returning it to the victims. Equitable monetary orders may also take the form of disgorgement,[11] which looks to deter wrongdoers by stripping them of any profits they have received and placing the funds into the U.S. Treasury.[12] The main difference between these two forms of relief is their focus. The goal of restitution is to return the ill-gotten gains to the victims, while disgorgement has no such goal. The FTC is not clear on why they pursue one over the other, but it is likely determined by how easily the victims can be identified and compensated, as well as how costly it would be to provide such compensation. Courts consistently rule in favor of the FTC in matters regarding their ability to pursue these forms of relief under Section 13(b),[13]

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[9] *See id.*

[10] *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014) (the Fourth Circuit upheld an award to the FTC for restitution as ancillary relief to Section 13(b). This was because Ross was found to have engaged in selling deceptive internet "scareware" to consumers. This software told consumers it was running a virus scan but when it completed it told them that their computers were infected with viruses, spyware and illegal pornography when it never actually ran any scans).

[11] *FTC v. Certified Merch. Servs.*, 126 F. App'x 651 (5th Cir. 2005) (the Fifth Circuit upheld an award of disgorgement in favor of the FTC as ancillary relief to Section 13(b). Certified Merchant Services "CMS" processed credit card transactions. When presenting their business to potential customers they led them to believe that they ran "FTC-approved audits" which they were not authorized to do, and the FTC alleges that they broke their fiduciary duty to customers. The district court enjoined the actions of CMS and ordered disgorgement of twenty percent of their profits).

[12] *Disgorgement*, Wex, https://www.law.cornell.edu/wex/disgorgement;*Restitution*, Wex, https://www.law.cornell.edu/wex/restitution.

[13] David C. Vladeck, *TIME TO STOP DIGGING: FAILED ATTACKS ON FTC AUTHORITY TO OBTAIN CONSUMER REDRESS*, 31 Antitrust ABA 89.

and at this time, every circuit but the Seventh allows for the FTC to provide these forms of relief.[14] This power has been constantly challenged, however,[15] with most parties claiming "that Section 19 of the Act--which authorizes the FTC to seek monetary redress in court after final judgments in FTC administrative cases--limits the relief available under Section 13(b)."[16] These arguments have continuously been rejected by courts because Section 19 was enacted two years later than Section 13(b), and Section 19(e) clearly states "remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."[17]

The FTC is not the only agency that has its ability to pursue equitable monetary orders as ancillary relief to permanent injunctions challenged. The Securities and Exchange Commission

[14] *FTC v. Direct Mktg. Concepts, Inc*., 624 F.3d 1 (1st Cir. 2010) (aff'd district court order for summary judgment in favor of FTC requesting a permanent injunction and restitution against defendant who made false claims about dietary supplements); *FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019) (aff'd district court order for summary judgment in favor of the FTC requesting a permanent injunction and restitution against defendant who violated the Fair Debt Collections Act); *FTC v. Magazine Solutions, LLC*, 432 F. App'x. 155 (3d Cir. 2011) (aff'd district court order in favor of FTC requesting a permanent injunction and restitution when defendant falsely advertised magazine subscriptions); *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014) (aff'd district court order for a permanent injunction and restitution when defendants were found to have engaged in deceptive internet advertising practices); *FTC v. Certified Merch. Servs., Ltd.*, 126 F. App'x 651 (5th Cir. 2005) (aff'd district court order for a permanent injunction and disgorgement of profits when defendant was found to have engaged in deceptive business practices as a credit card processor); *FTC v. Voc. Guides, Inc*., 2006 U.S. Dist. LEXIS 82308 (M.D. Tenn. Nov. 9, 2006) (Sixth Circuit district court case, ordered a permanent injunction and restitution against defendant who engaged in deceptive business practices against the USPS); *FTC v. Sec. Rare Coin & Bullion Corp*., 931 F.2d 1312 (8th Cir. 1991) (aff'd district court order for a permanent injunction and restitution against defendant who misrepresented the value of coins they were selling to consumers); *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018) (aff'd district court order for a permanent injunction and restitution against defendant who changed the terms on payday loans after individuals started paying on them); *FTC v. Freecom Commc'ns, Inc*., 401 F.3d 1192 (10th Cir. 2005) (in reversing the district court's award for attorney fees to defendant, the Court recognized that the FTC had the power to pursue injunctions and restitution under Section 13(b)); *FTC v. WV Universal Mgmt., LLC*, 877 F.3d 1234 (11th Cir. 2017) (aff'd district court order for a permanent injunction and disgorgement against defendant who engaged in fraudulent business practices by charging victims credit cards claiming it would lower their interest rates); In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002) (aff'd district court order for disgorgement under against pharmaceutical manufacturer engaging in illegal licensing agreements and drug pricing).

[15] See i*d.*

[16] Vladeck, *supra*.

[17] 15 U.S.C § 57b(e) (2020).

(SEC)'s authority to do so is currently under fire in *Liu v. SEC*, which was heard by the Supreme Court in March 2020. Petitioners argued in their brief that because SEC disgorgement is punitive in nature "it is against the general principles of equity to aid in the enforcement of penalties."[18] In short, the petitioners argued that because SEC disgorgement is a penalty, a court should not be able to issue disgorgement as ancillary equitable relief.

The Supreme Court and the other eleven circuits should reject the Seventh Circuit's break from tradition. This note consists of four parts and argues that the FTC should have the authority to pursue equitable monetary relief under Section 13(b) of the Act. Part II of this note examines the history which justifies the FTC having this power under Section 13(b). Part III will look at the justifications for the FTC continuing to have this power and Part IV will be concluding remarks.

II. BACKGROUND

A. History of Section 13(b)

During the late 1960s, Congress began to see the FTC as an ineffectual enforcement agency.[19] Section 13(b) of the Federal Trade Commission Act originated from a 1969 report from the American Bar Association (ABA), which found that the FTC failed to address retail fraud adequately.[20] The ABA and FTC both believed that the FTC lacked the ability to properly pursue fraud cases because it lacked jurisdiction in federal court and did not have access to

[18] *Liu v. SEC*, 2020 WL 6977158 Pet'r's Br. 20.

[19] Gerald G. Udell, *The FTC Improvement Act*, 41 No. 2 J. of Marketing 81 (1977).

[20] David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 Antitrust, 43 (2004) (citing Report of the ABA Commission to Study the Federal Trade Commission 50-54 (1969), The FTC asserted that it lacked jurisdiction in bringing fraud cases and even if it could bring fraud cases the FTC lacked proper remedies).

proper remedies.[21] In 1974, the power of the FTC was weakened even further by the Ninth Circuit in *Heater v. FTC*.[22] The Ninth Circuit held that the FTC did not have authority to order those who violated Section 5 to issue refunds to those they harmed.[23] Previously, it had been a regular procedure for the FTC to mandate refunds in the cease and desist orders, and it is believed that the Federal Trade Commission Improvement Act was a direct response to this Ninth Circuit ruling.[24] Congress added Section 13(b), amongst other amendments, to the Federal Trade Commission Act on November 16, 1973 as a rider to an amendment of the Mineral Leasing Act of 1920.[25] Congress enacted these amendments with the purpose of improving the FTC's ability "to deal with unfair consumer acts and practices."[26]

Congress enacted Section 13(b) with the purpose of providing an alternative to cumbersome administrative proceedings under Section 5.[27] Section 5 prohibits "unfair methods of competition."[28] The term was left undefined in order to allow the FTC to adapt to new business practices as they arise.[29] Section 5 is enforced before administrative law judges.[30]

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[21] *Id.*

[22] *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

[23] *Id*. at 327.

[24] SA Hildebrandt, *Heater v. FTC and the Federal Trade Commission Improvement Act: The FTC's Power to Order Restitution*, 1975 DUKE L. J. 379 (1975).

[25] Pub. L. No. 93-153, § 408(f).

[26] S. REP. No. 93-151, at 30-31 (1973).

[27] *Id.*

[28] 15 U.S.C § 45(a)(1) (2020).

[29] Marcy C. Priedeman, *Section 5 of the FTC Act: Dark Cloud or Silver Lining?*, 19 Competition: J. Antitrust & Unfair Competition L. Sec. St. B. Cal. 69, 70 (2010).

[30] 16 C.F.R. § 3.42 (2020).

Section 13(b) was intended to be an alternative to administrative proceedings, and was meant to enable the FTC to pursue preliminary and final injunctions to prevent firms from continuing in their unfair practices.[31] The purpose of this section is to allow the FTC to move quickly in district court to freeze assets and secure preliminary injunctive relief to prevent further injury and, when proper, provide permanent injunctive relief.[32] The Senate Committee on Commerce specifically states the goal for Section 13(b) was for "Commission resources [to] be better utilized, and cases [to] be disposed of more efficiently."[33]

The legislative history of this 1973 amendment indicates that the original text of Section 13(b)(2) was to be read that when the FTC has reason to believe a firm has engaged or is about to engage in a violation of Section 5, it may seek a District Court order

> enjoining thereof pending the issuance of a complaint by the Commission under Section 5, 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 within the meaning of Section 5, would be in the interest of the public.[34]

Congress then amended this language before enacting it to the current language of Section 13(b).[35] The key difference is the lack of any mention of a Section 5 proceeding in the language of Section 13(b)(2). Congress almost modified this section again in House Report 7917 Section 204.[36] However, the FTC and the Senate opposed the changes, and in the end were not passed

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[31] S. REP. No. 93-151, at 44.

[32] I*d*. at 30-31.

[33] *Id.*

[34] *Id.* at 44.

[35]Pub. L. 93–153, § 408(f).

[36] H.R. REP No. 93-1107, at 55 (1974) (proposing an amendment to the Federal Trade Commission Act specifically stating "The Commission strongly prefers the language of P.L. 93-153 to that of Section 204 of H.R. 7917. Section 204 would cut back on recently acquired authority to seek injunctions to halt anti-competitive practices. For these reasons, we urge that Section 204 be deleted from H.R. 7917."

because they intended to cut back on the FTC's authority[37] by only allowing injunctions in cases involving fraud.[38] The House Report specifically states that the Committee on Interstate and Foreign Commerce refused to "cut back" on the FTC's newly-found powers and requested no modifications be made to Section 13(b).[39] When the final bill was enacted, this amendment was dropped and the exact language of Public Law 93-153 was the final form adopted.

B. Historical Antecedents of the FTC's Disgorgement Power

1. Supreme Court Precedent

When the Ninth Circuit first recognized the FTC's disgorgement power in 1982,[40] it justified its decision in part on much older authority, including common law equitable remedies created by the Supreme Court as far back as 1836.[41] Courts traditionally found this power in their obligation to "secure complete justice."[42] It has been affirmed over and over to ensure that courts can continue to be able to do so.[43]

The case that established these common law equitable remedies was *Brown v. Swann.*[44] *Brown* involved a complex procedural uncertainty concerning how equitable relief under state

[37] S. REP No. 93-1107, at 55 (1974).

[38] *Id.* at 67.

[39] H.R. 7917 at 55.

[40] 668 F.2d 1107 (1982).

[41] *Brown v. Swann*, 35 U.S. 497 (1836).

[42] *Id.* at 503.

[43] *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); Mitchell v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960); *Kansas v. Nebraska*, 574 U.S. 445 (2015) (These three cases affirm the concept that courts have of wide range of equitable principles they are able to invoke to ensure complete justice).

[44] 35 U.S. 497 (1836).

usury statutes should be obtained, but in the course of its decision, the Court emphasized that courts have broad remedial power.[45] In its holding, the Court stated that "securing complete justice[] should not be yielded to light inferences, or doubtful construction."[46] This quote has been interpreted to mean that if a statute does not restrict the power of the courts to provide relief in equity, then courts have the power to do so.[47] This concept of complete justice is exactly what the FTC is pursuing when it brings action for injunctions and equitable monetary orders under Section 13(b).

The Supreme Court again brings up the concept of "complete justice" from *Brown* in 1946.[48] *Porter v. Warner Holding Co.* was a case regarding the Emergency Price Control Act of 1942 and had no connection to the FTC.[49] The Office of Price Administration[50] sought to enjoin Warner Holding Company from charging rent in excess of that permitted by the Emergency Price Control Act,[51] as well as restitution for excessive rent charged.[52] The District Court enjoined Warner Holding but declined to order restitution. [53] The Eight Circuit affirmed, finding

[45] *Id.* at 499.

[46] *Id.* at 503.

[47] 668 F.2d 1107 (1982).

[48] 328 U.S. 395 (1946).

[49] *Id.* at 396.

[50] National Archives, Records of the Office of Price Administration, (Mar. 8, 2020 10:00 AM), https://www.archives.gov/research/guide-fed-records/groups/188.html#188.1 (The Office of Price Administration was a federal agency under the Office of Emergency Management established to enforce price controls during and after WWII.).

[51] *Id.*

[52] 328 U.S. 397 (1946).

[53] *Id.*

no authority under the statute to order restitution.[54] In affirming *Brown*, the Supreme Court reversed, holding that restitution was necessary to ensure compliance with the act.[55] The Court held that

> "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[56]

Brown was cited by the Supreme Court in 1960 in *Mitchell v. Robert De Mario Jewelry*.[57] This was a case brought under the Fair Labor Standards Act (FLSA). The Secretary of Labor, on behalf of employees of Robert De Mario Jewelry, brought action against their employer seeking an injunction against retaliatory discrimination as well as restitution in the form of reimbursement of lost wages.[58] The Fifth Circuit reversed this decision, claiming that the district court did not have the authority to order this restitution under the FLSA.[59] The Supreme Court reversed, citing both *Porter* and *Brown*, explaining that courts have access to these non-textual powers to "secure complete justice."[60] The Court ordered that a "[d]istrict [c]ourt has jurisdiction to order an employer to reimburse employees, unlawfully discharged or otherwise discriminated against, for wages lost because of that discharge or discrimination."[61]As stated by the Supreme

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[54] *Id.*

[55] *Porter*, 328 U.S. 403 (1946).

[56] *Id.* at 398

[57] 361 U.S. 288 (1960).

[58] *Id.* at 289-91.

[59] *Mitchell v. Robert De Mario Jewelry, Inc.*, 260 F.2d 929, 934-35 (5th Cir. 1958).

[60] 361 U.S. 291 (1960).

[61] *Id.* at 296.

Court in *Brown*, *Porter*, and *Mitchell*, if Congress has not clearly foreclosed the ability of a court to issue relief in equity, they have the authority to do so.

2. Legislative History for the FTC Pursuing Equitable Monetary Orders

In all of its amendments to the Federal Trade Commission Act since *Singer* in 1982, Congress has only ever expanded the FTC's enforcement powers, and has never disturbed the monetary recovery powers recognized by courts, even when modifying Section 13 itself, and even when explicitly acknowledging those powers themselves.

The first case in which the FTC successfully pursued equitable monetary orders was in 1982.[62] Articles were published discussing the FTC pursuing these orders as early as 1988. In 1994, Congress amended the Federal Trade Commission Act and did not remove the FTC's power to enjoin or to pursue restitution and disgorgement. Instead, Congress expanded their venue and service of process.[63] Congress inserted language into Section 13(b) which allowed the FTC to add defendants to suits without having to worry about whether or not venue was proper.[64] This amendment to the Federal Trade Commission Act also came after the FTC began using Section 13(b) for restitution.[65] *Singer* had been decided twelve years earlier and held that the FTC was able to pursue restitution and other equitable monetary orders under section 13(b).[66] This power of the FTC was also recognized in the Senate Report accompanying the 1994

[62] Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 Antitrust L.J. 141 (1988); *F.T.C. v. H.N. Singer, Inc*., 668 F.2d 1107 (This was the first case that acknowledged the FTC's power to pursue equitable relief under Section 13(b))

[63] H. R. 2243, at 5 (1993).

[64] See i*d.*

[65] *See Singer,* 668 F.2d 1107.

[66] *Id.*

amendments.[67] The report specifically gave the FTC the ability to go into court ex parte under Section 13 "to obtain an order freezing assets, and is also able to obtain consumer redress."[68] The report then goes on to state that "the FTC has used its Section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts."[69] These sections provide clear evidence that the Senate was aware of actions taken by the FTC and wanted to expand upon these actions/abilities by expanding their venue and service of process.

This legislative history clearly indicates that Congress had no intention of limiting the FTC's ability to pursue equitable monetary relief under Section 13(b). Once Congress was clearly aware that the FTC was exercising this authority, they only chose to expand their service of process.

3. Courts of Appeals

The FTC's ability to pursue equitable monetary orders under Section 13(b) resulted from *FTC v. H. N. Singer*.[70] This Ninth Circuit case arose from costly franchising agreements to distribute frozen pizzas and ovens to retail stores.[71] The FTC sought to freeze the assets of Singer as ancillary relief to a the preliminary injunction.[72] The Ninth Circuit upheld the lower court's order to do so because preserving those assets by freezing them was necessary for final redress.[73]

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[67] S. Rep. 103-130 (1993).

[68] *Id*. at 15-16.

[69] *Id*. at 16

[70] *Singer*, 668 F.2d 110.

[71] *Id*. at 1109.

[72] *Id.*

[73] *Id*. at 1112.

The Ninth Circuit continued on to state that since Section 13(b) allows for permanent injunctions, "it also by implication gives the court authority to afford all necessary ancillary relief, including rescission of contracts and restitution." [74] Therefore, freezing assets is necessary to ensure this a possibility. The Ninth Circuit's justification for its decision was cited from *Brown* in stating that "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." [75] Following *Singer*, the FTC's ability to pursue equitable monetary orders has been continuously affirmed by circuit courts.

Three cases from recent years show that this principle is alive and well. The first of these cases came in front of the Second Circuit. In *FTC v. Moses,*[76] the FTC filed suit against thirteen corporations claiming their debt collection practices violated the Federal Trade Commission Act.[77] The FTC sought a permanent injunction under Section 13(b) and disgorgement of ten million dollars due to the defendant's fraudulent acts.[78] The court held in favor of the FTC, citing circuit precedent, which specified that the "unqualified grant of statutory authority to issue an injunction under Section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits."[79]

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[74] *Id.*

[75] *Id.*

[76] *FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019).

[77] *Id.* at 302-05.

[78] *Id.* at 309.

[79] *Id.* (citing *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 365 (2d Cir. 2011)).

The second case comes from the Ninth Circuit.[80] In *FTC v. AMG Capital Management*, the FTC brought action under Section 13(b) against payday lenders and the district court ordered, on summary judgment, an injunction against the lenders as well as 1.27 billion dollars of disgorgement.[81] The Ninth Circuit affirmed, citing precedent that Section 13(b) "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution."[82]

The third case is from the Eleventh Circuit.[83] In *FTC v. WV Universal Management*, the FTC brought action under Section 13(b) against a credit card payment processor alleging a fraudulent credit card interest reduction scheme.[84] The district court granted summary judgment in the FTC's favor, granting a permanent injunction as well as disgorgement in the amount of $1.7 million.[85] The Eleventh Circuit affirmed, citing prior precedent which states that "[a]lthough [S]ection 13(b) does not expressly authorize courts to grant monetary equitable monetary orders, this [c]ourt has held that the unqualified grant of statutory authority to issue an injunction under [S]ection 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits."[86]

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[80] *FTC v. AMG Capital Mgmt.*, LLC, 910 F.3d 417 (9th Cir. 2018).

[81] *Id.* at 422

[82] *Id.* at 426. (citing *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), cert. denied, 137 S. Ct. 624, 196 L.Ed.2d 515 (2017)).

[83] *FTC v. WV Universal Mgmt.*, 877 F.3d 1234 (2017).

[84] *Id.* at 1237.

[85] *Id.* at 1238.

[86] *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996).

These cases show that circuit courts have been willing and able to allow the FTC to pursue ancillary equitable monetary orders under Section 13(b). They recognized that Congress had no intention of limiting their authority to issue equitable monetary relief and continue to issue these orders to this day.

III. LAW & ANALYSIS

A. FTC v. Credit Bureau

Credit Bureau was a case brought by the FTC against the Credit Bureau Center, which was offering free credit reports and scores to consumers.[87] When offering these free credit reports, the Credit Bureau Center hid a key detail that in requesting and providing these scores, users were enrolled in a program for credit monitoring which charged them a $29.94 monthly membership fee.[88] Consumers were not notified that they were enrolled in this program until they received a letter that they were automatically enrolled.[89] In order to boost its membership, Credit Bureau Center posted fake rental properties on Craigslist and offered free credit scores to those who applied to live in them.[90] Once they applied and obtained their credit scores, they were also enrolled in Credit Bureau's monthly credit monitoring service.[91]

When the FTC discovered Credit Bureau's conduct, it brought action in federal court under Section 13(b), alleging violations of consumer-protection statutes,[92] and seeking a

[87] *Credit Bureau*, 937 F.3d 764, 766.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

permanent injunction and restitution.[93] At trial, the FTC was granted preliminary injunction and summary judgment awarding permanent injunction and restitution of $5.2 million.[94]

The Seventh Circuit upheld the permanent injunction, but vacated the restitution award.[95] The court reversed its own 1989 decision in *Amy Travel*,[96] arguing that the Supreme Court had limited "judicially implied remedies" after their determination in *Meghrig*.[97] The Seventh Circuit believed that *Meghrig* changed how courts should interpret Section 13(b) to allow for restitution and disgorgement.[98] This was because Section 13(b) did not "contemplate an award for restitution," and only authorized temporary and permanent injunctions, while other provisions of the Federal Trade Commission Act authorize equitable monetary orders.[99] The Seventh Circuit also believed that allowing Section 13(b) to authorize restitution would undermine other provisions of the Federal Trade Commission Act.[100] Specifically, Section 13(b) does not require notice to defendants, as does Section 5, and broad use of Section 13(b) remedies could undermine the use of FTC administrative proceedings that Congress evidently intended.[101]

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[93] *Id.*

[94] *FTC v. Credit Bureau Ctr., LLC*, 325 F. Supp. 3d 852 (N.D. Ill. 2018).

[95] 937 F.3d 764, 786 (2019).

[96] *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), *overruled* by Fed. Trade Comm'n v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019) This was an action brought under Section13(b) of the Federal Trade Commission Act. FTC sought preliminary and permanent injunctive relief, an asset freeze, rescission, restitution and other equitable monetary orders. The appellate court held that the trial court had the authority to grant monetary equitable monetary orders which was necessary to effectuate a permanent injunction.

[97] 937 F.3d, 764, 781 (2019) (citing *Meghrig v. KFC Western,* 116 S. Ct. 1251, 1256 (1996).

[98] *Id.*

[99] *Id.* at 783.

[100] *Id.* at 784.

[101] *Id.*

Chief Judge Wood dissented.[102] Judge Wood's first complaint with the majority's decision was that they refused to rehear the case en banc, which would have allowed all the circuit judges to determine whether or not it was appropriate to overturn their precedent in *Amy Travel*.[103] The dissent also points to the fact that the SEC has been able to pursue restitution and disgorgement in a similar fashion as the FTC, that *Meghrig* is distinguishable from the powers of the FTC, and that "the non-exhaustive examples of relief Congress chose to mention in one section do not limit what a court may or may not include pursuant to another section."[104]

B. Why the FTC Should have Equitable Monetary Relief Under Section 13(b)

The FTC needs these powers to ensure it can fully protect and redress consumers who have suffered harmed. There are many reasons why this power should be upheld; the first of which is that even though the Supreme Court has not yet addressed this issue, the principles of equity originally addressed in *Brown v. Swann* are still cited by courts to this day.[105] Second, federal agencies like the SEC and Food and Drug Administration (FDA) rely on these equitable

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[102] *Id.* at 786.

[103] *Id.*

[104] *Id.* at 796.

[105] *See Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 646 (11th Cir. 2019) (remanding case to district court to apply equity principles of Brown because district court denied plaintiff's slander claim on the basis of judicial estoppel. "[T]he goal of equity is to secure justice, it should not be yielded to light inferences, or doubtful construction"); *see also Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 367 F.3d 1108, 1114 (9th Cir. 2004) (stating that since Congress did not restrict the courts' equitable discretion in enforcing the Truth-in-Leasing Regulations, the district court did not err in applying equitable principles to plaintiff's motion for a preliminary injunction); *see also Wilson v. Happy Creek, Inc.*, 448 P.3d 1106 (Nev. 2019) (holding that the equitable principles in Brown applied to a case where plaintiff brought suit for the state of Nevada to restore their ground water rights. Specifically stating "[t]he Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute." (quoting *Shadow Wood Homeowners Ass'n v. New York Cmty. Bandcorp, Inc.*, 366 P.3d 1105, 1112 (Nev. 2016)).

principles in very similar manners to the FTC.[106] Third, these powers allows the FTC to redress consumers, discourage wrongful actors and avoid lengthy trials and administrative proceedings.

C. Modern Interpretation of Supreme Court Precedent

As stated above, the FTC's powers under Section 13(b) arise from the Supreme Court Cases *Brown v. Swann*, and *Porter v. Warner Holding.* To this day, the interpretation of these cases has remained mostly the same.[107]

The most recent case where the Supreme Court addresses the holding from *Brown* was in 1982 in *Weinberger v. Romero-Barcelo*.[108] In this case, the Court still upheld the same principle that unless Congress has foreclosed the use of equitable judicial remedies, these powers belong to the courts.[109] Circuit courts also still actively cite *Brown* when they invoke their equitable powers.[110] In 2004, the Ninth Circuit held that a district court did not err when it used an equitable balancing test instead of issuing a preliminary injunction, because Congress did not

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[106] *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (holding that the district court had the ability to disgorge defendant's profits for violations of the Williams Act in a suit brought by the SEC under their injunction provision. Specifically stating that there is "no indication in the language or the legislative history of the 1934 Act that even implies a restriction on the equitable remedies of the district courts"); *See also United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750 (6th Cir. 1999), cert. denied, 530 U.S. 1274 (2000) (holding that the district court had the authority to order restitution under the FDA's injunction provision, and specifically stating "[a]bsent a clear command by Congress that a statute providing for equitable relief excludes certain forms of such relief, this court will presume the full scope of equitable powers may be exercised by the courts.").

[107] *See generally Mitchell v. Robert De Mario Jewelry,* 361 U.S. 288 (1960) has been affirmed by the Supreme Court but is cited less often as precedent as compared to *Brown* or *Porter*. This is likely because the decision in *Mitchell* was closely related to violations of the Fair Labor Standards Act. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (*aff'g* Mitchell in a dispute regarding sex discrimination and retaliation); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 33 (2013) (*aff'g* Mitchell in a dispute regarding constructive discharge); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) (*aff'g* Mitchell in an employer retaliation suit).

[108] *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding that the district court did not err in providing a remedy that was more equitable than an injunction when the statute only specifically allowed for injunctions).

[109] *Id.* at 320.

[110] *Swift*, 367 F.3d at 1114.

foreclose that option.[111] In 2019, the Eleventh Circuit cited *Brown* in overturning a district court's summary judgment claim stating that judicial estoppel should not be invoked when it would not be the most equitable result.[112]

Porter has had an even greater showing in modern Supreme Court cases. In 2015, the Supreme Court cited the equitable principles in *Porter* when writing *Kansas v. Nebraska*.[113] In this dispute, Kansas alleged that Nebraska harmed it through excess groundwater pumping.[114] This was originally settled between the two states in 2002, but Kansas petitioned the court for monetary and injunctive relief to remedy violation of their compact.[115] The Court cited *Porter* when stating that the "Court may invoke equitable principles to devise "fair . . . solution[s] to compact violations" when issuing an injunction and disgorgement against the Nebraska.[116] The Supreme Court also cited *Porter* in an earlier decision in 2002.[117] In this case between the United States and a medical marijuana facility, the Court again recognized the principles of *Porter*, stating that the courts' equitable powers could only be displaced by a "clear and valid legislative command."[118] However, the Court found that these principles could not be applied in this case because of the language of the Controlled Substances Act.[119]

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[111] *Id*.

[112] *Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 646 (11th Cir. 2019)

[113] *Kansas v.* Nebraska, 574 U.S. 445 (2015).

[114] *Id.* at 445.

[115] *Id.*

[116] *Id.*

[117] *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

[118] *Id.* at 496.

[119] *Id.* at 485.

Looking at recent precedent from the Supreme Court, we can clearly see that the equitable principles which began with *Brown* are still alive and well to this day. This serves as a strong justification that the Supreme Court has no intention in *Meghrig* to limit a court's ability to issue equitable monetary relief.

D. Recent Circuit Court Decisions

Currently, every circuit except the Seventh allows for the FTC to pursue equitable monetary orders under Section 13(b); all of which have continued to apply this principal after *Meghrig* was decided in 1996.[120] The most recent cases brought by the FTC regarding equitable monetary orders under Section 13(b) that have been affirmed on appeal are *FTC v. Direct Mktg. Concepts, Inc., FTC v. Moses,* and *FTC v. AMG Capital Mgmt.*[121] These cases affirmed the FTC's power to pursue these orders which shows that this principle is alive and well.

Direct Mktg. Concepts was an FTC false advertising claim to challenge claims made by Direct Marketing that its products, Coral Calcium and Supreme Greens, cured many diseases, from cancer to Parkinson's to obesity.[122] The FTC sought an injunction and equitable monetary relief to redress consumers who had purchased these products.[123] The district court granted summary judgment in the FTC's favor, ordering a permanent injunction and disgorgement in the

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[120] *FTC v. Direct Mktg. Concepts*, 624 F.3d 1 (1st Cir. 2010); *FTC v.* Moses, 913 F.3d 297 (2d Cir. 2019); *FTC v. Magazine Sols., LLC*, 432 F. App'x. 155 (3d Cir. 2011); Ross, 743 F.3d 886 (4th Cir. 2014); *FTC v. Certified Merch. Servs.*, 126 F. App'x 651 (5th Cir. 2005); *FTC* v. *Vocational Guides*, 2006 U.S. Dist. LEXIS 82308 (M.D. Tenn. Nov. 9, 2006); *FTC* v. *Sec. Rare Coin*, 931 F.2d 1312 (8th Cir. 1991); *FTC* v. *AMG Cap. Mgmt.*, LLC, 910 F.3d 417 (9th Cir. 2018); *FTC* v. *Freecom*, 401 F.3d 1192 (10th Cir. 2005); *FTC v. WV Universal Mgmt.*, 877 F.3d 1234 (11th Cir. 2017); *In re Lorazepam & Clorazepate*, 289 F.3d 98 (D.C. Cir. 2002).

[121] *See Direct Mktg. Concepts*, 624 F.3d 1 (2010); *Moses*, 913 F.3d 297 (2019); *AMG Cap. Mgmt., LLC*, 910 F.3d at 417 (2018).

[122] *Direct Mktg. Concepts*, 624 F.3d at 4.

[123] *Id.* at 6.

amount of $49 million.[124] The First Circuit affirmed, stating that the Federal Trade Commission Act's "grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress."[125]

In *FTC v. Moses,* the FTC charged thirteen separate defendants with violations of the Fair Debt Collection Practices Act.[126] The defendants' businesses largely consisted of collecting payday loans which had been purchased from creditors and compiled into debt portfolios.[127] In order to collect on these debts, the defendants would claim that they were investigators and threaten criminal actions against debtors, alleging that the debtors had committed fraud, and would routinely contact the debtors' family members, employers, and friends in order to try to force debtors into paying these fake debts.[128] The district court granted the FTC's motion for summary judgment, ordering a permanent injunction as well as disgorgement in the amount of $11 million dollars.[129] The Second Circuit affirmed, stating that the FTC's "authority to issue an injunction under Section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits."[130] The Second Circuit now requires the FTC to show a reasonable approximation of the defendant's unjust gains, which the defendant may then attempt to disprove.[131] It also requires the FTC to show that consumers

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[124] *Id.*

[125] *Id.* at 15.

[126] 913 F.3d at 301 (2019).

[127] *Id.* at 302.

[128] *Id.*

[129] *FTC v. Fed. Check Processing, Inc.*, 2016 U.S. Dist. LEXIS 141998 at 18-38 (W.D.N.Y. Oct. 12, 2016).

[130] 913 F.3d at 310-11 (2019).

[131] *Id.* at 309.

relied upon the misrepresentation at issue.[132] In this case, the FTC had presented five hundred consumer reports regarding defendants' practices, which was enough fulfill the FTC's burden.

FTC v. AMG Capital Management was a case brought by the FTC against another payday lender alleging that the terms of the loan did not match the terms which the defendant enforced against debtors when collecting on their loans.[133] The district court granted summary judgment in the FTC's favor, granting a permanent injunction as well as restitution in the amount of $1.27 billion to redress consumers.[134] On appeal, the Ninth Circuit upheld the district court's determination.[135] The Ninth Circuit affirmed, citing *Porter* for the view that courts may "deprive defendants of their unjust gains from past violations, unless the Act restricts that authority."[136]

When looking at these three cases it is important to notice that not a single case discusses *Meghrig*. The Seventh Circuit's decision to limit the FTC's authority through *Meghrig* was novel and the argument was raised by Credit Bureau in their appellate brief. Therefore, as we can see from these cases, circuit courts still adhere to precedent in allowing the FTC to pursue equitable monetary orders under Section 13(b). This power allows the FTC to enjoin defendants and ensures that victims of wrongful acts are compensated on summary judgment instead of initiating lengthy hearings.

E. The SEC and FDA Rely on the Same Equitable Principles

[132] *Id.* at 310.

[133] 910 F.3d 421 (2018).

[134] *Id*. at 422.

[135] *Id.* at 428.

[136] *Id.* at 427.

Both the SEC and the FDA rely on the same judicially implied equitable powers and pursue violations identically to the FTC under Section 13(b). This shows that the equitable powers originally established in *Brown* are universally interpreted and other agencies are afforded the same powers as the FTC.

The SEC has been statutorily empowered to pursue a wide range of remedies against those who violate securities laws. These remedies include injunctions[137], administrative cease-and-desist orders[138], monetary penalties[139], and barring conduct as well as suspensions from service as a public company officer.[140] Congress never explicitly included disgorgement among the remedies that the SEC could pursue in federal court, but this power has been given to the SEC in a similar manner as the FTC.[141] Courts have held that disgorgement and restitution are available as ancillary relief to courts when they have been given the power by statute to provide injunctive relief.[142]

The statute which gives the SEC the power to pursue these injunctions is Section 78u(d)(1) of the Securities Act.[143] The language of the Securities Act states:

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[137] Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2012); Securities Exchange Act of 1934 § 21(d)(1), 15 U.S.C. § 78u(d)(1). 8 See, e.g., 15 U.S.C. §§ 77h-l(a), 78u (2020).

[138] 15 U.S.C. §§ 77h-l(a), 78u-3(a) (2020).

[139] 15 U.S.C. §§ 77t(d), 78u(d)(3) (2020).

[140] 15 U.S.C. § 77h-l(f), 77t(e) (bars and suspensions from service as public company officer or director); 15 U.S.C. § 78u(d)(2), 78u-3(f) (same): 15 U.S.C. § 78o(b)(4), (b)(6) (bars and suspensions from service as or association with broker-dealers); Investment Advisers Act of 1940 § 203(e), (f), 15 U.S.C. § 80b-3(e) to (f) (2012) (bars and suspensions from service as or association with investment advisers).

[141] Russell G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 2 (2013).

[142] *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); United States v. Bank, 378 F.Supp.3d 451, 453 (E.D.Va.2019).

[143] 15 U.S.C § 78u(d)(1).

> Whenever it shall appear to the [SEC] that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The [SEC] may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.[144]

This is very similar to the language of Section 13(b) of the Federal Trade Commission Act, which states

> Upon a proper showing that, weighing the equities and considering the [FTC]'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, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction.[145]

Both have the language that the commissions can issue preliminary injunctions upon a proper showing after weighing the likelihood of ultimate success and then issue permanent injunctions if necessary.

There are some differences between these two provisions. The SEC's provision allows for the evidence to be transmitted to the Attorney General for criminal proceedings, and the FTC's preliminary injunctions expire after twenty days if a complaint is not filed. While these differences do exist, what allows the SEC and the FTC to have the implied power to receive equitable monetary orders under their injunctive provisions is their ability to receive final

[144] *Id.*

[145] 15 U.S.C 53(b).

judgments in court in the form of permanent injunctions. This goes back to the Supreme Court's concept of complete justice in *Brown* and *Porter.* According to the Supreme Court, if Congress does not clearly restrict the ability of courts to issue orders in equity, they have the power to do so as ancillary relief.

The SEC's ability to pursue disgorgement and restitution under their injunction provision has also been challenged similarly to Section 13(b).[146] Courts have generally held that the SEC can pursue equitable forms of relief as long as it is not pursued purely for punitive purposes.[147] Challenges to the SEC's disgorgement power are still arising to this day with the Supreme Court hearing a case as recently as March 3, 2020, regarding whether the SEC is able to pursue disgorgement as ancillary relief.[148] News coverage of oral arguments seem to agree that the Supreme Court is extremely likely to uphold SEC disgorgement power due to questions at oral argument, including Justice Ginsburg's question of is it "not an equitable principle that no one should be allowed to profit from his own wrong?"[149]

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[146] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (stating that the five-year statute of limitations applies to disgorgement by the SEC because it is a penalty. The SEC was pursuing disgorgement as ancillary relief to an injunction against two investment firms which were misappropriating funds); *SEC v. Gentile*, 939 F.3d 549 (3d Cir. 2019) (affirming in the Third Circuit disgorgement as ancillary relief to an injunction. Specifically stating "unless Congress clearly states an intention to the contrary, statutory injunctions are governed by the same "established principles" of equity that have developed over centuries of practice."); *SEC v. Contorinis*, 743 F.3d 296 (2d Cir. 2014) (affirming in the Second Circuit disgorgement order as ancillary relief to an injunction citing *FTC v. Bronson.)*

[147] 137 S. Ct. 1635 (2017).

[148] 140 S. Ct. 451 (2019), certiorari granted, appealing SEC v. Liu, 754 F. App'x 505 (9th Cir. 2018).

[149] Andrew Chung, *U.S. Supreme Court leans toward SEC's power to recover ill-gotten gains*, Reuters, (March 3, 2020) https://www.reuters.com/article/us-usa-court-sec/u-s-supreme-court-leans-toward-secs-power-to-recover-ill-gotten-gains-idUSKBN20Q2LN; Dave Michaels, *Supreme Court Justices Indicate They May Further Narrow SEC's Enforcement Authority*, The Wall St. J., (March 3, 2020) https://www.wsj.com/articles/supreme-court-justices-indicate-they-may-further-narrow-secs-enforcement-authority-11583265540.

Since the 1990s, the FDA has likewise secured restitution as ancillary to injunctions under Section 332(a) of the Federal Food, Drug, and Cosmetic Act (FDCA),[150] though some courts have denied it disgorgement relief.[151] The FDCA sets out three FDA remedies: seizures,[152] injunctions,[153] and criminal prosecution.[154] Their purpose was to remove noncompliant products from the market, prohibit manufacturing or distribution of these products, and punish those who violated the act.[155] After a series of lawsuits in the early 1990s, the FDA realized that these actions were not always appropriate or effective for achieving their goals and began pursuing restitution and disgorgement in order to accomplish their goals.[156]

Section 332 of the FDCA states that "[t]he district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown to restrain violations of [S]ection 331."[157] This section is significantly different from the injunction provisions for the FTC and the SEC. Even with this difference courts have allowed the FDA to pursue equitable monetary relief, because this section permits the FDA to receive permanent

[150] 15 U.S.C § 332(a) (2020); *Restitution in Food and Drug Enforcement*, 4 STAN. L. REV. 519, 521 (1951-1952); William W. Vodra & Arthur N. Levine, *Anchors Away: The Food and Drug Administration's Use of Disgorgement Abandons Legal Moorings*, 59 Food & Drug L.J. 1, 2 (2004).

[151] *United States v. Universal Mgmt. Servs., Inc.*, 999 F. Supp. 974 (N.D. Ohio 1997), *afff'd* 191 F.3d 750 (6th Cir. 1999).

[152] 21 U.S.C. § 334.

[153] *Id.* at § 332.

[154] *Id.* at § 333.

[155] Vodra *supra* note 2.

[156] *Id.*

[157] 21 U.S.C § 332.

injunctions from courts.[158] As the Court stated in *Porter*, "[u]nless a statute in so many words, or … inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." This means that because the FDCA did not foreclose the FDA from receiving equitable monetary, courts have the power to issue them.

In *United States v. Lane Labs*, the Third Circuit found the same judicially implied power of restitution that courts have found under FTCA Section 13(b).[159] This case involved three health products produced by Lane Labs which they claimed could cure cancer and treat other diseases like HIV.[160] They marketed their products broadly through magazines, paid doctors to endorse their products, and wrote books about the health benefits that their product did not actually provide.[161] The FDA sought permanent injunction and restitution for those who purchased their products as well as disgorgement of their profits.[162] The district court granted the FDA's motion for summary judgment, granting both the permanent injunction as well as restitution. The Third Circuit upheld the order for restitution, citing both *Porter* and *Mitchell.*[163] This was because "Congress has placed no unambiguous restriction on equity jurisdiction under [Section] 332(a)" and therefore district courts are empowered to use equitable monetary orders when appropriate.[164]

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[158] *United States v. Regenerative Scis., LLC*, 741 F.3d 1314 (D.C. Cir. 2014) A permanent injunction was granted under FDCA § 332 when the defendant violated FDCA 331(k) by violating drug manufacturing regulations when producing a stem cell therapy.

[159] *United States v. Lane Labs-USA Inc.*, 427 F.3d 219 (3d Cir. 2005).

[160] *Id.* at 221.

[161] *Id.*

[162] *Id.* at 222.

[163] *Id.* at 225.

[164] *Id.* at 235.

F. Policy Justifications for Restitution and Disgorgement Under Section 13(b)

Policy favors monetary relief under Section 13(b). First and foremost, the ability to pursue restitution and disgorgement allows the FTC to complete cases at the summary judgment stage instead of initiating lengthy trials or administrative law proceedings under Section 19. Second, it allows the FTC to fully redress consumers who have been harmed by the actions of wrongdoers. Third, it discourages future wrongful actors because of the fear of restitution and disgorgement in addition to permanent injunctions.

Speed and flexibility are major advantages of pursuing monetary relief. Because Section 13(b) authorizes permanent injunctions, it effectively authorizes restitution or disgorgement at summary judgment.[165] This is because Federal Rule of Civil Procedure (FRCP) 56 authorizes summary judgement if "there is no genuine dispute as to any material fact and the movant is entitled to [summary judgment]."[166] When the FTC obtains a preliminary injunction against a party, the court looks at the current evidence to weight "the Commission's likelihood of ultimate success."[167] If this evidence is great enough, then the FTC can move for summary judgment under FRCP 56, requesting permanent injunction and restitution or disgorgement. This means that the FTC is able to avoid the lengthy process required by Section 19, which involves three separate legal proceedings:[168] (1) a preliminary injunction under 13(b); (2) an administrative

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[165] See *FTC v. Direct Mktg. Concepts, Inc*. 624 F.3d 1 (1st Cir. 2010); see also *FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019); see also *FTC v. AMG Capital Mgmt*., LLC 910 F.3d 417 (9th Cir. 2018).

[166] Fed. R. Civ. P. 56.

[167] 15 U.S.C. § 53(b) (1994).

[168] *See* J. Howard Beales III, *STRIKING THE PROPER BALANCE: REDRESS UNDER SECTION 13(B) OF THE FTC ACT*, 79 Antitrust L.J. 1, 3 (2013) (citing David M. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, 11-12, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf (last visited on November 15, 2020) ("To obtain complete final relief, the Commission would need to litigate and win three separate actions: (1) a Section 13(b) preliminary injunction proceeding to obtain a

proceeding and final cease and desist order, and; (3) a district court action to obtain redress under Section 19.[169] By allowing the FTC to receive equitable monetary orders under Section 13(b), this three-step process is reduced to one step, which allows for a much more efficient use of our limited agency and judicial resources. To counter this, it may be argued that Congress intended the FTC to go through a slow process, but this argument is flawed. No matter how many steps the FTC must go through, it is still held to the same preponderance of the evidence standard. Section 19 proceedings are logical for cases which do not have an imminent risk of continued harm requiring a preliminary injunction, and currently, there are over a thousand cases currently going through administrative proceedings with the FTC.[170]

Allowing equitable monetary relief under Section 13(b) also allows for consumers to be properly redressed when wrongful acts have been committed against them. This is similar to what is allowed by Section 19, although Section 19 does not allow for preliminary and permanent injunctions to be issued- only final cease and desist orders.[171] When this is taken into consideration with the efficiency mentioned above, by avoiding two additional judicial proceedings, consumers are able to be redressed in a much quicker timeframe. This expedited redressability can be extremely important when those who are wronged are vulnerable parties. The FTC often brings actions against payday lenders who are known to victimize consumers and

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preliminary asset freeze; (2) an administrative proceeding leading to a final cease and desist order; and (3) a district court action to obtain consumer redress under Section 19."); see also *Id.*at 19 (describing such a "three-part process" as ""lengthy and cumbersome" and noting that "[t]he permanent injunction proviso of Section 13(b) ... offered a much more effective and efficient weapon against fraud").

[169] *Id.*

[170] Cases and Proceedings, Federal Trade Commission (May 30, 2020, 5:07 PM), https://www.ftc.gov/enforcement/cases-proceedings.

[171] 15 U.S.C. § 57b(b) (1975).

disproportionally harm those who are indigent.[172] Freezing assets and pre-judgment interest can only help so much when those harmed need financial assistance. This is exactly what happened in both *Moses* and *AMG Capital Mgmt*.[173] The power to order injunctions and issue monetary relief in an efficient manner is critical in cases like these two, because it allows the FTC to minimize the damage that was done and allows consumers to move on with their lives.

Allowing equitable monetary orders under Section 13(b) discourages wrongful acts because firms will fear action being brought against them by the FTC. Section 19 specifically states "nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages."[174] This means that when the FTC brings action under Section 19, the most any firm has to fear losing is the amount in which they have defrauded consumers.

However, this is not the case under Section 13(b). As stated by the Ninth Circuit in *Gem Merchandising* "[S]ection 19(b), . . . is distinguishable from [S]ection 13(b) because it explicitly prohibits 'exemplary or punitive damages.' This legislative command expressly limits a court's equitable jurisdiction. In contrast, [S]ection 13(b) has no such limitation."[175] *Gem Merchandising* explores this in the context of *FTC v. Pantron I Corp.*, where the FTC not only ordered that consumers be redressed, but disgorged the defendant of any funds they acquired in a way that was "reasonably related" to their alleged wrongful acts.[176] The threat of the FTC pursuing more

[172] *See FTC v. Moses*, 913 F.3d 297 (2d Cir. 2019); *see also FTC v. AMG Capital Mgmt.*, LLC 910 F.3d 417 (9th Cir. 2018)

[173] *Id.*

[174] 15 U.S.C. § 57b(b) (1975).

[175] *See FTC v. Gem Merch. Corp.*, 87 F.3d at 469 (11th Cir. 1996).

[176] *See id.* at 470 (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994))

than what was wrongfully received from consumers carries significantly more weight when the goal is to prevent future firms from engaging in deceitful conduct.

Because of its efficiency, power of redress, and deterrence, the ability of the FTC to pursue equitable monetary orders under Section 13(b) serves a critical role. If this power were to be taken away from the FTC, like the Seventh Circuit has done, the FTC would be restricted in a way that would be detrimental to everyone. Litigation against wrongful actors would take substantially more time, which would lead to the FTC resolving fewer cases. This added length in time to proceedings would mean that those who may be relying upon relief would have to wait substantially longer, and those who want to commit wrongful acts would have less to dissuade them from doing so. Therefore, it is critical that courts preserve the FTC's power to pursue equitable action under Section 13(b).

G. Addressing Counter Points

1. Kokesh

Opponents of Section 13(b) monetary recovery often point to the Supreme Court's ruling in *SEC v. Kokesh*.[177] The SEC brought action under its injunction provision, 15 U.S.C. 78(u)(d)(1), alleging that Kokesh violated securities laws.[178] The major question raised was whether the SEC disgorgement was punitive. If it was, then the SEC disgorgement would be subject to the federal statute of limitations, 28 U.S.C.A. § 2462,[179] which had already run out, and the SEC would not have been able to disgorge Kokesh.[180] The Supreme Court reversed,

[177] 137 S. Ct. 1635 (2017); *see generally* Sean Royall, *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, ABA, Vol. 32, No. 2, 94 (2018).

[178] *SEC v. Kokesh*, 834 F.3d 1158, 1168 (10th Cir. 2016).

[179] 28 U.S.C. § 2462 (2020) ("the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued")

[180] *Id.*

holding that disgorgement obtained by the SEC is a penalty rather than necessary compensation, and was therefore subject to the five-year statute of limitation and the SEC would not be able to pursue disgorgement in this case.[181] At the end of its opinion, the Supreme Court stated in pertinent part that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings," which shows that the Court had no intention of stripping this power from the SEC.[182]

The FTC distinguishes *Kokesh* in that, unlike the SEC, which relies primarily on the punitive remedy of disgorgement, the FTC has used Section 13(b) mainly to secure restitution,[183] and the SEC often pursues recoveries significantly larger than what victims lost, because in addition to the disgorged profits, they often add civil penalties.[184] A court likely would not find restitution punitive, because its purpose is to "restor[e] the status quo and order[] the return of that which rightfully belongs to the purchaser."[185] Also, as stated by the Supreme Court in *Tull v. United States*, "a court in equity may award monetary restitution as an adjunct to injunctive relief, [but] it may not enforce civil penalties."[186] Parties arguing that *Kokesh* applies to the FTC believe that equitable monetary relief to be considered a penalty like SEC disgorgement was *Kokesh*. If this were to happen, they could argue that *Tull* applies and the FTC should no longer be able to pursue equitable monetary orders as ancillary relief to injunctions under Section 13(b).

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[181] 137 S. Ct. 1635 (2017).

[182] *Id*. at 1642 n.3.

[183] Royall, *supra* note 95-97.

[184] 137 S. Ct. 1639 (2017).

[185] 328 U.S. 402 (1946).

[186] *Tull v. United States*, 481 U.S. 412, 424 (1987).

Indeed, most courts have held that *Kokesh* does not apply to the FTC. In *FTC v. DirecTV*, the district court denied DirecTV's motion to amend its complaint to assert *Kokesh* as a defense.[187] The court stated that *Kokesh* "does not support the argument that the FTC is barred from seeking restitution: there, the Court explicitly declined to make any finding whatsoever, much less one relevant to whether the FTC has authority to seek restitution."[188] This was because the Supreme Court stated at the end of *Kokesh* that nothing in the opinion was intended to bar SEC disgorgement.[189]

In *FTC v. J. Williams*,[190] the FTC brought action against J. Williams, seeking injunction and disgorgement for violation of Section 5 and the Telemarketing Sales Rule.[191] J. Williams asserted *Kokesh* as a defense, but the court refused to deviate from Eleventh Circuit precedent and extend the logic *Kokesh*.[192] The court specifically stated that:

> [a]s a threshold matter, *Kokesh* did not involve [S]ection 13(b); it dealt with federal securities law . . . [T]he Supreme Court specifically declined to address whether courts possessed authority to order disgorgement in SEC enforcement proceedings.... [The] Supreme Court's deliberate avoidance of this different, if potentially analogous, issue provides no basis for this Court to disregard decades of precedent. Even if, as the Defendants argue, the footnote "is not merely a pronouncement of the limitations of the opinion," it is far from an extension of the holding in *Kokesh*.[193]

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[187] 2017 U.S. Dist. LEXIS 129119 (N.D. Cal. Aug. 12, 2017); 2017 WL 3453376 at 5.

[188] *Id.*

[189] 137 S. Ct. 1642 n. 3. (2017).

[190] 283 F. Supp. 3d 1259 (M.D. Fla. 2017).

[191] 16 C.F.R. 310.

[192] 283 F. Supp. 3d 1262 (2017).

[193] *Id.*

Finally, in *FTC v. Publishers Business Services*,[194] the FTC persuaded the court that "[t]he question whether courts may impose equitable monetary relief was neither presented nor answered" in *Kokesh,* and that because the case involved the SEC and not the FTC, *Kokesh* should not apply. The Ninth Circuit affirmed, noting the Supreme Court's admonition in *Kokesh* that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings."[195] The court also refused to apply any statute of limitation to Section 13(b).[196]

It is clear to see from these cases that courts are refusing to apply *Kokesh* to actions brought by the FTC. The main reason for this is simply because in *Kokesh,* the Supreme Court did not remove the SEC's power to pursue disgorgement- it merely held that the five-year statute of limitations applies under 28 U.S.C. § 2462 when the SEC pursues disgorgement as a penalty.[197] Also another major difference between disgorgement by the SEC's and the FTC is that the FTC attempts to return the disgorged profits to consumers, whenever possible.[198] This is different from the SEC because when they disgorge profits, returning the funds to victims is seen only as a secondary goal.[199] *Kokesh* cites *SEC v. Fischbach* to elaborate that in many SEC disgorgement cases, it becomes too costly to identify and create a repayment scheme for investors, and therefore, the primary goal in the case of the SEC is to deter conduct rather than

[194] 2017 WL 451953 (D. Nev. Feb. 1, 2017), *aff'd sub nom*. FTC v. Dantuma, 748 F. App'x 735 (9th Cir. 2018).

[195] 748 F. App'x 738 (9th Cir. 2018).

[196] *Id*. at 739.

[197] 137 S. Ct. 1645 (2017)

[198] *See*, *e.g.,* FTC OFFICE OF CLAIMS AND REFUNDS ANNUAL REPORT (2017), supra note 2, at 7, "As part of its mission to protect American consumers, the FTC works to get money back to people who are harmed by illegal business practices."

[199] *Kokesh*, 137 S. Ct. 1644.

make those who were harmed whole again.[200] This means that it is less likely that a court would be able to find that the FTC is acting only to punish wrongdoers and would thus be less likely to apply this statute of limitations. *Kokesh* was even brought as a defense by the defendant in *Credit Bureau*.[201] However, in this case the district court, like the other courts, refused to apply *Kokesh* in a manner that would limit the power of the FTC. Therefore, it seems extremely unlikely that courts will use *Kokesh* to limit the FTC's powers.

2. Statutory Construction

Many parties continue to argue that Section 19 of the Federal Trade Commission Act limits the authority of the FTC to pursue restitution and disgorgement under Section 13(b), in large part because it was enacted after Section 13(b).[202] Section 19(b) states:

> The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnership, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.[203]

[200] *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) ("It would be difficult and costly to identify and locate these shareholders, and it would be difficult to devise a coherent formula for distributing money among them…. The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.")

[201] 325 F. Supp. 3d 868 (2019).

[202] 15 U.S.C.S. § 57b.

[203] 15 U.S.C.S. § 57b(b).

This section authorizes district courts to hear actions brought by the FTC seeking monetary relief under Section 5 and actions heard "administratively by the agency and have been litigated to a final judgment."[204]

Section 19 does have some critical differences from Section 13(b). First, it authorizes district courts to hear cases that seek redressability where the case has been litigated to final judgment administratively. Second, it has a statute of limitations while Section13(b) has no statute of limitations, and third, it does not authorize preliminary injunctive relief.[205] The reason why it likely does not authorize preliminary injunctive relief is because Section 19 is only to be invoked after a final cease-and-desist order.[206] If it was to be believed that Section 19 would limit Section 13(b), David Vladeck, a former Director of FTC Bureau of Consumer Protection and law professor, states that you create a reality where the FTC could bring the case under "Section 13(b) and get interim relief, but … Forfeit[] any practical ability to force many defendants to give up the ill-gotten gains. Or, . . . proceed administratively under Section 5 and forgo interim relief in the hope that someday the Commission might obtain a disgorgement order."[207]

This argument was also rejected by the Supreme Court in its decision in *Porter*.[208] The defendant in *Porter* argued that courts are not permitted to award restitution under Section

[204] Vladeck, *supra* note 91.

[205] *Id.*

[206] *Id.*

[207] *Id*.

[208] 328 U.S. at 401 (1946).

205(a),[209] the injunction provision of the Emergency Price Control Act because a separate provision of the Act, Section 205(e), authorized litigation to recover damages.[210] The Supreme Court held that Section 205(e) does not eliminate a court's power under Section 205(a) to award restitution, and that these remedies "differ greatly" from the damages available under Section 205(e).[211]

This issue was brought up again by the Ninth Circuit in *FTC v. Commerce Planet*. [212] In this case, the FTC sought injunction and monetary relief for deceptive and unfair business practices in marketing a product which allowed individuals to sell products online.[213] This product was purely to instruct people on how to sell items on eBay. When they ordered the kit, they were enrolled in a monthly subscription fee, which they had to take affirmative steps to cancel and these steps were buried in the fine print of the defendant's website.[214] The district court permanently enjoined Commerce Planet under Section 13(b) and ordered $18.2 million in restitution.[215] On appeal, the defendant argued that Section 19 foreclosed the FTC from pursuing restitution under Section 13(b).[216] The Ninth Circuit disagreed, citing Section 19(e) which states

[209] Emergency Price Control Act of 1942 § 205(a) (§ 205(a) is the injunction provision of the statute which states "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court r an order enjoining such acts or practices").

[210] 328 U.S. at 401 (1956).

[211] *See Porter*, 328 U.S. at 401.

[212] 815 F.3d at 599 (2016).

[213] *See FTC v. Commerce Planet*, 815 F.3d, 593, 599 (9th Cir. 2016).

[214] *Id.*

[215] *Id.*

[216] *Id.* at 599.

that "remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."[217]

Based on this precedent from the Supreme Court and the Ninth Circuit, we can clearly see that courts did not intend for equitable monetary orders, like restitution and disgorgement, to be foreclosed when there is a separate provision of a statute which permits damages. The Supreme Court specifically stated that these remedies are part of securing complete justice for those who have been wronged.

3. The Textualist Approach Taken in Credit Bureau

The final argument that needs to be addressed is the argument made by the Seventh Circuit in *Credit Bureau*. The Seventh Circuit argued that the Supreme Court in *Meghrig* changed how courts should be interpreting statutes regarding judicially implied powers, believing that Section 13(b) no longer allowed for restitution and disgorgement. This belief was caused by the language in the provision, where Section 13(b) did not "contemplate an award for restitution" and only authorized temporary and permanent injunctions, while other provisions of the Federal Trade Commission Act do authorize equitable monetary relief.[218] The Seventh Circuit also believed that allowing Section 13(b) to authorize restitution would undermine other provisions of the Federal Trade Commission Act.[219] Because the Act does not require the FTC to give notice to defendants, as required by Section 5, there would no longer be a need for administrative proceedings if the FTC was able to obtain restitution while pursuing injunctions,

[217] *Id.* (citing 15 U.S.C § 57b(e))

[218] *FTC v. Credit Bureau Crt., LLC*, 937 F.3d at 783 (2019).

[219] *Id.* at 784.

and Section 13(b) has no statute of limitation while Section 19 has a three -ear statute of limitation.[220]

Meghrig v. KFC Western asked whether Section 7002 of the Resource Conservation and Recovery Act of 1976[221] authorized a private cause of action to recover the prior costs of cleaning up toxic waste that no longer endangers the environment.[222] In answering this issue, the Supreme Court interpreted the Act's citizen suit provision to reach only imminent and substantial harms.[223] This meant that the suit by plaintiffs, for past pollution which had already been cleaned up, could not recover restitution for completed clean-up.[224] The Court determined this by looking at the language in the citizen suit provision and believing that it only focused on the restraint of ongoing clean-up and disposal problems, not on past clean-up costs. [225]

The most obvious difference between *Meghrig* and *Credit Bureau* was explained by Chief Judge Wood in his dissent. She argued that *Meghrig* was a case of pure statutory interpretation and *Credit Bureau* was a case of judicially implied powers.[226] While both cases involved restitution, *Meghrig* concerned only whether the statute, which authorized restitution when there was "an imminent and substantial endangerment to health or the environment," required that the endangerment had to be ongoing at the time of suit.[227] Chief Judge Wood

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[220] *Id.*

[221] 42 U.S.C § 6972 (2015).

[222] *Meghrig v. KFC W., Inc.*, 116 S. Ct. 1252 (1996).

[223] *Id.* at 1256.

[224] *Id.*

[225] *Id.*

[226] *Credit Bureau Ctr.*, 937 F.3d at 792 (Wood, C.J., dissenting).

[227] *Id.*

specifically stated that "[g]eneral rules about equitable powers were of no importance for a statute that drew the temporal line at problems that are imminent and substantial."[228] Chief Judge Wood believed the Supreme Court only intended to determine whether the Resource Conservation and Recovery Act required imminent harm to be present, and did not intend to rework implied judicial powers since the Court was denying Meghrig the ability to pursue restitution which was explicitly authorized under Section 7002.

Another substantial issue for this argument is that *Meghrig* was decided in 1996, but the Supreme Court reaffirmed the traditional equitable principles of *Porter* as recently as 2015.[229] In *Kansas v. Nebraska*, the Court recognized that "court[s] may invoke equitable principles to devise 'fair . . . solution[s]' to compact violations."[230] The Supreme Court also cited *Porter* in 2002 in *United States v. Oakland Cannabis*,[231] stating that courts' equitable powers could only be displaced by a "clear and valid legislative command."[232]

In regard to the FTC pursuing equitable monetary orders under Section 13(b), there has been no clear and valid legislative command stating otherwise. As stated by the Ninth Circuit, Section 19(e) states "remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."[233]

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[228] *Id.*

[229] *Kansas v. Nebraska*, 574 U.S. 445 (2015).

[230] *Id.* at 445.

[231] 532 U.S. 483 (2002).

[232] *Id.* at 496.

[233] 815 F.3d at 599 (citing 15 U.S.C. § 57b(e)).

Chief Judge Wood also noted that *Meghrig* involved two private plaintiffs, while Credit Bureau involved government action against a private defendant. [234] As stated in *Porter*, "when the public interest is involved in a proceeding, a court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[235] When the government is seeking remedies, they are trying to undue public harm and prevent further ones through deterrence.[236]

When viewing all precedent and differences between *Meghrig* and *Credit Bureau,* it is inappropriate that the Seventh Circuit was willing to overturn over 30 years of precedent which began with *Amy Travel*.[237] The standing Supreme Court precedents from *Porter* and *Mitchell* as well as the Seventh Circuit's refusal to hear the case en banc shows that the Seventh Circuit was looking for any excuse they could to limit the FTC's power.[238]

IV. CONCLUSION

The Seventh Circuit decided to grossly deviate from the other eleven circuits in their decision in *Credit Bureau*. It ignored the legislative history of Section 13(b), ignored valid Supreme Court precedent, ignored all policy reasons for the FTC to have this power, and even overturned its own longstanding precedent without hearing the case en banc. Requiring the FTC to resort to Section 19 leaves the FTC in a similar position it was in before 1973. The FTC will

[234] *Credit Bureau Ctr.*, 937 F.3d at 793 (Wood, C.J., dissenting).

[235] 328 S. Ct. 1090.

[236] *Credit Bureau Ctr.*, 937 F.3d at 793.

[237] 875 F.2d 564 (1989).

[238] *Credit Bureau Ctr.*, 937 F.3d 786 (citing C.J. Wood's dissent.).

be less efficient with their limited resources, their ability to discourage future wrongful acts will be weakened, and those who need to be redressed will have to wait even longer.

The FTC pursing equitable monetary orders under Section 13(b) is not an abuse of its powers. This provision allows the FTC to enjoin malicious conduct and then redress those who have been harmed. Often, the firms that are violating the FTCA are hurting some of the most vulnerable members of our society. These firms falsely advertise medicine,[239] intimidate those who are in debt,[240] and deceive consumers into paying fees they cannot afford.[241] The FTC's power to pursue equitable monetary orders creates real consequences for those who intend to harm and deceive us, and it is unclear why the Seventh Circuit is trying protect wrongdoers. The Ninth and Tenth Circuits are currently rejecting this interpretation by the Seventh Circuit, and hopefully this error on their part can be corrected before too much damage is done.[242]

[239] *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 4 (1st Cir. 2010).

[240] *FTC v. Moses*, 913 F.3d 297, 301 (2d Cir. 2019).

[241] 937 F.3d at 766 (2019).

[242] *FTC. v. Am. Fin. Support Servs*., 2019 U.S. Dist. LEXIS 206205, 24-25 (C.D. Cal. Nov. 26, 2019) ("*FTC v. Credit Bureau Center, LLC*, is an out of circuit case that does not control here. The Ninth Circuit has "repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'"); *FTC v. Zurixx*, 2020 U.S. Dist. LEXIS 33719, 11 (D. Utah Feb. 26, 2020) ("The Tenth Circuit has rejected the reasoning and interpretations of precedent that the Seventh Circuit panel adopted in Credit Bureau.")