No. 13-1045

In the Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC., ET AL.
PETITIONERS

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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STATEMENT

1. Petitioners are Publishers Business Services, Inc., and Ed Dantuma Enterprises, Inc. (collectively PBS), along with six individual corporate officers and managers who are members of the Dantuma family. Pet. App. 3a. Petitioners operated a family business that telemarketed long-term magazine subscriptions by placing "cold calls" to approximately 25 million consumers between January 2004 and August 2008. Gov't C.A. Br. 2, 4.

During that period, PBS telemarketers called business phone numbers and pretended to be conducting a survey. Gov't C.A. Br. 4-5. After thanking the consumer for helping, PBS telemarketers told the consumers that they would be receiving subscriptions to various magazines. *Id.* at 5-6. Although the telemarketers assured consumers they were not being asked to buy anything, they asked consumers to help defray the cost of sending the magazines. *Id.* at 6. Using this ruse, the telemarketers induced consumers to articulate words of apparent assent to long-term magazine subscriptions. *Id.* at 6-9.

Shortly after the initial sales calls, consumers would receive another call from a "verifier" who thanked the consumers for participating in the survey and asked whether their information could be verified on tape. Gov't C.A. Br. 7. During those calls, the verifiers would obtain consumers' apparent consent to the sale of magazines and would inform consumers for the first time that the subscriptions could not be canceled. *Id.* at 8. The verifiers were instructed to avoid telling customers the total price if possible. *Ibid.*

The consumers then received invoices for magazine subscriptions, sometimes for hundreds of dollars.

Gov't C.A. Br. 9-10. Consumers who refused to pay received dunning calls from PBS collection agents and an escalating series of delinquency letters from fictitious PBS personnel threatening, for example, to "move forward reviewing our rights * * * for all monies due plus interest[] and costs." 821 F. Supp. 2d 1205, 1214 (2010) (internal quotation marks and citation omitted). After a "delinquency" of about six months, consumers received a dunning letter from the fictitious "Bob Callahan" from a PBS "Legal Department" that did not exist. Gov't C.A. Br. 11. Consumers who had agreed at most to pay nominal shipping and handling fees for free or cancellable trial magazine subscriptions complained to the FTC, state attorneys general, and the Better Business Bureau. 821 F. Supp. 2d at 1212-1215.

2. On May 14, 2008,d

The FTC brought its complaint under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), which authorizes district courts to grant permanent injunctions with respect to "any provision of law enforced by the Federal Trade Commission." The FTC also relied on its authority under Section 19 of the FTC Act, 15 U.S.C. 57b, with respect to petitioners' violations of the TSR. Under that provision, the court may "grant such relief as the court finds necessary to redress injury to consumers * * * resulting from the rule violation," including, but not limited to, "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification." 15 U.S.C. 57b(b); Docket entry No. 1, paras. 42-43.

3. a. The district court granted the FTC's motion for summary judgment and permanently enjoined petitioners from engaging in further deceptive and abusive sales practices. 821 F. Supp. 2d at 1205-1228.

The district court concluded that the "overall net impression" of petitioners' conduct was deceptive. 821 F. Supp. 2d at 1223. Applying well-established principles for identifying deception, the court concluded that there was no dispute of material fact that "the way in which PBS selectively disclose[d] the material terms throughout the various calls, preface[d] subsequent calls by informing the consumer PBS [was] just confirming information, and then add[ed] new required terms [was] likely to mislead." *Id.* at 1224-1225. The court concluded that PBS was "in violation of Section 5 of the FTC Act and the TSR with respect to its initial and verification calls." *Id.* at 1226. The court further concluded that PBS's collection practices violated both Section 5 and the TSR because PBS

relied on misrepresentations to induce consumers to pay and engaged in a pattern of abusive calls, in violation of 16 C.F.R. 310.4(b)(1)(i). 821 F. Supp. 2d at 1226-1227.

The district court entered a permanent injunction. 821 F. Supp. 2d at 1227-1228. The court noted that the FTC had requested restitution in “the full amount of the purchase price or payment less any refunds,” which amounted to $34.4 million between January 1, 2004, and August 31, 2008. *Id.* at 1227; Pet. App. 10a. The court scheduled a hearing to “fully evaluate the appropriate monetary relief, if any, to award.” 821 F. Supp. 2d at 1227.

b. After an evidentiary hearing, the district court ordered petitioners to pay $191,219 in “equitable damages.” Pet. App. 9a-14a. The court explained that restitution is a form of “ancillary equitable damages relief” that is available to effect complete justice under Section 13(b) of the FTC Act. *Id.* at 11a. The court concluded, however, that “[c]omplete disgorgement of [PBS’s] entire gross revenues” was not appropriate “unless FTC proves that such gross revenue is a ‘reasonable approximation’ of [petitioners’] gains from violations of [the FTC Act].” *Ibid.* The court concluded that the FTC “[had] not establish[ed] the necessary link between [petitioners’] acts in violation of Section 5, and PBS’s entire gross revenues between January 1, 2004[,] and August 31, 2008.” *Id.* at 12a.

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well that the consumers had actually received magazines, and that many of the consumers who had complained had elected to withhold payments even in the face of petitioners' collection efforts. *Id.* at 12a-13a. The court concluded that $191,219, the amount suggested by petitioners' expert, was an appropriate amount of "equitable damages." *Id.* at 13a.

The district court further concluded that only two of the six individual defendants had sufficient knowledge of PBS's deceptive business practices to be liable along with PBS for that amount. Pet. App. 13a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 2a-8a.

The court of appeals held that the district court had abused its discretion with respect to the amount of the equitable monetary relief awarded. Pet. App. 4a. The court concluded that the district court had applied an incorrect legal standard by focusing on petitioners' gain rather than on the loss to the victimized consumers. The court explained that "the FTC Act permits restitution measured by the loss to consumers." *Ibid.* (citing *FTC* v. *Stefanchik*, 559 F.3d 924, 931-932 (9th Cir. 2009)). The court further concluded that the district court had erred in relying on the potential difficulty of locating and reimbursing the particular consumers who had been injured. *Id.* at 5a. The court ex-

all the terms of the subscription so that they were not misled by the telemarketing salutation." *Ibid.* The court explained that this assumption was flawed because petitioners' fraud consisted not only of "the failure to disclose all pertinent terms," but also of "the misrepresentations that launched the process" and the "net effect" of petitioners' sales tactics. *Ibid.*

The court of appeals further concluded that the expert's calculation was based on the erroneous assumption that the magazine subscriptions had value. Pet. App. 6a-7a. The court explained that the value of magazines actually delivered to consumers was irrelevant because the consumers' injury arose from misrepresentations made in the sales process, which led to tainted purchasing decisions. *Ibid.*

The court of appeals stated that, on remand, the district court "should base its calculation on the injury to the consumers, not on the net revenues received by [petitioners]." Pet. App. 7a. The court stated that the district court was not required to accept the FTC's calculation, and that it could consider, along with petitioners' other arguments, petitioners' contention that customers who had renewed subscriptions or added on to a subscription order "necessarily knew the actual terms of the transaction at the time of renewal." *Ibid.*

The court of appeals further held that, with respect to three of the four individual defendants on whom the district court had declined to impose individual liability, the district court had abused its discretion in concluding that those defendants lacked sufficient knowledge to be held liable. Pet. App. 7a-8a. The court affirmed the district court's order of no personal

liability with respect to the fourth individual defendant. *Id.* at 8a.

ARGUMENT

Petitioners contend (Pet. 6-23) that, under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), a district court cannot award "damages" measured by loss to consumers. The court of appeals correctly vacated and remanded the district court's order awarding monetary relief in this case, which had relied on the report of an economist whose methodology for calculating such relief was inconsistent with governing law. The court

er's violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* 361 U.S. 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.

Applying those principles in the context of Section 13(b) of the FTC Act, the courts of appeals have uniformly held that, upon a (FLSssm6-5(h is) y heppea11.8q-5.5(ble1)]TJ-13.56 n

courts of appeals have similarly upheld the authority of the district courts to provide equitable monetary relief under comparable provisions of other regulatory enactments.[2]

b. The district court's primary error in this case was the logical inconsistency between its liability ruling and the amount of equitable monetary relief that it chose to award. As the court of appeals explained, the district court's grant of summary judgment at the liability stage was based on its recognition that, even though PBS had disclosed all the terms of the agreement to consumers by the end of the verification calls, "the net effect of PBS's sales tactics was misleading." Pet. App. 6a. The district court nevertheless calculated its award of equitable monetary relief using a methodology that petitioners' expert had formulated by listening to tapes and concluding that the terms of the deal had been disclosed to consumers during the verification calls. *Ibid.*; Gov't C.A. Br. 23.

The calculation that the district court accepted from petitioners' expert was also based on the supposed value of the magazines that the consumers had

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1994) (district courts may award the remedy of restitution to correct "unjust enrichment" and "protect consumers from economic injuries"), cert. denied, 514 U.S. 1083 (1995); *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).

[2] 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); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Securities Exchange Act); *CFTC* v. *Co Petro Mkt'g Grp., Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (Commodities Exchange Act); *ICC* v. *B & T Transp. Co.*, 613 F.2d 1182, 1184-1185 (1st Cir. 1980) (Motor Carrier Act).

loss. 443 F.3d at 68. In other words, as the Second Circuit clarified in *FTC* v. *Bronson Partners, LLC,* 654 F.3d 359 (2011), "[t]he only limitation that *Verity* placed on the district court's remedial authority was the requirement that any monetary award be limited to funds that actually were paid to the defendants, as opposed to money that was paid by the consumer but withheld by a middleman." *Id.* at 374.

For those reasons, the answer to the question posed by petitioners—whether monetary equitable relief may ever exceed the collective gain to wrongdoers (Pet. 15)—has no bearing on the outcome of this case. The Eleventh Circuit made precisely that point in *FTC* v. *Washington Data Resources, Inc.*, 704 F.3d 1323 (2013) (per curiam), when it noted that the distinction between consumer loss and unjust enrichment is "of no consequence" when consumers make a purchase directly from the defendants, without the involvement of a middleman. *Id.* at 1326; see *FTC* v. *Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14 (1st Cir. 2010) (describing "*Verity*'s facts as an exception limited to the situation 'when some middleman not a party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands.'") (quoting *Verity*, 443 F.3d at 68) (emphasis omitted).

The other Eleventh Circuit case cited by petitioners (Pet. 13), *CFTC* v. *Wilshire Inv. Mgmt. Corp.,* 531 F.3d 1339 (2008), illustrates another way—also inapposite to this case—in which consumer loss may differ from a defendant's gain. That case involved losses

than allowing recovery of the full amounts the customers had lost in market trades with persons not before the court. *Id.* at 1345. That decision has no bearing on the proper scope of petitioners' liability.

Petitioners' reliance (Pet. 12-13) on the unpublished opinion in *FTC* v. *Loanpointe, LLC*, 525 F. Appx. 696 (10th Cir. 2013), is also unavailing. In *Loanpointe*, the FTC sought disgorgement of interest payments that had been collected by means of unlawful garnishment letters, and the court concluded that the district court had not abused its discretion in ordering disgorgement of the interest payments that were connected to the defendant's fraud. *Id.* at 699-702. The court of appeals' decision in this case is consistent with that holding.[4] Petitioners have not identified any conflict warranting this Court's review.

b. The court of appeals at times used the term "damages" to describe the monetary relief at issue here. See, *e.g.*, Pet. App. 3a, 4a. Although those references may be an imprecise description of the district court's equitable authority to order monetary relief under Section 13(b) of the FTC Act, they do not suggest any substantive infirmity in the relief awarded. The court of appeals elsewhere recognized that the relief sought amounted to the disgorgement of unjust enrichment, a prototypical equitable remedy.

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[4] There is likewise no sound basis for petitioners' contention that the court of appeals' decision conflicts with the reasoning adopted by other circuits in civil enforcement actions brought by the Securities and Exchange Commission (SEC), in which the SEC has sought only disgorgement of the defendants' ill-gotten gains. See, *e.g.*, *SEC* v. *First City Fin. Corp.,* 890 F.2d 1215 (D.C. Cir. 1989); *SEC* v. *Blavin*, 760 F.2d 706 (6th Cir. 1985) (per curiam); *SEC* v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978).

Id. at 5a. In any event, some imprecision in the use of the term "damages" at various points in an unpublished opinion is no basis for concluding, as petitioner suggests (Pet. 21-22), that the court of appeals has abandoned the jurisprudence of federal equity practice. As reflected in the district court's own description of the requested remedy and in petitioners' briefs below, there is considerable inconsistency in the terms that courts and litigants use to describe monetary equitable remedies. See, *e.g.*, Pet. App. 9a ("Order Re: Equitable Damages"), *id.* at 11a ("ancillary equitable damages relief"). The court of appeals' choice of words to describe the remedy does not affect the equitable nature of the monetary relief at issue.

There is likewise no sound basis for petitioners' contention (Pet. 15) that the court of appeals' decision will invite awards of "punitive and exemplary damages." The FTC did not request an award of legal damages in this case, let alone punitive and exemplary damages. The court of appeals' observations about the textual differences between Sections 13(b) and 19 (which specifically authorizes damages, except for exemplary and punitive damages) thus cannot fairly be read to approve such relief under Section 13(b).

3. Finally, the Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals vacated the district court's award of equitable monetary relief, "remanded th[e] case for further proceedings," and stated that the district court is not requir

subscription order "knew the actual terms of the transaction at the time of renewal." *Id.* at 7a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Arostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for certiorari).

After the district court recalculates the appropriate amount of equitable monetary relief, petitioners will have an opportunity to raise their current claim, together with any other claims that may arise from the further proceedings, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Petitioner provides no basis for departing from the Court's normal practice of denying petitions challenging interlocutory determinations that, like the decision in this case, may be reviewed after final judgment.