No. 19-508

In the Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent non-profit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

AAI submits this brief because the goals of U.S. antitrust law will be significantly impaired if the Federal Trade Commission is unable to prevent unfair methods of competition by seeking disgorgement in appropriate antitrust cases under Section 13(b) of the Federal Trade Commission Act.

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[1] The parties have lodged blanket consent to file amicus briefs with the clerk. No counsel for a party authored this brief in whole or in part and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

INTRODUCTION & SUMMARY OF ARGUMENT

This case is about deceptive practices: The Federal Trade Commission sued AMG to put a stop to its fraudulent lending scheme that bilked over a billion dollars from unsuspecting borrowers. But the interpretation of the Federal Trade Commission Act that AMG asks this Court to adopt would undermine the Commission's ability not only to protect consumers from unfair and deceptive practices but also to prevent anticompetitive conduct.

There is little dispute that market power and anticompetitive conduct pose a serious threat to the U.S. economy—and they are on the rise. In many industries now, only a few companies control the vast majority of sales. And they work hard to keep competitors out through a variety of creative (and illegal) maneuvers, from paying competitors not to enter the market to threatening customers not to do business with anyone else.[2]

Antitrust violations are prevalent because they are profitable. Take, for example, the pharmaceutical industry. Drug companies can increase their revenue by billions of dollars simply by illegally delaying or foreclosing competition on a single drug.[3] Of course, those

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[2] For a discussion of the prevalence of anticompetitive conduct and the threat posed by increasing market power, see Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy 12–31 (2019).

[3] *See* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1580 (2006); John George, *Hurdles ahead for Cephalon*, Phila. Bus. J. (Mar. 20, 2006), https://perma.cc/3QAW-B3U9 (quoting pharmaceutical company CEO stating that delaying generic entry gave company "$4 billion in sales").

billions of dollars do not come from nowhere. They are taken from patients and their insurance companies.

The Federal Trade Commission Act specifically directs the Federal Trade Commission to prevent such anticompetitive conduct. Yet, on AMG's view, that same statute prohibits courts from awarding the relief necessary to enable the Commission to actually do so. Equitable monetary relief is critical to the FTC's ability to accomplish its statutory mission. Illegal business practices are not preventable if they are profitable.

In some instances, private enforcement of antitrust statutes can recover ill-gotten gains and deter violations. But in other cases, private litigation is insufficient or absent entirely. If the FTC cannot seek disgorgement in those cases, anticompetitive conduct will continue to pay. And the Commission will be hard-pressed to prevent it.

This is not the only problem with AMG's interpretation. In AMG's view, unless Section 13(b) expressly mentions a specific equitable remedy, it is categorically foreclosed. So, on that theory, courts are not permitted to order an asset freeze while administrative proceedings are ongoing. Nor can they order that companies hold illegally-acquired assets separate from the rest of their holdings until enforcement proceedings are resolved.

In other words, as AMG would have it, the statute designed to prevent anticompetitive conduct allows antitrust violators to get away with antitrust violations—as long as they can accomplish them fast enough—and to keep the profits those violations generate.

If, for some reason, the FTC Act mandated these absurd results, this Court would have no choice but to abide by it. But the statute requires no such thing. To the contrary, Section 13(b) authorizes courts to issue

injunctions—authority that for hundreds of years has been understood to empower courts to exercise their full equitable powers.

This is no accident. Congress knows how to limit courts' equitable power and chose not to do so in the FTC Act. And Congress is well aware that because of its choice, the Commission relies on Section 13(b) to seek disgorgement. Yet it has made no effort to alter courts' equitable power—despite having twice amended the statute in other ways.

That's because courts' authority to exercise the full panoply of equitable remedies is essential to the effective enforcement of the statute. This Court should reject AMG's request to interpret the statute in a way that would render it unable to achieve its goal.

ARGUMENT

I. Congress has repeatedly and knowingly chosen to ratify, rather than prohibit, the Federal Trade Commission's use of Section 13(b) to seek disgorgement.

As the Commission's brief thoroughly documents, it has been clear for hundreds of years that the power to issue an injunction includes the power to award restorative monetary relief. *See* FTC Br. 16–24. Beginning as far back as 1855, this Court repeatedly held that statutes that authorize courts to "grant injunctions" necessarily grant the authority to award equitable monetary remedies. *See, e.g.*, *Stevens v. Gladding,* 58 U.S. 447, 454 (1854); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

This is because "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery

of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 328 U.S. at 399. And the authority to enjoin violations of a statute, by definition, carries with it the authority to exercise "all the inherent equitable powers of the District Court . . . for the proper and complete exercise of that jurisdiction." *Id.* at 398; *see also id.* at 399 ("[W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.").

For years, Congress has relied on this well-established understanding of what it means to authorize courts to grant injunctions. Shortly after this Court's decision in *Porter*, for example, Congress added an exception to courts' jurisdiction "to restrain violations of" the Fair Labor Standards Act. *Mitchell*, 361 U.S. at 289. Congress provided that courts, acting under that grant of jurisdiction, could not "order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." *Id.*

If Congress did not understand the authority to enjoin statutory violations to encompass the authority to award restorative monetary relief, no such exception would have been necessary. The jurisdiction to enjoin statutory violations would never include the authority to order restitution of unpaid minimum wages in the first place. And because Congress expressly prohibited only restitution of unpaid minimum wages, this Court held that the statute did not prohibit other forms of restitution, such

as restitution of wages lost because of unlawful discharge or discrimination. *See Mitchell,* 361 U.S. at 288.

Put simply: When Congress wants to limit courts' equitable authority, it says so. *See id.* It did not say so in enacting Section 13(b) of the Federal Trade Commission Act.

For decades, courts of appeal consistently honored that choice, holding—as this Court had held for over a century—that the statutory grant of an injunction necessarily includes the authority of the court to exercise its full equitable powers.[4] And for decades, the Commission relied on this authority in appropriate cases to seek disgorgement from wrongdoers who would otherwise be able to keep the profits from their misconduct.

During this time, Congress has twice amended the statute. And twice it has decided not to limit courts' equitable power under it. *See* Pub. L. No. 103-312, 108 Stat. 1691 (1994); Pub. L. No. 109-455, § 3, 120 Stat. 3372 (2006) (codified at 15 U.S.C. § 45(a)(4)).

This is not because Congress is unaware of how the statute has been interpreted. To the contrary, the Federal Trade Commission's reliance on Section 13(b) to seek disgorgement has been brought to Congress's attention

[4] *See, e.g., F.T.C. v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991); *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989); *F.T.C. v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984); *F.T.C. v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *F.T.C. v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 & n.6 (10th Cir. 2005); *F.T.C.* v. *Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *F.T.C.* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *F.T.C.* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).

several times—including by the Chamber of Commerce, which now argues that Congress couldn't possibly have intended this result. *See, e.g.*, *The Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Commission and the Antitrust Division of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 75 (2000) (Chamber of Commerce representative testifying that Commission should not be permitted to seek disgorgement); *Oversight of Enforcement of the Antitrust Laws: Hearing Before the S. Subcomm. on Antitrust, Bus. Rights and Competition of the S. Comm. on the Judiciary*, 107th Cong. 48 (2002) ("[C]ourts in recent years have recognized the Commission's authority in antitrust cases to seek in federal court broad equitable relief, including disgorgement of ill-gotten gains and restitution for injured consumers, under Section 13(b) of the Federal Trade Commission Act."); *FTC at 100: Views from the Academic Experts: Hearing Before the Subcomm. on Com., Mfg., and Trade of the H. Comm. on Energy and Com.*, 113th Congress 119 (2014).

Multiple times a year, the Commission testifies before the Congressional committees that oversee the agency and informs them of its enforcement work. This testimony has consistently included reports on the Commission's use of disgorgement.[5] And the House Judiciary Committee

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[5] *See, e.g.*, Fed. Trade Comm'n, Prepared Statement, Before the Subcomm. on Regul. Reform, Com. and Antitrust Law of the H. Judiciary Comm., at 11 (2015), available at https://perma.cc/XJ25-HFEN; Fed. Trade Comm'n, Annual Report to Congress, at 25 (2018), available at https://perma.cc/W2EU-TU29. Archives of the Commission's testimony are available at https://perma.cc/ZK8E-YX8A. And archives of its annual reports are available at

had an entire hearing, where the Federal Trade Commission's use of disgorgement was one of only two topics discussed. *See Hearing before H. Comm. on the Judiciary*, 106th Cong. (2000).

In addition, the Antitrust Modernization Commission, a commission directed by statute to undertake a comprehensive review of American antitrust law, reported to Congress and the president that courts "generally have interpreted Congress's express authorization" to seek an injunction as permitting "all equitable remedies." Antitrust Modernization Commission, Report and Recommendations 286 (Apr. 2007).[6] And the Modernization Commission "endorse[d]" the FTC's use of "monetary equitable remedies in competition cases" under Section 13(b), advising that it was unnecessary to "clarify, expand, or limit" that authority. *Id.* at 285.

Moreover, when Congress amended the FTC Act in 1994, the Senate Report specifically mentioned that under Section 13(b), the Commission "can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 103-130, 15–16 (1993). That is, in reviewing and amending the statute, Congress itself expressly recognized that by authorizing courts to enter an injunction, the Act enabled courts to award the full panoply of equitable remedies.

If Congress had wanted to limit courts' equitable authority in cases under the FTC Act, it would not have used language that for hundreds of years has been

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https://perma.cc/R67D-8LTW.

[6] Available at https://perma.cc/456W-RGQJ.

understood to authorize the full equitable power of the court. Or, at the very least, it would have amended that language after being expressly informed of the unanimous interpretation it was being given by courts and the Commission. It did not do so.

Congress, courts, the FTC, and regulated businesses have long relied on that choice. This Court should not upend it.

II. Reading Section 13(b) to silently prohibit courts from exercising their equitable powers would undermine the statute.

Congress's decision not to limit courts' equitable authority under the Federal Trade Commission Act makes perfect sense. The statute directs the FTC to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition." 15 U.S.C. § 45(a)(2). Its ability to do so relies on courts' authority to exercise the wide range of equitable remedies that the power to issue an injunction has always been understood to encompass.

Indeed, this Court has frequently recognized that courts' broad discretion to fashion equitable remedies is central to remedying antitrust violations. *See, e.g.*, *Ford Motor Co. v. United States,* 405 U.S. 562, 573 (1972) (explaining that because the "relief in an antitrust case must be effective to redress the violations and to restore competition," courts are "clothed with large discretion to fit the decree to the special needs of the individual case" (cleaned up)); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 185 (1911) (court fashioning antitrust remedy has a "duty of giving complete and efficacious effect to the prohibitions of the statute"); *cf. California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990) (holding that "the statutory

language [of § 16 of the Clayton Act] indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief" and finding divestiture authorized by the plain text).

Reading Section 13(b) to silently prohibit courts from exercising that broad discretion would undermine the statute, and in some cases, render it almost entirely useless to prevent anticompetitive conduct.

A. Disgorgement is an essential tool for preventing unfair methods of competition.

1. For years, the FTC has judiciously sought disgorgement under Section 13(b) in cases involving egregious antitrust violations, where the wrongdoer would otherwise walk away with its ill-gotten gains.

Take, for example, *F.T.C. v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 34 (D.D.C. 1999). Mylan Laboratories, the nation's second-largest generic drug company, illegally conspired with its suppliers to deny its competitors access to the ingredients for two widely-prescribed anti-anxiety drugs. Fed. Trade Comm'n, FTC Reaches Record Financial Settlement to Settle Charges of Price-fixing in Generic Drug Market (Nov. 29, 2000).[7] Having blocked the competition, Mylan then raised the price on these drugs by over 1,900%, earning itself an extra $120 million. *Id.*; *Mylan*, 62 F. Supp. 2d. at 34. The FTC was able to disgorge much of this profit and return it to those who overpaid. *See id.*

Because the FTC was able to disgorge Mylan's profits, Mylan and other drugmakers learned that illegally blocking their competitors from obtaining the ingredients

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[7] Available at https://perma.cc/XBS9-WJGL.

they need would not ultimately make them money. And, in the years since, few drugmakers have even tried. In other words, the Commission's ability to seek disgorgement has gone a long way towards preventing this anticompetitive conduct.

Disgorgement has also been critical to preventing brand-name drug manufacturers from illegally paying generic drug makers to delay the entry of generic drugs onto the market. Such pay-for-delay schemes can cost drug-buyers millions, or even billions, of dollars by forcing them to buy the more expensive brand-name drug for years longer than they would otherwise have to. *See supra* note 3.

In *F.T.C. v. Cephalon*, the FTC obtained disgorgement from a brand-name drug manufacturer that had paid four competitors to wait years before beginning to sell a generic version of its highly profitable sleep-disorder drug—all the while drug purchasers (consumers, pharmacies, and insurers) paid over a billion dollars more for the drug than they would have had the generics been on the market. Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished (May 28, 2015).[8] The money disgorged from the company went to repay those who had overpaid for the drug. *See id.*

This disgorgement sent a key message: Unambiguously unlawful payments to delay generic entry will be unprofitable. *Cf. F.T.C. v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 440 n.5 (E.D. Pa. 2015) (noting that Cephalon's defense relied on the "scope of the patent" standard that this Court had definitively rejected). Since

[8] Available at https://perma.cc/8XL9-LQ5C.

the *Cephalon* case, there have been few instances of brand-name manufacturers attempting to overtly use large and unjustified payments to delay generic entry.

2. If the Commission is no longer able to seek equitable monetary relief in cases like this, these violations will continue to be profitable. And the agency's ability to prevent antitrust violations—that is, to accomplish the primary goal of the FTC Act—will be severely compromised.

The agency's own experience proves the point. For years there has been "an epidemic" of physician price-fixing schemes, in which competing doctors collude to extract higher rates from insurance companies. *See, e.g.*, Thomas L. Greaney, *Chicago's Procrustean Bed: Applying Antitrust Law in Health Care*, 71 Antitrust L.J. 857, 892 (2004); Stephen Calkins, Civil Monetary Remedies Available to the Federal Government, Testimony to Antitrust Modernization Committee, at 6 (Nov. 30, 2005).[9] These higher fees are then passed on to consumers as higher premiums. *See* Robert Pitofsky, Prepared Statement of the Fed. Trade Comm'n, Before the H. Judiciary Comm., at 5 (1999).[10]

Since 2000, the FTC has brought dozens of enforcement proceedings against healthcare providers for colluding with their competitors to negotiate higher reimbursement rates. *See* Fed. Trade Comm'n, Overview of FTC Actions in Health Care Services and Products 7–36 (June 2019).[11] The FTC did not lose a single one of these cases. But it sought and obtained disgorgement only once.

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[9] Available at https://perma.cc/MA22-78HT.

[10] Available at https://perma.cc/AXX6-7GHN.

[11] Available at https://perma.cc/7NYH-QPMC.

See id. at 31. In most cases, then, the only real consequence of physician price-fixing is an order not to do it again. Unsurprisingly, that has not worked to prevent the problem. *See* Calkins, Civil Monetary Remedies Available, at 7 (quoting FTC Chair stating that "by some estimates," ten percent "of all doctors in the country" were under order to stop colluding and that "the message is not being heard").

The FTC, in other words, cannot do its job of preventing antitrust violations if it must permit even those that commit egregious misconduct to keep their ill-gotten gains.

3. Private litigation is often proffered as the solution to this problem. But while private lawsuits are a crucial tool for enforcing antitrust law, they are often insufficient. For one thing, those most harmed by anticompetitive behavior are often too dependent on the antitrust violator to be willing to sue them. As a result, there are many cases in which there simply is no private litigant willing to file a lawsuit. For example, despite the prevalence of physician price-fixing schemes, there are almost no private lawsuits challenging them. *See* Calkins, Civil Monetary Remedies Available, at 6. That's because the "most logical plaintiffs," the health insurance companies, "are loath to sue providers with whom they desire a long-term, mutually beneficial business relationship." *See id.*

Even if there is someone willing to sue, there are numerous obstacles to doing so. *See, e.g.*, Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 444–46 (2001); Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. 79, 83 (2009).

For instance, antitrust litigation can often only be brought as a class action, but class certification has become increasingly difficult. *See* Elhauge, *supra*, at 83–84 ("Where once courts recognized that, because antitrust cases involve marketwide injuries, they are uniquely suitable for class action treatments, many courts now seem willing to accept arguments that in markets with product differentiation, buyer negotiation, or price discrimination, injuries are individuated in a way that undermines common proof of injury, even when the case involves horizontal price fixing.").

And, in some cases, arbitration clauses prevent class actions entirely—a prohibition this Court has upheld, even when the cost of bringing an individual arbitration outweighs the expected damages. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

This Court has also repeatedly held that, in most cases, only a direct purchaser of a product or service may sue an alleged antitrust violator under federal antitrust law. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019). So indirect purchasers—that is, the end users of a product or service—are typically unable to sue.

But direct purchasers are often unwilling to sue their suppliers for the same reason health insurers won't sue physicians: They depend on them. And they can pass any overcharge on to their customers. *See* Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 192 (2009).[12]

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[12] Contrary to the assertion of AMG's *amicus* SureScripts (at 25), the FTC's ability to obtain disgorgement and restitution does not undermine the policies underlying the direct-purchaser rule. As the

There are numerous examples of egregious antitrust violations that go unchallenged by the direct purchasers subject to them. Recently, for example, the FTC filed a complaint against Vyera Pharmaceuticals and its founder Martin Shkreli, alleging that Vyera monopolized the market for its life-saving toxoplasmosis drug, Daraprim, by illegally preventing generic drug manufacturers from having access to it. *See* Press Release, Fed. Trade Comm'n, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim (Jan. 27, 2020).[13] Such access is necessary because to get FDA approval to sell a generic, manufacturers need samples of the brand-name drug to demonstrate bioequivalence. *Id.* By blocking generics from having access to Daraprim—and therefore from

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majority of the Commission recognized in *Mylan*, this Court has strictly limited that rule to actions under the Clayton Act. *See California v. ARC America Corp.*, 490 U.S. 93 (1989) ("[I]n *Illinois Brick*, the issue before the Court in both that case and *Hanover Shoe* was strictly a question of statutory interpretation—what was the proper construction of § 4 of the Clayton Act."). Further, neither of the policy justifications for the rule apply here. The measure of disgorgement is the defendant's unjust enrichment, which does not entail any of the measurement problems the Court sought to address by the indirect purchaser rule. *See Mylan Labs.*, 62 F. Supp. 2d at 41 ("[T]he [Supreme] Court's concern [in *Illinois Brick*] for the complexity of the damages proceeding is not implicated by a disgorgement action."). And courts and the Commission are both well-equipped to prevent duplicative recovery. *See infra* page 20–21. Indeed, neither AMG nor any of its amici can point to a single instance of it ever actually happening. *See id*

[13] Available at https://perma.cc/653M-X6DA. The complaint in the case is available at https://perma.cc/6MUW-SEYB.

competing with it—Vyera was able to increase the price of this essential medication by over 4,000%. *Id.*

The direct purchasers of Daraprim are Vyera's distributors. Vyera ensured that generic manufacturers couldn't get access to Vyera by prohibiting its distributors from selling to them. *See id.* But in nearly a year since the Commission filed its complaint, no direct purchaser has brought suit. That's unsurprising: Vyera's distributors are compensated on the basis of the drug's exorbitant list price, and if they fall out of favor with Vyera, they lose the enormous profit distributing Daraprim brings. And so, despite Vyera's blatant misconduct, there's been no private enforcement of any kind. *See also* Bauer, *The Stealth Assault*, 62 U. Pitt. L. Rev. at 446 (describing inability of consumers to challenge Ticketmaster's use of its monopoly power over event tickets to extract supracompetitive fees because the Eighth Circuit held they were not direct purchasers); Am. Antitrust Inst., *Comments of American Antitrust Institute Working Group on Remedies to Antitrust Modernization Commission*, 19 (June 17, 2005) (auto manufacturers illegally prevented cheaper Canadian cars from entering the American market, but the direct purchasers, car dealers, did not sue).[14]

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[14] State-law suits are not a sufficient substitute for the federal claims consumers would bring absent the direct-purchaser rule. Although several states do permit indirect purchasers to bring claims under state law, many others do not. *See* Newberg on Class Actions § 20:12, at 435-439 (5th ed. 2011) (identifying 13 states that lack indirect purchaser laws, six that allow indirect purchaser suits only by the attorney general, and five that have never ruled on indirect purchaser standing).

In short, many victims of anticompetitive conduct can't successfully sue. What's more, when they do, the antitrust violator usually pays less in damages than the profits it gained from its misconduct. *See, e.g.,* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015) (finding, in study of "every completed private U.S. cartel case since 1990," that "median average settlement was 37% of single damages").

That's why the FTC Act does not prohibit courts from using their traditional equitable powers to award disgorgement. It is critical to the FTC's mission to prevent anticompetitive conduct. This Court should not interpret the statute in a way that would render it unable to accomplish its central aim.

4. AMG and its amici argue that there is no need for the FTC to obtain equitable monetary remedies under Section 13(b) of the statute because it can do so under Section 19, following an administrative proceeding and the issuance of a cease and desist order. That's wrong for two reasons. First, Section 19 applies only to "unfair or deceptive acts or practices." 15 U.S.C. § 57b. By its terms, it does not apply to unfair methods of competition. *See id.* Thus, the argument that Section 19 is a sufficient substitute for equitable relief under Section 13(b) ignores half of the FTC's mission: to prevent unfair methods of competition.

Second, even if consumer redress under Section 19 could be awarded in competition cases, requiring its use in every case would be a tremendous waste of the Commission and defendants' resources. Each case would have to be litigated three times: first, in district court so the Commission could obtain a preliminary asset freeze

under Section 13(b), then in administrative proceedings to obtain a cease and desist order, and then back to district court again for monetary remedies. Congress created a judicial pathway so that when the Commission does not seek to further expand upon the prohibitions of the FTC Act, it need not go through—or put defendants through—this years-long multi-forum process. *See* S. Rep. No. 93-151, at 31 (1973); FTC Br. 5–6.

Worse, on AMG's reading of the statute, the first step—going to court to obtain an asset freeze—would be foreclosed, rendering the whole exercise a fruitless endeavor. The statutory authority for preliminary equitable relief, including an asset freeze, is Section 13(b). But on AMG's view, that section prohibits courts from freezing defendants' assets. *See infra* page 24. So by the time the agency got through its years-long administrative proceeding, followed by its court proceedings, any antitrust violator worth its salt would have already dissipated the assets the FTC sought.

That is not an adequate substitute for the judicial pathway Congress actually provided.

5. AMG's amici, Pharmaceutical Research and Manufacturers of America and Surescripts, LLC, argue that the FTC has abused its authority to seek equitable monetary remedies in competition cases. Not so. The FTC has used these remedies judiciously in a small number of cases to prevent companies that had committed egregious wrongdoing from profiting from their misconduct. *See, e.g.*, *supra* pages 10–12.

To start, SureScripts asserts that the FTC's use of disgorgement in antitrust cases has "more than double[d]" since 2012. SureScripts Amicus Br. 18. But it has "more than double[d]" to a grand total of seven cases—seven

cases in nearly ten years. *See id.* (listing cases). That is not a sign of abuse; it is a sign of restraint.

Next, SureScripts cites (at 18) four cases in which, it asserts, the disgorgement awards sought by the FTC were "staggering." But disgorgement is, by definition, limited to the wrongdoer's ill-gotten gains. The Commission has never sought—and could not possibly obtain—any money from a defendant beyond the profits the defendant reaped from its illegal conduct. To the extent the Commission's disgorgement figures are staggering, it is because the profits extracted by these defendants in violation of the law were "staggering." Indeed, it is precisely these cases, cases where violating the law is extremely profitable, that disgorgement is most necessary. Otherwise, violating the law will continue to be good business.

Citing its own case, SureScripts accuses the Commission of bringing cases against defendants where the law is insufficiently clear to provide fair notice. That's simply not true. SureScripts' opposition to FTC enforcement is understandable, given the enforcement action against it. But as the court in that case held, the claims against the company—that SureScripts preserved its monopoly through threats and de facto exclusivity agreements preventing its customers from doing business with its competitors—are firmly "ground[ed]" in "Circuit precedent." *F.T.C. v. Surescripts, LLC*, 424 F. Supp. 3d 92, 98 (D.D.C. 2020).

The FTC seeks disgorgement in egregious cases, not liminal ones. Of course, as the Commission points out (at 44), if the FTC were truly bringing cases against defendants who had no notice they were violating the law, the Due Process Clause would prevent it from prevailing.

Defendants are already protected from this supposed harm. There is no need to give the FTC Act a new meaning to do so.

Finally, AMG's amici fret that equitable monetary relief, when combined with private actions, could lead to duplicative recovery. But they point to no example of this ever happening. *See* Gavil, *Thinking Outside the Illinois Brick Box*, 76 Antitrust L.J. at 192 n.76 ("[I]f the threat of multiple recoveries . . . was genuine, one would think some obvious examples would be observable after more than three decades."). In fact, PhRMA admits (at 10) that courts are able to prevent this problem. And in its disgorgement cases, the Commission has done so. *See, e.g.*, *F.T.C. v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 440 (E.D. Pa. 2015) (explaining that disgorgement would be placed in a "Consumer Relief Fund," from which any damages obtained by private plaintiffs could be paid, preventing duplicative recovery); *see also* Statement of Chairman Robert Pitofsky and Comm'rs Sheila F. Anthony & Mozelle W. Thompson, *Federal Trade Commission v. Mylan Laboratories, Inc.,* FTC File No. X990015 ("Courts have routinely coordinated remedies in government disgorgement actions and private damage actions, and are readily able to surmount the potential problem of duplicative recovery."); *id.* n.3 (citing numerous examples).

Not to mention that equitable monetary relief is equitable—that is, courts have discretion not to grant it if they believe it is unnecessary or unfair. Section 13(b) only enables the FTC to *seek* disgorgement. It is the court that decides whether to grant it.

For decades, the FTC has used its power to seek monetary equitable relief responsibly, seeking

disgorgement in a limited number of cases to ensure that egregious antitrust violators cannot profit off their misconduct and to return those profits to those who have been harmed. In these cases, courts' authority to grant disgorgement is essential to the FTC's ability to prevent this misconduct from continuing. The law—as courts, the agency, and Congress have understood it for years—does precisely what it was intended to do. This Court should not change it.

B. The Federal Trade Commission depends on courts' traditional equitable authority to fashion effective preliminary relief.

Reading Section 13(b) to limit courts' traditional equitable powers would not just prevent the Federal Trade Commission from obtaining disgorgement at the end of litigation, it would also threaten to deprive the Commission of essential preliminary remedies—particularly in cases involving illegal mergers and acquisitions.

There is no doubt that following litigation, Section 13(b) permits courts to enter a permanent injunction ordering divestiture. *Cf. Am. Stores*, 495 U.S. at 281 (holding that "[o]n its face," a "grant of authority" to enter "injunctive relief" includes injunctions requiring divestiture). But as this Court has observed, it is often difficult, if not impossible, to unscramble a merger years after the fact. *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966). It is imperative, therefore, that the Commission be able to obtain preliminary relief that prevents the scrambling of assets in the first place.

Indeed, this is one of the primary reasons Section 13(b) was passed in the first place.[15]

In many cases, the Commission can simply obtain an order temporarily enjoining the merger. But in some instances, the merging companies make that impossible. Take, for example, *F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989). In that case, one of the largest producers of industrial dry corn—processed corn used to make food like corn flakes, bread, and beer—acquired another large dry corn producer, further consolidating a market that only had a handful of manufacturers to begin with. *See id.* at 902. The companies were "well aware that the Commission possessed serious reservations about the legality of the [deal] before it was consummated." *F.T.C. v. Ill. Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988). So they structured their transaction to avoid the statutory requirement that they notify the FTC. *Id.* And they accelerated their closing date, ensuring the Commission could not get into court in time to stop it. *See Elders Grain,* 868 F.2d at 907.

The Commission instituted an administrative proceeding challenging the acquisition. *See Illinois Cereal Mills*, 691 F. Supp. at 1134. But if it could not unwind the deal in the meantime, it would be difficult if not impossible to do so later. *See id.* So the Commission asked a district court to rescind the merger, pending the completion of administrative proceedings. *See id.*

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[15] *See F.T.C. v. Ill. Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988), *aff'd sub nom. F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989) ("This persistent problem has been long recognized by courts, and is the underlying reason for the Commission's authority to seek preliminary relief under Section 13(b) of the FTC Act").

In upholding the court's decision to do so, the Seventh Circuit explained that interpreting Section 13(b) to remove courts' traditional authority to order rescission "as a form of preliminary equitable relief" would "go far toward rendering the statute a dead letter." *Elders Grain, Inc.*, 868 F.2d at 907. It would mean that companies could violate the law with impunity and, as long as they acted quickly enough, they could prevent the FTC from ever being able to do anything about it. *See id.* Nothing in the text or history of the statute requires that absurd result.

To the contrary, in declining to limit courts' equitable powers, Section 13(b) intentionally "preserves the flexibility of traditional equity practice." *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) (holding that request for preliminary relief was not moot, despite the completion of the challenged merger while the appeal was pending, because "courts are clothed with large discretion to create remedies effective to redress antitrust violations and to restore competition" (cleaned up)). This flexibility not only preserves courts' ability to order preliminary relief, it enables them to tailor that relief to preserve the status quo, while minimizing the impact on regulated businesses and the public.

For example, courts have long used their traditional equitable powers to enter hold separate orders, "a form of preliminary relief [that] permits the challenged transaction to go forward, but requires the acquiring company to preserve the acquired company (or certain of the acquired assets) as a separate and independent entity." *F.T.C. v. Weyerhaeuser, Co.*, 665 F.2d 1072, 1075 n.7 (D.C. Cir. 1981) (citing examples going back to 1956); *see also Whole Foods Mkt.,* 548 F.3d at 1034 ("[C]ourts retain the power to preserve the *status quo nunc,* for

example by means of a hold separate order."). The FTC often relies on these orders to ensure that illegally-acquired assets do not become so intertwined with pre-existing assets that divestiture becomes impossible.

If Section 13(b) prohibited traditional equitable remedies, the agency's—and courts'—only option for ensuring that a company will be able to divest its illegally-acquired assets would be to block a merger or acquisition outright. And so the agency would always be forced to forego a more targeted remedy—with less impact on the regulated business—in favor of the most drastic alternative, even when the Commission itself believes it is unnecessary to do so. That cannot be what Congress intended.

Nor could Congress have intended to permit antitrust violators to dissipate their assets during the course of enforcement proceedings, so that no matter the result, they never have to disgorge their ill-gotten gains. Yet that is precisely what AMG's reading of the statute would require. Section 13(b) does not specifically mention asset freezes. Therefore, on AMG's view, it necessarily prohibits them—even though that's directly contrary to the well-established understanding of courts' equitable power. *See, e.g.*, *Deckert v. Indep. Shares Corp.,* 311 U.S. 282, 290 (1940); *U.S. Oil & Gas Corp.*, 748 F.2d at 1431.

AMG's interpretation of Section 13(b) would "go far toward rendering the statute a dead letter." *Elders Grain, Inc.*, 868 F.2d at 907. All an antitrust violator would have to do to evade the statute is close its deal before the FTC can get to court or dissipate its assets before the end of a years-long administrative proceeding. Luckily, that is not what the statute requires. This Court should reject AMG's invitation to hold otherwise.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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