No. 13-294

In the Supreme Court of the United States

RANDALL L. LESHIN, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by converting the unpaid portion of an equitable disgorgement order, which was entered against petitioners as a compensatory civil contempt sanction for violations of a stipulated injunction, into a money judgment on which the Federal Trade Commission could execute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 719 F.3d 1227. The opinion of the district court (Pet. App. 53a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2013. The petition for a writ of certiorari was filed on August 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 2010, the district court entered an equitable disgorgement order against petitioners as a compensatory civil contempt sanction for violations of a stipulated injunction that settled claims brought against petitioners by the Federal Trade Commission (FTC). Pet. App. 77a-81a. In September 2010, the

court of appeals affirmed the disgorgement order. *Id.* at 21a-52a.

After petitioners failed to comply with the disgorgement order, the district court found petitioners in contempt and ordered them to pay a portion of the amount ordered disgorged or else be incarcerated. Pet. App. 54a-55a. Petitioners paid the amount required to purge the coercive contempt order. *Id.* at 55a. The district court granted the FTC's motion to convert the remaining balance of the disgorgement order into a money judgment. *Id.* at 55a-60a. The court of appeals affirmed. *Id.* at 1a-18a.

1. Petitioners are Randall Leshin, Charles Ferdon, and three corporations controlled by Leshin (Randall L. Leshin, P.A. (Leshin P.A.); Express Consolidation, Inc.; and the Debt Management Counseling Center, Inc. (Counseling Center)). Pet. App. 21a-23a, 24a-25a. Leshin is a Florida attorney who, through the corporate entities that he controlled, induced thousands of consumers to enter into contracts for "debt-consolidation" services. *Id.* at 22a. Pursuant to those contracts, the corporations purported to act as intermediaries between consumers and their creditors for the purpose of obtaining more favorable terms of payment. *Id.* at 23a. Ferdon served as an officer of Express Consolidation and the Counseling Center. *Id.* at 22a-23a, 24a-25a.

In 2006, the FTC brought a civil enforcement action against petitioners. Pet. App. 23a.[1] The com-

[1] The Counseling Center was not named as a defendant in the FTC's complaint, Pet. App. 25a, but it later became bound by the parties' stipulated injunction when it acted in concert with the named defendants, *id.* at 42a-43a. Petitioners do not challenge the Counseling Center's status as a party in this Court. Pet. ii.

plaint alleged that petitioners had engaged in unfair and deceptive practices, in violation of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and that petitioners had engaged in deceptive and abusive telemarketing, in violation of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101 *et seq.*, and the FTC's Telemarketing Sales Rule, 16 C.F.R. Pt. 310. Pet. App. 23a-24a. The complaint alleged that petitioners had blasted out millions of unlawful pre-recorded phone calls to solicit debt-consolidation contracts; secured tens of thousands of contracts based on deceptive and misleading representations about their fees, terms, and conditions; and falsely held themselves out as complying with applicable state consumer-protection requirements. *Id.* at 22a-24a.

In March 2008, the parties resolved the litigation through a stipulated injunction. Pet. App. 25a. The injunction appointed a monitor to notify consumers of their rights to cancel their contracts or transfer them to another provider. *Id.* at 26a-27a. The injunction required petitioners to stop making false representations with respect to their debt-consolidation services and to stop engaging in abusive telemarketing; to stop collecting fees from consumers who opted to cancel their contracts; and to stop entering into or servicing contracts in States where petitioners were not in compliance with applicable state-law requirements. *Id.* at 25a-27a. The injunction included monetary judgments against Leshin, Leshin P.A., and Express Consolidation, jointly and severally, for $40 million, and against

Ferdon for $380,000, for redress to consumers. *Id.* at 27a.[2]

2. On January 28, 2009, the FTC filed a motion in the district court to direct petitioners to show cause why they should not be held in contempt for failure to comply with the stipulated injunction. Pet. App. 30a. The FTC alleged, *inter alia*, that petitioners had continued to solicit and execute contracts with consumers in States where they were not authorized to conduct business, and that petitioners had continued to collect payments from customers in those States despite provisions of the stipulated injunction prohibiting such conduct. *Ibid.*

The district court ordered petitioners to respond. Pet. App. 30a, 126a-127a. The court then held an evidentiary hearing, issued findings of fact and conclusions of law, and held petitioners in contempt. *Id.* at 30a. The court concluded that petitioners had violated the stipulated injunction by continuing to collect from clients who had cancelled their contracts; by transferring contracts from the Counseling Center to Express Consolidation for persons who resided in States where Express Consolidation was not authorized to do business; and by executing new contracts in

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[2] The stipulated injunction conditionally suspended these judgments for redress, in part, based on petitioners' limited ability to pay. It required Leshin, Leshin P.A., and Express Consolidation, collectively, to make partial payments in an amount exceeding $2 million, and required Ferdon to make a partial payment in the amount of $2400. 0:06-cv-61851-UU Docket entry No. 321, at 26-28, 41-42 (S.D. Fla. May 5, 2008); *id.* No. 342, at 6-8 (Aug. 7, 2008). The injunction also required petitioners to deposit into a trust account, under the control of the court-appointed monitor, sufficient funds to make payments to creditors on behalf of existing clients. *Ibid.*; Pet. App. 27a-28a.

States where petitioners were not in compliance with state law. *Id.* at 30a-31a.

The district court ordered petitioners to "effect complete compensation to those aggrieved by the contempt" and to "disgorge all amounts collected from consumers" who were parties to the post-settlement consumer contracts that the court had found to be unlawful. Pet. App. 31a. The court-appointed monitor submitted a calculation of fees to be disgorged, and the monitor subsequently adjusted the amount to reflect additional information obtained from petitioners and to respond to certain of their objections. *Id.* at 31a-32a. On January 28, 2010, the district court issued an order that required petitioners to disgorge $594,988 within 30 days. *Id.* at 32a. The court stated that the order was entered "to remedy contempt via disgorgement and [was] not a money judgment," but that the FTC "may apply to the [c]ourt to convert any unpaid balance of this civil contempt remedy to a money judgment." *Ibid.*

3. The court of appeals affirmed. Pet. App. 19a-52a. The court held that the district court had properly concluded that petitioners had violated the terms of the stipulated injunction. *Id.* at 34a-42a. The court further held that the district court had not abused its discretion by ordering, as a compensatory civil contempt remedy, that petitioners disgorge the $594,988 that they had collected from consumers in violation of the injunction. *Id.* at 45a-49a. The court explained that consumers had entered into the contracts based on petitioners' misrepresentation that they had the legal authority to conduct business, and the consumers had thus "paid fees that they would not otherwise have paid." *Id.* at 46a.

The court of appeals rejected petitioners' argument that the disgorgement order was a punitive contempt sanction that was imposed in violation of petitioners' due process rights. Pet. App. 49a-51a. The court explained that "[t]he sanction to disgorge all fees collected from postorder contracts and from continuing to collect from existing clients is remedial in nature" because it "attempts to restore the status quo before [petitioners], in violation of the injunction, represented to consumers that they could lawfully enter into contracts in certain states." *Id.* at 50a. The disgorgement order was also compensatory in nature "because the sanctions were imposed to compensate consumers for the losses they sustained." *Ibid.* The court rejected petitioners' argument that they had received inadequate notice and opportunity to be heard, explaining that petitioners were placed on notice by the FTC's motion for an order to show cause and that they were heard both orally and in writing during a two-day evidentiary hearing. *Id.* at 51a.

Petitioners did not file a petition for a writ of certiorari.

4. Following the court of appeals' decision, petitioners failed to disgorge the $594,988. On March 8, 2011, the district court found petitioners in contempt of the disgorgement order. 0:06-cv-61851-UU Docket entry No. 563 (Docket entry No.) (S.D. Fla.); Pet. App. 3a-4a, 54a. The court concluded that petitioners had the ability to pay at least $92,671 and ordered petitioners to pay that amount to the FTC within ten days or else face incarceration. *Id.* at 54a-55a. Petitioners promptly paid $92,671 to the FTC, thereby purging themselves of the coercive contempt order. *Id.* at 55a.

On September 7, 2011, the FTC filed a motion to convert the unpaid balance of the disgorgement order into a money judgment. The district court granted the motion. Pet. App. 53a-60a. The court explained that its power to convert the disgorgement order into a money judgment stemmed from its "broad, inherent authority to remedy civil contempt." *Id.* at 56a. The court explained that because the disgorgement order was compensatory in nature, the court was "bound only by the principle that the [c]ourt can do no more than necessary to effect full remedial relief." *Id.* at 57a (citing *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949)). The court stated that petitioners had "cite[d] no authority for their argument that legal remedies are beyond the [c]ourt's reach in fashioning civil contempt sanctions." *Id.* at 58a.

The court also rejected petitioners' argument that, by converting the unpaid balance of the disgorgement order into a money judgment, the court was punishing petitioners rather than ordering compensation. Pet. App. 59a. The court explained that the amount of money necessary to compensate consumers for petitioners' violations of the stipulated injunction was meticulously calculated and had not changed. *Ibid.* "Converting the unpaid balance to a money judgment to allow [the FTC] to pursue collection," the court explained, "is a compensatory, and not a punitive measure." *Ibid.* The court further explained that, although inability to pay is a defense to a coercive sanction, it is not a defense to a compensatory sanction, and that petitioners' ability to pay therefore was "not relevant to either the amount of the sanction or the manner in which it may be enforced." *Ibid.*

5. The court of appeals affirmed. Pet. App. 1a-18a. The court concluded that the district court had not abused its discretion when it converted the original contempt sanction from an equitable disgorgement order into a money judgment. *Id.* at 5a-15a. The court explained that the district court could have chosen at the outset to impose the contempt sanction in the form of a money judgment. *Id.* at 7a-8a. The court stated that petitioners had conceded this point in their brief and at oral argument. *Id.* at 7a. The court also observed that, although it had identified no case directly on point, "the Supreme Court and at least one court of appeals have acknowledged that a court can issue a money judgment as a remedy for civil contempt." *Ibid.* (citing *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 220 (1945); *In re Professional Air Traffic Controllers Org.*, 699 F.2d 539, 542 (D.C. Cir. 1983)). The court of appeals reasoned that, "[i]f the district court could have granted either disgorgement or a money judgment as a remedy for [petitioners'] civil contempt, we are at a loss to see why the district court lacked the power to grant both the equitable remedy and the legal one so long as it did not permit double recovery." *Id.* at 8a. The court concluded that the disgorgement order could be converted to a money judgment "to satisfy 'the requirements of full remedial relief.'" *Id.* at 9a (quoting *McComb*, 336 U.S. at 193).

The court of appeals rejected petitioners' contentions that they had purged the disgorgement order by paying $92,671, and that the subsequent money judgment represented a serial contempt finding or imposition of a new liability. Pet. App. 11a-12a. The court explained that petitioners' payment purged only the

coercive sanction imposed for failure to comply with the disgorgement order, not the original compensatory contempt sanction imposed for petitioners' violations of the stipulated injunction. *Ibid.* The court further explained that, although inability to pay is a complete defense to a coercive contempt sanction, it is not a defense to a compensatory contempt sanction such as the disgorgement order. *Id.* at 12a-14a. The court stated that petitioners' liability under the disgorgement order "ends when [petitioners] pay[] the full amount." *Id.* at 13a.

ARGUMENT

Petitioners contend (Pet. 9-10, 14-17) that the district court abused its discretion by converting into a money judgment the prior order requiring petitioners to disgorge the $594,988 that they had collected from consumers in violation of the stipulated injunction. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners further contend that they did not have adequate notice or opportunity to be heard before the district court held them in contempt and ordered disgorgement (Pet. 1-3, 5-7, 12-14, 17-19); and that the disgorgement order was not compensatory in nature because the consumers had received value from the services that petitioners provided (Pet. 7-9, 15-16). Those arguments are not properly before the Court, and they lack merit in any event. Further review is not warranted.

1. District courts have broad discretion to impose compensatory sanctions for civil contempt, and "[t]he measure of the court's power in civil contempt proceedings is determined by the requirements of full

remedial relief." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). In this case, the district court could have exercised its discretion to order compensatory sanctions for petitioners' violation of the stipulated injunction in a variety of ways, including by issuing a money judgment or by ordering disgorgement of the fees petitioners had collected from consumers in violation of the stipulated injunction. Pet. App. 7a-8a. After the disgorgement order proved ineffective to collect the compensatory contempt sanction from petitioners, the district court was within the bounds of its discretion to ensure "full remedial relief" through its contempt power (see *McComb*, 336 U.S. at 193) by converting the balance of the disgorgement order to a money judgment that could be pursued through a collections process.

Noting the apparent absence of prior cases involving the conversion of a disgorgement order into a money judgment, the court of appeals acknowledged that the fact pattern here was "unusual." Pet. App. 2a. The court correctly concluded, however, that the district court could convert the civil contempt remedy in the circumstances at hand, where both sanctions were acceptable civil contempt sanctions and conversion "did not permit double recovery" because the money judgment was only for the unpaid balance of the disgorgement order. *Id.* at 8a. As evidenced by the court of appeals' recognition that the question whether a court could convert a disgorgement order into a money judgment was "an issue of first impression," this is not a recurring issue warranting this Court's intervention. *Id.* at 2a.

Petitioners contend (Pet. 14-17) that the district court could not have imposed a money judgment

against them in the first instance as a civil contempt sanction without triggering their Seventh Amendment right to a jury trial. Petitioners cite no authority to support that contention, nor do they respond to the court of appeals' explanation that "[this] Court and at least one court of appeals have acknowledged that a court can issue a money judgment as a remedy for civil contempt." See Pet. App. 7a (citing *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 220 (1945); *In re Professional Air Traffic Controllers Org.*, 699 F.2d 539, 542 (D.C. Cir. 1983)). Indeed, as the court of appeals recognized (*ibid.*), petitioners "conceded this point both in [their] briefs and at oral argument" in the court of appeals. That concession alone would make this case an unsuitable vehicle in which to address the issue. In any event, civil contempt sanctions "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard," and "[n]either a jury trial nor proof beyond a reasonable doubt is required." *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 827 (1994).

Petitioners express concern (Pet. 18) that, if the district court's order converting the disgorgement order into a money judgment is permitted to stand, nothing would prevent the district court from converting the order back and forth between a disgorgement order (so that petitioners could be held in contempt for failure to pay), and a money judgment (after petitioners purged the contempt order by demonstrating inability to pay). That is not a realistic scenario in this or any other case. A district court could prevent any abuse or unfairness if a plaintiff were to seek such serial conversions of the form of contempt sanctions.

Indeed, the magistrate judge below anticipated this concern and admonished that "the [c]ourt may negatively consider any later effort to reopen contempt proceedings, if the money judgment is not executable following the grant of this motion." Pet. App. 74a n.1.

2. a. Petitioners' remaining contentions—that they received inadequate notice and opportunity to be heard before the district court held them in contempt and ordered disgorgement (Pet. 1-3, 5-7), and that the disgorgement order was not compensatory in nature because consumers had received value from the services petitioners provided (Pet. 7-9, 15-16)—are not properly before this Court. Those arguments are challenges to the district court's disgorgement order, which was affirmed by a previous panel of the court of appeals on September 3, 2010. Pet. App. 19a-52a. Petitioners did not file a petition for a writ of certiorari seeking review of that decision.

Petitioners' current appeal arises out of the district court's choice of an appropriate remedy for petitioners' subsequent violations of the disgorgement order. Petitioners were entitled in this appeal to challenge the district court's choice of remedy (or to argue that they had not actually violated the disgorgement order). The appeal could not appropriately be used, however, to pursue a collateral attack on the disgorgement order itself. Cf. *Walker* v. *City of Birmingham*, 388 U.S. 307, 313-321 (1967) (holding that enjoined parties must ordinarily challenge an injunction directly, rather than violating its terms and then contesting its validity as a defense to contempt proceedings).[3]

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[3] When a court of appeals issues an interlocutory decision and remands a case for further proceedings, issues resolved in the

b. In any event, petitioners' challenges to the district court's disgorgement order lack merit. The district court gave petitioners ample notice and an adequate opportunity to be heard, both orally and in writing. See Pet. App. 15a-17a, 30a-32a, 51a. Petitioners received notice of possible contempt sanctions on January 28, 2009, when the FTC filed its motion for an order to show cause. Docket entry No. 366. The district court ordered petitioners to respond, and they filed a 23-page response, together with 15 exhibits. *Id.* No. 375 (Feb. 9, 2009). The district court conducted a two-day evidentiary hearing, at which both Leshin and Ferdon testified. *Id.* Nos. 380 (Feb. 18, 2009), 385 (Feb. 25, 2009) (transcripts).

Petitioners contend (Pet. 14, 16) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *FTC* v. *Kuykendall*, 371 F.3d 745 (2004) (en banc), because the district court in that case allowed the contempt defendant to take discovery and to present mitigating evidence on damages. There is no conflict between the decisions. In *Kuykendall*, the contempt defendants argued on appeal that they had received inadequate process because they were given insufficient time to conduct discovery and to prepare

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interlocutory ruling may be raised in a petition for a writ of certiorari seeking review of the eventual final judgment. See generally *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The court of appeals' September 3, 2010, decision, however, was not an interlocutory ruling that contemplated further district-court proceedings in the case. Rather, it was an affirmance of the district court's order of contempt and the court's January 28, 2010, corrected final judgment of disgorgement and consumer redress. See Pet. App. 32a, 52a, 77a. Further proceedings became necessary only because petitioners violated the disgorgement order.

for the show-cause hearing, and because the district court had not permitted "meaningful pretrial motions." *Id.* at 754. The Tenth Circuit *rejected* those arguments, explaining that "courts in civil contempt proceedings may proceed in a 'more summary fashion' than in an 'independent civil action.'" *Id.* at 756 (citation omitted). The court concluded that the procedure afforded was adequate, because the district court had "allowed [the defendants] to respond to the evidence presented by the FTC and to introduce their own evidence," and "[m]ost of the evidence * * * involved the defendants' own behavior and their own records." *Ibid.*

Like the contempt defendants in *Kuykendall*, petitioners had an opportunity to testify, to present evidence, to cross-examine the FTC's witnesses, and to respond to the evidence presented by the FTC (which, like the evidence in *Kuykendall*, was mostly drawn from petitioners' business records and concerned their own conduct). See p. 13, *supra*. To the extent petitioners argue that the defendants in *Kuykendall* had a greater opportunity to present mitigating evidence on damages (Pet. 14), petitioners were permitted, in response to the court-appointed monitor's submission of a fee calculation, to file various pleadings addressing the amount of money to be disgorged. See Docket entry Nos. 439 (Sept. 21, 2009), 445 (Oct. 19, 2009), 454 (Nov. 4, 2009), 480 (Dec. 22, 2009), 484 (Jan. 20, 2010). The district court considered those arguments and adjusted the disgorgement amount accordingly. Pet. App. 31a-32a. There is no conflict between *Kuykendall* and the court of appeals' decision in this case.

c. Finally, petitioners contend (Pet. 7-9, 15-16) that the disgorgement order was not compensatory in

nature because consumers had received value from the services petitioners provided. The court of appeals correctly rejected that argument. As the previous panel of the court of appeals had explained in its 2010 opinion, because consumers had entered into post-injunction contracts with petitioners based on the misrepresentation that petitioners had legal authority to conduct business, those consumers had "paid fees that they would not otherwise have paid." Pet. App. 46a-47a. The disgorgement order requires the FTC to use the disgorged funds "to pay consumer redress to each affected consumer." *Id.* at 79a.

The court of appeals identified various decisions upholding disgorgement of gross receipts collected in violation of an injunction, even though the consumers may have received some value from a product or service. Pet. App. 46a (citing, *inter alia*, *Kuykendall*, 371 F.3d at 766-767; *McGregor* v. *Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000)). Petitioners identify no authority supporting their contention that fees collected in violation of a stipulated injunction may not be ordered disgorged as a compensatory civil contempt remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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