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Does the FTC Have Blood On Its Hands? An Analysis of FTC Overreach and Abuse of Power After *Liu*

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Recent cases have called the Federal Trade Commission's ("FTC") enforcement methods into question. After a circuit split developed in the wake of the Seventh Circuit's decision in *Federal Trade Commission v. Credit Bureau Center, L.L.C.*, the Supreme Court responded by granting certiorari and consolidating the case with *AMG Capital Management, L.L.C. v. Federal Trade Commission*. The issue in these cases is whether Section 13(b) of the FTC Act authorizes the FTC to bypass the due process safeguards mandated by Congress in Sections 5 and 19 of the FTC Act and, in doing so, to conduct warrantless searches and seizures, unilaterally freeze assets, and impose punitive "disgorgement" monetary damages. In light of the Supreme Court's recent decision in *Securities & Exchange Commission v. Liu*, it seems likely that the Court will limit the FTC's abusive use of Section 13(b) and find in favor of the defendants in these cases.

The FTC's mission is to protect consumers from unfair

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or deceptive acts or practices, and for many years, one of its main enforcement methods has been disgorgement under Section 13(b) of the FTC Act. Section 13(b) gives the FTC the authority to seek preliminary and permanent injunctions when it believes that the law is being violated or is about to be violated. It does not mention disgorgement or any other restitution methods, but the FTC has spent considerable time and energy building a foundation of favorable case law to support its ability to use disgorgement. Its strategy consisted of building a body of precedent, based on old and inapplicable cases, and it has aggressively pursued this strategy with the intention of expanding its enforcement abilities. The way it has used its self-created power has caused untold damage to business owners, employees, and consumers.

This Article argues that the Supreme Court should rule against the FTC in *Credit Bureau Center/AMG Capital Management*. The FTC used shaky and extraneous case law to expand its power to include the ability to seek disgorgement, and it has caused irreparable harm to businesses and individuals across the country. Indeed, following the FTC's use of disgorgement as an improper remedy to seek damages, several business owners who were subjected to that improper treatment committed suicide, making the FTC a de facto judge, jury, and executioner. Part I details the methods that the FTC has used over the past few decades to expand its power to its current level. Part II argues that disgorgement is not authorized by Congress under Section 13(b). Indeed, nothing other than a preliminary or permanent injunction is authorized by Congress under Section 13(b). And Part III addresses the numerous constitutional issues that arise when a federal agency expands its power far beyond its statutory grant of power.

INTRODUCTION AND LEGAL BACKGROUND

The first indication that the FTC's enforcement methods would be receiving a more robust examination came in *Kokesh v. Securities & Exchange Commission*, when the Supreme Court ruled that the remedy of disgorgement operates as a "penalty," rendering it subject to a five-year statute of limitations.[1] The case included a footnote that many believed opened the door for a challenge to the Securities and Exchange Commission's ("SEC") right to seek disgorgement at all. The footnote stated that nothing in the decision "should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[2] Many legal commentators believed that meant the court was ready to hear a case on the practice of disgorgement as a whole. This case was relevant to the FTC because it uses the same disgorgement practices that the SEC does, and it signaled that big changes might be coming for the FTC.

Two cases had worked their way through circuit courts that seemed ripe for review by the Supreme Court. The FTC's position on disgorgement was weakened by a Seventh Circuit case, the result of which created an eight-to-one circuit split.[3] In that case, *Federal Trade Commission v. Credit Bureau Center, L.L.C.*, the court held that the FTC does not have authority to seek restitution under Section 13(b) because its plain terms provide solely for injunctive relief.[4] On the other

1. 137 S. Ct. 1635, 1645 (2017).

2. *Id.* at n.3.

3. *See* Recent Case, *Statutory Interpretation—Stare Decisis—Seventh Circuit Uses Methodological Stare Decisis to Reverse Substantive Precedent*—FTC v. Credit Bureau Center, LLC, 133 HARV. L. REV. 1444, 1444 (2020). The FTC's Section 13(b) power was also questioned in *Federal Trade Commission v. Shire ViroPharma*, 917 F.3d 147 (3d Cir. 2019), but the Third Circuit court did not go as far as the court in *Credit Bureau Center*. The court in *Shire ViroPharma* held that Section 13(b) only applies to ongoing or imminent harms. *See id.* at 155.

4. 937 F.3d 764, 785–86 (7th Cir. 2019).

hand, in *Federal Trade Commission v. AMG Capital Management, L.L.C.*, the Ninth Circuit held that the district court had the power to order "equitable monetary relief" or restitution, and that that power stemmed from the FTC's power to seek injunctions against businesses.[5] Now that the Supreme Court has granted certiorari on these cases, it should radically restrict the FTC's power under Section 13(b) to seek disgorgement or any remedies other than the injunctive relief specifically authorized by Congress.

After the ruling in *Kokesh*, a case came out of the Ninth Circuit that challenged the SEC's right to seek disgorgement. The Supreme Court took the case, and in *Liu v. Securities & Exchange Commission* the court held that disgorgement awards in SEC enforcement actions may not exceed a wrongdoer's net profits.[6] This was a major blow to the SEC's enforcement scheme because it limits the amount of restitution it is able to seek and underscores that the Court will no longer allow federal agencies to expand their powers beyond those specifically granted by Congress.

These cases constitute the legal background of the FTC's current predicament on disgorgement. Now that the Supreme Court has taken *Credit Bureau Center* and *AMG Capital Management*, it has the perfect opportunity to remedy the issue of the FTC's massively expanded power. A ruling against the FTC in these cases would bring its power back in line with what Congress intended. Because the FTC has been relying on weak caselaw since it first began the process of expanding its power, there is strong legal support for such a decision. The Supreme Court should continue down the path it followed in *Liu* and trim the FTC's power back to a more appropriate level.

5. 910 F.3d 417, 426–27 (9th Cir. 2018).

6. 140 S. Ct. 1936, 1940 (2020).

I. THE FTC'S POWER GRAB

A. *The FTC Worked to Remove Limitations on Its Power*

The FTC began to expand its power after two "provisos" were added to the Federal Trade Commission Act in 1973.[7] The first proviso gave the FTC the ability to seek preliminary injunctions, and the second gave it the ability to seek permanent injunctions.[8] The FTC then embarked on a decades-long campaign to transform this seemingly limited set of powers into an arsenal of enforcement methods, including disgorgement and other types of restitution, that the FTC continues to use to this day. Before Congress or the public realized what was going on, the FTC had gained an enormous amount of power, the legal basis of which was shaky at best. The FTC weaponized Section 13(b) to allow it to storm into businesses without due process and use all kinds of enforcement methods without having a statutory basis for doing so. This accretion of power is in violation of standard principles of statutory interpretation, contradicts current caselaw, and was done to make it easier for the FTC to enforce the law how it wanted the law to be interpreted with a minimum amount of oversight.

The FTC has essentially admitted that it relies on Section 13(b) because it makes it easier for the FTC to win cases with less oversight or due process rights for defendants. The other enforcement sections that the FTC can use, Sections 5 and 19, have many more procedural obstacles that the FTC would have to contend with if it were to use them in enforcement cases.[9] According to the FTC, the problem with Section 19 is that "[y]ou need[] three separate

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7. *See* Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141, 141–42 (1988); *see also* 15 U.S.C. § 53(b)(2) (2018).

8. *See* Paul, *supra* note 7.

9. *See* 15 U.S.C. § 57a(b) (2018).

lawsuits to get final relief."[10] Additionally, Section 19 enforcement actions are subject to a three-year statute of limitations.[11] That proved to be inconvenient for the FTC, and so it began to rely more on Section 13(b), which meant it could accomplish the same goals in one lawsuit. On its own website, it stated that "Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one step."[12] These statements, and the litigation strategy that the FTC has pursued, show an undesirable and unacceptable pattern of trying to skirt due process and change the law to favor its battering ram tactics.

Using Section 13(b) over Section 19 provides the FTC with another advantage. Under Section 13(b), defendants are not entitled to jury trials because the FTC seeks equitable remedies instead of legal remedies.[13] This takes away an important right for defendants and is another example of the FTC using certain enforcement methods to makes things easier on itself, causing great harm to those whom the agency sets its sights on.

Federal agencies should not make it their mission to expand their power as much as possible. Instead, they should focus on fairness and doing the mission that they were created to do. The FTC was granted the power, under Section

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10. Brief for Publishers Bus. Servs., Inc. et al. as Amici Curiae Supporting Petitioners at 6, Publishers Bus. Servs. Inc. v. Fed. Trade Comm'n, 540 F. App'x 555 (9th Cir. 2013) (Nos. 19-507 & 19-508) (quoting David M. FitzGerald, Remarks at the FTC 90th Anniversary Symposium: Session on "Injunctions, Divestiture and Disgorgement" (Sept. 23, 2004) (transcript available at http://bit.ly/2kW0VWS)).

11. 15 U.S.C. § 57b(d) (2018).

12. Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority,* FTC.GOV (July 2008), http://ftc.gov/about-ftc/what-we-do/enforcement-authority [https://web.archive.org/web/20190301021249/https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority].

13. *See* Fed. Trade Comm'n v. ELH Consulting, L.L.C., No. CV 12–02246–PHX–FJM, 2013 WL 593885, at *1 (D. Ariz. Feb. 7, 2013) (holding that there is no right to a jury for equitable claims).

13(b), to ask courts for injunctions. What it has done is go far beyond that to help ensure that any business it targets has less tools to defend itself.

B. *The FTC's Reliance on* Porter *and* Mitchell

The FTC embarked on a legal strategy, starting in the 1980s, to reconstruct the FTC Act in its favor. The first step that the FTC took was building up a body of favorable caselaw. The main cases that the FTC relied on to begin building up favorable precedent were *Porter v. Warner Holding Co.*[14] and *Mitchell v. Robert DeMario Jewelry, Inc.*[15] In *Porter*, the Court gave the Price Controls Board wide authority to use equitable remedies such as disgorgement of profits in its enforcement actions.[16] That authority stemmed from the statute that granted the Price Controls Board its power, which stated that in Price Controls Board cases, courts could grant "a permanent or temporary injunction, restraining order, or other order."[17] The Court in *Porter* also stated that when Congress gives federal district courts equitable jurisdiction, that comes with the "power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."[18] In *Mitchell*, the Court affirmed *Porter's* holding that "the comprehensiveness of th[e] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."[19] These cases' expansive views of the equitable remedies allowable under certain statutes proved to be all that the FTC needed to start building a foundation of precedent that it relies on to this day.

14. 328 U.S. 395 (1946).
15. 361 U.S. 288 (1960).
16. *See* 328 U.S. at 398–99.
17. *Id.* at 399.
18. *Id.*
19. 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398).

The FTC relied on *Porter* in many of the early cases when it sought to expand its Section 13(b) power. In *Federal Trade Commission v. U.S. Oil & Gas Co.*, the court held that it had the power to exercise traditional inherent powers of courts of equity in FTC enforcement actions.[20] The court also relied on *Porter* in *Federal Trade Commission v. H.N. Singer, Inc.*, where the Ninth Circuit held that it was entitled to use equitable remedies outside the bounds of the statutory language in FTC enforcement actions.[21] The FTC also used *Mitchell* to justify its use of disgorgement. In *United States v. Lane Labs–USA Inc.*, the court relied on *Mitchell* when it held that district courts sitting in equity may grant restitution unless there is a "clear statutory limitation" on that power.[22] And in *Federal Trade Commission v. Cephalon, Inc.*, the court accepted the FTC's argument that *Porter* and *Mitchell* established an analytical course for it to follow when deciding on the limits of the FTC's power.[23] These cases show that *Porter* and *Mitchell* form the foundation of the FTC's use of expansive equitable powers.

There are problems with the FTC's reliance on *Porter* and *Mitchell*. *Porter* is a 70-year-old case that deals with a completely different statute and agency, and the FTC has relied on it to grant itself a massive amount of power that Congress did not specifically allow. There is a major difference between the statute in *Porter* and Section 13(b) of the FTC Act. The difference is that the FTC Act does not say "or other order." The FTC Act specifically gives the FTC the right to seek injunctions from courts.[24] It does not include a catchall phrase like "or other order," which is the key phrase that allowed the Court in *Porter* to take such an expansive

20. 748 F.2d 1431, 1434 (11th Cir. 1984).

21. 668 F.2d 1107, 1111–12 (9th Cir. 1982).

22. 427 F.3d 219, 225 (3d Cir. 2005).

23. 100 F. Supp. 3d 433, 438 (E.D. Pa. 2015).

24. 15 U.S.C. § 53(b)(2) (2018).

view of which equitable remedies were available.[25] And in *Mitchell*, the Court agreed with the language from *Porter* that stated equitable jurisdiction should not be limited unless there is a "necessary and inescapable inference" in the statutory language that would limit the court's equitable power.[26] But Congress left out any mention of equitable powers other than the two types of injunctions in Section 13(b).[27] That leads to the inference that the only power Congress intended for the FTC to have under that section was the power to seek injunctions.

Another problem with using *Porter* as a legal foundation is that the Supreme Court has rejected using analogies to other statutory regimes when they are used in this way.[28] In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court did not rely on cases interpreting the Equal Pay Act when it was deciding a question about Title VII.[29] Its reasoning was simply that the two statutes were not the same, so analogizing one to the other did not do enough to answer the legal question at hand.[30] That is what the FTC and various courts have done with their reliance on *Porter* and *Mitchell*. Neither of those two cases dealt with anything even remotely related to the FTC, but courts have consistently used the interpretation of other statutes in those cases to interpret the FTC Act.

If analogies to other statutory regimes are the proper way to interpret Section 13(b) of the FTC Act, then the Supreme Court's ruling in *Meghrig v. KFC Western, Inc.*

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25. 328 U.S. 395, 402 (1946).

26. 361 U.S. at 291.

27. *See* 15 U.S.C. § 53(b)(2); *see also* Fed. Trade Comm'n v. AbbVie, Inc., 976 F.3d 327, 379 (3rd. Cir. 2020) (holding that the FTC's equitable powers under Section 13(b) do not include disgorgement because the statute already "specifies the form of equitable relief a court may order").

28. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640 (2007).

29. *See id.*

30. *Id.*

would provide a framework that is much more reasonable and in line with basic rules of statutory interpretation. In *Meghrig*, the Supreme Court held that a district court's equitable authority may be limited, even if the statute it is interpreting does not expressly limit the court to certain equitable remedies.[31] The Court also stated that courts should not assume other remedies are available when "a statute expressly provides a particular remedy or remedies."[32] That contradicts the *Porter-Mitchell* line of cases, which have been interpreted to say that if one equitable remedy is available, then all of them are.

By the plain text of the statute, Congress only provided for injunctive relief under Section 13(b). If Congress meant for restitution and other forms of relief to be available under Section 13(b), it would have specifically mentioned them. This is seen in other sections of the very same statute, where Congress did in fact describe the forms of relief available beyond just injunctions. The other two enforcement provisions that the FTC has at its disposal both use language that describe other forms of equitable relief that are available. Section 5 of the FTC Act states that "injunctions and such other and further equitable relief as [district courts] deem appropriate" are available.[33] And in Section 19 of the FTC Act, the FTC is authorized to seek "the refund of money or return of property."[34] There is no similar language in Section 13(b). Congress specifically allowed other forms of equitable relief under the other two enforcement provisions, while limiting Section 13(b) to injunctions. This misinterpretation of Section 13(b) allows the FTC to circumvent the limitations of the other enforcement sections while enjoying the benefits of the less restrictive Section 13(b). This point was raised in *Credit Bureau Center*, and it

31. *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 487–88 (1996).

32. *Id.* at 488.

33. 15 U.S.C. § 45(l) (2018).

34. 15 U.S.C. § 57b(b) (2018).

is one of the main reasons why the Seventh Circuit court ruled against the FTC in that case.[35] The Seventh Circuit relied on language from a recent Supreme Court case, which stated that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[36] We must assume that Congress acted intentionally when it used different wording in Section 13(b), and that therefore it did not intend for anything besides injunctions to be available under that section.

There are serious problems with the FTC's and courts' reliance on *Porter* and *Mitchell*. The cases are outdated, the interpretation of the statute is flawed, and the legal reasoning is stretched to the breaking point. When the Supreme Court reviews this issue, it should rely on modern cases that deal with the issue more directly, instead of analogizing distantly related cases from decades ago.

C. *Extensive Caselaw Contradicts the FTC's Position*

Besides the problems with the FTC's reliance on *Porter* and *Mitchell*, other cases have held that the FTC's interpretation of Section 13(b) is incorrect. In *Federal Trade Commission v. Credit Bureau Center, L.C.C.*, the 7th Circuit held that "[r]estitution isn't an injunction."[37] This bare statement of fact exposes the basic issue with the FTC's entire argument. And contrary to what the FTC would have us believe, many courts agree with this simple and logical assertion. In *Owner-Operator Independent Drivers Ass'n v. Landstar System, Inc.*, the court stated that "[i]njunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or

35. *See* Fed. Trade Comm'n v. Credit Bureau Ctr., L.L.C., 937 F.3d 764, 773 (7th Cir. 2019).

36. Nken v. Holder, 556 U.S. 418, 430 (2009).

37. 937 F.3d 764, 771 (7th Cir. 2019).

disgorgement."[38] The court in *Wal-Mart Stores, Inc. v. Dukes* held that an equitable order for backpay is not an injunction, showing that all other forms of equitable relief are not covered by the term injunction.[39] And in *Owner-Operator Independent Drivers Ass'n v. New Prime, Inc.*, the court addressed this exact issue when it stated that disgorgement does not qualify as injunctive relief.[40]

One other case that damages the FTC's argument is the Supreme Court's recent ruling in *Liu v. Securities & Exchange Commission*, where, in considering the statute that gives the SEC the ability to seek disgorgement, it noted that when courts interpret a statute, they must give effect to every clause and word of that statute.[41] The corollary of that basic rule of statutory interpretation is that courts must not add words that are not there. When courts add their own unstated ideas into statutes, they go beyond what the judiciary is meant to do. These cases show that the FTC's argument is built on a shaky foundation that relies on two old Supreme Court cases that might not even be decided the same way if they were ruled on today. The FTC's authority to seek disgorgement is built on a house of cards that is ready to topple at the first sign of a breeze.

The FTC should never have been granted power beyond what Congress specifically enacted in the statute. Federal agencies have no power to act in any way unless Congress expressly confers power onto them.[42] In the case of the FTC, Congress gave it the power to seek preliminary and permanent injunctions in the proper cases.[43] But agencies

38. 622 F.3d 1307, 1324 (11th Cir. 2010).

39. 564 U.S. 338, 365 (2011).

40. 213 F.R.D. 537, 545 (W.D. Mo. 2002), *aff'd*, 339 F.3d 1001 (8th Cir. 2003).

41. *See* 140 S. Ct. 1936, 1948 (2020).

42. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986); *see also* Lyng v. Payne, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

43. 15 U.S.C. § 53(b) (2018).

cannot assume that they have plenary authority to act in an area just because Congress gave them some authority to act in that area.[44] That is precisely what the FTC has done. It was given a specific amount of authority to seek injunctions when the law is being violated or is about to be violated,[45] and has aggressively expanded that authority to include a whole range of equitable powers that Congress never sanctioned. Now that the Supreme Court has taken up cases on this issue, it seems increasingly likely that it will rule against the FTC.

Many courts have brought up other glaring issues with the FTC's current enforcement scheme. Multiple cases have noted that the FTC is authorized to act when wrongdoers are violating or are about to violate the law, which would seem to exclude enforcement actions based purely on past conduct. But methods of restitution, such as disgorgement, are definitionally based on past conduct. In *Federal Trade Commission v. Shire ViroPharma, Inc.*, the court held that it was "unambiguous" that "Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation."[46] The court used the "plain language" of Section 13(b) to show that the FTC does not have the power it claims it does.[47] The Seventh Circuit raised this same argument in *Credit Bureau Center*, when it held that methods of restitution "do[n't] sit comfortably with the text," because injunctions are forward-facing, not backward-looking.[48] Black letter law also supports this argument.[49] In

44. *See* Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 670 (D.C. Cir.), *amended*, 38 F.3d 1224 (D.C. Cir. 1994).

45. 15 U.S.C. § 53(b).

46. 917 F.3d 147, 156 (3d Cir. 2019).

47. *Id.*

48. 937 F.3d 764, 772 (7th Cir. 2019).

49. *See* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 47 (3d ed. 2013) (stating that injunctive relief looks to the future); 1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(1), at 551 (2d ed. 1993) (defining restitution

short, the FTC has twisted the very meaning of the word injunction into something that has little basis in caselaw or black letter law.

The FTC has demonstrated that it will use any means necessary to expand its power beyond what Congress intended. While it may believe that what it is doing is in the best interests of the country, there are many cases where it has reached far beyond its mission of protecting consumers, to the point where it has worked against the interests of the American public.

D. *Examples of FTC Overreach*

A recent case that is currently in litigation shows the extent of the FTC's overreach. Zurixx, LLC, was a company that sold real estate and business education to consumers. The company had met with FTC officials twice a year through a Better Business Bureau trade organization called the Electronic Retailers Self-Regulation Program ("ERSP") for well over five years. At these meetings, the company, as well as other companies, asked the FTC for review and guidance on compliance with federal trade regulations. Rather than providing clear guidance, issuing a cease and desist notice, or initiating an administrative hearing, as called for in Sections 5 and 19 of the FTC, the FTC purposefully side-stepped the due process requirements of those applicable Sections of the Act and, instead, blind-sided the company by bringing a sealed ex parte action under Section 13(b).[50] The FTC asserted that the company's actions posed an imminent harm to consumers, alleging that the company overstated the potential benefits of the education that the company offered and did not verbalize the company's full written guarantee during sales presentations.[51]

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as a return of what the defendant gained in the transaction).

50. *See* Fed. Trade Comm'n v. Zurixx, L.L.C., No. 2:19-CV-00713, 2019 WL 7790890, at *1 (D. Utah Oct. 1, 2019).

51. *Id.* at *2.

During the ex parte hearing, the FTC presented the federal court in the District of Utah with a very one-sided, skewed, and misleading set of "facts." Taking the FTC at its word, the court entered an FTC-penned ruling that Zurixx, among other things, falsely represented the potential earnings of consumers and that Zurixx understated the amount of time and effort that consumers would need to spend to earn money from their real estate training.[52] The array of heavy-handed enforcement methods that the FTC was granted shows the problem with its current enforcement scheme. Before the defendants were even given notice of the action, the FTC obtained multiple forms of "equitable relief" that do not necessarily fall under its statutory powers.[53] The court allowed the FTC to seize the bank accounts of the company and its principals and use local law enforcement offers to raid the company's offices, copy all of the company's digital files and physical records, confiscate employee laptops and cell phones, and detain employees for hours and interview them with no attorneys present.[54] The FTC then issued a press release defaming the company and, through a court-appointed monitor-turned-receiver, directed customers to institute refunds of over $20 million. A company, and its owners, that had diligently sought FTC guidance for over five years was stunned, bankrupted, needlessly defamed, and out of business before any semblance of due process was granted them. The FTC has now moved on to seek even more unlawful equitable relief, including rescission of contracts, restitution, disgorgement, and damages. These FTC actions take the statutory power permitting preliminary and permanent injunctions and expands them to a level that Congress never intended.

Zurixx submitted a motion to dismiss that was partially based on the argument that Section 13(b) does not grant the

52. *Id.*

53. *See generally infra* Part II.

54. *See Zurrix, L.L.C.*, 2019 WL 7790890, at *8–10.

FTC the right to seek restitution.[55] In denying the motion, the court relied on the same set of cases that other courts have recently declined to extend or overturned in their respective jurisdictions. Zurixx argued that the plain language of the FTC Act does not allow for relief other than injunctive relief.[56] It also pointed to the recent ruling in *Credit Bureau Center*, which stated that "section 13(b) does not authorize restitutionary relief."[57] The Tenth Circuit declined to adopt the reasoning in *Credit Bureau Center*, instead choosing to follow the *Porter-Mitchell* line of cases and *Federal Trade Commission v. Freecom Communications, Inc.*[58] In *Freecom*, the Tenth Circuit held that Section 13(b) grants the FTC the ability to seek the "full range of equitable remedies."[59] By denying this motion, the Tenth Circuit upheld the flawed precedent that the FTC relies on to the detriment of business owners and employees.

The FTC now has different enforcement methods available to it depending on what jurisdiction it is operating in. Because of the ruling in *Credit Bureau Center*, businesses in the Seventh Circuit are not subject to the range of equitable remedies that the FTC has access to in other areas of the country. This will cause a large amount of unfairness in enforcement until the Supreme Court comes to a decision on *Credit Bureau Center*. It means that some businesses will be subject to the array of questionably legal equitable remedies that the FTC is so quick to use in its enforcement actions, and others will only be subject to the plain language powers of Section 13(b). In order to have a fair, nationwide

55. *See* Fed. Trade Comm'n v. Zurixx, L.L.C., 441 F. Supp. 3d 1216, 1220 (D. Utah 2020), *motion to certify appeal denied*, No. 2:19CV713-DAK-EJF, 2020 WL 2043482 (D. Utah Apr. 28, 2020).

56. *Id.*

57. *Id.* (quoting Fed. Trade Comm'n v. Credit Bureau Ctr., Inc., 937 F.3d 764, 767 (7th Cir. 2019)).

58. *See id.* at 1221.

59. *Id.* (quoting Fed. Trade Comm'n v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005)).

enforcement scheme for the FTC, there needs to be consistency in its powers. Thankfully, the Supreme Court is now addressing this issue. But it is important that it acts quickly to overturn the *Porter-Mitchell* line of cases so that more businesses are not treated unfairly.

There are many other examples of the FTC going too far in its enforcement actions and causing more harm than good. In one representative case, the FTC raided a Florida business called Vylah Tec, L.L.C. With the help of local police, the FTC entered the business and told employees to put their hands up and step away from their computers.[60] The FTC confiscated the employees' cell phones.[61] The FTC then detained the employees for hours and interviewed them with no attorney present.[62] A federal court granted the FTC a preliminary injunction that appointed a receiver to control the business.[63] Because of the raid, the business was unable to continue to operate. This caused a huge amount of hardship for the business's customers, employees, and the owners of the business. This is the type of raid that exemplifies the problem with the FTC's current enforcement scheme. If the FTC is not reined in by the Supreme Court, these raids will continue to happen, and mistakes are inevitable. If a raid like this happens to a business that is later cleared of wrongdoing, the damage will be severe and permanent, and innocent businesses should not be accepted as casualties of FTC enforcement.

On several occasions, the extreme abuse of power that the FTC engages in has resulted in the suicide of stunned

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60. Robert Cupo, *The FTC Raided My Office, Found Nothing, and Is Destroying My Business Anyway*, INVESTOR'S BUSINESS DAILY (Oct. 2, 2017, 3:10 PM), https://www.investors.com/politics/commentary/the-ftc-raided-my-office-found-nothing-and-is-destroying-my-business-anyway/.

61. *Id.*

62. *Id.*

63. *Id.*

business owners and executives.[64] When FTC enforcement actions result in the suicides of multiple business owners, those actions are long overdue for a close inspection. Our inspection of how the FTC interprets its ability to use Section 13(b) that goes far beyond its statutory meaning shows that not only is the FTC improperly interpreting its statutory powers, but that it is also time for the Supreme Court to weigh in.

The Supreme Court needs to address this problem by reining in the FTC's enforcement powers back to what Congress originally intended. Until the Supreme Court does that, the FTC will continue to run wild and cause untold amounts of damage to businesses and people across the country.

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64. The list of deceased includes, but is not limited to, Michael McLain Miller, Russ Whitney, Jr., Don Lapre, and Chad Huntsman. *See MOBE's Russell Whitney Dead, Susan Zanghi's $318M Settlement*, BEHIND MLM (Dec. 11, 2018), https://behindmlm.com/companies/mobe/mobes-russell-whitney-dead-susan-zanghis-318m-settlement/; Obituary of *Chad S. Huntsman*, LEGACY.COM, https://www.legacy.com/obituaries/name/chad-huntsman-obituary?pid=174598761 (last visited Nov. 11, 2020); Tom Harvey, *Feds Sue Utah Companies, Including a Swallow Donor, for Alleged Fraud*, SALT LAKE TRIB. (Feb. 21, 2014, 5:01 PM), https://archive.sltrib.com/article.php?id=57577172&itype=cmsid; Philip Caulfield, *Don Lapre, TV Pitchman Accused of Fraud, Found Dead in Arizona Jail Cell of Apparent Suicide*, NY DAILY NEWS (Oct. 3, 2011, 8:19 PM), https://www.nydailynews.com/news/national/don-lapre-tv-pitchman-accused-fraud-found-dead-arizona-jail-cell-apparent-suicide-article-1.959915; Obituary of *Michael McLain Miller*, LEGACY.COM, https://www.legacy.com/obituaries/thespectrum/obituary.aspx?n=mclain-miller&pid=179486062&fhid=18337 (last visited Nov. 11, 2020).

II. THE MISCHARACTERIZATION OF DISGORGEMENT AS EQUITABLE RELIEF

A. *History and Usage of Equitable Remedies*

The power that the FTC was granted by Congress in Section 13(b) is equitable in nature. The concept of equitable relief in American law sprang from the types of relief that were available under English Courts of Chancery.[65] While equity as a whole is difficult to define, there are some basic principles that have guided the development of equitable relief. Traditionally, equity served the purpose of remedying defects in the common law, and it was applied in cases where using the common law would have undesirable effects that did not seem to fit the circumstances of the case.[66] In general, equitable remedies were used to avoid injustice that would occur if the common law was used.[67] They provided flexibility in situations where fair administration of justice called for it,[68] and by doing so, equitable remedies have and will continue to serve an important purpose in the American common-law system.

When founded, many states in the United States maintained separate courts of equity modeled after the English system.[69] Courts of law and equity were separate until the adoption of the Federal Rules of Civil Procedure in 1938.[70] Now, in most states, there is no distinction between courts, and the same courts and judges apply both law and

65. *See* Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 24–25 (1951).

66. *See id.* at 24.

67. *See id.* at 25.

68. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 568–71 (2016).

69. *See id.* at 537.

70. *See id.* at 538; *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988) ("[T]he merger of law and equity . . . was accomplished by the Federal Rules of Civil Procedure . . . .").

equity.[71] Although there has been significant overlap between the two types of law, the system of equitable remedies has stayed separate from legal remedies. One reason for this is the irreparable injury rule, which states that plaintiffs may not seek equitable remedies if a legal remedy would be adequate.[72] Although precisely defining whether a legal remedy is adequate has been the subject of extensive debate, this rule is the basic dividing line between equitable and legal remedies.

In modern American law, the use of equitable remedies is based on their traditional, historical use. Courts acting in equity have access to a few different types of equitable remedies. The classic equitable remedies that courts use are injunctions, accounting for profits, constructive trust, equitable liens, subrogation, equitable rescission, reformation, and specific performance.[73] Injunctions allow courts to prohibit the defendant from taking certain actions, or require the defendant to take certain actions.[74] Courts grant preliminary injunctions before a case is litigated in full in order to preserve the status quo,[75] and permanent injunctions are given after the merits of the case have been decided.[76] Courts apply four factors when deciding whether to grant a preliminary injunction: "(1) whether the movant will be irreparably harmed in the absence of an injunction, (2) the movant's likelihood of success, (3) the balance between the harm to the movant and the harm to the

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71. *See* Bray, *supra* note 68, at 538.

72. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990).

73. *See* Bray, *supra* note 68, at 553–57.

74. *Id.* at 553; *see also* Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte Cty./Kansas City, 38 P.3d 723, 729 (Kan. 2002) ("An injunction is an equitable remedy . . . prohibiting or commanding certain acts.").

75. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (describing the purpose of preliminary injunctions as to "preserve the relative positions of the parties until a trial on the merits can be held").

76. Bray, *supra* note 68, at 553.

nonmovant, and (4) the public interest."[77]

For the purposes of this Article, injunctions will be the most important category of equitable relief to consider, because the under Section 13(b) of the FTC Act, the FTC is entitled to seek preliminary and permanent injunctions.[78] Nothing in the history of equitable remedies or the history of injunctions supports the FTC's position that it should have the power to seek disgorgement when the statute only grants it the power to seek injunctions.

B. *The FTC's Misuse of Equitable Relief*

The FTC has characterized its practice of seeking disgorgement as an equitable remedy that falls under its statutory power to seek preliminary and permanent injunctions.[79] The way that disgorgement is used by the FTC does not fit with the traditional view of equity. Both traditional views and usages of equity, as well as case law spanning hundreds of years, prove disgorgement, as used by the FTC, is not allowed by the statute that grants the agency power.

Equitable remedies are limited to those categories of relief that have traditionally been available in equity. Those remedies are the ones that were available "during the days of the divided bench," or the time before courts of law and courts of equity merged.[80] In *Great-West Life & Annuity Insurance Co. v. Knudson*, the Supreme Court held the relief that the plaintiffs sought was legal, not equitable, because the funds at issue were not in the possession of the

77. Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1522–23 (2011).

78. 15 U.S.C. § 53(b)(2) (2018).

79. *See, e.g.*, Sec. & Exch. Comm'n v. Liu, 754 F. App'x 505, 509 (9th Cir. 2018).

80. Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651, 657 (2016).

defendants.[81] This would apply to many different FTC enforcement actions because the FTC often seeks to take back any and all money that was gained through the wrongdoing, even if it is no longer in the possession of the defendant. If the FTC does that, that makes it more of a legal remedy, not an equitable remedy, and it therefore does not have the power to seek it.

The FTC's use of disgorgement does not fit within the traditional view of equity because it is punitive. One of the main features of equity is that it should bring the situation back into balance, not punish one party or another. Courts have always tried to treat equity as "a court of conscience, . . . not a forum of vengeance."[82] Equity "permits only what is just and right with no element of vengeance or punishment . . . ."[83] Courts of law are supposed to be where punishment is meted out by the court system; the function of courts of equity is not to administer punishment.[84] Most recently, the Supreme Court affirmed that this remains the law, when in *Liu*, it held that a wrongdoer "should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'"[85] This is the traditional view of equity in American courts, and the FTC's use of disgorgement does not fit within that view, because it goes beyond fair compensation and is really just a form of punishment.

Disgorgement is a modern term that has no history in courts of equity.[86] Unlike other monetary remedies with long histories in courts of equity, such as constructive trust or

81. *See* 534 U.S. 204, 214 (2002).

82. Bush v. Gaffney, 84 S.W.2d 759, 764 (Tex. Civ. App. 1935).

83. Williamson v. Chi. Mill & Lumber Corp., 59 F.2d 918, 922 (8th Cir. 1932).

84. Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 717–18 n.14 (1974).

85. 140 S. Ct. 1936, 1943 (2020) (citation omitted) (quoting Tilghman v. Proctor, 125 U.S. 136, 145–46 (1888)).

86. *See* Thomas C. Mira, *The Measure of Disgorgement in SEC Enforcement Actions Against Inside Traders Under Rule 10b-5*, 34 CATH. U. L. REV. 445, 445 (1985).

equitable liens, disgorgement is a modern invention never used by Courts of Chancery. As the Court stated in *Kokesh*, disgorgement is imposed for "punitive purposes."[87] Because the availability of equitable remedies is based on their historical and traditional use in our legal system, courts cannot create new remedies, especially when they go against the fundamental rule that equitable remedies should not be punitive.

Case law also supports the argument that the FTC is misusing its ability to seek equitable remedies. In *Liu*, the Liu family challenged the SEC's ability to seek disgorgement, and the Supreme Court dealt the SEC a major blow. Although this case dealt with the SEC and not the FTC, the SEC uses disgorgement in much the same way as the FTC does, and it is a dispositive case for the practice of disgorgement among government agencies. The backdrop of the case was the Supreme Court's ruling in *Kokesh v. Securities & Exchange Commission*, which stated that disgorgement operates as a "penalty."[88] In *Kokesh*, the Supreme Court also included a footnote that intimated that courts had not properly applied disgorgement principles in the context of SEC enforcement actions.[89] That led to *Liu*, which challenged the SEC's enforcement methods and finally made its way to the Supreme Court three years later. In *Liu,* the Court held that disgorgement awards must not exceed a wrongdoer's net profits, effectively making business expenses deductible from the amount of the disgorgement.[90] The SEC sought disgorgement that would equal the full amount of money that the defendants had raised in the course of their business.[91] The Court found that to be beyond

87. 137 S. Ct. 1635, 1643 (2017).

88. *Id.* at 1642 (stating that a penalty is something that deters others from offending in a like manner and does not simply compensate victims for their loss).

89. *See id.* at n.3.

90. *See* 140 S. Ct. at 1940.

91. *Id.* at 1942.

what an equitable remedy should allow.[92]

In its analysis, the Court asked whether the remedy of disgorgement fell into "those categories of relief that were *typically* available in equity."[93] This is the how the Court has traditionally determined whether a particular type of relief is equitable relief.[94] The Court's analysis showed that there are two principles that equitable remedies must follow. First, equity authorizes courts to take back ill-gotten gains, and second, equitable remedies must not merge with legal remedies by being punitive.[95] The Court also noted that "disgorgement of improper profits" was how courts traditionally applied equitable remedies.[96] However, that does not give the FTC unlimited power to seek restitution. The SEC is granted the right to seek equitable remedies in the statute granting it power,[97] but the FTC is only granted the right to seek injunctions.[98] This case will have a huge impact on the FTC's ability to seek disgorgement, and the amount of disgorgement it will be able to seek. By affirming that equitable remedies must not be punitive, and that they must be limited to net profits only, defendants in FTC enforcement actions can argue the disgorgement the FTC seeks is illegal under *Liu*.

Other cases also support the argument that the FTC has gone further than its statutory power allows. In *Credit Bureau Center*, the court stated that "[r]estitution isn't an injunction" and that "statutory authorizations for injunctions don't encompass other discrete forms of equitable

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92. *Id.* at 1940.

93. *Id.* (quotation marks omitted) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

94. *See, e.g.*, CIGNA Corp. v. Amara, 563 U.S. 421, 439 (2011).

95. *Liu*, 140 S. Ct. at 1942.

96. *Id.* at 1943 (quotation marks omitted) (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).

97. 15 U.S.C. § 78u(d)(5) (2018).

98. *See* 15 U.S.C. § 53(b) (2018).

relief like restitution."[99] In that case, the FTC argued that the statute implicitly authorizes restitution. But the court disagreed with that argument because the statute grants the FTC the right to seek injunctions against defendants who are violating or about to violate the law.[100] Seeking restitution against defendants does not fit within that power because the power is forward-looking, not backward-looking. Restitution is about taking back what was wrongfully gained, not preventing further violations of the law.

Disgorgement, as currently used by the FTC, bears the same "hallmarks of a penalty" that the Court described in *Kokesh*.[101] And when a remedy is a penalty, it cannot be an equitable remedy, because punishment is not the job of courts of equity.[102] Although courts have acknowledged that equity is a flexible concept, that "flexibility is confined within the broad boundaries of traditional equitable relief."[103] Accordingly, courts cannot make up new equitable remedies or start using legal remedies and call them equitable remedies.[104] The system of equity in this country has always been based on the traditional remedies used by English Courts of Chancery, and expansion of those remedies merges the law of equitable remedies with legal remedies, which the Supreme Court has sought to avoid many times.[105] To keep with the tradition of equitable remedies in this country, and be consistent with our reading of cases and statutes, the

99. 937 F.3d 764, 771–72 (7th Cir. 2019).

100. *See* 15 U.S.C. § 53(b).

101. 137 S. Ct. 1635, 1644 (2017).

102. *See* Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 717–18 n.14 (1974).

103. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999).

104. *See id.* at 321 (stating that courts cannot make up new forms of equitable relief to serve "the grand aims of equity").

105. For example, in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 209 (2002), the Court affirmed that equitable relief must mean something less than all relief.

FTC's power to seek disgorgement must be curtailed.

III. Constitutional Concerns with FTC Enforcement Methods

A. *The FTC Avoids Jury Trials by Using Section 13(b)*

There are also constitutional problems with the FTC's enforcement scheme. The FTC strategically picks which enforcement methods to use in order to avoid giving defendants the option of having a jury trial. The Seventh Amendment guarantees defendants the right to a jury trial.[106] Specifically, it states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[107] The importance of this fundamental right in the American legal system cannot be overstated. The right to a jury trial has always given defendants the chance to argue their cases in front of normal citizens instead of a judge. This allows defendants to have their cases decided by normal people, who are not so constrained by stare decisis and judicial momentum that they cannot take a detached look at what is actually going on in the case. When the FTC strategically takes that opportunity away from a defendant, it takes away one of the basic rights of defendants in the American legal system.

The FTC avoids jury trials by only seeking what it argues are equitable remedies. The Seventh Amendment only extends to cases where "*legal* rights" are at issue, not "those where equitable rights alone were recognized, and equitable remedies were administered . . . ."[108] Therefore, when the court is acting in equity, defendants do not have a right to a jury trial. Courts have concluded that this rule applies to Section 13(b) enforcement actions. For example, in *Federal*

106. U.S. Const. amend. VII.

107. *Id.*

108. Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 447 (1830).

Trade Commission v. ELH Consulting, L.L.C., the court held that because the FTC sought "relief based on the court's equitable powers," the defendants had no right to a jury trial.[109] The FTC takes full advantage of this aspect of Section 13(b) to skirt the requirements of the Seventh Amendment, making sure that defendants have only the most limited options in their cases.

The problem with this strategy is that the actual enforcement methods in Section 13(b) have more in common with legal remedies than equitable remedies.[110] This gives the FTC an advantage because it gets to use powerful remedies that seem like legal remedies without having to fight and win a verdict from a jury trial. On the other hand, if the FTC were to use Section 19 of the FTC Act, defendants would have the right to a jury trial because Section 19 contains legal remedies. And if the case involved both legal and equitable claims, then the legal claims could be tried to a jury first, followed by the rest of the case being tried by a judge.[111] The FTC has purposefully arranged a system where defendants are as disadvantaged as possible. If courts continue to allow the FTC to use these so-called equitable remedies in its enforcement actions, then defendants will not have access to the rights guaranteed to them in the Constitution.

B. *Restitution Under Section 13(b) Violates the Eighth Amendment*

The FTC frequently uses Section 13(b) to impose massive fines on businesses,[112] a practice which is in violation of the

109. No. CV 12-02246-PHX-FJM, 2013 WL 593885, at *1 (D. Ariz. Feb. 7, 2013); *see also* Danjaq L.L.C. v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001) (observing that there is no right to a jury for equitable claims).

110. *See supra* Part II.

111. *See* Colo. Visionary Acad. v. Medtronic, Inc., 397 F.3d 867, 875 (10th Cir. 2005).

112. *See, e.g.*, Fed. Trade Comm'n v. Publishers Bus. Servs., Inc., No. 2:08–cv–00620–APG–GWF, 2017 WL 451953, at *7 (D. Nev. Feb. 1, 2017) (upholding a

Eighth Amendment's prohibition on excessive fines. The Eighth Amendment provides protection against excessive fines imposed by the government.[113] The main goal of the Eighth Amendment's excessive fines clause is to ensure that the amount of forfeiture is proportional to the gravity of the offense.[114] If the forfeiture is grossly disproportional to the offense, then it is in violation of the Eighth Amendment.[115] There are many examples of the FTC violating this principle by imposing huge fines on businesses that are far out of proportion with the offense.

In *U.S. Department of Justice v. Daniel Chapter One*, the court refused to consider the defendants' argument that the restitution the FTC sought violated the Eighth Amendment, because the defendants failed to show the penalty was punitive and disproportionate.[116] The court stated that, because the defendants raised the issue in a cursory fashion, the court would decline to resolve it.[117] From this case, we can conclude that courts require defendants to show two factors when making an argument under the Excessive Fines Clause: the payment is punitive and it is disproportionate with the offense. Many of the judgments that defendants in Section 13(b) cases have to pay satisfy both of these requirements.

The disgorgement that the FTC frequently seeks constitutes a fine under the Eighth Amendment. A statutory forfeiture is a fine under the Eighth Amendment if it is a punishment.[118] Forfeitures that are "nonpunitive" do not fall

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$24 million disgorgement payment).

113. U.S. CONST. amend. VIII.

114. *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

115. *See id.*

116. 89 F. Supp. 3d 132, 154–55 (D.D.C. 2015), *aff'd*, 650 F. App'x 20 (D.C. Cir. 2016).

117. *Id.* at 155.

118. *See Bajakajian*, 524 U.S. at 331 n.6.

under the Eighth Amendment.[119] In *Kokesh*, the Court established that disgorgement, as used by the SEC, bore "all the hallmarks of a penalty."[120] This was because disgorgement is imposed with the intent to deter future conduct, not to compensate for the wrongdoing that was already committed.[121] The FTC uses disgorgement in much the same way as the SEC. The FTC imposes massive fines on businesses that do more than remedy past wrongs. The fines are warnings to other businesses to not repeat the behavior, and the FTC seeks to make the fines as high as possible to further that goal. Under the Supreme Court's reasoning in *Kokesh*, that makes the fines a punishment, not a remedial measure.

Some of the fines that the FTC imposes are vastly disproportional to the offense that it seeks to punish. After the Supreme Court's ruling in *Liu*, it is established law that disgorgement payments that exceed net profits are not allowed.[122] Even though that case dealt with the SEC and not the FTC, the same principle should apply because disgorgement as used by the FTC is functionally the same as when it is used by the SEC. However, the FTC has continually sought disgorgement payments that far exceed the net profits acquired in the course of the wrongdoing. That makes the disgorgement disproportionate because it goes beyond taking back the money that was gained by the wrongful scheme.

The FTC's use of disgorgement in Section 13(b) enforcement actions violates the Eighth Amendment. The imposed fines are grossly disproportionate to the crimes they seek to remedy, and there is an intention to punish the businesses instead of simply returning the parties to the status quo. The FTC cannot be allowed to continue levying

119. *See id.*

120. 137 S. Ct. 1635, 1644 (2017).

121. *Id.*

122. *See* 140 S. Ct. 1936, 1949–50 (2020).

these unconstitutional fines on businesses. The effect is businesses being destroyed without the protections that they have the right to under the Constitution. Of course, consumers should be protected, but violating the Eighth Amendment is not the best way to achieve that goal.

C. *The FTC's Use of Receivers is Contrary to the Intention of the Fourth Amendment*

The FTC uses receivers to avoid the requirement of obtaining a search warrant before gaining access to materials and information belonging to defendants. The Fourth Amendment provides protection against unreasonable searches and seizures.[123] However, when the FTC appoints a receiver in a case, that receiver can demand businesses to turn over information without the normal procedural protections that go along with obtaining a proper search warrant. In *Katz v. United States*, the Supreme Court established that people and businesses under investigation have a reasonable expectation of privacy.[124] The general rule is that when a person has a subjective expectation of privacy, and society would recognize that expectation as reasonable (the objective requirement), then a search warrant is required to search that location.[125] The FTC gets around that rule by appointing receivers, who can then demand materials from businesses without having to go through the formal process of obtaining a search warrant.

In *Federal Trade Commission v. Pointbreak Media, L.L.C.*, the FTC acquired laptops and other electronically stored information by way of a receiver, thereby avoiding any Fourth Amendment protections that would come with getting a search warrant.[126] The court denied the defendants' arguments that a search warrant was necessary because the

123. U.S. CONST. amend. IV.

124. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

125. *See id.*

126. 343 F. Supp. 3d 1282, 1288 (S.D. Fla. 2018).

evidence submitted by the FTC constituted probable cause for the seizure of the materials.[127] But that goes against the intention and meaning of the Fourth Amendment, and the FTC takes full advantage of that. The FTC is able to simply present its evidence, and when a receiver is appointed, it essentially acts as a general search warrant for every asset of the business.

General search warrants violate the particularity requirement of the Fourth Amendment. In *Groh v. Ramirez,* the Supreme Court held that any search warrant must state the particular items that are going to be seized.[128] And in *Massachusetts v. Sheppard*, the Court affirmed that a warrant that does not follow the particularity requirement is unconstitutional.[129] But when the FTC is able to appoint a receiver, it has access to all the assets of the business and can search them at will. Indeed, the "central purpose" of appointing a receiver is the seizure of all assets.[130] There is never any statement of which particular items are going to be searched. Appointing a receiver has the opposite effect. It allows the FTC to access any and all assets of the business without having to explain why those particular items are subject to search and seizure. This does not square with the requirements of the Fourth Amendment.

The FTC's use of receivers to seize assets acts as a general warrant and is clearly in violation of the Fourth Amendment. This type of behavior is contrary to the basic intention of the Fourth Amendment, which is to protect defendants from wide-ranging searches that are unsupported by evidence against them. Appointing receivers allows the FTC to go fishing for any possible evidence against the defendants, and the defendants do not have the opportunity to defend themselves from it. The FTC's use of

127. *Id.*

128. 540 U.S. 551, 557 (2004).

129. 468 U.S. 981, 988 n.5 (1984).

130. United States v. Setser, 568 F.3d 482, 488 (5th Cir. 2009).

this strategy further shows that there is a pattern of avoiding procedural protections and using loopholes in order to destroy businesses' opportunities to defend themselves.

CONCLUSION

The FTC's power has grown to an unacceptable and lethal level. When the Supreme Court addresses this issue, it will have the chance to bring the FTC's enforcement powers back to what Congress intended. And it looks likely that it will. After the decisions in *Kokesh* and *Liu*, the Supreme Court has shown that it agrees with reducing the power that federal agencies have when it comes to using disgorgement as an enforcement method. With those recently decided cases setting the tone of the Supreme Court, it seems likely that the Court will follow the lead of the Seventh Circuit in *Credit Bureau Center* and bring the FTC's power back into line with the original meaning of the statute.

The FTC should never have been allowed to have disgorgement in its arsenal of enforcement methods. It initially gained the ability to seek disgorgement by relying on old and inapposite caselaw. It then worked to build a foundation of precedential cases that courts had little choice but to follow. The FTC reconstructed the entire meaning of the statutory language and redefined what equitable relief means to suit its own purposes. Its use of disgorgement has strayed so far from traditional equitable remedies that it is not recognizable as equitable any longer. And during this process, the FTC has infringed on, or found loopholes around, multiple constitutional rights. This slippery slope of stronger and stronger enforcement methods has had a terrible effect on businesses and people around the country.

The damage that has been caused to businesses and private citizens of this country by the FTC's overreach is hard to quantify. But it has been far too high of a cost for the benefit that the country has received in return. The FTC lost sight of its purpose in its quest to expand its power to its current level, and the only thing that can stop this out-of-control process is for the Supreme Court to make the right decision and limit the FTC's enforcement power.