No. 19-508

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC; BLACK CREEK CAPITAL CORPORATION; BROADMOOR CAPITAL PARTNERS, LLC; LEVEL 5 MOTORSPORTS, LLC; SCOTT A. TUCKER; PARK 269 LLC; AND KIM C. TUCKER,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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QUESTION PRESENTED

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), authorizes the Federal Trade Commission to sue in federal district court those who violate the laws under the Commission's purview and authorizes the district court in such cases to issue "a permanent injunction."

The question presented is:

Whether, when the Commission seeks a permanent injunction under Section 13(b), the district court may order the defendant to return money unlawfully taken from consumers as part of the relief.

PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the court of appeals.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-40a) is reported at 910 F.3d 417. The district court's opinion on liability (Pet. App. 41a-73a) is reported at 29 F. Supp.3d 1338, and its opinion on remedy (Pet. App. 74a-116a) is unreported.

JURISDICTION

The court of appeals entered judgment on December 3, 2018, and denied rehearing on June 20, 2019. On September 3, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to October 18, 2019, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, are reproduced in the Appendix. App., *infra*, 1a-12a.

INTRODUCTION

Scott Tucker ran a deceptive payday lending scheme so egregious that he ultimately went to prison for it. He stole more than $1.3 billion from consumers by misrepresenting loan terms and causing borrowers to pay more than seven times the interest they were told they would pay, violating the Federal Trade Commission Act's prohibition on deceptive practices. In this civil case, Tucker and his companies were enjoined from further consumer lending and ordered to pay back the victims.

Tucker's scam is just one example of the many ways in which fraudsters reap enormous profits at the expense of American consumers. From bogus health insurance scams, to debt-relief schemes, to quack cancer cures, con artists are endlessly creative in fleecing consumers, and the Commission wages a ceaseless battle against them. It brings scores of enforcement cases every year which have returned billions of dollars to cheated victims. Often, legal action by the Commission is the only practical means of stopping the misconduct and securing monetary recovery.

Tucker does not dispute that he violated the law or that the district court properly enjoined his future conduct. Instead, he insists that because the Commission sued him under a provision authorizing a "permanent injunction," the district court was powerless to award any kind of monetary relief, and he should have kept his ill-gotten gains.

That position conflicts with basic principles of equity and nearly three hundred years of precedent. Since the eighteenth century, equity jurisprudence has recognized

that a court's jurisdiction to issue an injunction carries with it the authority to provide complete relief, including the restoration of property or money improperly taken from its owner or an accounting of profits. Such restorative remedies rest on the "foundational principle" that "the wrongdoer should not profit 'by his own wrong.'" *Liu* v. *SEC*, 140 S. Ct. 1936, 1943 (2020) (quoting *Tilghman* v. *Procter*, 125 U.S. 136, 145 (1888)).

Applying traditional principles of equity, the Court has repeatedly held that unless Congress clearly directs otherwise, a statute authorizing an "injunction" allows a court not only to restrict future conduct, but also award restorative monetary remedies. As the Court explained in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946), "[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."

That principle controls this case. When Congress empowered courts in FTC enforcement cases to issue "permanent injunction[s]," it relied on and incorporated that established understanding of the term. Nothing in the FTC Act shows that Congress intended to depart from the bedrock principles of equity that Section 13(b) incorporates.

STATEMENT

A. Congress's Creation And Expansion Of The Commission's Enforcement Powers

Section 5 of the Federal Trade Commission Act outlaws and directs the Commission to prevent "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. 45(a)(1), 45(a)(2). Congress has provided two different avenues for the Commission to enforce the Act: an

administrative one in which the Commission acts as an adjudicative body, and a judicial one in which the Commission sues in federal district court and acts as a litigant. The Commission has discretion to decide which route is appropriate for any given matter.

1. The administrative enforcement avenue dates back to the original FTC Act of 1914. Section 5 of the Act sets forth a process—entirely new at the time—by which the Commission issues a complaint, considers evidence, and determines whether a violation has occurred. 15 U.S.C. 45(b). If the Commission finds a violation, it may order the respondent to cease and desist from the illegal conduct. *Ibid.* A respondent can challenge the Commission's order in a court of appeals, but "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c).

2. Congress created the judicial enforcement pathway in 1973 when it added to the Act a new Section 13(b)—the provision at issue here. *Trans-Alaska Pipeline Authorization Act*, Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973) (codified as amended at 15 U.S.C. 53(b)). Section 13(b) was enacted in response to criticism that the Act did not give the Commission sufficient authority to effectively combat fraud. At President Nixon's request, the American Bar Association undertook a study of the Commission's operations. The ABA found that fraud against consumers was being "practiced on a vast scale." American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission* 49 (1969). The report further found that the Commission lacked an effective program to enforce cease-and-desist orders entered in the administrative adjudication pathway. *Id.* at 44. The ABA suggested reforms to shore up the Commission's adjudications, such as expanding the ability to halt illegal practices during an

administrative adjudication by obtaining preliminary injunctive relief in federal court. *Id.* at 62-64. The ABA also noted that consumers had no way to recover money lost to fraud and recommended the creation of private rights of action for recovery. *Ibid.*

The bulk of Section 13(b) answers the ABA's specific recommendation to expand the Commission's authority to seek preliminary relief in federal court to stop illegal conduct while an administrative adjudication is pending. Previously, that authority was limited to narrow categories of cases, such as food and drug advertising and textile labeling. *E.g.*, 15 U.S.C. 53(a), 68e(b), 69g(b), 70f. Section 13(b) extended the authority to seek preliminary relief to cases involving the violation of "any provision of law" enforced by the Commission. 15 U.S.C. 53(b).

Section 13(b) also created a means for the Commission to enforce the Act directly in federal court as an alternative to the administrative forum. Allowing judicial enforcement alleviated the ABA's concern about the ability of administrative enforcement to keep pace with the prevalence of consumer fraud. Section 13(b) states: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[1] *Ibid.* A Senate report explained that this provision would give the Commission the ability to "seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order." S. Rep. No. 93-151, at 31 (1973). In that way, "Commission resources will be better utilized,

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[1] In this brief, we use "Section 13(b)" to mean the permanent-injunction authority unless the context shows otherwise.

and cases can be disposed of more efficiently" than through the Commission's own adjudicative process. *Ibid.*

The permanent injunction authority thus created a new judicial enforcement pathway in which the Commission may forgo its own adjudicative process and factfinding authority and instead employ the federal courts to redress violations of the FTC Act. In such cases, a court, rather than the Commission, determines in the first instance whether a violation has occurred and whether relief is warranted; the Commission acts only as a litigant.

3. In the same 1973 act, Congress also amended the FTC Act to augment the administrative pathway, and it did so again in legislation enacted in 1975. The 1973 law expanded Section 5(*l*), which authorizes civil penalties for the violation of a Commission cease-and-desist order, to also authorize "mandatory injunctions and such other and further equitable relief as [courts] deem appropriate." 87 Stat. at 591. The Senate Report explains that this language was directed at "persons in violation of a Commission order for whom the threat of economic penalty is more apparent than real because they have no available resources with which to pay the penalty." S. Rep. No. 93-151, at 29.

The 1975 legislation further expanded the Commission's ability to enforce its own orders. See *Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, Pub. L. No. 93-637, 88 Stat. 2183 (1975). Most relevant here, the 1975 act created a new Section 19, which authorizes the Commission to obtain additional relief after finding in an administrative proceeding that a defendant engaged in unfair or deceptive practices. In cases where a reasonable person would have known that the conduct was "dishonest or fraudulent," 15 U.S.C. 57b(a)(2), a court may "grant such relief as the court finds necessary to redress injury to consumers or other persons," including "rescis-

sion or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification." 15 U.S.C. 57b(b). The administrative proceeding must begin within three years of the violation, and the Section 19 action within one year of the final cease-and-desist order. 15 U.S.C. 57b(d).

This new authority was enacted in the wake of *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), which held that the Commission could *not* order consumer redress on its own authority in an administrative proceeding. Congress made clear, however, that the new remedies did not limit any existing ones. Congress specified that the new remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," and that "nothing in [Section 19] shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. 57b(e). Legislative history confirms that Congress did not intend to express any view on the Commission's existing enforcement powers. H.R. Conf. Rep. 93-1606, at 42 (1975).[2]

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[2] The 1975 act also codified the Commission's authority to promulgate rules defining unfair or deceptive acts or practices, see 15 U.S.C. 57a, and created mechanisms to enforce such rules. Section 19(a)(1) allows the Commission to sue rule violators in federal or state court for the consumer redress relief described above, 88 Stat. at 2201 (codified as amended at 15 U.S.C. 57b(a)(1), 57b(b)). Section 5(m) permits civil penalties for knowing rule violations. It also authorizes civil penalty actions against those who knowingly violate a cease-and-desist order even if they were not a party to the original proceeding. 88 Stat. at 2200-2201 (codified as amended at 15 U.S.C. 45(m)).

B. The Commission's Use Of Section 13(b) To Obtain Restorative Monetary Relief

The Commission brought its first case under the permanent injunction provision in 1979. See *FTC* v. *Virginia Homes Mfg. Corp.*, 509 F. Supp. 51 (D. Md. 1981). Since then, the permanent injunction provision of Section 13(b) has become a mainstay of the Commission's enforcement program. Before the Seventh Circuit's decision in *FTC* v. *Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), eight courts of appeals had held, without exception, that under this Court's decisions in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), judicial authority to enter a permanent injunction includes the authority to require the return of wrongfully obtained money.[3]

Today, the agency brings dozens of cases every year seeking a permanent injunction and the return of illegally obtained funds.[4] Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers

[3] See *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984) (per curiam); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 571-572 (7th Cir. 1989); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC* v. *Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014).

[4] In mid-2020, there were 56 such cases pending in district courts. See FTC, *Semiannual Federal Court Litigation Status Report*, at 6-70 (2020), https://www.ftc.gov/system/files/attachments/litigation-status-report/2020_06_semiannual_litigation_report_public.pdf.

who have fallen victim to a wide variety of illegal scams and anticompetitive practices.[5]

C. The Commission's Enforcement Case

1. Petitioner Scott Tucker ran a large-scale deceptive payday lending scheme through his wholly owned companies, including petitioner AMG Capital Management. Pet. App. 4a-6a. A payday loan is a high-interest, short-term loan, typically marketed to low-income consumers in need of quick cash. Tucker's loan documents contained a disclosure box mandated by the Truth in Lending Act (TILA), 15 U.S.C. 1601-1667f, purporting to display the key financial terms of the loan. For example, if a customer sought to borrow $300, Tucker's TILA box disclosed a finance charge of $90 (30% of the amount borrowed) and total payments of $390, to be withdrawn in one payment two weeks later from the consumer's bank account. Pet. App. 8a, 45a.

Instead of applying those terms, Tucker regularly made multiple withdrawals, assessing the finance charge and automatically "renewing" the loan for another two weeks. Tucker claimed that practice was justified by loan terms hidden in a maze of confusing fine print, asterisks, and footnotes. But even that text did not reveal that unless the borrower affirmatively opted out, the loan would be renewed 10 times, with a new finance charge each time. The net result was that a person who borrowed $300 expecting to pay back $390, but who did not opt out of the default plan, paid a total of $975. *Id.* at 8a-9a, 48a-50a. In the four years from 2008 to 2012, Tucker made more than five million loans and collected about $1.32 billion in deceptive

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[5] See FTC, *FTC Refunds to Consumers*, Fiscal Year: 2016 to 2020, https://public.tableau.com/profile/federal.trade.commision#!/vizhome/Refunds_15797958402020/RefundsbyDate.

finance charges over and above the amounts disclosed in the TILA box. *Id.* at 4a-5a, 15a, 17a-18a.

2. The Commission sued to halt Tucker's fraudulent scheme under Section 13(b), alleging that it violated Section 5's prohibition on deceptive acts or practices and TILA. *Id.* at 5a-6a, 42a, 51a. The district court granted summary judgment for the FTC. *Id*. at 41a-73a. It held that the "net impression" of the loan documents was "likely to mislead borrowers acting reasonably under the circumstances because the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action." *Id.* at 60a-70a, 78a. The Court found Tucker personally responsible for the acts of his company because of his "pervasive role and authority * * * which extended to almost every facet of the company's business and operations," and his "sustained and continuous conduct that perpetuated the deceptive lending." *Id.* at 92a, 98a.

The court entered an injunction that barred Tucker from engaging in consumer lending and related practices and ordered him to pay $1.27 billion in equitable monetary relief to be used for consumer redress and attendant expenses (any money that cannot practicably be returned to victims may be deposited in the Treasury). *Id.* at 105a-108a.[6]

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[6] In October 2017, Tucker was convicted criminally on fourteen counts of racketeering, conspiracy, and fraud offenses arising out of his payday lending scheme, including "five counts of making false statements in disclosures required by the Truth in Lending Act." *United States* v. *Grote*, 961 F.3d 105, 109 (2d Cir. 2020). Tucker now claims that he merely "managed" a business for tribal "lenders." Br. 11. In fact, the tribes were "fronts" that Tucker used "to avoid detection of [his]

3. The court of appeals affirmed. *Id.* at 1a-40a. It agreed that Tucker's loan documents were "deceptive" and "did not accurately disclose the loan's terms," and that the "fine print * * * is riddled with still more misleading statements." *Id.* at 9a-10a. The court also upheld the district court's monetary judgment as consistent with circuit precedent. *Id.* at 15a-17a.

Judge O'Scannlain, joined by Judge Bea, specially concurred to question whether prior decisions had properly construed Section 13(b) as authorizing monetary relief and suggested that the court rehear the case en banc (ultimately, no judge voted for rehearing). *Id.* at 23a-37a, 119a.

SUMMARY OF THE ARGUMENT

I. Nearly three centuries of equity jurisprudence demonstrate that the authority Congress granted to district courts in Section 13(b)—to issue a "permanent injunction"—includes the power to order restorative monetary relief. Since at least 1745, equity courts have held that when a plaintiff seeks an injunction against ongoing or threatened misconduct, the court may not only prohibit future action, but also grant monetary relief to redress past harm.

What happened here is fully consistent with that equitable tradition. The Commission sued Tucker under Section 13(b) for running a deceptive loan scam that cheated consumers of more than $1.3 billion. The Commission sought to enjoin Tucker from continuing to trick borrowers and require him to pay back the money he stole. The district court granted both parts of that request. Tucker does not deny his deceptive practices or challenge the injunction;

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usurious lending practices or to give those practices the appearance of legality." 961 F.3d at 111. Tucker went so far as to build and staff "sham business office facilities" on tribal lands as part of the charade. *Id.* at 113.

he merely claims that he should get to keep the money. Legions of judicial decisions emphatically say otherwise.

A. Since before the founding of the Republic, equity courts have awarded restorative monetary remedies incident to an injunction. Leading equity commentators, including Justice Story and Professor Pomeroy, recognized this principle as black-letter law by the mid-nineteenth century. Today, the Court continues to recognize that "a court in equity may award monetary restitution as an adjunct to injunctive relief," *Tull* v. *United States*, 481 U.S. 412, 424 (1987), and that a court of equity will shape its remedies so as to "accord full justice," *Kansas* v. *Nebraska*, 574 U.S. 445, 456 (2015) (quoting *Porter*, 328 U.S. at 398).

The Court has always construed statutes that authorize district courts to grant an injunction to also authorize them to exercise the full range of their equitable authority unless the statute clearly says otherwise. The Court thus read patent and copyright statutes authorizing courts to "grant injunctions" to allow an accounting on the ground that such monetary relief is "incident to the right to an injunction." *Stevens* v. *Gladding*, 58 U.S. 447, 455 (1855). The Court has repeatedly reaffirmed this principle. See *Tilghman* v. *Procter*, 125 U.S. 136, 144 (1888); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940). It follows that when Congress authorizes the government to seek an injunction against the violation of a regulatory statute, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise" of the court's equity jurisdiction. *Porter*, 328 U.S. at 398. That jurisdiction includes the power to grant restorative monetary relief, because "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of

that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* at 399.

The interpretation of Section 13(b)'s permanent injunction clause is controlled by that equity precedent. By authorizing the district courts to grant permanent injunctions, Congress conferred on them all the traditional powers of a court of equity, including the power to grant restorative monetary relief. Nothing in the FTC Act shows that Congress intended to depart from traditional equitable practice. Indeed, Congress has twice signaled approval of judicial decisions upholding monetary remedies under Section 13(b).

B. Tucker's arguments for disregarding *Porter* and its equity antecedents lack merit. He claims that the power of injunction is strictly limited to prospective relief and can never be used to order restorative remedies, but centuries of equity precedent refute that argument. Injunctions are preventative and forward-looking, but they are not *limited* to such relief. The decisions Tucker relies on describe common properties of an injunction, but do not address whether a court issuing an injunction may also order restorative remedies. *Porter* and centuries of equity jurisprudence do address that question and hold squarely that when a court of equity enjoins ongoing or future acts, it may also order restorative monetary relief. Tucker does not cite any decision from this Court holding otherwise.

Tucker cannot avoid *Porter* on the ground that the statute there authorized the court to enter an injunction or "other order." The Court rejected the same argument in *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), making clear that *Porter*'s explication of the powers of a court of equity did not turn on the additional phrase. Nor is Tucker helped by *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), or *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Those cases

considered whether private plaintiffs without an express right to sue for the requested relief nevertheless had an implied cause of action. This case involves an express right to sue and the express remedy of an injunction, which carries with it the long-established understanding of that remedy. Tucker is also wrong to suggest that the Court abandoned *Porter* and its equity antecedents in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996). To the degree the Court discussed *Porter*, it described how the intricacies of a statutory regime very different from the FTC Act provided the kind of compelling evidence of congressional intent needed before the Court will find a limitation on the equity powers of district courts. That the Court has not abandoned *Porter* is obvious from the numerous times it has recently relied on the decision.

II. Under a century-old line of precedent, Congress must express its intent to limit the district court's equitable powers "in so many words" or "by a necessary and inescapable inference." *Porter*, 328 U.S. at 398. Contrary to Tucker's argument, neither Section 19 nor Section 5(*l*) of the FTC Act supports any inference, let alone an "inescapable" one, that Congress meant to limit the scope of the district courts' equitable jurisdiction under the permanent injunction authority of Section 13(b).

Sections 19 and 5(*l*) play roles in the FTC Act's enforcement regime different from Section 13(b). The Act provides two independent avenues of Commission enforcement, administrative and judicial, with analogous features and remedies. The different wording of the provisions reflects their different roles and origins.

Section 13(b), which created the judicial pathway, draws upon centuries of established law defining the court's powers, such as the authority to enter preliminary relief, the contempt power, and the historic power of equity to provide

restorative monetary remedies. The administrative adjudication pathway, by contrast, rests upon no similar tradition. Congress created it from scratch and therefore had to define whatever elements in that process it wished to correspond to traditional elements of the judicial process. Thus, a cease-and-desist order functions similarly to an injunction; Section 19 resembles a court's power in equity to provide monetary redress; and Section 5(*l*) provides a remedy for defying Commission orders, analogous to the contempt power.

Accordingly, contrary to Tucker's argument, reading Section 13(b) to authorize monetary relief does not make Section 19 superfluous. Section 19 provides a remedy in the administrative enforcement pathway that otherwise would be unavailable. Moreover, Congress plainly did not intend Section 19 to limit Section 13(b) because it expressly stated that "[r]emedies provided in [Section 19] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal Law," and that "[n]othing in [Section 19] shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. 57b(e).

Similarly, the authority for "equitable relief" in Section 5(*l*) does not show that Congress intended to exclude such relief from Section 13(b). Unlike Section 13(b), Section 5(*l*) is not a means of enforcing the Act itself, but only of punishing violations of administrative cease-and-desist orders. Congress did not draw upon traditional equity practices in authorizing a penalty and thus had to use different terminology than it used in Section 13(b).

III. Tucker waived his challenges to the calculation of the monetary judgment. He argued below neither that the district court should have deducted any legitimate costs of

business nor that the court could not impose joint-and-several liability.

In any event, Tucker has shown no legal infirmity in the judgment. Section 13(b)'s unqualified permanent injunction remedy allows the court to order relief necessary to achieve complete justice. Moreover, the judgment reflects only the amount paid by borrowers in excess of the charges disclosed in the loan documents. Pet. App. 17a, 101a. That methodology excludes from the judgment legitimately charged amounts, which cover the genuine costs of doing business. Tucker and his companies were partners engaged in concerted wrongdoing, properly subject to joint liability under *Liu* v. *SEC*, 140 S. Ct. 1936 (2020).

Finally, Tucker is wrong that monetary judgments in equity require tracing to particular tainted funds. The Court imposed no tracing requirement in *Liu*, and other sources recognize that an accounting is an equitable remedy that allows a general claim on assets. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 214 n.2 (2002); *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. b (2011).

ARGUMENT

I. Section 13(b)'s Grant Of The Equitable Power Of Injunction Conveys The Power To Order The Return Of Unlawfully Taken Money.

Nearly three centuries of equity jurisprudence establish that a court's authority to grant a "permanent injunction" under Section 13(b) includes the power not only to restrain future conduct, but also to redress wrongdoing by ordering the return of ill-gotten gains. As early as 1745, the English Court of Chancery held that when it was asked to enjoin ongoing misconduct, it could also order an accounting—a

form of restorative money judgment—to remedy past harms. See *Jesus College* v. *Bloom*, 26 Eng. Rep. 953, 27 Eng. Rep. 31 (Ch. 1745).[7] By the nineteenth century, it was black-letter law that "wherever the court of equity has jurisdiction to grant the remedy of injunction * * * it may go on and decide all the issues, and make a final decree granting full relief." 1 John Norton Pomeroy, *Treatise on Equity Jurisprudence* § 236 (1881).

Applying that principle, the Court has recognized since the 1850s that statutory authority to grant an "injunction" conveys the authority to order monetary relief through an accounting. See, *e.g.*, *Stevens* v. *Gladding*, 58 U.S. 447, 453-455 (1855); *Tilghman* v. *Procter*, 125 U.S. 136, 144-145 (1888). The same principle underlies the Court's decisions in *Porter* and *Mitchell*, both of which held that where a statute authorizes the government to seek an injunction, the court is not limited to prohibiting future misconduct but may also award restorative monetary relief. *Porter,* 328 U.S. at 397-403; *Mitchell*, 361 U.S. at 291-296.

Those authorities control the interpretation of Section 13(b). When Congress gave courts the authority to grant a "permanent injunction" in Commission enforcement cases, it drew upon centuries of equity jurisprudence and the common understanding that a court with the power to enter an injunction may award restorative relief necessary to achieve complete justice.

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[7] The citations in the text to *Jesus College* are to two reported versions stating its holding in slightly different form.

A. In Traditional Equity Practice, A Court Hearing A Suit For An Injunction Could Order Restorative Monetary Relief.

Equity courts have always had the power to order restorative remedies as part of or incident to an injunction. One such remedy is an accounting—a general command to the defendant to turn over money earned through unlawful activity. See Dan B. Dobbs, *Law of Remedies* § 4.3(5), at 608 (2d ed. 1993). As the Court explained last Term, such restorative monetary remedies have been called both "restitution" and "disgorgement," but "[n]o matter the label," they rest on the "foundational principle" of equity that "the wrongdoer should not profit 'by his own wrong.'" *Liu* v. *SEC*, 140 S. Ct. 1936, 1943 (2020) (quoting *Tilghman*, 125 U.S. at 145).

The basic principle was articulated in 1745 by the Lord Chancellor in the *Jesus College* case. He explained that while a landlord could recover damages for a tenant's past waste in an action at law, if the landlord sought an injunction against ongoing or future waste, "this Court will decree an account of waste done at the same time with an injunction." 27 Eng. Rep. at 31. "[I]n bills for *injunctions*," the Chancellor emphasized, "the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here." 26 Eng. Rep. at 954.

Equity commentators universally recognized this principle. Justice Story, for example, explained that by bringing a bill in equity for an injunction, "not only may future waste be prevented," but "an account may be decreed, and compensation given for past waste." 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 917 (1836). Pomeroy likewise explained that in a suit for an injunction against

waste, the court "will retain the cause, and decree full and final relief, including damages." 1 Pomeroy, *supra*, § 237; see also James L. High, *A Treatise on the Law of Injunctions* § 451 (1873) ("in all cases where a bill for an injunction will lie to restrain waste, an account of and satisfaction for the waste already committed will be allowed").

Restorative monetary relief in the form of an accounting was likewise available in patent and copyright cases at equity, where the Chancellor would typically both enjoin future infringement and order an accounting of profits from past infringement. See *Hogg* v. *Kirby*, 32 Eng. Rep. 336, 339 (Ch. 1803) (remedy in copyright case is "an injunction and account"); *Colburn* v. *Sims*, 67 Eng. Rep. 224, 226 (Ch. 1843); 2 Story, *supra*, § 933 (in patent and copyright cases an account "will, in all cases * * * be decreed as incidental, in addition to the other relief of a perpetual injunction"). Courts in this country applied the same principle in a variety of situations where plaintiffs sought injunctions against ongoing harm. See Howard C. Joyce, *Treatise on the Law Relating to Injunctions* § 10 (1909) (collecting state cases awarding monetary relief incident to injunction).

The Court has continued to recognize that "a court in equity may award monetary restitution as an adjunct to injunctive relief." *Tull* v. *United States*, 481 U.S. 412, 424 (1987). That approach reflects the broader rule of equity that "when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue" so as to reach "a complete adjudication." 1 Pomeroy, *supra*, § 181; see also *id.* §§ 231, 236 (restating this principle and applying it specifically to injunctions).

The Court has regularly invoked that principle. In 1913, the Court held that "[a] court of equity ought to do justice completely, and not by halves," and may even "determine

purely legal rights that otherwise would not be within the range of its authority." *Camp* v. *Boyd*, 229 U.S. 530, 551-552. In 1935, it held that, "having jurisdiction of the parties to controversies brought before them," equity courts "will decide all matters in dispute and decree complete relief." *Alexander* v. *Hillman*, 296 U.S. 222, 242; see also *United States* v. *Union Pacific R. Co.*, 160 U.S. 1, 52 (1895). More recently, the Court recognized that when an equity court's jurisdiction is properly invoked, it may award "*all* relief." *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 256-257 (1993) (citing 1 Pomeroy § 181). And when the Court itself sat in equity to resolve a water usage dispute between states, it awarded a monetary judgment against the state that withdrew more than its share of water. *Kansas* v. *Nebraska*, 574 U.S. 445, 456 (2015). The Court reaffirmed its duty in equity to "'mould each decree to the necessities of the particular case' and 'accord full justice' to all parties." *Ibid.* (quoting *Porter*, 328 U.S. at 398).

B. Statutory Authority To Grant An "Injunction" Includes The Power To Grant Restorative Monetary Relief.

When Congress uses a statutory term like "injunction" with a long-established legal understanding, the term "brings the old soil with it." *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation and quotation marks omitted). Thus, where words have "a well-known meaning at common law," Congress is "presumed to have * * * used [them] in that sense." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). For more than 150 years, the Court has construed statutes authorizing an "injunction" consistently with the principles discussed above. The Court has established that absent clear congressional direction to the

contrary, authority to grant an "injunction" includes the power to grant restorative monetary remedies.

In 1819 and 1836, Congress authorized federal courts to "grant injunctions" against patent and copyright infringement. Pub. L. No. 15-19, 3 Stat. 481 (1819) (patent and copyright); Pub. L. No. 24-357, § 17, 5 Stat. 117, 124 (1836) (patent). Neither statute referred to any equitable remedy other than an "injunction." Nevertheless, the Court held that in a suit in equity for an "injunction" under the 1819 statute, the court could also award monetary relief in the form of an accounting. *Stevens* v. *Gladding*, 58 U.S. 447 (1855). The Court explained that under the traditions of equity, "[t]he right to an account of profits is incident to the right to an injunction." *Id.* at 455. The Court reaffirmed that principle in numerous cases decided in the ensuing 15 years. *E.g.*, *Dean* v. *Mason*, 61 U.S. 198, 203 (1858) (plaintiff was entitled to recover "the amount of profits received by the unlawful use of the [infringing] machines"); *Rubber Co.* v. *Goodyear*, 76 U.S. 788, 802 (1869) (accounting was "in accordance with the rule in equity cases established by this court").

The Court continued to hold that an accounting was available in copyright even after Congress codified the accounting remedy for patent infringement and did not make a corresponding change to the copyright law. *E.g.*, *Belford* v. *Scribner*, 144 U.S. 488, 506-508 (1892). With respect to patent suits, the Court explained that although Congress "expressly affirm[ed]" the authority to order an accounting, that power was already inherent in its use of the word "injunction." *Tilghman*, 125 U.S. at 148-149, 144. The Court held that although the statute "simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions," the rule allowing a restorative monetary remedy accords "complete

justice between the parties." *Id.* at 144-145. "[I]n equity," the Court explained, "profits made by the infringer of a patent belong to the patentee and not to the infringer" and it would be "inconsistent with the ordinary principles and practice of courts of chancery * * * to permit the wrongdoer to profit by his own wrong." *Id.* at 145.

The Court reiterated these points fifty years later, explaining that although copyright law provided no express statutory recovery of profits before 1909, accounting was "appropriate equitable relief incident to a decree for an injunction." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940). Monetary relief, the Court explained, is "given in accordance with the principles governing equity jurisdiction * * * to prevent an unjust enrichment by allowing injured complainants to claim 'that which, *ex aequo et bono*, is theirs.'" *Ibid.* (quoting *Livingston* v. *Woodworth*, 56 U.S. 546, 560 (1854)); see also *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916) (in injunction case under trademark statute, "the court of equity, having acquired jurisdiction upon such a ground, retains it for the purpose of administering complete relief"). And just last Term, the Court invoked this line of patent and copyright cases to hold that statutory authority to enter "equitable relief" permits monetary judgments. *Liu*, 140 S. Ct. at 1944. The same principles apply to the statutory power to enter an injunction.

The Court's decisions in *Porter* and *Mitchell* follow directly from the centuries of equity precedent described above and this Court's long-settled understanding of the power conferred by the statutory term "injunction." *Porter* involved the Emergency Price Control Act of 1942, which gave a government official, the Price Administrator, power to sue violators of price and rent controls for "a permanent or temporary injunction, restraining order, or other order."

Pub. L. No. 77-421, § 205(a), 56 Stat. 23, 33 (1942). When a landlord charged rents above the permitted maximum, the Administrator sued, seeking both to enjoin further overcharges and a refund of past overcharges. *Porter*, 328 U.S. at 396-397. The Court held that the district court could award both remedies.

The Court explained that where Congress gives equitable jurisdiction to a court through the injunctive power, "[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." *Id.* at 398. And when "the public interest is involved," as it is in government enforcement cases, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.* An equity court's mandate, the Court explained, is to "accord full justice to all the real parties in interest," and it may grant "whatever other relief may be necessary" to do "complete rather than truncated justice." *Ibid.*

Applying those principles, the Court found it "readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [the law] may properly be entered by the District Court once its equity jurisdiction has been invoked." *Id.* at 398-399. The Court found that an order for the "recovery and restitution" of the illegal rents was proper for two reasons. First, such an order "may be considered as an equitable adjunct to an injunction decree." *Id.* at 399. It explained 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." *Ibid.* Second, the Court relied on the deterrent effect of monetary relief, holding

that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400.

In *Mitchell*, the Court reaffirmed the teachings of *Porter* and applied them to a provision of the Fair Labor Standards Act (FLSA) that authorizes district courts to "restrain violations" of the Act's anti-retaliation ban. See 29 U.S.C. 217. The Secretary of Labor sued an employer for wrongfully terminating employees, seeking both reinstatement and reimbursement of lost wages. The Court held that even though the statute did not contain the phrase "other order," *Porter* still controlled. The applicability of *Porter*'s principles, the Court held, "is not to be denied * * * because, having set forth the governing inquiry, [the Court] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." *Mitchell*, 361 U.S. at 291. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment," the Court explained, "it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-292.

C. Section 13(b) Grants The District Courts Equitable Jurisdiction To Enter An Injunction And The Attendant Authority To Order Restorative Monetary Relief.

This case is controlled by *Porter*, *Mitchell*, and their equity antecedents. Like the statutes in *Porter* and *Mitchell* and the 1819 and 1836 patent and copyright laws, Section 13(b) gives district courts the authority to issue an injunction. That "jurisdiction is an equitable one," and absent a clear indication of contrary congressional intent, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdic-

tion." *Porter*, 328 U.S. at 397-398. The district court may do whatever is necessary to "accord full justice to all the real parties in interest," including compelling the defendant to "disgorge profits * * * or property acquired in violation of" the law. *Id.* at 398-399. As the Court put it in *Liu*, an order of monetary relief that "restores the status quo" is situated "squarely within the heartland of equity." 140 S. Ct. at 1943.

When Congress enacted Section 13(b), it relied on the established understanding of "injunction." "It is a commonplace of statutory interpretation that Congress legislates against the backdrop of existing law." *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (cleaned up). "A court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (cleaned up). That principle carries particular force with respect to equitable remedies such as injunctions. "[C]ases in which injunctions are sought in the federal courts reflect a 'practice with a background of several hundred years of history,' a practice of which Congress is assuredly well aware." *Weinberger* v. *Romero–Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). The Court "do[es] not lightly assume that Congress has intended to depart from established principles." *Ibid.*

Indeed, just a few years before Congress enacted Section 13(b), a court of appeals had interpreted nearly identical securities statutes to permit monetary remedies. The Securities Act of 1933 and the Securities Exchange Act of 1934 both authorized suits for a "permanent or temporary" injunction against violations of the securities laws. See Pub. L. No. 73-22, § 20(b), 48 Stat. 74, 86 (1933) (codified as amended at 15 U.S.C. 77t(b)); Pub. L. No. 73-291, § 21(e),

48 Stat. 881, 900 (1934) (codified as amended at 15 U.S.C. 78u(d)(1)).[8] The Second Circuit, relying on *Porter* and *Mitchell*, read those statutes to authorize monetary relief. See *SEC* v. *Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103-1104 (2d Cir. 1972). Congress is presumed to be aware of such judicial interpretations when it passes a new statute. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

Tucker claims (Br. 40) that Section 13(b) was modeled on what is now Section 13(a), authorizing preliminary injunctions and temporary restraining orders in aid of administrative proceedings in certain false advertising cases. See 15 U.S.C. 53(a). That is true for the first part of 13(b), which expanded the availability of such preliminary relief to cases involving "any provision of law" enforced by the Commission. 15 U.S.C. 53(b). But Section 13(a) does not authorize permanent injunctions,[9] and Congress understood that it was opening a separate enforcement pathway by adding the new proviso conveying such authority. See S. Rep. No. 93-151, at 31. Section 13(b)'s preliminary relief provisions therefore do not overcome the presumption that

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[8] In 2002, after many additional courts of appeals had held that the securities laws' injunction provision authorized monetary relief (with none reaching a contrary conclusion), Congress added "any equitable relief" to the list of remedies. Pub. L. No. 107-204, § 305(b), 116 Stat. 745, 779 (2003) (codified at 15 U.S.C. 78u(d)(5)). This is the language the Court interpreted in *Liu*. A Senate Report on the 2002 amendment states that "[f]or a securities law violation, currently an individual may be ordered to disgorge funds that he or she received 'as a result of the violation.' Rather than limiting disgorgement to these gains, the bill will permit courts to impose any equitable relief necessary or appropriate to protect, and mitigate harm to, investors." S. Rep. No. 107-205, at 27 (2002).

[9] Nor did the other provisions authorizing preliminary relief in support of administrative adjudication. *E.g.*, 15 U.S.C. 68e(b), 69g(b), 70f.

Congress intended the permanent injunction language to be construed like similar language in other statutes that had been addressed by the courts.

D. Congress Has Twice Ratified The Lower Court Rulings That Section 13(b) Allows Monetary Relief.

Following the enactment of Section 13(b), several appellate courts held that it permits restorative monetary remedies. Congress ratified those rulings twice by substantively amending the FTC Act—including Section 13(b) itself—without changing the authority to seek "a permanent injunction." As the Court has held, when Congress amends a statute without altering text that a growing body of cases has uniformly interpreted, it shows "that the construction adopted by the courts has been acceptable to the legislative arm of the government." *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U.S. 320, 336 (1934); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (When a statute "has been given a uniform interpretation by inferior courts * * *, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

In 1994, Congress thoroughly reviewed the Commission's operations and reauthorized the FTC Act with numerous substantive changes. Pub. L. No. 103-312, 108 Stat. 1691 (1994). By that time, four circuits had held that monetary relief was available under Section 13(b), and none had ruled to the contrary.[10] Far from overturning or limiting those decisions, Congress made it easier to sue under the

[10] See *Security Rare Coin*, 931 F.2d at 1314-1315; *Amy Travel Serv.*, 875 F.2d at 571-572; *U.S. Oil & Gas Corp.*, 748 F.2d at 1432, 1434; *H.N. Singer*, 668 F.2d at 1113.

statute, amending Section 13(b) to relax the venue and joinder rules and to authorize nationwide service of process. See 108 Stat. at 1695-1696. The Senate Report notes that under Section 13(b), the Commission could "go into court ex parte to obtain an order freezing assets, and * * * obtain consumer redress" and that the amendments would "assist the FTC in its overall efforts" at enforcement. S. Rep. No. 103-130, at 15-16 (1993). Congress understood that the Commission was using Section 13(b) to obtain monetary relief (and asset freezes in aid of such relief) and wanted to facilitate such efforts.

Congress again signaled its approval of monetary relief under Section 13(b) in 2006, when it clarified that Section 5's prohibition of unfair or deceptive acts or practices extends to certain activities involving foreign commerce and authorized "all remedies available to the Commission" with respect to such conduct. Pub. L. No. 109-455, §§ 3, 120 Stat. 3372 (2006) (codified at 15 U.S.C. 45(a)(4)). Congress specified in the statute itself that those remedies "includ[e] restitution to domestic or foreign victims." *Ibid*. By that time, dozens of decisions had affirmed judgments under Section 13(b) and many had described the monetary relief as "restitution."[11] Given that the statute preserves "all remedies available to the Commission," those decisions render implausible the Seventh Circuit's theory that the statute was describing relief only under Section 19 or Section 5(*l*). *See Credit Bureau Center*, 937 F.3d at 775.

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[11] See, besides the cases the cases cited in n.10, *Freecom Commc'ns*, 401 F.3d at 1202 & n.6; *FTC* v. *Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).

E. Tucker's Arguments That Section 13(b) Precludes Monetary Relief Are Incorrect.

Tucker principally contends that "injunction" has a narrow meaning that refers exclusively to forward-looking remedies and by definition excludes restorative monetary remedies. The overwhelming weight of authority, including the Court's decisions in *Porter* and *Mitchell*, soundly defeats that claim. While injunctions are generally prospective in operation, they have always been used for restorative purposes as well. Tucker's attempt to distinguish *Porter* is squarely foreclosed by *Mitchell*, and he is simply wrong that the Court has abandoned *Porter* and the principles it is based on.

1. Injunctions have always included restorative remedies.

a. Tucker relies heavily on the simplistic assertion that "[r]estitution isn't an injunction." Br. 20. He contends that injunctions are strictly limited to prospective relief and therefore can never be used to order restorative remedies. See *id.* at 14-15, 19-21. That cramped reading is plainly inconsistent with the law. Equity courts have recognized for centuries that an injunction may direct the return of property. In 1744, for example, the Lord Chancellor issued an "injunction to the defendant to deliver possession" of property rightfully belonging to the plaintiff. *Stribley* v. *Hawke*, 26 Eng. Rep. 961 (Ch. 1744). In 1808, the Court of Chancery granted "a Writ of Injunction * * * enjoining the Defendant to deliver up possession of the estate." *Huguenin* v. *Basely*, 33 Eng. Rep. 722 (Ch. 1808).

Injunctions have similarly been used to order the return of money. In *Osborn* v. *Bank of the United States*, 22 U.S. 738 (1824), state officers unlawfully seized banknotes and

coins. The Court affirmed an injunctive decree barring them from spending the money and ordering them to make restitution, including interest. *Id.* at 743-744, 871. And as discussed above, the power to award restorative relief was not limited to the return of specific items of property. For centuries, equity courts have had the power to order an accounting as an adjunct to an injunction.

Treatises have likewise recognized for centuries that injunctions may serve restorative purposes. Justice Story explained that injunctions are "generally preventive, and protective, rather than restorative," but are "by no means confined to the former." 2 Story, *supra* § 862. Thus, an injunction "may contain a direction to the party defendant to yield up * * * the possession of lands or other property, constituting the subject-matter of the decree, in favor of the other party." *Id.* § 861. Joyce agreed that an injunction "may * * * be used to reinstate the rights of persons to property of which they have been deprived." Joyce, *supra*, § 2a. He explained further that "the injunction has been regarded as more flexible and adjustable to circumstances than any other process known to the law," permitting a court "by a single exercise of equitable power" to ensure "an injury is both restrained and repaired." *Id.* § 2. High noted that an injunction can be "restorative as well as preventive." High, *supra* § 1. And Pomeroy observed that a mandatory injunction's "essential nature" is "wholly restorative and compels the defendant to restore the thing to its original situation." 3 John Norton Pomeroy, *Treatise on Equity Jurisprudence* § 1337 (1883).

Modern sources agree. Professor Dobbs explains that injunctions "may attempt to prevent harm or to compel some form of reparation for harm already done," and "[i]n fact, some restitution is compelled by resort to a form of injunction." Dan B. Dobbs, *Law of Remedies* § 1.1, at 7 (2d

ed. 1993); see also *Injunction*, Black's Law Dictionary (11th ed. 2019) (A "reparative injunction" "require[s] the defendant to restore the plaintiff to the position that the plaintiff occupied before the defendant committed a wrong.").

b. Tucker gets no help from commentary and decisions stating that injunctions are preventive and forward-looking. Br. 22-23. As just described, the treatises Tucker relies on generally recognize that injunctions are not *limited* to such relief. And the cases he relies on do not address whether a court issuing an injunction may also order restorative remedies. For the most part, they simply note in passing that injunctions are prospective. *E.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975) (mentioning "a declaration, injunction, or some other form of prospective relief"); *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928) (noting that suits for an injunction deal "primarily" with "threatened future" violations). The other cases address whether an injunction was appropriate at all in specific circumstances; they do not address the scope of available remedies once the equitable jurisdiction of the court has been properly invoked. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 (1965); *Lacassagne* v. *Chapuis*, 144 U.S. 119, 124 (1892). The Court's decision in *Porter* and equity cases stretching back to and before the founding of the Republic do address that question. They hold squarely that when a court of equity enjoins ongoing or future acts, it may also order restorative monetary relief. Tucker fails to cite even a single case prior to the Seventh Circuit's decision in *Credit Bureau Center* holding that a court of equity may not order such relief in connection with a forward-looking injunction.

For similar reasons, Tucker is wrong that Section 13(b) excludes monetary relief by authorizing the Commission to

file suit when it has "reason to believe that any person, partnership, or corporation is violating, or is about to violate" the law. The claim is that the statute addresses *only* present or future conduct, revealing an intent to *exclude* remedies for past conduct. Br. 15, 25-26. But that language simply reflects the forward-looking nature of injunctive relief generally. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (an injunction is appropriate where there "exists some cognizable danger of recurrent violation"). It says nothing about the scope of relief a court may order when the standard for an injunction is met. And it does not remotely suggest that Congress intended defendants who are subject to an injunction to keep the fruits of their illegal activity. When the Commission properly invokes the court's jurisdiction to enter an injunction—as it undisputedly did here—it may seek all the restorative relief that the court has power to grant in such a case.

The Court held nothing to the contrary in *Mertens* or *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). Neither decision addressed the scope of relief that can be granted along with an injunction. In *Mertens*, the plaintiffs did not seek an injunction, and the relief they requested was "nothing other than compensatory damages." 508 U.S. at 255. Far from holding that an equity court could not award restorative relief ancillary to an injunction, the Court recognized that once a court of equity's jurisdiction is properly invoked, it may provide "all relief" allowed in equity, including "establish[ing] purely legal rights and grant[ing] legal remedies which would otherwise be beyond the scope of its authority." *Id.* at 256-257 (quoting 1 Pomeroy § 181). In *Great-West*, the plaintiffs sought an "injunction to compel the payment of money past due under a contract"; which the Court held was relief "not typically available in equity." 534 U.S. at 210-211. Here, by

contrast, the Commission sought, and the court granted, an injunction barring future conduct, a classic equitable remedy that Tucker does not contest. In *Great-West*, the Court did not address the availability of restorative monetary relief as part of or incident to an injunction.

2. Tucker cannot escape *Porter*, *Mitchell*, and the centuries of equity jurisprudence preceding them.

Tucker argues that *Porter* (but not *Mitchell*) is distinguishable and that both cases rest on jurisprudence that the Court has since abandoned. Neither argument is correct.

a. Tucker tries to distinguish *Porter* on the ground that the Price Control Act considered there allowed not just an injunction but also an "other order." Br. 33-34. But as we have shown, the 1819 and 1836 copyright statutes only authorized an "injunction" and the Court held repeatedly that they allowed monetary remedies. See part I.B, *supra*. Furthermore, *Porter*'s explication of the powers of a court of equity did not turn on the phrase "other order." Rather, the Court held that the jurisdiction to enjoin "is an equitable one" under which "all the inherent equitable powers of the District Court are available," including the powers "to accord full justice to all the real parties in interest" and to "do complete rather than truncated justice." 328 U.S. at 398.

In *Mitchell*, the Court directly rejected the "other order" argument that Tucker relies on. The law in that case empowered the district court to "restrain" violations, but did not authorize an "other order"; the Court found that *Porter* still controlled. 361 U.S. at 289. It explained that the "applicability of th[e] principle" that equity will provide complete justice "is not to be denied" simply because,

"having set forth the governing inquiry, [the Court in *Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." *Id.* at 291. In other words, the "other order" clause served only to reaffirm the existing scope of the equitable power to grant complete relief incident to an injunction.[12] Notably, Tucker does not argue that this case is distinguishable from *Mitchell*.

b. Tucker next claims that the Court has abandoned the historical understanding of injunctive relief, which purportedly rests on discredited "implied remedies" jurisprudence. Br. 37-38. He argues that while the Court "once assumed that 'all the inherent equitable powers of the District Court are available' unless 'restricted' by 'a clear and valid legislative command,' the Court now takes the opposite approach." Br. 37, quoting *Porter*, 328 U.S. at 398 (cleaned up). Now, Tucker contends, the Court limits remedies to those "explicit in the statutory text itself." Br. 37.

The decisions that Tucker relies on show no such thing. They address whether a *cause of action* may be implied in favor of private plaintiffs where Congress has not provided an express cause of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001), held that private plaintiffs lacked an implied cause of action to enforce regulations issued under

[12] For similar reasons, statutes that use terms such as "restitution" or "equitable remedies" in addition to the word "injunction" (see Br. 21 & n.3) do not show that statutes authorizing only an injunction necessarily restrict the traditional authority of equity. Congress has taken a variety of approaches to defining judicial remedies for the enforcement of federal law; the construction of those laws should be "specific to the statute." *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 204 (2000); see also *Mertens*, 508 U.S. at 257 (the scope of equitable relief authorized under a statute "remains a question of interpretation in each case").

Title VI of the Civil Rights Act. The Court explained that "*private rights of action* to enforce federal law must be created by Congress" and rejected its prior "method for discerning and defining *causes of action*" based on an effort to effectuate congressional purpose. *Ibid.* (emphasis added). *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), declined to extend the implied *Bivens* cause of action to permit private plaintiffs detained after the September 11 attacks to challenge their detention. The Court recognized the "notable change in the Court's approach to recognizing *implied causes of action*" following *Alexander*. *Id.* at 1857 (emphasis added).

This case does not involve an implied private right of action. Section 13(b) provides the Commission with an *express* right of action to sue in federal court for an injunction. The only question is whether in creating that express cause of action, Congress intended to limit the power to grant restorative monetary relief that equity courts have traditionally exercised in injunction cases. As discussed further in part II below, Congress must express such an intent directly or by unavoidable inference. *Porter*, 328 U.S. at 398. Nothing in the FTC Act shows such an intent, and Tucker does not cite a single case where the Court restricted a remedy sought by the government in a law enforcement action brought under an express right to sue for an unqualified injunction remedy.

Nor did the Court abandon *Porter* and its equity antecedents in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996). *Meghrig* turned on the intricacies of a statutory scheme very different from the FTC Act. The Resource Conservation and Recovery Act (RCRA) governs the handling of hazardous waste. Congress assigned primary enforcement responsibility to the government, but also permitted citizen suits where waste presents an "immi-

nent" danger to health or the environment and the government declines to act. *Id.* at 483-484, 486. Private-party plaintiffs may ask a district court to "restrain" persons who contributed to contamination or "to order such person to take such other action as may be necessary." *Id.* at 484 (quoting 42 U.S.C. 6972(a)).

The plaintiff in *Meghrig* had already cleaned up a contaminated site, which therefore presented no imminent danger. The lawsuit sought neither a mandatory nor a prohibitory injunction, but asked only for an award of cleanup costs. The Court held that RCRA did not permit that remedy. RCRA was not "designed * * * to compensate those who have attended to the remediation of environmental hazards." 516 U.S. at 483. Rather, it only "provide[s] a remedy that ameliorates present or obviates the risk of future 'imminent' harms." *Id.* at 486. Congress provided for cost recovery in a companion statute, CERCLA, which was designed for that purpose. At bottom, RCRA provides a remedy for present and imminent future harm, whereas CERCLA provides for the recovery of cleanup costs. *Id.* at 485-486. The two statutes are not different routes to the same end.

The Court rejected the amicus curiae argument of the United States that, under the reasoning of *Porter*, RCRA would hypothetically allow a plaintiff to recover past cleanup costs in an appropriate case. The Court concluded that the text of RCRA, together with that of CERCLA, "amply demonstrate[d] that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA" in any circumstances. 516 U.S. at 487. Given the purposes of the two statutes as reflected in their remedial provisions, the Court determined that allowing a private plaintiff to recover cleanup costs under RCRA would be "wholly irrational." *Id.* at 486-487.

But the Court did not remotely suggest that *Porter* was no longer good law. At most, its opinion illustrates the kind of compelling evidence of congressional intent needed before the Court will find a limitation on the equity powers of district courts. As we show in part II below, Congress expressed no such intent in the FTC Act.

That the Court has not abandoned traditional principles of equitable remedies is obvious from the many times it has relied on *Porter* and its antecedents. In 2015, for example, the Court cited *Porter* to support a restorative monetary remedy in an interstate water dispute. *Kansas* v. *Nebraska*, 574 U.S. at 456. The Court explained that the judiciary's "equitable authority to grant remedies is at its apex when public rights" are at stake. *Id*. at 472. The Court has also cited *Porter* to hold that authorization under Section 16 of the Clayton Act, 15 U.S.C. 26, to issue "injunctive relief" conveyed the power to order divestiture of illegally obtained assets. *California* v. *American Stores Co.*, 495 U.S. 271, 275, 281 (1990). And during the last Term, the Court relied on *Porter* to hold that when federal courts sit in equity, "all * * * inherent equitable powers * * * are available for the proper and complete exercise of that jurisdiction." *Liu*, 140 S. Ct. at 1946-1947. Relying on that principle and on the many cases finding a right to monetary remedies under statutes that provided for injunctions, the Court found that the statutory term "equitable relief," which does not mention money, includes monetary remedies.

II. Nothing In The FTC Act Provides A Clear Legislative Command To Restrict The Traditional Powers Of Equity.

Congress may override the traditional rules of equity and limit a court's power to grant complete relief in injunction cases, but only if it says so directly. "Unless a statute

in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. That principle follows from a long-established rule of statutory interpretation that a court of equity will "secur[e] complete justice" unless the legislature has stated a contrary intent "in so many words, or by an inference which does not admit of a doubt." *Brown* v. *Swann*, 35 U.S. 497, 503 (1836). The same rule applies today: the Court "will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland* v. *Florida*, 560 U.S. 631, 646 (2010) (cleaned up).

Tucker points to nothing in the FTC Act that "in so many words" restricts courts from exercising the traditional scope of their authority in permanent injunction cases under Section 13(b). He asks the Court to infer Congress's intent to restrict the scope of injunctive relief from the structure of the Act in two ways. First, he contends that allowing monetary remedies under Section 13(b) would render Section 19, which has various procedural limitations absent from Section 13(b), superfluous. Br. 16, 26-27, 32. Second, he claims that by authorizing a "mandatory injunction" and "other and further equitable relief" in a civil penalty action under Section 5(*l*), Congress signaled that it did not intend to allow anything other than prospective injunctive relief under Section 13(b). Br. 35.

Neither Section 19 nor Section 5(*l*) supports any inference—let alone an inescapable one—that Congress intended to displace the traditional equitable powers of the district courts. The provisions perform different roles under the FTC Act and those roles drive how each section is written. Congress created two alternative pathways for adjudicating violations of the Act: administrative proceed-

ings before the Commission and permanent-injunction litigation in federal court. Congress did not need to spell out the parameters of the judicial pathway because it could piggyback on the centuries of established law of injunctions described above. That was not true for administrative adjudication. Instead, in Sections 19 and 5(*l*), Congress had to specifically define the remedies it wished to authorize to support the agency's adjudications. Driving the point home in Section 19, Congress stated explicitly that the remedies available there do not displace other remedies available to the agency and that the provision may not be read to restrict the Commission's authority. 15 U.S.C. 57b(e).

A. Congress Created Two Enforcement Pathways In The FTC Act With Appropriate Statutory Text For Each.

Congress provided two different pathways through which the Commission may enforce the prohibitions of the FTC Act: the original administrative pathway, leading to a cease-and-desist order under Section 5(b), and a judicial enforcement pathway, leading to a permanent injunction under Section 13(b). Both Section 19 and Section 5(*l*) of the Act play important roles in the *administrative* pathway. Section 19 allows the Commission to seek consumer redress that the Commission cannot order using its cease-and-desist authority, and Section 5(*l*) creates a mechanism to enforce compliance with cease-and-desist orders, which the Commission also lacks power to order on its own. Neither provision says anything about the powers the court may exercise when the Commission chooses the *judicial* pathway under Section 13(b). Understanding how those sections and others function within the two enforcement pathways shows that Congress has created "a symmetrical and coherent regulatory scheme," and that the parts of the

FTC Act fit "into an harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up).

When Congress enacted the FTC Act in 1914, administrative enforcement was a novel concept. Adjudication by an expert administrative body and cease-and-desist orders were "newcomers in the field of law," without grounding in longstanding tradition. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950). As Congress's own creation, the Commission could have only the authority conveyed to it by statute. See *Civil Aeronautics Bd.* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) ("the determinative question is * * * what Congress has said [an agency] can do"). Congress therefore had to define with specificity how administrative adjudication would work: the required allegations in a complaint, how hearings would be conducted, what relief the Commission could order, and when a Commission order becomes final. See 15 U.S.C. 45(b), 45(g); cf. *Liu*, 140 S. Ct. at 1946 ("[I]t makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings."). Congress likewise had to be specific when it crafted the judicial support for administrative adjudication in Sections 19 and 5(*l*) of the Act.

Until 1973, administrative adjudication was the sole pathway in which the Commission could enforce the FTC Act. See pp. 3-8, *supra*. The agency could not enforce the Act directly in court, and courts had no power to determine in the first instance whether a practice violated the Act. That changed when Congress enacted Section 13(b). Congress granted new authority not only to the Commission, which for the first time could seek to enforce the Act directly in court, but also to the district courts, which were granted the power to adjudicate those cases in the first instance.

But while the authority granted by Section 13(b) was new, the cause of action it created was not: "cases in which injunctions are sought in the federal courts reflect a 'practice with a background of several hundred years of history.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Hecht* v. *Bowles*, 321 U.S. 321, 329 (1944)). Congress could rely on courts to exercise their new permanent injunction authority under Section 13(b) just as they had exercised that authority in other cases for centuries.

Having created separate, parallel enforcement paths, Congress naturally gave administrative cease-and-desist adjudication features and remedies similar to traditional permanent-injunction litigation in federal court. Thus, whereas Section 13(b) invokes the court's traditional powers and jurisdiction in a suit for a permanent injunction, the power to prohibit future conduct is mirrored in the Commission's power to enter a cease-and-desist order. 15 U.S.C. 45(b). The district court's authority to halt challenged conduct during a permanent-injunction proceeding (under Federal Rule of Civil Procedure 65) is replicated by separate authority to seek preliminary relief during an administrative adjudication. 15 U.S.C. 53(b). Congress likewise provided an analog to the district court's inherent power to punish violations of an injunction through contempt, including the imposition of monetary sanctions, by authorizing civil penalties, "mandatory injunctions," and "other equitable relief" to address violations of cease-and-desist orders. 15 U.S.C. 45(*l*), 45(m). And in place of the traditional power in equity to order restorative remedies along with an injunction, the FTC Act separately authorizes an action for consumer redress following a cease-and-desist proceeding. 15 U.S.C. 57b(a)(2), 57b(b).

Each time the Commission enforces the Act, it decides which pathway is most appropriate. Despite their similar

endpoints, the routes have their own advantages and disadvantages. The administrative pathway allows the Commission to establish policy and render legal conclusions on its own authority and under deferential standards of review. But adjudication can draw heavily on the agency's limited resources. Judicial enforcement, on the other hand, conserves agency resources and makes available the traditional powers of the district court. When the Commission chooses that approach, however, it forgoes the power to define unlawful conduct, find facts under a deferential standard of review, and draw legal conclusions.

1. Monetary remedies under Section 13(b) are compatible with Section 19, as its savings clauses make clear.

The functions that Sections 13(b) and 19 perform within their respective enforcement pathways show that Congress did not intend to limit the jurisdiction it granted in the former when it enacted the latter, and that monetary relief in one pathway does not render similar relief in the other redundant. Tucker claims "[t]here would have been no need" for Congress to authorize monetary remedies in Section 19 if courts could grant such relief in permanent injunction actions. Br. 16, 26. But Congress determined that Section 19 was necessary because without it, consumer redress was *not* available in the administrative pathway.[13] By adding Section 19, Congress ensured that both enforcement methodologies would be effective. The differences between the two forums also show that seeking a

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[13] Congress added Section 19 specifically to address the remedial gap in the administrative pathway, noting that "cease-and-desist orders have prospective application only and afford no specific consumer redress to consumers who have been injured." S. Rep. No. 93-151, at 28.

permanent injunction under Section 13(b) is not just an end run to avoid Section 19's procedural protections. If any doubt remains, Congress foreclosed it by clearly specifying that Section 19's remedies do not displace other remedial options, and that it may not be construed to limit the Commission's authority.

a. Tucker's claim that monetary relief under Section 13(b) makes Section 19's remedies redundant misses the mark. Section 19 is simply the administrative-pathway analog to the district court's traditional authority to enter monetary relief in permanent injunction cases. Section 13(b) does not make Section 19's monetary remedy redundant any more than its permanent injunction authority renders cease-and-desist orders redundant. They are simply analogous remedies in the two enforcement pathways that Congress created.

In fact, the administrative and judicial pathways are mutually exclusive in nearly every case. If the Commission chooses to proceed under Section 13(b), it will not also commence an administrative case that may lead to relief under Section 19. If it chooses administrative adjudication, it will not also seek a permanent injunction under Section 13(b). The only situation where the Commission may proceed directly under both Section 13(b) and Section 19 is when it sues in court to enforce a Commission rule. 15 U.S.C. 57b(a)(1). But that overlap does not make the two sections redundant; it simply reflects an additional flexibility that Congress afforded for rule violations, giving the Commission multiple options to address them.

b. For similar reasons, Tucker is incorrect that the ability to return money to consumers under Section 13(b) nullifies procedural protections contained in Section 19 and subjects violators to monetary liability without fair notice. Br. 27-29. Tucker relies specifically on Section 19's re-

quirements, absent from Section 13(b), that the Commission show that a reasonable person would have understood the unlawful practice to be dishonest or fraudulent, 15 U.S.C. 57b(a)(2), and its statute of limitations, 15 U.S.C. 57b(d). He contends that without a prior cease-and-desist order or Commission rule, he could not have known that his conduct was illegal and that Congress could not have meant to allow the Commission to avoid those restrictions simply by filing suit under Section 13(b). Br. 27-29.

Those arguments ignore important differences between the administrative process created by Congress and traditional judicial proceedings. Congress was understandably cautious when it authorized monetary judgments based solely on an administrative agency's determination of legality. In what was then a novel situation, Congress prudently limited the availability of monetary redress through the reasonable person requirement and the statute of limitations.

The same concerns do not arise in cases adjudicated in the first instance by Article III courts. Proceedings for a permanent injunction under Section 13(b) are conducted by a federal judge, not the Commission itself. In court, the Commission is treated like any litigant that must prove both a substantive violation and the appropriate redress. Congress could reasonably rely on the court's equitable duty to prevent unjust monetary awards. And while Section 13(b) does not contain an express statute of limitations, courts of equity have wide discretion in fashioning monetary remedies and may take concerns of repose into account in the exercise of their equitable discretion.

Similarly, the due process standards that apply to all district court litigation are fatal to Tucker's claim that Section 13(b) can subject defendants to liability without "fair notice that the FTC Act proscribes their conduct."

Br. 27; see also *id.* at 27-28, 43. Tucker offers no reason to believe that district courts are incompetent or unable to prevent that result. Indeed, the courts have recognized that fair notice is satisfied under the FTC Act "as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute." *FTC* v. *Wyndham Worldwide Corp.*, 799 F.3d 236, 256 (3d Cir. 2015).

Tucker cannot seriously argue that he lacked notice that his own conduct was illegal. See Br. 29-30. He claims that "no existing Commission rule" prohibited his use of deceptive lending practices, but the statute's prohibition of deceptive acts or practices speaks for itself. Indeed, Tucker omits that his lending practices resulted in his criminal conviction for fraud, despite the principle that no one "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie* v. *City of Columbia*, 378 U.S. 347, 351 (1964). Tucker did not need the Federal Trade Commission—or the United States Attorney for that matter—to tell him in advance that it was deceptive to say that a $300 loan will be repaid in one installment with $90 interest while making ten withdrawals and charging $675 interest.

c. If there were any doubt that Section 19 was not meant to limit remedies available under Section 13(b), Congress removed it with two express savings clauses. Section 19 states explicitly that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal Law." 15 U.S.C. 57b(e). The statute also contains an interpretive rule commanding that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." *Ibid.*

Tucker attempts to do exactly what the plain language of the clauses forbids, both by treating Section 19's remedies as the exclusive means to redress harm to consumers and by using those remedies as a means of constraining the scope of relief available under Section 13(b). See Br. 26-27. Recognizing the problem, Tucker asks the Court to simply disregard the savings clauses for three reasons, all of which fail.

First, he asserts that the savings clauses only preserve existing remedies and cannot be construed as granting authority to award monetary relief under Section 13(b). Br. 31. As we showed above, restorative monetary relief is an existing remedy under the longstanding principle that a court of equity can order such relief unless Congress expressly says otherwise. *Porter*, 328 U.S. at 399. The relevant question is whether anything in Section 19 *limits* the traditional scope of equity, and the savings clauses make clear that the answer is no.

Tucker next asserts that Section 19's savings clauses do not even apply to Section 13(b). He argues that Section 19's reference to remedies available under "any other provision of law" excludes those available under the FTC Act itself and applies only to statutes other than the FTC Act. Br. 32. That is flatly contrary to the plain text of the statute. One clause preserves "*any* other remedies" provided by "State or Federal Law"; the other bars reading Section 19 "to affect *any* authority of the Commission under *any* other provision of law." 15 U.S.C. 57b(e) (emphasis added). Section 13(b) clearly provides remedies under federal law and is likewise a provision of law that grants authority to the Commission.

Tucker incorrectly claims support for his atextual position in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). The statute

at issue in that case provided a private right of action that required citizen-plaintiffs to comply with certain notice requirements. *Id.* at 14-15. The plaintiffs did not comply, but nevertheless claimed that the statute also gave them an *implied* right of action *without* any notice requirement. *Ibid.* They relied on a savings clause stating that nothing in the citizen-suit provision restricted any enforcement right that a person might have "under any statute or common law." *Ibid*. The Court rejected that contrived bootstrap argument, finding it "doubtful that the phrase 'any statute' includes the very statute in which this statement was contained," while resting its decision on other grounds. *Id.* at 15-16. No similar situation is presented here. The Court should reject Tucker's contrived claim that under *Sea Clammers*, Section 19's savings clauses mean the opposite of what they say.

Finally, Tucker claims that applying the savings clauses consistent with their plain language would cause the statute to "destroy itself." Br. 32. That claim is a variation on his argument that Section 19 would be redundant if monetary relief is available under Section 13(b), and it fails for the same reasons.

2. The provision for "equitable relief" in Section 5(*l*) does not restrict the scope of remedies under Section 13(b).

Tucker fares no better with his claim that the courts' authority in Section 5(*l*) civil-penalty actions to order "mandatory injunctions and such other and further equitable relief as they deem appropriate" shows that Congress intended to strip monetary remedies from Section 13(b). Br. 15, 20-21. He claims that Congress's use of "equitable relief" in addition to "mandatory injunction" shows that Section 13(b), which authorizes a "permanent injunction"

without mentioning "equitable relief," can provide only prospective remedies. Tucker invokes the principle that when "Congress includes particular language in one section of a statute but omits it in another," the Court presumes "that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009); see Br. 20-21.

But that interpretive guide is "no more than a rule of thumb that can tip the scales when a statute could be read in multiple ways." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013) (cleaned up). Here, the structure of the Act shows that Congress used different language in Section 5(*l*) and Section 13(b) because the two sections address different issues. Unlike Section 13(b), Section 5(*l*) is not a means of enforcing the Act itself, but rather a means to enforce compliance with a Commission cease-and-desist order issued though the administrative pathway. Section 5(*l*) provides an analog to a court's power to enforce its own orders through contempt, primarily by creating a civil action for a *penalty*, but also by providing non-monetary means of coercion. Its additional remedies—mandatory injunctions and other equitable relief—were intended to afford flexibility beyond monetary penalties in cases where "the threat of economic penalty is more apparent than real because [the defendant has] no available resources with which to pay the penalty."[14] S. Rep. No. 93-151, at 29. The word "injunction" thus has a "distinct characte[r]" in Section 5(*l*) that it does not have in Section 13(b) because of its

[14] The difference between "mandatory injunction" and "permanent injunction," as well as Congress's stated reasons for the injunctive relief in Section 5(*l*), also refute Tucker's argument that Congress must have intended "injunction" to have the same meaning in Sections 5(*l*) and 13(b) because the two provisions were enacted together. Br. 20-21.

"association with distinct statutory objects." *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

The different functions of Section 5(*l*) and Section 13(b) also belie Tucker's suggestion that Congress would have "said so expressly" in Section 13(b) if it intended to authorize monetary relief. Br. 15, 20. For all the reasons discussed above, Congress did not need to specify that it intended courts to exercise their traditional jurisdiction in suits for an injunction—including the authority to enter restorative monetary relief—when it authorized them to hear such suits. It *did* need to specify the remedies it intended to support administrative adjudication, which was Congress's own creation. By Tucker's logic, the civil penalties authorized by Section 5(*l*) (and Section 5(m)) would imply that district courts are *not* authorized to use the contempt power to enforce permanent injunctions. After all, those sections show that Congress knows how to authorize penalties for violating an order to stop conduct found to violate the FTC Act, but Section 13(b) is silent on the authority to punish violations of permanent injunctions. Similarly, under Tucker's theory, Congress would have "said so expressly" if it intended to authorize preliminary relief to maintain the status quo in a permanent injunction action, yet the first part of Section 13(b) authorizes preliminary relief only in favor of administrative proceedings. See 15 U.S.C. 53(b). In reality, the contempt power and the authority to enter preliminary relief are inherent in federal district court litigation just as the authority to enter monetary relief is inherent in the power to enter an injunction.

B. Tucker Offers No Rational Explanation Why Congress Would Have Intended Wrongdoers To Keep The Proceeds Of Their Illegal Conduct.

As shown, the remedial sections of the FTC Act work in harmony to allow the Commission to carry out its mission effectively in either of two adjudicative forums. Tucker's interpretation would turn the judicial forum into a poor relation for no good reason. In his view, Congress invoked the traditional equitable power of the district courts only halfway, silently withdrawing the remedial authority that equity courts have used for centuries. Indeed, Tucker attacks the very idea of "[a]llowing the Commission to proceed straight to court under §13(b)," claiming that the Commission's "primary statutory role" is to "defin[e] prohibited conduct for the public, in advance, through administrative processes." Br. 43, 17. Tucker therefore asserts that the Commission may seek to redress consumer harm only in the administrative pathway through Section 19. *Id.* at 42-44.

Tucker's desire to cabin the Commission's enforcement discretion cannot be squared with Congress's creation of two enforcement pathways. When Congress creates two means for an agency to proceed, it conveys the discretion to choose between them. See generally *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293-295 (1974). Here, when the Commission "does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order," it may sue in federal court instead. S. Rep. No. 93-151, at 31.

Neither Tucker, his amici, nor any court below has offered a reason why Congress would have wanted the impaired scheme Tucker conjures. His contention that courts may not exercise the traditional powers of equity in Com-

mission lawsuits violates the "foundational principle" of equity that a wrongdoer should not "make a profit out of his own wrong." *Liu*, 140 S. Ct. at 1943 (quotation marks omitted). In Tucker's case, ignoring that principle would allow him to walk away from his illegal scheme with more than a billion ill-earned dollars in his pocket.

III. The Determination Of Monetary Remedies Below Was Correct.

Tucker argues that even if Section 13(b) does authorize monetary relief, the judgment against him was improper under *Liu*. Tucker waived these challenges by failing to raise them below, and they lack merit in any case.

Liu set forth two main criteria for calculating "equitable relief" in SEC enforcement cases seeking disgorgement. First, legitimate expenses must be deducted from the judgment, except where the "entire profit of a business or undertaking results from the wrongdoing." 140 S. Ct. at 1950 (cleaned up). Second, joint liability for disgorgement is appropriate only for "partners engaged in concerted wrongdoing." *Id.* at 1949. In addition, under a provision in the securities law requiring that monetary remedies be "for the benefit of investors," monetary remedies in securities cases must be paid to victims and not the Treasury. *Id.* at 1947-1949. The Court did not address whether or how its decision should apply outside the securities context.

a. Tucker waived his challenge to the deduction of legitimate expenses because he did not raise the issue below. He neither asked the district court to deduct any expenses nor identified any. Pet. App. 101a-104a. He asked both courts below to exclude income from loans to repeat customers on the theory they were not deceived, *id.* at 18a, 102a-103a, but he makes no such claim here. In any event, even if *Liu* applies to the FTC Act, the judgment does not

include deductible expenses. It rests on a calculation of the amount paid by borrowers in excess of the charges disclosed in the loan documents. Pet. App. 17a, 101a. That methodology by definition excludes legitimately charged interest, which covers the genuine costs of doing business.

b. Tucker also waived his claim that the district court improperly imposed joint-and-several liability. He did not argue before the Ninth Circuit that joint liability was inappropriate, and he makes only a glancing argument to that effect now. Br. 47-48. Even assuming that *Liu* applies here, the district court below correctly imposed collective liability on Tucker and his companies. It held that Tucker actively controlled the companies, which themselves formed a common enterprise, and that he personally participated in their deceptive conduct. Pet. App. 4a, 77a, 87a-94a. Tucker and his companies thus were "partners engaged in concerted wrongdoing" and properly subject to joint liability.[15] *Liu*, 140 S. Ct. at 1945. Tucker offers no reason why an individual fraudster and the wholly owned companies through which he acts should not be deemed jointly liable as an equitable matter under *Liu*.

c. The Court ruled in *Liu* that monetary judgments in SEC enforcement cases generally must be paid directly to victims to satisfy the statutory condition that the remedy be "for the benefit of investors." 140 S. Ct. at 1947-1949. Section 13(b) contains no such restriction, but the judg-

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[15] Tucker's wife, Kim Tucker, and the company she created to purchase the couple's Aspen vacation home were held separately liable as relief defendants based on their receipt of tainted proceeds traceable to Tucker's scam. Pet. App. 18a n.5. Tucker does not claim that the funds his wife and her company received were untainted and provides no reason why equity would allow them to keep millions of dollars diverted to them from consumer victims.

ment nonetheless contemplates that the FTC will deposit the money it receives into a fund to be used for consumer redress and attendant expenses. It states that if the Commission determines that "direct redress to consumers is wholly or partially impracticable or money remains after redress is completed," it may apply the money to other equitable remedies related to the defendants' misconduct, with any money not used for such equitable relief to be deposited in the Treasury. Pet. App. 108a-109a. Thus, contrary to Tucker's contention, Br. 47, money could go to the Treasury only if payment to victims is infeasible.

The court's order is consistent with the Commission's general practice of returning directly to victims the maximum amount possible except where infeasible. As a result, payments to the Treasury are minimal in comparison with the amount of money returned to consumers. From 2016 to 2020, the Commission returned approximately $1.1 billion directly to consumers, and $10 billion more was returned directly by defendants or other agencies. In contrast, the Commission sent just over $22 million to the Treasury, mostly where per-person payments were too small to justify the costs of processing or where victims could not be located.[16]

d. Tucker is wrong that the judgment must be reversed because it imposes legal rather than equitable restitution.

To begin with, the Court recognized in *Great-West* and *Mertens* that when a court of equity properly exercises its power to enjoin (as it undisputedly did here), it may invoke "*all* relief available" in equity, including the power of complete relief. The Court contrasted that broad grant of au-

[16] See FTC, *FTC Refunds to Consumers*, Fiscal Year: 2016 to 2020, https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyDate.

thority with the more restrictive power to grant "equitable relief," which implied only those remedies that were typically available in equity. *Mertens*, 508 U.S. at 255, 257-258; *Great-West*, 534 U.S. at 210. The question whether the relief would be legal or equitable in the absence of a duly granted injunction is a red herring.

In any event, the judgment here comports with the Court's understanding of equitable relief in decisions stretching from the 1850s to last Term in *Liu*. As a result, Tucker gets no help from *Great-West*, which he cites for the proposition that equitable restitution requires the return of particular funds or property in the defendant's possession or their traceable proceeds. 534 U.S. at 213. *Great-West* also recognized that an "accounting for profits" is a form of equitable restitution that can allow a general claim on assets. *Id.* at 214 n.2. As the *Restatement of Restitution* explains, this remedy (whether termed "disgorgement" or "accounting") "involves no claim to particular assets and no requirement of tracing" and is "to be satisfied from the defendant's available assets." *Restatement* (*Third*) *of Restitution and Unjust Enrichment* § 51 cmt. b (2011). In keeping with that tradition of equity, the Court imposed no tracing requirement in *Liu*. Instead, the Court remained mindful of the "foundational principle" of equity that a wrongdoer should not "make a profit out of his own wrong." *Liu*, 140 S. Ct. at 1943 (quotation marks omitted).

CONCLUSION

The Court should affirm the court of appeals' decision.

Respectfully submitted.

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APPENDIX

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RELEVANT STATUTORY PROVISIONS

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides, in relevant part:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so

complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of

the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph 1 (2) not later than 120 days after the date of the filing of such request.

* * *

(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or

neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered 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.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States

against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is

accompanied by a public statement of its reasons and is approved by the court.

* * *

Section 13 of the Federal Trade Commission Act, 15 U.S.C. 53, provides, in relevant part:

§ 53 False advertisements; injunctions and restraining orders

* * *

(b) Temporary restraining orders; preliminary injunctions

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 in-

junction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

Section 19 of the Federal Trade Commission Act, 15 U.S.C. 57b, provides, in relevant part:

§57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

(b) Nature of relief available

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

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) of this section relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.