No. 19-508

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

BRIEF OF *AMICI CURIAE*
REMEDIES, RESTITUTION, ANTITRUST, AND INTELLECTUAL PROPERTY LAW SCHOLARS
IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are 43 professors and scholars of remedies, restitution, antitrust, and intellectual property law throughout the United States. *Amici* include editors of major casebooks and books on Remedies, Antitrust, and Intellectual Property, and one of the *amici* is the new editor of the leading treatise on Remedies. Many of the *amici* also have served as Advisers and Members of the Consultative Group to the *Restatement (Third) of Restitution and Unjust Enrichment* (Am. Law Inst. 2011). Two are the Reporters, and several serve as Advisers, for the *Restatement (Third) of Torts: Remedies* (in progress). One is President Emeritus of the American Law Institute. All *amici* have taught at major law schools and regularly publish articles in the areas of remedies, restitution, antitrust, and intellectual property. *Amici* seek to clarify the history and source of power for equitable remedies incident to injunctions such as disgorgement of a wrongdoer's profits.

Amici have no direct financial interest in the parties to or the outcome of this case. They do share a professional and academic interest in ensuring that the Court is aware of the history of injunctions and equitable power to order ancillary relief.[1]

A full list of *amici* can be found in the Appendix.

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[1] The parties have granted blanket consent for the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. *Amici's* university affiliations are for identification purposes only; *amici's* universities take no position on this case.

SUMMARY OF ARGUMENT

An injunction is an equitable remedy with a long history in the courts of equity. The injunctive power historically and necessarily includes the attendant power for a court also to order restitutionary disgorgement of a defendant's ill-gotten gains, among other forms of equitable monetary relief. That has been a long-standing and steadfast rule in equity jurisprudence for nearly two hundred years. It has also been a consistent holding in this Court's cases. And this Court has required statutes to be clear and unambiguous in disclaiming traditional equity powers. The FTC Act does not do so.

ARGUMENT

This brief addresses two principal questions: (i) whether statutory authority for courts to issue an injunction includes the power to issue equitable ancillary relief, including disgorgement or other restitution remedies to strip ill-gotten gains, and (ii) whether restitution or disgorgement under the Federal Trade Commission Act should accord with the longstanding principles of equity. The answer to both questions is yes.

I. SECTION 13(b) OF THE FTC ACT PROPERLY AUTHORIZES AN AWARD OF RESTITUTION OR DISGORGEMENT.

Pursuant to Section 13(b) of the FTC Act, "the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. §53(b). The statutory authority to issue an injunction includes with it a range of well-established equitable powers incident or ancillary to the injunction power.

The Ninth Circuit properly determined that §13(b)'s statutory injunctive power "'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'" *FTC v. AMG Capital Mgm't, LLC*, 910 F.3d 417, 426 (9th Cir. 2018), quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). This grant of injunctive authority includes the traditional equitable power, incident to the injunction, to order disgorgement or restitution of net gains to undo unjust enrichment.

An overly rigid conception of the statutory injunction power as including only a command to act or not act, but not the adjunct authority to order an accounting of profits or restitution of ill-gotten gains, belies the historic meanings and uses of injunctive authority. Such a strict and formalistic view ignores the long history of injunctions and incident authority also to order restitution, even when the statute provides for injunctions without explicitly listing other remedies.

A. Equity Has Long Permitted Courts to Order the Disgorgement of Gains from Wrongful Acts.

Disgorgement of a wrongdoer's profits, by whatever name, is an equitable remedy with a pedigreed history. The Restatement describes it as "one of the cornerstones of the law of restitution and unjust enrichment." *Restatement (Third) of Restitution and Unjust Enrichment* §3 Comment a (Am. Law Inst. 2011). And this Court recognized last Term that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains." *Liu v. SEC*, 140 S.Ct. 1936, 1942 (2020).

An injunction is an in personam command to the defendant to take action (affirmative/mandatory) or to stop action (negative/prohibitory). Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages—Equity—Restitution* §2.1(2) (West 3d ed. 2018); Doug Rendleman, *Complex Litigation: Injunctions, Structural Remedies, and Contempt* 79 (2010) (continuing edition of Owen M. Fiss & Doug Rendleman, *Injunctions* (2d ed. 1984)). An injunction can include both affirmative and negative commands.

But the injunction power is not limited only to the ability to impose negative and affirmative orders on a defendant. In appropriate circumstances, courts' "injunctive orders compel the payment of money." Dobbs & Roberts, *supra*, §2.6, at 106. The history of equitable relief demonstrates that Section 13(b)'s statutory grant of injunctive authority includes equity's power to achieve complete relief.

In the absence of clear congressional words of limitation on historical equity power, the court maintains the full range of equity power to grant, shape, or deny equitable relief. "Unless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction.'" *Liu*, 140 S.Ct. at 1947 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946)).[2] Here, Congress, in drafting Section

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[2] Compare *TVA v. Hill*, 437 U.S. 153 (1978) (ruling that Congress's clear statutory command eliminated the court's ability to deny an injunction where it found an ongoing statutory violation), with *Weinberger v. Romero*, 456 U.S. 305 (1982) (maintaining the court's historic equity power to deny injunctive relief despite a technical statutory violation where Congress had not clearly foreclosed historic equitable discretion).

13(b)'s injunctive power, used no words of limitation; the Section's statutory grant of power thus carries with it the full scope of historic equity.

i. Equitable Remedies Are Highly Flexible and Have Long Recognized Accounting for Profits and Disgorgement as Incident to the Injunction Power.

Flexibility and adaptability of equitable remedies is the coin of the equity realm. 1 John Norton Pomeroy, *Treatise on Equity Jurisprudence*, §109 (5th ed. 1941) ("Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application . . . ."). Historically, courts considering equitable remedies have always possessed the ability to fashion appropriate equitable relief. *See* Dobbs & Roberts, *supra*, §2.1, at 47; *see also id.* §2.4; Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1434–35 (2015).

Modern applications of equity, even pursuant to statutory authorization, still require an understanding of historic equity and the role of the Chancellor as Writ Maker, which included power to fashion new kinds of writs and corresponding equitable relief. *See Weinberger*, 456 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") (cleaned up); Dobbs & Roberts, *supra*, §2.2; *see also* Frederic

William Maitland, *Equity* 1–11 (Brunyate, reissue ed. 2011 (notating 1936 ed.)). Injunctive relief with an incident accounting for profits relies on these historic equitable principles.

Restitution for wrongdoing and its disgorgement remedy strip willful wrongdoers of their unjust profit, both to return to the victims of the wrongdoing funds obtained through the unlawful activity and to deter conscious advantage-taking. The roots of such a restitution award—disgorgement of wrongful profits—are incident to the injunction power. The early tie was the equitable remedy of accounting for profits:

> *Money claims for restitution with equitable enforcement: accounting for profits.* Several remedies parallel the constructive trust. The remedy known as accounting or accounting for profits is usually regarded as equitable, but it can ultimately resemble a money judgment.

Dobbs & Roberts, *supra*, §2.6, at 109–110; *see also Restatement Third of Unfair Competition* (Am. Law Inst. 1995) at §37, Comment b ("Accountings of profits in unfair competition cases were initially granted as ancillary relief in actions in equity, thus permitting an award of monetary and injunctive relief in the same action.").

Restitution and unjust enrichment remedies, particularly disgorgement, service the goals of undoing a wrongdoer's unjust gain and deterring opportunism, fraud, and other wrongful behavior. *Restatement (Third)*, at §3, Comment a & §39, Comment b; Andrew Kull, *Rationalizing Restitution*, 83 Calif. L. Rev. 1191 (1995). In such cases, "[e]quity

courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names." *Liu*, 140 S.Ct. at 1942.[3]

In interpreting statutes that provide for equitable relief, the Court "analyzes whether a particular remedy falls into 'those categories of relief that were typically available in equity,'" the basic contours of which "can be discerned by consulting works on equity jurisprudence." 140 S.Ct. at 1942 (internal citations omitted). And indeed, early commentators and treatise writers confirm that not just equitable power generally, but the injunction power specifically, included the power to order restoration or restitution of ill-gotten gains. *See, e.g.*, Dobbs & Roberts, *supra*, *Law of Remedies* §1.1, at 6 ("The injunction may be prohibitory in form or it may be mandatory, compelling some affirmative action. It may attempt to prevent harm or to compel some form of reparation for harm already done."); Howard C. Joyce, *Treatise on the Law Relating to Injunctions* (1909) §2: ("[T]he injunction has been regarded as more flexible and

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[3] "*Compare, e.g.*, 1 D. Dobbs, *Law of Remedies* §4.3(5), p. 611 (1993) ('Accounting holds the defendant liable for his profits'), *with id.*, §4.1(1), at 555 (referring to 'restitution' as the relief that 'measures the remedy by the defendant's gain and seeks to force disgorgement of that gain'); *see also Restatement (Third)* §51, Comment a, p. 204 ([2011]) . . . ('Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.'). Other cases refer to an 'accounting' or an 'accounting for profits'); 1 J. Pomeroy, *Equity Jurisprudence* §101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy)." *Liu*, 140 S.Ct. at 1943–44; *see also Restatement (Third)* §51, Comment a & 51(4).

adjustable to circumstances than any other process known to the law," as seen in "the ease with which damages are substituted in their place when justice and the public interest so require; the facility with which a preventative and a mandatory injunction are made to co-operate so that by a single exercise of equitable power an injury is both restrained and repaired.").

ii. This Court's Decisions Have Long Confirmed the Equitable Power to Disgorge Ill-Gotten Profits.

"Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts." *Liu*, 140 S.Ct. at 1943.[4] Both this Court and lower courts have routinely coupled injunctions with restitution awards.

1. This Court's early intellectual-property cases in particular confirm that the Court has always viewed restitution of a defendant's profits as proper additional

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[4] *See also Kansas v. Nebraska*, 574 U.S. 445, 466–67 (2015) (upholding Special Master's equitable disgorgement award but finding the injunction unnecessary where the offensive behavior was unlikely to recur, especially given that another disgorgement award would deter such an occurrence). This ruling reinforces the equitable principles and the functions of a restitution-based disgorgement of wrongful gain award. *See Liu*, 140 S.Ct. at 1943–44 (citing with approval the *Kansas* holding that, in the "basically equitable" proceeding, ordering disgorgement of Nebraska's unlawful gains was appropriate). *Kansas* also reinforced the Court's equitable power to "accord full justice." *Kansas*, 574 U.S. at 456 (quoting *Porter*, 328 U.S. at 398).

relief incidental to the equitable authority to enjoin deliberate acts of infringement. The disgorgement remedy is now codified for copyright, trademark, trade secret, and design patents.[5] But as this Court explained in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), and in numerous other cases, and as Justice Story had explained in his *Commentaries* more than a century before, the remedy was developed in equity as relief incident to an injunction long before it was codified in these statutes.

Sheldon was a suit to recover the profits of an infringing movie based on the script of plaintiff's copyrighted play (a remedy the Court called an "accounting of profits"). 309 U.S. at 396. The Court described the history of this remedy and its origins in equity before it was partially codified in the Patent Act of 1870 and the Copyright Act of 1909:

> Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been allowed in equity both in copyright and patent cases *as appropriate equitable relief incident to a decree for an injunction*. That relief had been given according to the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by

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[5] *See* 17 U.S.C. §504(b) (2012) (copyright); 11 U.S.C. §1117(a) (2012) (trademark); 18 U.S.C. §1836(b)(3)(B) (2012) (trade secret); 35 U.S.C. §289 (2012) (design patents). Disgorgement was a mainstay of utility patents until 1946, when Congress eliminated it. *See* 35 U.S.C. §284 (2012).

> allowing injured complainants to claim "that which, *ex aequo et bono*, is theirs[.]"

Sheldon, 309 U.S. at 399) (quoting *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 560 (1853) (other citations omitted) (emphasis added).

Livingston was a patent case under the 1836 Patent Act, which conferred the power to grant injunctions but did not explicitly provide for the award or accounting of profits. 56 U.S. at 550. The Court recognized "[a]ll the authorities and precedents which declare that the infringer is to account in equity for the 'profits'" resulting from its infringement, and reiterated that this "jurisdiction in equity conferred . . . by statute, contemplates full power to give the plaintiff as ample redress as he could have at law[.]" *Id*. (citing the Patent Act of July 4th, 1836, §§17, 14, 5 Stat. 123). *Accord Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 803–04 (1869) (upholding, under the 1836 Patent Act, an accounting of profits "in accordance with the rule in equity cases established by this court.").

These cases reflect the history of accounting or restitution in patent cases under courts' general equitable jurisdiction, before the specific provision for the recovery of profits was added by the Patent Act of 1870. Act of July 8, 1870, §55, 16 Stat. 198, at 206. This Court summarized that pre-1870 history in *Tilghman v. Proctor*, 125 U.S. 136, 144 (1888), and recognized that recovery of an infringer's profits "was established by a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions in cases arising under the patent laws." *Id.* at 144; *see also* Caprice L. Roberts, *The Case*

for Restitution and Unjust Enrichment Remedies in Patent Law, 14 Lewis & Clark L. Rev. 653, 657–58 & n.21 (2010) (reviewing the availability and evolution of the accounting remedy in patent cases and noting that the power to issue injunctions "carried with it the power to order an equitable accounting of the infringer's illicit profits.") (cleaned up).

While the Patent Act of 1870 provided that a patent plaintiff could recover "the profits to be accounted for by the defendant," Act of July 8, 1870, 16 Stat. 198, §55 at 206, the corresponding copyright provision (in the same statute) did not specify profits at all; it simply granted equity jurisdiction and authorized injunctions. *Id*. §106 at 215. The trademark statutes did not allude to net profits until the Lanham Act, 60 Stat. 427, §35 at 440 (1946), and then only to allocate the burden of proof. *See* 11 U.S.C. §1117(a) (making recovery of profits "subject to the principles of equity"). But under principles of equity, courts had the power to make awards of net profits in all three of these types of cases.

Stevens v. Gladding, 58 U.S. (17 How.) 447 (1855), was a copyright case under the 1831 Copyright Act involving printed copies of a map of the State of Rhode Island. This Court remanded the case with instructions to grant a "perpetual injunction" and also to make an accounting of the profits of the defendants, because "*[t]he right to an account of profits is incident to the right to an injunction* in copy and patent-right cases." *Id*. at 455 (emphasis added). Similarly, *Callaghan v. Myers*, 128 U.S. 617, 666 (1888), addressed the infringement of copyright in reports of the Illinois Supreme Court. The Court upheld a "perpetual injunction" against further infringing

publication, as well as an accounting of profits the defendant had made from infringing works that had been distributed.

The accounting of profits in these cases was not authorized by the terms of the statutes in effect at the time. For patents, such explicit authorization was true only after 1870, well after many of these cases; before that, the various patent statutes did not mention defendant's profits. There was no statutory authorization for recovery of profits in copyright actions until 1909. Yet accounting of profits, or restitution, were routinely awarded in both contexts, as relief incident to an injunction. *See Liu*, 140 S.Ct. at 1944 ("[A]s these [pre-1870 Patent Act] cases demonstrate, equity courts habitually awarded profits-based remedies in patent cases well before Congress explicitly authorized that form of relief.").

In the trademark context, the Court in *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 259–60 (1912), provided a detailed explanation of the equitable origins of accounting of profits in trademark infringement cases, closely parallel to the history reviewed in *Sheldon*) for that remedy in patent and copyright cases. The *Hamilton-Brown Shoe* Court did not cite the Trademark Act's then relatively abbreviated authorization for the recovery of profits, Act of Feb. 20, 1905, §19, 33 Stat. 724, at 729. Instead, it relied solely on traditional equity power to justify accounting as a remedy incident to an injunction. *Id.* at 259 (where jurisdiction rests on the equitable ground of "the right to an injunction . . . the court of equity, having acquired jurisdiction upon such a ground, retains it for the purpose of administering complete relief[.]").

2. The remedy of an accounting of profits from infringement was clearly established in the lower courts well before the first such cases reached this Court. Justice Story explained in 1836, far in advance of a remedy of accounting for profits being added to the patent or copyright statutes, that damages were generally an inadequate remedy for patent or copyright infringement and that the equity court would therefore enjoin infringement. 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* §§931–32, at 210 (1st ed. 1836). His *Commentaries* explained that,

> [I]n most cases of this sort, the bill usually seeks an account, in one case of the books printed, and in the other of the profits, which have arisen from the use of the invention, from the persons, who have pirated the same. And this account will, in all cases, where the right has been already established, or is established under the direction of the Court, be decreed as *incidental, in addition to the other relief of a perpetual injunction*.

Id. §933 at 211 (emphasis added).

Thus, while disgorgement was "typically" available in equity, it was available "in all cases" in which infringement was enjoined. *Id*. This history and the Court's decisions in this area demonstrate that disgorgement is not a recent notion or a mistaken accompaniment to the power to issue an injunction, but rather a long-standing and well-established incidental power of equity.

3. These well-established principles of equitable power to order restitution or disgorgement incidental to injunctions are not limited to cases of intellectual

property infringement. They extend to courts' equitable authority to enjoin violations of federal regulatory statutes. In that context too, this Court has held that courts have the power to order violators of those statutes to disgorge their ill-gotten gains in the absence of clear congressional language to the contrary.

For example, this Court endorsed equitable relief of an injunction and restitution in a case under the National Bank Act. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). The Court found that a court of equity could decree restitution and further found no error in the lower court's equitable restitution award coupled with an injunction:

> so far as it directs restitution of the specific sum of 98,000 dollars, which was taken out of the Bank unlawfully, and was in the possession of defendant . . . when the injunction was awarded . . . to restrain him from paying it away, or in any manner using it[.]

Id. at 871.

Later, in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that provided for issuance of a permanent or temporary injunction, restraining order, or other order. The Court indicated that an order for the "recovery and restitution" of illegal rents "*may be considered as an equitable adjunct to an injunction decree*." *Id.* at 399 (emphasis added). It also emphasized the essential connection between restitution and the injunction: "Nothing 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." *Id*.

The Court found that the authority "to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act" was equitable in nature, and,

> [u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances.

Id. at 397–98.

The Court also observed that the "comprehensiveness of this equitable jurisdiction" should not be limited or rejected "in the absence of a clear and valid legislative command" that, "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Id*. at 398. Otherwise, "'[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id*. (quoting *Brown v. Swann*, 35 U.S. 497, 10 Pet. 497 (1836)). This Court cited *Porter* with approval in *Liu* in concluding that a "mainstay of equity courts" has been the power to strip wrongdoers of their illegal profits. 140 S.Ct. at 1943.

Similarly, in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the Court reviewed a suit by the Secretary of Labor to enjoin violations of the Fair Labor Standards Act forbidding retaliatory firing of or discrimination against employees who complained under the FLSA. The Act confers on district courts the power "to restrain violations" of the relevant section. Section 17 of the Act, 52 Stat. 1069, *as amended*, 29 U.S.C. §217.

The Court rejected the lower court's conclusion that it lacked the power to award lost wages because such authority "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment." 361 U.S. at 290. Instead, the Court reiterated its holding in *Porter* that courts had the "implied power to order reimbursement" under their statutory power to enjoin violations, 361 U.S. at 291, and that unless otherwise provided by statute, "all the inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Id.* (quoting *Porter*, 328 U.S. at 397–98). As a result, the Court held that district courts' authority "to restrain violations" of the FLSA also includes the implied power to order the payment of lost wages. 361 U.S. at 296.[6] *See also United States v. RaPower-3, LLC*, 960 F.3d 1240 (10th Cir. 2020) (enjoining defendants, pursuant to 26 U.S.C. §7408, from continuing to promote an abusive solar power

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[6] The Court did so even though the FLSA expressly provides that courts do not have jurisdiction, in such injunctive proceedings, to order the payment of unpaid minimum wages or overtime compensation. *Id.* at 293–94. The Court found this express limitation inapplicable to restitution of wages lost due to an unlawful discharge. *Id.*

energy tax scheme and ordering disgorgement of gross profits from the scheme).

This long history has not been abrogated or undermined by this Court's more recent cases. In fact, just last Term the Court strongly confirmed what it identified in its prior cases as the "'protean character' of the profits-recovery remedy." *Liu*, 140 S.Ct. at 1943 (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668, n.1 (2014)). *Liu* also described how the Court's "'transsubstantive guidance on broad and fundamental' equitable principles . . . thus reflects the teachings of equity treatises that identify a defendant's net profits as a remedy for wrongdoing. 104 S.Ct. at 1944 (quoting *Romag Fasteners, Inc. v. Fossil Group, Inc.,* 140 S.Ct. 1492, 1496 (2020)).

Given the clarity of the Court's determinations in *Porter* and *Mitchell*, it is no surprise that, until the Seventh Circuit's outlier decision in *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019), the courts of appeals had been uniform for over 35 years in holding that Section 13(b)'s authorization for courts to grant permanent injunctions also included the authority to order wrongdoers to disgorge their illegal gains. *See* Brief of Respondent FTC ("Resp. Br."), at 8.

iii. Petitioners' Claims that Statutory Injunction Power Cannot Include Disgorgement Authority Ignore This History of Equitable Remedies and This Court's Decisions.

1. In the face of this clear and well-established history, Petitioners' advance a cramped and artificially narrow view of the effect of statutory authorization to grant injunctions as categorically

excluding the possibility of monetary relief incident to those injunctions. Their claims that "as traditionally understood, injunctions could not be used to compel restitution or payment of monetary relief," Petitioner's Opening Brief ("Pet. Br."), at 2, and that injunctions "traditionally excluded monetary relief, *id*. at 24, are contradicted by the history of equitable remedies. Similarly, the Seventh Circuit's statement in *Credit Bureau Center*, that "[r]estitution isn't an injunction. . . . [and] statutory authorizations for injunctions don't encompass other discrete forms of equitable relief like restitution," 937 F.3d at 771–72, fares no better. Both claims reflect a formalistic and simplistic view of injunction power that ignores the long history of relief incident to injunctions.

Petitioners try to cast aside much of this equitable history, characterizing *Porter* and *Mitchell's* reliance on core equitable principles as "a relic of that *ancien regime*" that this Court "long ago rejected." Pet. Br. at 36–37. Petitioners even assert that, "[w]here *Porter* once assumed that 'all the inherent equitable powers of the District Court are available' unless 'restrict[ed]' by 'a clear and valid legislative command,' the Court now takes the opposite approach when considering remedies 'not explicit in the statutory text itself[.]'" *Id.* (internal citations omitted). But Petitioners' attempt to rewrite the long history of equitable disgorgement is squarely contradicted by *Liu*, where this Court quoted with approval *the very same language* from *Porter*: in "federal courts . . . '[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction.'" 140 S.Ct. at 1946–47 (quoting *Porter*, 328 U.S. at 398). *See also Tull v. United States*, 481 U.S. 412, 414, 425 (1097) (disgorgement of

improper profits, traditionally considered an equitable remedy, was still available under the remedies section of the Clean Water Act, 33 U.S.C. §1313(b), that allowed injunctions, even though separate provisions of §1313 provided for legal relief in the form of civil penalties).

2. But even without incorporating this historical scope of the power incident to an injunction, the nature of injunctions cannot be narrowed in the formalistic way Petitioners urge. For one thing, authority to issue an injunction inherently contains authority to issue contempt sanctions for violation of that injunction. Enforcement in equity relied on the contempt power because equity operated in personam with "pressure on the conscience of defendant" rather than in rem. Dobbs & Roberts, *supra*, §2.2, at 60. Contempt power cannot be divorced from injunctions, and contempt power includes the ability to order defendant to pay money as a coercive sanction to compel compliance or as compensation for harms caused by violating the injunction, *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829–30 (1994), or to disgorge the profits of the violation. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455–57 (1932).

The threat of contempt is essential to the functioning of injunctions. "For in personam to work, the judge will wield contempt against a recalcitrant or disobedient defendant." Doug Rendleman & Caprice L. Roberts, *Remedies: Cases and Materials* 298 (9th ed. 2018). The injunctive personal command must carry force. On disobedience, the judge may seek to coerce obedience by fine or imprisonment. 1 John Norton Pomeroy, *Treatise on Equity Jurisprudence* (1881), §428, at 469 (1881).

Nor is it an answer to suggest that the disgorgement incident to an injunction is effectively a damages award and thus inappropriate for an equitable remedy. While an award of purely compensatory damages would be beyond Section 13(b)'s injunctive power, an order to pay money is not automatically or necessarily a damages remedy. "Some money claims are not 'damages' representing plaintiff's loss but 'restitution' representing defendant's unjust gains . . . ." Dobbs & Roberts, *supra*, §2.6, at 109; *see also* Douglas Laycock & Richard L. Hasen, *American Remedies: Cases and Materials* 645 (5th ed. 2019) ("Damages are based on plaintiff's loss; restitution is based on defendant's gains."). The disgorgement of wrongful gains authorized by Section 13(b) is restitution and not compensatory damages, and it is a restitutionary remedy that has long been available in equity as relief incident to an injunction.

The award of restitution of unjust gains under Section 13(b) is not simply a matter of labels. What governs classification and corresponding equitable power is the nature and function of the remedy. Here, the award keys to the wrongdoer's gain rather than the victim's loss. This feature renders it an equitable restitution award and not a legal damages compensatory award.

B. Congress Enacted Section 13(b) Against the Backdrop of These Well-Established Equitable Principles.

Thus, at the time Congress enacted §13(b) in 1973, the availability of accounting for profits or restitution was a well-established, integral part of equity practice under statutes authorizing injunctions. Congress

acted with that understanding and against the backdrop of the settled principle that the power to issue an injunction also includes the power to order restitution or disgorgement. In determining the meaning of "permanent injunction" as used in §13(b), this Court should not interpret that term in a way that contravenes this longstanding, well-established history and practice.[7]

1. *Liu* reiterates *Porter's* conclusion that "all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction" unless a statute provides otherwise. 140 S.Ct. at 1947 (quoting *Porter*, 328 U.S. at 398)). Congress, in using the term "permanent injunction" in §13(b), provided no other language or provisions that would limit those "inherent equitable powers."

When, as in Section 13(b), Congress explicitly authorizes injunctions, that language necessarily carries with it the historic equitable principles detailed above regarding restitution, accounting of profits, and disgorgement. And, of course, it also carries historical equitable limits. Any use of the injunction remedy by Congress necessarily incorporates the history of equitable principles. Thus, when Congress uses a statutory term like "injunction"

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[7] Petitioner advances a separate argument that the other statutes that provide the FTC with remedial powers in the context of *its own* administrative proceedings, Section 19 (enacted two years after §13(b)) and Section 5(l), demonstrate that Congress must have intended, sub silentio, to alter the settled meaning of "injunction" when it used that term in §13(b). Pet. Br. at 25–32. *Amici* agree with Respondent, Resp. Br. at 37–49, that this argument is unavailing but leave the details of the rebuttal to Respondent and other *amici*.

in a statute, it "brings the soil with it." *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1801 (2019).

Statutory silence on general equitable principles cannot divorce injunction power from its source and function. The specific history of injunction is rich and varied. An essential feature of equitable principles grounding injunctions is the ability for the judge to shape the equitable relief necessary to stop the wrongdoing and to return to the victims the wrongdoer's its ill-gotten fruits, whether that relief is called restitution, disgorgement, or accounting of profits—it's all the same remedy. *See Liu*, 140 S.Ct. at 1942 ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names"); *see also* George Palmer, *The Law of Restitution* §1.5(c) (1978) (exploring the equitable nature of accounting); *see also* Rendleman & Roberts, *supra*, at 287) (coupling together, as equitable remedies, accounting for profits and accounting-disgorgement). These remedies coexisted as part of equitable relief in historic equity courts:

> Plaintiff could seek certain restitutionary remedies in the old equity courts, notably equitable liens, constructive trusts, and an accounting for profits . . . . Lurking behind the constructive trust is the *in personam* power of the old equity courts. Implicitly, if not actually, defendant who is subjected to a constructive trust will be subjected to a coercive order to make the required transfer of property or funds.

Dobbs & Roberts, *supra*, §1.4, at 14–15. *See also Snepp v. United States*, 444 U.S. 507 (1980) (per curiam)

(imposing a constructive trust that effectively stripped profits from a book published without prepublication clearance from the former employer, the Central Intelligence Agency).

2. "'[A] major departure from the long tradition of equity practice should not be lightly implied.'" *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)). Here, there is nothing in the text or operation of 13(b) that gives any reason to think Congress intended its choice of the term "permanent injunction" to alter the well-settled principle that the power to issue an injunction includes the power to order restitution or disgorgement incident to that injunction.

Congress knows how to impose limitations on well-established meaning. And this Court has required it to be express in cabining equity jurisdiction. *See, e.g., Mitchell*, 261 U.S. at 296. Congress did nothing of the sort here; it certainly did not, silently and entirely by implication, impose significant statutory limits on the traditional incidents of the power to issue injunctions. *See Cook Cnty. v. United States ex rel. Chandler,* 538 U.S. 119, 122 (2003) (finding it unlikely that Congress intended to repeal municipal liability sub silentio by enacting a law to strengthen the government's ability to fight false claims, even though the text arguably implied otherwise); *Hecht v. Bowles*, 321 U.S. 321, 330 (1944) ("[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.").

3. In the face of the well-settled history of disgorgement and restitution as incident to injunction,

Petitioners rely primarily on *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996), an action under the citizen suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6972(a). *See* Pet Br. at 17 ("*Meghrig* is all but controlling here."). But *Meghrig* represents none of the sweeping departure from historical practice that Petitioners attribute to it.

Unlike the Court's careful review of that history in its subsequent *Liu* decision and its confirmation that restitution of unlawful profits has been "a mainstay of equity courts," 140 S.Ct. at 1943, the decision in *Meghrig* engages in no review of historical equity practices and no analysis of *Porter* or *Mitchell* or the many other equitable disgorgement cases. Nor is *Meghrig* cited, at all, in *Liu*. Instead, *Meghrig* stands only for the unremarkable proposition that, where a statute presents a complex and comprehensive statutory scheme (in that case one with interrelated private, federal, and state enforcement authority) that demonstrates Congress's clear intent to restrict the available remedies, that clear legislative command may overcome the usual equitable authority for restitution. *See* 516 U.S. at 487–88. Here, the very different FTC Act does not foreclose equitable power incident to an injunctive order.

II. DISGORGEMENT UNDER SECTION 13(b) MUST COMPLY WITH THE LIMITS ARTICULATED IN *LIU v. SEC*

The history of equity also includes limits on fashioning disgorgement awards to undo unjust enrichment. But these limits are not as narrow as

petitioner contends. Guidance on the scope of such limits is evident from this Court's recent precedent. As the Court clarified in *Liu*, several limits ensure that disgorgement of gains fits within the boundaries of equitable principles as well as the law of restitution and unjust enrichment. 140 S.Ct. at 1044–47. Acknowledging that Section 13(b)'s injunction power authorizes the Commission to seek and the court to award restitutionary awards does not equate with the power to punish. A restitution award for disgorgement on unjust gains must conform to *Liu*. Therefore, the restitution award must be limited to net rather than gross profits. To do more would create a penalty.

Moreover, it appears that the FTC returns virtually all the money obtained under 13(b) to injured consumers, at least whenever it is feasible. *See* Resp. Br. at 53. In accordance with *Liu*, the Commission must endeavor to continue to distribute the restitution award to victims of the wrongdoing that is being remedied whenever possible.

III. SOUND POLICY REASONS SUPPORT PERMITTING COURTS TO CONTINUE TO ORDER DISGORGEMENT UNDER SECTION 13(b).

Significant policy considerations support reading §13(b) to continue to permit courts to award a defendant's profits when they enter permanent injunctions. It should not be lightly implied that Congress meant to leave courts powerless to strip serious wrongdoers of the ill-gotten fruits of their fraud or other misconduct and limit courts only to preventing future harm. *See Liu*, 140 S.Ct. at 1493 (disgorgement to reverse unjust enrichment "reflected

a foundational principle:" that it would be "inequitable" for a wrongdoer to "'make a profit out of his own wrong.'" (internal citations omitted)).

Eliminating the ability of courts to award restitution in §13(b) cases would cause serious harm in many cases. It would unjustly enrich defendants, leave wrongdoing under-deterred, and fail to carry out the very purposes of the FTC Act—protecting against exactly this type of wrongful profiting from consumers.

CONCLUSION

The judgment should of the court of appeals should be affirmed.

Respectfully submitted,

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