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THE CONSUMER PROTECTION AND RECOVERY ACT: RETURNING MONEY TO DEFRAUDED CONSUMERS

VIRTUAL HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

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THE CONSUMER PROTECTION AND RECOVERY ACT: RETURNING MONEY TO DEFRAUDED CONSUMERS

TUESDAY, APRIL 28, 2021

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 1:03 p.m., via Cisco Webex online video conferencing, Hon. Jan Schakowsky (chair of the subcommittee) presiding.

Members present: Representatives Schakowsky, Rush, Castor, Trahan, McNerney, Clarke, Cárdenas, Dingell, Kelly, Soto, Rice, Craig, Fletcher, Pallone (ex officio), Bilirakis (subcommittee ranking member), Upton, Latta, Guthrie, Bucshon, Dunn, Pence, Lesko, and Armstrong.

Staff present: Jeffrey C. Carroll, Staff Director; Lisa Goldman, Senior Counsel; Waverly Gordon, General Counsel; Daniel Greene, Professional Staff Member; Tiffany Guarascio, Deputy Staff Director; Perry Hamilton, Clerk; Alex Hoehn-Saric, Chief Counsel, Communications and Consumer Protection; Ed Kaczmarski, Policy Analyst; Zach Kahan, Deputy Director, Outreach and Member Service; Mackenzie Kuhl, Digital Assistant; David Miller, Counsel; Kaitlyn Peel, Digital Director; Tim Robinson, Chief Counsel; Chloe Rodriquez, Clerk; Andrew Souvall, Director of Communications, Outreach and Member Services; Sydney Terry, Policy Coordinator; C.J. Young, Deputy Communications Director; Anna Yu, Professional Staff Member; Sarah Burke, Minority Deputy Staff Director; Nate Hodson, Minority Staff Director; Peter Kielty, Minority General Counsel; Bijan Koohmaraie, Minority Chief Counsel, Minority Oversight and Investigations Chief Counsel; Tim Kurth, Minority Chief Counsel, Consumer Protection and Commerce; and Michael Taggart, Minority Policy Director.

Ms. SCHAKOWSKY. The Subcommittee on Consumer Protection and Commerce will now come to order.

Did you hear that? OK.

Today, we will be holding a hearing entitled "The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers." Due to the COVID 0919 public health emergency, today's hearing is being held remotely.

All Members and witnesses will be participating via video conference. As part of our hearing, microphones will be on mute for

the purpose of eliminating inadvertent background noise, like my dogs and maybe yours. And, Members and witnesses, you will need to unmute your microphone each time you wish to speak.

Additionally, Members will need to be visible on the screen in order to be recognized.

Documents for the record can be sent to Ed Kaczmarski at the email address that we have provided to your staff. All documents will be entered into the record at the conclusion of the hearing.

Now, normally I would begin with an opening statement of 5 minutes, but because the chairman of the full committee has a conflict and in deference to him, I am going to recognize Frank Pallone, the chairman of the full committee, for 5 minutes to give his opening statement.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Well, thank you, Madam Chairwoman, and I apologize for going before you, but I have to speak to one of our caucuses any minute, so thank you.

Ms. SCHAKOWSKY. Of course.

Mr. PALLONE. Let me say that last Thursday, as you all know, the Supreme Court ruled that the Federal Trade Commission may no longer use its primary tool to get Americans their money back from fraudsters and scammers. And this strikes at the very heart of the FTC's mission to protect and provide relief to consumers.

The FTC, we know, lost the case, but it is the American people that will suffer. And what my colleagues and I have been saying for over a year was a problem is now unfortunately an emergency. And certainly Chairwoman Schakowsky has been on the forefront of telling us that we need to do something.

The FTC used section 13(b) for over 40 years to sue in court to get consumers the money stolen from them and to force fraudsters to give up illegal profits, and for over 40 years it was effective in providing relief. In my home State of New Jersey, the FTC has sent $37.5 million to over 167,000 residents since July of 2018.

And New Jersey is not unique. The FTC has helped return stolen money and provided other equitable relief to millions of constituents every year. Hardworking Americans can feed their families, pay for rent, buy clothes for their kids because the FTC used this section 13(b) to return money that was defrauded. And over 200,000 consumers, including many veterans and servicemembers, scammed by University of Phoenix and DeVry were relieved from undeserved and burdensome student debt because of the FTC when it used 13(b).

But if we don't take any action, the FTC's ability to provide that kind of help to our constituents is no longer possible because of the Supreme Court's decision. So that is why the FTC unanimously requested Congress to ensure to continue to seek the mandatory relief for consumers under 13(b) as soon as circuit courts first questioned this authority in 2019, and that is when Chair Schakowsky and every Democratic Member joined with Vice Chair Cárdenas to support the Consumer Protection and Recovery Act that we are considering today.

And there are no adequate substitutes in the current law that can simply replace what the FTC lost. The remaining authority of the FTC is too weak and, where available, will take too long for meaningful relief for our constituents. Vice Chair Cárdenas' bill restores the minimum authorities necessary for an effective enforcement regime.

Now, some have argued that we need to take this opportunity to reconsider the scope of the FTC's authority and even weaken it, but I don't agree with that. I think they should have greater authority to go after scammers, and simply getting stolen money returned or a court order preventing further illegal activity is insufficient, in my opinion.

I want to basically stress how important it is that we do this quickly, and Tony's Consumer Protection Recovery Act, you know, does what I think needs to be done. And I hope our colleagues on both sides of the aisle will work with us to pass this bill quickly.

I mean, obviously, there is always opportunity for input. I am not saying that we have to report out the bill exactly the way it is, but I do think it sets a really good example for what we need to do because it puts consumers first.

[The prepared statement of Mr. Pallone follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Last Thursday, the Supreme Court ruled that the Federal Trade Commission (FTC) may no longer use its primary tool to get Americans their money back from fraudsters and scammers. This strikes at the very heart of the FTC's mission to protect and provide relief to consumers. The FTC lost the case, but it's the American people that will suffer. What my colleagues and I have been saying for over a year was a problem is now an emergency.

The FTC used section 13(b) for over 40 years to sue in court to get consumers the money stolen from them and to force fraudsters to give up illegal profits. And for over 40 years, it was effective in providing relief. In my home State of New Jersey alone, the FTC has sent $37.5 million to over 167,000 residents since July 2018. And New Jersey is not unique.

The FTC has helped return stolen money and provided other equitable relief to millions of constituents across every one of our States. Hard-working Americans can feed their families, pay for rent, and buy clothes for their kids because the FTC used section 13(b) to return money that was defrauded. Over two hundred thousand consumers, including many veterans and service members, scammed by the University of Phoenix and DeVry were relieved from undeserved and burdensome student debt because the FTC used section 13(b).

Unless we take action, the FTC's ability to provide that kind of help to our constituents is no longer possible as of last week, thanks to the Supreme Court's decision.

That is why the FTC unanimously requested Congress ensure it could continue to seek monetary relief for consumers under 13(b) as soon as circuit courts first questioned this authority in 2019. That is why I, Chair Schakowsky, and every Democratic member of this subcommittee joined with Vice Chair Cárdenas to support the Consumer Protection and Recovery Act we are considering today.

There are no adequate substitutes in the current law that can simply replace what the FTC has lost. The remaining authority of the FTC is too weak and, where available, will take too long for meaningful relief for our constituents. Vice Chair Cárdenas' bill restores the minimum authorities necessary for an effective enforcement regime.

Some argue that we need to take this opportunity to reconsider the scope of the FTC's authority and even weaken it in some ways. To the contrary, I believe that the FTC should have greater authority to go after scammers. Simply getting stolen money returned or a court order preventing further illegal activity is an insufficient deterrent for companies and individuals intent on scamming consumers, including veterans, the elderly, and vulnerable communities.

While I am willing to discuss larger reforms, I am not willing to leave Americans out in the cold and leave the door open for scammers while we debate. The Supreme Court's decision put a neon welcome sign out for fraudsters to target consumers and made clear Congress alone has the power to come together and fix this.

That is what the Consumer Protection and Recovery Act does, and I hope my colleagues on both sides of the aisle will work with us to pass this bill quickly. Putting consumers first is something we should all be able to agree on.

Mr. PALLONE. So, with that, I would like to yield the remaining of my time to the vice chair and the sponsor of the bill, Mr. Cárdenas.

Mr. CÁRDENAS. Thank you very much, Chairman Pallone.

And thank you so much, Chairwoman Schakowsky, for having this important hearing.

And I also want to thank all of my colleagues for your amazing questions that are going to come forth so that we can deliberate, as legislatures do, so we can set the record straight, and create laws that, in this case, protect the American consumer.

And I think it is important that the Federal Trade Commission's, FTC, authority be returned so that they can help return money to defrauded individuals across this country.

In many of our districts we have seen our constituents inundated with COVID 0919 scammers attempting to prey on their fears and financial insecurities. If the scams were successful, the FTC would have been able to step in, use its 13(b) authority to stop these bad actors, and put money back into the pockets of hard-working Americans.

Since July of 2018, almost a million people in my State of California have received nearly $172 million in redress under 13(b).

For 40 years, the courts uniformly held that the FTC could obtain equitable monetary relief under section 13(b). Last Thursday, the Supreme Court held it could not.

It is hard to imagine a more pressing issue for Congress to fix than the leading Federal consumer protection agency losing its most effective weapon to help people during an unprecedented public health crisis.

The Consumer Protection and Recovery Act seeks to reaffirm this authority so the agency can continue to make consumers whole again.

And, with that, I yield back. Thank you, Madam Chair.

Ms. SCHAKOWSKY. I thank the gentleman for yielding back, and now I recognize Mr. Bilirakis, the ranking member of the subcommittee, for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. GUS M. BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BILIRAKIS. Thank you very much, Madam Chair. I appreciate it.

Good afternoon. Welcome to today's subcommittee legislative hearing. I want to thank the witnesses for being here today.

Acting Chair Slaughter, I appreciate you and the entire Commission's tireless efforts of fighting against scams and fraud during the COVID 0919 pandemic, especially those targeting our most vulnerable constituents.

As you know, this committee worked in a bipartisan success, as you know, last year, to provide your agency first-offense-penalty

authorities on COVID 0919 scams and fraud. So I can assure you, we all take a hard line when it comes to bad actors.

Despite this, Madam Chair, again, Madam Chair, I know your side is aware of several irregularities on how this hearing has been approached and how the minority rights have been disregarded. This contrasts with a unanimous Supreme Court decision last year—excuse me—last week, where we saw all nine Justices, across the philosophical spectrum, unambiguously communicate that this is not about siding with fraudsters but actually about respecting the law.

If we are to find a balanced solution to addressing FTC authorities, we must work in good faith and in a bipartisan manner to do so.

In the Court's decision, the nine Justices all agreed the FTC clearly exceeded its 13(b) authority to seek monetary relief. The Court also detailed the other avenues, apart from 13(b), the FTC can currently use for restitution and disgorgement. In light of this, it is important to engage in a thoughtful conversation about the additional authorities that may be required to act quickly against fraudsters.

We also have a responsibility to consider how powers are targeted, transparent, and focus on getting redress for, again, for our victims. However, we won't get to hear all those options, unfortunately, today.

The other FTC Commissioners can review and approve the written testimony prepared for the hearing, but the oral statement by the Acting Chair and answers to our questions will reflect her own opinions. While I certainly value her insight—and I certainly do—again, we will not have the benefit of counterpoints for how we focus on legislation, on this particular legislation which we vote, all of us want to work together on.

We all understand the urgency, but we need to get this right. And excluding the views of experts in this field is a disservice to the consumers we are trying to protect.

In addition, I and several of my colleagues introduced legislation to factor into this review, such as H.R. 2672, the FTC REPORTS Act, that I introduced last week. This commonsense legislation would require FTC to submit a report to Congress that includes all FTC enforcement actions involving allegations of fraud against our senior citizens.

My bill moved through committee unanimously previously, and I am disappointed it and the other reform bills are not included on the docket today.

Republicans all agree seeking financial restitution for victims is essential. I want to repeat that: Republicans all agree seeking financial restitution for victims is essential. But there is a history of regulatory overreach we must consider and how that impacts our business sectors as we rebound from the COVID 0919 pandemic.

I am pleased that we can hear from Professor Howard Beales on how to avoid the FTC's abuses of power we saw in previous decades. If this legislation moves forward, in my opinion, I am hopeful my Democratic—as it moves forward—I am hopeful my Democratic friends work with us to establish guardrails to ensure due process

remains a foundational principle for the protection of America's and, again, Americans' legal rights.

Today is also an opportunity to highlight the need to act on a national privacy standard, and I know most of you agree with this.

Acting Chair Slaughter, I understand you announced a centralized rulemaking process, and you and other Commissioners expressed support to establish privacy rulemakings through this process.

While I appreciate the nudge to get us to act, I do worry that privacy rulemaking will still conflict with State laws that may lead to even more confusion on this topic. This committee must work together to establish a preemptive national privacy standard that protects all Americans.

Madam Chair, I am hopeful you and the majority will engage with us on FTC updates and to work in a bipartisan fashion to pass FTC reform language, including 13(b) clarity and a national privacy standard that allows for greater transparency, economic analysis, due process, and equitable restitution for victims.

And I know you will, Madam Chair. So thank you very much for giving us the opportunity, and I yield back the balance of my time. I don't have any time.

[The prepared statement of Mr. Bilirakis follows:]

PREPARED STATEMENT OF HON. GUS M. BILIRAKIS

Good afternoon and welcome to today's subcommittee legislative hearing.

I want to thank the witnesses for being here today. Acting Chair Slaughter, I appreciate you and the entire Commission's tireless efforts fighting against scams and fraud during the COVID 0919 pandemic—especially those targeting our most vulnerable constituents. As you know, this committee worked with bipartisan success last year to provide your agency first offense penalty authorities on COVID 0919 scams and fraud, so I can assure you we all take a hard line when it comes to bad actors.

Despite this, Madam Chair Schakowsky, I know your side is aware of several irregularities on how this hearing has been approached, and how the minority rights have been disregarded. This contrasts with a unanimous Supreme Court decision last week where we saw all nine Justices across the philosophical spectrum unambiguously communicate that this is not about siding with fraudsters, but actually about respecting the law. If we are to find a balanced solution to addressing FTC authorities, we must work in good faith and in a bipartisan manner to do so.

In the Court's decision, the nine Justices all agreed the FTC clearly exceeded its 13(b) authority to seek monetary relief. The Court also detailed the other avenues apart from 13(b) the FTC can currently use for restitution and disgorgement. In light of this, it is important to engage in a thoughtful conversation about additional authorities that may be required to act quickly against fraudsters. We also have a responsibility to consider how powers are targeted, transparent, and focused on getting redress for victims.

However, we won't get to hear all those options today. The other FTC Commissioners can review and approve the written testimony prepared for the hearing, but the oral statement by the Acting Chair and answers to our questions will reflect her own opinions. While I certainly value her insight, we will not have the benefit of counterpoints or how we focus this legislation. We all understand the urgency, but we need to get this right and excluding the views of experts in this field is a disservice to the consumers we are trying to protect.

In addition, I and several of my colleagues introduced legislation to factor into this review, such as H.R. 2672, the FTC REPORTS Act that I introduced last week. This commonsense legislation would require FTC to submit a report to Congress that includes all FTC enforcement actions involving allegations of fraud against our senior citizens. My bill moved through the committee unanimously previously, and I am disappointed it and the other reform bills are not included on the docket today.

Republicans all agree seeking financial restitution for victims is essential, but there is a history of regulatory overreach we must consider, and how that impacts

all business sectors as we rebound from the COVID 0919 pandemic. I am pleased that we can hear from Professor Howard Beales on how to avoid the FTC's abuses of power we saw in previous decades. If this legislation moves forward, I am hopeful my Democratic friends work with us to establish guardrails to ensure due process remains a foundational principal for the protection of Americans' legal rights.

Today is also an opportunity to highlight the need to act on a national privacy standard. Acting Chair Slaughter, I understand you announced a centralized rulemaking process and you and other Commissioners expressed support to establish privacy rulemakings through this process. While I appreciate the nudge to get us to act, I do worry that a privacy rulemaking will still conflict with State laws that may lead to even more confusion on this topic. This committee must work together to establish a preemptive national privacy standard that protects all Americans.

Madam Chair, I am hopeful you and the majority will engage with us on FTC updates and work in a bipartisan fashion to pass FTC reform language, including 13(b) clarity and a national privacy standard, that allows for greater transparency, economic analysis, due process, and equitable restitution for victims. Thank you, I yield back.

Ms. SCHAKOWSKY. I thank the gentleman. That is OK. I thank the gentleman for yielding back, and I do want to assure you that legislation that you have proposed and ideas that you have will be completely considered as well.

But today is a special day of urgency, and I now—inadvertent—OK. And now I yield myself 5 minutes for an opening statement.

OPENING STATEMENT OF HON. JAN SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

So today the subcommittee acts urgently to ensure that the Federal Trade Commission can put money back into the pockets of consumers who have been victims of fraud or scams. And this authority, as has already been mentioned, was stripped away from the FTC last week by a decision of the United States Supreme Court. Really only criminals and scammers benefit from this decision, while consumers are the losers.

However, the Supreme Court has essentially invited us to fix this, so we are here today to right this wrong. Only we can restore the FTC's most important consumer protection tool. For decades, as you have heard—more than four decades—the FTC has used section 13(b) of the Federal Trade Commission Act to get money back for consumers harmed by unfair and deceptive practices.

Companies that commit violations of the FTC Act could be made to not only stop committing bad acts but to pay back the money that they use to dupe—the money that they actually duped or stole from their customers.

Since just 2018, the Federal Trade Commission has recovered over $1 billion for 6.8 million American consumers. One of their largest recent cases was against the multilevel marketing scheme Herbalife. That resulted in a total relief, the amount of money that was returned, of nearly $200 million for more than 260,000 people who had been lured into running Herbalife businesses by deceptive earning claims.

Since 2018, the Commission has put more than $49 million back into the pockets of over 255,000 Illinois residents, my State. None of this relief would have happened without the use of section 13(b).

While some will argue that the FTC has other tools, like section 19, for example, those require years of process, and by the time the cases are concluded the money is long gone, leaving consumers out in the cold.

We must make consumers whole when they have been victimized. That is why we are moving forward today with legislation to restore the FTC's authority.

The Consumer Protection and Recovery Act, introduced by our vice chair, Tony Cárdenas, with the support of every member—Democratic member—of this subcommittee confirms the authority that the FTC has to seek equitable relief, including monetary relief for consumers in Federal court.

Now, let me be clear: This is not the only reform that I would like to see, but it is the most important one right now. Understanding what the loss of security of 13(b) means for consumers is really inestimable, and we want to work with our colleagues—we absolutely do—to act quickly, to address the immediate need.

Vice Chairman Cárdenas' legislation is necessary and urgent, and it is an important step that Congress must take to protect American consumers. It is in our court.

As the stress of the pandemic makes consumers even more vulnerable right now to new scammers and fraudsters, we shall not allow criminals to victimize the American public with impunity. They must pay, literally, what they owe.

So I am hoping that my colleagues will work with us to put consumers first. I want to thank the witnesses that are here today joining us,

[The prepared statement of Ms. Schakowsky follows:]

PREPARED STATEMENT OF HON. JAN SCHAKOWSKY

Today, this subcommittee acts urgently to ensure the Federal Trade Commission can put money back in the pockets of consumers who have been the victims of fraud or scams. This authority was stripped from the FTC last week by a decision of the United States Supreme Court. Only criminals and scammers benefit from this decision, while consumers lose. The Supreme Court has mandated that we fix this, so we are here today to right this wrong.

For decades, the FTC used section 13(b) of the Federal Trade Commission Act to get money back for consumers harmed by unfair and deceptive practices. Companies that committed violations of the FTC Act could be made to not only stop committing bad acts, but to pay back the money they duped from their customers. Since just 2018, the FTC has recovered over $1 billion for 6.8 million American consumers. One of their largest recent cases, against the multilevel marketing scheme Herbalife, resulted in total relief of nearly $200 million for more than 260,000 people who had been lured into running Herbalife businesses by deceptive earnings claims.

Deceptive business schemes can ensnare unwitting Americans across the country. In my own home State of Illinois, the FTC recovered $9.6 million for more than 10,000 residents who were defrauded by Herbalife. Since 2018, the Commission has put more than $49 million back in the pockets of over 255,000 Illinois residents. None of this relief would have happened without the use of section 13(b). The Supreme Court's decision deprives the FTC of a critical tool. While some will argue that the FTC has other tools, like section 19, those are hardly a replacement. They require years of process and by the time the cases are concluded, the money is long gone, leaving consumers out in the cold. The Supreme Court has made it clear that Congress needs to act.

Scammers and fraudsters must be held accountable. We must make consumers whole when they've been victimized. That is why we are moving forward today with legislation to give the FTC back its authority. The Consumer Protection and Recovery Act, introduced by Vice Chair Cárdenas, with the support of all the Democratic members of this subcommittee, confirms the authority of the Federal Trade Commission to seek equitable relief, including monetary relief, for consumers in Federal Court.

Let me be clear, this is not the only reform that I would like to do to the FTC's authority. I think that the agency should have civil penalty authority, rulemaking

authority that works, as well as other tools to better protect consumers. But I understand what the loss of section 13(b) authority means for consumers and am willing to work with my colleagues to move quickly to address the immediate need. Vice Chair Cárdenas' legislation is a necessary and urgent step that Congress must take to protect American consumers. As the stresses of the pandemic make consumers vulnerable to new scams and fraud, we should not allow criminals to victimize the American public with impunity. They must pay, literally, what they owe.

I hope my colleagues will work with us to put consumers first.

Thank you to the witnesses for joining us today. I now recognize Ranking Member Bilirakis for 5 minutes.

Ms. SCHAKOWSKY. and now, I guess I was going to introduce the next speakers. But now, actually, I am going to—oh, I know what it was. Here it is.

The ranking member of the full committee has a conflict as well, and so the Chair now recognizes Mr. Armstrong for 5 minutes for an opening statement. Mr. Armstrong, it is yours.

OPENING STATEMENT OF HON. KELLY ARMSTRONG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. ARMSTRONG. Thank you, Madam Chair. As has been mentioned, the Supreme Court ruled last week on the Federal Trade Commission's use of 13(b) authorities. The Court's unanimous decision delivered by Justice Breyer was clear: Section 13(b), as written, does not authorize the FTC to seek monetary relief.

Today we are going to hear from Acting—and welcome—Acting FTC Chair Rebecca Slaughter, and I have no doubt she will advocate for her position on how to amend 13(b). Acting Chair Slaughter has been quoted in an April 22 statement that says, "In AMG, the Supreme Court ruled in favor of scam artists and dishonest corporations."

Americans are losing faith and trust in our institutions, and a big part of the reason is due to unnecessary political rhetoric that villainizes a person or that institution. Perhaps no institution has been subject to such unnecessary rhetoric as the Supreme Court.

Reasonable legal scholars across the spectrum can agree that this unanimous Supreme Court decision was actually the right legal decision. It may not be the policy outcome you or I want, but that is not the Supreme Court's job.

The Court's role, as stated in *Marbury* v. *Madison*, is simply to say what the law is. And I would suggest there are more productive ways to advocate for policy preferences.

And I am troubled that the other FTC Commissioners are not here today. Just last week, Senator Cantwell allowed for all four current Commissioners to testify before the Senate Commerce Committee. Surely this committee would benefit from the testimony of all of the Commissioners.

This committee will also be denied the opportunity to hear other FTC reform proposals. Six bills by our Members were ready and shared with the majority in time to be noticed as part of this hearing. These bills have passed out of this committee in previous forums.

However, all were rejected for consideration today, and this is part of a pattern. The minority is told that we do not have enough legislation ready for floor consideration. Yet our bills are never con-

sidered during the committee process. It is a catch-22 that seems convenient for partisan ends.

Similar concerns extend to other parts of the committee process. Despite two panels for this hearing, the minority was allowed only one witness. The good news is that that minority-invited witness is Professor Howard Beales, who previously led the FTC's Bureau of Consumer Protection.

He is widely regarded as an FTC expert. The Supreme Court has cited his work by him and former FTC Chairman Tim Muris in its decision last week. And he also has a history lesson for us. His work, cited by the Court, states that "In the 1970s, the Commission embarked on a vast enterprise to transform entire industries" and continues with "the Commission issued a rule a month" over a 15-month period.

This should sound familiar. Advance a few decades, and we have a recent announcement on a centralizing FTC rulemaking authority within the Office of General Counsel. This will move authority away from the issuance experts and the economic analysis that are central to FTC actions.

Interestingly, the statement on the new rulemaking effort tied its purpose to the Supreme Court challenge to 13(b).

Beyond the multiple process fouls, we are also bypassing the opportunity for substantive reforms. Senator Wicker rightly identified last Congress that privacy reform and a 13(b) amendment could be a part of the same legislative fix. I was pleased to hear Mr. Cárdenas, the sponsor of the bill before us, cite the worker proposal at our COVID scams hearing earlier this year.

I was also pleased with the bipartisan efforts to move privacy legislation forward during the first half of last Congress. Those efforts were obviously sidelined by COVID. Yet while we delayed, State legislatures are continuing to enact privacy legislation.

And I know that we are not that far apart, and I ask that the committee, that we can finish that job.

And in all due respect to the Acting Chair, it is neither her duty nor our request regarding the proper strategy and outcome. That is our job. This committee must work together to solve these issues.

Let's enact real FTC reform that reflects a bipartisan legislative accomplishment for this committee. The American people deserve a landmark consumer protection bill that meets the needs of the 21st century. Thank you, and I yield back.

[The prepared statement of Mr. Armstrong follows:]

PREPARED STATEMENT OF HON. KELLY ARMSTRONG

Thank you, Madam Chair. As you mentioned, the Supreme Court ruled last week on the Federal Trade Commission's use of Section 13(b) authorities.

The Court's unanimous decision, delivered by Justice Stephen Breyer, was clear. Section 13(b) does not authorize the FTC to seek monetary relief. Today, we welcome FTC Acting Chair Rebecca Slaughter. She will advocate her position on how to amend Section 13(b).

Acting Chair Slaughter, in an April 22 statement you stated that quote: "In AMG, the Supreme Court ruled in favor of scam artists and dishonest corporations." Americans are losing trust in our institutions. Part of the reason is due to unnecessary political rhetoric that villainizes a person or institution.

Perhaps no institution has been subject to such unnecessary rhetoric as the Supreme Court. Reasonable legal scholars across the ideological spectrum could agree

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The Court's role, as stated in Marbury v. Madison, is to say what the law is. I would suggest there are more productive ways to advocate for your policy preferences.

The minority is also concerned about the committee's process to review Section 13(b). I am troubled that the other FTC Commissioners are not here today. Just last week, Senator Cantwell allowed all four current Commissioners to testify before the Senate Commerce Committee.

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However, all were rejected for consideration today. This is part of a pattern. The minority is told we do not have enough legislation ready for floor consideration. Yet, our bills are never considered during committee process. It is a catch-22 that seems convenient for partisan ends. Similar concerns extend to other parts of the committee process. Despite two panels for this hearing, the minority was allowed only one witness.

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Let's enact real FTC reform that reflects a bipartisan legislative accomplishment for this committee. The American people deserve a landmark consumer protection bill thatmeets the needs of the 21st Century. I yield back. Thank you.

Ms. SCHAKOWSKY. I thank the gentleman, and I just want to make the comment that having a Chair or a sole Commissioner to speak on a panel, to testify before Congress alone, is not unusual. When Republicans were in charge of Congress, it was normal procedure. I don't want to get into a fight about it, that is for sure, but I just want to say that we have done this many times before on both sides of the aisle.

And at this point, I now would like to introduce our witness for our first panel of today's hearing, Honorable Rebecca Slaughter, who is the Acting Chair of the Federal Trade Commission. We want to thank you so much for being our witness, and now I would like to yield to you for 5 minutes of your opening statement.

STATEMENT OF REBECCA SLAUGHTER, ACTING CHAIRWOMAN, FEDERAL TRADE COMMISSION

Ms. SLAUGHTER. Thank you very much, Chair Schakowsky, Ranking Member Bilirakis, and members of the subcommittee for inviting me here today. Late last week, as you know, the Supreme Court ruled in *AMG* that the Federal Trade Commission cannot go to Federal court to return money to those from whom it was illegally taken.

The Federal court path, now foreclosed, had been used for 40 years to make your injured constituents whole. This path was utilized and supported on a bipartisan basis, throughout Republican and Democratic administrations, and upheld by eight different Circuit Courts of Appeals. Having it cut off is a devastating outcome for consumers and honest businesses.

As reflected in the joint written testimony submitted for this hearing, there is unanimous, bipartisan support at the Commission for a fix to 13(b).

Just days before the *AMG* decision came down, Mr. Cárdenas introduced clear and straightforward legislation that would affirm Congress' intent that the FTC be able to go to Federal court to stop bad conduct, disgorge ill-gotten gains, and provide restitution.

I cannot emphasize enough the importance of quick congressional action on this legislation. I will focus my remarks today on the consequences for the public and the markets absent the swift passage of this bill.

The Supreme Court's ruling eliminates the Commission's primary and best tool to seek monetary remedies when a company violates the FTC Act. This tool, referred to by its statutory provision, section 13(b), enabled the FTC to provide billions of dollars of relief—$11.2 billion in the last 5 years alone—in a broad range of matters.

Let me just give you a few examples of cases in which we were able to provide refunds to consumers solely through our now defunct 13(b) authority.

In addition to the Herbalife case which Chair Schakowsky mentioned, there is Amazon Flex. In January of this year, Amazon agreed to return $61.7 million in tips to drivers in its Flex program from whom it illegally withheld that compensation.

In the University of Phoenix case, we returned $49 million to over 146 consumers nationwide, including $1.3 million to Illinois consumers and $3 million to Florida consumers, to resolve allegations of deceptive claims regarding job placement.

And in Volkswagen, $9.5 billion was returned to consumers nationwide to resolve the company's deceptive marketing of 550,000 clean diesel Volkswagens and Audis.

Right now, the Commission has 24 active Federal court cases that rely exclusively on 13(b) for a monetary remedy, representing $2.4 billion that should be returned to injured consumers.

On the consumer protection side, these matters include cases addressing false or unsubstantiated COVID 0919 cures, a pyramid scheme, and a scam that used fake apartment listings to trick people into buying credit monitoring services with recurring charges.

On the competition side, affected cases include the Martin Shkreli matter in which defendants raised the price of a lifesaving

drug from $17.50 to $750 and the sham patent litigation case, AbbVie, in which the district court awarded $493 million in restitution to consumers harmed by inflated drug prices.

The significant direct harm to consumers from congressional inaction is obvious enough, but there are additional indirect harms to consumers and to law-abiding businesses. The loss of 13(b) will result in emboldened defendants with little incentive to agree to return money to consumers or even to provisions requiring them to change their behavior in meaningful ways.

This will mean more litigation at higher cost for taxpayers, resulting in less protection for consumers and more profit for lawbreakers, all at the expense of honest businesses trying to compete against companies that engage in unfair, deceptive, and anticompetitive conduct.

The Supreme Court's opinion left the policy questions about the FTC's authority to provide more effective and efficient monetary relief up to Congress. The policy goals that animated our 13(b) program are: incentivize companies to comply with the law and return money to harmed consumers when they don't.

I respectfully request that Congress act quickly to provide clear authority to the Commission to achieve these goals.

Finally, a word about the FTC's other authorities. We will use them all to pursue law violations where we can, but without congressional action none of these options will come close to protecting consumers and incentivizing compliance as much as our lost 13(b) authority. I hope you will move swiftly to restore it. Thank you, and I look forward to answering your questions.

[The prepared statement of Ms. Slaughter follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION:

THE URGENT NEED TO FIX SECTION 13(b) OF THE FTC ACT

Before the

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

APRIL 27, 2021

I. INTRODUCTION

Chair Schakowsky, Ranking Member Bilirakis, and Members of the Subcommittee, I am Rebecca Kelly Slaughter, Acting Chairwoman of the Federal Trade Commission, and I am pleased to appear before you today. In this testimony, we express our gratitude for the introduction of H.R. 2668 and explain why legislation is so urgently needed to address legal challenges to critical authority that enables the FTC to do its job of protecting consumers and competition.

House bill 2668, which Congressman Cárdenas introduced last week, addresses the two significant judicial limitations to Section 13(b) of the FTC Act. First, late last week, the Supreme Court ruled that courts can no longer award refunds to consumers in FTC cases brought under 13(b), reversing four decades of case law that the Commission has used to provide billions of dollars of refunds to harmed consumers. Second, some courts recently have ruled that the Commission cannot seek injunctive relief under 13(b) in cases where the unlawful conduct is no longer occurring, even if there is a reasonable likelihood that it will re-occur. The discussion below elaborates on these challenges and illustrates why we so appreciate that, with the introduction of H.R. 2668, Congress is acting to clarify one of the FTC's most essential tools.[1]

II. LEGISLATION IS NEEDED TO ENSURE EQUITABLE MONETARY RELIEF UNDER SECTION 13(b) OF THE FTC ACT

Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many

[1] This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions do not necessarily reflect the views of the Commission or any other Commissioner.

others.[2] More recently, in the wake of the pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams.[3] Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including $11.2 billion in refunds to consumers during just the past five years.[4] Section 13(b) is a critical tool in support of our enforcement missions, but its effectiveness has been substantially curtailed by recent judicial decisions, which have significantly weakened the Commission's ability to protect consumers from deceptive, unfair, or anticompetitive practices.

Section 13(b) of the FTC Act has been the agency's primary and most effective way of returning money to consumers that was unlawfully taken from them. The relevant portion of Section 13(b), often referred to as the "second proviso," authorizes the FTC to sue directly in federal court for violations of the FTC Act and states that "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[5] Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money. For decades, no court held to the contrary. In 1994, Congress ratified

[2] 15 U.S.C. § 53(b).
[3] *See, e.g.*, FTC Press Release, *FTC Sues California Marketer of $23,000 COVID-19 "Treatment" Plan*, https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan (July 31, 2020).
[4] *See* Tableau, *FTC Refunds to Consumers*, https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.
[5] 15 U.S.C. § 53(b).

its intent to enable the FTC to obtain monetary remedies when it expanded the venues available for FTC enforcement cases, strengthening the Commission's ability to bring redress cases.[6]

Recent judicial rulings, however, indicate a dramatic shift in how courts are interpreting and applying Section 13(b) in FTC cases. For example, in 2019, the Seventh Circuit, in *FTC v. Credit Bureau Center, LLC*,[7] overruled its three decades of precedent and held that Section 13(b) no longer allows the FTC to obtain monetary relief. The *Credit Bureau Center* opinion held that the word "injunction" in the statute allows only behavioral restrictions and not monetary remedies. Last fall, the Third Circuit, in *FTC v. AbbVie Inc.*,[8] relying heavily on the analysis in *Credit Bureau Center*, similarly concluded that the Commission could not obtain any monetary relief under Section 13(b). In *AbbVie*, for example, the court held that the defendant drug company violated the antitrust laws by engaging in sham litigation to keep out generic competition, but it nonetheless reversed the district court's award of $448 million meant to repay overcharged consumers. The net effect of the *AbbVie* ruling is that an adjudicated violator is nonetheless free to keep enormous ill-gotten profits extracted from consumers, based on a legal interpretation of Section 13(b) that no court of appeals had adopted before 2019.

This dramatic shift culminated in last week's decision by the U.S. Supreme Court in *AMG Capital Management, LLC v. FTC*, which held that equitable monetary relief such as

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[6] Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15–16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790–91. As the Senate Report noted, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress. . . . The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id.*

[7] *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

[8] *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020).

restitution or disgorgement is not authorized by the text of Section 13(b).[9] That is why we call on you to fix our statute to clarify the FTC's tools.

III. LEGISLATION IS ALSO NEEDED TO ENSURE THAT THE FTC CAN KEEP HARMFUL CONDUCT FROM RE-OCCURRING

In addition to the decisions that eliminate the FTC's ability to use 13(b) to return money to consumers, two other recent Third Circuit decisions reinterpreting Section 13(b) jeopardize the FTC's ability to enjoin illegal conduct in federal court. In *FTC v. Shire ViroPharma, Inc.*, a case involving a drug company's alleged abuse of the FDA's citizen-petition process to delay generic competition, the court held that the FTC can bring enforcement actions under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed.[10] That decision unnecessarily limits the Commission's ability to obtain injunctive relief for consumers who have been harmed by unlawful conduct that occurred entirely in the past. And, in the Third Circuit's decision in *FTC v. AbbVie*, the court cited *Shire ViroPharma* in dicta while agreeing that the FTC cannot sue under Section 13(b) unless conduct is imminent or ongoing.[11] Notably, in its motion to dismiss the Commission's antitrust complaint, Facebook has cited these decisions and argued that Section 13(b) bars the federal court suit.[12]

These decisions hamper the Commission's longstanding ability to protect consumers by enjoining defendants from resuming their unlawful activities when the conduct has stopped but there is a reasonable likelihood that the defendants will resume their unlawful activities in the

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[9] *See AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ___, slip op. (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf. *AMG* was an appeal by defendants from a 2018 Ninth Circuit ruling in which the court re-affirmed its precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief, a judgment that the Supreme Court reversed. *See FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

[10] *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

[11] *AbbVie*, 976 F.3d at 376.

[12] Memorandum in Support of Facebook, Inc.'s Motion to Dismiss FTC's Complaint, *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590-JEB (D.D.C.).

future. These decisions also limit the FTC's ability to settle cases efficiently. Targets of FTC investigations now routinely argue that they are immune from suit in federal court because they are no longer violating the law, despite a likelihood of re-occurrence, and they make these arguments even when they stopped violating the law only after learning that the FTC was investigating them.

Overall, these recent decisions have significantly limited the Commission's primary and most effective tool for providing refunds to harmed consumers, and, if Congress does not act promptly, the FTC will be far less effective in its ability to protect consumers and execute its law enforcement mission.

IV. CONCLUSION

We respectfully request that Congress act to clarify Section 13(b) of the FTC Act and revive the FTC's ability to enjoin illegal conduct and return to consumers money they have lost, which will greatly assist our efforts to protect consumers.

We look forward to continuing to work with the Subcommittee, Committee, and Congress, and we would be happy to answer your questions.

Ms. SCHAKOWSKY. Thank you very, very much, and thank you for sticking to the 5 minutes for a very concise and, I thought, very effective presentation.

So we have concluded our witness' opening statement for our first panel, and at this time I will move to Member questions. Each Member will have 5 minutes to ask the questions of our witness.

And I know you have done this before, but the 5 minutes includes your answer.

I will start by recognizing myself for 5 minutes.

So, even before the Supreme Court decided on Thursday, the uncertainty in the law surrounding section 13(b) was already hurting the Commission's enforcement efforts and draining the Commission's limited resources.

On October 20th, all five FTC Commissioners—Republicans and Democrats—sent a letter urging Congress to act quickly to reaffirm section 13(b). I repeat that. All of you had sent us a message to reinstate 13(b) to recover ill-gotten gains for consumers.

The letter warned that the defendants were using delay tactics in ongoing litigation, hoping that another Circuit would reverse its precedent, et cetera.

So I wanted to ask you now, what is happening to the cases the FTC was pursuing under its 13(b) authority?

Ms. SLAUGHTER. Thank you for the question. Honestly, it is a big problem. I mean, our ability to get monetary relief in those cases—and I mentioned that we have 24 cases pending in Federal courts right now that rely entirely on 13(b) for monetary relief—the money in question in those cases will not be on the table through the Federal court path. And that is a huge problem that not only jeopardizes our ability to provide relief for consumers in those cases, it disincentivizes the parties, and parties in other cases, from entering into settlements with us in any case.

Ms. SCHAKOWSKY. So can you estimate how much money consumers will lose out of just these cases that you have pending right now and that are under investigation?

Ms. SLAUGHTER. Yes. In the cases that we have already filed—there are, as I said, 24 cases, with about $2.4 billion at stake.

Ms. SCHAKOWSKY. Based on past experience, can you estimate how much money will not be able to be returned to defrauded Americans over, let's say, the next 5 years, if the FTC authority is not reinstated?

Ms. SLAUGHTER. Well, I think the best evidence for the next 5 years is the last 5 years, and over the last 5 years, we were able to return $11.2 billion to consumers, and we won't be able to do that going forward.

Ms. SCHAKOWSKY. And will the legislation that has been introduced by Vice Chairman Cárdenas, does it effectively restore the FTC's 13(b) authority?

Ms. SLAUGHTER. Yes. I think it is clear, commonsense, reasonable legislation that puts us right back where we, on a bipartisan basis, understood ourselves to be until the Seventh Circuit reversed its own precedent 2 years ago in the CBC case.

Ms. SCHAKOWSKY. And let me just ask you kind of open-ended, how will such a restoration of authority benefit consumers and businesses as well?

Ms. SLAUGHTER. Thanks. I think that is a really important question. So restoring the authority not only allows us to make consumers whole if they have been injured, it also protects honest businesses who need to compete against companies that may be engaging in unfair, deceptive, and anticompetitive practices to give themselves a leg up. So we want honest businesses to be there on a level playing field.

The other way it affects small businesses in particular is that small victims are often—small businesses are often the victims of scams and illegal conduct, and so we use 13(b) to return money to them, not just to individual consumers.

Ms. SCHAKOWSKY. Can you give us an example, a specific example, or perhaps the type of enforcement matter that the Commission may not be able to pursue because of this Court decision? I have 20 seconds.

Ms. SLAUGHTER. Sure. Sorry. So I think I mentioned some of the matters that are really important like the University of Phoenix case, which targeted veterans and Spanish-speaking consumers. When I mentioned small businesses, just this week we filed a potential settlement against a company that preyed on small businesses. So I think the examples are endless, and I am happy to provide a long list for you for the record.

Ms. SCHAKOWSKY. Thank you so much. I appreciate that.

And now I will recognize the ranking member of the subcommittee, Mr. Bilirakis, for 5 minutes to ask his questions.

Mr. BILIRAKIS. Thank you, Madam Chair, I appreciate it very much.

Given we did not have the other Commissioners here today, I would like to ask that the transcript—it is really an unofficial transcript from Senator Cantwell's hearing—be entered to the record, Madam Chair, please.

Ms. SCHAKOWSKY. Without objection, it will be entered at the end of the hearing.

[The information appears at the conclusion of the hearing.]

Mr. BILIRAKIS. Thank you, Madam Chair.

Acting Chair Slaughter, the Commission is an entity we rely on for objective technical assistance when it comes to legislation we are considering. You have identified the unanimous Supreme Court decision as needing an immediate congressional response.

This means both parties need to work together just as they did last year—and we did a great job last year under your leadership, Madam Chair—to provide FTC first offense civil penalty authority on COVID 0919 scams and fraud. Will you promise that you will provide us technical assistance on the legislation before us that reflects the support of all the other Commissioners?

Ms. SLAUGHTER. Well, we are always happy to provide technical assistance, and that technical assistance is provided by our technical experts within the agency. It is, I think, never by practice of the Commission, technical assistance, it is reviewed by all of the Commission. And I don't think it would be practical for you for it to be reviewed that way.

Mr. BILIRAKIS. Representing all technical assistance representing all Commissioners, correct?

Ms. SLAUGHTER. Well, again, I think the technical assistance program that the Commission has, to which we are very committed, is to make sure that we give you the technical input of the folks who are going to be implementing whatever law Congress passes. And we will absolutely continue to do that.

We don't, and never have, run all of our technical assistance by all the Commissioners. We didn't when I was in the minority. It is just not something the Commission has done, and I don't think it would be practical to do so because I don't think we will be able to get you that feedback on a timely basis. But I know all of my colleagues are always happy to share their own views if they are asked.

Mr. BILIRAKIS. So I would love to hear from your colleagues on that. On the topic of privacy, are you aware that Republicans in Congress have supported increasing FTC rulemaking authority, as well as agency funding, and continue coordination with State attorneys general so that we have strong national privacy protections? While we have national privacy protections, we need them to protect all Americans. If you could answer that briefly, I would appreciate it.

Ms. SLAUGHTER. Yes. I am aware there is a robust debate around privacy legislation.

Mr. BILIRAKIS. Thank you. I want to make it clear that I support going after bad actors—and all Republicans on the committee and I know Democrats as well—bad actors that seek to harm Americans.

However, I am concerned that, if we expand your current authority to allow the FTC to retroactively go after past behavior up to 10 years—so we are expanding it by at least 5 years—then the Commission will not pursue those currently committing harm.

If Congress expands the FTC's authority, how will you prioritize going after those who are actively committing harm versus those who committed harm in the past? And this is a very important question, so if you could answer that for me, I would really appreciate it.

Ms. SLAUGHTER. Thank you. Well, I think our priority always is, and necessarily must be, current bad acts and preventing future bad acts. So that is the first way I would answer.

The second way is, under the 13(b) authority that we had understood for the last 40 years, I don't think there was any statute of limitations. The legislation Mr. Cárdenas has offered introduces one for the first time, and I think that that is a fair compromise, but it is always in the interest of the Commission and the consumers that we protect to prioritize ongoing bad conduct in order to best protect your constituents.

Mr. BILIRAKIS. What is the current practice? How far back do you all go currently, the FTC, even though you said there is nothing in legislation currently?

Ms. SLAUGHTER. I am trying to—I don't think I have a great answer to that off the top of my head. I am happy to get you more for the record, but certainly we investigate conduct when we hear complaints and try to bring cases as quickly as possible. That is in our interest and in consumers' interest too.

The longer time elapses between bad conduct and our ability to bring a case, the harder it is to hold bad actors responsible, the harder it is to find consumers to provide redress. So I think we have a shared interest in moving as quickly as possible. The only people who don't have an interest in us moving quickly are the bad actors themselves who tend to drag out investigations and delay.

Mr. BILIRAKIS. OK. We need to prioritize the current ones because they are going after our constituents. Well, thank you very much. I appreciate it.

I yield back, Madam Chair.

Ms. SCHAKOWSKY. The gentleman yields back, and the Chair recognizes, if he is here, Mr. Pallone, chairman of the full committee, for 5 minutes of questions.

Are you here, Frank?

OK. Then I am going to call on Representative Kathy Castor for her 5 minutes of questions.

Ms. CASTOR. Well, thank you very much, Chair Schakowsky, for calling this very important hearing.

And to Acting Chair Slaughter, thank you for testifying today.

It is important to move Congressman Cárdenas' Consumer Protection and Recovery Act right away, and I am proud to be a cosponsor of the bill.

Acting Chair Slaughter, the Federal Trade Commission has relied on section 13(b) of the FTC Act to secure billions of dollars in relief for consumers all across America. You have testified to that. You have been at this for many years. Thank you very much for your service.

In Florida, just over the last 3 years, the FTC has used this authority to recover over $81 million to approximately over 500,000 Florida residents who were defrauded by some fraudster or criminal.

This specific FTC authority has been especially critical during the coronavirus pandemic. We have all seen criminals prey on our vulnerable neighbors, and many have had stolen funds that are intended for different uses under the CARES Act and the American Rescue Plan. So we have got to make sure that America's lead consumer protection agency has all of the tools necessary to protect our neighbors.

And I agree with you that, if Congress does not act expeditiously, we are going to see a lot more fraudsters, more deception out there. I guarantee you they have been following this and are going to try to get away with as much as they can.

And, as Chair Schakowsky mentioned, in October of last year all of the Commissioners of the FTC—Democrats and Republicans—wrote us a bipartisan letter asking us to make clear that the Commission can bring actions in Federal court under section 13(b) even if the conduct is no longer ongoing or impending when the suit is filed, and then can obtain monetary relief, including restitution and disgorgement, if successful.

Very quickly, Acting Chair Slaughter, does this bill do that?

Ms. SLAUGHTER. Yes, it does.

Ms. CASTOR. Does this bill do more than that?

Ms. SLAUGHTER. No, it does not.

Ms. CASTOR. Yes. That is why this bill should be a bipartisan slam-dunk. It is a targeted approach to do exactly what all of the Commissioners have suggested the Congress do.

Now, with the Supreme Court decision, time is of the essence to move it, so I know that we need to move forward on this. I want to—let's see if I have a little time.

OK. I want to ask you one other question. Under section 5 of the FTC Act, the FTC cannot obtain civil penalties for first violations, correct?

Ms. SLAUGHTER. Yes, that is correct. We have to have a company under order first.

Ms. CASTOR. And civil penalties are only brought when a company violates a rule or violates an order, correct?

Ms. SLAUGHTER. Yes, that is correct.

Ms. CASTOR. So, if the FTC were provided first offense civil penalty authority in addition to reaffirming section 13(b) in the Consumer Protection and Recovery Act, what would this allow the Commission to do?

Ms. SLAUGHTER. Civil penalty authority can be very effective for us to incentivize companies to comply with the law because they will have to pay an actual penalty beyond just disgorgement or restitution if they violate the law, but it is important, as you note, that penalties are different from restitution. They don't go back to wronged consumers under the current law. They go into the Treasury, and so they are good from an incentive perspective, but they aren't helpful to make consumers whole.

Ms. CASTOR. And I saw that in March you announced the creation of a new rulemaking group within the FTC's Office of General Counsel. Under section 18 of the FTC Act, the Commission had what is known as Magnuson-Moss rulemaking. It is different from the typical APA rulemaking because it sets up a more burdensome process.

What barriers does section 18 of the FTC Act have that are not included in normal APA rulemaking, and what would APA rulemaking authority allow the Commission to do?

Ms. SLAUGHTER. Section 18 sets up more process in terms of hearings, opportunity for notice, participation. Section 18 rules tend to take substantially longer to get from the starting point over the finish line. And so, to the extent that we want to send a clear message to businesses about what behavior is out of bounds and a clear message to consumers about the way that they are protected, APA is definitely a more efficient way to get there than section 18.

Ms. CASTOR. I agree. Thank you. I yield back.

Ms. SCHAKOWSKY. OK.

The gentlewoman yields back.

And now, Fred Upton, you are recognized for 5 minutes for questions.

Mr. UPTON. Well, thank you, Madam Chair.

I appreciate everyone being here, as we are all back in our districts in places around the country.

Acting Secretary, I have just a couple of questions. I know that in the hearing last week in the Senate, the U.S. Chamber sub-

mitted a letter highlighting their concerns of the current 13(b) proposals.

And, during that hearing, Senator Wicker requested all four Commissioners to weigh in on the letter. Now, I know it has just been a couple days, and I would doubt that any response has been prepared and submitted, but do you know what the status of that request is?

And as a backup to that, should Congress wait until we have them respond before pursuing legislation? What are your thoughts?

Ms. SLAUGHTER. Thank you. So, when Senator Wicker asked about that letter at the time, he had literally just handed it to me——

Mr. UPTON. Yes, I know.

Ms. SLAUGHTER [continuing]. So I haven't had a chance to review it. But I have, in the intervening week, had a chance to take a look at it, and I can tell you, from my perspective, I take a lot of exception to a lot of the arguments that are made within the letter and the policy views that it advances.

I would strongly urge you not to wait for any more formal response. Although I am, of course, happy to provide one for the record for you because the fact is that the cases that we have that are active now, the money that is at stake and the consumers that are harmed, are being harmed on an ongoing basis, and we really need to get them relief sooner and not wait any longer than is absolutely necessary to get that done.

Mr. UPTON. Well, I just know, you know, sometimes the legislative process is slow—hearings, markups, subcommittee, full committee, House floor—usually weeks at a time, and it would help us, as we prepare for this, versus having unanswered questions, knowing that in the Senate, where it really is 50/50, they are going to probably want to wait as well. So any effort that you can do to put a little gasoline on the fire and get a response back, I know, would be appreciated by all sides.

The last question I have is, do you believe that the changes under consideration may contrast with existing means of monetary recovery under section 5 and 19 of the FTC Act?

Ms. SLAUGHTER. Yes. Thank you. It is a really good question. The Supreme Court opinion suggested that, because we had section 19, we didn't need monetary relief under section 5. And, respectfully, as a matter of policy, I disagree with that. And I think it is worth understanding just how much more burdensome the process is to get money back to consumers under section 19.

So, in order to recovery money for section 19, which is limited to dishonest and fraudulent activity, which is a pretty high standard and wouldn't cover some of our important consumer protection or any of our competition cases, we would have to first do a full administrative litigation in part 3 for the section 5 claim and then go to a district court to request the money back. And there is a 3-year statute of limitations on returning that money.

The time it takes to go through that entire process when we have used it before can be, I think, as little as 7 years, but as much as 12 years or more, and our ability to find consumers after that 12 years is elapsed and get money back to them is really, really limited and inhibited.

And, moreover, in the intervening 12 years, the consumers have lost the benefit of that money that was gone from them. Contrast with an immediate asset freeze in Federal court as we were getting under 13(b), that is a much more efficient and effective way to protect consumers.

Mr. UPTON. OK. Well, thank you, and I yield back.

Ms. SCHAKOWSKY. The gentleman yields back, and now I call on Lori Trahan for 5 minutes for her questions.

Mrs. TRAHAN. Thank you, Chairwoman Schakowsky, for convening today's important and timely hearing. You know, one of the subcommittee's top priorities recently has been to hold the large social media platforms accountable for the ways they harm consumers by mistreating user data and amplifying destructive content.

You know, Facebook has gotten away with far too much because of its size and market dominance. Fortunately, the FTC brought an antitrust case against Facebook in December.

But my understanding is that Facebook is now relying on two recent court decisions to argue, and I quote, that "the FTC lacks statutory authority to maintain this suit. Section 13(b) of the Federal Trade Commission Act, the sole claimed source of the FTC's authority here, authorizes the FTC to proceed in Federal district court only to stop ongoing or imminent violations of the law. It does not authorize actions to remedy past conduct."

Well, you know, it is not clear to me where this argument might end. Could a defendant simply stop violating the law after the FTC sues them and get the whole case dismissed? This seems problematic, to say the least.

Acting Chair Slaughter, does the Consumer Protection and Recovery Act, which I am proud to cosponsor, make clear the FTC can obtain relief under 13(b) for consumers when defendants have violated the law and not have to demonstrate that they are still violating or will be violating the law again?

Ms. SCHAKOWSKY. Great question.

Ms. SLAUGHTER. Yes, it does.

Mrs. TRAHAN. So, you know, many experts believe that Facebook and Google will likely overcharge advertisers on their platforms due in part to their dominance in the first-party digital advertising space.

Unfortunately, digital advertising is an incredibly opaque market, and I am planning to introduce a bill that begins to address this issue. But even if the FTC had the evidence to make a clear case that Facebook and Google improperly overcharge for digital advertising, my understanding is that, because of the Supreme Court ruling last week, an advertiser, including our small businesses, would not be able to receive monetary relief for being overcharged.

Is my understanding correct that in this hypothetical situation the FTC could not prevent Google and Facebook from keeping ill-gotten earnings obtained through anticompetitive conduct?

Ms. SLAUGHTER. I want to be really careful to not comment on any specific fact pattern, but, yes, it is absolutely true that, under the Court decision, the FTC couldn't recoup ill-gotten gains in Federal court in a competition case.

Mrs. TRAHAN. Well, Acting Chair Slaughter, I want to thank you for your work in protecting small business innovation and consumers.

You know, as our economy begins to recover after a devastating pandemic, the work of the FTC is of utmost importance, and I hope we can pass H.R. 2668, so that the FTC can hold companies accountable.

Thank you again, and I yield back.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And next it is Bob Latta's turn for 5 minutes.

Mr. LATTA. Thank you very much, Madam Chair. Appreciate today's hearing, and also appreciate the Acting Chair to be with us today. It is very important as we work on protecting our consumers and identifying ways to undo the damage caused by fraud and counterfeiting online.

As we discuss the issues before us, the committee should also be considering additional overdue reforms. One such issue is looking for ways that we can work to restore WHOIS access to our law enforcement entities, like the FTC and others. WHOIS information or domain registration information informs us who is behind a website registration. This information had been publicly available prior to the implementation of the European Union's GDPR.

Last year, I reached out to the FTC to ask them about the impact of the loss of the WHOIS information and the data, especially on their consumer protection efforts. In their response, they said, before GDPR took effect in May of 2018, the FTC and other consumer protection law enforcement agencies routinely relied on publicly available registration information about domain names in the WHOIS database to investigate wrongdoing and combat fraud. The FTC uses this information to help identify wrongdoers and their locations, alter conduct, and preserve money to return to defrauded victims.

Restoring WHOIS access is critical, and consumer protection is a key piece of the intent of today's discussion. I want to work with my colleagues on both sides of the aisle to identify ways that we can restore access to this valuable resource.

Madam Chair, I would also like to submit that letter for the record today.

Ms. SCHAKOWSKY. Without objection, that will be inserted at the end of the hearing.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. Well, thank you very much, Madam Chair.

Protecting Americans from becoming the victims of scams and holding scammers accountable should not be a partisan issue. The FTC must have the tools available to pursue bad actors and achieve equitable restitution for victims of scams, but we also must be careful not to create unintended consequences when expanding the FTC's authority.

Acting Chair Slaughter, in February you spoke about the need for a Federal privacy and exacerbated data risks in light of COVID 0919 public health emergency. How would clear Federal privacy laws streamline current FTC enforcement actions?

Ms. SLAUGHTER. Thank you.

I think a Federal privacy law with strong protections for consumers would be enormously helpful because, right now, most of our Federal privacy program, with the exception of our COPPA work, is conducted entirely under Section 5 authority to prevent unfair or deceptive action practices, and that is an imperfect tool that we are using as best we can to address privacy.

Mr. LATTA. Thank you.

You know, shifting gears, the FTC also has the authority on deceptive practice acts and also those practices at the core of your mission. This committee is working together to move forward on legislation that will set a framework for the commercialization of autonomous vehicles. Given that serious work, I am concerned when terms are used in this sector that do not accurately represent a vehicle's current capabilities.

Are you aware that the terms "autopilot" or "self-driving" capability are currently being utilized when, in fact, there are no commercially available AVs on the road today?

Ms. SLAUGHTER. That sounds reflective of what I have read about.

Mr. LATTA. Well, it is really important, as we go forward, that we make sure that we have this done. Because, when you look around the world with other countries as they advance on their AV technology, that we don't want the United States to be left behind. And so we really have to make sure that we have the United States leading on this issue and on the legislation we have to get out there.

And, with that, Madam Chair, I will yield back my last 45 seconds.

Ms. SCHAKOWSKY. I thank you for those.

And now I call on Jerry McNerney for 5 minutes for his questions.

Mr. MCNERNEY. Well, I thank the chairwoman.

And I thank Chairwoman Slaughter for your work on the Commission.

Ms. Slaughter, Volkswagen sold vehicles that were rigged to pass emissions tests. The vehicles were advertised and sold as clean diesel, but this was clearly not true. The FTC proved that Volkswagen tricked consumers into believing the cars were low-emission and environmentally friendly.

How did the agency use section 13(b) authority in this case to get redress for consumers, and why the agency wouldn't have been able to use other authorities to obtain redress as quickly as it did?

Ms. SLAUGHTER. Thank you.

Volkswagen is a terrific case to illustrate the importance of our 13(b) authority. 13(b) was the tool that allowed us to negotiate a settlement with Volkswagen that returned $9.5 billion to consumers who were misled in the purchase of 150,000 [inaudible] ostensibly clean diesel——

Mr. MCNERNEY. Let me interrupt.

Chairwoman, there is quite a bit of interference here. Could we see if there is a way to clean up the——

Ms. SCHAKOWSKY. I wanted to see if any of our tech people can help clear it up. It is the——

Ms. SLAUGHTER. I can elaborate. I am sorry. I am not sure if you were also asking about the other tools. If we had to use [inaudible]——

Mr. MCNERNEY. Ms. Slaughter, you are still breaking up.

Ms. SCHAKOWSKY. Yes, you are still breaking up. You are still breaking up.

Uh-oh. I think she can't hear, either.

I don't know—can you hear us? Commissioner, can you hear us? Because you are breaking up right now.

I wonder if any of the tech people have a suggestion?

Mr. CÁRDENAS. Madam Chair?

Ms. SCHAKOWSKY. Yes.

Mr. CÁRDENAS. I have a suggestion. On one of the committee hearings, when I started to speak, my device was using data even though I had access to data or the internet, and when I switched off the data and it went strictly internet, immediately the signal got better.

Ms. SLAUGHTER. Are you having trouble hearing me?

Mr. MCNERNEY. Yes.

Ms. SCHAKOWSKY. It was breaking up. Right. We are.

Mr. CÁRDENAS. Can I make a suggestion, Chairwoman Slaughter, if you can hear me? This is Congressman Cárdenas.

If your device allows you to use data or the internet and you have access to both where you are at, try to switch off the data and force it to only use the internet. It worked for me on one of the hearings.

Ms. SCHAKOWSKY. And could you hear him? Can you hear us?

Mr. MCNERNEY. She is muted.

Ms. SCHAKOWSKY. Oh, she is muted.

Can you unmute, and let's hear it?

Acting Chair Slaughter, can you hear us? Can you unmute?

Ms. CLARKE. Madam Chair, I think that her broadband is giving her difficulty, because she is not moving, which indicates that it is buffering. So I think it is a broadband issue.

Mr. ARMSTRONG. Maybe she is just holding really still.

Ms. SCHAKOWSKY. So I think what we are going to do right now is call for a 5-minute recess, and then we will try to resume.

Ms. SLAUGHTER. Now, I can.

Ms. SCHAKOWSKY. Wait. Are you there?

No.

OK. Let's do that.

Ms. SLAUGHTER. Can you hear me? Can you hear me now?

Ms. SCHAKOWSKY. Say a whole sentence. Try it now.

Ms. SLAUGHTER. I switched devices. Is that better?

Ms. SCHAKOWSKY. Oh, yes, it is fine.

OK. Never mind that 5-minute break. We are going to go on.

Ms. SLAUGHTER. I came into my office so I could be wired to the ethernet, and it is 2021, so we still just have to pick.

Ms. SCHAKOWSKY. You know, technology. OK. So we were in——

Mr. ARMSTRONG. We have the hearing with the FCC next week.

Ms. SCHAKOWSKY. We were in the middle of Jerry McNerney's questions.

And we can return to you, Jerry.

Mr. MCNERNEY. Thank you. Thank you, Chairwoman.

And, Ms. Slaughter, thank you for holding in here. My question was about using section 13(b) for the Volkswagen case and how hard would it have been to do those reliefs without section 13(b).

Ms. SLAUGHTER. Thank you. I gave such a great answer that you didn't get to hear because apparently it was all broken up.

What I was saying is that 13(b) was the authority we used in the Volkswagen case. It is a perfect example of a case where 13(b) was what allowed us to be able to go to Federal court but also to negotiate the settlement with Volkswagen that returned $9.5 billion to consumers over the misrepresentations in the sale of 550,000 clean diesel VWs and Audis.

If we had had to recover money using the section 19 process, I am just thinking through what that might have looked like. We would have had to go into our administrative court, first go through a full litigation there, then the district court to ask them to provide redress for consumers. We would certainly still be in that litigation now and might be for another several years, instead of having been several years beyond returning money to consumers who were defrauded.

Mr. MCNERNEY. Thank you. That is pretty stark.

My congressional district includes parts of the San Joaquin Valley. Air pollution is a major problem in the valley, and the region has some of the poorest air quality in the country. Additionally, a large portion of my constituents are low-income. My district includes the city of Stockton, which had one of the highest numbers of foreclosures during the financial crisis of 2010.

So, in districts like mine, where there is poor health quality and a high percentage of population is low-income, why was the FTC's enforced monetary relief so important?

Ms. SLAUGHTER. Thank you. I think you are pointing out exactly why returning money to consumers matters. It is often taken from people who most need it, and that is why we really value our ability to get it back, not just to get civil penalties, which, like I said, are valuable in incentivizing compliance from companies but, at the end of the day, what we want to do is make your injured constituents whole. 13(b) is the way we can do that.

Mr. MCNERNEY. Well, thank you.

Do you think that this case and the nearly $9.5 billion monetary relief that was awarded to consumers deterred other companies from engaging in similar practices?

Ms. SLAUGHTER. Yes, I think having money on the line is an incredibly important part of the deterrence effect of our enforcement. We don't want companies to violate the law to begin with. We don't want them to hurt your constituents in the first place. And so, if our enforcement efforts don't have meaningful deterrent effect, then their reach is really, really limited.

Mr. MCNERNEY. Well, in general, why is section 13(b) so important then in seeking monetary relief to discourage unfair and deceptive practices?

Ms. SLAUGHTER. Thank you. Because it is a tool that puts money on the line for companies. That is money that can go back to consumers in the form of redress, but it also, as Mr. Cárdenas' legislation makes clear, gets taken from law-breaking companies in the form of disgorgement of the ill-gotten gains. We do not want com-

panies to keep the profits of law breaking. We should want them to have to give up those profits. Otherwise, they just have an incentive to violate the law.

Mr. MCNERNEY. So, in general terms, again, returning money to consumers that were defrauded, why is the FTC's authority under section 13(b) so critical in addition to these other paths? And I know it is a little repetitive, but I just want to hear it again.

Ms. SLAUGHTER. I am happy to say it as many times as I can, because it is that important.

13(b) is the most efficient and most effective way for us to return money to consumers who have lost it and to stop companies from breaking the law to begin with and to disgorge ill-gotten gains. Those are all really important policy goals, and 13(b) has been the best and most effective tool for us to achieve them.

Mr. MCNERNEY. Well, great.

Since 2018, almost 1 million consumers in California have received monetary relief as a result of the cases that the Commission brought under section 13(b). I want to make sure that my constituents are able to get the relief they deserve when they have been defrauded, and that is why I am a proud cosponsor of this legislation. And we need to move quickly to pass it.

And I yield back.

Ms. SCHAKOWSKY. The gentleman yields back.

And now I recognize Neal Dunn for 5 minutes for his questions.

Mr. DUNN. Thank you very much, Madam Chair.

Professor Beales, I am going to ask you a question, so you might warm up your camera there.

I think we can all agree that recovering losses and compensation for harms from the perpetrators of some of these actions that are heard before the FTC is entirely appropriate. And I associate myself with, you know, the cases that were described by my colleague from California immediately before this.

There are, however, a number of actions taken based on complaints by the FTC that have no significant harm, or no harm at all or loss at all, or insignificant ones. Many of these findings by the FTC are based on very subjective opinions by experts who actually disagree among themselves.

And I think these opinions, these findings and the CFTC actions and guidance that gets issued from them cannot reasonably be expected to be known in advance to even the most legitimate and proactive companies, especially in the rapidly evolving realm of cyber activities, artificial intelligence, autonomous vehicles, et cetera.

The prospect of fines totaling millions or even billions of dollars would have a chilling effect on innovation. And I would like Professor Beales to address that, if you would, sir.

I just saw you on there. Professor Beales?

Dr. BEALES. Chairwoman Schakowsky, I am happy to do that if that is appropriate, but I am not actually the witness on this panel. So I am at your pleasure.

Mr. DUNN. So I may have misunderstood that. I had your testimony, so I assumed you were a witness.

Madam Chair——

Ms. SCHAKOWSKY. He is a witness, but——

Dr. BEALES. I am on the next panel.

Ms. SCHAKOWSKY. He is——

Mr. DUNN. OK.

Ms. SCHAKOWSKY. On the next panel, he is a witness. So we will get to your question.

Mr. DUNN. Go ahead.

Ms. SCHAKOWSKY. No, he can't answer now.

Mr. DUNN. He can, yes.

Go ahead. Professor Beales?

Ms. SCHAKOWSKY. No, he cannot.

Mr. DUNN. Oh, he cannot. Oh, OK.

Well, I think I made my point there, you know. I think that—I am all for the 13(b) being reestablished, but with some guardrails on it so that we understand who is going to be subject to these, you know, sometimes very high fines and very chilling things—things they cannot anticipate in advance.

With that, Madam Chair, I yield back.

Mr. PENCE. Would the gentleman yield to me?

Mr. DUNN. Yes.

I would like to yield to my colleague, Mr. Greg Pence.

Ms. SCHAKOWSKY. Mr. Pence, you are recognized for the remainder of the time of Mr. Dunn.

Did you want that time?

OK. Otherwise—yes? No?

Otherwise——

Mr. DUNN. You are still muted, Greg.

Mr. PENCE. All right. Let's try that.

Ms. SCHAKOWSKY. You have about 2 minutes.

Mr. PENCE. Thank you, Chair Schakowsky and Ranking Member Bilirakis, for holding this important hearing today.

To date, the FTC has returned more than $25 million to Hoosiers that have fallen victim to deceptive scams and fraud. While it is important that we maintain the FTC's ability to award restitution to consumers that have been defrauded, I agree with Republican Leader Bilirakis that this conversation would be better suited for a broader consumer privacy and FTC reform discussion.

In addition, as we consider this proposal, we should incorporate sufficient guardrails to protect against unintended consequences. I hope that we can come together to find common ground on a broad range of FTC reform policies to best protect consumers in Indiana and, of course, across the country.

Acting Chairwoman Slaughter, thank you for being here today.

You recently announced a new rulemaking group within the FTC's Office of the General Counsel. I am concerned that this new plan will create a more centralized rulemaking process at the FTC. In order to best protect consumers, I want to make sure that the Commission prioritizes input from each of the Commissioners as well as the Bureau of Economic Analysis.

Two questions. Can you commit to incorporating feedback from the other Commissioners and bureaus? And, two, will each potential new rule include an economic analysis to determine if there are any unintended consequences that could be derived from the rule?

Ms. SLAUGHTER. Thank you for the question.

First, let me say I think the value of rules is actually reflected in what you and some of your colleagues have talked about today, which is providing clear notice to businesses and to consumers about what is within the bounds of the law and what is not. Rules cannot change what is illegal. They cannot reach conduct and make things illegal that wouldn't be covered by the law. But they can provide clarity. And I think that that is really important for honest businesses who want to comply.

So that is the first thing I would say.

The second thing I would say is, absolutely, input from other Commissioners, input from our bureaus, input from the subject-matter experts has always been and will always be a very important part of the Commission's work, whether it is on rules, of which we have many already that we enforce, or on particular cases. So that has been important and will continue to be important and is, in fact, baked into Commission process.

Mr. PENCE. OK. Thank you.

Thank you, Madam Chair. I yield.

Ms. SCHAKOWSKY. The gentleman yields back.

Now I call on Congresswoman Yvette Clarke for 5 minutes of questions.

Ms. CLARKE. Thank you, Chairwoman Schakowsky and Ranking Member Bilirakis, for holding today's hearing on this critical piece of legislation.

This is critical. The FTC's 13(b) cases are vital to protecting communities of color from not only dishonest business practices but also abhorrent and illegal racial discrimination.

Last year, the FTC bought a case under 13(b) against a New York City car dealership, Bronx Honda. The complaint detailed that Bronx Honda ordered its salespeople to charge higher financing markups and fees to Black and Latino customers. The company's general manager told employees that these groups should be targeted due to their limited education and that they should avoid the same practices with their White customers.

Thanks to 13(b), the FTC was able to step in and send $1.5 million to the victims of this car dealership's illegal financing and sales practices, in addition to putting an end to these abusive markups for Black and Latino customers.

Acting Chairwoman Slaughter, can you talk about how the dealership, in this instance, might have gotten away with this abhorrent conduct had it not been for 13(b)? And can you describe how difficult or impossible this case would have been without 13(b)?

Ms. SLAUGHTER. Thank you, Congresswoman.

As a native New Yorker, I cared a lot about this case. It was extremely important to me for exactly the reasons that you point out, that the population that was targeted by the illegal conduct in this case were the Black and Latino constituents in New York who were ending up paying more money for their cars.

In this case, like in many cases, our 13(b) authority is what incentivizes companies to engage in settlement negotiations with us, push forward to stop their bad conduct, hopefully will incentivize other businesses not to engage in that bad conduct to begin with. And bringing cases like that is enormously important for the Commission and for the constituents we serve.

Ms. CLARKE. And if you didn't have 13(b) authority, how would that have been difficult or even impossible for you to have brought this case?

Ms. SLAUGHTER. So my memory in Bronx Honda is that we had a couple of other counts in addition to 13(b). We had the Truth and Lending Act and ECOA. But 13(b) does remain our primary authority to get monetary redress for consumers. And so, if we can't do that, even if perhaps we could have gotten civil penalties under some other authority, we wouldn't be able to return money to the consumers who were hurt. And, at the end of the day, that is an extremely important service that we provide.

Ms. CLARKE. Thank you.

I am particularly concerned about the disproportionate impact of scams on vulnerable communities, communities who have already been struggling with the combined impacts of COVID 0919 and economic crisis and the deep, systemic inequities that are pervasive throughout our civil society.

According to the FTC's own research, folks who are Black and Latino are more likely than their White peers to be victims of fraud. And yet data suggests that there is also a serious underreporting of fraud from communities of color. Back in 2014, the FTC launched its Every Community initiative to address these underlying disparities when it comes to fraud.

Acting Chairwoman Slaughter, when the FTC has secured refund checks for consumers under section 13(b), can you explain how the FTC makes sure those checks get to the victims in Black and Latino communities even if they aren't necessarily the ones reporting the fraud?

Ms. SLAUGHTER. Thank you.

I think it is really important to note that we don't just return money to people who have reported fraud. In cases where we use our 13(b) authority, we get information from the defendants about who their customers were and who suffered losses as a result, and then we directly send money back to those people in almost all of our cases, whether that is in the form of electronic payments or mailed checks. We do the best we can, using all of the information we have available, to identify who the affected consumers are and what the best way is to get money directly to them.

Ms. CLARKE. So why is passing the Consumer Protection and Recovery Act important to tackling fraud in Black and Latino communities? And if Congress fails to act on this legislation, what message does this send to scammers that target communities of color?

Ms. SLAUGHTER. I think it is critically important to pass this legislation in order to give us the tools to efficiently and effectively disgorge ill-gotten gains and return money to consumers. And because we know, exactly as you testified, that an enormous number of scams prey on communities of color and especially Black and Latino communities, but also veterans, also military consumers, also older Americans—these are the consumers who most need our help, and without 13(b) we are not going to be able to return money to them in any kind of an efficient or effective way.

Ms. CLARKE. Thank you, Madam Chair. I yield back.

Ms. SCHAKOWSKY. Thank you.

The gentlelady yields back.

And now I yield to Debbie Lesko for 5 minutes for her questions. Are you here, Debbie?

Let's see. Not at the moment. So—Debbie, are you there? OK.

So, Kelly Armstrong, you are recognized for 5 minutes for questions.

Mr. ARMSTRONG. Thank you, Madam Chair.

Retroactivity is not favored by the law. The ex post facto clause espouses this principle in criminal contexts, but we have judicial estoppel, laches, all different, I mean, various degrees on this, and it is based on fairness. Laws produce expectation and reliance, and people conform to their conduct accordingly. In any 13(b) reform bill, I think it is our duty to address the retroactivity question. If we fail to do so, we can expect continued uncertainty in litigation.

Acting Commissioner Slaughter, you said in your testimony that there are approximately 24 pending cases in Federal court alleging section 13(b) violations. And the Supreme Court has repeatedly affirmed a presumption against retroactivity unless there is a clear statutory test. The Landgraf test holds that, if a statute does not address retroactivity, the court should determine whether retroactivity would alter vested rights, create new obligations, impose a new duty, or attach a new disability.

It is possible that if Congress enacts a law to provide the FTC the ability to seek monetary relief under 13(b) and does not address retroactivity, the FTC will argue that retroactivity applies. The FTC would argue that it had such authority for decades under case law and that the conduct at issue occurred under the case law prior to the *AMG Capital* decision.

The FTC would argue that defendant's conduct occurred with their reliance based on the regime where 13(b) carried the threat of monetary relief. For the record, I think such an argument would be incorrect. Whatever monetary liability is previously attached under section 13(b), *AMG Capital* probably wipes that slate clean.

At this present moment, however brief it may be, section 13(b) carries no threat of equitable relief. Congressional authorization of such monetary relief under 13(b) would impose a new reliance that would reaffirm Landgraf's presumption against retroactivity.

This new reality creates due-process considerations that cannot be overcome unless Congress explicitly addresses and authorizes retroactivity. Mr. Cárdenas's bill does not explicitly address retroactivity. The only provision somewhat related is on page 4, starting at line 9, which seems to provide a 10-year statute of limitations.

I am worried about this ambiguity. And I think it is our responsibility as a committee and as Congress to adequately address the retroactivity question. I don't think we should, as a policy reason, leave it up to the courts.

And then I just—I have one question for Ms. Slaughter, because I was reading a Law Review article, and in that article it said there are roughly 75 pending Federal cases addressing 13(b), and in your testimony you said there are about 24. And I am wondering if—either my article is just old or we are talking about different cases. Because I didn't think it was that old.

Ms. SLAUGHTER. Thank you. I actually heard a similar number at the Senate Commerce hearing this morning and can get back to you on the record on what the discrepancy is. The 24 reflects our

inventory that we have done since the Supreme Court decision came down about what [inaudible] exclusively on 13(b). So it could be the discrepancy is either a difference in time because the caseload varies or because the cases of 13(b) plus other authority [inaudible].

Mr. ARMSTRONG. Thank you. And we are going to dig into it, too, in my office, too, because it is a big difference, and, I mean, it could be for various different reasons.

Thank you. I yield back.

Ms. SCHAKOWSKY. Thank you.

And now the sponsor of the bill under consideration, or under discussion anyway, today, the vice chair of the subcommittee, Tony Cárdenas.

You are up for 5 minutes of questions.

Mr. CÁRDENAS. Thank you, Madam Chair, once again, and also Ranking Member Bilirakis for having this important hearing.

And this is an opportunity for the American people to understand the balance of power and authority in this country, with the three branches of government. And here we have a law that was interpreted by the courts, and now we head back to the legislature, where we make laws. And therefore I think this is a perfect opportunity for us to exercise our responsibility as the legislative branch.

And also, if you don't mind, Madam Chair, I think there was a little bit of noise going on, or misinterpretation, about the next witness panel, Mr. Beales, which—he is going to have a great opportunity to answer any questions. I didn't want any of our viewers to think that he was thwarted or can't answer any questions. It will happen in the next panel.

So, with that, I have a question for our panelist, the Acting Chairwoman of the FTC.

Consumers who are harmed deserve fast, meaningful redress, and that means, at the very least, getting their money back. It simply cannot be profitable to defraud consumers until the FTC notices it. Right now, the message to wrongdoers is that they are free to pocket the money they have stolen from consumers ever since last week. Meaningful consumer recovery cannot be theoretical. It needs to be firmly established in the law.

I have also heard some in the business community express due-process concerns if the FTC has the authority to obtain monetary relief for consumers under section 13(b). I personally have had some meetings with some of these individuals who have those concerns. No one wants to prevent people from defending themselves, especially when asset freezes or other court orders really can devastate legitimate small businesses. As a former small-business owner myself, I appreciate this concern fully.

So, in addition to the fact that all the proceedings under section 13(b) under this legislation happen in Federal court before a neutral Federal judge, can you speak to the checks and balances in the FTC enforcement process that ensures due process for the accused, Acting Chair Slaughter?

Ms. SLAUGHTER. Thank you so much for that question, because I agree with you that due process is enormously important to us. We take our law enforcement authority very seriously, and we

want to execute it fairly. And so we have a number of procedures in place within the FTC to make sure that that is the case.

So investigations happen, companies are given an opportunity to respond, to engage with the staff. Before any complaint is filed, companies have an opportunity to meet with the Bureau Director and, if they want, with the Commission and for each Commissioner to hear out the arguments that the company makes.

And then the Commission itself has to vote, and the vote has to carry with a majority on any particular enforcement action and on any settlement. So, whether we are going to court and asking for money or we are agreeing with the defendant to settle for money, that has to be subject to a Commission vote. And that is a really important protection.

Mr. CÁRDENAS. Thank you.

I have heard some argue that the FTC will be just fine without section 13(b) authority in this bill because the Commission can simply use section 19 of the FTC Act to seek consumer redress.

I just want to go through, especially for our consumer viewers, go a little bit through a question-and-answer with you, if you don't mind. I would like to explore the mechanics of section 19 with you.

How long does it take for an administrative order to be entered under section 19?

Ms. SLAUGHTER. A fully litigated administrative order could take years—3 to 5, let's say.

Mr. CÁRDENAS. OK. And under 13(b) process, it is less lengthy?

Ms. SLAUGHTER. Under 13(b), we would go directly to Federal court. So we wouldn't have to do the administrative process and then a Federal court proceeding to get money. We would go right to Federal court to seek the money.

Mr. CÁRDENAS. So, in layperson's terms, when you say "to seek the money," basically, the court is the one that gives you the thumbs-up or thumbs-down to continue to proceed in that action, correct?

Ms. SLAUGHTER. Yes. And that is another really important due-process protection. The FTC can't order fines or order restitution unilaterally. We have to seek it from a judge. And the remedies are equitable, which means they have to be fair to both sides.

Mr. CÁRDENAS. OK.

Under section 19—well, I am almost out of time, and I just wanted to thank you, Acting Chairwoman Slaughter, for testifying today. And I am sure that we are going to have other opportunities for us to get written information back and forth from the FTC, not just from you but from other Commissioners, et cetera. So I am very glad that we do have a fair and thorough process before us.

With that, my time is up, and I yield back. Thank you, Madam Chairwoman.

Ms. SCHAKOWSKY. The gentleman yields back.

And now I recognize Debbie Dingell, if she is here, for 5 minutes. Yes, there you are.

Mrs. DINGELL. Thank you, Madam Chair. And thank you for having this hearing. And I really want to thank my colleague from California, Representative Cárdenas, for leading this. And this subject is so important, and his leadership is really making a difference.

And thank you, Chair Slaughter, for being here with us today.

I am going to stay on section 19. There are significant limitations to the FTC using section 19 of the FTC Act to seek consumer redress. Chief among them is that section 19 of the FTC Act has a 3-year statute of limitations. Oftentimes, we do not even learn about unlawful conduct until many years later. Consumers who were the victims of deception should be entitled to refunds even if the deception isn't discovered until after it stops.

So my first question, Chair Slaughter: How would a 3-year statute of limitations impact the FTC's ability to go after unlawful conduct and recover money for victims?

Ms. SLAUGHTER. Thank you for the question.

I think you are absolutely right that a 3-year statute of limitations would be a huge impediment to enforcement for us. It incentivizes defendants to drag out investigations. It is a problem where, as you pointed out, we haven't even discovered harm until well into that period of time.

And I think the other thing for those who are particularly concerned about due process that I worry about is that a 3-year statute of limitations forces us to rush to the courthouse door in order to—or to the administrative courthouse door in order to file an action because we are mindful of that clock. And I would rather we have the opportunity to do a thorough investigation to really understand the magnitude of the harm, the justifications the company provides, and the 3-year clock is an impediment to that.

Mrs. DINGELL. Thank you for that.

I am proud to be an original cosponsor of the Consumer Protection and Recovery Act, which would restore the agency's authority to get money back to consumers who have been scammed. This bill adds a 10-year statute of limitations on a court's ability to award monetary relief in section 13(b) cases, which my colleague was talking about a minute ago. The statute of limitations should allay any concerns that the FTC will seek monetary relief in cases involving [inaudible].

But even with the 10-year statute of limitations, this doesn't mean Congress can take its time now in fixing 13(b). As you well know, scammers and fraudsters often disappear, leaving no money for consumers to recover.

Chair Slaughter, does the inclusion of a 10-year statute of limitations make it any less urgent for Congress to pass this legislation?

Ms. SLAUGHTER. No, absolutely not. I mean, I think, as I reflected earlier, Section 5 hasn't had a statute of limitations. This would be a new statute of limitations that it imposes.

And I think it is a reasonable imposition compared to what we have had because of the urgency to pass this legislation right now. As I mentioned, we have $2.4 billion in consumer redress that is at stake in our currently pending cases, and that is gone if Congress doesn't act.

Mrs. DINGELL. So, if we delay, I mean, you have talked about how you can't get it back. What does it do to your real ability to get money back to consumers who have been—excuse my language, everybody—screwed? But it is really true.

Ms. SLAUGHTER. I think it really hobbles us to not have this authority. I think the thing to think about is, not only will we not

be able to get that money that is pending back to consumers or in new cases, it will also disincentivize businesses from entering into settlements with us to begin with, which means we are going to have to do more litigation, which is higher cost for taxpayers that provides less benefit for consumers. It is more profit for lawbreakers. And all of that is at the expense of the honest businesses who are trying to compete against companies who engage in unfair, deceptive, and anticompetitive conduct.

Mrs. DINGELL. Thank you.

I am almost out of time, so thank you, Acting Chairwoman Slaughter, for being here, to all those that are working it, and I look forward to working with all my colleagues on this. And I yield back.

Ms. SCHAKOWSKY. The gentlelady yields back.

And now I recognize Robin Kelly, my colleague from Illinois, for 5 minutes.

Ms. KELLY. Thank you, Madam Chair Schakowsky, for holding this important and timely hearing.

And thank you, Ranking Member Bilirakis.

Seniors are especially vulnerable to scams and fraud. According to the most recent report from the FTC, older adults reported more than $440 million in losses from fraud in 2019. And older consumers who report losing money reported much higher individual losses than younger consumers.

It is hard to recover these losses, but the FTC's efforts have helped many seniors get some compensation. According to the FTC's 2020 "Protecting Older Consumers" report, the Commission filed 10 new actions last year against entities for deceptively pitching products that would purposely treat or cure medical concerns that disproportionately affect older adults.

The report also notes the FTC's success in getting money back to consumers. This includes $2.7 million in redress for over 8,000 consumers defrauded by a timeshare resale scheme, $441,000 in refunds to more than 27,000 consumers who purchased purported cognitive improvement supplements, and $16 million to more than 27,000 consumers who lost money to a debt relief scheme that took tens of millions of dollars from financially strapped consumers, including the elderly.

These represent just a few examples of the FTC getting money back for consumers in cases that disproportionately affected older Americans. Protecting older consumers in the marketplace has always been one of the FTC's top priorities. The Supreme Court decision has now deprived the FTC of its best tool to get money back quickly to seniors who have been scammed.

We all need to work together to protect senior citizens from scams before they fall victim and suffer monetary losses.

Acting Chair Slaughter, when seniors are scammed, they tend to report much higher individual losses. Can you explain why this is and why it can be especially difficult for seniors to recover when they have been scammed?

Ms. SLAUGHTER. Thank you. It is a great question. And I think that looking out for elder populations who are targeted with fraud is a high priority and has been a high priority for the FTC.

I think the reason they report higher losses may often be because they have, you know, maybe more access to income than younger consumers, and maybe the types of scams that target them. We see seniors as targets of scams that involve tech support, including pain treatment scams, and disease and pain claims.

And I just want to take the moment to point out that, when we talk about the timeframe that it would take for section 19 cases to be brought, as opposed to the short timeframe for 13(b), if we had to go through a 10-year process to get money back in a section 19 case, think about what that means for a senior who is suffering a loss. That 10 years is really significant and really material, and I don't want to have to tell them that they are going to have to wait that long to recover money that they have lost.

Ms. KELLY. Well, I know that is one reason seniors will be especially hurt by the recent Supreme Court decision. And what are other reasons?

Ms. SLAUGHTER. Well, I think it is not just the time; it is harder for us to get money back at all. Section 19 makes it harder to get asset freezes. The burden of proof is higher. The process is longer. And without the ability to go to Federal court and stop bad conduct immediately and recoup money to return to consumers, we are at a real disadvantage and, more importantly, those seniors are at a real disadvantage compared to the scammers.

Ms. KELLY. And how will this new legislation help seniors recover from being defrauded?

Ms. SLAUGHTER. This new legislation restores the understanding of the FTC Act that had been validated by eight circuit courts of appeals and in place over the last 40 years. And that is the tool that we have used to return money to seniors, and it is a really important tool.

Ms. KELLY. And without this act would the FTC be as well-positioned to help seniors who have been defrauded? If not, why not?

Ms. SLAUGHTER. No. We would be substantially less well-positioned—we would be substantially worse off in our efforts to help seniors who have been defrauded because we wouldn't have that efficient and effective tool to stop bad conduct in Federal court and return money to seniors who have suffered losses.

Ms. KELLY. Thank you so much.

And, again, thank you, Madam Chair, for having this hearing. I yield back.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And now, Kathleen Rice, I recognize you for 5 minutes for questions.

Miss RICE. Thank you, Madam Chair.

And thank you, Ms. Slaughter, for being here with us today. This is really very informative.

You know, there are some who would say that the Consumer Protection and Recovery Act, Mr. Cárdenas' bill, would expand the FTC's authority in a way that would threaten industry. Can you address that claim? Because I don't understand where that kind of claim comes from.

Ms. SLAUGHTER. I could try to address it. I have to tell you, I don't really understand it either, because I firmly believe that 13(b) has been the tool that allows us to go after illegal conduct by dis-

honest businesses and scam artists, and to me that helps honest businesses who want to comply with the law and want to be able to compete on a level playing field.

So I can't really explain it for you, but I think it is an argument I don't find particularly persuasive.

Miss RICE. So I don't know if this is an obnoxious question, but do you lose a lot of cases?

Ms. SLAUGHTER. You know, honestly, we do lose some cases, and I think that that is an important thing to remember, because we do not have the ability to get monetary redress by fiat. We cannot issue fines on our own. We have to go to a Federal court, and we have to convince a judge not only the conduct is illegal but that redress or disgorgement is appropriate and that the remedies that we are seeking are equitable. Or, at least, this is how it is under 13(b).

So I think it is really important. I think we take seriously the responsibility to follow the facts and follow the law and bring cases where we have reason to believe that the law has been violated, but there are important checks in this system on the FTC, especially in the form of judicial review. And I think that that would stay under the bill Mr. Cárdenas has proposed.

Miss RICE. And just to be clear, how are cases—are cases referred to you? Are you the originator of cases? Do you hear things? I mean, you are not out there just targeting willy-nilly, you know, small businesses all over the country to try to put them out of business.

Ms. SLAUGHTER. No, absolutely not. And I think we try to prioritize the worst conduct. We collect complaints through our consumer complaint system. We monitor public reporting. We work with State attorneys general and local authorities and advocacy groups to identify violations of the law, to investigate them thoroughly and carefully, to propose complaints and potential remedies, and then to move forward.

Miss RICE. Again, I think it is—the other—very quickly, I have 2 minutes left—I just want to ask you about a very vulnerable group: veterans.

In 2016 and 2019, the FTC settled cases, as I am sure you are well aware, against DeVry University and the University of Phoenix, respectively. And, as we now know, these for-profit colleges were targeting veterans for their Post-9/11 GI Bill benefits and ending up saddling them with student loan debt without providing the career opportunities that they promised.

Now, in my home State of New York, 5,283 people who were defrauded by DeVry University were able to get back over $2 million, and 3,784 people who were defrauded by the University of Phoenix were able to get back over $1.2 million in these settlements, thanks to the work of the FTC. So that is what it looks like to protect people from unfair or deceptive practices, especially vulnerable groups of people like veterans.

Can you just talk about other cases where veterans have received redress thanks to the FTC taking action under its 13(b) authority?

Ms. SLAUGHTER. Sure. And I am happy to get you a longer list of cases for the record, but I know we have seen cases where veterans are targeted with business opportunity schemes and with, sort of, lead-generation efforts, in part because of the difficulty of

adjusting from military life to civilian life, because of the ways veterans move around so much, and because they need to get into the economy. I think that scammers see this.

I heard someone earlier mention that crisis is a moment of opportunity for scam artists, and that is true of any challenge. We have seen it in COVID 0919. We see it in the way scammers target vulnerable populations. And that is exactly why it is so important to us to be able to protect those people who most need our help.

Miss RICE. Yes, critical. I mean, your authority under section 13(b) is so critical to helping—you know, we talked about seniors before. Veterans, the veteran community is particularly vulnerable.

So thank you so much for joining us here today.

And, Madam Chairman, I yield back.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And now I recognize Congresswoman Angie Craig for 5 minutes of questions.

Ms. CRAIG. Well, thank you so much, Madam Chair, for yielding. And thanks, in particular, to my colleague Representative Cárdenas for his work on this bill and for all of our panelists for being here today.

Acting Chair Slaughter, I want to ask you briefly about a case that involves the great work of our Minnesota attorney general, Keith Ellison, and your agency, where you worked together to stipulate an order with Manhattan Beach Ventures to help protect student loan borrowers.

As you may recall, this company deceptively promoted payment-reduction programs to consumers looking for help with their student loans. The FTC determined in September 2019 that Manhattan Beach Ventures had been charging borrowers up to $1,400 under the premise that this money went toward their students loans and falsely promised that their services would permanently lower or even eliminate consumers' loan payments or balances.

Our AG took special notice of this case because Manhattan Beach was directing those borrowers into financing this fee through a high-interest loan with a third-party financier, Equitable Acceptance Corporation, a company based in Minnesota.

The outcome of this case is yet another example of why we need strong 13(b) authority. The agency imposed a $4.2 million judgment on Manhattan Beach and $28 million on the Equitable Acceptance Corporation, along with other proconsumer actions against these two companies.

As I understand it, the agency is currently reviewing the customer data now to determine restitution for individual borrowers.

Acting Chair Slaughter, can you give me any sort of status update on this case or commit to ensuring that the agency prioritizes this customer review to help get this money back to defrauded borrowers as soon as possible?

Ms. SLAUGHTER. Thank you so much for the question. And as you said that, I realized I should have answered to Congresswoman Rice that student loans to end payday lending are another example of areas that really target veterans and military consumers.

I can absolutely commit to you that we will prioritize that work. And I am happy to get you more details on the status for the record.

Ms. CRAIG. Well, I appreciate that. And, obviously, Congresswoman Rice brought up some incredibly important points about protecting our Nation's veterans. And I appreciate all the work that you are doing.

And, Madam Chair, I yield back.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And now I am recognizing Congresswoman Lizzie Fletcher for 5 minutes for her questions.

Are you here, Lizzie?

Mrs. FLETCHER. Yes. Thank you, Chairwoman Schakowsky. And thanks to you and Ranking Member Bilirakis for convening today's hearing.

Chairwoman Slaughter, thank you for your testimony today. It has been very helpful, very useful. And as we are getting to the end of the hearing, we have already covered a lot of ground, but I want to follow up on a couple of issues.

I agree with Mr. Cárdenas's point that this is a great opportunity to see how our government functions, and I want to bring it back to why we are here. We are here to address the finding of the Supreme Court in the *AMG Capital* case. And that is where Justice Breyer, writing for a unanimous Court, said the question before the Court was whether the statutory language authorizes the FTC to seek and the Court to award equitable monetary relief, like restitution or disgorgement, and the Court concluded it did not.

And so that has created the problem that we are here to address, and it forms the basis of, I think, the very simple legislation before us, H.R. 2668, the Consumer Protection and Recovery Act, which I was glad to cosponsor and which answers the question the Court asks by making clear that it is the intent of Congress to provide these remedies to the FTC.

Some of my colleagues have raised concerns today and mentioned that they want to address these issues in a bigger bill that covers other issues. But it appears to me that the issue that was before the Court is the issue before this committee, and it is narrowly tailored to address what has become now an urgent concern, to effectively maintain the status quo on enforcement actions.

So, you know, I would like to hear, as we have just a few minutes left, a response to what Congresswoman Rice touched on as well, this concern about predictability for businesses that we have heard from some of the people on this hearing today, that in fact what we are talking about is maintaining the status quo. It is making clear Congress' intent and really making it clear for businesses to operate.

And I think you have touched on this a little bit, but just in framing the question I will say, you know, we heard at a hearing earlier this year that section 13(b) really is critical to keeping a level playing field for businesses. And if, you know, we don't have the tools to regulate what is happening and to seek disgorgement of ill-gotten gains, to make sure that there are monetary penalties brought about after a court case, that that really takes away from businesses that are playing by the rules and also, you know, causes consumers to question the legitimacy of the entire market and lose trust.

So can you just talk, with the time we have left, about how this bill, the Consumer Protection and Recovery Act, will ensure, really, a healthy marketplace and clarity for those businesses by returning and making clear our intent of the Congress to provide these remedies to the FTC?

Ms. SLAUGHTER. Thank you so much for the question.

I think you are absolutely right. I think 13(b) restoration is really largely about protecting honest businesses and making sure that they can compete fairly against a level playing field of companies who are also behaving honestly. If some business is getting ahead by lying to its consumers or deceiving them or taking money unfairly, that not only hurts those consumers, it disadvantages the honest businesses who are following the law. So I think that that part is really important.

The other way I think it protects businesses that is important is that small businesses can be the victims of scams too. And so 13(b) has been used and we will continue to use it, if we get the authority restored, to protect small businesses and to return to them money that was illegally taken from them.

Mrs. FLETCHER. Thanks.

And that is great segue to the last question I have in the time that I have left. But you mentioned that the section 13(b) enforcement has resulted in more than $11 billion in refunds to consumers during just the past 5 years. And in my home State of Texas, more than 670,000 consumers have received more than $100 million in refunds in just the past few years.

What is the estimated loss to consumers over the next, say, 5 years if Congress doesn't, in fact, reinstate the FTC section 13(b) authority?

Ms. SLAUGHTER. Thanks.

Well, it is really hard to predict the next 5 years with any specificity. I said earlier that I think the best measure of the next 5 years is the last 5 years, which you pointed out is $11.2 billion.

But I would amend that only to say that I don't think we have seen evidence that conduct is getting better. I think, to the contrary, we have seen evidence that conduct is getting worse. And particularly in the pandemic, we have seen complaints go way up. So I would say that 11.2 would be more like the baseline, and it is probably more than that, given what we know about the markets.

Mrs. FLETCHER. Well, thank you, Chairwoman Slaughter, for your testimony today.

And thank you, Chairwoman Schakowsky, for holding the hearing. I yield back.

Ms. SCHAKOWSKY. And the gentlelady yields back.

And last but not least for panel one—I remind you that we have a second panel coming—I yield 5 minutes to Darren Soto for his questions.

Mr. SOTO. Thank you, Chair Schakowsky.

We know scams in the modern era are coming in all sorts of forms—robocalls, fake websites, emails, social media, text scams. They are focusing on our veterans, our seniors, poor Americans, communities of color, persons with disabilities, and other vulnerable communities.

And we have seen the coronavirus pandemic just exacerbate the type of fertile ground for these scams to take hold, whether it is stimulus checks, vaccine claims, people claiming to help with paycheck protection loans. We have heard about fake testing kits, [inaudible] treatment scams, unsubstantiated disinfectant claims, and, even worse than all, cure claims.

In Miami, we saw a scam where a company created a Miracle Mineral Solution. It contained bleach. And they made over a million dollars selling this bleach product to tens of thousands of consumers and promising to cure COVID and other illnesses. Can you imagine if this Miracle Mineral Solution scam—if this company could keep that money? That would be outrageous.

And, of course, that is why we are here today. We are appreciative of the FTC for netting over $482 million for 1.6 million seniors and other consumers, for victims of fraud, illegal business practices, and the like.

We saw that this section 13(b) power was settled law for over 40 years, but then the Seventh Circuit, the Third Circuit came up with new rulings, and 48 million Americans now are unable to get monetary redress under 13(b).

I want to thank Tony Cárdenas—Tony Cárdenas, my fellow E&C brother—for cointroducing this bill along with many of us, including myself, the Consumer Protection and Recovery Act. It amends the 13(b) FTC to explicitly state that the FTC has the ability for both injunctive and monetary equitable relief so that we can require bad actors to repay these ill-begotten gains.

And I am encouraged by the bipartisan comments from today. We can do this in a bipartisan way. We did it with robocalls and with new violations.

Acting Chairwoman Slaughter, we see these scams run rampant in Spanish, in Hispanic communities. And as we look to pass this bill solidifying your 13(b) authority, what is the current monitoring of scams in Spanish and your ability to use this 13(b) authority to be able to stop some of these in-Spanish scams?

Ms. SLAUGHTER. Thank you. I think it is a really good point. Spanish-speaking communities are among those where we have seen disproportionate numbers of scams and where it is particularly important for us to be able to return money to consumers who have been harmed. One that comes to mind in the course of the pandemic was a business opportunity scam that particularly targeted Latino women.

And so it is important not only for us to stop those scams but to be able to get money back to people who are hurt by those scams. And if we don't have the ability to get the money back, it is harder for us to stop the scams to begin with and there is less incentive for other potential scam artists to stay out of the scam business to begin with.

Mr. SOTO. And what about foreign scams? We have a very international, very diverse community in Florida. And we have scammings coming from every continent other than Antarctica, and we certainly want to make sure they are being held accountable.

What is the limits of what FTC can do under 13(b), should we be able to pass it, to help with some of these foreign scams?

Ms. SLAUGHTER. So I think it is a fact-specific question, because it depends on, are the defendants within our jurisdiction or without our jurisdiction? Do we have cooperation agreements with foreign jurisdictions where they may be located?

It is certainly harder to deal with foreign scams, but that doesn't mean it is not a priority. We work very hard to identify the source of the scam and work with whatever authorities are available—local, international, Federal partners, and other levels—to target the bad behavior and put a stop to it.

Mr. SOTO. Thanks so much.

I yield back.

Ms. SCHAKOWSKY. Well, the gentleman yields back, and that concludes our first panel.

I want to give a hardy thank you, hardy because that was 2 full hours of being questioned. And we appreciate your availability to us in answering all the questions from all of our members that asked them. So thank you very, very much.

I will now introduce our witnesses for the second panel. And I am hoping to see them click on so we can see their faces. I see——

Mr. CÁRDENAS. Chairwoman Slaughter?

Ms. SCHAKOWSKY. Tony, did you want to say something to——

Mr. CÁRDENAS. Thank you, Chairwoman Slaughter. That is all. Thank you.

Ms. SCHAKOWSKY. Yes. We appreciate you so very, very much.

So let me introduce the next panel.

We have Anna Laitin—am I saying that right?

Ms. LAITIN. Yes. Thank you.

Ms. SCHAKOWSKY. Director of financial fairness and legislation strategy at Consumer Reports; Dr. J. Howard Beales, who is professor emeritus of strategy management and public policy at George Washington University; and Ted Mermin, who is executive director of the Center for Consumer Law and Economic Justice at the University of California Berkeley School of Law.

We want to thank our witnesses. We look forward to hearing your testimony.

And why don't we begin, then, with Ms. Laitin?

You are recognized now for 5 minutes for an opening statement.

STATEMENTS OF ANNA LAITIN, DIRECTOR, FINANCIAL FAIRNESS AND LEGISLATIVE STRATEGY, CONSUMER REPORTS; J. HOWARD BEALES III, PH.D., EMERITUS PROFESSOR OF STRATEGIC MANAGEMENT AND PUBLIC POLICY, GEORGE WASHINGTON SCHOOL OF BUSIINESS; AND TED MERMIN, EXECUTIVE DIRECTOR, CENTER FOR CONSUMER LAW AND ECONOMIC JUSTICE, UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW

STATEMENT OF ANNA LAITIN

Ms. LAITIN. Thank you, Chair Schakowsky and Ranking Member Bilirakis and members of the committee, for inviting Consumer Reports to testify on this important legislation and the vital role of the Federal Trade Commission in protecting consumers in the marketplace.

As a former member of the staff of this subcommittee, it is particularly nice to be back, if only virtually.

The FTC is an essential consumer protection entity. It is charged with protecting consumers from unfair and deceptive acts and practices, both online and off. This includes, as we have been discussing, scammers peddling bogus coronavirus cures, fake online reviews, deceptive data collection practices, fraudulent lenders exploiting small businesses, and more—all in a marketplace that is growing larger, more complicated, and harder for consumers to navigate each year. And, increasingly, it is having to do it with both hands tied behind its back, underfunded and underresourced.

Last week, the Supreme Court stripped the FTC of its most effective means to recover ill-gotten profits from scam artists and fraudsters and return the money to the victims of those scams. For more than 40 years, the FTC has relied on section 13(b) of the FTC Act to stop unfairness and deception in the marketplace, prevent wrongdoers from benefiting from their behavior, and repay the victims of the fraud. Unless Congress acts to amend the FTC Act to ensure that the Commission can appropriately address illegal behavior, scam artists and fraudsters will feel empowered to engage in more wrongdoing.

The facts of the case decided by the Supreme Court last week highlight the urgent need for a legislative fix to the FTC Act. AMG Services was a fraudulent payday lending company. It bilked millions of struggling low-income Americans out of their hard-earned money by imposing undisclosed charges and hidden fees on small-dollar loans, sometimes inflating the cost to more than three times the amount borrowed.

The victims were people in financial need who went to a payday lender, a borrower of last resort. They were lied to and, due to those lies, lost more money. More than 5 million people who were looking for a lifeline instead got fleeced.

As a result of the FTC's enforcement action, AMG was required to pay disgorgement in the amount of $1.3 billion to be returned to the individuals who were defrauded. To date, nearly 1.2 million people across the country have received checks from the FTC, averaging $235 each.

As this case worked its way through the courts, nobody argued that AMG Services was a model company or that it did anything other than scam and defraud its customers. What AMG Services argued and what the Supreme Court decided last week was that the FTC can stop the fraud but it does not have authority to take any further steps. It cannot recover those funds from AMG Services and return them to the customers who were defrauded.

This is clearly an unjust outcome that Congress cannot let stand. No company should be able to hold onto money that it obtained illegally. And people who are lied to and defrauded should be able to get their money back. They should never be left holding the bag.

The FTC's other options for obtaining restitution are nowhere near as effective as Section 13 has been or as effective as the FTC and the Americans that it serves need it to be. This is a problem that Congress can fix. There is no reason for the FTC to twist itself in knots and use unwieldy authorities to achieve justice when a

simple change to the FTC Act can restore the Commission's authority.

The Consumer Protection and Recovery Act, introduced by Representative Cárdenas, would amend the FTC Act to restore the authorities that the Commission has successfully operated under for more than 40 years. It would enable the Commission to pursue fraudulent and deceptive actors and to return money to the people they harmed. And it would end any debate about the proper role for the FTC in achieving relief for consumers.

Importantly, this bill extends the 13(b) authorities for equitable remedies to all violations of the FTC Act and does not create artificial delineations for the types of illegal acts that should qualify. The FTC has authority to enforce against unfair and deceptive acts and practices as well as unfair methods of competition. It should have authority to seek equitable remedies in all cases under its jurisdiction—disgorgement of ill-gotten gains and restitution for consumer losses.

It is a simple matter: If a business makes money from violating the FTC Act, it should not be able to keep that money.

In conclusion, this hearing raises a simple question: Should companies be able to profit from lies and deception in the marketplace? The answer is as simple as the question: No.

While the Supreme Court decided last week the text of section 13(b) does not allow for that, it in no way ruled on this commonsense question. This leaves the question in your hands.

In order to continue to effectively monitor the marketplace and stop fraudulent and illegal activity, the FTC needs this authority restored. The Consumer Protection and Recovery Act would do just that, and we urge you to act quickly to enact it into law.

We urge the committee to go further, as well, and to recognize the FTC is being asked to do far more than it realistically can with its existing staff and resources. In order to build a marketplace that works for consumers, for small businesses, and for honest companies that can't compete against those that are willing to break the law, we need an FTC with sufficient capacity and penalty authority to provide truly effective deterrence.

We look forward to working with this committee to further strengthen this important consumer protection authority.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Laitin follows:]



Testimony of Anna Laitin
Director, Financial Fairness and Legislative Strategy
Consumer Reports

Before the
United States House of Representatives Committee on Energy & Commerce
Subcommittee on Consumer Protection and Commerce

Hearing on
"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers"

April 27, 2021

Thank you Chair Schakowsky and Ranking Member Bilirakis for inviting Consumer Reports[1] to testify on this important legislation, and on the vital role of the Federal Trade Commission in protecting consumers in the marketplace.

The FTC is an essential consumer protection entity. It is charged with protecting consumers from unfair and deceptive acts and practices — both online and offline. This ranges from scammers peddling bogus coronavirus cures, fake online reviews, deceptive data collection practices, fraudulent lenders exploiting low-income consumers and small businesses with illegal fees, companies that misuse their customers' information, and more — in a marketplace that is growing larger, more complicated, and harder for consumers to navigate each year. And increasingly, it is having to do so with both hands tied behind its back.

The Commission is underfunded, operating with fewer staff than it had in the 1970s, when the marketplace was much smaller and simpler. It has had to operate for years with limits imposed on its rulemaking authority; and gaps in its enforcement authorities have become increasingly evident. And while, thanks to the work of the committee, the FTC has new authority to seek civil penalties for COVID-related scams, it generally cannot obtain civil penalties which are necessary to meaningfully deter illegal activity.[2] And now the Supreme Court has stripped it of the authority it has relied upon to recover ill-gotten profits from scam artists and fraudsters and return the money to the victims of those scams.

We thank Representative Cardenas for his timely introduction of the Consumer Protection and Recovery Act. This bill would make clear that the FTC can pursue meaningful restitution for victims, addressing the urgent problem that was created last week when the Supreme Court's narrow interpretation of § 13(b) of the Federal Trade Commission Act eliminated the Commission's most effective enforcement tools. We look forward to working with the Committee so that it can act quickly on this bill and restore effective enforcement authority to the Commission.

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[1] Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising, CR strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

[2] *Pallone & Schakowsky Celebrate Consumer Protection and Commerce Bills Included in Omnibus,* House Committee on Energy & Commerce (Dec. 21, 2020), https://energycommerce.house.gov/newsroom/press-releases/pallone-schakowsky-celebrate-consumer-protection-and-commerce-bills-included.

The Role of the FTC's § 13(b) Enforcement Authority

For more than 40 years, the FTC has relied on § 13(b) of the FTC Act to stop unfairness and deception in the marketplace, prevent wrongdoers from benefiting from their behavior, and repay the victims of the fraud. The COVID-19 pandemic has made clear the FTC's essential role. As this Subcommittee discussed at a hearing earlier this year, scams and fraud were particularly pervasive during the pandemic, given that, as Ranking Member Bilirakis noted, nearly a year into the pandemic, "scammers are continuing to find new ways to exploit vulnerable Americans during COVID-19."[3]

Unless Congress acts to ensure that the FTC can appropriately address illegal behavior, scam artists and fraudsters will feel empowered to engage in more of it. Without the authority that the FTC previously enjoyed under § 13(b) — to prevent wrongdoers from profiting from their fraudulent acts and to repay the victims — the FTC won't be able to effectively strip the ill-gotten earnings from payday lenders that trick some of the most vulnerable consumers with hidden fees, or send adequate refunds to small business owners who had money illegally withdrawn from their accounts by lenders. Nor will it be able to rein in the big tech companies that have taken advantage of their market power to crowd out small businesses and exploit consumers' personal data.

The facts of the case decided by the Supreme Court last week highlight the urgent need for a legislative fix to the FTC Act. AMG Services was a fraudulent payday lending company. It bilked millions of struggling low-income Americans out of their hard-earned money, by imposing undisclosed charges and hidden fees on small-dollar loans — sometimes inflating the cost to more than three times the amount borrowed.[4]

The victims were people in financial need who went to a payday lender — a borrower of last resort. They were lied to, and due to those lies, lost more money. More than 5 million people who were looking for a lifeline instead got fleeced.

As a result of the FTC's enforcement action, AMG was required to pay disgorgement in the amount of $1.3 billion — the amount the company was assessed to have scammed from these borrowers — to be returned to the individuals who were defrauded. Many of them already have

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[3] Statement of Ranking Member Bilirakis Subcommittee on Consumer Protection and Commerce, United State House of Representatives, Hearing on Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic at 5 (Feb. 4, 2021).

[4] *FTC Charges Payday Lending Scheme with Piling Inflated Fees on Borrowers and Making Unlawful Threats when Collecting*, Fed. Trade Comm'n (April 2, 2012), https://www.ftc.gov/news-events/press-releases/2012/04/ftc-charges-payday-lending-scheme-piling-inflated-fees-borrowers.

received checks. Nearly 1.2 million people have received checks from the FTC, averaging $235 each.[5]

As this case worked its way through the courts, nobody argued that AMG Services was a model company, or that it did anything other than scam and defraud its customers. What AMG Services has argued, instead, and what the Supreme Court decided last week, is that the FTC can stop the fraud, but it does not have authority to take any further steps. It cannot recover those fraudulently scammed dollars from AMG Services and return them to the consumers who were defrauded.

This is clearly an unjust outcome that Congress cannot let stand. No company should be able to hold on to money that it obtained illegally. And people who were lied to and defrauded should be able to get their money back. They should never be left holding the bag.

Unless Congress acts, this decision will make it harder for individuals and small businesses across the country who are victims of scams or other illegal acts to get back the money that was unlawfully taken from them. Last week, on the same day that the Supreme Court issued its ruling, the Commission announced a $9.8 million settlement with Yellowstone Capital, a provider of merchant cash advances — short-term, high-cost financing products marketed to small business owners in immediate need of funds. According to the complaint, Yellowstone Capital engaged "in a pattern of deceptive and unfair conduct in connection with the marketing, advertising, and offering of their MCAs.... Additionally, the Defendants have made excess, unauthorized withdrawals from consumers' accounts after consumers already repaid the full amount that they owed."[6] The settlement was filed before the Supreme Court issued its decision. If the case had taken any longer, the FTC would likely not have been able to secure the settlement, and small business owners would not be looking forward to receiving refunds in the mail.

Again, these small business owners are a year into a pandemic that has shut down companies across the country. It cannot be the proper policy answer for the FTC to be denied this enforcement authority to strip the ill-gotten earnings from this company or for it to be able to send refunds to small business owners.

Further, critics — including my own organization and observers across the political spectrum — have argued that the FTC has not been aggressive enough in reining in big tech companies, including the largest platforms that dominate so much of our economy, for abusing monopoly power, enabling fraud, using consumers' personal data inappropriately, and other misbehavior.

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[5] *Tableau Public Refunds By Case*, Fed. Trade Comm'n, (last visited April 25, 2021) https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.
[6] *Fed. Trade Comm'n vs. Yellowstone Capital*, Case No. 20-cv-6023, (Aug. 3, 2020), https://www.ftc.gov/system/files/documents/cases/1823202yellowstonecomplaint.pdf.

When the FTC has gone after major tech companies like Facebook and Uber, it has often relied on its § 13(b) authority.[7] This decision will make it even harder for the Commission to take on these giant companies. An after-the-fact injunction to cease and desist unfair and deceptive acts and practices, without more, is just a slap on the wrist

The FTC's other options for obtaining restitution are nowhere near as effective as § 13(b) has been, or as effective as the FTC, and the Americans that it serves, need it to be. In his Opinion, Justice Breyer stated that nothing "prohibits that Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers." But as Jessica Rich, the former Director of Consumer Protection at the FTC, noted in testimony before this committee earlier this year, that approach "raises the risk that the money wrongly taken will be long gone, or the victims impossible to locate, by the time redress is distributed, especially since cases that have used this approach have taken many years to resolve."[8] This is a slow and multi-pronged approach that requires the FTC to first obtain an order through administrative adjudication under § 5 of the FTC Act (a particularly slow process given that the FTC has only one Administrative Law Judge to hear all its cases[9]), and only then can it seek restitution in federal district court under § 19.

Similarly, while the Commission can seek civil penalties in some cases, that authority is not broad enough to be an effective deterrent in the marketplace — it is limited to violations of an FTC rule, a consent decree, or, as in the case of the recent COVID legislation, a specific grant of civil penalty authority from Congress.

This is a problem that Congress can fix. There is no reason for the FTC to twist itself in knots and use unwieldy authorities to achieve justice when a simple change to the FTC Act can restore the FTC's authority.

The Consumer Protection and Recovery Act

Rep. Cardenas' Consumer Protection and Recovery Act would amend the FTC Act to restore the authorities that the Commission has successfully operated under for more than 40 years. It would enable the Commission to pursue fraudulent and deceptive actors and to return money to the people they harmed. And it would end any debate about the proper role for the FTC in achieving relief for consumers.

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[7] See, for example, *Fed. Trade Comm'n v. Facebook, Inc.*, Case No.: 1:20-cv-03590 (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf; *Fed. Trade Comm'n v. Uber Technologies*, Case 3:17-cv-00261 (Jan. 19, 2017), https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf.

[8] Statement of Jessica Rich, Distinguished Fellow, Institute of Technology Law and Policy, Georgetown University Law Center, before the Subcommittee on Consumer Protection and Commerce, United State House of Representatives, on Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic at 5 (Feb. 4, 2021), https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-RichJ-20210204.pdf.

[9] *See* https://www.ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges.

Importantly, this bill extends the § 13(b) authorities for equitable remedies to all violations of the FTC Act, and does not create artificial delineations of the types of illegal acts that should qualify. The FTC has authority to enforce against unfair and deceptive acts and practices, as well as unfair methods of competition. It should have authority to seek equitable remedies in all cases under its jurisdiction — disgorgement of ill-gotten gains, and restitution for consumer losses. It is a simple matter: if a business makes money from violating the FTC Act, it should not be able to keep that money.

Consider the following example: a large tech company collects a lot of your personal data, and *explicitly promises* that they will never sell or share that data with anyone. One day, they decide to sell everyone's records — their personal information, their messages, their purchase history — to a data broker for $10 million in cash. This isn't really a case of "pure fraud." These consumers didn't lose any money. And we don't really know what the data broker is going to do with that information, so it's hard to calculate the harm to consumers in advance. But as a matter of fairness, if the FTC brings a case and the court deems the action to be illegal, it's simply wrong to let the company keep that money. Making them give up the proceeds of this sale is not punitive — the company is just back to the same place they were before making that illegal sale. But it would be immoral and outrageous to say that a large tech company is entitled to retain the proceeds of that illegal sale.

By quickly enacting the Consumer Protection and Recovery Act, Congress can ensure that companies that violate the law will not be able to hold onto their ill-gotten gains.

Additional Needs of the FTC

Enacting the Consumer Protection and Recovery Act is essential. But it will not be enough to ensure that the Federal Trade Commission can fully achieve its mission. After all, even if a company is forced to give up its illegally obtained profits, it's no worse off than it was before it started its illegal activities. If a thief gets caught, it's hardly sufficient punishment or deterrent to simply make them give up what they stole. As noted above, even before these cases were brought to challenge the Commission's 13(b) authority, it has long been clear that the Commission needs more resources as well as more enforcement and rulemaking authority. Most pertinent to today's hearing are the resource limitations, the restrictions on seeking civil penalties, and the limitations on rulemaking.

Resources and Staffing

For years, Congress has failed to provide the FTC with the funding it needs to do the massive job with which it is tasked. The agency is overdue for an influx of resources to help it play catch-up

to the modern economy. Currently, the FTC only has 1,100 staff positions total to pursue both its competition and consumer protection missions.[10] This number has been roughly flat over the past twelve years, and actually represents a significant *decrease* from 1,746 positions in 1979.

Given the size and complexity of the modern marketplace — and the calls from all sides for the FTC to be more active — the Commission is operating with almost 40% fewer staff than it had before home computers, before cordless phones, and even before the fax machine was a common item in offices.

Giant, vertically-integrated technology companies increasingly dominate the marketplace, and the FTC is expected to have the technical expertise and sophistication to meaningfully check abuses by these companies. In 2015, the Commission established the Office of Technology Research and Investigation as a way of levelling the playing field and empowering the FTC to better tackle abuses from technology companies.[11] The stated purpose of OTECH was to:

> provide expert research, investigative technique and further insights to the agency on technology issues involving all facets of the FTC's consumer protection mission, including privacy, data security, connected cars, smart homes, algorithmic transparency, emerging payment methods, big data, and the Internet of Things.

Despite this wide-ranging mission, no additional staff were appropriated to fund this office, so it was largely staffed by shifting personnel from other parts of the agency. Even today, OTECH only has a handful of employees to support all five Departments in the Bureau of Consumer Protection (and there is no analogous Office within the Bureau of Competition at all).

Similarly, acting Chairwoman Rebecca Slaughter recently announced the creation of an Office of Rulemaking to take advantage of dormant and unused authorities to issue more clear and substantive guidance to companies on what behaviors violate the law.[12] We welcome the creation of this group, which signals that the FTC will make rulemaking a priority and, we hope, lead to greater consumer protections and corporate accountability. But the FTC has not received additional funding to do this work, so again it will have to shift resources from other priorities.

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[10] *FTC Appropriation and Full-Time Equivalent (FTC) History*, Fed. Trade Comm'n (last visited Apr. 22, 2021), https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

[11] *FTC Seeks Technologists for New Research, Investigations Office*, Fed. Trade Comm'n (Mar. 23, 2015), https://www.ftc.gov/news-events/press-releases/2015/03/ftc-seeks-technologists-new-research-investigations-office.

[12] *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group*, Fed. Trade Comm'n (Mar. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

Civil Penalties

The disgorgement and restitution that were previously allowed for under § 13(b) and that are provided for in the Consumer Protection and Recovery Act are vital tools for the FTC's law enforcement work. But to truly be able to deter bad behavior, and keep industry honest, the Commission needs the authority to assess civil penalties against the worst actors. Under current law, the Commission can generally assess penalties against companies that violate an FTC Rule or a consent decree, but cannot do so in the first instance.

The FTC is stretched thin and its enforcement resources are limited. Sufficiently large civil penalties provide real teeth to the Commission's enforcement, and create a necessary deterrent effect for the rest of the industry. It's also appropriate that companies face meaningful consequences for breaking the law. Allowing companies to engage in and profit from egregious behaviors without a threat of penalty will not prevent fraud from happening. Given the Commission's limited staff and capacity to police an $18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do get caught shouldn't get off easy.

Rulemaking Authority

The FTC can more effectively enforce the law and stop bad actors when it has established rules regarding certain practices. While Congress has occasionally granted the FTC the authority to issue rules under the standard Administrative Procedures Act processes available to other federal agencies, the FTC's core rulemaking process — known as Magnuson-Moss — has seriously hindered FTC trade regulation, as its procedures are notoriously onerous and can take years to pursue.[13] Since 1975, the Commission has finalized only a small number of rulemakings under this process.[14]

Under Acting Chair Slaughter, the FTC has sent a clear message that it seeks to make more active use of its existing rulemaking authority, which includes its authority under Magnuson-Moss, and the specific APA rulemaking authorities Congress has granted it. But it should have that authority afforded to it for all rulemaking. If we are to expect the FTC to effectively protect consumers in the marketplace, it needs the full range of authorities and remedies at its disposal in order to protect consumers.

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[13] Statement of Jessica Rich, *supra* note 5, at 6; Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, The George Washington Law Review (Nov. 2015), Vol. 83 No. 6, p. 1982-1985, http://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1979.pdf.
[14] *Id.* at 1985.

Conclusion

This hearing raises a simple question: should companies be able to profit from lies and deception in the marketplace? The answer is as simple as the question: no.

While the Supreme Court decided last week that the current text of §13(b) is so narrow that the Commission can no longer use its most effective tool to take away ill-gotten gains and return them to the consumers who were defrauded, it in no way ruled on this common-sense question.

This leaves the question in your hands. In order to continue to effectively monitor the marketplace and stop fraudulent and illegal activity, the FTC needs this authority restored. The Consumer Protection and Recovery Act would do just that, and we urge you to act quickly to enact it into law.

We urge the Committee to go further as well, and to recognize that the FTC is being asked to do far more than it realistically can with its existing staff and authority. In order to build a marketplace that works for consumers, for small businesses, and for legitimate businesses that can't compete against companies that are willing to break the law, we need an FTC with sufficient capacity and penalty authority to provide truly effective deterrence, so that others will think twice before violating the law. We look forward to working with this committee to further strengthen this important consumer protection authority.

Ms. SCHAKOWSKY. Well, thank you.

The gentlewoman yields back, and let me now thank her and recognize Dr. Beales.

You are now recognized for 5 minutes.

STATEMENT OF J. HOWARD BEALES III, PH.D.

Dr. BEALES. Thank you for the opportunity to testify today. I am Howard Beales, an emeritus professor at George Washington School of Business. I spent most of my career either at or writing about the FTC, most recently as the Director of the Bureau of Consumer Protection early in this century.

Since 1981, attacking fraud in Federal court has been the foundation of the FTC's consumer protection enforcement. The FTC files a case under 13(b) seeking an ex parte asset freeze—and that is really the key to 13(b)—and resolves the matter in the same forum with a permanent injunction and monetary relief for consumers.

Faced with egregious frauds, eight circuit courts of appeals blessed the program. Fraud cases saw an expansive measure of injury—total sales of product. Sensible in the context of worthless products promoted through fraud, that measure is completely unreasonable when applied to a new, tangential claim of benefits for a long-established product. The Commission has yet to develop a reasonable approach to assessing injury in this situation.

As the Supreme Court has noted, success led to expanded use of 13(b), both in antitrust and consumer protection. Used in complex cases of advertising substantiation, the potential consequences of a violation went from an administrative cease-and-desist order to the total sales of the product. Eight years ago, I coauthored an article warning that this unwarranted overreach could jeopardize the fraud program itself. Unfortunately, that is exactly what happened in the Supreme Court last week.

Congress should answer two key questions in legislation: When can the Commission get monetary relief? And what procedures should it use to do so? Congress should provide specific answers to those questions, not leave them to the Commission's unlimited discretion.

Regarding monetary relief, the original vision of the FTC was to provide guidance for appropriate marketplace conduct. Because the statutory prohibition was deliberately vague, the only remedy available was a cease-and-desist order. This choice was wise because, with uncertain standards, the risk of monetary sanctions could chill lawful conduct that actually benefits consumers. That uncertainty remains.

When I was Bureau Director, for example, we took the thennovel position that lax information security practices could be illegal. Significant monetary penalties for failing to anticipate that legal innovation would have been inappropriate.

Nevertheless, some areas are clear. Fraud involves business conduct about which there is no legal uncertainty. Section 19 also allows monetary relief where a reasonable person would know the conduct was dishonest or fraudulent. The early 13(b) cases respected this standard, and it remains appropriate.

Fraudulent or dishonest conduct should be subject to monetary sanctions. Conduct where reasonable people may disagree about whether a violation even exists should not. Aggressive penalties applied to practices of uncertain legality will likely lead to excessive caution that can harm consumers.

For example, the FTC's advertising substantiation cases often turn on disagreements among scientific experts about the evidence to support a particular claim. The history of claims about the relationship between diet and health illustrates the problem. Such claims were illegal under FDA rules in 1984 when Kellogg began a campaign for All Bran promoting the National Cancer Institute's recommendation that diets higher in fiber could reduce the risk of cancer. If such claims are wrong, consumers may give up a better-tasting cereal. Mistakenly prohibiting such claims or deterring them because of the risk of severe penalties would deprive consumers of information that may save lives. If total sales of All Bran are at risk from the date the claim first appeared, the FTC starting point for equitable relief, that would be a severe financial penalty indeed.

Today, claims that masks can help reduce the risk of COVID are useful to consumers. Typically, however, the FTC wants randomized, double-blind, clinical trials to support health-related claims. Such evidence does not exist for masks, and there was almost no evidence of any sort a year ago when the claims mattered most. If total sales revenue is at risk, few are likely to make claims.

In addition, the Commission should seek to complement, not compete with, monetary remedies available to private plaintiffs. This is especially relevant in antitrust, where the class-action bar routinely follows government findings of a violation with lawsuits seeking monetary relief. The same is increasingly true of consumer protection cases against legitimate companies. Money is available, and private class actions can and do pursue financial relief. There is no reason for the FTC to supplant these cases.

Regarding procedures, with fraud, section 19 process is unworkable. It would require three separate proceedings—a preliminary injunction to obtain an asset freeze, an administrative proceeding to determine a violation, and a separate district court proceeding to recover money. A district court judge would have to freeze assets and supervise the receiver without having any control over the ultimate disposition of the case. Judges will probably decline to do so, but then there will be no money left for consumers.

The section 19 process is eminently workable when cases involve legitimate companies, however. Most such cases settle, and whether the pleadings cite section 13(b) or section 19 does not matter. The Volkswagen case and the Herbalife case that you heard about this morning, or earlier today, are examples. Those cases would have been consent agreements still. They just would have cited a different section of the statute.

To conclude, Congress should authorize the Commission to pursue equitable relief under 13(b), subject to the substantive standard set forth in section 19. Congress should set the standards for when money is appropriate rather than granting the agency unlimited discretion.

Thank you, and I look forward to your questions.

[The prepared statement of Dr. Beales follows:]

Testimony of

J. Howard Beales III

Emeritus Professor of Strategic Management and Public Policy

George Washington School of Business

Before the

Subcommittee on Consumer Protection and Commerce

Committee on Energy and Commerce

House of Representatives

On

The Consumer Protection and Recovery Act:

Returning Money to Defrauded Consumers

April 27, 2021

Chairwoman Schakowsky, Ranking Member Bilirakis, and members of the Committee, thank you for the opportunity to testify today on the Consumer Protection and Recovery Act. I am Howard Beales, an Emeritus Professor of Strategic Management and Public Policy in the George Washington School of Business. I have spent most of my career either at or writing about the FTC and its consumer protection mission, publishing numerous academic articles and serving in a variety of different positions at the agency. My fifth and most recent position was as the Director of the Bureau of Consumer Protection from 2001 to 2004.

Since 1981, using Section 13(b) to attack fraud in federal district court has been the foundation of the Federal Trade Commission's consumer protection enforcement program. Because courts used that provision to award monetary relief, the program returned billions of dollars to consumers. Successive agency Chairs expanded and strengthened the program, and the agency now coordinates a vast network of local, state, national, and international law enforcement agencies to prosecute the many faces of fraud.

In what became known as the "Section 13(b) Fraud Program,"[1] the FTC filed a single federal action under Section 13(b), seeking an *ex parte* temporary restraining order (TRO) and an asset freeze under Rule 65(b). The district court typically appoints a receiver to secure and monitor the fraudster's frozen assets.[2] At a preliminary injunction hearing, the fraudster can contest the asset freeze, and, if the FTC prevails, the court will continue to monitor the receivership while the parties litigate the merits of the FTC's claim. Upon resolving the merits, the district court issues a permanent injunction and award consumer relief from the fraudster's still-frozen funds. Absent an asset freeze, funds would likely be dissipated or hidden quickly, leaving nothing for defrauded consumers.

The early cases under Section 13(b) recognized its limited availability in consumer protection cases and respected the limits Congress had imposed in requiring that other parts of the FTC Act be used to obtain monetary relief in more complex cases. Faced with egregious frauds, eight Circuit Courts of Appeal had blessed the program, often with broad language that, read outside of the context of the fraud case before it, appeared to approve expansive use of Section 13(b).

The roots of the 13(b) program in attacking fraud had another consequence, related to the determination of damages. When a fraudster uses inflated claims to sell an essentially worthless product, the Commission argued successfully that the appropriate measure of injury to consumers was total sales of the product, and it sought to recover the fraudster's total revenue. Again, numerous courts endorsed that approach in the cases before them. Sensible in the context of fraud, that measure of injury is completely unreasonable when applied to other cases, for example a tangential claim about a new nutritional benefit for a product that has been on the

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[1] *See generally* David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, ANTITRUST, Summer 2004, at 43.

[2] For an overview of the typical procedure, see Dana J. Lesemann & Peter B. Zlotnick, *Receiverships and Other Shark Tales*, LITIG., Fall 2005, at 48.

market for decades. To date, the Commission has failed to develop a reasonable approach to assessing injury in this situation.

As the Supreme Court noted, the success of the 13(b) program led the agency to expand its use, first to antitrust cases and later to more traditional consumer protection cases. The consumer protection uses went well beyond cases involving obviously dishonest business conduct, including those involving complex issues of advertising substantiation or disputed issues regarding the adequacy of disclosures to consumers that would have been resolved previously with, at most, an administrative cease and desist order. Instead, total sales of the product were now at risk.

A 2013 law review article I coauthored warned that this unwarranted expansion of the agency's authority would jeopardize the heretofore uncontroversial fraud program itself.[3] Unfortunately, that is exactly what happened in the Supreme Court's recent decision in the AMG case.[4] Rather than defending the use of 13(b) in the context of fraud, the Commission argued that it could get monetary relief in any case it thought appropriate. It ended up with nothing.

Given the Court's decision, legislative changes are needed to ensure the continued vitality of the FTC's fraud program. In this legislation, Congress should answer two key questions itself, rather than leaving them to the FTC's discretion. First, when can the Commission get monetary relief? Second, what procedures can the Commission use to do so? I address each of these questions below.

When can the Commission get monetary relief?

As articulated in Woodrow Wilson's 1912 campaign,[5] the FTC was to be an expert body to provide guidance for appropriate marketplace conduct. Because the statutory prohibition of "unfair" conduct[6] was deliberately vague, the only remedy initially available was a cease-and-desist order, with monetary relief eventually made available only for violations of that order.[7] This was a wise approach for many practices, because the line between permissible and impermissible conduct was unclear until the Commission had addressed a particular practice through the administrative process. The possibility of imposing monetary relief for the initial conduct could chill otherwise lawful conduct that actually benefits consumers or competition.

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[3] *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1 (2013).

[4] AMG Capital Mgmt., LLC v. FTC, No. 19-508 (593 U.S. ___ (2021), decided April 22, 2021) (Around the time the Commission's complaint was issued, I discussed a possible consulting role with AMG but was never retained).

[5] *See generally* SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2009). The FTC Act followed in 1914. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

[6] As passed in 1914, the FTC Act prohibited only "unfair methods of competition," § 5, 38 Stat. at 719; the prohibition against "unfair or deceptive acts or practices" was added in 1938, Act. of Mar. 21, 1938, ch. 49, § 5(a), 52 Stat. 111, 111–12.

[7] The Wheeler-Lea Act of 1938 first subjected violations of Commission orders to civil penalties. *See* Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, 111.

Although some regard a cease-and-desist order is no penalty at all, giving violators "one free bite of the apple," the evidence is clear that legitimate businesses suffer reputational and financial penalties from FTC cease and desist orders.[8]

This approach remains appropriate today. When I was Bureau Director, for example, we launched the first of many information security cases, alleging that the failure to maintain reasonable and appropriate security for sensitive information was a deceptive practice (or later unfair in certain circumstances). I know of no one who previously thought that information security practices could violate Section 5, and imposing significant monetary penalties for failing to anticipate the Commission's legal innovation would not have been appropriate. Today, civil penalties would be an appropriate remedy for such violations, because estimating actual injury for data breaches is exceedingly difficult.

Nevertheless, by the mid1970s, in some areas the law was quite clear. The FTC fraud program involves business conduct about which there is typically no legal uncertainty, and thus little risk of excessive caution. Section 19, added in the 1975 amendments, recognized the distinction between clear and unclear violations, limiting monetary relief after the administrative process to violations that a reasonable person would have known under the circumstances were "dishonest or fraudulent."[9] The early uses of Section 13b cases respected the Section 19 standard, and it remains an appropriate substantive standard for when monetary relief is appropriate. Fraudulent or dishonest conduct should be subject to monetary sanctions. Conduct where reasonable people may disagree about whether a violation even exists should not.

The distinction between clear and unclear cases has a sound policy basis in protecting consumers. Aggressive penalties applied to practices not previously considered unlawful or to areas of law that often require careful consideration of evidence about which reasonable people may well differ will likely lead to excessive caution from those subject to the law. And excessive caution can also harm consumers.

The FTC's advertising substantiation program perhaps best illustrates this phenomenon. The substantiation doctrine holds that regardless of truth or falsity, an objective claim is deceptive unless it is supported by evidence—a "reasonable basis." For example, an advertiser must have evidence to support a claim that dietary fiber may reduce the risk of cancer, or to claim that masks help reduce the risk of COVID. The typical substantiation case involves a reputable business making claims about the features of an existing product. Even after extensive litigation, money will be available at the end if monetary relief is appropriate, unlike the typical fraudster. Substantively, these cases often turn on disagreements among recognized scientific experts about whether there is adequate evidence to support a particular claim.

Former FTC Chairman Robert Pitofsky wrote that the FTC's advertising enforcement should be "a practical enterprise to ensure the existence of reliable data," not "a broad,

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[8] *See* Beales & Muris, *supra* note 3, at 36–37 & n.166.
[9] 15 U.S.C. § 57(b).

theoretical effort to achieve Truth."[10] Pitofsky's last major consumer protection article, joined by another former Chairman and me,[11] supported the agency's traditional substantiation approach that recognized both the risks of mistakenly allowing false claims and the risks of mistakenly suppressing truthful ones. The latter mistake harms consumers, and we warned that increasing the evidence required would inevitably increase the risk of suppressing truthful claims. Just as advertisers who need increased scientific evidence will make fewer claims, increasing the financial consequences of being found to lack substantiation will make them more cautious, potentially denying truthful useful information to consumers. When reasonable experts disagree, it is difficult for even the most scrupulous company to predict Commission decisions. Again, the higher the cost of telling the truth, the less will be the supply of truthful claims.

The concern about chilling truthful claims is not merely theoretical. Consider, for example, the history of claims about the relationship between diet and health, which were illegal on food labels in 1984.[12] That year Kellogg, with the blessing of the National Cancer Institute, began a campaign for All Bran cereal promoting the NCI's recommendation that diets higher in fiber could reduce the risk of cancer. The FDA threatened to seize the product, but when the FTC argued the claim benefited consumers, the FDA instead decided to reassess its policy. The NCI recommendation remains, but in the absence of definitive clinical trials, some scientific uncertainty exists. If such claims are wrong, consumers may give up a better tasting cereal or spend a few pennies more for breakfast. Mistakenly prohibiting such claims, or deterring them because of the risk of severe financial penalties, would deprive consumers of information that may help save lives. Putting the total sales of All Bran at risk from the date the claim first appeared, the FTC's current starting point in seeking equitable relief, would be a severe financial penalty indeed.

Today, advertising that promotes mask wearing to reduce the risks of COVID would be useful to consumers. Early in the pandemic, there was virtually no evidence of efficacy, and indeed the CDC initially recommended against wearing masks. Although more recent evidence supports the benefits of wearing masks, such claims are not supported by the amount of evidence that the FTC typically wants for health-related claims: randomized, controlled, double blind studies of efficacy. Suppressing such claims would harm consumers, not protect them.

It is no answer to say that the FTC can use prosecutorial discretion to avoid chilling truthful speech.[13] The record of the last 12 years already demonstrates multiple efforts to expand the FTC's reach, seemingly on the belief that ever-tougher remedies, even in close, complex cases, are in the consumer's interest.[14] If the agency can always obtain monetary penalties, the

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[10] Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671 (1977).
[11] J. Howard Beales III, Timothy J. Muris & Robert Pitofsky, *In Defense of the Pfizer Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 83 (James Campbell Cooper ed., 2013).
[12] *See id.* (discussing the Kellogg incident and its effects).
[13] *See* J. Howard Beales III & Timothy J. Muris, *The Obama FTC Departed from Its Predecessors to the Detriment of Consumers*, ANTITRUST, Summer 2017, at 66.
[14] *See id.*

default rule will inevitably be that all violators must pay. Prudent businesses, recognizing both the increased financial and reputational penalties from government action, cannot rely on prosecutorial discretion to protect truthful speech.

The distinction between cases where the law is clear and those in which there is legal uncertainty is also relevant in antitrust. For this reason, the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, adopted unanimously in 2003, limited use of 13(b) to "exceptional cases" involving "clear violations" of the antitrust laws.[15] The statement was withdrawn, but not replaced, in 2012.[16] Congress should enact the substantive limits adopted in the 2003 policy statement, limiting monetary relief to exceptional cases involving clear violations.

An additional reason for limiting the Commission's ability to obtain monetary relief is particularly significant in antitrust: The Commission's remedies should seek to complement, not compete, with monetary remedies available to private plaintiffs. In antitrust, an active class action bar routinely follows up government findings of a violation with class action lawsuits seeking monetary relief. FTC monetary remedies are only appropriate if they provide added benefits because these private remedies are unlikely to achieve the purposes of the antitrust laws. The same principle is increasingly relevant to consumer protection as well. When the FTC finds a legitimate company in violation and monetary remedies are available, private class actions can, and do, pursue financial relief. If the FTC obtains financial relief, however, private plaintiffs are less likely to find such actions attractive.

What procedures can the Commission use to obtain monetary relief?

Section 19 sets out a specific process for seeking monetary relief in consumer protection cases. The Commission first determines in the administrative process that there has been a violation of Section 5, and, after appeals are exhausted and the order becomes final, files a separate action in federal district court to obtain monetary relief. When the agency seeks monetary relief from legitimate companies, this process is entirely workable. Legitimate companies will still be there when the litigation concludes, and money will still be available to redress consumers. In fact, the overwhelming majority of cases against legitimate companies are resolved through settlement, and there is no substantive difference between a settlement that cites Section 19 as the statutory basis for monetary relief and one that cites Section 13b.

In fraud cases, however, the Section 19 process is likely unworkable. It would require what we have termed a "Triple Hybrid" procedure, involving three distinct legal actions litigated in at least three (but sometimes four or five) separate fora.[17] It would begin with an action under Section 13(b) to seek an ex parte asset freeze and temporary restraining order, assuming such an

[15] 68 Fed. Reg. 45821.
[16] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071.
[17] For a detailed description, see **J**. Howard Beales, III, Benjamin M. Mundel, and Timothy J. Muris, Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground**,** theantitrustsource, www.antitrustsource.com, December, 2020.

action is allowed under the Court's reading of 13(b). While the district court monitors the receivership, the Commission would file and litigate an administrative action to adjudicate the alleged violation. After appeals were exhausted and the Commission's order final, the Commission would file a separate district court action seeking redress under Section 19.

It seems unlikely that district court judges would, or should, accept such a process, where they are asked to freeze assets, supervise a receivership, but surrender all ability to resolve the case on the merits. Without an asset freeze, however, there will likely be nothing left for consumers at the end of the litigation.

Legislation should clearly authorize the Commission to use the process of Section 13(b), subject to the substantive limitations of Section 19, to pursue cases in which the Commission believes monetary relief is appropriate. If the court determines that a violation occurred but does not meet the Section 19 standard, it would simply enter appropriate injunctive relief, as it can clearly do under the Court's decision.

Conclusion

Congress should explicitly authorize the Commission to pursue equitable relief under Section 13(b), subject to the substantive standards set forth in Section 19. Congress should set the standards for when money is appropriate, rather than granting an agency unlimited discretion to seek financial sanctions whenever it thinks they are appropriate.

Thank you again for the opportunity to testify today. I look forward to your questions.

Ms. SCHAKOWSKY. Thank you, Dr. Beales.

And now I would call on Mr. Mermin for his 5 minutes of presentation.

STATEMENT OF TED MERMIN

Mr. MERMIN. Thank you very much, Chair Schakowsky, Ranking Member Bilirakis, and members of the subcommittee. My name is Ted Mermin. I direct the Center for Consumer Law and Economic Justice at the Berkeley Law School, but the thoughts I share today are my own.

Today, I am here today as a concerned citizen. We need the FTC. But the agency that is supposed to be protecting all of us from scammers and con artists and hackers and tech barons no longer has the tools and the resources it needs to do its job. Last Thursday's decision by the Supreme Court means that the FTC is now unable to perform its most important consumer protection function—getting money back to the people it has been taken from illegally.

Fortunately, Congress can fix the problem. The Consumer Protection and Recovery Act represents a significant and now absolutely urgent step towards retooling the FTC. It is one step, because I hope that this committee will, perhaps later this year, take on the full task of giving the FTC what it needs to handle not only the current emergency but also the next one. We need to make sure that a 21st-century FTC has the tools to take on 21st-century problems.

Now, I want to emphasize that I look at the FTC from the outside—outside the agency and outside the Beltway. Some of my proudest years were spent as a deputy attorney general in a State AG's office. We worked with the FTC. But we also wondered why the FTC was so underresourced and why it couldn't do many of the things that State AGs take for granted.

For example, in consumer protection cases, State AGs rely on three kinds of relief in almost every case: first, getting people their money back; second, ensuring that the business that acted unlawfully is under court order not to do it again; third, requiring the payment of civil penalties to give the business and its competitors an incentive not to engage in that activity.

It never made sense to us that the FTC mostly couldn't require civil money penalties and in some courts couldn't get an injunctive order simply because the illegal conduct had ended.

And, last week, well, the *AMG* v. *FTC* ruling is going to disrupt, as we have heard today, every case the FTC has pending. On Friday, for example, a judge in Arizona appointed by President Trump who had granted an asset freeze against a pure pyramid scheme, suggested he was going to lift the order because it was aimed at consumer redress.

The FTC needs new resources. The agency has many fewer employees than comparable agencies that cover industries responsible for much smaller segments of the economy. And it has lost almost 40 percent of its positions in the last four decades, while the GDP of this Nation grew by 750 percent. That makes no sense.

Praise, kudos to this committee for making sure, in bipartisan fashion, that the Appropriations Act last December included more

resources and COVID-related civil penalty authority to the FTC. But that expires with the pandemic. This committee can make it permanent so that the FTC can handle emergencies when they arise and not on a one-by-one, after-the-fact basis.

The need for public enforcement capacity is acute. Most Americans can't afford to hire their own lawyers, and mandatory arbitration and restrictions on class actions have drastically reduced the availability of private redress. Public enforcement has become the last line of defense in market protection.

The CPRA is a direct and a modest fix. The alternative cannot respond to the speed and ingenuity of fraudsters. The requirement for a complete administrative proceeding before an action can be brought under section 19 is unworkable.

I think members of this committee, along with the American public, have come to rely on the FTC to safeguard us during the pandemic. Perhaps this agency that is dedicated to getting our money back, to stopping scams, and to ensuring our privacy has earned our trust.

I have many colleagues who work at the FTC. You could not find a more dedicated, capable group of people. They don't cut corners. They do things the right way. They are public servants in the truest sense.

I believe we can agree today that a currently underequipped FTC needs to be able to do more to protect American consumers, not less. State AGs have had the authority proposed in the CPRA, and more, for decades. The political process and the court system have apparently managed to keep the AGs in line.

This committee meets at a perilous historical moment. The chief protector of American consumers has been sent to the sideline just when we are experiencing a heightened threat.

Members, swift action to restore the FTC's traditional authority means that, when constituents contact your office and tell your staff that they have lost their life savings to a work-at-home scam or their identity has been stolen and someone has opened accounts in their name or they spent their stimulus payment on a sham cure for COVID for their grandmother who is on a respirator, there will still be an agency to refer them to.

No one wants that staffer to have to add, "Well, we could have sent you to the FTC, but they don't actually have the power to get you your money back anymore." Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

Thank you.

[The prepared statement of Mr. Mermin follows:]

Berkeley Law | Center for Consumer Law & Economic Justice

April 27, 2021

Testimony of Ted Mermin
Executive Director
Center for Consumer Law & Economic Justice
UC Berkeley School of Law*

Before the
United States House of Representatives
Committee on Energy & Commerce
Subcommittee on Consumer Protection and Commerce

Hearing on
"The Consumer Protection and Recovery Act:
Returning Money to Defrauded Consumers"

*The witness appears in his individual capacity.

Chair Schakowsky, Chair Pallone, Ranking Member Bilirakis, Ranking Member Rogers, and Members of the Subcommittee:

My name is Ted Mermin. I direct the Center for Consumer Law and Economic Justice at the UC Berkeley law school. I also run the California Low-Income Consumer Coalition, which works on behalf of legal aid clients, and the Public Good Law Center, which advocates for fairness in the courts and in the marketplace. But the thoughts I share today are my own. Today, I am here as a concerned citizen. Because the agency that is supposed to be protecting me – and my 86-year-old mother, and my teenage daughter, and my former students who are now in the military – from scammers and con artists and financial predators and hackers and tech barons no longer has the tools and resources it needs to do its job.

Last Thursday's decision by the Supreme Court means that the FTC is now unable to effectively perform its most important consumer protection function: getting money back to the people it has been unlawfully taken from.[1] This is the latest in a series of court decisions that have systematically cut back on the authority of the FTC[2] and that now collectively mean that the Commission must try to operate with hobbles that are not only unlike any that other agencies – federal or state – must contend with, but that also make no sense for an agency whose work on our behalf is desperately needed.

Fortunately, as the Supreme Court emphasized, Congress can fix the problem.[3] Representative Cárdenas's Consumer Protection and Recovery Act represents a significant – and, now, urgent – step toward re-establishing the Federal Trade Commission as America's leading consumer protection agency.

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[1] Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEG. 37, 69-70 (2018).

[2] *See, e.g., FTC v. Shire ViroPharma*, 917 F.3d 147 (3d Cir. 2019) (limiting ability to obtain injunctive relief); *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (limiting ability to get monetary relief to victims); *FTC v. AbbVie, Inc.*, 976 F.3d 327 (3d Cir. 2020) (same).

[3] "If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority." *AMG Capital Mgmt v FTC*, No. 19-508, 593 U.S. __ (April 22, 2021), slip op. at 14.

I. There is an Acute, Commonsense Need for Congress to Take Action Now.

The fix that is now so pressing is a matter of common sense. Why wouldn't every American want to have an agency to turn to when they are ripped off, when their computer is frozen and held hostage, when their mom is the victim of a pyramid scheme, when a big tech company promises them it will never share their data – and then does? Why wouldn't every member of this committee want to be able to their constituents who call with one of these problems, "Let me put you in touch with the FTC; they may be able to help"? How do you explain to that constituent that you'd like to be able to assist them but unfortunately the FTC can't get them their money back any more?

I want to emphasize that I look at the FTC from the outside – outside the agency and outside the Beltway. Some of my proudest years were spent as a deputy attorney general in a state AG's office. We worked with the FTC. We partnered with the FTC. But we also wondered why the FTC was so under-resourced, and why it couldn't do many of the things that state AGs take for granted.

In consumer protection cases, state AGs rely on a triad of relief in almost every case: first and foremost, restitution and disgorgement – getting people their money back and making sure that the business doesn't get to keep ill-gotten gains; second, injunctive relief – making sure that the business that acted unlawfully is under court order not to do it again, so that enforcement is quicker and more effective; third, fines – requiring the payment of civil penalties to give the business (and its competitors) an incentive not to engage in illegal activity in the first place. We were bemused that the FTC couldn't impose civil money penalties in most cases when the AGs could; we were puzzled when some courts started holding that the FTC couldn't get injunctive relief if the illegal course of conduct had ended. And last week, we were frankly dismayed that the FTC can't now effectively perform the single most basic task of a consumer protection enforcement agency: getting money back to the consumers it was unlawfully taken from.

Where is the logic in underfunding an agency that is responsible for fighting fraud and deception in a majority of the American economy? How can that agency have so many fewer employees than comparable agencies that cover industries responsible

for much smaller segments of the GDP?[4] More pointedly, how can it have *lost* almost 40% of its positions in the past 40 years, while the GDP grew by 750%?[5] How can an agency so hobbled accomplish the ever-increasing mission that Congress – and all Americans – have assigned it?

Make no mistake. We need the FTC and we need it at full power – now more than ever. We are emerging from a pandemic that has killed more than half a million Americans and that shut down much of our economy. It will take years for our economy and our society fully to recover – and in the meantime, we can be absolutely certain that scams, robocalls, data breaches resulting in identity theft, and unfair and deceptive practices of all kinds will continue to besiege us. They will especially target seniors, veterans, low-income communities, communities of color, mom-and-pop businesses – the most vulnerable among us.

It is a very good thing that this committee, in bipartisan fashion, made sure that the Consolidated Appropriations Act and COVID 19 Consumer Protection Act last December allocated additional resources and provided civil penalty authority to the FTC for the duration of the public health crisis.[6]

But that authority expires with the pandemic. Why would we not want the FTC to be fully staffed and fully empowered to meet the next emergency, *before* it happens?

The need for public enforcement capacity is acute. The FTC needs to be able to do its job robustly and effectively because the vast majority of Americans cannot afford

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[4] The Consumer Financial Protection Bureau, which provides oversight for one sector of the American economy, has over 1500 employees. The SEC, responsible for another sector, has over 4400. The FTC, which is responsible for industries representing much of the rest of the national GDP, has 1100. *Compare Consumer Financial Protection Bureau, Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview* (Feb. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy19.pdf *with* Securities and Exchange Commission, *Full Time Equivalents History* (2020), *available at* https://www.sec.gov/foia/docs/fulltimes.htm *and FTC Appropriation and Full-Time Equivalent History*, Federal Trade Commission, *available at* https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

[5] *See* Federal Reserve Economic Date (FRED), GDP, St. Louis Fed (2021), *available at* https://fred.stlouisfed.org/series/GDP; *FTC Appropriation and Full-Time Equivalent History*, Federal Trade Commission, *available at* https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

[6] The Consolidated Appropriations Act and the COVID-19 Consumer Protection Act, passed last December, grant additional resources and authority to the FTC to seek civil penalties for unfair and deceptive practices associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 or a government benefit related to COVID-19. *See* https://www.ftc.gov/enforcement/statutes/covid-19-consumer-protection-act-2021-consolidated-appropriations-act

to hire private counsel to assist them in dealing with civil legal problems.[7] Ninety percent of low-income Americans with civil legal problems report receiving "inadequate or no legal help"; legal aid providers, lacking sufficient resources, have to turn away more than 50% of qualifying consumers seeking legal help.[8] Most middle-income families also face civil legal problems without counsel, and the pandemic will strain already inadequate pro bono resources for years to come.[9] Even for consumers with sufficient resources and the wherewithal to find a lawyer in a consumer protection matter, mandatory arbitration and restrictions on class actions have drastically reduced the availability of redress.[10]

Public enforcement has, in sum, become the "last line of defense in market protection."[11] And at the head of the agencies providing that enforcement is the Federal Trade Commission.

II. The Consumer Protection and Recovery Act is a Much-Needed Step Toward Providing the FTC With Adequate Authority to Do Its Job.

Restoration and reform starts with the single most important function of any government enforcement agency – federal, state or local – that works to protect consumers: the ability to provide redress to those who have lost money to unfair or deceptive tactics. Those victims receiving relief potentially include every person in this hearing, and every person in your district – seniors, students, servicemembers, small businesses.[12] And of course restitution and disgorgement by businesses acting unlawfully also benefit competitors that want to and do play by the rules.

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[7] Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA at 3-20 (S. Estreicher & J. Radice, eds., 2016).
[8] LEGAL SERVICES CORPORATION: THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, at 6 (2017); LEGAL SERVICES CORPORATION, FY 2017 BUDGET REQUEST (2016), https://lsc-live.app.box.com/LSCFY2017BudRequest.
[9] Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast Hidden Inequities of the Civil Justice System*, NEW REPUBLIC (June 22, 2020), *available at* https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice.
[10] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535 (2016) ("class actions brought by or on behalf of low-income consumers and employees are on the verge of disappearing").
[11] Prentiss Cox & Christopher L. Peterson, *Public Compensation for Public Enforcement*, 39 Yale Journal on Regulation (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809786# at 11.
[12] *See, e.g.*, Federal Trade Commission, *At FTC's Request, Court Permanently Stops A-1 Janitorial Office Supply Scam* (Apr. 11, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/04/ftcs-request-court-permanently-stops-1-janitorial-office-supply.

Representative Cárdenas's Consumer Protection and Recovery Act aptly distinguishes between "restitution" (returning to consumers money that was unlawfully taken from them) and "disgorgement" (compelling a business to give up ill-gotten gains), and ensures that the FTC is empowered to seek each.[13] That is authority held uncontroversially not only by almost all state attorneys general but also by other federal agencies – including, for example, the Commodity Futures Trading Commission.[14]

It is necessary to explicitly restore the FTC's restitution and disgorgement authority. The alternative cumbersome and outdated process set out in Section 19 of the FTC Act – providing for redress only if a "reasonable man" would find the conduct "dishonest or fraudulent," and then only after an administrative proceeding has concluded[15] – is wholly inadequate to respond to the speed and ingenuity of fraudsters. The definitions of "dishonest" and "fraudulent" are undeveloped and unclear. And the requirement for a complete administrative proceeding before an action for redress can be commenced will be unworkably cumbersome. We don't ask the FBI to fill out forms in triplicate and conduct a year-long hearing in order to stop a bank robbery in progress.

I know the people who work at the FTC, in Washington and around the country. You could not find a more dedicated, capable group of people, committed to preventing fraud, helping people who have lost their life's savings, stopping the fraud so that more people don't get hurt. But these cases take time, and they take resources to do the right way – which is the way the FTC does things. It doesn't cut corners. That means, however, that requiring an administrative process before the Commission could get relief to consumers would too often result in no relief at all, because the perpetrators will have disappeared, or dissipated or hidden their assets.

Ultimately, the criticisms expressed about the Consumer Protection and Recovery Act amount to a curious distrust of the FTC. The proposed alternatives would enact further limitations on an already hobbled agency. What remains unexplained – and very difficult to understand to the great majority of the 330 million consumers in the United States who seek *more* protection from fraud and deception, not less – is

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[13] Cox & Peterson, *supra* note 11, at 23 ("State courts typically use the term restitution and the concept of consumer loss as a measure of relief regardless of the nomenclature in the underlying statutory authority.")

[14] Dee Pridgen & Richard Alderman, CONSUMER PROTECTION AND THE LAW app. 7A (2016-17) (every state but New Mexico has some form of statutory authority for consumer restitution); 7 U.S.C. § 13a-1(d)(3). *Commodity Futures Trading Comm'n v. JBW Capital*, 812 F.3d 98, 111 (1st Cir. 2016).

[15] 15 U.S.C. §57b.

exactly why they should fear a robust agency dedicated to protecting their money. State AGs have had the authority proposed in the CPRA – and more – for decades. The political process and the court system have apparently managed to keep the AGs in line. And in the meantime, they have returned billions of stolen dollars to consumers.

To equip the FTC properly to do its job is a straightforward task, and a serious responsibility of this committee. The Consumer Protection and Recovery Act represents a sensible step forward toward restoring essential protections for all Americans.

III. 10 Things This Committee, and This Congress, Can Do to Give the FTC the Tools It Needs to Do Its Job.

The Consumer Protection and Recovery Act advances the first two critical improvements to the FTC Act listed below. But the task before this committee is broader than simply filling the void left by the Supreme Court's decision last week. The following suggestions – all endorsed in various forms by bipartisan cohorts of FTC commissioners, and all supported by broad coalitions of advocates for consumers, small businesses, veterans, and seniors – would restore the FTC to its rightful and logical position as the nation's leader in consumer protection.

1. **Restore the FTC's authority to get money back to consumers from whom it was unlawfully taken**. This most salient fix is critical to the functioning of the FTC as a consumer protection agency.

2. **Give the FTC full authority to obtain an injunction barring future misconduct**. A court order barring the conduct that the FTC has gone to such pains to investigate and prove is a vital part of the toolbox of the Commission or any consumer protection agency. A thief who takes your wallet may end up closely monitored on probation or, after prison, on parole – whether or not he had stopped taking wallets by the time he was caught. When a business steals your money, it too should be subject to additional supervision, with quicker enforcement.

3. **Provide the FTC with the default ability to require the payment of civil penalties.** Give businesses and individuals who are inclined to break the law a reason not to do so. Routine civil penalty authority is exercised by state Attorneys General – and in some states local government authorities – in almost all the cases

that they bring.[16] It is common sense to ensure that the FTC is able to make use of the same tools as its state and local counterparts.

4. **Establish a Civil Penalty Fund dedicated to providing compensation to victims of unfair and deceptive business practices who cannot be repaid by the businesses or individuals that harmed them.** All too often, scam artists spend the money they steal from consumers. By the time the FTC can fully prosecute a case, the judgment – frequently for an impressively large amount of restitution – must be suspended because of the defendants' inability to pay.[17] There is a way around this dilemma: Congress can grant the FTC authority to set up a Civil Penalty Fund or Consumer Redress Fund to provide a source of relief to victims, funded by civil penalties collected in other cases. The CFPB has exercised this type of fund effectively and with great benefit to consumers.[18] This fund could also receive funds paid pursuant to an order to disgorge illegally-obtained money when it is not practicable to return those funds to consumers.

5. **Give the FTC the same ability to make rules that is exercised by other federal agencies**. Rulemaking under the Administrative Procedures Act provides all stakeholders the ability to express their views, and requires the agency to consider those views. And unlike the Commission's current sclerotic Magnusson-Moss rulemaking authority, the proceedings will not be so delayed that the rule is likely to be outdated by the time it is finally issued.

6. **Fully fund the FTC so that it may effectively play its role as the nation's consumer protection agency.** As former Commissioner William Kovacic explained at a hearing before this subcommittee in February, the FTC cannot accomplish the mission that Congress has set for it without a significant infusion of resources.[19] That money is a wise investment: far greater sums will be

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[16] "[C]ivil penalties, akin to fines, are available to public enforcers in almost all cases." Cox and Peterson, *supra* note 11, at 5; *see also* Cox et al., at 73-74 (state attorneys general obtain civil penalties or other forms of government payment in 73% of cases).

[17] *See, e.g.*, Federal Trade Commission, *FTC Puts an End to Deceptive Advertising of Light Therapy Device* (June 5, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/06/ftc-puts-end-deceptive-advertising-light-therapy-device

[18] *See* Craig Cowie, *Putting Money Back Into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, __ U. ILL. L. REV. (forthcoming 2021), *available at* https://ssrn.com/abstract=3537984.

[19] Testimony of William E. Kovacic to the House Subcommittee on Consumer Protection and Commerce, *Safeguarding American Consumers: Fighting Frauds and Scams During the Pandemic* (Feb. 4, 2021), *available at* https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-KovacicW-20210204.pdf.

returned to consumers and small businesses, and received from customers by competitors who play by the rules.

7. **Give the FTC general authority to prevent price gouging in emergencies**. This is a power currently held by the states and exercised by attorneys general across the nation.[20] Providing the FTC the same authority would add measurably to the nation's ability to respond to natural disasters and other emergencies; these events are too frequent to make it feasible for Congress to pass separate legislation each time one occurs.

8. **Provide the FTC authority over common carriers.** When the common carrier exemption was included in the FTC Act more than 100 years ago, it was logical to exempt the monopoly providers of common carrier services, who were not disciplined by competition but rather by detailed rate and service regulation. Since that time, the telecommunications industry and the regulatory role of the federal government have changed dramatically. As the Ninth Circuit observed three years ago, the FTC Act already allows the Commission to regulate common carriers' non-common-carriage activities.[21] This extension of the FTC's jurisdiction would permit the "leading federal consumer protection agency"[22] to take on widespread consumer protection issues that are in need of further attention, including data breaches, privacy and robocalls.

9. **Give the FTC authority over non-profit corporations.** The Internal Revenue Service has nominal authority now, but its purview is limited essentially to whether a tax-exempt organization should be able to maintain that status. Given the widespread business activities of nonprofit corporations like hospital chains, and all-too-common examples of unfair or deceptive conduct by charitable organizations, this extension would close an important gap in FTC protection, including in oversight of data security and privacy practices.

10. **Trust the FTC.** This final step informs all the others. There can be no doubt that there is more work to do protecting consumers than the FTC currently has the tools or resources to accomplish. There is also no doubt that the FTC has been trammeled in ways that its sister agencies, federal and state, have not. Whatever the reason, it is high time to retire the "zombie ideas" about the FTC – that the

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[20] *See* King & Spaulding, *COVID-19 Survey of Federal and Side Price Gouging* Laws (2021), *available at* https://www.kslaw.com/pages/covid-19-survey-of-federal-and-state-price-gouging-laws
[21] *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018) (en banc).
[22] *Id.* at 851.

Commission is unnecessary, or overreaching, or heavy-handed, or inefficient.[23] It is time, as one commissioner stated in Senate testimony last week, to "turn the page on the FTC's perceived powerlessness."[24]

For an American public eager for greater – not lesser – protection from increasingly sophisticated scam artists, deceptive advertisers, and privacy violating tech companies, building an effective FTC is an easy decision. It can and should be for this committee as well.

IV. Conclusion

This subcommittee meets at a remarkable historical moment, when the COVID-19 pandemic has revealed the profound need for a robust Federal Trade Commission just days after the Supreme Court made action by Congress an absolute necessity. This is a perilous time, with the chief protector of American consumers rendered nearly powerless just when those consumers are experiencing a heightened threat resulting from a once-in-a-century pandemic. The Consumer Protection and Recovery Act provides a critical first step toward restoring authority and effectiveness to the nation's leading consumer protection agency.

Swift action to restore the FTC's traditional 13(b) authority means that when constituents contact your office, and tell your staff that they have lost their life's savings to a work-at-home scam, or their identity has been stolen and someone has opened accounts in their name, or they just spent their stimulus payment on a supposed cure for COVID for their grandmother who's on a respirator – there will still be an agency to refer them to. No one wants that staffer to have to add: "Well, we could send you to the FTC, but they don't actually have the power to get you your money back."

Inaction or delay will mean no recovery for millions of wronged American consumers. The time to pass the Consumer Protection and Recovery Act is now.

Thank you for your time and consideration.

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[23] Chris Jay Hoofnagle, FEDERAL TRADE COMMISSION: PRIVACY LAW AND POLICY 351 (2016) (describing ideas about the FTC that have little basis in reality but have nonetheless persisted over time).

[24] *Strengthening the Federal Trade Commission's Authority to Protect Consumers*, U.S. Senate Committee on Commerce, Science, & Transportation (Apr. 20, 2021) (statement of Commissioner Chopra).

Respectfully submitted,

/s/ Ted Mermin

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Mr. CÁRDENAS. Madam Chair.

Ms. SCHAKOWSKY. Sorry, I thought I was——

OK. So we have now concluded witnesses' opening statements for the second panel. At this time, we will move to Member questions. Each Member will have 5 minutes to ask questions for our witnesses, and I will start by recognizing myself for 5 minutes.

I feel like I need to begin by restating something that I had asked before, a fact I had mentioned before. In October of 2020, all five FTC Commissioners, Republicans and Democrats, sent a letter urgently to Congress to act quickly to reaffirm section 13(b) and preserve the FTC's ability to recover ill-gotten gains for consumers. So that was the FTC itself, in a bipartisan way, that was asking us to act, and I certainly agree that we ought to do that.

Fraudsters and scammers have profited immensely from the fear and anxiety that we have seen come along with the COVID 0919 pandemic. Since the beginning of the pandemic, consumers have reported losing more than $400 million just on pandemic-related fraud. As we all struggle with the devastating consequences of the COVID 0919 pandemic, we shouldn't also have to worry about scammers and fraudsters taking advantage of it.

So I am very proud of the bipartisan COVID Consumer Protection Act that passed. This was a new act which was included in the 2021 omnibus giving the FTC authority to seek civil penalties for scammers. And I was pleased to see that the Federal Trade Commission brought its first case under this new law against a business' deceptive marketing of a product containing vitamin D and zinc as scientific proof to treat and/or prevent COVID.

So my question is this: Under the COVID 0919—this is for Mr. Mermin. Under the COVID 0919 Consumer Protection Act, the FTC can fine companies who violate the law for up to $43,792 per violation. When the FTC fines companies using this authority, where does that money go?

Mr. MERMIN. That money currently returns to the U.S. Treasury. And that is one way of addressing things.

I would say, perhaps—I don't think it is a matter for this bill, but if in a bill later this year this committee were to think of perhaps setting up a civil penalty fund or a consumer redress fund that would allow the FTC to get money back to people who were scammed by a fly-by-night company and there might be a large judgment that the FTC obtained but none of that money was available actually to get back to consumers, well, if you set up a fund that disgorgement or penalties from another case might be able to be paid into, then those consumers could be made whole.

Ms. SCHAKOWSKY. I think it is important just to note that the COVID 0919 Consumer Protection Act actually does not right now provide the authority for monetary reward.

Ms. Laitin, I thank you very much for your testimony. What I wanted to ask you: Now that the Supreme Court has rejected the FTC's ability to get money back into the pocket of consumers under section 13(b), what are the FTC options for getting money back to consumers who have been defrauded in the COVID 0919 case like this one, like the one we were talking about.

Ms. LAITIN. They are extremely limited, if nonexistent, right now. Thank you, Chair, for the question.

This is the issue at hand right now, that the FTC had this authority for 40 years. Whether we agree or disagree with the Supreme Court doesn't matter anymore. The question you all have to deal with is, the Supreme Court decided that the text does not allow the FTC to get this consumer redress. So it is up to Congress to be able to restore this authority to the FTC so they can continue doing the work they have done previously.

And if they can't get that redress back to consumers, then we are talking about people who—as in Mr. Mermin's example, if somebody spent their stimulus check on a false cure for COVID, they will not see that money again.

Ms. SCHAKOWSKY. Right.

So would the Consumer Protection and Recovery Act provide the kind of authority, and the sufficient authority, to the FTC to enable the FTC to recover the illegal profits and get them back to consumers, in your view?

Let me ask both Mr. Mermin and Ms. Laitin.

Mr. MERMIN. Yes, I believe it would.

Ms. SCHAKOWSKY. OK.

Actually, Dr. Beales as well. I mean, just a "yes" or "no."

Dr. BEALES. It certainly would. It does more than that, but it certainly does that.

Ms. SCHAKOWSKY. OK.

And Ms. Laitin?

Ms. LAITIN. Yes, it absolutely does that.

Ms. SCHAKOWSKY. And if you could just describe—I talked about it as the most powerful tool that the FTC really has to redress the grievances and the losses of consumers. Would you speak to that?

Let's start with Mr. Mermin.

Mr. MERMIN. It is certainly a powerful tool. I think it is an enormously important tool from the point of view of consumers themselves. If you haven't ever had—I recommend having it—the experience of seeing someone who got money back that they never expected to see again, that is what government is supposed to do for people. And it really, I think, emphasizes why that is the most important authority that the FTC does have.

Ms. SCHAKOWSKY. You know what? I didn't realize that I have gone over my time. And, being the chair, I should really be setting an example. So I will have to yield back and now turn it over to the ranking member of the subcommittee, Gus Bilirakis.

Congressman Bilirakis, it is your turn.

Mr. BILIRAKIS. Thank you, Madam Chair. I appreciate it very much.

And I thank everyone for their patience today, but this is a very important issue.

Professor Beales, it is not often that we have someone before us who was cited in a Supreme Court decision just a few days ago. You have a wealth of knowledge, and I am hopeful that the members of this committee can benefit from your insights.

And I know we only have 5 minutes here. Can you give us a very brief background of the FTC's past misuse of the rulemaking process that we should keep in mind as we move forward on expanding FTC authority?

Dr. BEALES. Well, when the FTC launched rulemaking in the 1970s, it proposed a rule a month at one period, and it did so without really thinking through the legal theories of why there was a violation and without really thinking through what kind of evidence it would need in order to prove or disprove those theories.

The result was enormous rulemaking records that didn't have any relevant evidence to address the merits of whether the rule should be adopted or not, and most of those rules came to nothing. They were huge amounts of resources. The reason that the FTC is so much smaller than it was in 1981 is that it is no longer wasting all those resources on rulemakings.

But that is what happened to a lot of them.

Mr. BILIRAKIS. Thank you very much.

Reclaiming my time, again, for Professor Beales, I am concerned that this legislation may incentivize the FTC to seek redress without allowing due process to commerce. Do you agree with this concern?

And is there a way we can streamline the efficiency of the FTC while at same time protecting the right to due process?

Dr. BEALES. I actually think the standard of section 19 does that fairly well—not the process of section 19, but the standard, that the FTC should be able to get money when the conduct is something that a reasonable person would have known was dishonest or fraudulent.

Other than that, the FTC should resolve whether this practice is legal or not, and it should make people conform to the legal practice. But there shouldn't be financial sanctions for that.

I don't think there is a due-process problem in fraud. I think the standards for fraud are well-recognized.

Mr. BILIRAKIS. Thank you, sir.

My next question. You authored a piece last year entitled "Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground." Can you elaborate on where you think the middle ground is?

And since we didn't have Republican Commissioners here today, is there anything you care to respond to—well, respond to Acting Chair Slaughter's testimony? I know you were actually present during the time she testified. So, if you could give me an answer to that as well, please.

Dr. BEALES. Sure. As to what Chairman Slaughter had to say, I think my main point is that a lot of the cases that were significant sources of monetary relief, like Volkswagen and Herbalife and Amazon, those were all consent agreements. And, in a consent agreement, the section 19 process works fine. You have a settlement that resolves both the administrative matter and the district court matter. And the only difference is, it is citing different statutory authority. The FTC will still be able to get money in those cases, and I don't see any real complication.

The middle ground that we talked about is—and I think the FTC could have defended its use of Section 13 this way—is to use Section 13 against fraud but not against legitimate companies where the legality of the practices is not well established—or the illegality of the practices is not well established.

And that is essentially what we argued for in that article, and that is essentially what I am recommending today: the Section 13 process, but the section 19 standards for when you can get money.

Mr. BILIRAKIS. Thank you.

Let me ask a question of the full panel, if that is OK, quickly. If you could amend the current piece of legislation that we are—well, we are not marking up today, but we are hearing today—how would you do so?

Why don't we go through the panel, quickly.

Dr. BEALES. In section 13(b), I would insert language that cites the standards of section 19. And I think that is pretty much the only change that would be needed.

Mr. BILIRAKIS. OK.

Anyone else?

Mr. MERMIN. I don't think that that amendment is necessary. And I am happy to explain why in response to a later question, because I see the time is up.

Mr. BILIRAKIS. But you don't have any other suggestions, sir, as to how to make the bill better?

Mr. MERMIN. For this particular bill, with respect to restitution and disgorgement, I think it is well-written as it is. I think there are other issues that the committee can take up, I hope relatively soon.

Mr. BILIRAKIS. And the Chair plans to do that, I believe. All right.

Anyone else? Thank you very much, if not.

Thank you. I yield back.

Ms. LAITIN. Thank you. I just——

Mr. BILIRAKIS. Oh. Please.

Ms. LAITIN. I can answer quickly and just say I agree that I think the bill works as it is written, and I also have concerns about the amendment that has been suggested.

If it was open for—if I thought it could fly through, I have lots of ideas on how to strengthen the FTC, but I think that waits for another day.

Ms. SCHAKOWSKY. OK.

And the gentleman yields back.

Next we have Congresswoman Kathy Castor for 5 minutes of questions.

Ms. CASTOR. Yes. Thank you, Madam Chair.

I will go to Professor Mermin to finish his thought there on why he disagreed with the proposed amendment from Professor Beales.

Mr. MERMIN. Thank you very much, Congresswoman.

I think that there are a few things to keep in mind here. And I speak, again, from the perspective of State AGs.

There is flexibility that needs to be built into unfair and deceptive practices laws, and there also needs to be flexibility built into the way that money is returned to consumers. We need the FTC to be prepared for the cases that come up that we can't even imagine what they would look like now.

If there are situations, as Professor Beales mentioned, where it would be inappropriate to get the money back, well, then that is something that the Commission itself can get involved in discussing and courts can get involved in discussing. We have cer-

tainly seen, as we saw with the Supreme Court last week, no hesitation on the part of courts to limit the FTC when they believe that it has stepped over the line.

But flexibility in getting money back to consumers, as is in the current draft of the bill, is vital.

Ms. CASTOR. Thank you very much for that.

You know, I thought it was so interesting that both you and Ms. Laitin, in your testimony, also called on Congress and the FTC to do more to hold Big Tech accountable. I think you referred to them as the Big Tech barons or something like that. Because it is clear now that companies like Facebook and Google seem to think that it is better for their business model to—that they can break the law and just, if there is a fine, it is the cost of doing business. But that has to change. That just cannot be the way that we operate.

For example, in 2019 the FTC entered into a settlement with Facebook, but it fell incredibly short. Even though it sounds like a lot of money, when it comes to Facebook, it is not. It was a $5 billion penalty.

And you know what happened? Facebook's stock value went up. They didn't have to rein in its user surveillance or make any significant changes to its business model. The FTC actually granted immunity provisions for Facebook's top executives. And I just think that is not going to lead to protection of the consumer, and we know that Congress has to do more, and hopefully we will.

But do you see a role here for the Consumer Protection and Recovery Act on first-offense civil penalty authority and rulemaking authority that would allow the FTC to rein in Big Tech?

Ms. LAITIN. I don't know who you were pointing that question at, but I am happy to start.

Ms. CASTOR. I will start—yes, go ahead, Ms. Laitin, and then I will go to Mr. Mermin.

Ms. LAITIN. I would say two things.

First, section 13(b) has been used by the FTC in some of their cases against the tech companies, and it is an important tool. And having the ability to seek disgorgement strengthens their hand and enables them to do more to go after these companies. As the Acting Chair noted, not having that ability weakens their negotiation.

But, yes, I think in order to truly have the impact that Congress and so many on this committee want them to have with respect to Big Tech, the ability to get civil penalties and to set rules in a meaningful way is also incredibly important. But the 13(b) fix will help a great deal.

Ms. CASTOR. Mr. Mermin?

Mr. MERMIN. I certainly agree.

And just to emphasize something that my friend Professor Beales said. The problem—I mean, yes, the settlements that have been achieved are impressive in their numbers, but you don't get a settlement if you don't have the ability to get the money in the first place. And as that judge in Arizona has just indicated, he probably wouldn't have granted that asset freeze.

So not having 13(b) authority undermines everything that the FTC is trying to do.

Ms. CASTOR. Well, thank you very much.

I will yield back at this time. Thank you, Madam Chair.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And now I recognize Fred Upton for 5 minutes.

Are you there, Fred?

OK. It looks like he is not.

Then, Bob Latta, it will be your turn for 5 minutes.

Mr. LATTA. Well, thanks again, Madam Chair, for today's hearing.

And thanks to our witnesses for being with us today. I greatly appreciate it.

Dr. Beales, in your testimony you reference a triple hybrid procedure when dealing with illegitimate companies in fraud cases. Would you elaborate about how 13(b) reforms may differently impact legitimate companies and illegitimate bad actors?

Dr. BEALES. 13(b) is essential to go after the fraudulent actors because those cases really need to start with an asset freeze. If you don't get an asset freeze at the beginning, the fraudsters will either spend the money or hide it, and there won't be anything left for consumers.

The procedure that we are left with as a result of the Supreme Court decision is the triple hybrid: going for an asset freeze, which, as Mr. Mermin notes, you may not get; then an administrative proceeding to resolve liability; and then a separate proceeding to get money. And when you get to the end of that, there is not going to be any money.

For legitimate companies, the Volkswagen example, they are going to be there. You don't need an asset freeze. You are not going to get an asset freeze. You have the authority to get money if you can say that the conduct is fraudulent or dishonest, and that is pretty easy in the Volkswagen case. You are just citing a different statutory authority. There is not any difference in the substantive posture in the negotiation. The Commission is saying, "We have the authority to get money, and you are going to have to pay."

But that only works for legitimate companies. It doesn't work for the fraudsters.

Mr. LATTA. All right. Well, thank you.

Dr. Beales, also, the Bureau of Economics has published a detailed analysis of how it calculates remedies. It also frequently weighs in on FTC settlements and cases with calculations of what the likely injury and proper redress would be.

What principles does it apply in such opinions that could guide Congress in modifying 13(b)?

Dr. BEALES. I think the basic principle of damages is—there are two ways people get injured by deceptive claims. One is, there may be a price premium that everybody pays because they think the product has a feature that it doesn't, and that price premium is an injury. And the second source of injury is that some people buy the product who would not have bought it otherwise.

In the case of fraud, virtually all of the sales are because of the deceptive claim, and total sales are an appropriate measure of the injury to consumers.

That is not true if you have an established product that has been around for years—All Bran, for example, that starts claiming that diets high in fiber may reduce the risk of cancer. If you decide that claim is deceptive, well, most of those people were going to buy All

Bran anyway. All Bran's total sales are not the right measure of injury.

The Bureau of Economics recognizes that. The Commission's starting point, however, in every negotiation I have seen is, "We are entitled to your total revenue, and let's bargain from there."

Mr. LATTA. OK.

Let me follow up with this: Why is it important that the FTC's monetary remedies be offset by the value that a consumer receives from the product or the service at issue?

Dr. BEALES. Because otherwise we risk excessive caution in places where the law is in dispute, where reasonable scientific experts disagree—about whether you should or should not take vitamin D to reduce COVID risks, for example. We ought to recognize the value of that information to consumers, and we don't want a penalty that is so high that it discourages providing important information.

Mr. LATTA. And not picking on you, just with my last 45 seconds, what methodologies are appropriate for calculating monetary remedies under the dishonest or fraudulent standard? And should these be written into the Act?

Dr. BEALES. I think the same approach is conceptually right. There is a price premium for a feature it doesn't have, and there are people who buy the product who wouldn't have otherwise, and the question is, what is the mix of those.

I would be reluctant about writing them into the Act, because I think it is hard to do without creating a recipe for how to avoid recoverable damages. But I think those are principles that would develop once there is actually litigation about how to do this.

Mr. LATTA. Well, thank you very much.

Madam Chair, I yield back.

Ms. SCHAKOWSKY. The gentleman yields back.

And now I recognize Congresswoman Lori Trahan for her 5 minutes.

Mrs. TRAHAN. Well, thank you, Chairwoman Schakowsky.

I want to discuss a case the FTC brought in 2005 against Direct Marketing Concepts, a company based in my home State of Massachusetts. DMC ran infomercials for a range of supplements, including Supreme Greens. Their ads claimed that the supplement could treat, cure, and prevent cancer and cause dramatic weight loss, all while being safe for consumption by pregnant women and even children.

These claims simply had no evidence behind them, no peer-reviewed research, no FDA approval. They misled and they harmed consumers. And yet DMC had no problem featuring a woman who claimed to lose 81 pounds after taking Supreme Greens for 8 months—a story that simply wasn't true.

The cost to consumers for a 1-month supply of Supreme Greens ranged between $32 and $50, plus shipping and handling. That is a lot of money for a product that does not work and, more importantly, that could be harmful to our children and mothers.

Fortunately, the FTC was able to use their 13(b) authority to order these scammers to cede $70 million of ill-gotten money and return that money to defrauded consumers.

Now, if this case were brought today, my understanding is that the FTC could only ask Direct Marketing Concepts to stop selling Supreme Greens, a forward-looking behavioral restriction, but could not seek monetary remedy for consumers that were harmed.

Mr. Mermin, is this correct? And, if so, in a case like this, does the FTC possess other enforcement tools that could practically provide actual monetary relief to real people?

Mr. MERMIN. Thank you for the question.

I think that it does not in any realistic way. As Professor Beales has mentioned, for a fraud case like that, the remedies of section 19 are just going to be inadequate. And I would say that they are inadequate in any case.

I do want to mention one further thing just about Supreme Greens. Let's just say that, instead of whatever the material was, that they had been sending oatmeal. Could they then say, "Well, you can't recover all the money that was taken from you because we gave you the benefit of a package of oatmeal, and so please subtract that"? I don't think that that is the way that we want to do business.

Mrs. TRAHAN. Well, I agree.

And this case is just one of many. In fact, over 100,000 Massachusetts residents have received refunds in the last 2½ years totaling over $18 million as a result of section 13(b) cases. And it speaks to the importance of an effective FTC.

Mr. Mermin, in your testimony you explain that the FTC has lost almost 40 percent of its positions in the past 40 years while the GDP grew by 750 percent.

You know, given your experience as an enforcer at the State level, can you speak to the importance of properly funding the FTC? What would it mean for the American people in today's economy?

Mr. MERMIN. I think it would mean a much safer marketplace. And I think that that is what we ultimately need.

That decline is a decline in the FTC's budget over time. It is not just rulemaking, of course; it is across the board. And it has meant a relative lack of leadership.

This is the Nation's leading consumer protection agency, and it should be in that position with respect to the States, with respect to localities—who have greater enforcement authority right now and tools available to them than the FTC does. And I think that making sure that those tools are available and that the FTC is fully funded, as former Commissioner Kovacic noted in a recent hearing, is essential.

Mrs. TRAHAN. Well, thank you for that, Mr. Mermin.

And thank you to all the panelists for your time and your testimony today.

I yield back, Madam Chair.

Ms. SCHAKOWSKY. The gentlewoman yields back.

And now I recognize Kelly Armstrong for his 5 minutes for questions.

Mr. ARMSTRONG. Thank you, Madam Chair.

Mr. Beales, the 2003 policy statement—which I believe you think should be reinstated, is that correct?

Dr. BEALES. At this point, it probably needs to be codified, if you are going to extend 13(b) to antitrust cases. But, yes, at the least, it should be reinstated.

Mr. ARMSTRONG. And that is what leads me to my question. It suggests the Commission should only seek monetary equitable remedy when there is a reasonable basis to calculate the amount of disgorgement or restitution.

And at last month's Big Tech CEO hearing, I asked about the consideration of nonprice factors, like privacy and innovation, in antitrust analysis and actually got several of the members of that hearing to agree that those should be factored in. But nonprice factors are obviously less quantifiable than price.

As Congress considers enacting comprehensive data privacy legislation, what would you suggest is the most reasonable basis—or is there one—to calculate that type of restitution?

Dr. BEALES. I think, in places where calculating damages is very difficult, if you really want penalties, I think civil penalties is a more sensible approach.

On the consumer protection side, I think on information security cases, for example, civil penalties would make a lot of sense for exactly that reason. It is very hard to figure out what the injury is from a particular data breach.

Mr. ARMSTRONG. And I think this is a question we are going to look at moving forward with these companies, right, is, I mean—and particularly in antitrust analysis. The consumers and their customers aren't always the same thing. But I also think it is one of the most significant questions, if not the FTC, but Congress is going to have to wrestle with moving forward.

Dr. BEALES. No, I agree with that. It is a difficult question.

Mr. ARMSTRONG. Yes. I should have put a question mark after the end of my statement. I appreciate it.

And, with that, I will yield back, Madam Chair.

Ms. SCHAKOWSKY. The gentleman yields back.

And now I recognize Jerry McNerney, Congressman McNerney, for 5 minutes.

Mr. MCNERNEY. Well, I thank the chairwoman.

And I thank the witnesses for hanging in there today.

Mr. Mermin, your comparison of the FTC and the AGs was instructive, so I want to thank you for that.

My congressional district has a large low-income population—and it is close to Cal—including parts of Contra Costa, San Joaquin, and Sacramento counties. The cities of Antioch and Stockton are the major cities in my district.

Why is it so important for low-income consumers for Congress to pass quickly the Consumer Protection and Recovery Act?

Mr. MERMIN. Thank you very much, Congressman, and I know your district well.

Mr. MCNERNEY. Good.

Mr. MERMIN. Low-income communities, communities of color, seniors, veterans, students—these are folks who, generally speaking, do not have access to attorneys.

I wish that the private sector and the private bar were as robust. As was mentioned earlier, I am afraid they are not. And I am afraid that there are structural impediments to that. The manda-

tory arbitration clauses, the restrictions on class actions, these have dried up those kinds of cases enormously.

And that means that there is a tremendous reliance right now on the public sector, on public enforcement agencies, to do that job and to get money back to consumers, especially low-income consumers, especially communities of color, from whom it has been taken.

Mr. MCNERNEY. Thank you. Thank you.

Ms. Laitin, in your testimony you noted that not having section 13(b) type of authority poses a big risk for the Commission's ability to—and quoting you—rein in Big Tech companies that have taken advantage of their market power to crowd out small businesses and exploit consumer data.

So I am following up on Ms. Castor's questions. Could you please expand on your meaning and further discuss what that means for consumers?

Ms. LAITIN. Absolutely. Thank you for the question.

The FTC has brought some cases against large tech companies, not as many as many, I know, members of this committee and elsewhere would like to see. I think there is an interest in them being more aggressive. But where they have brought cases, they have relied on section 13(b).

And without the ability to get disgorgement and restitution, those cases are largely meaningless and will be very difficult for the FTC to use to aggressively enforce against these companies. So all of that is needed.

And I want to make the point: Mr. Beales has talked about this fraud distinction, of fraudulent, dishonest behavior. That is a tough line to draw. And I think if that was put into statute, that could create problems for things like enforcement against the tech companies. Are they being fraudulent, or are they just lying to their customers? Where is the line? And should that line be drawn in statute, or should we let the courts draw that line and work it out over time?

The FTC has used 13(b) to enforce against unfair and deceptive acts and practices and unfair methods of competition. Leaving it like it is now and giving them that opportunity to work it out in the courts and figure out where restitution is appropriate and where it is not makes more sense than drawing artificial lines in statute.

Mr. MCNERNEY. So not having this authority will lead these companies to taking greater advantage of consumers. Would——

Ms. LAITIN. Absolutely.

Mr. MCNERNEY [continuing]. That be true?

Ms. LAITIN. Absolutely.

Mr. MCNERNEY. Thank you. I agree.

Mr. Mermin, in your written testimony you note that it will take years for our economy to recover from the pandemic and that in the meantime scams, robocalls, data breaches resulting in identity theft, and unfair and deceptive practices will proliferate.

How has the pandemic left lower-income consumers even more vulnerable? And why can't we afford to delay restoring the FTC's authority?

Mr. MERMIN. These are folks who are more likely to have lost jobs, less likely to be able to work from home, more likely to have family members who got sick or who passed away. And you can imagine, with hospital bills, medical bills, with the various expenses that have arisen, that it is especially low-income folks who have felt the brunt of the pandemic and of the recession.

And there is going to be a tail for that. We need a robust FTC to be able to protect those folks and all of us from predators.

Mr. MCNERNEY. Well, as I said at the end of my first-panel questioning, this is important to my constituents. I want to make sure we get this legislation passed to protect my constituents as soon as we can.

Thank you. I yield back.

Ms. SCHAKOWSKY. The gentleman yields back.

And now I recognize Congresswoman Yvette Clarke for 5 minutes.

Ms. CLARKE. Thank you once again, Madam Chairwoman.

And let me thank our panelists for your testimony here today.

You know, the company at the center of the Supreme Court case last week was AMG, and it was a payday lender that preyed on those living paycheck to paycheck. They charged interest rates as much as 700 percent and sometimes as high as 1,000 percent and collected millions of dollars in undisclosed and inflated fees.

They took advantage of at least 5 million consumers from 1997 to 2013, including 250,000 people in my home State of New York. The record $1.3 billion judgment against AMG speaks to just how many consumers were victimized in this case.

Ms. Laitin, according to one recent survey, 63 percent of all Americans have been living paycheck to paycheck since the beginning of the COVID 0919 pandemic. Can you tell me how refund checks from the FTC to victims of AMG's unlawful conduct might make a difference for these people?

Ms. LAITIN. Absolutely. And thank you for the question.

The economy has been absolutely brutal for the past year, and Americans are hurting and they are looking for assistance. And what AMG offered their customers was a loan that folks thought would help them—it would help them get out of trouble and help them restore themselves back to financial security. And they got the opposite.

And by the FTC enforcing against AMG and getting these checks, that means people are able to get their money back and be back at least where they were when it started, although probably not as well, because they took a hit from that loan.

But it is so important to get people their money back. Enforcing against these folks and getting civil penalties is important, but returning money to the people who were harmed is vital to help these folks get back on their feet and to enable them to participate in the economy.

Ms. CLARKE. And what message does the Supreme Court's decision now send to payday lenders who are thinking about violating the law?

Ms. LAITIN. It is an interesting question. They are certainly probably feeling a little more free, which is why this is so important.

You know, the thing to recall, though, is the Supreme Court said nothing about whether AMG should be allowed to keep its money or if restitution should be made. What they said was that the FTC doesn't, under the language of the statute, have the authority. So, on the policy question of whether AMG should be required to give that money back, they didn't speak on that. And that is your job, is to speak on that piece.

Ms. CLARKE. So, Mr. Mermin, to date the FTC has issued almost 1.2 million checks, totaling more than $505 million, to borrowers defrauded by this massive AMG payday lending scheme. In the wake of the Supreme Court decision, would you say that victims of scammers and fraudsters would be more likely or less likely to get their money back, even if the FTC still goes after the criminals?

Mr. MERMIN. I am afraid they would be much less likely to get their money back.

Ms. CLARKE. And would passing the Consumer Protection and Recovery Act help to address this?

Mr. MERMIN. It certainly would.

Ms. CLARKE. So millions of Americans are struggling right now to make ends meet. They are struggling to provide food for their families, keep a roof over their heads, and pay medical bills. Putting money back in people's pockets who have been defrauded or scammed seems like a no-brainer to me, and I hope we act expeditiously to pass this legislation into law.

So, Madam Chair, I want to thank you for holding this hearing. My colleague Tony Cárdenas, thank you for your leadership. And I yield back the balance of my time.

Ms. SCHAKOWSKY. The gentlelady yields back.

And now it is my honor, as we wind down this hearing, to call on the author of the legislation that, in most people's view, it seems, would address the problem of getting money back in people's pockets—the problem of not getting money back in people's pockets, and that would be the vice chair of this subcommittee, Tony Cárdenas.

Mr. CÁRDENAS. Thank you, Madam Chairwoman. And thank you for carefully and accurately explaining how, Republican and Democrat, we agree that the legislature should act, and then where we disagree, on many of the details. But I am glad that we are having this hearing so that we can have an opportunity to hear those details—but not just us—making sure that our constituents, the American people, hear this deliberation and hopefully will be paying attention and understand how important it is that the FTC be restored its authority under 13(b).

It is no mystery that Latino, Black, and Asian-owned small businesses have been hit hardest by the COVID 0919 pandemic. The numbers are real, and they are there. In addition to struggling to access pandemic relief, they are also vulnerable to predatory lenders and other scammers that are increasingly targeting small businesses.

In other words, a small business may be victimized by bad actors, much like individual consumers. So the FTC's ability to get monetary relief for victims is just as critical for small businesses as it is for individuals as well, especially during the strains of this pandemic.

That is why I stress that the Consumer Protection and Recovery Act specifically provides section 13(b) authority for the FTC to recover for small businesses, not just for individuals.

So this question I have for Mr. Mermin or Ms. Laitin: Historically, how has section 13(b) been used to get money back to small businesses who have been scammed or defrauded?

Mr. MERMIN. I can give you certainly one example, the A1 Janitorial Services case that the FTC decided—or brought in recent years. These were small businesses that were being falsely invoiced for services that had never been provided, for supplies that had never been provided.

And you are exactly right that, in many cases, a small business looks a lot like a consumer. It could indeed be an individual. And I think it is entirely appropriate to make sure that the FTC can effectively recover money for small businesses as well.

Ms. LAITIN. I will jump in as well. Thank you for the question.

Yes, FTC definitely looks out for small businesses as well. And in fact, last week, I believe the same day that the Supreme Court made its decision, they announced a settlement with Yellowstone Capital, a company that provided merchant cash advances, a kind of financial product for small businesses, that was charged—they had enormous problems with predatory practices and cost these small businesses a lot of money. It is a $9.8 million settlement.

Still looking to see what happens with that settlement following the Supreme Court case. Certainly hopeful that those small businesses will get their money back, but I don't know that we know that for sure.

Mr. CÁRDENAS. Thank you.

And I apologize, I am going to ask you to speculate a little bit, but I think that the question is pretty clear. Who tends, on any given day, to have access to more lawyers? Would you assume it would be the FTC or it would be a big company like Facebook, for example?

Mr. MERMIN. I think it is—I will judge from my time in the AG's office and my knowledge of the FTC. I think that total number of lawyers available is going to be much larger for industry. It is essentially unlimited.

Mr. CÁRDENAS. Thank you.

And, Ms. Laitin, it is no secret that in many counties across the country they have statistics on what the average income of a household is, and in some counties it might be as low as $30,000. In many counties, like Los Angeles, it is probably closer to $50,000, $60,000, et cetera.

Now, when it comes to hiring lawyers because you have been defrauded, how many families, like, in those categories could honestly afford to hire a lawyer? Is it a high percentage or a very low percentage? Or would many households just kind of throw up their hands, with tears in their eyes, and possibly say, "I just can't do anything about, I guess I have been defrauded, and I have to walk away"?

Ms. LAITIN. Unfortunately, it is probably a small number. And especially—you know, it is very costly to hire a lawyer, and if they have already lost money, that may be farther than they want to go.

Mr. CÁRDENAS. Uh-huh. Especially when it comes to most seniors, right, Ms. Laitin? Seniors tend to, on average, across America, have less disposable income, right? Correct?

Ms. LAITIN. Correct.

Mr. CÁRDENAS. And the reason why I think 13(b) is so critical is because we are talking about protecting Americans across the board. And the most common denominator in America is most American households, most American seniors, most veterans, et cetera, after being defrauded, are really not in a position to go after and protect themselves and get their money back. And that is why the FTC is there.

In this great country of America, thank God we have a Federal Trade Commission like the FTC. And 13(b) is a critical part of making sure that we have an efficient and effective opportunity to protect the American people and to restore some justice in their lives.

So, with that, Madam Chair, I yield back.

Ms. SCHAKOWSKY. The gentleman yields back.

And I believe hanging in there to be last but not least, Lizzie Fletcher, you still here?

Well, she was. OK.

Well, I want to really give a big thank you to our witnesses over the day.

And by the way, Mr. Bilirakis, if you want to make any kind of a closing thank you, that would be good too.

I want to thank our Acting FTC Chair, Rebecca Slaughter, for the time that she gave to us, to Dr. Beales, Mr. Mermin, and Ms. Laitin for the enlightenment that you provided us and for hanging in there. I know it has been a long day, and I appreciate it so very, very much.

Gus, did you want to say anything?

Mr. BILIRAKIS. Well, I just wanted to thank you again, Madam Chair, for holding this hearing.

And, Tony, well said at the end. And, hopefully, we can find some middle ground and get this done as soon as possible, because I know how important section 13(b) is and how important the FTC is to our constituents. So I appreciate you filing the bill, and let's work on this and get it done right and get it through the United States Senate.

Well, thank you very much, and we will see you next week. I yield back.

Ms. SCHAKOWSKY. OK. Thank you, Gus.

And thank you, Tony.

Mr. CÁRDENAS. Madam Chair?

Ms. SCHAKOWSKY. Yes.

Mr. CÁRDENAS. If you don't mind, as the lead author of the bill, I just want to thank all of my colleagues for the respectful manner in which we have been debating today and putting out before the people of America our concerns and our agreements and disagreements on how we can move this legislation forward.

And I just want to give a special thanks to a class act, Gus Bilirakis. Thank you so much for being so generous with your understanding of our ability to agree and disagree and continue to always want to work together. So thank you, Gus.

And, Madam Chair, thank you for this opportunity to legislate this bill.

Mr. BILIRAKIS. I think, like you said, Tony, you know, we are all here for the same goal, to protect our constituents. So thank you, sir.

And thank you, Madam Chair. I yield back.

Mr. CÁRDENAS. And to all the witnesses, thank you so, so much.

Ms. SCHAKOWSKY. Thank you.

Before we close, I request unanimous consent to enter the following documents into the record.

I will excuse our witnesses right now. You don't have to stay for this part. But, once again, just a great thank you. And I am sure we will be in touch with you as we move forward with the Consumer Protection and Recovery Act and other things that deal with the Federal Trade Commission. And your expertise is really appreciated.

So I am going to begin reading the letters and communications that we have gotten.

And let me also, though, remind Members that, pursuant to committee rules, they have 10 business days to submit additional questions for the record to be answered by the witnesses who have appeared.

So the letters include a letter of support from 32 public interest groups; a letter from Veterans Education Success endorsing H.R. 2668; an article from The New York Times; an article from The Washington Post; a letter from the Chamber of Commerce; a research paper from Beales and Muris titled "Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act;" a research paper from Beales and Muris entitled "Choice or Consequences: Protecting Privacy in Commercial Information;" a research paper from Beales and Muris titled "Privacy and Consumer Control;" a research paper from Beales and Muris and Mundel—I guess it is Beales, Muris, Mundel—titled "Section 13(b) of the Federal Trade Commission at the Supreme Court: The Middle Ground;" a Supreme Court opinion; an unofficial transcription of a Senate committee—that is April 20th, 2021—FTC hearing; and a letter from the Federal Trade Commission to Representative Latta.

That is it. And so, without objection, so ordered. Those will be added.

[The information appears at the conclusion of the hearing. 1A[1]]

Ms. SCHAKOWSKY. At this time, the subcommittee is adjourned.

[Whereupon, at 4:12 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

[1]The four Beales and Muris research papers and the Senate committee hearing transcript have been retained in House Committee on Energy and Commerce files and are available at https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112501.

.....

(Original Signature of Member)

117TH CONGRESS
1ST SESSION

H. R. 2668

To amend the Federal Trade Commission Act to affirmatively confirm the authority of the Federal Trade Commission to seek permanent injunctions and other equitable relief for violations of any provision of law enforced by the Commission.

IN THE HOUSE OF REPRESENTATIVES

Mr. CÁRDENAS introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Federal Trade Commission Act to affirmatively confirm the authority of the Federal Trade Commission to seek permanent injunctions and other equitable relief for violations of any provision of law enforced by the Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consumer Protection and Recovery Act".

SEC. 2. FTC AUTHORITY TO SEEK PERMANENT INJUNCTIONS AND OTHER EQUITABLE RELIEF.

(a) PERMANENT INJUNCTIONS AND OTHER EQUITABLE RELIEF.—Section 13 of the Federal Trade Commission Act (15 U.S.C. 53) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by inserting "has violated," after "corporation";

(B) in paragraph (2)—

(i) by striking "that" and inserting "that either (A)"; and

(ii) by striking "final," and inserting "final; or (B) the permanent enjoining thereof or the ordering of equitable relief under subsection (e),"; and

(C) in the matter following paragraph (2)—

(i) by striking "to enjoin any such act or practice";

(ii) by striking "Upon" and inserting "In a suit under paragraph (2)(A), upon";

(iii) by striking "without bond";

(iv) by striking "proper cases" and inserting "a suit under paragraph (2)(B)";

(v) by striking "injunction." and inserting "injunction, equitable relief under

subsection (e), or such other relief as the court determines to be just and proper, including temporary or preliminary equitable relief.";

(vi) by striking "Any suit" and inserting "Any suit under this subsection"; and

(vii) by striking "In any suit under this section" and inserting "In any such suit"; and

(2) by adding at the end the following:

"(e) EQUITABLE RELIEF.—

"(1) RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.—In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, with respect to the violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.

"(2) DISGORGEMENT.—In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a person, partnership, or corporation obtained as a result of the violation that gives rise to the suit.

"(3) CALCULATION.—Any amount that a person, partnership, or corporation is ordered to pay under paragraph (2) with respect to a violation shall be offset by any amount such person, partnership, or corporation is ordered to pay, and the value of any property such person, partnership, or corporation is ordered to return, under paragraph (1) with respect to such violation.

"(4) LIMITATIONS PERIOD.—

"(A) IN GENERAL.—A court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought.

"(B) CALCULATION.—For purposes of calculating the beginning of the period described in subparagraph (A), any time during which an individual against which the equitable relief is sought is outside of the United States shall not be counted.".

(b) CONFORMING AMENDMENTS; TECHNICAL CORRECTION.—Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(1) in subparagraph (A), by striking "(relating to injunctive relief)";

(2) in subparagraph (B), by striking "(relating to consumer redress)"; and

(3) in subparagraph (D), by striking "subpena" and inserting "subpoena".

(c) APPLICABILITY.—The amendments made by this section shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of the enactment of this Act.

April 26, 2021

The Honorable Maria Cantwell, Chair
The Honorable Roger Wicker, Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

The Honorable Frank Pallone, Jr. Chairman
The Honorable Cathy McMorris Rodgers, Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: Call to update Federal Trade Commission's enforcement tools under the FTC Act, Section 13(b)

Dear Chairs Cantwell and Pallone and Ranking Members Wicker and McMorris Rogers:

The undersigned consumer and privacy organizations, representing millions of American consumers, write to convey our strong support for legislative action to ensure that the Federal Trade Commission has the full range of equitable authority to curb unfair, deceptive, fraudulent and anticompetitive acts and practices. While the FTC plays a critical role in protecting both consumers and businesses, the agency's ability to protect consumers has been seriously compromised by the Supreme Court's recent decision in *AMG Capital Management, LLC, et al. v. Federal Trade Commission*. In that case, the Court held that the Commission does not have the ability to obtain equitable monetary relief in its 13(b) enforcement actions. In this letter, we urge you to act to amend the FTC Act to ensure that the Commission's full slate of enforcement tools, including its ability to seek injunctive as well as monetary and equitable remedies on behalf of consumers affected by violations of the law, is preserved. Indeed, we urge that the Commission's powers to protect consumers be expanded, not curtailed as some seek to do.

The timing is urgent. Millions of Americans including seniors, servicemembers, and others are facing widespread fraud in the wake of the COVID-19 pandemic. The Commission reported that it received 2.2 million fraud reports from consumers in 2020, in the midst of the COVID-19 health and financial crisis – an almost 33% jump from the year before.[1]

The FTC historically relied on Section 13(b) of the Federal Trade Commission Act to hold bad actors accountable when they violate the law. Last week's Supreme Court decision takes away essential remedial powers that had been effectively used for decades to deprive wrongdoers of the profits of their illegal activities. Consequently, the FTC's ability to prosecute and deter wrongdoers will be seriously weakened going forward. The ability to obtain remedial injunctive relief has always been essential in the FTC's fight against consumer fraud, and that is especially true today.

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[1] Federal Trade Commission, *New Data Shows FTC Received 2.2 Million Fraud Reports from Consumers in 2020*, Feb. 4, 2021, https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers

Enforcement of laws under its jurisdiction is one of the Commission's integral functions and serves as a necessary safeguard to help maintain an open and honest marketplace for consumers and businesses. First, the FTC should be able to not only seek injunctions to stop illegal and harmful acts as they are occurring, but also turn to the courts to seek temporary restraining orders and injunctions to eradicate these acts even when violators of the law appear to have voluntarily ended the respective illegal practice. That way, the Commission can ensure that scams or other risky behavior will likely not be restarted.

Second, disgorgement and restitution are critical aspects of the Commission's enforcement authority. It is essential that perpetrators of anticompetitive, or unfair, fraudulent and deceptive acts or practices not be allowed to retain all the benefits of their illegal conduct. If wrongdoers continue profiting from their harmful behavior without accountability, they will be motivated to continue breaking the law, knowing that they can carry on and reap the benefits while suffering few if any consequences. This perverse incentive system hurts consumers and honest, law-abiding business competitors.

Therefore, it is crucial that the Commission have the ability to obtain equitable relief including but not limited to restitution and disgorgement. Monetary remedies compensate seniors, veterans and other consumers for their losses and help to restore fairness by deterring unlawful practices. The FTC Act does not provide a private right of action for harmed consumers to seek remedies against bad actors on their own. It is the Commission's responsibility to obtain relief for victims and to provide meaningful accountability on the public's behalf.

We echo the views of the bipartisan group of FTC commissioners who have called for Congress to pass legislation to clearly establish the agency's ability to disgorge wrongdoers' ill-gotten gains and to obtain essential equitable remedies. Notably, we share the urgent concern expressed in the October 22, 2020 letter to Congress signed by all five commissioners, and in the recent congressional testimony of William Kovacic, a former chair, member, and general counsel of the FTC. We agree, with former Chair Kovacic, that the Commission should have the "power to obtain the full range of equitable remedies, including monetary recoveries as remedies for consumer protection violations."[2]

While this legislation is necessary to restore the Commission's equitable authorities, more should be done to bolster the Commission if Congress is truly committed to protecting U.S. consumers and honest businesses from the frauds and scams that are proliferating in today's economy. We urge Congress to, at a minimum, act to provide the FTC with broad-based penalty authority, establish a penalty authority fund to reimburse consumers for their loses, allow the FTC to establish rules using the Administrative Procedure Act, and provide the Commission with the resources it needs to accomplish its broad mission.

But most immediately, in light of the *AMG Capital Management* decision, we urge Congress to amend Section 13(b) of the FTC Act and ensure that the Commission is authorized to vigorously enforce laws and obtain adequate remedies for the marketplace.

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[2] Written Testimony of William E. Kovacic before the U.S House of Representatives, Committee on Energy and Commerce, Hearing Before the Subcommittee on Consumer Protection and Commerce, *Safeguarding American Consumers: Fighting Frauds and Scams During the Pandemic*, February 4, 2021.

Thank you for considering our views.

Sincerely,

Access Now
American Association for Justice
Americans for Financial Reform
California Reinvestment Coalition
Campaign for a Commercial-Free Childhood
Center for Digital Democracy
Center for Justice & Democracy
Common Sense
Consumer Action
Consumer Federation of America
Consumer Reports
Electronic Frontier Foundation (EFF)
Jacksonville Area Legal Aid
Main Street Alliance
Media Alliance
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
New America's Open Technology Institute
Privacy Rights Clearinghouse
Public Citizen
Public Good Law Center
Public Justice
Public Knowledge
Public Law Center
Strategic Organizing Center
Texas Appleseed
truthinadvertising.org (TINA.org)
Tzedek DC
U.S. PIRG
Woodstock Institute

VETERANS EDUCATION SUCCESS®

April 27, 2021

The Honorable Maria Cantwell, Chair
The Honorable Roger Wicker, Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

The Honorable Frank Pallone, Jr. Chairman
The Honorable Cathy McMorris Rodgers, Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: Call to update Federal Trade Commission's enforcement tools under FTC Act, Section 13(b)

Dear Chairs Cantwell and Pallone and Ranking Members Wicker and McMorris Rogers:

We represent servicemembers, veterans, and their families and are writing to convey our strong support for legislative action to ensure that the U.S. Federal Trade Commission (FTC) has the full range of equitable authority to curb unfair, deceptive, fraudulent and anticompetitive acts and practices, particularly under section 13(b) of the Federal Trade Commission Act. That's why we endorse H.R. 2668, the "Consumer Protection and Recovery Act."

Active duty and reserve servicemembers, family members, survivors, and veterans are frequent targets of deceptive and fraudulent activities. Holly Petraeus, former head of the Office of Servicemember Affairs at the Consumer financial Protection Bureau, said this happens because "[i]n this uncertain world, [scammers] get an absolutely guaranteed paycheck".[1] We urge you to amend the FTC Act to ensure the FTC can seek injunctive as well as monetary and equitable remedies for violating these important consumer protection provisions.

Over the last four years, the FTC has logged over 378,000 complaints from veterans. Over 24,000 of those reported a loss, with total losses of $205 million. Veterans had a median loss of $755 and active duty servicemembers who reported a median loss of $500 over the same period.[2]

In recent years the FTC has protected the interests of servicemembers, the reserve component, their families, survivors and veterans in important actions, including:

- In 2019, the FTC recouped $191 million for students – many of them servicemembers and veterans – who had been deceived by deceptions by the University of Phoenix about its

[1] Debra O'Connor, Watchdog: Military Members at Special Risk For Scams, *St. Paul Pioneer Press* (2015), https://www.twincities.com/2012/11/10/watchdog-military-members-at-special-risk-for-scams/amp/ (last accessed April 26, 2021).
[2] Available at: https://www.consumer.ftc.gov/blog/2020/11/veterans-and-imposter-scams-0?utm_source=govdelivery (last accessed April 25, 2021).



graduates' employment prospects. The agreement brought $141 million in debt forgiveness and $50 million in cash payments through the FTC's use of 13(b) authority.[3]

- Also in 2019, the FTC delivered $30 million in consumer redress for students – many of them veterans – who were lured to Career Education Corporation schools based on false pretenses.[4]
- In 2018, the FTC action shut down scam "military" websites that targeted patriotic Americans seeking to join the U.S. Armed Forces but then steered them away from military service and into for-profit colleges. With domain names like "Army.com," "NavyEnlist.com," and "Air-Force.com," these websites appeared to be official military recruiting pages. Because the U.S. Armed Forces are all volunteer, these websites also interfered with military readiness by siphoning away military recruits. The FTC's settlement included penalties under section 13(b) of the FTC Act.[5]
- In 2017, the FTC forced accurate disclosures on "military-friendly" rankings of colleges and universities that allegedly functioned as a "pay to play" scheme that deceived tens of thousands of veterans.[6]
- In 2016, the FTC recouped $100 million (roughly half cash and half debt relief) to students – many of them veterans and military students – who were misled by Devry University's false claims about job prospects and job placement in its advertisements.

Each of these FTC actions were extremely important to the veterans and military community, as reflected in the attached letters from dozens of veterans and military service organizations.[7] It is not clear that any of these FTC actions, which compel critical things like student debt relief and revocation of taxpayer subsidies, and which serve to protect hard-earned military benefits, would have been possible without the FTC's powers under section 13(b).

Last year the FTC's Consumer Protection Data Spotlight found that active duty servicemembers are 76 percent more likely than other adults to report that an identity thief misused existing accounts, such as a

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[3] Statement of Commissioner Rohit Chopra, *In the Matter of University of Phoenix Commission File Number 1523231* (December 10, 2019), available at: https://www.ftc.gov/system/files/documents/public_statements/1557180/152_3231_statement_of_commissioner_rohit_chopra_0.pdf (last accessed April 25, 2021). *See also* https://www.ftc.gov/system/files/documents/cases/de_15_stipulated_order_for_permanent_injunction_and_monetary_judgment.pdf (last accessed April 26, 2021).

[4] FTC Press Release, "Operator of Colorado Technical University and American InterContinental University Will Pay $30 Million to Settle FTC Charges it Used Deceptive Lead Generators to Market its Schools" (August 27, 2019), available at: https://www.ftc.gov/news-events/press-releases/2019/08/operator-colorado-technical-university-american-intercontinental (last accessed April 25, 2021).

[5] Andrew Kreighbaum, FTC Shuts Down Scam Military Websites, *Inside Higher ED* (2017), https://www.insidehighered.com/quicktakes/2018/09/07/ftc-shuts-down-scam-military-websites (last accessed April 26, 2021); https://www.ftc.gov/system/files/documents/cases/sunkey_proposed_order.pdf?utm_source=govdelivery (last accessed April 26, 2021).

[6] Andrew Kreighbaum, Crackdown on 'Pay to Play' for 'Military-Friendly' Colleges, *Inside Higher Ed* (2018), https://www.insidehighered.com/news/2017/10/20/ftc-settlement-says-rankings-military-friendly-colleges-were-deceptive-promotions (last accessed Apr 26, 2021).

[7] Available at: https://vetsedsuccess.org/our-letter-to-ftc-regarding-fake-military-recruiting-websites/ (last accessed April 27, 2021)

bank account or credit card. [8] This is an absolutely critical problem because foreign state and non-state actors are constantly attempting to impersonate American military personnel. Identity theft leading to financial hardship can also result in the loss of a security clearance and ultimately result in unemployment for military personnel. The FTC's 13(b) authority has helped bring these victims some measure of justice and a step closer to recovery.

It is crucial that Congress act to protect American servicemembers, the reserve component, their families, survivors, and veterans before emboldened scam artists try to cheat them out of their hard-earned benefits.

Sincerely,

Veterans Education Success

[8] FTC Press Release, "Active Duty Servicemembers are More likely to Report Identity Theft than Other Adults, New FTC Data Shows" (May 21, 2020), available at: https://www.ftc.gov/news-events/press-releases/2020/05/active-duty-servicemembers-are-more-likely-report-identity-theft (last accessed April 26, 2021).

The New York Times | https://www.nytimes.com/2021/04/08/technology/vaccine-card-scam.html

Online Scammers Have a New Offer for You: Vaccine Cards

Hundreds of sellers are offering false and stolen vaccine cards, as businesses and states weigh proof of vaccinations for getting people back to work and play.



By Sheera Frenkel

Published April 8, 2021 Updated April 26, 2021

SAN FRANCISCO — On Etsy, eBay, Facebook and Twitter, little rectangular slips of paper started showing up for sale in late January. Printed on card stock, they measured 3 by 4 inches and featured crisp black lettering. Sellers listed them for $20 to $60 each, with a discount on bundles of three or more. Laminated ones cost extra.

All were forgeries or falsified copies of the Centers for Disease Control and Prevention vaccination cards, which are given to people who have been inoculated against Covid-19 in the United States.

"We found hundreds of online stores selling the cards, potentially thousands were sold," said Saoud Khalifah, the founder of Fakespot, which offers tools to detect fake listings and reviews online.

The coronavirus has made opportunists out of many people, like those who hoarded bottles of hand sanitizer at the start of the pandemic or those who cheated recipients out of their stimulus checks. Now online scammers have latched on to the latest profit-making initiative: the little white cards that provide proof of shots.

Online stores offering counterfeit or stolen vaccine cards have mushroomed in recent weeks, Mr. Khalifah said. The efforts are far from hidden, with Facebook pages named "vax-cards" and eBay listings with "blank vaccine cards" openly hawking the items.



A screenshot of a "vax cards" page on Facebook.

Selling fake vaccination cards could break federal laws that forbid copying the C.D.C. logo, legal experts said. If the cards were stolen and filled out with false numbers and dates, they could also violate identity theft laws, they said.

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What You Need to Know About the Johnson & Johnson Vaccine Pause in the U.S.

- On April 23, a Centers for Disease Control and Prevention panel of advisers voted to recommend lifting a pause on the Johnson & Johnson Covid vaccine and adding a label about an exceedingly uncommon but potentially dangerous blood clotting disorder.
- Federal health officials are expected to formally recommend that states lift the pause.

- Administration of the vaccine ground to a halt recently after reports emerged of a rare blood clotting disorder in six women who had received the vaccine.
- The overall risk of developing the disorder is extremely low. Women between 30

SEE MORE

But profiteers have pressed ahead as demand for the cards has grown from anti-vaccine activists and other groups. Airlines and other companies have recently said they may require proof of Covid-19 immunization so that people can safely travel or attend events.

The cards may also become central to "vaccine passports," which offer digital proof of vaccinations. Some tech companies developing vaccine passports ask people to upload copies of their C.D.C. cards. Los Angeles also recently began using the C.D.C. cards for its own digital proof of immunization.

Last week, 45 state attorneys general banded together to call on Twitter, Shopify and eBay to stop the sale of false and stolen vaccine cards. The officials said they were monitoring the activity and were concerned that unvaccinated people would misuse the cards to attend large events, potentially spreading the virus and prolonging the pandemic.

"We're seeing a huge market for these false cards online," said Josh Shapiro, Pennsylvania's attorney general, whose office has investigated fraud related to the virus. "This is a dangerous practice that undermines public health."

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The C.D.C. said it was "aware of cases of fraud regarding counterfeit Covid-19 vaccine cards." It asked people not to share images of their personal information or vaccine cards on social media.

Facebook, Twitter, eBay, Shopify and Etsy said that the sale of fake vaccine cards violated their rules and that they were removing posts that advertised the items.

The C.D.C. introduced the vaccination cards in December, describing them as the "simplest" way to keep track of Covid-19 shots. By January, sales of false vaccine cards started picking up, Mr. Khalifah said. Many people found the cards were easy to forge from samples available online. Authentic cards were also stolen by pharmacists from their workplaces and put up for sale, he said.

Many people who bought the cards were opposed to the Covid-19 vaccines, Mr. Khalifah said. In some anti-vaccine groups on Facebook, people have publicly boasted about getting the cards.

"My body my choice," wrote one commenter in a Facebook post last month. Another person replied, "Can't wait to get mine too, lol."

Other buyers want to use the cards to trick pharmacists into giving them a vaccine, Mr. Khalifah said. Because some of the vaccines are two-shot regimens, people can enter a false date for a first inoculation on the card, which makes it appear as if they need a second dose soon. Some pharmacies and state vaccination sites have given priority to people due for their second shots.

The tweet linked to a now-defunct Etsy shop that sold fake vaccine cards.

One Etsy seller, who declined to be identified, said she had sold dozens of fake vaccine cards for $20 each recently. She justified her actions by saying she was helping people evade a "tyrannical government." She added that she did not plan to get inoculated.

Vaccine proponents say they have been troubled by the proliferation of forged and stolen cards. To hold those people accountable, Savannah Sparks, a pharmacist in Biloxi, Miss., began posting videos on TikTok last month naming the sellers of falsified vaccine cards.

In one video, Ms. Sparks explained how she had tracked down the name of a pharmacy technician in Illinois who had nabbed several cards for herself and her husband and then posted about it online. The pharmacy technician had not disclosed her identity, but had linked the post to her social media accounts, where she used her real name. The video has 1.2 million views.

"It made me so mad that a pharmacist was using her access and position this way," Ms. Sparks said. The video drew the attention of the Illinois Pharmacists Association, which said it had reported the video to a state board for further investigation.

Ms. Sparks said her work had drawn detractors and vaccine opponents, who have threatened her and posted her home phone number and address online. But she was undeterred.

"They should be first in line advocating for people to get vaccinated," she said of pharmacists. "Instead, they're trying to use their positions to spread fear and help people circumvent getting the vaccine."

Mr. Shapiro, the Pennsylvania attorney general, said that in addition to violating federal copyright laws, the sale of counterfeit and stolen cards most likely broke civil and consumer protection laws that mandate that an item can be used as advertised. The cards could also violate state laws regarding impersonation, he said.

"We want to see them stop immediately," Mr. Shapiro said of the fraudsters. "And we want to see the companies take serious and immediate action."

The Washington Post
Democracy Dies in Darkness

'Ripe for fraud': Coronavirus vaccination cards support burgeoning scams

Officials warn that falsified cards could endanger lives and undermine efforts to end the pandemic

By **Dan Diamond**

April 18, 2021 at 3:15 p.m. EDT

One listing offered eBay customers an "Authentic CDC Vaccination Record Card" for $10.99. Another promised the same but for $9.49. A third was more oblique, offering a "Clear Pouch For CDC Vaccination Record Card" for $8.99, but customers instead received a blank vaccination card (and no pouch).

All three listings were posted by the same eBay user, who goes by "asianjackson" — using an account registered to a man who works as a pharmacist in the Chicago area — and all were illegal, federal regulators say. The account sold more than 100 blank vaccination cards in the past two weeks, according to The Washington Post's review of purchases linked to it.

The listings are a "perfect example" of burgeoning scams involving coronavirus vaccination cards that could undermine people's safety, as well as the success of the nation's largest mass vaccination effort, said Nortb Carolina Attorney General Josh Stein. Individuals might use them to misrepresent their vaccination status at school, work or in various living and travel situations, potentially exposing others to risk.

Stein, who led a recent effort with 47 colleagues demanding that eBay and other e-commerce platforms crack down on the scams, pointed to the FBI's warning that anyone who makes or buys a fake vaccine card is breaking the law, and said he would consider prosecution, too.

"This is a concern that is national and bipartisan," Stein added, saying the spread of fake vaccination cards "will extend the pandemic, resulting in more people sick and more people dead."

At least 129.5 million Americans have gotten at least one or both doses of a coronavirus vaccine and have received a free proof-of-vaccination card with the logo of the Centers for Disease Control and Prevention, as officials push to inoculate the nation. But that vaccination drive has pitted people like asianjackson, selling blank or fake credentials, against law enforcement officials rushing to stop them — and warning that the full scope of the problem is impossible to grasp.

The clash has escalated as businesses and universities say they'll require proof of vaccination before allowing Americans to board cruises, enter some stores and even return to college classes, prompting some vaccine-hesitant

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For months, officials have been a step behind the scammers, who have openly discussed strategies to fake the cards on social media, sold them on sites such as eBay and pulled blank photos off state websites. Federal officials' decision to use paper cards tbat can be easily photocopied or even printed off a template, rather than a digital tracking system, worsened those risks.

"This is exactly the scenario that you want to guard against. It undermines the entire effort by having falsified cards out there," said Jennifer Kates, who oversees global health policy for the Kaiser Family Foundation and reviewed asianjackson's eBay listings. "It certainly holsters the argument for a digitized mechanism — which isn't a tamper-proof system, hut certainly a more secure one."

"Paper *anything* is ripe for fraud," said Nenette Day, an assistant special agent in charge at the Department of Health and Human Services' inspector general's office who oversees whistleblower tips. Day said she bas reviewed dozens of reported vaccination-card scams that range from Americans stealing blank cards to sharing tips on how to fake a card on social media. She described the trend as among the most frustrating chapters in a 20-year career that included responding to the 9/11 terrorist attacks as an FBI agent.

"I feel like nobody has taken this to its natural conclusion," Day said, hypothesizing about a scenario where an unvaccinated person could illegally create a vaccination card and pretend to be immunized, using that to enter a high-risk environment such as a nursing home, then unknowingly spread the virus, potentially resulting in someone's death. "It disturbs me, having been in law enforcement this long, this flippant attitude that people have."

While e-commerce platforms cracked down on listings after recent news reports, there are already signs that the supply of the cards is bouncing back, said Saoud Khalifah, chief executive of Fakespot, a company that specializes in

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to skip the line [and] say, 'Hey, I got dose one, can I get dose two?' "

Easy-to-copy cards

Some federal officials involved in the vaccine drive said that last summer, they had initially discussed using digital systems to track the vaccine push and to help Americans manage getting shots. CDC officials believed they could harness the nation's dozens of immunization information systems, which track shots administered by providers within a specific geographic area.

"IT/data infrastructure supports entire distribution, ordering, tracking process from end-to-end," according to a July slide deck about the CDC's planned vaccine rollout that was obtained by The Washington Post. The slide deck made no mention of using paper cards.

A CDC letter sent the following week, also obtained by The Post, similarly touted using IT systems to manage the vaccine rollout, including "record-keeping for the vaccine recipient," with no mention of paper cards.

Pamela Schweitzer, a retired assistant surgeon general who helped with the coronavirus response last year, said that she and her colleagues were aware in June that the CDC was focusing on a "comprehensive IT infrastructure" to help Americans track their vaccinations before opting for paper cards as a fallback later in the year.

A former administration official closely involved in the vaccine effort who spoke on the condition of anonymity to discuss private conversations confirmed initial plans for "a digital system with digital reminders about when to get your shot, like, 'Your library book is due in five days.' " But technical setbacks and time pressure forced the administration to rely instead on paper cards, which the CDC had positioned as a "fail-safe," the official said.

"If there had been a vaccine during the 1918 flu pandemic, you could probably have used the same exact card — just

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Paul Mango, a former Trump administration official who helped oversee Operation Warp Speed, the administration's vaccine accelerator, acknowledged that "there were many complexities, technical and otherwise, associated with digital vaccination tracking, so for exigency purposes, we fell back on vaccination cards."

While state and local immunization registries do store individual coronavirus vaccination data, officials said there's no current system that would allow businesses, schools and other organizations to easily check the databases to see if a visitor was presenting a falsified paper card.

HHS did not respond to questions about health officials' decision to opt for paper cards and whether that increased the risk of scams. An HHS spokesperson pointed to an October playbook that instructed accredited vaccinators to provide "a completed COVID-19 vaccination record card to every vaccine recipient/parent/legal representative."

Private-sector organizations, including pharmacies such as Walmart and Walgreens, have recently mounted a push for using digital "vaccine passports" for Americans to prove they've gotten shots, arguing such systems would better track vaccinations and protect against fraud. But federal officials have struggled to corral the initiatives and adopt a standardized approach, particularly as the issue has become politicized in recent weeks.

Even as puhlic health officials warn about the risk of fraud, some states have inadvertently boosted it. The Post identified several states, including Tennessee and Texas, that posted blank card templates to their bealth department websites among their coronavirus-related resources. Some social media users have boasted that they had printed the documents to produce their own fake cards.

Day, the official at the HHS's inspector general's office, recounted an explosion of whistleblower tips related to vaccination card scams in the past month. "On any given day, it's 40 to 50 percent of our covid-related complaints," she said.

One report was about a woman who worked in a vaccination clinic and gave a blank card to her boyfriend. The boyfriend then detailed on social media how he had filled in the card himself and bragged about the accomplishment, Day said.

Schweitzer, who has volunteered at multiple vaccination clinics across Arizona, compared the abundance of blank vaccination cards at those sites to doctors not protecting their prescription pads.

"There's limited control over these cards," she said. "They're all over the place. It's pretty easy to get a stack."

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Asianjackson — the eBay account maintained by a man who works at a Chicago-area location of a national pharmacy chain — sold at least 110 blank vaccination cards through eBay, including 50 cards alone on April 11, according to a Post review. The Post obtained one of those cards, which was identical to the CDC vaccination cards dispensed by pharmacies, and sent from a Zip code in the greater Chicago area.

Law enforcement officials said they are alarmed by the possibility that eBay users such as asianjackson are taking blank cards from pharmacies or other health-care facilities where they work.

"That's very troubling," said Stein, the North Carolina attorney general. "That's an instance where it's an actually authentic card but illegally acquired and sold."

When contacted by The Post through the full name offered on the eBay sales receipt, the man who uses the "asianjackson" account confirmed he lives in the Chicago area and works in a pharmacy, and listed other items sold through the account, such as empty boxes from luxury-goods retailers like Hermès and Chanel. But he claimed he had not used eBay this month and had no knowledge of any vaccination card sales.

"I need to get that straightened out with eBay," the man said, claiming he had stopped using the service after his password was unexpectedly changed about two weeks ago. The Post is not identifying him because he disputes he sold the cards.

After The Post brought the listings to eBay's attention on Thursday, the company removed them. "Our team has reviewed and taken appropriate action," said eBay spokesperson Parmita Choudhury, who declined to disclose additional details about the account.

Pharmacies insist they have protections in place to track the blank cards they receive and would know if any cards were wrongly removed.

"Our pharmacies receive a limited number of CDC dose cards as part of the CDC immunization supply kits shipped to the stores that are receiving and administering coronavirus vaccines," Walgreens spokesperson Erin Loverher said in a statement.

"We store and monitor the vaccination cards in our pharmacies and each vaccine card is a 1:1 match for the vaccine doses in a pharmacy's inventory, so we would know if any are missing," said Mike DeAngelis, a CVS spokesperson.

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Scammers exploit selfies

Still, scammers have had a field day, getting plenty of help from the public, not just in making fake cards but also in committing identity theft: Many Americans put pictures of their vaccination cards online, sharing information such as the day of their shot, their birthdays and other identifying details. The trend, intended to boost vaccine acceptance, has alarmed regulators. "While the #COVID19 vaccine helps protect against the virus, posting your vaccine card online opens you up to another type of plague—scammers who would use the document to steal your identity," Ashley Moody, Florida's attorney general, wrote on Twitter in February.

Day agreed that those pictures have helped scammers get the details right, including vaccine manufacturer and lot information. "They can fill out their cards, which would have at least some level of legitimacy, because they had the right numbers and letters for the lot numbers," she said.

Khalifah, the Fakespot CEO, said regulators face persistent challenges because of how easy the cards are to exploit.

"Let's speak bluntly about this. We're talking about paper and stamps — technology that's been around for a while," Khalifah said, adding that some people selling cards online are involved in other long-running scams. "There's overlap with these stores and others selling fake Gucci bags. They'll leverage fake reviews, fake upvotes. There's a lot of fraud."

Officials said it's impossible to get a true picture on the number of Americans who have faked vaccine cards themselves or have bought them online. "It's not the kind of thing that the person buying is going to report. In some ways, they're complicit," Stein said.

"Anything that's going to delay the end of this pandemic is incredibly unfortunate and counterproductive," he added. "These vaccine cards will do just that."

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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

April 26, 2021

The Honorable Janice D. Schakowsky
Chair
Subcommittee on Consumer
Protection and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Gus M. Bilirakis
Ranking Member
Subcommittee on Consumer
Protection and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

We write concerning the Federal Trade Commission's ("FTC") statutory authority under Section 19 of the Federal Trade Commission Act of 1914 ("the Act") ahead of a subcommittee hearing entitled "The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers," to be held on April 27, 2021.

The Chamber has been in conversation with our members over proposed legislative text designed to address a core concern the FTC has over its ability to seek monetary relief in certain types of fraud cases. We believe that the ability for the FTC to seek and the courts to award monetary relief in such cases is consistent with long standing Congressional intent for such fraudulent activities. However, as the Supreme Court decided last week in a unanimous, 9-0 decision authored by Justice Breyer, the Federal Trade Commission has not followed the law.

Congressional intent and the FTC's statutory authority to seek monetary damages are found within Section 19 of the Act. However, the FTC has chosen not to use Section 19 as it requires the FTC to first use its administrative authorities to determine a violation before going to court and then to prove that a reasonable person should have known they were violating the law.

Instead, as the Supreme Court explained, the FTC has chosen to "circumvent" the "important limitations" in Section 19 by seeking injunctive relief under 13b, avoiding its own administrative process, as well as seeking unbounded monetary relief while avoiding Section 19's statute of limitations. *See AMG v. FTC* slip op. 9-10 (Apr. 22, 2021). As the Supreme Court makes clear, the text of the statutes only allows the FTC to seek, and the courts to grant, monetary relief under Section 19, not Section 13b.

The FTC is arguing for a legislative change under the guise that it needs the appropriate tools to combat "scams." However, instead of asking for a legislative solution that empowers the

agency to target such abhorrent practices, the agency is asking for a sweeping expansion of its authority that would allow the agency to universally seek monetary damages under Section 13b.

The Chamber supports a legislative solution that is narrowly crafted to address "scams," however, we oppose H.R. 2668, the "Consumer Protection and Recovery Act" because it goes well-beyond the issues raised as part of last week's Supreme Court decision or the FTC's stated need to combat "scams". Our concerns with H.R. 2668 are outlined below:

13b Monetary Relief

H.R. 2668 is seeking to extend 13b authority beyond injunctive relief to now include restitution and/or disgorgement remedies. It is important to recognize that 13b authority found within the Act applies universally to the laws the FTC enforces. As a result, attempts to import the monetary authority Congress gave the FTC in Section 19 into section 13b, expands monetary relief to many more consumer protection cases beyond the scope of Section 19, but also to antitrust cases. Such an expansion is deeply problematic without corresponding safeguards against misuse.

One of the most important safeguards is the "reasonable person standard" Congress wrote into the Section 19 statute. Monetary relief should not be available for every consumer protection violation but should be reserved for the most egregious types of cases. Section 19 recognizes this by inserting a "reasonable person test" for the courts to utilize, however, H.R. 2668 fails to include such a standard in its proposed text.

In addition, extending monetary relief as a statutory remedy for antitrust violations prosecuted by the FTC is similarly problematic. Antitrust violations are routinely subject to actions by private plaintiffs, where compensation and treble damages are awarded. Subjecting antitrust violations to restitution and/or disgorgement fails to recognize the role private litigation plays and the way those harmed by antitrust violations are already effectively compensated.

Further, the Chamber has concerns about establishing expanded statutory authority for the FTC to seek monetary relief in competition cases this new authority would not extend to the Department of Justice. While we have two agencies that enforce the antitrust laws, we have one law. The law does not distinguish which companies go before which agencies. It becomes a fundamental due process consideration if the FTC has a different remedy tool kit for civil enforcement.

"Has Violated"

H.R. 2668 creates the ability within 13b to go after conduct that is no longer occurring. Currently, 13b, which is focused on injunctive relief, is targeted at conduct that is occurring in the market or is about to occur in the market. It does not provide for the ability to seek injunctive relief for conduct that has occurred in the past. It is unnecessary to block conduct that is no longer occurring in the market, further, if the ceased conduct may occur again, the FTC can seek an injunction at that point. It can also under existing law seek an injunction if it believes it may or likely resume.

The ability to target past conduct is presumably important to the agency, not in the context of seeking an injunction to prohibit such conduct, but to go after monetary relief for conduct that has ceased. This is a result of the FTC seeking to make 13b no longer just about injunctive relief, but now to also include monetary relief. A major problem with the insertion of "has violated" into 13b is the draft language offers no clear statute of limitation for how far back the agency can go to address past conduct that is no longer occurring in the market. Such an open-ended authority is ripe for abuse.

All of these concerns, including potential solutions, were raised last week in the Senate Commerce hearing on 13b by Commissioner Wilson and Commissioner Phillips. The Chamber is willing to work with the sponsors of H.R. 2668 to address these concerns we agree the FTC need to be able to go to court and seek appropriate equitable monetary relief for clearly fraudulent cases that are found to be in violation of the law. However, the Chamber will continue to oppose changes to 13b that would dramatically expand FTC authority beyond the purported reason being given to justify the legislation.

Sincerely,



Neil L. Bradley

cc: Members of the Committee on Energy and Commerce

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMG CAPITAL MANAGEMENT, LLC, ET AL. *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–508. Argued January 13, 2021—Decided April 22, 2021

The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices in violation of §5(a) of the Federal Trade Commission Act. The District Court granted the Commission's request pursuant to §13(b) of the Act for a permanent injunction to prevent Tucker from committing future violations of the Act, and relied on the same authority to direct Tucker to pay $1.27 billion in restitution and disgorgement. On appeal, the Ninth Circuit rejected Tucker's argument that §13(b) does not authorize the award of equitable monetary relief.

Held: Section 13(b) does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement. Pp. 3–15.

(a) Congress granted the Commission authority to enforce the Act's prohibitions on "unfair or deceptive acts or practices," 15 U. S. C. §§45(a)(1)–(2), by commencing administrative proceedings pursuant to §5 of the Act. Section 5(*l*) of the Act authorizes the Commission, following completion of the administrative process and the issuance of a final cease and desist order, to seek civil penalties, and permits district courts to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." §45(*l*). Section 19 of the Act further authorizes district courts (subject to various conditions and limitations) to grant "such relief as the court finds necessary to redress injury to consumers," §57b(b), in cases where someone has engaged in unfair or deceptive conduct with respect to which the Commission has issued a final cease and desist order applicable to that person, see §57b(a)(2). Here, the Commission responded to Tucker's payday lending practices

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by seeking equitable monetary relief directly in district court under §13(b)'s authorization to seek a "permanent injunction." In doing so, the Commission acted in accordance with its increasing tendency to use §13(b) to seek monetary awards without prior use of the Commission's traditional administrative proceedings. The desirability of the Commission's practice aside, the question is whether Congress, by enacting §13(b) and using the words "permanent injunction," granted the Commission authority to obtain monetary relief directly from courts and effectively bypass the requirements of the administrative process. Pp. 3–6.

(b) Section 13(b) does not explicitly authorize the Commission to obtain court-ordered monetary relief, and such relief is foreclosed by the structure and history of the Act. Section 13(b) provides that the "Commission may seek . . . a permanent injunction." §53(b). By its terms, this provision concerns prospective injunctive relief, not retrospective monetary relief. Section 13(b) allows the Commission to go directly to district court when the Commission seeks injunctive relief pending administrative proceedings or when it seeks only a permanent injunction. Other statutory provisions, in particular the conditioned and limited monetary relief authorized in §19, confirm this conclusion. It is highly unlikely that Congress, without mentioning the matter, would grant the Commission authority to circumvent its traditional §5 administrative proceedings. Pp. 6–10.

(c) The Commission's contrary arguments are unavailing. First, *Porter* v. *Warner Holding Co.*, 328 U. S. 395, and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, did not adopt a universal rule that statutory authority to grant an injunction automatically encompasses the power to grant equitable monetary remedies. Instead, the text and structure of the particular statutory scheme at issue can limit a court's jurisdiction in equity. Second, in enacting §19 two years after §13(b), Congress did not simply create an alternative enforcement path with similar remedies. The Court does not believe Congress would have enacted §19's provisions expressly authorizing monetary relief if §13(b) already implicitly allowed the Commission to obtain that same monetary relief without satisfying §19's conditions and limitations. Third, §19's saving clauses—preserving "any authority of the Commission under any other provision of law" and "any other remedy or right of action provided by State or Federal law," §57b(e)—do not help answer whether §13(b) gave the Commission the authority to obtain equitable monetary relief directly in court in the first place. Fourth, the Act's 1994 and 2006 amendments, which did not modify the specific language at issue here, do not demonstrate congressional acquiescence to lower court rulings that favor the Commission's interpretation of

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§13(b). Fifth, policy arguments that §5 and §19 are inadequate to provide redress to consumers should be addressed to Congress. Pp. 10–14.

910 F. 3d 417, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 19–508

AMG CAPITAL MANAGEMENT, LLC, ET AL., PETITIONERS *v.* FEDERAL TRADE COMMISSION

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

[April 22, 2021]

JUSTICE BREYER delivered the opinion of the Court.

Section 13(b) of the Federal Trade Commission Act authorizes the Commission to obtain, "in proper cases," a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is violating, or is about to violate, any provision of law" that the Commission enforces. 87 Stat. 592, 15 U. S. C. §53(b). The question presented is whether this statutory language authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement. We conclude that it does not.

I

Petitioner Scott Tucker controlled several companies that provided borrowers with short-term payday loans. The companies, operating online, would show a potential customer a loan's essential terms. When the companies explained those terms, they misled many customers. The companies' written explanations seemed to say that customers could normally repay a loan by making a single payment. And that payment would cost a person who, for example, borrowed $300 an extra $90. (The customer would

likely repay a total of $390.) But in fine print the explanations said that the loan would be automatically renewed unless the customer took affirmative steps to opt out. Thus, unless the customer who borrowed $300 was aware of the fine print and actively prevented the loan's automatic renewal, he or she could end up having to pay $975, not $390. Between 2008 and 2012, Tucker's businesses made more than 5 million payday loans, amounting to more than $1.3 billion in deceptive charges.

In 2012 the Federal Trade Commission filed suit and claimed that Tucker and his companies were engaging in "unfair or deceptive acts or practices in or affecting commerce," in violation of §5(a) of the Act. 15 U. S. C. §45(a)(1). (We shall refer to all of the defendants collectively as Tucker.) In asserting that Tucker's practices were likely to mislead consumers, the Commission did not first use its own administrative proceedings. Rather, the Commission filed a complaint against Tucker directly in federal court. The Commission, relying upon §13(b), asked the court to issue a permanent injunction to prevent Tucker from committing future violations of the Act. Relying on the same provision, the Commission also asked the court to order monetary relief, in particular, restitution and disgorgement. The Commission moved for summary judgment.

The District Court granted the Commission's summary judgment motion. The court also granted the Commission's request for an injunction and directed Tucker to pay $1.27 billion in restitution and disgorgement. The court ordered the Commission to use these funds first to provide "direct redress to consumers" and then to provide "other equitable relief" reasonably related to Tucker's alleged business practices. Finally, the court ordered the Commission to deposit any remaining funds in the United States Treasury as disgorgement.

On appeal, Tucker argued that §13(b) does not authorize the monetary relief the District Court had granted. The

Ninth Circuit rejected Tucker's claim. 910 F. 3d 417 (2018). It pointed to Circuit precedent that had interpreted §13(b) as "empower[ing] district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." *FTC* v. *Commerce Planet, Inc.*, 815 F. 3d 593, 598 (2016); see also *FTC* v. *H. N. Singer, Inc.*, 668 F. 2d 1107, 1113 (CA9 1982). Two judges, while recognizing that precedent in many Circuits supported that use of §13(b), expressed doubt as to the correctness of that precedent.

Tucker then sought certiorari in this Court. In light of recent differences that have emerged among the Circuits as to the scope of §13(b), we granted his petition.

II

The Federal Trade Commission Act prohibits, and authorizes the Commission to prevent, "[u]nfair methods of competition" and "unfair or deceptive acts or practices." 15 U. S. C. §§45(a)(1)–(2). The Act permits the Commission to use both its own administrative proceedings (set forth in §5 of the Act) and court actions in exercising this authority. In construing §13(b), it is helpful to understand how the Commission's authority (and its interpretation of that authority) has evolved over time.

Ever since the Commission's creation in 1914, it has been authorized to enforce the Act through its own administrative proceedings. Section 5 of the Act describes the relevant administrative proceedings in some detail. If the Commission has "reason to believe" that a party "has been or is using any unfair method of competition or unfair or deceptive act or practice," it can file a complaint against the claimed violator and adjudicate its claim before an Administrative Law Judge. §45(b). The ALJ then conducts a hearing and writes a report setting forth findings of fact and reaching a legal conclusion. *Ibid.* If the ALJ concludes that the conduct at issue was unfair or misleading, the ALJ will issue

an order requiring the party to cease and desist from engaging in the unlawful conduct. *Ibid.* The party may then seek review before the Commission and eventually in a court of appeals, where the "findings of the Commission as to the facts" (if supported by the evidence) "shall be conclusive." §45(c). If judicial review favors the Commission (or if the time to seek judicial review expires), the Commission's order normally becomes final (and enforceable). §45(g).

In the 1970s Congress authorized the Commission to seek additional remedies in court. In 1973 Congress added §13(b), the provision at issue here. That provision permits the Commission to proceed directly to court (prior to issuing a cease and desist order) to obtain a "temporary restraining order or a preliminary injunction," and also allows the Commission, "in proper cases," to obtain a court-ordered "permanent injunction." 15 U. S. C. §53(b). In the same legislation, Congress also amended §5(*l*) of the Act to authorize district courts to award civil penalties against respondents who violate final cease and desist orders, and to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." §45(*l*). Two years later, Congress enacted §19 of the Act, which authorizes district courts to grant "such relief as the court finds necessary to redress injury to consumers," including through the "refund of money or return of property." §57b(b). However, Congress specified that the consumer redress available under §19 could be sought only (as relevant here, and subject to various conditions and limitations) against those who have "engage[d] in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such person." §57b(a)(2).

Beginning in the late 1970s, the Commission began to use §13(b), and in particular the words "permanent injunction,"

to obtain court orders for redress of various kinds in consumer protection cases—without prior use of the administrative proceedings in §5. See, *e.g.*, *FTC* v. *Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 59 (Md. 1981) (relying on §13(b) to order the defendant to notify past customers of their warranty rights); see also D. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 1–2, Paper at FTC 90th Anniversary Symposium, Sept. 23, 2004 (FitzGerald); Beales & Muris, Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act, 79 Antitrust L. J. 1, 3–4 (2013). The Commission used this authority to seek and win restitution and other forms of equitable monetary relief directly in court.

Similarly, in the late 1990s the Commission began to use §13(b)'s "permanent injunction" authority in antitrust cases to seek monetary awards, such as restitution and disgorgement—again without prior use of traditional administrative proceedings. See Complaint in *FTC* v. *Mylan Labs., Inc.*, No. 98–3114 (DC); Complaint in *FTC* v. *The Hearst Trust*, No. 01–734 (DC). In 2003 the Commission issued guidance that limited its use of §13(b) to obtain monetary relief to "exceptional cases" involving a "[c]lear [v]iolation" of the antitrust laws. Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (emphasis deleted). But in 2012 the Commission withdrew its policy statement and the limitations it imposed. See Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071.

The result is that the Commission presently uses §13(b) to win equitable monetary relief directly in court with great frequency. The Commission tells us that "the agency [now] brings dozens of [§13(b)] cases every year seeking a permanent injunction and the return of illegally obtained funds." Brief for Respondent 8; see also, *e.g.*, Ohlhausen, Dollars, Doctrine, and Damage Control: How Disgorgement Affects

the FTC's Antitrust Mission 7, Speech at Dechert LLP, NY, Apr. 20, 2016 (Commission sought disgorgement in antitrust cases four times between 2012 and 2016, which is "as many times as the [Commission] pursued such relief in the prior twenty years"). With respect to consumer protection cases, the Commission adds that "there's no question that the agency brings far more cases in court than it does in the administrative process." Tr. of Oral Arg. 49. In fiscal year 2019, for example, the Commission filed 49 complaints in federal court and obtained 81 permanent injunctions and orders, resulting in $723.2 million in consumer redress or disgorgement. See FTC, Fiscal Year 2021 Congressional Budget Justification 5 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf. In the same period, the Commission issued only 21 new administrative complaints and 21 final administrative orders.

Our task here is not to decide whether this substitution of §13(b) for the administrative procedure contained in §5 and the consumer redress available under §19 is desirable. Rather, it is to answer a more purely legal question: Did Congress, by enacting §13(b)'s words, "permanent injunction," grant the Commission authority to obtain monetary relief directly from courts, thereby effectively bypassing the process set forth in §5 and §19?

III

Several considerations, taken together, convince us that §13(b)'s "permanent injunction" language does not authorize the Commission directly to obtain court-ordered monetary relief. For one thing, the language refers only to injunctions. It says, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent *injunction*." 15 U. S. C. §53(b) (emphasis added). An "injunction" is not the same as an award of equitable monetary relief. Compare, *e.g.*, *United States* v. *Oregon State*

Medical Soc., 343 U. S. 326, 333 (1952) (injunction typically offers prospective relief against ongoing or future harm), with, *e.g.*, 1 D. Dobbs, Law of Remedies §4.1(1) (2d ed. 1993) (restitution typically offers retrospective relief to redress past harm). We have, however, sometimes interpreted similar language as authorizing judges to order equitable monetary relief. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288 (1960).

But if this language alone is not enough, there is more. The language and structure of §13(b), taken as a whole, indicate that the words "permanent injunction" have a limited purpose—a purpose that does not extend to the grant of monetary relief. Those words are buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief. It says (in relevant part):

> "Whenever the Commission has reason to believe—
>
> "(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> "(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> "the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not

> filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That *in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.*" 15 U. S. C. §53(b) (final emphasis added).

Taken as a whole, the provision focuses upon relief that is prospective, not retrospective. Consider the words "is violating" and "is about to violate" (not "has violated") setting forth when the Commission may request injunctive relief. Consider too the words "pending the issuance of a complaint," "until such complaint is dismissed," "temporary restraining order," "preliminary injunction," and so forth in the first half of the section. These words reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness. Cf. §53(a) (providing similar provisional relief where false advertising regarding food, drugs, devices, and cosmetics is at issue). And the appearance of the words "permanent injunction" (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction. They might also be read, for example, as granting authority for the Commission to go one step beyond the provisional and ("in proper cases") dispense with administrative proceedings to seek what the words literally say (namely, an *injunction*). But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large

dog.

Further, the structure of the Act beyond §13(b) confirms this conclusion. Congress in §5(*l*) and §19 gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission has *issued cease and desist orders, i.e.*, where the Commission has engaged in administrative proceedings. Since in these provisions Congress explicitly provided for "other and further equitable relief," 15 U. S. C. §45(*l*), and for the "refund of money or return of property," §57b(b), it likely did not intend for §13(b)'s more cabined "permanent injunction" language to have similarly broad scope.

More than that, the latter provision (§19) comes with certain important limitations that are absent in §13(b). As relevant here, §19 applies only where the Commission begins its §5 process within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order. 15 U. S. C. §57b(d). And it applies only where "a reasonable man would have known under the circumstances" that the conduct at issue was "dishonest or fraudulent." §57b(a)(2); see also §45(m)(1)(B)(2) (providing court-ordered monetary penalties against anyone who engages in conduct previously identified as prohibited in a final cease and desist order, but only if the violator acted with "actual knowledge that such act or practice is unfair or deceptive"). In addition, Congress enacted these other, more limited, monetary relief provisions at the same time as, or a few years after, it enacted §13(b) in 1973.

It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via §13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations. Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority

so readily to circumvent its traditional §5 administrative proceedings. See FitzGerald 1 (arguing that, in the mid-1970s, "no one imagined that Section 13(b) of the [FTC] Act would become an important part of the Commission's consumer protection program" (footnote omitted)).

At the same time, to read §13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then §19's redress provisions (which include limitations). And the Commission may use §13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. By contrast, the Commission's broad reading would allow it to use §13(b) as a substitute for §5 and §19. For the reasons we have just stated, that could not have been Congress' intent. Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes").

IV

The Commission makes several arguments to the contrary. First, the Commission points to traditional equitable practice and to two previous cases where we interpreted provisions authorizing injunctive relief to authorize equitable monetary relief as well. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288 (1960). In *Porter* we said that "[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." 328 U. S., at 399. In *Mitchell* we said that, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of

the statutory purposes." 361 U. S., at 291–292. The Commission argues that these cases consequently support the proposition that the traditional equitable "authority to grant an 'injunction' includes the power to grant restorative monetary remedies." Brief for Respondent 21.

The problem for the Commission is that we did not in these two cases purport to set forth a universal rule of interpretation. And both cases involved different statutes. See *Porter*, 328 U. S., at 397 (Emergency Price Control Act provision authorizing courts to issue "'a permanent or temporary injunction, restraining order, or other order'"); *Mitchell*, 361 U. S., at 289 (Fair Labor Standards Act provision authorizing courts to "'restrain violations'" of the Act's antiretaliation ban). In both cases, we recognized that the text and structure of the statutory scheme at issue can, "in so many words, or by a necessary and inescapable inference, restric[t] the court's jurisdiction in equity." *Porter*, 328 U. S., at 398; *Mitchell*, 361 U. S., at 291. Thus in *Porter* we examined "other provision[s] of the [Emergency Price Control] Act" to determine whether they "expressly or impliedly preclud[e] a court from ordering restitution in the exercise of its equity jurisdiction." 328 U. S., at 403. And in *Mitchell* we examined other provisions of the Fair Labor Standards Act before concluding that there was "no indication in the language" that the statute precluded equitable relief in the form of lost wages. 361 U. S., at 294.

Moreover, more recently, we have held, based on our reading of a statutory scheme as a whole, that a provision's grant of an "injunction" or other equitable powers does not automatically authorize a court to provide monetary relief. Rather, we have said, the scope of equitable relief that a provision authorizes "remains a question of interpretation in each case." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 257 (1993). Our decision in *Meghrig* v. *KFC Western, Inc.*, 516 U. S. 479 (1996), is instructive. There, we considered a provision in the Resource Conservation and Recovery Act

that authorizes district courts "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste," and "to order such person to take such other action as may be necessary, or both." 98 Stat. 3268, 42 U. S. C. §6972(a). The question was whether this language permits courts to award restitution in the form of past cleanup costs. We concluded that, despite *Porter*, the provision's grant of equitable authority does not authorize past cleanup costs because the relevant statutory scheme (as here) contained other "'elaborate enforcement provisions,'" including (as here) provisions that explicitly provide for that form of relief. *Meghrig*, 516 U. S., at 487. Here, the inference against §13(b)'s authorization of monetary relief is strong and follows from the interpretive approach we took in *Meghrig*.

Second, the Commission argues that Congress simply created two enforcement avenues, one administrative and the other judicial, leaving the Commission the power to decide which of the two "separate, parallel enforcement paths" to take. Brief for Respondent 41. To the extent that §19 authorizes "similar relief" as §13(b), the Commission continues, that reflects only the fact that each pathway is an alternative route to "similar endpoints." *Id.*, at 41–42. This statement, however, does not overcome the interpretive difficulties we have set forth, for example permitting the Commission to avoid the conditions and limitations laid out in §19. We cannot believe that Congress merely intended to enact a more onerous alternative to §13(b) when it enacted §19 two years later.

Third, the Commission points to saving clauses in §19, which, it says, save its ability to use §13(b) to obtain monetary relief. See *id.*, at 42. Those clauses preserve "any authority of the Commission under any other provision of law" and preserve "any other remedy or right of action provided

by State or Federal law." 15 U. S. C. §57b(e). Here, however, the question is not one of preserving pre-existing remedies given by other statutory provisions. The question is whether those other provisions (namely, §13(b)) gave that remedy in the first place.

Fourth, the Commission points out that the courts of appeals have, until recently, consistently accepted its interpretation, and that Congress has in effect twice ratified that interpretation in subsequent amendments to the Act. See, *e.g.*, Brief for Respondent 8, and n. 3 (citing the similar conclusions of eight Circuits). But see *FTC* v. *Credit Bureau Center, LLC*, 937 F. 3d 764 (CA7 2019); *FTC* v. *AbbVie Inc.*, 976 F. 3d 327 (CA3 2020). We have held that Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation. See, *e.g.*, *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 338 (1988). We have also said, however, that when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court's] statutory interpretation." *Alexander* v. *Sandoval*, 532 U. S. 275, 292 (2001) (internal quotation marks omitted). We find this latter statement the more relevant here.

The two examples of acquiescence to which the Commission refers do not convince us that Congress acquiesced in the lower courts' interpretation. The Commission first points to amendments that Congress made to the Act in 1994. See §10, 108 Stat. 1695–1696. Those two amendments, however, simply revised §13(b)'s venue, joinder, and service rules, not its remedial provisions. They tell us nothing about the words "permanent injunction" in §13(b).

The Commission also points to amendments made to the Act in 2006. Those amendments modified the scope of §5 so that, where certain conduct in foreign commerce is in-

volved, §5 authorizes "'[a]ll remedies available to the Commission,'" including "'restitution.'" See §3, 120 Stat. 3372. We agree, however, that restitution is available, for example, when the Commission uses its administrative process. See, *e.g.*, 15 U. S. C. §57b(b). That being so, these amendments also tell us nothing about the scope of §13(b).

Fifth, the Commission and its *amici* emphasize the policy-related importance of allowing the Commission to use §13(b) to obtain monetary relief. They suggest that it is undesirable simply to enjoin those who violate the Act while leaving them with profits earned at the unjustified expense of consumers. See, *e.g.*, Brief for Respondent 8–9; Brief for Truth in Advertising, Inc., as *Amicus Curiae* 7–13; Brief for American Antitrust Institute as *Amicus Curiae* 9–21; Brief for National Consumer Law Center et al. as *Amici Curiae* 10–20; Brief for Illinois et al. as *Amici Curiae* 5–11. They point to the billions of dollars that the Commission has returned to consumers as a result of the Commission's §13(b) efforts. See, *e.g.*, Brief for Respondent 8–9; Brief for Illinois et al. as *Amici Curiae* 5.

Nothing we say today, however, prohibits the Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority. Indeed, the Commission has recently asked Congress for that very authority, see Hearing before the Senate Committee on Commerce, Science, and Transportation on Oversight of the Federal Trade Commission, Prepared Statement of the FTC, 116th Cong., 2d Sess., 3–5 (2020), and Congress has considered at least one bill that would do so, see S. 4626, 116th Cong., 2d Sess., §403 (2020) (revising §13 to expressly authorize restitution and disgorgement). We must conclude, however, that §13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief.

* * *

For these reasons, we reverse the Ninth Circuit's judgment, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

July 30, 2020

The Honorable Robert E. Latta
United States House of Representatives
Washington, D.C. 20515

Dear Representative Latta:

Thank you for your June 24, 2020 letter requesting information about how the Federal Trade Commission ("FTC" or "Commission") uses domain name registration information, also known as WHOIS, to carry out its law enforcement mission, including its efforts to stop frauds related to COVID-19. You also highlighted your concerns that the implementation of the European Union's General Data Protection Regulation ("GDPR") has negatively affected the ability of law enforcement to identify bad actors online. I share your concerns about the impact of COVID-19 related fraud on consumers, as well as the availability of accurate domain name registration information.

Since the beginning of the pandemic, the FTC has been monitoring the marketplace for unsubstantiated health claims, robocalls, privacy and data security concerns, sham charities, online shopping fraud, phishing scams, work at home scams, credit scams, and fake mortgage and student loan relief schemes, and other deceptions related to the economic fallout from the COVID-19 pandemic.[1] In response, we have taken actions, including filing four cases in federal courts and sending hundreds of warning letters to businesses in the United States and abroad.[2] In addition, we have conducted significant public outreach and education efforts.[3]

Before the GDPR took effect in May 2018, the FTC and other consumer protection and law enforcement agencies routinely relied on the publicly-available registration information about domain names in WHOIS databases to investigate wrongdoing and combat fraud.[4] The FTC uses this information to help identify wrongdoers and their locations, halt their conduct, and preserve money to return to defrauded victims. Our agencies may no longer rely on this information because, in response to the GDPR, ICANN developed new policies that significantly limit the publicly available contact information relating to domain name registrants. For

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[1] *See generally* Prepared Statement by the Federal Trade Commission before the S. Comm. on Commerce, Science, and Transp., Subcommittee on Manufacturing, Trade, and Consumer Protection: Consumer Protection Issues Arising from the Coronavirus Pandemic (July 21, 2020), https://www.ftc.gov/public-statements/2020/07/prepared-statement-federal-trade-commission-consumer-protection-issues.

[2] *See generally* https://www.ftc.gov/coronavirus. This page is updated regularly.

[3] *Id.*

[4] *See, e.g.*, Comment of the Staff of the FTC Bureau of Consumer Protection before the ICANN Public Comment Forum, In the Matter of Tentative Agreements among ICANN, U.S. Dep't of Commerce, and Network Solutions, Inc. (Oct. 29, 1999), https://www.ftc.gov/policy/policy-actions/advocacy-filings/1999/10/ftc-staff-comment-internet-corporation-assigned-names; Prepared Statement of the Federal Trade Commission, Hearing on Internet Governance: The Future of ICANN, Before the Subcommittee on Trade, Tourism, and Econ. Dev. of the S. Committee on Commerce, Science, and Transp., 109th Cong. (Sept 20, 2006), http://www.ftc.gov/os/testimony/P035302igovernancefutureicanncommissiontestsenate09202006.pdf.

example, before the GDPR went into effect, the FTC could quickly and easily obtain detailed information about the name, address, telephone number and email of the domain name registrant by typing a simple query. Since May 2018, however, we generally must request this information directly from the particular registrar involved. This can be a time-consuming and cumbersome process.[5]

This lack of access also limits consumers' ability to identify bad actors using WHOIS information. Prior to the GDPR, thousands of the complaints filed in our Consumer Sentinel complaint database referred to the filer's use of WHOIS data to identify businesses involved in spyware, malware, imposter scams, tech support scams, counterfeit checks, and other malicious conduct.[6]

The FTC would benefit from greater and swifter access to domain name registration data. Achieving this goal is difficult, however, given the complexity of the GDPR's effect, the required international coordination, and the many stakeholders involved. We have been working with other U.S. agencies to develop solutions through our interaction with ICANN and our international law enforcement colleagues.

One approach that could help overcome the current obstacles would be to mandate disclosure of domain name registration data associated with legal entities, as opposed to natural persons. Legal entities register a significant percentage of domain names, and the GDPR protects the information of natural persons but does not apply to information related to legal entities. ICANN's current mechanisms result in over-application of the GDPR by permitting registrars to choose whether to make the registration data of legal entities public or not. We have raised this issue within ICANN's policy development process.

I appreciate your interest in these issues. If you or your staff has additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Joseph J. Simons

Joseph J. Simons
Chairman

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[5] There are more than 2,500 ICANN accredited registrars, many located outside the U.S., with different procedures to obtain registrant data. It can be challenging to determine where to direct a request and what to include in such request for access to this now non-public information as many registrars fail to place such guidance in a location that is easy to find on their websites. After submitting a request, the FTC must wait for the registrar to approve or reject our requests. Moreover, when data is located in a foreign jurisdiction, the process may be more time consuming and require cooperation from our law enforcement partners.

[6] In 2017, we identified over 4,000 complaints filed over a five-year-period.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers."
April 27, 2021

Hon. Rebecca Kelly Slaughter, Acting Chairwoman, Federal Trade Commission

The Honorable Gus M. Bilirakis

1. Acting Chair Slaughter, during the hearing you expressed the need for the FTC to prioritize going after bad actors currently engaging in unfair or deceptive acts or practices. I want to reiterate, as I mentioned during the hearing, I am concerned that unintended consequences may be a result of granting FTC authority to retroactively go after bad actors.

    a. Before the Supreme Court ruling, what was the percentage of cases brought forth against retroactive unfair or deceptive acts or practices versus cases against those actively engaging in unfair or deceptive acts or practices?

    RESPONSE:

Although we do not have readily available data to calculate exact percentages, we conducted an informal review of the Commission's consumer protection cases brought since 2018. That review showed that the majority of the Commission's recent consumer protection enforcement actions involve ongoing unlawful conduct. Nonetheless, the Commission also brings enforcement actions involving past consumer protection violations when it can establish to a court that there is a likelihood that the unlawful conduct will recur, which is the well-established legal standard for obtaining an injunction in federal court.

Enforcement actions addressing ongoing unlawful conduct are important, but so too are actions addressing past misconduct that is no longer occurring. Even in past-conduct cases, injunctions remain critically important to prevent illegal conduct from recurring and protect consumers from future violations. When the Commission has reason to believe that defendants will re-engage in their unlawful conduct, it is important to obtain a federal court injunction that carries with it the threat of contempt sanctions, which serves as a strong deterrent to discourage defendants from violating the law again.

Moreover, limiting the Commission to only cases that involve ongoing violations would have wide ranging negative consequences. For example, the Commission would no longer be able to bring federal court actions to address many data breaches (such as the action it brought in

response to the Equifax breach[1]) because companies typically take remedial steps as soon as they are discovered—long before the Commission can file suit. Furthermore, limiting Commission enforcement to those cases where lawbreakers are caught in the act would encourage would-be violators to break the law as long as they can avoid detection during the violation. Many defendants could easily escape a federal court injunction by stopping their unlawful conduct upon learning of the FTC's investigation, forcing the Commission to wait until the unlawful conduct recurs before seeking a federal court order enjoining it. In that scenario, more consumers end up being harmed despite the fact that it was foreseeable that the defendant would resume its unlawful activities. By seeking federal court injunctions in cases in which there is a likelihood of recurrence, the Commission can effectively and efficiently protect consumers from future violations.

Commission actions involving past conduct are also necessary to make whole consumers who lost money as a result of defendants' unlawful conduct. Take for example a defendant who sold a supplement falsely advertised to cure cancer but stopped selling it before the Commission was able to file suit. Although the conduct would not be ongoing, Commission action would still be needed to provide refunds to consumers who lost money to the scam and to prevent the defendant from retaining the unjust gains earned from the scheme. Below are some recent Commission actions that involved allegations of past conduct and resulted in settlements that returned billions of dollars to harmed consumers:

- Volkswagen: From 2008 to 2015, VW sold "clean" diesel vehicles that the company claimed had been shown in government tests to have reduced emissions. In reality, the vehicles did not have lower emissions because they were equipped with a defeat device that could detect government testing and artificially lower emissions in response. VW stopped using defeat devices in 2015 in response to an investigation by EPA and California. The FTC brought suit in 2016, securing nearly $10 billion in compensation in the form of vehicle buy-backs or repairs for consumers who purchased "clean" diesel vehicles that had lost significant value due to the defeat devices.[2] Neither the EPA, the Department of Justice, nor the states had statutory authority to provide nationwide redress to these purchasers—that authority came solely from the Commission's pre-*AMG* ability to obtain equitable monetary relief under Section 13(b) of the FTC Act.

- Office Depot: From 2009 to 2016, Office Depot offered consumers a "free PC check-up" that utilized a scanning program that falsely claimed that every computer had malware or viruses, which the company then used to sell consumers millions of dollars of computer repair services that they did not need. Tech support scams like

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[1] Press Release, FTC, *Equifax to Pay $575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach* (July 22, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related.

[2] Press Release, FTC, *In Final Court Summary, FTC Reports Volkswagen Repaid More Than $9.5 Billion to Car Buyers Who Were Deceived by "Clean Diesel" Ad Campaign* (July 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/07/final-court-summary-ftc-reports-volkswagen-repaid-more-than-9-billion.

this disproportionately impact seniors.[3] Office Depot stopped using the scanning program in 2016 after news reports exposed the practice. The FTC reached a settlement with Office Depot and the company that created the software in 2019. The settlements required the companies to pay $35 million in refunds to consumers who paid for unnecessary computer repairs.[4]

- DeVry University: From 2008 to 2015, DeVry University ran advertisements that falsely claimed that 90% of its graduates obtained a job in their field within 6 months of graduation and that its graduates had 15% higher incomes than graduates of other colleges and universities. These false advertisements targeted, among others, former members of the military. DeVry stopped making these claims in 2015 when the FTC began investigating. DeVry ultimately agreed to a $100 million settlement in 2016, which included payments and debt forgiveness for students who were deceived by DeVry's false claims.[5]

- T-Mobile / AT&T: T-Mobile and AT&T earned millions in fees when consumers paid unauthorized third-party charges that were discretely placed on their phone bills, a practice known as mobile cramming. The carriers continued to allow these charges to be placed on their bills despite numerous consumer complaints, news reports, high refund rates, and other obvious signs that the third-party charges were fraudulent. The carriers also buried these unauthorized charges on their bills making it difficult for consumers to detect them. By early 2014, both carriers had stopped allowing third-parties to place charges on their bills. The FTC subsequently brought suit against the carriers and obtained nearly $180 million that was returned to consumers who paid these bogus hidden charges.[6]

b. Before the Supreme Court ruling, how far back, in time, did the FTC go to pursue bad actors who engaged in unfair or deceptive acts or practices?

RESPONSE:

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[3] Emma Fletcher, FTC, *Older Adults Hardest Hit by Tech Support Scams* (Mar. 7, 2019), https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams.

[4] Press Release, FTC, *Office Depot and Tech Support Firm Will Pay $35 Million to Settle FTC Allegations That They Tricked Consumers into Buying Costly Computer Repair Services* (Mar. 27, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/office-depot-tech-support-firm-will-pay-35-million-settle-ftc.

[5] Press Release, FTC, *DeVry University Agrees to $100 Million Settlement with FTC* (Dec. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/devry-university-agrees-100-million-settlement-ftc.

[6] Press Release, FTC, *T-Mobile to Pay At Least $90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case* (Dec. 19, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds; Press Release, FTC, *FTC Providing Over $88 Million in Refunds to AT&T Customers Who Were Subjected to Mobile Cramming* (Dec. 8, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/ftc-providing-over-88-million-refunds-att-customers-who-were.

Based on an informal review of consumer protection cases that we have brought since 2014, we were unable to identify any FTC case in which a court awarded monetary relief for violations that occurred more than ten years prior to the filing of our complaint. Most of our recent cases have been limited to unlawful conduct that began no more than five to seven years prior to filing.

c. When would it be appropriate to redirect efforts to retroactively go after bad actors when there are bad actors currently taking advantage of Americans?

RESPONSE:

Please see response to Question 1.a.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers."
April 27, 2021

Anna Laitin, Director, Financial Fairness and Legislative Strategy, Consumer Reports

The Honorable Kelly Armstrong (R-ND)

1. **The courts have found the Commission need not prove actnal knowledge: "Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective."[1] The dishonest or fraudulent standard was met in Figgie. That case may have taken an extended time to prosecute, but doesn't it serve as an example that the Commission is capable of proceeding, and succeeding, under the dishonest and fraudulent standard?**

   RESPONSE: While the Commission is capable of proceeding and succeeding under the dishonest and fraudulent standard, holding all equitable relief cases to that standard will limit the Commission's ability to stop wrongdoing, disgorge ill-gotten gains, and secure relief for consumers. In order to protect consumers and small businesses - including our most vulnerable citizens - the FTC needs a standard broad enough to ensure that liars, cheats, scammers and dishonest business alike are not able to benefit from their efforts. The "unfair or deceptive" standard worked for many years and enabled the FTC to prevent bad actors from benefiting from their illegal behavior.

   It isn't entirely clear how courts may define "fraudulent and dishonest," but the standard would certainly be narrower than the "unfair or deceptive" standard, and will create new hurdles for the FTC. No longer would the FTC simply need to show deception to a court in order to proceed; now they need to meet a new, less established standard. The FTC should be able to bring cases for equitable remedies under unfairness and deception, and should not be legislatively prohibited from doing so. It is up to the courts to determine what equitable relief is appropriate given the facts of the case.

   The purpose of any 13(b) authority would be to provide the FTC with the ability to take action to stop illegal activity, disgorge ill-gotten gains, and to seek restitution for

[1] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 603 (9th Cir. 1993).

consumers. With unfair and deceptive practices rampant in the economy, the FTC needs flexibility to pursue cases in which consumers are being harmed without being held to a standard that remains undefined and would limit the FTC's ability to seek equitable remedies.

2. **FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), involved "websites [that] offered a 'free credit report and score' while obscuring a key detail in much smaller text: that applying for this 'free' information automatically enrolled customers in an unspecified $29.94 monthly 'membership' subscription."[2] "The subscription was for Brown's credit-monitoring service, but customers learned this information only when he sent them a letter after they were automatically enrolled."[3] Although the Commission proceeded under 13(b) and the "unfair or deceptive" standard in this case, the Seventh Circuit declared this a "fraudulent scheme."[4] Is there a reason the Commission could not have proven a case under the dishonest or fraudulent standard?**

   RESPONSE: When the FTC brings a case, it does so before discovery. While it may be able to make a case for deception at the outset, it may not be able to plead fraud with the specificity until it has actually received documents and taken depositions. This makes it difficult to look at cases in hindsight and determine a standard based on those cases that seem most clearly fraudulent. While the court declared that this case involved a "fraudulent" scheme, there may be cases that are clearly fraudulent in retrospect, but take longer to build. The "unfair or deceptive" standard works well.

3. **The Commission obtained $14.7 billion, by far its largest ever monetary remedy, from Volkswagen in a 2016 settlement. The Commission alleged the company had intentionally installed, in millions of vehicles sold in the U.S., "illegal software designed to enable the vehicle to cheat emissions tests" to allow "emissions at as much as 4,000 percent above the legal limit." If intentional falsification of a product quality, which is both required by law and also valued by environmentally sensitive consumers, does not qualify as dishonest or fraudulent conduct, what type of conduct would meet this standard?**

   RESPONSE: This case clearly met the "dishonest and fraudulent" standard. In fact, before the FTC filed its complaint against Volkwagen, the company admitted publicly that it had installed devices to defeat the emissions tests and had "broken the trust of our customers and the public."

   The question arises however, whether the FTC could bring a similar case in which the company had not admitted to the fraud, under the "fraudulent and dishonest"

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[2] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

[3] *Id.*

[4] *Id.*

standard. To bring its case under Section 13(b), the FTC only had to show that the company made claims about clean fuel and that those claims were not true. It did not have to show how the company intentionally defeated the emissions tests.

It is rare for a company to admit that it deceived its customers. In order to stop bad actors from taking advantage of consumers and small businesses, bilking them out of their hard earned money, the FTC needs to be able to counter illegal activity, particularly when companies conceal that activity.

4. **H.R. 2668 contains a provision that "a court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought."**

   a. **Is 10 years an appropriate period? Please explain.**

      RESPONSE: Yes, ten years is an appropriate period. Some FTC cases deal with illegal behavior that took place over the course of years. The FTC should be able to seek equitable relief for consumers who lost money in the early years of the illegal behavior. A ten year look back may also provide a useful deterrent to businesses that consider engaging in deceptive practices.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers."
April 27, 2021

J. Howard Beales, Ph.D., Professor Emeritus, George Washington University

The Honorable Kelly Armstrong (R-ND)

1. The courts have found the Commission need not prove actual knowledge: "Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective."[1] The dishonest or fraudulent standard was met in Figgie. That case may have taken an extended time to prosecute, but doesn't it serve as an example that the Commission is capable of proceeding, and succeeding, under the dishonest and fraudulent standard?

   RESPONSE: The Commission can proceed, and succeed, under the dishonest and fraudulent standard. Indeed, the 9th Circuit's opinion should facilitate the use of Section 19. The Court held that the Commission need not establish actual knowledge that a violator knew its practices were dishonest or fraudulent, because "the issue of law is what a reasonable person would have known, not what Figgie's executive knew. The statute is unambiguous."[2] Moreover, the Court was clear that the Commission's findings were conclusive; the district court resolved both liability and damages on summary judgment motions.

   Although the Figgie case took time, additional cases are unlikely to take as long. First, since Figgie the Commission has revised its rules to speed up its administrative litigation. Second, Figgie was the first case to address the dishonest or fraudulent standard, a circumstance that inevitably provoked additional litigation. In the Telebrands case,[3] one of the few other cases under the Section 19 process, the case settled some 16 months after the Commission's Section 19 complaint in 2007. In contrast, the Section 19 portion of the Figgie litigation took 5 years to resolve.

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[1] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 603 (9th Cir. 1993).

[2] Id. at 603.

[3] FTC v. Telebrands Corp., 2:07-cv-3525 (D.N.J. 2008).

Moreover, most FTC cases settle, and a settlement resolving both liability and monetary relief is no more complicated or time-consuming under Section 19 than it is under Section 13(b). Prominent cases mentioned at the hearing, such as the case against Volkswagen,[4] were settlements that could have cited Section 19 as easily as they cited Section 13(b). There is no reason to think either that the outcome would have been different, or that the process would have been longer.

2. FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), involved "websites [that] offered a 'free credit report and score' while obscuring a key detail in much smaller text: that applying for this 'free' information automatically enrolled customers in an unspecified $29.94 monthly 'membership' subscription."[5] "The subscription was for Brown's credit-monitoring service, but customers learned this information only when he sent them a letter after they were automatically enrolled."[6] Although the Commission proceeded under 13(b) and the "unfair or deceptive" standard in this case, the Seventh Circuit declared this a "fraudulent scheme."[7] Is there a reason the Commission could not have proven a case under the dishonest or fraudulent standard?

   RESPONSE: There is no reason to think that the FTC would have any difficulty in meeting the "dishonest or fraudulent" standard in the Credit Bureau case. In that case, the judge issued an ex parte asset freeze, an extraordinary form of relief. It is hard to imagine any case in which a district court judge is willing to freeze assets that would not involve conduct that a reasonable person would know is dishonest or fraudulent.

   The important question for a case like Credit Bureau Ctr. is procedural, not substantive. Will judges still be willing to freeze assets to preserve funds for relief under Section 19 when they will lose control of the case as it moves into administrative litigation? If not, the money will likely disappear before the FTC can make the showing that the conduct was indeed dishonest or fraudulent. In a recently published article that I coauthored, we show that Section 19 will not work against true fraudsters.[8]

3. The Commission obtained $14.7 billion, by far its largest ever monetary remedy, from Volkswagen in a 2016 settlement. The Commission alleged the company had

[4] FTC v. Volkswagen Group of America, Inc., No. 3:16-cv-1534 (N.D. Cal).

[5] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

[6] *Id.*

[7] *Id.*

[8] J. Howard Beales, III, Benjamin M. Mundel, and Timothy J. Muris, Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground, theantitrustsource, www.antitrustsource.com, December, 2020.

intentionally installed, in millions of vehicles sold in the U.S., "illegal software designed to enable the vehicle to cheat emissions tests" to allow "emissions at as much as 4,000 percent above the legal limit." If intentional falsification of a product quality, which is both required by law and also valued by environmentally sensitive consumers, does not qualify as dishonest or fraudulent conduct, what type of conduct would meet this standard?

RESPONSE: Although the precise contours of the dishonest or fraudulent standard will no doubt be subject to litigation, I can see no plausible interpretation of the standard that would fail to find Volkswagen liable. There will be difficult cases, but Volkswagen is not one of them.

4. H.R. 2668 contains a provision that "a court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought."

    a. Is 10 years an appropriate period? Please explain.

REPONSE: Statutes of limitations can trace their roots back for centuries. They must balance two important, competing goals. One goal, favoring a long period, is to encourage resolution of all claims on their merits. A competing goal, favoring a shorter limitation, is to provide repose, to protect against surprises through the assertion of claims long after the conduct, when evidence may be stale or no longer available, and to encourage the timely filing of claims by regulatory agencies.[9] The general federal statute of limitations limits penalties to conduct in the previous 5 years. I see nothing unique about the FTC that would argue for a longer statute of limitations than what applies to other agencies. If anything, the risk of harm to consumers because the Commission fails to take timely action to address violations would argue for a shorter period.

5. The Commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (commonly called the Disgorgement Policy Statement) said: "The Commission will ordinarily seek monetary disgorgement only when the violation is clear." "The Commission will assess whether a violation is 'clear' by means of an objective, not a subjective, standard, i.e., a reasonableness test. 'Naked' restraints of trade, such as price-fixing or horizontal market division, are presumptively clear cases. The list of 'clear' cases, however, goes beyond traditional per se violations."

    a. Is "clarity" the right standard in some cases?

RESPONSE: In my view, clarity is an appropriate standard in all cases of monetary relief. When legal requirements are uncertain, parties subject to those

[9] See Tyler T. Ochoa and Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 Pacific Law Journal 453-514 (1997).

requirements may avoid conduct that would benefit consumers because it might expose them to the risk of significant monetary sanctions. As explained in my written statement, the advertising substantiation program is a prime example. Monetary liability for claims that the Commission eventually finds unsubstantiated may chill the provision of truthful information that is valuable to consumers. The dishonest or fraudulent standard in Section 19 avoids this problem for consumer protection cases. As the Commission's policy statement notes, a limitation to cases where "a reasonable party should expect that the conduct at issue would likely be found to be illegal"[10] avoids the problem in antitrust cases.

b. If so, when is it appropriate?

RESPONSE: A clarity standard would be appropriate for cases involving antitrust violations or unfair methods of competition. For matters involving unfair or deceptive practices, I believe the dishonest or fraudulent standard that already exists in the law is more appropriate, and serves the same policy purpose.

c. The Policy Statement said that deterrence "can best be served when the violator can determine in advance that its conduct would probably be considered illegal." Do you agree?

RESPONSE: Yes. Overdeterrence that chills valuable conduct is a significant risk when potential violators cannot determine with reasonable certainty whether their course of action is legal or illegal.

d. The Policy Statement also noted that "when significant consumer harm will not (for one reason or another) be redressed through a private action ... , the Commission might therefore consider seeking restitution even if the conduct at issue does not otherwise meet our definition of a 'clear' violation." Is that the right standard?

RESPONSE: Yes. Commission enforcement is vital, because in many instances private remedies are inadequate or impractical to pursue. The Commission should allocate its resources to complement, not compete with, private remedies.

e. If so, how should Congress codify it to avoid duplication of remedies with other causes of action?

REPONSE: Avoiding duplication of private remedies will likely rely to a considerable extent on the agency's discretion regardless of any statutory standard. A statute, for example, might limit the Commission's monetary relief to cases in which there is no practical private remedy, but making that determination would leave much to the agency's discretion. A brighter line test might make monetary relief available only if no private class action cases have been filed, but

[10] 68 Fed. Reg. 45821 (2003).

that restriction would place a priority on the FTC acting first. Moreover, in many instances, particularly in antitrust, class actions that follow on an FTC case finding liability may provide entirely adequate monetary relief, even though the government filed first. Oversight of when the agency seeks money may be a more finely tuned way to prevent needless duplication.

6. What economic principles should guide the Commission in calculating (a) consumer redress and (b) disgorgement?

   RESPONSE: Regarding redress, there are two sources of injury to consumers from deceptive claims. First, some consumers purchase the product would not have purchased at all had they known the truth. For these consumers, the price they paid for the product is an appropriate measure of redress. In fraud cases, essentially all consumers purchase only because of the fraudulent claim, so total revenue is an appropriate redress amount. In other cases, a full refund should apply only to those who purchased because of the claim. Second, all consumers may pay a higher price for the product because they mistakenly believe it has a feature or attribute that it does not. For these consumers, the appropriate amount of redress is the increase in price attributable to the deceptive claim.

   Regarding disgorgement, the goal is to remove the profit from a violation in order to reduce the incentive to engage in such violations in the first place. The only difference is that the remedy is confined to the profits from the activity, rather than the harm to consumers. Disgorgement based on avoided compliance costs can be appropriate when damages are difficult to determine and civil penalties are not available.

7. The Bureau of Economics has published a detailed analysis of how it calculates remedies. It also frequently weighs in on settlements and cases with calculations of the likely injury and proper redress.

   a. What principles does it apply in such opinions that could guide Congress in modifying 13(b)?

   RESPONSE: Codifying an approach to calculating remedies in FTC cases is likely to prove exceedingly challenging, particularly since there has been little public or academic analysis of alternative approaches and their implications. As a general matter, however, remedies should be limited to redressing the incremental impact of the practice at issue on total revenue (or total profit in the case of disgorgement), rather than total revenue from all sales (or profits). As noted in response to question 6, total revenue is an appropriate measure in a subset of cases, most notably involving fraud.

   b. Is it important that the Commission's monetary remedies be offset by the value that a consumer receives from the product or service at issue?

RESPONSE: Consideration of offsetting value from a product or service that is subject to misrepresentations depends on the circumstances. When the misrepresented characteristic is essentially the only reason most consumers bought the product, there is no reason to consider offsetting value. In *FTC v. Bronson Partners, LLC*, 654 F. 3d 359 (2d Cir. 2011), for example, Chinese Diet Tea was promoted as a weight loss remedy, and it seems unlikely that any appreciable number of consumers purchased the product for its value as a beverage. Ignoring any possible offsetting value is therefore appropriate. In the Commission's settlement with Kellogg regarding nutritional claims for Frosted Mini Wheats and Rice Krispies,[11] however, the overwhelming majority of sales of products that had long been marketed were likely for reasons that had nothing to do with the challenged claims. Although the Commission did not obtain monetary relief in that case, any attempt to seek monetary remedies in such cases should be limited to the incremental sales attributable to the claim.

c. What methodologies are appropriate for calculating monetary remedies under the "dishonest or fraudulent" standard?

RESPONSE: The principles are the same as those discussed in response to question 6. In fraud cases, total revenues from sale of the product (net of refunds or returns) are an appropriate measure of damages. In other cases, monetary remedies should be limited to the incremental revenue or profit attributable to the violative practice.

[11] Press Release, Fed. Trade Comm'n, Order Modifying Order, Kellogg Co. (June 3, 2010) (modifying order to cover additional claims).

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers."
April 27, 2021

Ted Mermin, Executive Director, Center for Consumer Law and Economic Justice

The Honorable Kelly Armstrong (R-ND)

1. QUESTION: The courts have found the Commission need not prove actual knowledge: "Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective."[1] The dishonest or fraudulent standard was met in Figgie. That case may have taken an extended time to prosecute, but doesn't it serve as an example that the Commission is capable of proceeding, and succeeding, under the dishonest and fraudulent standard?

   RESPONSE: It may be that the FTC could bring some limited number of cases under the 'dishonest or fraudulent' standard – but how would the American public benefit from such a partial approach? Certain cases could still move forward under that constrained standard; but many others could not.

   Among the cases that couldn't be brought are those that involve significant harm to consumers, but not necessarily dishonesty or fraud by the business. These cases might include data breaches that lead to identity theft, apps that collect private personal information and sell it to the highest bidder, or harassment of consumers who allegedly owe a business money. Other cases that couldn't be brought include those where it is simply difficult to prove fraudulent intent. There is a reason that Section 5 and Section 13 of the FTC Act – not to mention other federal and state consumer protection statutes – contain no intent requirement: establishing a company's "state of mind" can be a very complicated and involved process. (*See* Prentiss Cox and Christopher Peterson, n.4 ("Scienter is not a consideration in liability for UDAP violations"), https://bit.ly/3ufuDDF.)

   In any case, if consumers were deceived, shouldn't they get their money back, whether or not the deception was intentional? If a business accidentally mislabeled a product, shouldn't consumers who would not have bought the product if it had been labeled accurately be entitled to a refund?

[1] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 603 (9th Cir. 1993).

As for the decision in *FTC v. Figgie Int'l*: The *Figgie* case was a long and difficult case for the FTC, precisely because it was brought under Section 19. Illustrating just how unwieldy and burdensome the case was to bring, the FTC stopped using Section 19 in administrative cases after *Figgie*. Part of the reason is the complexity and years of effort required by the Section 19 process, which involves litigating the case at least two and often three separate times: first an administrative proceeding, then either judicial review or a proceeding to enforce the FTC's order – and a third time if the FTC has needed to secure an asset freeze while the case is being litigated. But there is substantial additional difficulty in determining whether the conduct at issue is what a reasonable person would consider "dishonest" or "fraudulent" – especially when neither of those terms is defined in rule or statute.

Consider the following archetypical cases, in all of which the FTC has successfully obtained monetary relief for consumers who were harmed financially. *None* of these matters could have been brought under the "fraudulent or dishonest" standard.

1. Unfair Billing Cases

Example: FTC v. Amazon.com (2017)
The FTC brought suit against Amazon for billing consumers for unauthorized in-app charges incurred by children. The Commission sued under Section 13(b), alleging unfair practices in violation of Section 5 of the FTC Act. The settlement agreement provided refunds to consumers of more than $70 million.

2. Data Breach Cases

Example: FTC v. Equifax (2019)
The FTC brought suit under Section 13(b) against Equifax for lax security practices that led to a data breach affecting 147 million people. The breach exposed millions of names and dates of birth, Social Security numbers, physical addresses, and other detailed personal information whose misuse could readily lead to identity theft. In settling the case, Equifax agreed to pay at least $425 million in redress to consumers.

3. Debt Collection Practices Cases

Example: FTC v. Global Processing Solutions, LLC (2018)
The FTC sued under section 13(b) and settled with a debt collector that, among other things, illegally contacted consumers' employers and other third parties, and failed to provide written notices and disclaimers required by law. The settlement provided for equitable monetary relief of over $3 million.

Note that common debt collection practices like calling in the middle of the night, talking to employers, and using abusive language do not amount to "fraudulent" or "dishonest" behavior. Note also that the Fair Debt Collection Practices Act (15 U.S.C. section 1692), which restricts these practices, does not provide remedies to the FTC beyond those available under the FTC Act, and in any case does not apply to

creditors collecting their own debts – so the remedies available under Section 13(b) remain critically relevant.

4. Racial Discrimination Cases

Example: FTC v. Bronx Honda (2020)
The FTC sued car dealer Bronx Honda under Section 13(b) and obtained $1.5 million in equitable relief to consumers who had been charged higher financing markups and higher fees simply because they were African-American or Hispanic.

In sum, consumers were injured in each of these paradigm cases, sometimes seriously – and in each case the FTC was able to obtain substantial sums of money to provide relief to consumers. However, in each case the injured consumers could not have been provided economic relief if the "fraudulent or dishonest" standard had been in place.

2. QUESTION: FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), involved "websites [that] offered a 'free credit report and score' while obscuring a key detail in much smaller text: that applying for this 'free' information automatically enrolled customers in an unspecified $29.94 monthly 'membership' subscription."[2] "The subscription was for Brown's credit-monitoring service, but customers learned this information only when he sent them a letter after they were automatically enrolled."[3] Although the Commission proceeded under 13(b) and the "unfair or deceptive" standard in this case, the Seventh Circuit declared this a "fraudulent scheme."[4] Is there a reason the Commission could not have proven a case under the dishonest or fraudulent standard?

RESPONSE: *FTC v. Credit Bureau Center* was a massive fraud, causing a half-billion dollars in consumer loss. Although the FTC did essentially prove that this was a fraudulent scheme, there was no Section 19 claim asserted and there was no basis to do so since there was no rule violation and no prior administrative proceeding.

Therefore, to the extent the question is asking whether the FTC could have litigated *Credit Bureau* in a way that allowed the Commission to use Section 19, the realistic answer is no. The FTC would have to have filed an action for an asset freeze in federal court, which would have required the FTC to give the company a real preview of its case in order to meet the likely-to-succeed requirement. The Commission would then have to go back and litigate the case administratively, which takes longer then federal court proceedings; then wait until judicial review of the FTC's order was complete; and only *then* bring a Section 19 case. That process would have taken years. Doing so in *FTC v. POM Wonderful*, for example, took more than five years.

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[2] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

[3] *Id.*

[4] *Id.*

(*See* David Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 Mont. L. Rev. 159, 188-90 (2021).) Could the FTC find victims after so long? Could it maintain an asset freeze for so long?

To the extent that the question asks instead whether the "dishonest or fraudulent" standard could have been met in that case, the answer is "perhaps." It would have depended on the definitions of "dishonest" and "fraudulent" that the court chose to apply – and which could well have varied from the common meanings of the words employed in the existing opinion.

But again, the crucial issue in deciding on a legislative fix to the *AMG v. FTC* case is not the cases that *could* still have been brought, but rather those that could *not* have been.

Conduct that violates users' privacy, that involves abusive or even unconscionable behavior, that preys on children or seniors or the disabled – but that is not dishonest or fraudulent – is conduct that we want the FTC to be able to stop. And we want the Commission to be able to obtain redress for consumers who are injured. That can only be accomplished if Congress provides the FTC with full authority to provide equitable relief to consumers. That is the same authority that the FTC has been exercising under an interpretation of Section 13(b) that went unchallenged by appellate judges for four decades. It is the same authority that is exercised by other federal agencies and by state attorneys general. It is neither novel nor exceptional. It is, rather, precisely what is needed by every consumer – every senior, every servicemember, every veteran, every small business – in this country.

3. QUESTION: The Commission obtained $14.7 billion, by far its largest ever monetary remedy, from Volkswagen in a 2016 settlement. The Commission alleged the company had intentionally installed, in millions of vehicles sold in the U.S., "illegal software designed to enable the vehicle to cheat emissions tests" to allow "emissions at as much as 4,000 percent above the legal limit." If intentional falsification of a product quality, which is both required by law and also valued by environmentally sensitive consumers, does not qualify as dishonest or fraudulent conduct, what type of conduct would meet this standard?

   RESPONSE: Given the intentional conduct on the part of Volkswagen, it does seem that this behavior could readily be characterized as both dishonest and fraudulent. But rarely do public prosecutors encounter a case in which the conduct is admitted and the intent is so readily established. Much more common are the cases in which intent (including, perhaps, dishonesty and fraud) is difficult to prove. After all, "unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery" (*People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 772 (1962)) and those who perpetrate them are often "wily or obstinate enough to hide the truth." (*U.S. Dept. of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920, 927 (4th Cir. 1995).) In the great majority of cases brought by public prosecutors, including the FTC, the defendant denies all

wrongdoing – even in the consent decree or stipulated judgment settling the case. It is for this reason that public consumer protection statutes generally do not contain a "scienter" or intent requirement. (*See* Cox & Peterson, *supra*, at p. 37.)

4. QUESTION: H.R. 2668 contains a provision that "a court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought."

    a. Is 10 years an appropriate period? Please explain.

The current FTC Act does not contain a statute of limitations for 13(b) relief. Imposing one now is not necessary – the FTC has operated for the past four decades and more without great consternation over the lack of a limitations period. And the consensus among public prosecutors is that there is no need for such a limitation. Nevertheless, in the interest of finality, a carefully crafted statute of limitations of some kind should not overly burden the Commission's work. Given the months or often years it can take for misconduct to reach the attention of the FTC, a finite but not overly constricted statute of limitations would make sense. A 10-year timeframe could provide the balance of returning money to as many consumers as possible on the one hand, and providing finality while allaying concerns about evidence that has gone stale or disappeared on the other. It is, however, necessary to add to any statute of limitations the caveat that the statute does not begin to run until the FTC has discovered or should have discovered the wrongdoing. That is, so long as the wrongdoing conceals the fraud, the statute of limitations should not be running. Otherwise, we run the risk that bad actors will retain money that they unlawfully took from consumers more than a few years ago.

This last observation serves as a useful summation to the entire question of placing limitations on the FTC's ability to return stolen money to consumers: Why would we want to let wrongdoers keep the money they took illegally?

The time has come for Congress – including every member who cares about fairness in the marketplace and safeguarding their constituents – to act swiftly to restore the FTC's full capacity to protect all Americans.

Respectfully submitted,

/s/ Ted Mermin

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