No. 13-1426

In the Supreme Court of the United States

KRISTY ROSS, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JONATHAN E. NUECHTERLEIN
General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
THEODORE (JACK) METZLER
Attorney
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), authorizes district courts to order equitable remedies ancillary to a permanent injunction, including equitable monetary relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 13-1426

KRISTY ROSS, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 743 F.3d 886. The opinion of the district court (Pet. App. 17a-51a) is reported at 897 F. Supp. 2d 369.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2014. The petition for a writ of certiorari was filed on May 27, 2014 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT

1. This case involves an illegal scheme to sell computer software using deceptive advertisements claiming that consumers' computers had been scanned and were infected with viruses, spyware, or other danger-

ous files. Pet. App. 3a. The advertisements appeared while consumers browsed the Internet, often mimicking the look of their computers' dialog boxes and security warnings. Millions of consumers, tricked into clicking on the advertisements, were routed to websites offering software to fix their fictitious security problems. *Id.* at 3a, 28a. Consumers spent more than $163 million on the products. *Id.* at 22a, 27a-28a.

Petitioner Kristy Ross was a founder and vice president of the company behind the scheme, Innovative Marketing, Inc. Pet. App. 24a-25a, 29a. Petitioner was responsible for the company's sales and marketing, and she personally "approved, developed, wrote, altered, reviewed, and contributed to a large number of" the deceptive advertisements. *Id.* at 29a, 31a. Petitioner also personally placed advertisements that reached hundreds of millions of consumers. *Id.* at 32a.

The Federal Trade Commission (FTC or Commission) sued petitioner, five other individuals, Innovative Marketing Inc., and one other corporate entity under Sections 5(a) and 13(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a), 53(b). Pet. App. 17a, 19a. The cases against all of the defendants except petitioner were resolved by default judgments or settlements. *Id.* at 19a.

2. The district court granted the Commission summary judgment on the deceptiveness of Innovative Marketing's advertisements, and the court held a two-day bench trial to determine the extent of petitioner's control over the company and her knowledge of its practices. Pet. App. 10a-11a, 27a-28a. After the trial, the court entered judgment against petitioner. *Id.* at 17a-51a. The court found that petitioner "had authority to control the deceptive practices or acts of Innova-

tive Marketing," and that she had "participated directly in these deceptive practices." *Id.* at 23a; see *id.* at 29a-33a, 38a-41a. The court further found that petitioner "had knowledge of the deceptive practices" or at least acted with "reckless indifference and intentionally avoided the truth" about the deceptive nature of the advertisements. *Id.* at 23a-24a; see *id.* at 32a-33a, 41a-45a.

The district court entered a permanent injunction prohibiting petitioner "from the marketing and sale of computer security software and software that interferes with consumers' computer use," and "from engaging in any form of deceptive marketing." Pet. App. 52a. The court's authority to enter that relief was derived from Section 13(b) of the FTC Act, which provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. 53(b). The court also held petitioner jointly and severally liable with Innovative Marketing and two other individual co-defendants for $163 million in equitable monetary relief. Pet. App. 45a-53a. The court explained that the power to grant injunctive relief under Section 13(b) of the FTC Act "includes the [ancillary] power to order repayment of money for consumer redress as restitution." *Id.* at 47a (citation omitted).

3. The court of appeals affirmed. Pet. App. 1a-16a. As relevant here, petitioner argued that Section 13(b)'s authorization to enter injunctive relief does not empower district courts to award consumer redress in the form of money. *Id.* at 4a-8a. The court of appeals rejected that contention. The court explained that this Court "has long held that Congress' invocation of the federal district court's equitable jurisdiction

brings with it the full '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.'" *Id.* at 5a (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946)). The court further explained that this Court's decisions "articulate an interpretive principle that inserts a presumption into what would otherwise be the standard exercise of statutory construction: we presume that Congress, in statutorily authorizing the exercise of the district court's injunctive power, 'acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes.'" *Ibid.* (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960)).

Applying those principles, the court of appeals held that, "by authorizing the district court to issue a permanent injunction in [Section 13(b) of] the [FTC] Act, 15 U.S.C. [] 53(b), Congress presumably authorized the district court to exercise the full measure of its equitable jurisdiction." Pet. App. 6a. The district court therefore "had sufficient statutory power to award 'complete relief,' including monetary consumer redress, which is a form of equitable relief." *Id.* at 5a-6a.

Petitioner argued that *Porter* is inapplicable here because the language of Section 13(b) is different from the remedial provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, that was at issue in *Porter*. That remedial provision authorized district courts to issue "a permanent or temporary injunction, restraining order, *or other order*." *Id.* § 205(a), 56 Stat. 33 (emphasis added); see *Porter*, 328 U.S. at 397; Pet. App. 6a. In rejecting petitioner's argument, the

court of appeals explained that this Court had applied *Porter*'s holding in *Mitchell*, where the relevant provision of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, did not include the "or other order" language, but instead simply vested district courts with jurisdiction to "restrain violations of Section 15" of the FLSA. Pet. App. 6a (quoting *Mitchell*, 361 U.S. at 289); see 29 U.S.C. 217 (1952). The court explained that, in *Mitchell*, this Court had "reasoned that the 'other order' provision was merely an 'affirmative confirmation'—icing on the cake—over and above the district court's inherent equitable powers." Pet. App. 7a (quoting *Mitchell*, 361 U.S. at 291).

The court of appeals also observed that petitioner's arguments "have ultimately been rejected by every other federal appellate court that has considered this issue." Pet. App. 7a (citing cases). The court "adopt[ed] the reasoning of those courts" and declined to create a circuit split "in the face of powerful Supreme Court authority pointing in the other direction." *Id.* at 8a.

ARGUMENT

Petitioner contends (Pet. 16-25) that, under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), district courts lack authority to order equitable monetary relief. 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. Further review is not warranted.

1. a. Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. 53(b). Although Section 13(b) does not explicitly authorize district courts to order

equitable monetary relief, it is well-established that, when an agency of the United States prosecutes a civil enforcement action in the public interest, an unqualified grant of authority to enter a permanent injunction carries with it the authority to use "all the inherent equitable powers" of the district court "for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946) (recognizing authority of district court to require, as an equitable adjunct to an injunction, restitution of rents charged in excess of the statutory maximum). When an agency has taken action in the public interest, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*

The Court reaffirmed that principle in *Mitchell* v. *Robert Demario Jewelry, Inc.*, 361 U.S. 288 (1960), where it sustained the district court's authority to grant a back-pay award, ancillary to an injunction against an employer's violation of the FLSA. *Id.* at 291-292. Although the FLSA did not specifically authorize such relief, the Court explained that, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Ibid.* The Court further explained that, when Congress authorizes injunctive relief, "the comprehensiveness of [a court's] equitable jurisdiction" does not turn on "affirmative confirmation of the power to order reimbursement." *Id.* at 291 (quoting *Porter*, 328 U.S. at 398). Thus, "[u]nless 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." *Ibid.* (quoting *Porter*, 328 U.S. at 398).

There is broad agreement that these principles apply to Section 13(b) of the FTC Act. Before the court of appeals issued its decision in this case, seven other circuits had held that district courts may order monetary equitable relief to achieve complete justice upon a showing that a defendant has engaged in "unfair or deceptive acts or practices" in violation of 15 U.S.C. 45(a). See *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011) (Section 13(b) empowers the district courts to grant ancillary equitable relief, including a money judgment); *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010) (restitution is an appropriate remedy for deceptive advertising); *FTC* v. *Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) (Section 13(b) authorizes "monetary relief * * * incidental to injunctive relief"); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (Section 13(b) "carries with it the full range of equitable remedies," including monetary remedies); *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (district courts are authorized to award restitution to correct "unjust enrichment" and "protect consumers from economic injuries"), cert. denied, 514 U.S. 1083 (1995); *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991) ("[S]ection 13(b) empowers district courts to grant * * * ancillary equitable relief" including "equitable monetary relief"); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.) (Section 13(b) includes grant of power to order ancillary equitable

relief, including "rescission and restitution"), cert. denied, 493 U.S. 954 (1989).

The courts of appeals have similarly upheld the authority of district courts to provide equitable monetary relief under comparable provisions of other regulatory enactments. See, *e.g.*, *United States* v. *Lane Labs-USA Inc.*, 427 F.3d 219, 225-226 (3d Cir. 2005) (Federal Food, Drug, and Cosmetics Act, 21 U.S.C. 332(a)); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Securities Exchange Act of 1934, 15 U.S.C. 78m(d)); *CFTC* v. *Co Petro Mkt'g Grp., Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (Commodity Exchange Act, 7 U.S.C. 13a-1); *ICC* v. *B&T Transp. Co.*, 613 F.2d 1182, 1184-1186 (1st Cir. 1980) (Motor Carrier Act, 1935, 49 U.S.C. 304a (1976)).

b. Petitioner contends (Pet. 18-19) that, because the text of Section 13(b) refers only to injunctions, it necessarily excludes other forms of equitable relief. That argument is foreclosed by *Mitchell*, where the Court sustained the district court's authority to grant a back-pay award ancillary to an FLSA injunction under a remedial provision that gave district courts jurisdiction to "restrain violations of Section 15" of the FLSA. See *Mitchell*, 361 U.S. at 289. In *Mitchell*, the Court stated that, when Congress authorizes injunctive relief, "the comprehensiveness of [a court's] equitable jurisdiction" does not require "affirmative confirmation of the power to order reimbursement." *Id.* at 291-292 (quoting *Porter*, 328 U.S. at 398). Petitioner further contends (Pet. 22-24) that the grant of equitable authority in Section 13(b) is not broad enough to encompass equitable monetary relief because it does not include the "other order" language that was present in the statutory provision at issue in *Porter*. That

argument is likewise foreclosed by *Mitchell*. See Pet. App. 7a (explaining that the Court in *Mitchell* "reasoned that the 'other order' provision [in *Porter*] was merely an 'affirmative confirmation'—icing on the cake—over and above the district court's inherent equitable powers") (quoting *Mitchell*, 361 U.S. at 291).

2. a. Petitioner acknowledges (Pet. 37) that there is no conflict among the courts of appeals on the question whether Section 13(b) of the FTC Act authorizes district courts to order equitable monetary relief ancillary to a permanent injunction. Petitioner nevertheless contends (Pet. 37-38) that there is a "more generalized" conflict between the uniform body of case law interpreting Section 13(b) and a D.C. Circuit decision interpreting the remedial provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* See *United States* v. *Phillip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005) (*Phillip Morris*). Because the RICO provisions at issue in *Phillip Morris* differed meaningfully from Section 13(b) of the FTC Act, petitioner's claim of a circuit conflict is unfounded.

In *Phillip Morris*, a divided panel of the D.C. Circuit held that the remedial provisions of RICO do not authorize a disgorgement remedy. 396 F.3d at 1192. Like other decisions involving application of the *Porter* principle in various statutory contexts, the court's decision turned on the specific remedial provisions of the relevant statutory scheme. The court observed that, unlike the statute at issue in *Porter*, RICO contains a list of remedial orders that district courts may enter, such as divestiture, restrictions on future activities, and dissolution of an enterprise. 396 F.3d at

1198; see 18 U.S.C. 1964(a). The court concluded that those remedies were exclusively forward-looking, and that RICO's more specific remedial provision limited the district court's equitable jurisdiction to order the "backward-looking" remedy of disgorgement. 396 F.3d at 1198-1199.

As the United States explained in its petition for a writ of certiorari in *Phillip Morris*, the D.C. Circuit's opinion departed from this Court's decisions in *Porter* and *Mitchell*. See Pet. at 9-17, *United States* v. *Phillip Morris USA Inc.*, 546 U.S. 960 (2005) (No. 05-92). The RICO language on which the D.C. Circuit relied, however, has no analogue in the FTC Act provision at issue here. Section 13(b) of the FTC Act contains a general grant of authority to issue a permanent injunction in proper cases. It contains no detailed list of specific remedies comparable to those that the court in *Phillip Morris* discussed. Cf. *Lane Labs-USA, Inc.*, 427 F.3d at 233 (distinguishing RICO's remedial provisions from the Food, Drug, and Cosmetics Act, which "gives blanket authority to district courts to 'restrain violations of [21 U.S.C.] 331'"). Because the proper resolution of cases raising this issue depends in part on the specific language and structure of different regulatory enactments, different outcomes in cases interpreting the remedial provisions of the FTC Act and RICO do not present a direct conflict warranting this Court's review.

b. Petitioner contends (Pet. 16-17, 21, 24-25) that Section 19(b) of the FTC Act, 15 U.S.C. 57b(b), provides a specific list of remedies analogous to the list set forth in RICO's authorization for injunctive relief. Enacted less than two years after Section 13(b), Section 19 authorizes a court in some circumstances to

award various remedies, including damages, after the Commission has issued an administrative cease-and-desist order. Section 19(b) provides that, in such cases, the district court "shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. 57b(b). Section 19(b) further provides that "[s]uch relief may include, but shall not be limited to, recission 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, * * * except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages." *Ibid.*

Petitioner's argument reflects a misunderstanding of the relationship between Section 13(b) and Section 19. Those provisions do not limit each other. Rather, the FTC Act gives the Commission a choice of enforcement mechanisms when it identifies unlawful conduct within its authority. Section 13(b) allows the FTC to challenge illegal conduct directly in federal district court, whereas Section 5, 15 U.S.C. 45, allows the FTC to challenge the conduct administratively. The judicial remedies of Section 19 give teeth to the administrative process set out in Section 5.

Congress understood that Section 13(b) would provide an alternative to administrative proceedings. The Senate Report explained that, in situations like "the routine fraud case," where "[the FTC] does not desire to further expand upon the prohibitions of the [FTC] Act through the issuance of a cease-and-desist order," the Commission could "seek a permanent

injunction" in district court. S. Rep. No. 151, 93d Cong., 1st Sess. 30-31 (1973).[1]

Although the relief available under Sections 13(b) and 19 partially overlaps, the availability of equitable monetary relief under Section 13(b) does not, as petitioner contends (Pet. 21), "render[] Section 19(b) superfluous." Section 19(b) authorizes not only equitable remedies such as disgorgement or restitution, but also, unlike Section 13(b), purely legal remedies such as "the payment of damages." 15 U.S.C. 57b(b). In some cases, the "damages" available under Section 19, including incidental and consequential damages, may far exceed the equitable monetary relief available under Section 13(b). Here, petitioner seeks not simply to avoid liability for incidental and consequential damages, but to avoid *any* obligation to compensate the victims of her fraud.[2]

---

[1] The FTC ordinarily uses its administrative adjudication authority in cases involving violations of the antitrust laws and in complex consumer-protection cases. It ordinarily seeks relief directly in federal district court when the Commission perceives no need to further elaborate the requirements of the law, including in cases (like this one) that involve straightforward deceptive or unfair conduct.

[2] Petitioner contends (Pet. 3 & n.1) that an article coauthored by former FTC Chairman Timothy J. Muris supports petitioner's argument that the agency's use of Section 13(b) to obtain equitable monetary relief lacks a legal basis. The article concludes, however, that to the extent equitable monetary relief is authorized by Section 13(b), it should be limited to cases that would warrant monetary relief under Section 19 for the violation of an administrative cease-and-desist order, *i.e.*, cases (like petitioner's case) that involve fraudulent or dishonest conduct. See J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L. J. 1, 31-32 (2013); see also 15 U.S.C. 57b(a)(2).

Congress specifically provided that Section 19's remedies "are in addition to, and not in lieu of, any other remedy," 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). That language precludes an interpretation of Section 19 that would limit the court's authority under the earlier-enacted Section 13(b). See *Security Rare Coin & Bullion Corp.*, 931 F.2d at 1315 (rejecting argument that Section 19 restricts remedial authority under Section 13(b)); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (same).

Finally, Congress acknowledged the availability of equitable monetary relief under Section 13(b) when, in 1994, it expanded the venue and service-of-process provisions of that section. See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1695. The Senate Report accompanying that legislation recognized, when describing FTC testimony, that Section 13(b) authorizes the FTC to "go into court * * * to obtain consumer redress." S. Rep. No. 130, 103rd Cong., 1st Sess. 15-16 (1993). Where, as here, the interpretation of a statute "has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) (internal quotation marks and citation omitted).

3. Petitioner further contends (Pet. 24-25) that the decision below conflicts with this Court's decision in *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996). That is incorrect.

The plaintiff in *Meghrig* brought suit under the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to recover the costs of cleaning up contaminated soil. See 516 U.S. at 481. That provision authorizes district courts "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste, * * * to order such person to take such other action as may be necessary, or both." 42 U.S.C. 6972(a). This Court held that RCRA's citizen-suit provision did not authorize district courts to award compensation for past clean-up costs. *Meghrig*, 516 U.S. at 484.

The Court in *Meghrig* explained that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, contains a citizen-suit provision identical to the citizen-suit provision in RCRA, but that CERCLA (unlike RCRA) expressly provides for recovery of clean-up costs in enforcement actions brought by the United States. See *Meghrig*, 516 U.S. at 485. "Congress thus demonstrated in CERCLA," the Court explained, "that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy." *Ibid.* The Court further explained that RCRA's citizen-suit provision includes a timing requirement, which "permits a private party to bring suit only upon a showing that the solid or hazardous waste at issue 'may present an imminent and substantial endangerment to health or the environment.'" *Id.* at 485 (quoting 42 U.S.C. 6972(a)(1)(B)). The Court explained that this timing provision "clearly excludes

waste that no longer presents such a danger," and that petitioner therefore was not entitled to any relief under RCRA because the waste had already been cleaned up. *Id.* at 485-486.

Mehgrig's holding that past clean-up costs were not authorized under RCRA's citizen-suit provision does not conflict with the court of appeals' holding in petitioner's case. Because RCRA permits injunctive relief under the citizen-suit provision only upon a showing that the hazardous waste at issue "may present an imminent and substantial endangerment to heath or the environment," 42 U.S.C. 6972(a)(1)(B), the statute authorizes no remedy, including an injunction, for a site that has already been cleaned up and is no longer hazardous. *Meghrig*, 516 U.S. at 485-486. The Court's analysis in *Meghrig* therefore has no bearing on the question presented here, which concerns the availability under a different statute of ancillary equitable monetary relief in a government enforcement suit where a permanent injunction was properly issued. Indeed, the Court in *Meghrig* left open the possibility that a district court might have equitable authority to award any clean-up costs arising "after the invocation of RCRA's statutory process." *Id.* at 488.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JONATHAN E. NUECHTERLEIN
General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
THEODORE (JACK) METZLER
Attorney
Federal Trade Commission

JULY 2014