

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 AMG CAPITAL MANAGEMENT, LLC,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 19-508
7 FEDERAL TRADE COMMISSION,)
8 Respondent.)
9 - - - - -
10
11 Washington, D.C.
12 Wednesday, January 13, 2021
13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:00 a.m.
17
18 APPEARANCES:
19 MICHAEL PATTILLO, ESQUIRE, Fernandina Beach, Florida;
20 on behalf of the Petitioners.
21 JOEL R. MARCUS, ESQUIRE, Washington, D.C.;;
22 on behalf of the Respondent.
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-508, AMG
5 Capital Management versus the Federal Trade
6 Commission.

7 Mr. Pattillo.

8 ORAL ARGUMENT OF MICHAEL PATTILLO

9 ON BEHALF OF THE PETITIONERS

10 MR. PATTILLO: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The FTC Act's test, structure, and
13 purpose make clear that when Section 13(b)
14 authorizes the Commission to seek a permanent
15 injunction, it means just that, a permanent
16 injunction as traditionally understood. It does
17 not mean injunctions and all equitable relief or
18 injunctions and monetary relief for past harms.

19 Three features of the Act make that
20 especially clear. First, 13(b) is limited to
21 cases where someone is violating or is about to
22 violate the Act. That limit to ongoing or
23 imminent violations would make no sense if 13(b)
24 authorized retrospective monetary relief for
25 past harms.

1 Second, where the Act allows relief
2 beyond injunctions, it says so. Section 5(l)
3 authorizes an injunction and further equitable
4 relief as appropriate. That language would have
5 been pointless if the word "injunction" itself
6 implied all equitable relief.

7 Third, another provision, Section 19,
8 authorizes monetary relief for past consumer
9 injury. But it provides safeguards, including a
10 statute of limitations, a heightened proof
11 requirement, and notice to victims. Those
12 limits would be meaningless if they could be
13 evaded under 13(b).

14 Even if there were a presumption that
15 mentioning a specific type of equitable relief
16 meant all equitable relief, and there should not
17 be, those three features overcome it.

18 To be clear, the Commission can get
19 retrospective relief for consumer harm, but it
20 must invoke Section 19, the mechanism Congress
21 provided for that purpose. That makes sense.
22 Because the Act's prohibitions are broad and
23 general, Congress, since 1914, made agency
24 processes the primary enforcement mechanism so
25 the agency can apply its expertise and give

1 businesses notice on what is prohibited.

2 Section 13(b), by contrast, is a
3 narrow supplement for threatened harm where the
4 Commission must come to court to stop the
5 conduct quickly. Where there is more time, like
6 for backward-looking remedies, there was no
7 reason for Congress to bypass agency
8 responsibilities to provide guidance.

9 CHIEF JUSTICE ROBERTS: Mr. Pattillo,
10 one of the issues with your reading of the
11 statute is that it was passed roughly 50 years
12 ago, and in the intervening years, there's been
13 a significant change in how this Court
14 interprets statute -- statutes.

15 Back when this one was passed, we had
16 a pretty free-wheeling approach. You know, we
17 weren't as confined to the specific language.
18 You sort of looked at what Congress had in mind
19 and -- and figured out the meaning in light of
20 that.

21 And, of course, today, we have a more
22 disciplined approach, you know, I think more
23 suited to our role under the Constitution. But
24 shouldn't we construe this statute in the
25 environment in which Congress passed it in light

1 of the, as I said, more free-wheeling approach?

2 And I think there'd be a lot more
3 leeway to your friend on the other side argument
4 about an expansive reading of some of the
5 language.

6 So why -- why do we sort of adopt a --
7 I don't know what it is -- a view that -- that
8 is current today but wasn't current back then?

9 MR. PATTILLO: Your Honor, I have two
10 responses to that question. The first is that
11 this Court rejected a very similar argument in
12 Alexander v. Sandoval. The argument was made
13 that, listen, at the time that Title VI of the
14 Civil Rights Act was enacted, the Court at that
15 time followed what you referred to as the more
16 free-wheeling approach to implying causes of
17 action and implied remedies.

18 And the Court said, be that as it may,
19 you know, we have since sworn off that method of
20 statutory interpretation and we decline, you
21 know, one -- one last drink. And I think that
22 that applies equally here. Whether or not that
23 was the motive at the time 13(b) was enacted,
24 the reasoning of Alexander versus Sandoval --

25 CHIEF JUSTICE ROBERTS: Yeah, no, I --

1 MR. PATTILLO: -- holds --

2 CHIEF JUSTICE ROBERTS: -- I know

3 that's -- I know that's what we said. Maybe I

4 just don't find that so -- so compelling.

5 It's -- it's -- it's -- you know, we try to look

6 at language as it was understood in other

7 contexts when we're interpreting provisions.

8 You know, we go back to the, you know, 1860

9 treatise and say what did that mean back then,

10 and we don't look at a contemporary dictionary.

11 Do you have any argument besides what
12 we said in Sandoval?

13 MR. PATTILLO: Yes, I do. The theory
14 that Congress somehow thought permanent
15 injunction carried with it all equitable relief
16 when it enacted 13(b) itself defies the three
17 features I mentioned in my opening.

18 In the very same legislation that
19 enacted 13(b), Congress expressly authorized an
20 injunction and other and further equitable
21 relief in Section 5(l). So that cannot be
22 reconciled with the notion that Congress somehow
23 thought in -- the word "injunction" itself
24 automatically included all equitable relief a la
25 Porter's method of interpretation, much like the

1 --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 Counsel, let's -- continuing along the
8 lines of the Chief Justice, let's assume that we
9 did not have Sections 5 and 19 and -- but you --
10 you still have the same language that we have in
11 13.

12 Would -- would it be reasonable to say
13 that Congress legislated against -- in that
14 case, in that instance, against the backdrop of
15 cases like Porter and Mitchell, and, if so, then
16 how would that change your argument?

17 MR. PATTILLO: This Court looks to how
18 equitable terms are traditionally understood,
19 and permanent junctions traditionally exclude
20 monetary relief as compensation for past harm,
21 as Great-West noted. And, here, the -- the
22 phrase, 13(b) itself refers to a permanent
23 injunction.

24 And you wouldn't ordinarily think of a
25 one-time order to turn over property as a

1 permanent -- as a permanent injunction, and so
2 the -- the specific language used in 13(b)
3 itself, even without reference, but also 13(b)
4 is limited to cases of imminent or ongoing harm.

5 And it wouldn't have made any sense to
6 authorize retrospective -- to -- to -- to link
7 the authority for retrospective monetary relief
8 to the availability of imminent or ongoing harm.
9 Consumers don't become more or less worthy of
10 redress for their injuries depending on whether
11 or not the conduct is ongoing.

12 JUSTICE THOMAS: So, with that
13 argument, how would you address or deal with the
14 19th Century intellectual property cases that
15 allowed monetary relief incident to the
16 injunction?

17 MR. PATTILLO: All of those cases
18 involve a situation where there was -- the
19 parties had a general right to seek all
20 equitable relief, and that is simply not the
21 case here. This case, 13(b) is just limited to
22 injunctions, so whether or not the other relief
23 of an accounting might be available where all
24 equitable relief is available to the plaintiff,
25 that's not the case here.

1 Injunction means injunction in 13(b),
2 and we know that, and it's limited by the three
3 features of the Act that I've mentioned.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Good morning. Here,
8 I thought the briefs were very good in this
9 case. Blue brief, I think you're right. Red
10 brief, I think you are right. They can't both
11 be right, that's right. All right. You see
12 that's the old joke, but that's where I am.

13 So I'm pretty familiar with the
14 arguments and I see which way do we go, and the
15 argument, it seems to me, that's against you --
16 and I'll put the other half to the other side.

17 The argument that's against you is
18 simply this to me: Law isn't perfect. Courts
19 make mistakes. We make mistakes too. And this,
20 if it is a mistake, has been around for 50 years
21 and there's a pretty uniform interpretation
22 before the Seventh Circuit.

23 And if we never say let bygones be
24 bygones, I mean, we're going to be here to
25 Marbury versus Madison and beyond. So too much

1 time has passed, water under the bridge,
2 good-bye. Why doesn't that apply?

3 MR. PATTILLO: Well, Your Honor, this
4 is the first time that the Court was called
5 to -- to step in to -- to resolve this conflict,
6 and the mode of interpretation has -- has
7 changed over -- over time, and the -- when the
8 courts of appeals took this approach during --

9 JUSTICE BREYER: Oh, just wait. For
10 my question, I'm assuming you're right on all
11 that, okay? My question is still -- it's close,
12 and still the lower courts at least have been
13 uniform for 50 years. We cannot undo everything
14 that was, in your opinion or mine or somebody
15 else's, decided not perfectly and may be wrong.
16 That's what I just asked.

17 MR. PATTILLO: Well --

18 JUSTICE BREYER: And so why wouldn't I
19 follow that very basic principle about courts
20 and how the judiciary has to function in a
21 society that's continuously changing?

22 MR. PATTILLO: There are now two
23 courts of appeals, one on either side -- or,
24 excuse me, on -- there are courts of appeals on
25 either side. There are now two courts of

1 appeals that have rejected the notion that 13(b)
2 carries with it all monetary relief, and there's
3 simply no rule that the first court of appeals
4 to issue its ruling on a particular version of
5 the law wins. And so there's no reason to give
6 a -- a presumption to the -- the courts of
7 appeals that decided it first.

8 JUSTICE BREYER: Okay. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Mr. Pattillo, could I
11 ask you about the practicalities of -- of this
12 case. Have some of the money in question here
13 already been distributed to the victims of this
14 scheme?

15 MR. PATTILLO: Yes. My understanding
16 is that around 500 million dollars has been
17 distributed.

18 JUSTICE ALITO: If we rule in your
19 favor, what will happen with respect to those
20 individuals? Will they be required to return
21 that money?

22 MR. PATTILLO: I honestly don't know.
23 I would be surprised if -- if that is the
24 result. One option would perhaps be for -- the
25 Commission would have to repay us out of -- out

1 of the federal Judgment Fund, which, you know,
2 is a reservoir that exists for paying
3 liabilities of the United States. I suppose it
4 would be up to the Commission to decide whether
5 the United States bears the burden of its error.

6 JUSTICE ALITO: What is the
7 relationship between the -- the order in
8 question here and the forfeiture order that was
9 issued in the Southern District of New York in
10 Tucker's criminal case? There, he was, as I
11 understand it, required to return 3 billion
12 dollars. Is that -- does that encompass the
13 amount of money that's involved here?

14 MR. PATTILLO: There is -- my
15 understanding is that there is some overlap
16 between the assets that were at issue. I mean,
17 it -- Mr. Tucker just had -- had one pool of --
18 of resources, and to date, my understanding is
19 that the Commission and the Southern District
20 have been divvying up the different
21 responsibilities.

22 But it's also worth noting here that
23 the order in this case encompasses --
24 encompasses money paid by innocent parties, such
25 as Mrs. Tucker and Park 269, which were never

1 alleged to have been -- and that amount is over
2 27 million dollars. They were never alleged to
3 have participated in any wrongdoing. And so
4 those assets certainly couldn't be subject to
5 the criminal forfeiture as well.

6 JUSTICE ALITO: Let me turn back
7 briefly to basically the same question that the
8 Chief Justice asked. If -- I mean, most of the
9 members of Congress are not lawyers. That was
10 true when this provision was enacted. And even
11 those who were lawyers, perhaps like me, never
12 heard the word "equity" when they were in law
13 school.

14 So suppose one of those members said,
15 well, here, we're going to authorize the
16 Commission to seek an injunction, so I'm going
17 to look at the most recent edition of Black's
18 Law Dictionary, which defines an injunction in
19 part as "a judicial process operating in
20 personam and requiring a person to whom it is
21 directed to do or refrain from doing a
22 particular thing."

23 If the member read that definition,
24 wouldn't they think that it would authorize
25 exactly what was done here?

1 MR. PATTILLO: Perhaps there --
2 injunctions are broad and flexible, and,
3 certainly, as -- as the Court explained in
4 Great-West, with lawyerly inventiveness, just
5 about any order could be framed in terms of
6 injunction -- of an injunction.

7 But this Court has held that it --
8 it's not just what Black's Law Diction --
9 Dictionary says. It's how the terms are
10 traditionally understood in equity. And
11 permanent injunctions traditionally exclude
12 monetary relief as compensation for past harm.

13 JUSTICE ALITO: All right.

14 MR. PATTILLO: The fact that the
15 Commission --

16 JUSTICE ALITO: Thank -- thank you. I
17 -- I think --

18 CHIEF JUSTICE ROBERTS: Justice --

19 JUSTICE ALITO: -- my time has
20 expired.

21 CHIEF JUSTICE ROBERTS: -- Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, you argue
24 that there would be no reason for Congress to
25 provide for monetary remedies under Section 19

1 if the FTC could obtain disgorgement under
2 13(b). But it makes sense to me that the FTC
3 might sometimes want to establish new rules
4 through agency adjudications that are binding on
5 absent parties and to which courts will defer.

6 So the more important question for me
7 is -- and I hope you can answer it -- is, why
8 would Congress authorize the FTC to seek a
9 permanent injunction if no other equitable
10 remedies were available? It seems that under
11 your understanding of the statute, why would the
12 FTC ever pursue a permanent injunction under
13 13(b) rather than a cease-and-desist order that
14 could lead to monetary relief? It could --

15 MR. PATTILLO: The answer is that --

16 JUSTICE SOTOMAYOR: Go ahead.

17 MR. PATTILLO: -- sometimes -- I'm
18 sorry. The answer is that 13(b) is a -- it's a
19 narrow supplement to the overall FTC Act, which
20 is -- which almost every other single provision
21 is about or in service of administrative
22 processes. 13(b) exists for situations where
23 there is threatened or ongoing harm, and it
24 allows the Commission to come to court to stop
25 the conduct quickly --

1 JUSTICE SOTOMAYOR: But it could do
2 that --

3 MR. PATTILLO: -- in order to get --

4 JUSTICE SOTOMAYOR: -- it could do
5 that with a temporary injunction, and so it
6 doesn't need to do it with a permanent
7 injunction. And if it's barred from getting
8 permanent relief and remedies, why would it ever
9 seek a permanent injunction?

10 MR. PATTILLO: It would -- it just --
11 if it -- if -- there's no need if it's a routine
12 case where the agency doesn't need to
13 pronounce -- as is its statutory obligation, to
14 define whether or not -- apply its expertise and
15 define whether particular conduct is prohibited.
16 The -- the permanent injunction path through
17 district court might be a -- a quicker and more
18 expedient remedy.

19 But the fact is that the -- the Act's
20 prohibitions are broad and general. And
21 Congress made agency processes the primary
22 enforcement mechanism, and its job is to
23 apply its expertise --

24 JUSTICE SOTOMAYOR: So why -- why even
25 give it a permanent injunction when it wasn't,

1 according to your reading, able to recover
2 anything else under that process?

3 It could always do a temporary
4 injunction and stop impend -- and stop impending
5 harm that way and then always have to pursue
6 administrative process to get monetary relief.
7 It makes no sense to me.

8 MR. PATTILLO: Because sometimes that
9 would be -- that would be good enough.
10 Sometimes just stopping the conduct is a
11 sufficient remedy in and of itself. There won't
12 always need to be consumer redress in every
13 case. And, in fact, you know, for most of
14 the -- most of the FTC's early history, it had
15 no authority to seek consumer redress whatsoever
16 until it was enacted in -- in Section 19.
17 Stopping the conduct was its primary
18 responsibility.

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 JUSTICE KAGAN: Mr. Pattillo, I'd like
21 to go back to the Chief Justice's first
22 questions about which approach we're supposed to
23 use, our old approach, which was very liberal in
24 finding rights and remedies, or our new
25 approach, which is decidedly not.

1 And you said, well, Alexander v.
2 Sandoval, and the Chief asked you to put that --
3 the Chief Justice asked you to put that aside.
4 And I'd like you to put that aside as well. I
5 think it's at least arguably very different.

6 Do you have a -- a theoretical
7 argument for why it is that we should be using
8 the new approach? Because I would have thought
9 that the whole idea behind the new approach is
10 that what matters most is what Congress thinks
11 about a question, not what the Court thinks
12 about it, and that that would suggest, well,
13 we're supposed to be looking at what Congress
14 thought in 1973 given the backdrop of all of our
15 precedents.

16 MR. PATTILLO: Well, as I mentioned,
17 the -- the words of the statute are the law.
18 The words of the statute tell you what Congress
19 intended. And even under the old approach, what
20 -- if we're trying to discern whether Congress
21 thought that -- you know, that "injunction"
22 actually meant all relief, all we need to know
23 is that at the same time that Congress enacted
24 13(b) it also enacted Section 5(l). And at that
25 time --

1 JUSTICE KAGAN: So that --

2 MR. PATTILLO: -- it expressly
3 authorized --

4 JUSTICE KAGAN: -- that's an argument
5 -- I mean, that's an argument on a different
6 point, the point about what Congress would have
7 understood back then, but -- but I take that to
8 be assuming my premise, which is that the very
9 issue is -- I mean, that the thing we're
10 supposed to be figuring out is what Congress
11 would have assumed back then, isn't it?

12 MR. PATTILLO: Yes, but I think we --
13 in -- in under -- in trying to think what
14 Congress understood about Porter and Mitchell,
15 we have to look at what else Porter and Mitchell
16 said, and notwithstanding Porter and Mitchell's
17 broad language, Congress also would have known
18 that Porter and Mitchell said you have to look
19 at the entire statute --

20 JUSTICE KAGAN: Well, in -- in just --

21 MR. PATTILLO: -- and you have to see
22 the --

23 JUSTICE KAGAN: Sorry, Mr. Pattillo.
24 In -- in -- in -- in just two years before
25 Congress enacted this legislation, the Second

1 Circuit, you know, obviously, an important
2 circuit when it comes to these matters, held
3 that the FTC had power to seek restitution
4 because its statute said that the agency could
5 seek an injunction, the exact same question as
6 is -- as -- as we're confronting.

7 And the Second Circuit relies on
8 Porter, relies on Mitchell, relies on all the
9 old cases that you say are distinguishable, and
10 -- and said yes, an injunction includes
11 restitution according to Supreme Court law on
12 the subject.

13 So doesn't that suggest that the FTC
14 has a pretty good point about what Congress
15 understood in 1973?

16 MR. PATTILLO: No, I don't think so.
17 If -- if the -- if Congress were looking to what
18 Porter held, Porter acknowledged that it was
19 looking to see whether an implied remedy was
20 consist -- it had to look and see if the implied
21 remedy was consistent with the statutory scheme.
22 And Porter found that even though there was
23 nothing that precluded an implied restitution
24 remedy, it said, look, there is another section
25 of the Emergency Price Control Act and that

1 provision addresses damages. So the fact that
2 the -- that the statute elsewhere mentions
3 damages supersedes the possibility that there
4 could be an implied damages remedy.

5 JUSTICE KAGAN: Thank you, Mr.
6 Pattillo.

7 MR. PATTILLO: So, if Congress wanted
8 --

9 JUSTICE KAGAN: Thank you very much.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning,
13 counsel. I'd like your help with a -- a
14 line-drawing problem. I -- I -- I think you
15 agree that an injunction can be used to provide
16 certain forms of equitable relief, including
17 restitution perhaps, an accounting, requiring a
18 freezing of assets, or handing over a thing of
19 value, but -- but it's -- it -- it can't go this
20 far.

21 How would you have us draw that line
22 and describe it?

23 MR. PATTILLO: I think it's a -- I
24 think it's a fairly simple line, and we can look
25 to how Justice Story described it. There's a

1 difference between -- there's a difference
2 between the initial determination as to who owns
3 the property, whether property should be
4 returned, and that principle is articulated in
5 terms of other equitable doctrines, such as
6 restitution.

7 Now there were instances in the past,
8 and these were, you know, more the -- certainly,
9 more the exception than the rule, where an
10 injunction might use -- be used to enforce that
11 prior decree, where -- where someone had already
12 been given the award of restitution that
13 determines the property right.

14 And then, if there was some other
15 reason why an additional coercive remedy was
16 needed, the injunction might issue to force
17 that. As Justice Story explained in his
18 treatise, that type of injunction was issued
19 "after a decree in the nature of an execution to
20 enforce the underlying decree." And that's
21 completely different from what the Commission
22 seeks here.

23 The Commission doesn't seek to use an
24 injunction to enforce a right to restitution.
25 It doesn't have a right to restitution under

1 13(b). It -- it's trying to -- to bootstrap
2 that. And so I -- I think that the distinction
3 at equity was actually pretty clear.

4 JUSTICE GORSUCH: Thank you, counsel.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 And good morning, counsel. Your
10 argument here is strikingly similar to the
11 argument advanced in the dissent in Porter by
12 Justice Rutledge, joined by Justices Reed and
13 Frankfurter, and the dissent in Mitchell written
14 by Justice Whittaker, joined by Justices Black
15 and Clark.

16 The Rutledge dissent, Justice Rutledge
17 dissent in Porter, for example, said "Congress
18 could not have been ignorant of the remedy of
19 restitution. It knew how to give remedies it
20 wished to confer. There was no need to add this
21 one, nor do I think it did so. It did not give
22 it expressly." That kind of argument.

23 What do we do with Porter and Mitchell
24 if we decide this case in your favor? In other
25 words, how should we write the opinion with

1 respect to those cases?

2 MR. PATTILLO: This Court doesn't need
3 to overrule Porter and Mitchell any more than it
4 needed to do so in Meghrig, which held that in
5 the context of RCRA, "injunction" did not mean
6 all equitable relief.

7 Neither Porter nor Mitchell involved a
8 statute with the three features that I mentioned
9 at the outset. In neither case did Congress
10 elsewhere authorize an injunction and other and
11 further equitable relief, making it clear that
12 Congress didn't presume that an injunction
13 carried with it all equitable relief.

14 Neither Porter nor Mitchell addressed
15 a statute limited to ongoing or threatened
16 violations, which is the sort of thing that an
17 injunction would address but is totally
18 inconsistent with backwards-looking monetary
19 relief.

20 And neither statute in Porter or
21 Mitchell provided the very same monetary relief
22 in a separate provision -- here, that's Section
23 19 -- subject to various protections like a
24 statute of limitations that would be rendered
25 entirely meaningless if the Commission could

1 implicitly get the same relief under 13(b)
2 instead.

3 So Porter and Mitchell are entirely
4 distinguishable based on the statutory scheme.

5 JUSTICE KAVANAUGH: And picking up on
6 one of Justice Breyer's questions, when you have
7 the combination of Porter and Mitchell plus some
8 maybe broad, you would say too tangential, but
9 some Congressional ratification argument, and
10 all the court of appeals for a number of years
11 interpreting it in the FTC's favor, at some
12 point, does all that combine, do you think, to
13 get us to a point of leave well enough alone?

14 I mean, certainly, stability in the
15 law is important. And when you have Porter and
16 Mitchell plus ratification plus courts of
17 appeals, at some point, does that kick in?

18 MR. PATTILLO: I -- I don't think so.
19 Long-standing error doesn't make it any less
20 error. The statute is still the statute, and
21 now that the issue is before this Court, it's
22 the Court's duty to give the correct
23 interpretation of the statute, notwithstanding a
24 long history of error.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Counsel, let's say
4 that we agree with you about 13(b). Your
5 client, I don't understand you to be arguing
6 that he has clean hands. I mean, he's been
7 convicted. He has the dubious distinction of
8 being the subject of an episode of "Dirty Money"
9 on Netflix.

10 But you -- you suggested in your brief
11 that because of the safeguards of Section 19, in
12 particular, you know, the -- the reasonable man
13 standard, knowing and understanding that the
14 conduct was deceptive, that the FTC couldn't
15 have gotten a monetary remedy from him under 19.

16 So is -- is it your position that if
17 we adopt your view, there's no way for the FTC
18 to get the ill-gotten gains back from someone
19 who has violated the law like your client?

20 MR. PATTILLO: I'm sorry, I didn't
21 mean to suggest that the FTC could not have
22 proven its case under Section 19, although I --
23 I do think there is a substantial question about
24 that.

25 In the -- in Judge Bea's dissent in

1 the decision below, he noted that, you know, the
2 three judges on the Ninth Circuit have looked at
3 the disclosures and they thought that they were
4 accurate and they were not deceived by that.

5 But notwithstanding that, the fact is
6 that, you know, the decision here doesn't just
7 affect my client, it doesn't just affect, you
8 know, payday lenders. As our amici, the
9 Chamber, has pointed out and as, you know,
10 this -- the sweep of the FTC Act is about as
11 broad as you can get, reaching into every single
12 area of commerce, and it's precisely because the
13 prohibitions of the Act are so broad and general
14 that it's important to hold the Commission to
15 its primary responsibility of, you know, telling
16 businesses what the law is prospectively instead
17 of running to court instead, you know, trying to
18 seek retrospective monetary relief.

19 JUSTICE BARRETT: Thank you, counsel.

20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, Mr. Pattillo.

22 MR. PATTILLO: The question here is
23 whether 13(b)'s reference to "permanent
24 injunction" means permanent injunction or
25 whether it instead means all equitable relief

1 and money for past harms.

2 The three features of the Act that
3 I've discussed confirm that "injunction" is
4 limited to an injunction as that term was
5 traditionally understood.

6 To be any clearer, Congress would have
7 to take the absurd step of saying, and by
8 "injunction," we mean only injunction, not other
9 remedies. But this Court does not impose and
10 never has imposed any such requirement.

11 The FTC Act, moreover, is striking in
12 its consistent focus on agency processes to
13 prospectively define prohibited conduct. Yet,
14 under the Commission's view, the single
15 sentence, second-level proviso in 13(b)
16 authorizing permanent injunctions is virtually
17 all the statute it needs.

18 The Commission can get all the
19 injunctions and monetary relief it wants without
20 the burdens of the administrative processes that
21 were its very reason for being. That cannot be
22 right. The Court should return the Commission
23 to the limits that Congress placed on its
24 authority.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Marcus.

3 ORAL ARGUMENT OF JOEL R. MARCUS

4 ON BEHALF OF THE RESPONDENT

5 MR. MARCUS: Thank you, Mr. Chief
6 Justice, and my it please the Court:

7 The Petitioners are asking you to rule
8 that when Congress allowed the Commission to
9 enforce the FTC Act in federal court, it
10 intended that the Court would merely stop the
11 violations while letting the violator keep his
12 stolen money.

13 Such a ruling would radically depart
14 from the foundational principle of equity
15 recognized just last term in Liu that wrongdoers
16 should not profit from their own wrongdoing.

17 It would also profoundly deviate from
18 the understanding of injunctive remedies that
19 was embedded in the law when Congress enacted
20 Section 13(b), as many of the Court's questions
21 have recognized.

22 Courts of equity have recognized since
23 before the founding that the equitable power to
24 issue an injunction inherently includes the
25 power to order the return of unlawful gains. As

1 the Court summed it up in Porter, nothing is
2 more clearly the subject of a suit for an
3 injunction than the recovery of that which has
4 been illegally acquired and which has given rise
5 to the necessity for injunctive relief.

6 Sections 19 and 5(l) of the Act, which
7 provide remedies when the Commission chooses to
8 enforce the Act administratively, do not create
9 an unmistakable inference that Congress intended
10 to limit traditional equitable powers when the
11 Commission chooses instead to proceed in court.
12 Section 19 expressly says otherwise in the
13 savings clauses. Section 5(l) serves a
14 fundamentally different role in the Act than
15 Section 13(b), and its language reflects its
16 function.

17 A cease-and-desist order works like a
18 prohibitory injunction. Congress therefore had
19 to specify the additional remedies it wanted for
20 a violation. It did not need to do that in
21 Section 13(b) but could instead invoke its
22 understanding of the traditional equitable
23 powers of injunction without the need for
24 elaboration.

25 Together, the -- Sections 9 --

1 Sections 13(b), 19, and 5(l) work in harmony to
2 give the Commission a choice between effective
3 enforcement pathways that can provide meaningful
4 relief to victimized consumers.

5 CHIEF JUSTICE ROBERTS: Counsel, a lot
6 of the cases you -- you cite in support of a
7 broad reading of injunction -- injunction and
8 equitable powers -- in fact, I think most of
9 them involve courts, not agencies. And -- and
10 courts have broad inherent equitable power. You
11 -- you don't sort of parse and construe their
12 authority very carefully, at least I don't think
13 so. But this involves an agency, and an agency
14 only has the authority delegated to it by
15 Congress. And I'm not sure we can assume that
16 those precedents involving courts apply so
17 smoothly in the context of an agency.

18 MR. MARCUS: Well, certainly, the
19 agency has whatever power Congress has accorded
20 it, which is exactly why Congress had to be more
21 specific when it was talking about remedies for
22 the agency's own adjudicatory orders.

23 But Section 5 -- I'm sorry, Section
24 13(b) says the Commission may seek and the court
25 may grant a permanent injunction. So what

1 Congress is saying there is that the Commission
2 can invoke the courts' equitable authority. And
3 that then puts the issue squarely within the
4 courts' authority, as you just alluded to.

5 CHIEF JUSTICE ROBERTS: Well, I'm not
6 sure that follows. I mean, "the agency can seek
7 and the court can enforce" doesn't mean that the
8 same authority that a court has the agency has;
9 just that the court can enforce whatever
10 authority the agency has.

11 MR. MARCUS: It doesn't say "enforce";
12 it says "grant." And the court can enforce
13 under a different provision, Section 5, the
14 Commission's own orders. But what Section 13(b)
15 is doing is it's giving the Commission the
16 ability to go to court to seek the relief that a
17 court can grant. This is no different than what
18 the price administrator did in Porter or the
19 Department of Labor in --

20 CHIEF JUSTICE ROBERTS: The -- your
21 friend on the other side makes the point that
22 "injunction" appears in the United States Code
23 throughout the code hundreds of times. And is
24 your position that, whenever it does, a broader
25 range of equitable powers is conferred on an

1 agency?

2 MR. MARCUS: Well, again, it's not
3 that the power is conferred on the agency; it's
4 that the court has inherent powers. Now, in --
5 in many cases, it -- it may be appropriate in --
6 in conjunction with an injunction to engage in
7 other types of equitable remedies, but it's not
8 always appropriate. These are case-by-case
9 determinations.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.

15 Mr. Marcus, Section 13(b)(1) says that
16 whenever the Commission has reason to believe
17 that a person, partnership, or corporation is
18 violating or is about to violate any provision
19 of law. That seems to suggest that that
20 provision is focused on forward-looking,
21 preventing a -- a future or a present action.

22 It seems that what you're doing here
23 is using it for something that has already
24 happened. Would you be kind enough to reconcile
25 your approach with the language of 13(b)?

1 MR. MARCUS: I'd be happy to, Justice
2 Thomas. "Is or is about to" echoes the standard
3 for the grant of an injunction. For example,
4 the -- typically, an injunction requires there
5 to be ongoing or expected conduct, and -- but,
6 once the court's equity jurisdiction has been
7 properly invoked, the court can order associated
8 remedial relief. And that's what happened in
9 all of the 19th Century intellectual property
10 cases. And, in fact, in the Root case in
11 particular, the Court said your injunction --
12 I'm sorry, your patent has expired. Therefore,
13 you can't seek an injunction and you cannot get
14 a naked monetary remedy.

15 But, here, there was ongoing conduct
16 at the time the FTC sued. The court granted an
17 injunction. And the question is, once the court
18 has had its authority triggered, once the court
19 has exercised that authority, can it also engage
20 in the traditional mechanisms of injunctive
21 relief? And I think the answer in centuries of
22 law is pretty clear.

23 JUSTICE THOMAS: Would you just take a
24 minute and explain again why -- from my
25 perspective, it seems as though what you're

1 doing here fits more comfortably under Section
2 19. But would you explain why the Commission
3 chooses to use Section 13 rather than Section 19
4 again?

5 MR. MARCUS: Certainly. Well, it --
6 for one thing, it is easier to use Section 13 in
7 many respects than it is in Section 19. But,
8 also, there are many cases where it doesn't take
9 a lot of Commission expertise to explain why a
10 particular act is deceptive. And, here,
11 certainly, it did not take the agency or even
12 the U.S. Attorney's Office for that matter to
13 explain to Scott Tucker that misleading people
14 about the terms of their loan was a deceptive
15 act. So, when the Commission feels that it
16 doesn't need to expound on the -- the meaning
17 and boundaries of the FTC Act, it can bring
18 cases under Section 13.

19 Now, keep in mind, when it does that,
20 it gives up a bunch of stuff. It gives up the
21 ability to find its own facts. It gives up the
22 somewhat broader remedies that Section 19
23 allows, including -- Section 19 allows us to sue
24 in state court, as well as federal court.

25 And so each -- it's a little bit like

1 the choice between rulemaking and adjudication
2 in, you know, Bell Aerospace. Congress wanted
3 the Commission to have flexibility to choose
4 between enforcement pathways. They both --

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: History matters. I
8 think Justice Brandeis, when he started, was
9 faced with a business community that was very
10 suspicious of the FTC's power and thought it
11 would be abused and a progressive community that
12 thought it's absolutely necessary to bring bad
13 business practices under control. So they
14 compromised.

15 The compromise was you've got to do
16 what the FTC says, but before it tells you to do
17 something, it will find that what you're doing
18 now is wrong. It will find that. It will be a
19 cease-and-desist order, later expanded under
20 Moss-Magnuson, I think, to include violation of
21 a rule.

22 So Section 5, cease-and-desist order
23 or violation of a rule, ha, damage of some kind.
24 Nineteen, the same thing. And now we have right
25 in the middle 13, no protection like that

1 whatsoever. Do not worry, says the FTC, we will
2 only use it in exceptional cases.

3 Ha! In 2012, they repeal that. And
4 now, 10 years later, after this has been in
5 effect for a few years, I read that 100 cases
6 under this provision are in the courts, compared
7 with 10 or 12 under the regular cases.

8 And you say it's just obvious, we're
9 going to get those people who think their bad
10 conduct is obvious. Look at Skechers. Look at
11 the Cardinal case. Go back to the famous Unburn
12 case. Add substantiation.

13 People wouldn't know that it is an
14 unfair practice that a chiropractor who was
15 married to a wife who had some income from the
16 company and therefore is a conclusion as to the
17 muscle toning of the company should be
18 discounted. And that's the kind of case they're
19 bringing now.

20 Now do you see my point? On the one
21 hand, it's well-established law in the lower
22 court. On the other hand, if we interpret it
23 your way, we -- we -- we say your fears,
24 business community, were absolutely right. It
25 is now up to the FTC. Before you know the thing

1 is wrong, they hit you with bad damages.

2 This case? Perhaps you're right. But
3 Skechers, Cardinal, even Unburn, build strong
4 bodies eight ways, that was Wonder Bread. They
5 only did it six ways. I mean, you see, it's
6 giving the FTC -- that -- that -- you get my
7 point. Now I'd like to hear an answer.

8 MR. MARCUS: I do get your point,
9 Justice Breyer, and the answer is that in 1914,
10 when the -- when the Commission was created,
11 there was a bargain struck. And in 1973, when
12 consumer fraud became rampant in the economy and
13 people were complaining about the toothless FTC,
14 there was a new bargain struck where the
15 Commission could go into court and seek remedies
16 in court as a litigant in the first instance.

17 Courts are, of course, bound by
18 principles of constitutional due process and
19 notice. And if the court concludes that the --
20 that the chiropractor couldn't possibly
21 understand what was required of him, it will
22 find that a remedy is not available.

23 Many of the cases that you're
24 referring to, though, Justice Breyer, actually
25 involve settlements that were made with the

1 Commission in the course of administrative
2 proceedings. These things do get complicated.
3 But those are companies that agreed to settle.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: In answer to Justice
6 Thomas's question, well, his -- your answer to
7 Justice Thomas's question leads me to ask this:
8 If the activity here had ceased before this
9 order was entered, would the court have been
10 able to enter it?

11 MR. MARCUS: Well, so, if the activity
12 had ceased and it was -- there was no
13 possibility that it could have resumed again,
14 then the answer is typically no. Of course,
15 there are some people who, when the FTC starts,
16 you know, inquiring about them, they stop for
17 the time being, only to resume again later. But
18 if they --

19 JUSTICE ALITO: And why would Congress
20 -- why would Congress draw that line? Why would
21 it provide a -- a -- a restitution remedy when
22 there is still ongoing activity but no
23 restitution remedy when all of the harm has
24 already been completed?

25 MR. MARCUS: Well -- well, because the

1 -- the remedy goes along with the injunctive
2 remedy. It's inherent in the injunction that
3 the court can issue. And that's what the
4 Congress has traditionally done. It's what it
5 did in the 19th Century patent and copyright
6 cases.

7 JUSTICE ALITO: What would be the
8 policy -- what would be the policy justification
9 for doing that? Why would Congress draw that
10 line?

11 MR. MARCUS: I can't tell you why
12 Congress would want to have a less-than-complete
13 remedy, but it's -- it's something that Congress
14 does quite often. It does -- it's still to this
15 day in the Securities and Exchange Act cases.
16 It requires -- it -- there is an about to
17 requirement -- before they can get the equitable
18 relief.

19 JUSTICE ALITO: We asked Mr. Pattillo
20 questions about how this provision would have
21 been understood in 1973. His brief cites
22 comments made by a former FTC official,
23 Mr. FitzGerald, that addresses that directly,
24 and they are pretty damaging to your position.

25 Mr. FitzGerald says that when 13(b)

1 was enacted, nobody on the Commission imagined
2 that it would become an important part of its --
3 the Commission's consumer protection program.

4 But the Commission decided that
5 Section 19 was too time-consuming, so it
6 wanted -- it looked for a workaround, and
7 "neither the text of 13(b) nor its legislative
8 history disclosed a basis to argue for broad
9 equitable relief. The Commission's attorneys
10 thought these arguments were not going to
11 succeed, but, to their surprise, they were
12 successful."

13 And you don't say anything about
14 Mr. FitzGerald. Do you want to say something
15 about him now?

16 MR. MARCUS: I'd be happy to, Justice
17 Alito. Mr. FitzGerald, for one thing, is not
18 Congress. So the question is what Congress
19 understood. And there was a huge body of law
20 indicating that Congress understood what it was
21 doing.

22 But, beyond that, what
23 Mr. FitzGerald's article does indicate is that
24 in the 1970s, at the time when people were
25 complaining that the FTC was lackadaisical about

1 enforcement, the Commission's mindset was all
2 about rulemaking, making broad rules to govern
3 large industrial sectors, and it did take a
4 little while for the Commission's mindset to
5 change from a rulemaking to an enforcement
6 perspective.

7 But, once it did, it vigorously
8 started invoking Section 13(b), and, as has been
9 pointed out by the questioning, courts for 40
10 years now have accepted those things. And
11 before the FTC even did this, courts had been
12 accepting the exact same arguments in the SEC
13 context.

14 JUSTICE ALITO: All right. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, how do
18 you explain Section 5(l), which was passed at
19 the same time as Section 13(b) and separately
20 authorizes mandatory injunctions and further
21 equitable relief?

22 Why would Congress use a different
23 language for injunctive relief in one section
24 and just stop at "injunctive relief" and in the
25 other add "and further equitable relief" in a

1 different section?

2 MR. MARCUS: Well, the textual
3 differences in the two provisions reflect their
4 functional differences. Section 5(l) is used to
5 enforce cease-and-desist orders, the
6 administrative orders, and -- and so there
7 already basically is an injunction on the books,
8 and it's an injunction that doesn't come with
9 any traditional remedies. So Congress had to
10 say exactly what remedies it wanted. And that's
11 why it's limited to mandatory injunctions and
12 other equitable relief.

13 But, in Section 13, Congress didn't
14 need to do that. It could rely on, could
15 piggyback on, all of the traditional remedies
16 inherent in a permanent injunction, which is
17 different from a mandatory injunction. And so,
18 you know, you could look at it that, in fact,
19 what Congress wanted to make sure of was that,
20 no matter how the Commission proceeded, whether
21 it proceeded by administrative, by a
22 cease-and-desist order, or whether it went into
23 court as a litigant, that each time consumers
24 were harmed they would have the opportunity to
25 get redress for their victimization.

1 JUSTICE SOTOMAYOR: Now I'm following
2 up slightly on Justice Alito's question.
3 Legislative history is not unimportant to me.
4 What am I to make of the fact that I saw nothing
5 in the history of this bill suggesting that
6 Congress understood that Section 13(b)
7 authorizes monetary awards?

8 Quite to the contrary, the prior
9 version of what became Section 19 triggered
10 extensive debate because there wasn't money
11 damages available, and Section 19 was passed to
12 remedy what was perceived as a fault in the bill
13 as it existed.

14 So what am I missing in terms of the
15 absence of anything to do with this issue before
16 Congress?

17 MR. MARCUS: Well, you are correct,
18 Justice Sotomayor, that the legislative history
19 does not -- 13(b) itself does not explicitly
20 address money. But there is a presumption that
21 Congress legislates against the backdrop of the
22 law. And the backdrop of the law of injunction
23 really couldn't be clearer.

24 Now, when it comes to Section 19, the
25 debate about monetary remedies in Section 19 had

1 to do with the Commission's own ability to order
2 monetary remedies in its own administrative
3 processes as part of a cease-and-desist order.
4 The -- as Section 19 was being debated, the
5 Ninth Circuit ruled in the Heder case, which is
6 cited in our brief, that the Commission could
7 not order monetary remedies in its own
8 proceedings, and that's why money was front and
9 center in Congress's mind. But it --

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Marcus, it seems
12 to me that the best argument against your
13 position, and -- and it's a strong one, comes
14 from Section 5 and Section 19, which have these
15 protections in them that Section 13 do not, that
16 there has to be a repeated violation, that there
17 has to be a certain kind of mens rea and so
18 forth.

19 And -- and it -- it does seem as
20 though your interpretation of Section 13 makes
21 those pretty much entirely irrelevant. I mean,
22 you say, well, this is a choice. There are two
23 pathways of different kinds of administrative
24 action.

25 But what -- what -- what seems

1 significant about those two pathways as you've
2 led them -- as you've laid them out, is that one
3 is so clearly better from the agency's
4 perspective. And so I'm wondering if that's the
5 kind of choice that Congress really gave to the
6 agency.

7 MR. MARCUS: Well, Justice Kagan, the
8 -- I think that the core of the answer goes back
9 to what Justice Breyer was describing in his
10 answer to me, which was a fear of Congress that
11 an agency would have too much power, and if
12 Congress gave the Commission the ability to
13 address economy-wide practices in -- in -- under
14 fairly broad terms, and it was concerned that
15 the agency was going to declare novel practices
16 to be deceptive or unfair or anticompetitive.

17 And so Congress was understandably
18 concerned and, therefore, included procedural
19 protections in -- you know, in -- in the
20 provisions regarding relief for agency
21 processes. But what it --

22 JUSTICE KAGAN: It seems as though
23 that's exactly why we should maintain the
24 integrity of those protections rather than your
25 interpretation, which essentially makes them

1 irrelevant. It was nice that Congress once
2 thought that, but we don't have to deal with
3 that anymore.

4 MR. MARCUS: It -- it doesn't make
5 them irrelevant. It just makes one pathway more
6 attractive in certain instances than another,
7 but, if the Commission does encounter a novel
8 practice or if the Commission wishes to make its
9 own fact-finding in -- in particularly
10 complicated cases or difficult cases, then it
11 can do that only in the administrative pathway.

12 So it's not just a -- it's not just a
13 freebie. The Commission has to give something
14 up when it decides to go to federal court. It
15 just so happens that, you know, there's a lot of
16 cases that we deal with that are not
17 particularly complicated and that do not require
18 a lot of explanation of what deception is.
19 There are scams that run amok all over the
20 place.

21 JUSTICE KAGAN: If you could --

22 MR. MARCUS: It's happening right now.

23 JUSTICE KAGAN: Just going back to
24 Justice Breyer's numbers, I mean, can you give
25 me any sense of the empirics of this, how often

1 the FTC uses the cease-and-desist order route as
2 opposed to the go-to-court route?

3 MR. MARCUS: I don't have exact
4 numbers for you, Justice Kagan, but, in most
5 antitrust cases, the Commission uses the
6 administrative route. Of -- in at least several
7 cases a year, the Commission uses the
8 administrative route in consumer protection
9 cases, but there's no question that the agency
10 brings far more cases in court than it does in
11 the administrative process.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch --

14 MR. MARCUS: But, again, that largely
15 reflects the --

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.

18 JUSTICE GORSUCH: Oh, counsel, finish
19 your answer. I'm -- I'm interested.

20 MR. MARCUS: Oh, thank you. That
21 largely reflects the -- the kind of basic
22 deceptiveness of much of the stuff that we deal
23 with on the consumer protection side.

24 JUSTICE GORSUCH: Well, let -- let's
25 focus on the consumer protection side because I

1 think the antitrust side, there are a lot more
2 standards out there that people are familiar
3 with. But -- but Justice Breyer really does
4 remind us of -- of the history here. The FTC
5 was set up in part to enact rules about
6 deceptive conduct. It chose not to go that
7 route, preferred an enforcement route. And --
8 and recognizing that a term like "deceptive
9 practices" in Section 5 is not exactly
10 self-defining -- it may lack some of the
11 substance that we now have at least under the
12 Sherman Act in the antitrust context -- laid out
13 a bunch of protections in Section 19 before your
14 money can be taken away.

15 We've all kind of wandered around this
16 question, but is -- isn't -- I think our core
17 concern is you're rendering that -- those
18 protections superfluous, that there's very
19 little incentive for the agency to ever comply
20 with them, and it's just a -- another step away
21 from what Congress had anticipated would be a
22 regulatory regime that's never materialized.

23 MR. MARCUS: Well, certainly, Justice
24 Gorsuch, Congress did seem to recognize the
25 issue, and that's why it included savings

1 clauses in Section 19. You know, I -- I -- I
2 don't see much other explanation for very broad
3 provisions that clearly on their face say this
4 is in addition to other remedies and you can't
5 use the existence of this provision to interpret
6 other remedies.

7 JUSTICE GORSUCH: Let -- let me put
8 the question a different way: What incentive
9 does the Commission have today to use Section
10 19?

11 MR. MARCUS: The -- the Commission has
12 the incentive that I discussed, which are if it
13 wishes to engage in its own fact-finding and
14 use -- and draw its own legal conclusions to
15 address novel conduct --

16 JUSTICE GORSUCH: Yes, but it -- it's
17 inherently difficult, and Section 13 is so
18 comparatively easy. What -- what incentive
19 remains to do that? I know it can, but why
20 would it? Just as it can come up with rules
21 defining what unfair trade practices are but --
22 but chooses not to do so.

23 MR. MARCUS: Well, it -- well, it
24 does. I mean, so it -- it doesn't do it as
25 often, but it does do it. And so that proves

1 that there are cases where the Commission thinks
2 we need to take this one. This one's difficult
3 enough. This one's uncertain enough. This one
4 requires our application of agency expertise,
5 and the Commission has to give up all that when
6 it goes to federal court.

7 Now some would say that it's actually
8 better to have a commission litigating cases in
9 federal court than it is to have the Commission
10 making broad-based rules that may apply to
11 non-parties.

12 JUSTICE GORSUCH: Thank you, counsel.

13 MR. MARCUS: So --

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 And good morning, Mr. Marcus. Good to
19 be with you again. I want to pick up on Justice
20 Alito's question and Mr. FitzGerald's article,
21 which I've read. You obviously put forward good
22 arguments on Porter and the Court's precedent
23 and Congress's intent, as well as the body of
24 court of appeals cases, but it seems that the
25 problem you have is the text. And in that

1 sense, this case really is a separation of
2 powers case.

3 I -- I -- I worked in the Executive
4 Branch for many years, so I understand how this
5 happens. When you're in the Executive Branch or
6 an independent agency, you want to do good
7 things and prevent or punish bad things, and
8 sometimes your statutory authority is
9 borderline. And it could be war policy or
10 immigration or environmental or what have you,
11 but with good intentions, the agency pushes the
12 envelope and stretches the statutory language to
13 do the good or prevent the bad.

14 The problem is -- is it results in a
15 transfer of power from Congress to the Executive
16 Branch to decide whether to exercise this new
17 authority. That's a particular concern, at
18 least for me, with independent agencies. So --
19 now why isn't the answer here, for the agency to
20 seek this new authority from Congress, for us to
21 maintain the principle that separation of
22 powers, that the agency should stick to the
23 authority in the -- in the text and not -- and
24 not go beyond that?

25 A 30,000-foot question. Interested in

1 your responses to that.

2 MR. MARCUS: Well, so, again, the
3 question, the real question, is what was
4 Congress's intent when it gave the Commission
5 the authority to seek a permanent injunction in
6 federal court. And if it intended to accord the
7 agency the -- the ability to go ask the court
8 for all of the inherent equitable remedies, then
9 I think that resolves your concern about
10 separation of powers issues.

11 And, you know, again, it -- it
12 couldn't be clearer that -- that Congress,
13 legislating against the backdrop of injunctions,
14 would have had the intent to accord all the
15 traditional equitable remedies.

16 And, you know, this is not a -- this
17 is not a new question. Even, you know, in the
18 California versus American Stores cases we cite
19 in our brief, the Court held that "injunction"
20 as used in the Clayton Act indicates Congress's
21 intention that traditional principles of equity
22 govern the grant of injunction -- of injunctive
23 relief.

24 And so, you know, ultimately, I -- I
25 think the -- the -- your concern is a valid one

1 but is resolved if you look at what Congress
2 would have understood the words to mean when it
3 used them. And there was, in fact, a common
4 understanding of what "injunction" meant in
5 1973.

6 JUSTICE KAVANAUGH: Appreciate it, Mr.
7 Marcus. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett.

10 JUSTICE BARRETT: Counsel, the -- the
11 damages award here or the money at stake here
12 was 1.3 billion dollars and then the 27 million
13 dollars collected from Mr. Tucker's wife. And
14 when Justice Alito asked Mr. Pattillo how much
15 of that had been distributed to the victims, he
16 said about 500 million dollars. So I -- I take
17 it the rest of that is in the Treasury, or does
18 the FTC have it right now?

19 MR. MARCUS: So I'm glad you ask that
20 question, Justice Barrett. I will get you a
21 clarification on what Mr. Pattillo said because
22 the money that's actually been distributed from
23 consumers comes from a different defendant, not
24 Tucker, not Mrs. Tucker, not any of the
25 Petitioners before this Court. It comes from a

1 bank that settled separately with the government
2 and agreed to a restitution remedy in the
3 criminal case that the Justice Department then
4 turned over to the FTC to distribute to
5 consumers. So none of that money is the
6 judgment in this particular case.

7 JUSTICE BARRETT: So what happens or
8 has happened to the judgment, the money flowing
9 from the judgment, in this particular case?

10 MR. MARCUS: So, right now, there's
11 some money that is being held in an account
12 separately for -- for redress should the
13 Commission ultimately wind up with the ability
14 to distribute --

15 JUSTICE BARRETT: How much money --

16 MR. MARCUS: -- that money.

17 JUSTICE BARRETT: -- in that account
18 compared to the 1.3 billion?

19 MR. MARCUS: I don't know the exact
20 number, but it's tens of millions. It's a --
21 it's a lot of money.

22 JUSTICE BARRETT: But this is what I'm
23 -- I'm getting at. It seems to me that
24 equitable remedies attempt to restore the
25 plaintiff to the position in which the plaintiff

1 stood before the plaintiff was defrauded. This
2 money isn't traceable back to the FTC, and the
3 money that's gained isn't all being distributed
4 to the plaintiffs. So it seems like it
5 functions almost more like a fine. It doesn't
6 really seem analogous to, say, restitution to
7 me.

8 MR. MARCUS: Well, I -- I'm not sure
9 that's quite correct, because the point here is
10 that it's a -- it's -- it's an equitable remedy
11 meant to restore the victims to the place that
12 they were in before they were ripped off, and --

13 JUSTICE BARRETT: But, if the victims
14 don't get the money or if all the money is not
15 traceable to the victims, that -- then all the
16 money is not remedying that wrong.

17 MR. MARCUS: Well, no, we know -- we
18 know who the victims were and we know how much
19 they were -- we know how much was stolen from
20 each of them. It's just a matter of collecting
21 the money, figuring out from this case whether
22 we are allowed to give back the money, and then
23 basically cutting checks to everybody. Right
24 now, the money's being held in safekeeping.

25 JUSTICE BARRETT: So the full 1.3

1 billion dollars will be distributed to the
2 victims?

3 MR. MARCUS: As much of it as we can
4 get, yes. We're not going to get 1.3 billion
5 dollars. A lot of it was spent and it doesn't
6 exist anymore, and, you know, Tucker is now
7 judgment-proof for the most part. But there
8 were bank accounts, houses, race cars, whatever,
9 assets that were seized and are being held
10 basically in trust forever.

11 JUSTICE BARRETT: Thank you, counsel.
12 My time's expired.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, Mr. Marcus.

15 MR. MARCUS: Thank you, Chief Justice.

16 I want to reiterate that a court with
17 the power of injunction sits as -- as a court of
18 equity. And one thing that the Court should not
19 overlook is the basic principle of equity that
20 wrongdoers have to give back the money that they
21 took unlawfully. AMG asks the Court to
22 disregard that principle. But the Court should
23 have that principle firmly in mind when it
24 decides this case.

25 It should uphold the history and

1 tradition and affirm once again that a permanent
2 injunction includes the power to restore victim
3 money that was wrongfully taken from them. And
4 I don't think that -- that anything in Sections
5 19 or 5(l) rise to the level of an unmistakable
6 inference, which is the standard that is
7 required under Porter.

8 So the Court should affirm the
9 judgment below. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Rebuttal, Mr. Pattillo.

13 REBUTTAL ARGUMENT OF MICHAEL PATTILLO
14 ON BEHALF OF THE PETITIONERS

15 MR. PATTILLO: I heard the Commission
16 say that this case should be decided by looking
17 at Congress's intent when it enacted 13(b). And
18 the way we determine Congress's intent is by
19 looking at the words on the page.

20 Congress used the word "injunction"
21 with a clear historical meaning. Even if, in
22 certain cases like Porter and Mitchell, that
23 term might be construed to carry with it other
24 equitable remedies, we know that's not the case
25 here.

1 Even under Porter and Mitchell, Porter
2 and Mitchell make clear that you must look at
3 the statute and ask if another feature impliedly
4 precludes broader relief. The Commission
5 suggests that standard isn't met here. But all
6 we have to do is look at Porter.

7 In Porter, the existence of another
8 provision providing a damages remedy was
9 sufficient for the Court to conclude that it
10 should not also imply that same damages remedy
11 into the provision at issue. That is precisely
12 what the Commission is trying to do here. It is
13 trying to get precisely the same relief that
14 would have been available under 5(l),
15 injunctions and other equitable relief.

16 It's trying to get precisely the same
17 relief available under Section 19 but without
18 complying with any of its safeguards. I heard
19 the Commission say that sometimes pathways --
20 one pathway might be more attractive. Well, of
21 course, it's going to be more attractive for the
22 Commission to proceed under Section 13 than
23 Section 19, where it doesn't have to comply
24 with, for example, the heightened proof
25 requirement, where it doesn't have to comply

1 with the limitations period. I -- I didn't hear
2 a single response to why Congress would have
3 intended to allow the same relief under two
4 pathways yet only provide protections in one but
5 not the other.

6 And the absence of a limitations
7 period is something that Meghrig pointed out.
8 It would be truly striking for a statute to
9 award retrospective monetary relief but not
10 include a statute of limitations. That applies
11 equally here but even more so when you consider
12 what the Commission's core mission is here.

13 Here, the -- the Commission first
14 investigated this conduct, it first asked
15 Mr. Tucker about his disclosures, in 2002. Yet,
16 subject to no limitations period, it sat on its
17 hands for a decade.

18 Now, if it were following the
19 prescriptions that Congress provided, in 2002,
20 if it thought that there was something wrong
21 with the disclosures, it should have gone in
22 then. It should have thought to bring a stop to
23 it. It could have gone -- it should have gone
24 to administrative processes to make clear that
25 this particular remedy -- or, excuse me, that

1 these particular disclosures, which are
2 widespread throughout the industry, were, in
3 fact, not acceptable and a violation of the 5(l)
4 act. But it didn't do that. And this case
5 shows precisely why holding the Commission to
6 its core mission of providing prospective
7 monetary -- prospective guidance to business
8 about what conduct is prohibited is so
9 important. It's exactly what Congress intended.

10 And the entire structure of the -- of
11 the Commission's mission is being altered by it
12 choosing to go down the easy path of render --
13 racking up huge judgments under 13(b) without
14 the protections that Congress provided under
15 Section 19.

16 If there are no further questions, I
17 would ask that the judgment of the court of
18 appeals be reversed. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:07 a.m., the case
22 was submitted.)

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