

2020

## What Remains of the FTC's Enforcement Power After FTC v. Credit Bureau?

Robert Sommers

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_student\\_papers](https://opencommons.uconn.edu/law_student_papers)



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

Sommers, Robert, "What Remains of the FTC's Enforcement Power After FTC v. Credit Bureau?" (2020).  
*Dissertations and Honors Papers*. 4.  
[https://opencommons.uconn.edu/law\\_student\\_papers/4](https://opencommons.uconn.edu/law_student_papers/4)

***WHAT REMAINS OF THE FTC'S ENFORCEMENT POWER AFTER FTC v. CREDIT BUREAU?***

**ROBERT SOMMERS**

## TABLE OF CONTENTS

I.	<b>INTRODUCTION .....</b>	<b>3</b>
II.	<b>THE FTCA’S STATUTORY FRAMEWORK &amp; JUDICIAL HISTORY OF SECTION 13(B).....</b>	<b>4</b>
III.	<b>ANALYZING THE CREDIT BUREAU MAJORITY DECISION AND DISSENTING OPINION .....</b>	<b>7</b>
	A. FACTS AND PROCEDURAL HISTORY.....	7
	B. FTCA STATUTORY FRAMEWORK.....	9
	C. SHIFT IN SUPREME COURT IMPLIED-REMEDIES JURISPRUDENCE .....	11
IV.	<b>WHAT DOES THE FUTURE HOLD FOR FTC ENFORCEMENT? .....</b>	<b>13</b>
V.	<b>CONCLUSION.....</b>	<b>15</b>

## I. INTRODUCTION

Many consumers, at some point, have been misled by a company's business practices. When a consumer is duped by a company's deceptive advertising, or is the victim of outright fraud, the consumer should be made whole and the company should be punished. But where does a consumer look for such relief? One agency responsible for protecting consumers is the Federal Trade Commission ("FTC" or "the Commission"). The FTC is a federal administrative agency that aims to protect consumers and competition in the marketplace by preventing anti-competitive, deceptive, and unfair business practices.<sup>1</sup> The Federal Trade Commission Act ("FTCA" or "the Act") prohibits "unfair or deceptive acts or practices in or affecting commerce,"<sup>2</sup> and authorizes the FTC to investigate and enforce violations in broad sectors of the economy.<sup>3</sup>

The FTC is authorized to effectuate the purposes of the Act through three different statutory enforcement provisions: (1) Section 5,<sup>4</sup> (2) Section 13(b),<sup>5</sup> and (3) Section 19.<sup>6</sup> While the FTC may use any of these enforcement tools to carry out its mission, it relies primarily on Section 13(b).<sup>7</sup> The FTC's use of Section 13(b), however, may soon be halted.

On August 21, 2019, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") overturned long-standing precedent and held that the FTC does not have the authority to obtain restitution under Section 13(b) of the Act.<sup>8</sup> This holding significantly curtails the FTC's ability to obtain monetary relief from companies who violate the Act. In practical

---

<sup>1</sup> *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> (last visited Jan. 17, 2019).

<sup>2</sup> Federal Trade Commission Act, ch. 311, § 5(a), 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a) (1988)).

<sup>3</sup> FED. TRADE COMM'N, *supra* note 1.

<sup>4</sup> Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45(b) (1988).

<sup>5</sup> Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b) (1988).

<sup>6</sup> Federal Trade Commission Act, § 19, 15 U.S.C. § 57(b) (1988).

<sup>7</sup> See *Petition For a Writ of Certiorari*, at 5 ("The Commission depends heavily on Section 13(b) in carrying out its mandate to protect consumers and competition.").

<sup>8</sup> See *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 767 (7th Cir. 2019) (holding that "section 13(b) [of the FTCA] does not authorize restitutionary relief.").

terms, the consumer who was duped or defrauded may never be made whole; and the company who was responsible for the deception or fraud may never have to return the ill-gotten gains. Moreover, this decision is important because it creates a “square circuit split,”<sup>9</sup> by departing from the jurisprudence of every other circuit that has decided this issue.<sup>10</sup>

This Comment proceeds in three Parts. Part II briefly explains the three different enforcement provisions available to the FTC and provides a brief history on the FTC’s use of Section 13(b). Part III analyzes the Seventh Circuit’s opinion in *FTC v. Credit Bureau* and argues that the court, despite overturning long-standing precedent, got it right. Part IV addresses the future implications of the *Credit Bureau* decision by (1) addressing the possible Supreme Court analysis if it grants certiorari and (2) how the FTC should proceed if the Supreme Court denies certiorari or decides adversely to the FTC’s interests.

## **II. THE FTCA’S STATUTORY FRAMEWORK & JUDICIAL HISTORY OF SECTION 13(B)**

The Commission derives its primary enforcement authority from Section 5 of the FTCA, which authorizes the agency to lodge administrative complaints and adjudicate cases before the Commission itself.<sup>11</sup> Upon completion of a proceeding before an administrative law judge,<sup>12</sup> the Commission may enter an order “requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.”<sup>13</sup> This is commonly referred to as the FTC’s “cease and desist” power. Despite being the FTC’s primary enforcement tool, Section 5 is widely criticized as an inadequate method of deterring and punishing violators of the Act.<sup>14</sup>

---

<sup>9</sup> Petition For a Writ of Certiorari, at 10.

<sup>10</sup> *Id.* at 11 (collecting cases) (“[T]he First, Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that Section 13(b) authorizes district courts to enter injunctions that include monetary relief.”).

<sup>11</sup> *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Jan. 17, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> 15 U.S.C. § 45 (1988).

<sup>14</sup> See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1141–42 (1992) (“Entry of a cease and desist order sometimes requires years of litigation, during which the prohibited

In 1973, Congress enacted Section 13(b) of the Act in response to Section 5's inability to adequately protect consumers and deter violators.<sup>15</sup> Section 13(b) authorizes the FTC to seek preliminary injunctive relief in federal court to enjoin an alleged Section 5 violator from continuing its practices pending the completion of a traditional administrative proceeding.<sup>16</sup> Moreover, Section 13(b) provides that in "proper cases," the Commission may issue a permanent injunction against the violator.<sup>17</sup> The FTC, and commentators alike, view Section 13(b) as the most effective enforcement tool in the FTC's arsenal.<sup>18</sup>

In 1975, Congress enacted Section 19 of the Act in an attempt to remedy another Section 5 deficiency, namely, its failure to provide monetary relief.<sup>19</sup> Section 19 permits the FTC to seek monetary relief in federal court after an administrative determination that there was a violation of a cease and desist order.<sup>20</sup> However, monetary redress can be awarded only against practices that "a reasonable man would have known under the circumstances [were] dishonest or fraudulent."<sup>21</sup> Moreover, Section 19 imposes a three-year statute of limitations on consumer redress actions beginning at the time of the injury-causing activity.<sup>22</sup>

Due to the limitations of Section 5 and Section 19,<sup>23</sup> the FTC increasingly relied on its 13(b)-enforcement power to protect consumers and competition, specifically by using Section

---

activity continues and consumers continue to sustain injury."); David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, 31 ANTITRUST 89, 89 (2016) ("The Commission has no authority to order interim injunctive relief or monetary relief in Section 5 cases.").

<sup>15</sup> Ward, *supra* note 14, at 1141–42.

<sup>16</sup> *Id.* at 1174.

<sup>17</sup> 15 U.S.C. § 53(b) (1988).

<sup>18</sup> See Petition For a Writ of Certiorari, at 1 n.1 (referring to Section 13(b) as "one of its most important and effective enforcement tools"); See Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141, 145 (1988) ("[A] suit for a permanent injunction and other equitable relief is clearly the most efficacious way to obtain quick and effective relief.").

<sup>19</sup> J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC Act* (2013), 79 ANTITRUST L.J. 1, 2 (2013).

<sup>20</sup> 15 U.S.C. § 57(b)(a)(2) (1988).

<sup>21</sup> *Id.*

<sup>22</sup> Ward, *supra* note 14, at 1182.

<sup>23</sup> Berin Michael Szóka, *FTC's Remedial Powers in Jeopardy*, TECHFREEDOM (March 22, 2019), <https://ssrn.com/abstract=3367172> ("To the extent the FTC must rely on Section 19 rather than Section 13 . . . [it] faces significant problems: the delays associated with administrative cases under Section 19 can be significant. . . . Section 19 sets a high bar on the kind of cases to which it applies. . . . [and] Section 19 is subject to a 3-year statute of limitations."). See also Beales & Muris, *supra* note 19, at 2 (explaining that Section 19's fundamental flaw is its inability to adequately address fraud because "the investigative target would have time to hide the money well before it could be ordered to pay redress.").

13(b) to obtain monetary remedies.<sup>24</sup> However, nothing in the text of Section 13(b) authorizes the FTC to obtain monetary remedies.<sup>25</sup> In fact, the legislative history is fairly clear that the purpose of Section 13(b) was to eliminate the aforementioned deficiency in FTC enforcement that allowed prohibited activities to continue pending the issuance of a final cease and desist order.<sup>26</sup>

Notwithstanding Section 13(b)'s lack of explicit statutory authorization, the courts—until the decision in *Credit Bureau*—have reasoned that the FTC's injunctive power *implies* the power for the agency to obtain other equitable remedies, including restitution.<sup>27</sup> With approval from the courts, the FTC weaponized Section 13(b) as its main enforcement tool over the past thirty-five years, and has returned billions of dollars to consumers during that time.<sup>28</sup> Thus, the Seventh Circuit's decision in *Credit Bureau* not only threatens to severely limit the Commission's

---

<sup>24</sup> See Paul, *supra* note 18, at 143 (explaining that in the early 1980's, the Commission shifted from using Section 5 to using Section 13(b) to obtain remedies such as restitution, disgorgement, and asset freezes.). See also Beales & Muris, *supra* note 19, at 3 (explaining that the Commission's adoption of the "Section 13(b) Fraud Program" in 1981 to obtain monetary remedies was a shift in FTC enforcement); Timothy J. Muris, *Will the FTC's Success Continue?* 18–35 (George Mason Law & Economics Research, Paper No. 18-35, 2018), <https://ssrn.com/abstract=3254294> ("The agency's systematic attack on fraud, begun in 1981, replaced the failed rulemakings of the 1970s . . . as the core of FTC consumer protection.").

<sup>25</sup> 15 U.S.C. § 53(b) (1988). Specifically, Section 13(b) states:

Whenever the Commission has reason to believe—

(1) that any person partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission . . . may bring suit in a district court . . . to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. . . .

<sup>26</sup> See Ward, *supra* note 14, at 1178 (footnote omitted) ("[T]he legislative history [of Section 13(b)] does not suggest that Congress expected that provision to authorize the awarding of restitution to those injured. Its purpose was simply to avoid future injury once the FTC had . . . blown the whistle on suspect conduct."); Beales & Muris, *supra* note 19, at 16–17 (footnote omitted) (arguing that Congress's adoption of Section 19 two years after the enactment of Section 13(b) "is illuminating because it suggests that no one at the time understood Section 13(b) to authorize an award of consumer redress in all cases."). But see Paul, *supra* note 18, at 145 (footnote omitted) ("[T]here is a large body of jurisprudence involving regulatory enactments enforced by other federal agencies, to the effect that where Congress empowers an agency to resort to the equitable authority of the court, Congress should be held to have intended to invoke the full range of the court's equitable authority unless the statute [says] otherwise.").

<sup>27</sup> See Paul, *supra* note 18, at 143 (footnote omitted) (emphasis added) ("The courts have uniformly acknowledged that the statutory language authorizing the district court to grant a 'permanent injunction' invokes the *entire panoply of traditional equitable remedies* . . . includ[ing] the authority to award monetary equitable relief, such as restitution and rescission . . .").

<sup>28</sup> Petition For a Writ of Certiorari, at 5 ("Agency records show that from 2016 to 2019, the Commission returned approximately \$977 million directly to consumers in Section 13(b) cases. Billions more were returned to consumers directly from defendants."). See also Testimony of the FTC, *Oversight of the Federal Trade Commission*, at 2. Hearing before the Subcommittee on Digital Commerce and Consumer Protection, (July 18, 2018), available at <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-the-federal-trade-commission-subcommittee-on> (finding that in 2017, defendants in the *Volkswagen*, *Amazon*, and *Net Spend* matters were ordered to create "consumer refund programs worth more than \$11.5 billion.").

enforcement ability, but also changes the landscape of consumer protection entirely.

### III. ANALYZING THE *CREDIT BUREAU* MAJORITY DECISION AND DISSENTING OPINION

#### A. FACTS AND PROCEDURAL HISTORY

The facts leading to the momentous *Credit Bureau* decision are fairly straightforward. Respondent Michael Brown (“Brown”) is the owner and operator of Credit Bureau Center, LLC (“Credit Bureau”), a credit-monitoring service.<sup>29</sup> In early 2014, Brown contracted with an individual named Danny Pierce to direct customers to various websites created by Brown that invited the customers to sign up for “free” credit reports.<sup>30</sup> In order to create a customer-base, Pierce and another individual created Craigslist advertisements boasting bargain prices for different rental properties.<sup>31</sup> Once a customer showed interest in renting, Pierce—posing as the landlord—would direct the individual to one of Brown’s websites to complete a “free” credit report.<sup>32</sup> The first problem was that the rental properties were completely fabricated by Pierce.<sup>33</sup> The second problem was that the “free” credit reports contained disclaimers buried in small font that “informed” customers that they were also enrolling in Credit Bureau’s credit-monitoring service for \$30 per month.<sup>34</sup> This “negative option feature” worked, generating more than \$6.8 million in revenue from unknowing consumers.<sup>35</sup>

On January 10, 2017, after receiving hundreds of consumer complaints, the Commission sued Brown and Credit Bureau under Section 13(b), seeking a permanent injunction and restitution to obtain the unlawful gains they acquired.<sup>36</sup> The district court granted the Commission’s motion for summary judgment, holding Brown and Credit Bureau liable under the

---

<sup>29</sup> *Credit Bureau Center*, 937 F.3d at 766.

<sup>30</sup> *Id.* at 767.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 768.

<sup>33</sup> *Id.* at 767.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Complaint for Permanent Injunction and Other Equitable Relief at 1, *FTC v. Credit Bureau Center, LLC*, No. 17-cv-00194 (N.D. Ill. Jan. 10, 2017).



FTCA and other, unrelated statutory provisions.<sup>37</sup> Moreover, the district court issued a permanent injunction and ordered Brown and Credit Bureau to pay over \$5 million in restitution.<sup>38</sup>

The respondents appealed the district court’s judgment arguing, *inter alia*, that Section 13(b) does not address monetary relief, and that on its face, only permits injunctive relief.<sup>39</sup> As such, the respondents argue, the FTC is not entitled to restitution under Section 13(b).<sup>40</sup> The Seventh Circuit agreed. Despite affirming the district court on all other grounds, the Seventh Circuit vacated the restitution award.<sup>41</sup>

Before reaching its decision, the majority had to overcome a formidable barrier: *FTC v. Amy Travel Service, Inc.*<sup>42</sup> Nearly thirty years prior to the *Credit Bureau* decision, the Seventh Circuit held that “the statutory grant of authority to the district court to issue permanent injunctions [under Section 13(b)] includes the power to order any ancillary relief necessary to effectuate the exercise of the granted powers.”<sup>43</sup> Following this precedent, the FTC continuously relied on Section 13(b) to obtain monetary relief against violators of the Act. However, the majority overruled *Amy Travel* reasoning that: (1) the plain language and structure of the statute does not authorize restitution, and (2) intervening precedent, namely the Supreme Court’s decision in *Meghrig v. KFC Western Inc.* (“*Meghrig*”),<sup>44</sup> renders *Amy Travel* no longer applicable.<sup>45</sup>

---

<sup>37</sup> *Credit Bureau Center*, 937 F.3d at 768.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 771.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 786.

<sup>42</sup> 875 F.2d 564 (7th Cir. 1989).

<sup>43</sup> *Id.* at 572.

<sup>44</sup> 516 U.S. 479 (1996).

<sup>45</sup> *Credit Bureau Center*, 937 F.3d at 775, 781–82.

## B. FTCA STATUTORY FRAMEWORK

The majority's *de novo* review of Section 13(b)'s statutory scheme begins with the blunt analysis that restitution is "obvious[ly]" not an injunction.<sup>46</sup> The majority found the FTC's contention that Section 13(b) implicitly authorizes restitution unconvincing because the text of Section 13(b) requires respondents to be "violating" or "about to violate" the law.<sup>47</sup> In other words, the majority states that this language is a "forward-facing" remedy and thus is consistent with an injunctive remedy.<sup>48</sup> As such, the "implied restitution remedy doesn't sit comfortably with the text of [S]ection 13(b)," because "restitution is a remedy for past actions."<sup>49</sup> The dissent, however, does not find this analysis so obvious. Relying on precedent contradictory to the precedent provided by the majority, the dissent argues that injunctions "come in all shapes and sizes," and to wholly exclude restitution as a possible ancillary measure denies the FTC the right to "use any of the tools that Congress gave it."<sup>50</sup> The flaw in the dissent's argument is that Congress must have actually intended Section 13(b) to be a tool for monetary relief. The legislative history is clear that Section 13(b) was intended to serve as a "gap filler" to ameliorate the inadequacy of Section 5's enforcement ability.<sup>51</sup> Even if the majority conceded that injunctions may, at times, act in a backward-looking manner, the dissent's argument still rests on shaky grounds because nothing in the legislative history, nor the statute itself, points to Congressional intent to authorize monetary relief.

The majority next looks to the presence of the two other enforcement provisions to contextualize the purposes of Section 13(b). First, in an exercise of statutory construction, the

---

<sup>46</sup> *Id.* at 771.

<sup>47</sup> *Id.* at 772.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citation omitted).

<sup>50</sup> *Id.* at 787.

<sup>51</sup> Ward, *supra* note 14, at 1175 (citing *Letter from Lewis A. Engman*, Chairman, Federal Trade Commission, to Rep. Harold T. Johnson (Nov. 9, 1973), reprinted in 119 CONG. REC. 36,610 (1973)).

majority argues that the existence of language authorizing equitable relief in both Section 5 and Section 19 “amplif[ies] the poor fit between [S]ection 13(b) and restitution.”<sup>52</sup> This begs the question: Why would Congress include such language in two of the FTC’s remedial provisions but not in Section 13(b)? Again, the legislative history leading up to the enactment of Section 13(b) and Section 19 sheds light on this apparent conundrum. Section 19, enacted *after* Section 13(b), was the result of a Congressional compromise between the equivalent of the Section 13(b) remedial scheme used prior to the *Credit Bureau* decision, and a stricter version of Section 19.<sup>53</sup> As the majority states, “[i]f [S]ection 13(b) permitted restitution as a general matter, Congress would have had no reason to enact [Section 19].”<sup>54</sup> Moreover, the framework provided by Section 19 provides various protections that are not included in Section 13(b), and allowing the FTC to bypass this congressionally constructed framework would render Section 19 “largely pointless.”<sup>55</sup> The fact that Section 13(b) is an easier and more effective method for obtaining monetary remedy in comparison to Section 19 does not mean the congressional intent should be ignored.

In response, the dissent and the FTC argue that Section 19’s savings clause preserves, rather than limits, the remedies available under Section 13(b).<sup>56</sup> Section 19’s savings clause states “[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.” Thus, the dissent and

---

<sup>52</sup> *Credit Bureau Center*, 937 F.3d at 773. *See also* 15 U.S.C. § 45(l) (1988) (stating that courts are authorized to “grant mandatory injunctions and such other and further equitable relief as they deem appropriate.”); 15 U.S.C. § 57b(b) (1988) (stating that the FTCA authorizes “such relief as the court finds necessary . . . [including] the refund of money or return of property.”).

<sup>53</sup> For an extensive discussion surrounding the legislative history of Section 13(b) and Section 19, *see* Ward, *supra* note 14, at 1174–83. (“There is nothing in the legislative history suggesting that members of Congress [] understood [Section 13(b)] to have addressed the consumer redress issue. Furthermore, the legislative history does not support a congressional intent that [S]ection 13(b) relief [would] provide consumer restitution in circumstances where [S]ection 19 would not.”).

<sup>54</sup> *Credit Bureau Center*, 937 F.3d at 774.

<sup>55</sup> *Id.* (citation omitted) (stating that “[w]ithout a clear textual signal, we cannot presume that Congress implicitly made a consequential shift in policy.”).

<sup>56</sup> *Id.* at 796 (Wood, J., dissenting); Petition For a Writ of Certiorari, at 21.

FTC argue, the Commission has the ability to choose among the enforcement tools that Congress has provided.<sup>57</sup> The majority aptly points out two main flaws with this argument. First, as explained above, reading Section 13(b) to authorize monetary remedies would render Section 19 pointless.<sup>58</sup> Second, a savings clause can only protect a remedy that already exists. The dissent and FTC’s argument presumes that Section 13(b) actually infers a right to restitution.<sup>59</sup> At bottom, the text and structure of the Act, in conjunction with its legislative history supports the majority’s reasoning.

### C. SHIFT IN SUPREME COURT IMPLIED-REMEDIES JURISPRUDENCE

Since the Seventh Circuit’s decision in *Amy Travel*, the Supreme Court’s jurisprudence regarding implied statutory remedies has changed.<sup>60</sup> Specifically, the majority argues, the Court is less willing than it was in the past to find implied remedies when they are not expressly authorized by the statutory scheme.<sup>61</sup> The majority relies on the Court’s decision in *Meghrig* to highlight this jurisprudential evolution and to justify its overruling of *Amy Travel*.

The majority first addressed the conflict between the Supreme Court precedent that *Amy Travel* relied on,<sup>62</sup> and the current jurisprudence of the Court. *Porter* adopted a presumption that Congress authorizes monetary remedies when a statutory scheme permits the courts to issue injunctive relief.<sup>63</sup> Years later, the Court applied the broad *Porter* presumption to *Mitchell*, holding that nothing in the statute at issue precluded restitution as an implied remedy.<sup>64</sup> These two decisions, along with a string of lower-court decisions, created the implied-remedy jurisprudence that *Amy Travel* perpetuated.

---

<sup>57</sup> *Credit Bureau Center*, 937 F.3d at 796 (Wood, J., dissenting).

<sup>58</sup> *Id.* at 775.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 779.

<sup>61</sup> *Id.* at 780.

<sup>62</sup> The Seventh Circuit relied on two Supreme Court decisions to justify its holding in *Amy Travel*: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (“*Porter*”) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (“*Mitchell*”).

<sup>63</sup> *Porter*, 328 U.S. at 398.

<sup>64</sup> *Mitchell*, 361 U.S. at 294.

*Meghrig* addressed a provision of the Resource Conservation and Recovery Act (“RCRA”) that permits an individual to seek environmental cleanup costs from the handlers of waste who were responsible for contamination and when the contamination would present “imminent and substantial endangerment.”<sup>65</sup> The RCRA authorizes courts to “restrain any person [who contributed to the handling of toxic waste], to order such person to take such other action as may be necessary, or both.”<sup>66</sup> The question presented in *Meghrig* was whether this provision of the RCRA also allowed the individual bringing the action to obtain restitution.<sup>67</sup> The Court refused to find an implied restitutionary remedy in the RCRA because doing so would frustrate the statutory scheme.<sup>68</sup> Moreover, the Court held that it cannot assume that an implied remedy is authorized by a statute containing “elaborate enforcement provisions.”<sup>69</sup>

In applying *Meghrig*, the Seventh Circuit majority reiterated that the plain text and structure of the Act, along with its forward-facing purpose of mitigating harm, makes clear that Section 13(b) does not authorize restitution.<sup>70</sup> The dissent’s main gripe with the majority’s analysis is that the cases are incongruent: *Meghrig* involved private plaintiffs, not a government agency, and the plaintiffs sued under a statutory scheme dissimilar to the Act.<sup>71</sup> The majority concedes that “equitable powers assume a[] broader and more flexible character,” when “the public interest is involved.”<sup>72</sup> However, “public interest” does not necessarily turn on the identity of the parties, rather it turns on the issue at stake in any particular case.<sup>73</sup> Moreover, even if the equitable powers are broader when the public interest is involved, that does not *create* a remedy that is expressly left out of the statutory scheme. The dissent’s contention that the statutory

---

<sup>65</sup> *Meghrig*, 516 U.S. at 484 (citing 42 U.S.C. 6972(a)(1)(B)).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 481.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 487.

<sup>70</sup> *Credit Bureau Center*, 937 F.3d at 779–82.

<sup>71</sup> *Id.* at 792–93 (Wood, J., dissenting).

<sup>72</sup> *Id.* at 784.

<sup>73</sup> *Id.*

schemes of the Act and the RCRA are dissimilar is matter of nitpicking. While the statutes don't use identical language, they are "materially indistinguishable" in their text, structure, and purpose.<sup>74</sup>

Lastly, the precedent that *Amy Travel* relied on left an important message that years of precedent seemed to overlook: "implied remedies must be 'consistent with the statutory language and policy, the legislative background and the public interest.'"<sup>75</sup> The statutory text and structure and the legislative history support the majority's difficult, albeit correct, decision.

#### IV. WHAT DOES THE FUTURE HOLD FOR FTC ENFORCEMENT?

The Seventh Circuit's decision undeniably weakens one of the FTC's most important enforcement tools. As the dissent more harshly puts it, "no court has ever tied the hands of a government agency in the way that the majority has done here."<sup>76</sup> There is understandable concern surrounding the Commission's ability to make consumers whole,<sup>77</sup> and deter future companies from violating the Act.<sup>78</sup> The future of Section 13(b) remains to be seen, but the FTC will first try its luck with the Supreme Court.

On December 19, 2019, the Commission filed a Petition for a Writ of Certiorari, requesting the Supreme Court to review the Seventh Circuit's decision.<sup>79</sup> While it is likely that the Supreme Court will grant review due to the gravity of the issue presented and the square circuit split between the Seventh Circuit and seven other circuits, the FTC may be disappointed in the outcome. The Court's shift in jurisprudence as explained in Part III, along with the Court's

---

<sup>74</sup> See *id.* at 783. The majority finds that: (1) both statutes authorize the same remedy and expressly exclude monetary relief; (2) Section 13(b)'s relationship to Section 5 and Section 19 is materially parallel to the provisions surrounding the RCRA; and (3) both statutes were designed to prevent the risk of future harm, not to remedy past actions. *Id.*

<sup>75</sup> *Id.* at 776 (citing *Porter*, 328 U.S. at 403).

<sup>76</sup> *Id.* at 786 (Wood, J., dissenting).

<sup>77</sup> See Szóka, *supra* note 23 ("Having to rely on Section 19 would significantly weaken the FTC's leverage in pressuring companies to settle enforcement actions . . . especially to agree to monetary relief for consumers.").

<sup>78</sup> *Credit Bureau Center*, 937 F.3d at 797 (Wood, J., dissenting) (stating that the majority's decision "grants a needless measure of impunity to brazen scammers like the defendant in this case.").

<sup>79</sup> See generally Petition For a Writ of Certiorari.

recent holding in *Kokesh v. SEC*,<sup>80</sup> suggest that the Court will likely uphold the Seventh Circuit's decision and cast binding precedent across the rest of the country.

Commentators, and at least two ninth circuit judges,<sup>81</sup> believe that the Court's decision in *Kokesh* suggests that restitution is not within the FTC's power under Section 13(b) because it constitutes a penalty, and would thus be authorized only under Section 19.<sup>82</sup> The SEC injunctive relief provision at issue in *Kokesh* is arguably analogous to Section 13(b) and could spell doom for the Commission.<sup>83</sup> If the Supreme Court grants certiorari, it could be the first court to apply its *Kokesh* analysis to the FTC's Section 13(b) powers. As Berin Szóka puts it, "the FTC should be deeply concerned."<sup>84</sup>

Lastly, it is likely that the Court would view the judiciary's long-standing interpretation of Section 13(b) as "an impermissible exercise of judicial creativity," that does not respect the independent role of the legislature.<sup>85</sup> As the majority in *Credit Bureau* recognized, the answer to Section 13(b) lies not in the courts, but in the legislature. The Commission should continue to seek clarification from Congress,<sup>86</sup> and petition the legislature to modify the statute to expressly allow monetary relief under its Section 13(b) power. Due to the importance of Section 13(b) to the FTC and duped consumers alike, Congress should be open to modifying the statute consistent with how the Commission has been using this purported power for the past thirty years.

However, as it currently stands, Section 13(b) is standing on one leg.

---

<sup>80</sup> 137 S. Ct. 1635 (2017).

<sup>81</sup> In *FTC v. AMG Capital Management*, 910 F.3d 417 (9th Cir. 2018), two judges joined in a concurrence urging the Ninth Circuit to reconsider its interpretation of the FTC's Section 13(b) powers.

<sup>82</sup> Szóka, *supra* note 23.

<sup>83</sup> See Benjamin Mundel & Lucas Croslow, *How Kokesh v. SEC Will Impact the FTC and Other Agencies*, (June 22, 2017), <https://www.sidley.com/-/media/publications/mundel-croslow--law360.pdf> ("Restitution sought by the FTC 'bears all the hallmarks of a penalty' that SEC disgorgement does

<sup>84</sup> Szóka, *supra* note 23.

<sup>85</sup> *AMG Capital Management*, 910 F.3d at 427 (O'Scannlain, J., concurring)

<sup>86</sup> On May 8, 2019, FTC Commissioner Christine Wilson testified before the Subcommittee on Consumer Protection and Commerce, asking Congress to clarify the meaning of Section 13(b). See Oral Statement of FTC Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019).

## V. CONCLUSION

At bottom, the Seventh Circuit majority got it right both analytically and from a separation of powers perspective. Section 13(b)'s text, structure, purpose and legislative history make clear that while the FTC's use of Section 13(b) may be the easiest and most effective, it is legally incorrect. After thirty years of stale precedent, the Seventh Circuit became the first circuit to actually exam whether allowing restitution under Section 13(b) is consistent with the statutory scheme, and more importantly, what the impact of *Meghrig* is on Section 13(b)'s long-standing interpretation.<sup>87</sup> There is understandable concern surrounding the future of FTC enforcement, as well as distaste with the Seventh Circuit's decision. However, the majority understood the gravity of its decision and it properly left the future of FTC enforcement in the hands of Congress.

---

<sup>87</sup> *Credit Bureau Center*, 937 F.3d at 785.