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HOW A PREVAILING STATUTORY INTERPRETATION IS COSTING BUSINESSES BILLIONS

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I. INTRODUCTION

In 1914, President Woodrow Wilson signed the Federal Trade Commission Act (Act) into law in the United States.[1] The Act outlaws unfair methods of competition affecting commerce and unfair or deceptive business practices, and it established the Federal Trade Commission (FTC), a government agency, to enforce the Act.[2] The goals of the Act are to prevent antitrust violations in business, hold hearings for businesses accused of violating the provisions of the Act, and, if needed, award damages or injunctions to parties injured by the unfair or deceptive business practices.[3] The Act applies to "person[s], partnership[s], or corporation[s]," a scope that allows the FTC to oversee adjudication of any deceptive or unfair business practice and empowers the FTC to seek judicial remedies in court for selected violations of the Act, including those found in § 13(b).[4]

The Act's broad grant of authority and the FTC's ability to pursue remedies at law and in equity has allowed the FTC to abuse its power by pursuing monetary damages against businesses by invoking provisions of the Act that do not provide for monetary damages, resulting in excessive damage awards that harm businesses.[5] In particular, § 13 of the Act, codified as 15 U.S.C. § 53, permits the FTC to initiate preliminary and permanent injunction proceedings in federal court and is widely abused by the agency.[6] U.S. courts consistently allow the FTC to misuse its powers under § 13(b) to seek massive monetary damage awards in federal court, despite contrary language in the Act, which stipulates that the FTC can only seek preliminary and permanent injunctions, not monetary damages.[7] In 2017, the FTC utilized § 13(b) to collect $5.29 billion in disgorgement and restitution damages from businesses in the span of a single year.[8]

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[1] *Our History*, FED. TRADE COMMISSION, https://www.ftc.gov/about-ftc/our-history, (last visited Jan. 31, 2020); 15 U.S.C. § 41 (2018).

[2] *Our History*, *supra* note 1; 15 U.S.C. § 41.

[3] 15 U.S.C. § 45.

[4] *Id.*; 15 U.S.C. § 53(a).

[5] Brief for Chamber of Commerce of the United States of American & National Retail Federation as Amici Curiae Supporting Petitioners at 7, AMG Capital Mgmt., LLC v. F.T.C., 910 F.3d 417 (9th Cir. 2018) (No. 19-508), 2019 WL 6211314 [hereinafter Brief for Chamber of Commerce].

[6] *Id.*; § 53(a).

[7] *See* § 53(a); F.T.C. v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); F.T.C. v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); F.T.C. v. Pantron I. Corp., 33 F.3d 1088, 1102 (9th Cir. 1994); F.T.C. v. Ross, 743 F.3d 886, 891 (4th Cir. 2014).

[8] Brief for Chamber of Commerce, *supra* note 5, at 3.

This comment argues that the current prevailing interpretation of § 13(b) is contrary to the congressional intent of the statute and is contradictory to the plain text and structure of the statute. Section II of this comment provides a detailed background of how different courts laid the groundwork for the FTC to seek restitution and disgorgement damages as implied remedies under § 13(b).

Then, in Section III, this comment highlights a recent Seventh Circuit decision that overturned the court's own precedent in holding that § 13(b) does *not* authorize courts to award disgorgement and restitution damages as implied legal remedies.[9] Moreover, Section III of this comment argues that the prevailing interpretation of § 13(b) is incorrect and does not align with the text, structure, and purpose of the statute and that businesses lack substantive procedural safeguards under § 13 that are provided for elsewhere in the Act. Furthermore, in Section III, this comment argues that the United States Supreme Court, after having granted a *writ of certiorari* in *AMG Capital Management LLC v. F.T.C.*, should hold that § 13(b) does not provide for damages as a remedy under the provision.[10] Finally, in Section IV, this comment concludes that the United States Supreme Court should hold that § 13(b) does not authorize courts to provide damages, only injunctive relief, alleviating the current circuit split.

II. BACKGROUND

Section 13 was not originally included in the Act, but was added as an amendment to the Act in 1973.[11] Congress added § 13(b) in an effort to resolve the FTC's problematic, slow-moving administrative regime, which required the issuance of cease and desist orders, and subsequent court orders to enforce those cease and desist orders.[12] In pertinent part § 13(b) provides:

> (b) Temporary restraining orders; preliminary injunctions.
> Whenever the Commission has reason to believe— . . .
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such

[9] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 786 (7th Cir. 2019).

[10] AMG Capital Mgmt., LLC v. F.T.C., 910 F.3d 417 (9th Cir. 2018), *cert granted*, 2020 WL 3865250 (U.S. July 9, 2020) (No. 19-508).

[11] ACT OF NOV. 16, 1973, PUB. L. NO. 93-153, § 408, 87 STAT. 576, 592 (1973) (amending the Act by adding § 13(b) and detailing the purpose for the addition of § 13(b) (codified as 15 U.S.C. § 53 (1973)).

[12] *Id.*; 15 U.S.C. § 45 (1973).

> 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—
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> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States 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: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.[13]

Thus, § 13(b) provides that a court may award a preliminary or permanent injunction against violators of the Act.[14] Noticeably absent, though, is any explicit language authorizing a court to award monetary damages such as restitution and rescission.[15] Thus, § 13(b) is distinguishable from other enforcement provisions within the Act, namely § 5 and § 19, which explicitly authorize "forms of equitable relief" and "payment of damages" as remedies a court may award, among other forms of remedies.[16]

Even though § 13(b) contains no utterance of restitution or monetary damages, the FTC frequently utilizes this section to reap billions of dollars in restitution damages.[17] The majority of courts awarding these billion-dollar judgments pursuant to § 13(b) justify the remedy by

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[13] § 53(b).

[14] *See id.*

[15] *Id.*

[16] *Compare id.* (failing to expressly mention monetary damages, restitution, rescission, and other ancillary forms of relief), *with* § 45(l) (stating that the statute provides other equitable forms of relief), *and id.* § 57b(b) (stating "payment of damages" as a remedy that a court is authorized to grant by the section).

[17] *See* § 53; *see also* Brief for Chamber of Commerce, *supra* note 5, at 6–9.

rationalizing that because Congress provided the remedies of preliminary and permanent injunctions without any clear limiting language, courts may also award monetary damages under § 13(b).[18] Thus, courts reason that because Congress omitted such limiting language, it actually intended to allow courts to use all ancillary forms of relief necessary to accomplish justice, and monetary damages such as restitution and rescission damages are permissible forms of relief under § 13(b).[19] This line of reasoning is characterized as an implied legal remedy.

An implied legal remedy is essentially what its nomenclature suggests. It is a remedy fashioned by a judge who believes the statute *should* provide a remedy, or that Congress *implicitly* intended to provide such a remedy, even though the statute does not expressly provide it.[20] The doctrine of implied legal remedies is one of the driving forces behind the misinterpretation of available remedies under § 13(b) of the Act, as judges and courts fashion remedies not expressly provided in § 13(b), such as restitution and monetary damages.[21]

A. Origins of the Doctrine of an Implied Legal Remedy

The Supreme Court's first use of an implied legal remedy in *Porter v. Warner Holding Co.* was the catalyst for the jurisprudence that led to the expansive judicial interpretation of § 13(b), allowing the FTC to excessively penalize businesses.[22] *Porter*, decided in 1946, is the seminal case when the United States Supreme Court first recognized the

[18] F.T.C. v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); F.T.C. v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); F.T.C. v. Pantron I. Corp., 33 F.3d 1088, 1102 (9th Cir. 1994); F.T.C. v. Ross, 743 F.3d 886, 891 (4th Cir. 2014).

[19] F.T.C. v. Elders Grain Inc., 868 F.2d 901, 907 (7th Cir. 1989); F.T.C. v. Amy Travel Serv. Inc., 875 F.2d 564, 571 (7th Cir. 1989); *see* F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 776–80 (7th Cir. 2019) (detailing the history of courts reading an implied legal remedy into § 13(b) through the absence of limiting language).

[20] *Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Credit Bureau Ctr.*, 937 F.3d at 767 (discussing the Supreme Court's jurisprudence on the doctrine of implied legal remedies).

[21] *See* § 53; *see also Credit Bureau Ctr.*, 937 F.3d at 775–80 (showing how different courts have read an implied legal remedy into § 13(b) and arguing that those courts have done so in contradiction of the text and structure of § 13(b)).

[22] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (holding that unless a statute restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied); *Credit Bureau Ctr.*, 937 F.3d at 776 (highlighting Porter v. Warner Holding Co., as leading to the prevailing interpretation of § 13(b)).

doctrine of an implied legal remedy.[23] *Porter* involved the Emergency Price Control Act of 1942, which empowered district courts to issue a "permanent or temporary injunction, restraining order, or other order" against violators of the Emergency Price Control Act.[24] The Court assessed the Emergency Price Control Act to determine if it authorized a court to award restitution damages.[25] The Court held that the Emergency Price Control Act authorized restitution damages through Congress's use of the language "other order" and further explained that, "[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."[26]

Stated simply, if a statute does not explicitly state or limit the remedies that a district court can provide, then the district court will have the power to utilize all available remedies it determines to be appropriate.[27] However, the Supreme Court clarified its holding, stating that implied remedies should be consistent with the language, policy, and legislative background of the statute.[28]

Similarly, in 1960, the Supreme Court read an implied remedy into the Fair Labor Standards Act (FLSA) when deciding *Mitchell v. Robert DeMario Jewelry*.[29] In *Mitchell*, the Court relied on *Porter* in deciding whether the language of the FLSA allowed for an implied legal remedy.[30] Just as in *Porter*, the Court in *Mitchell* assessed whether the FLSA had any language which prevented district courts from providing restitution damages.[31] The Court determined that there was no language in the FLSA preventing district courts from awarding restitution as a remedy under the statute.[32] Ultimately, the Court held that the FLSA provides restitution as an implied remedy because restitution was congruent with the text and purpose of the FLSA.[33]

Legal scholars have noted that the *Porter* and *Mitchell* decisions were typical of the Supreme Court jurisprudence of that era, in that the

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[23] *Porter*, 328 U.S. at 398; *Credit Bureau Ctr.*, 937 F.3d at 776.

[24] *Porter*, 328 U.S. at 397.

[25] *Id.* at 399.

[26] *Id.* at 398.

[27] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 777 (7th Cir. 2019) (discussing how the Supreme Court in the era of Porter would reach the result most consonant with the purpose of the statute).

[28] *Porter*, 328 U.S. at 399–401 (1946) (discussing how the Court's holding was in accordance with language, policy, and legislative background of the statute).

[29] Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 295–97 (1960).

[30] *Id.* at 290–92.

[31] *Id.* at 291–94.

[32] *Id.* at 294–97.

[33] *See id.*

justices frequently read implied legal remedies into statutes.[34] Indeed, *Porter* and *Mitchell* laid the groundwork for circuit courts to take action similar to the Supreme Court and read implied remedies into § 13(b) of the Act, ultimately to the benefit of the FTC and to the detriment of businesses.[35]

B. How Lower Courts Applied the Doctrine of Implied Legal Remedies to § 13(b) of the Act

While the Supreme Court in *Porter* and *Mitchell* laid the groundwork for an implied legal remedy to be read into § 13(b), lower court decisions further developed the implied legal remedy doctrine jurisprudence.[36] The cases in this subpart are examples of circuit courts relying on *Porter* and *Mitchell* to explain that Congress implicitly authorized all ancillary forms of necessary relief, including monetary damages, in § 13(b) charges.[37] Each decision shares a similar reasoning: because § 13(b) permits courts to grant preliminary and permanent injunctions, without any limiting language, Congress implicitly granted courts the ability to exercise the full range of equitable power over a violator of the Act.[38]

In 1982, the Ninth Circuit heard a case which presented the opportunity to develop § 13(b)'s implied legal remedy jurisprudence.[39] In *F.T.C. v. H. N. Singer, Inc.*, the FTC brought suit against the defendants for violating the franchise rule of the Act.[40] Pursuant to § 13(b), the FTC sought a preliminary injunction against the defendants to prevent further wrongdoing, as well as a freezing of the defendants' assets to preserve the possibility of restitution and rescission damages.[41] The FTC argued that because § 13(b) provides courts the authority to

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[34] William N. Eskridge Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 281–82 (1988); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 16–17 (2014).

[35] F.T.C. v. Credit Bureau Ctr., 937 F.3d 764, 776–80 (7th Cir. 2019) (showcasing how other courts read implied remedies into § 13(b) after the Supreme Court decisions in Porter and Mitchell); *see* Brief for Chamber of Commerce, *supra* note 5, at 6–9 (highlighting the damage awards the FTC is receiving from courts under § 13(b)).

[36] *Credit Bureau Ctr.*, 937 F.3d at 776–80.

[37] F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1112–14 (9th Cir. 1982); F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984); F.T.C. v. Elders Grain Inc., 868 F.2d 901, 907 (7th Cir. 1989).

[38] *Singer*, 668 F.2d at 1113; *U.S. Oil & Gas*, 748 F.2d at 1434; *Elders Grain*, 868 F.2d at 907.

[39] *Singer*, 668 F.2d at 1109.

[40] *Id.*

[41] *Id.* at 1109, 1112.

grant a preliminary or permanent injunction, then implicitly, absent any language limiting the remedies authorized by § 13(b), a court has the authority to provide any necessary ancillary relief.[42] The Ninth Circuit relied on the Supreme Court cases, *Porter* and *Mitchell,* in employing the rationale that when Congress authorizes courts to grant permanent injunctions, absent any limiting language or inescapable inference limiting the equitable power of the court, courts also have the authority to grant all ancillary forms of relief deemed necessary.[43] *Singer* marked the first instance that the implied legal remedy doctrine was applied to the Act, specifically § 13(b).[44]

The Eleventh Circuit also expanded the implied legal remedies available under § 13(b).[45] In *F.T.C. v. United States Oil & Gas Corp.*, the defendants alleged that the FTC had not followed statutory protocol, which required the FTC to file an administrative complaint within twenty days after issuing a preliminary injunction or dissolve the injunction, as explicitly provided in § 13(b). They also sought to have the preliminary injunction vacated.[46] Here, the district court issued a preliminary injunction and froze the defendants' assets to preserve the possibility of permanent monetary relief.[47] Twenty days elapsed and the FTC had still not filed an administrative complaint or dissolved the preliminary injunction.[48] Relying on *Porter* and *Singer*, the Eleventh Circuit held § 13(b) not only authorizes the court to grant preliminary injunctions, but, as an implied remedy, also authorizes the court to freeze the assets of a defendant during the pendency of an action for permanent relief.[49]

The Seventh Circuit built upon the implied legal remedies § 13(b) foundation by deeming rescission damages permissible under § 13(b) as an ancillary remedy. [50] In *F.T.C. v. Elders Grain Inc.*, the Seventh Circuit discussed the Act, acknowledging that § 13(b) authorizes a court to grant a preliminary injunction, so long as "upon a proper showing that, weighing the equities and considering the Commission's likelihood of success, such action would be in the public interest."[51] Next, the Seventh Circuit determined that the authority to issue a preliminary or permanent injunction implies the power to award any

[42] *Id.* at 1110–12.

[43] *Id.* at 1112.

[44] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 776–80 (7th Cir. 2019) (laying out the history of courts reading implied legal remedies into § 13(b)).

[45] F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984).

[46] *Id.* at 1433.

[47] *Id.* at 1432.

[48] *Id.* at 1433.

[49] *Id.* at 1434.

[50] F.T.C. v. Elders Grain, Inc., 868 F.2d 901, 907 (7th Cir. 1989).

[51] *Id.* at 902 (quoting 15 U.S.C. § 53 (1973) (internal quotations omitted)).

other relief that is necessary absent any limiting statutory language.[52] Interestingly, the defendants agreed with the Seventh Circuit's rationale on this point and conceded that the ability to award those injunctions implicitly allows the court to fashion any other ancillary remedies it determines necessary.[53] Notably, the *Elders Grain* case was concerned with awarding rescission damages—a type of remedy which had never been awarded under § 13(b) before.[54] Thus, *Elders Grain* marks a significant development in § 13(b) precedent, being the first time a court granted rescission damages against the defendant under this section of the Act.[55]

C. How the Seventh Circuit Created the Prevailing Statutory Interpretation of § 13(b)

The Seventh Circuit's holding in *F.T.C. v. Amy Travel Service Inc.* created the prevailing statutory interpretation of § 13(b), authorizing all forms of equitable relief deemed necessary by the court, not limited to just asset freezes and rescission damages.[56] The defendants in *Amy Travel* appealed a lower court decision awarding the FTC restitution and rescission damages, arguing that the district court had no authority to grant such remedies because the text of § 13(b) only gives the court authority to grant a preliminary or permanent injunction.[57]

The Seventh Circuit relied on *Singer* and its own precedent from *Elders Grain*, which both provided that, absent any limiting language, § 13(b)'s preliminary and permanent injunction provisions authorize a court to award any ancillary relief deemed necessary, including asset freezes and rescission damages.[58] The Seventh Circuit held that the implicit authorization to grant any ancillary relief deemed necessary, under the preliminary and permanent injunction provisions of § 13(b), allowed a court to also grant restitution damages, in addition to asset freezes and rescission damages.[59] In its reasoning, the Seventh Circuit stated, "[r]escission and restitution are proper forms of ancillary relief. All other circuits that have dealt with this issue have found that § 13(b)

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[52] *Id.* at 907.
[53] *Id.*
[54] *Id.*; *see* F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 778 (7th Cir. 2019) (discussing the court's own decision in Elders Grain).
[55] *Elders Grain*, 868 F.2d at 907; *Credit Bureau Ctr.*, 937 F.3d at 778.
[56] F.T.C. v. Amy Travel Serv., Inc., 875 F.2d 564, 571–72 (7th Cir. 1989).
[57] *Id.* at 571.
[58] *Id.*
[59] *Id.*

grants the authority to issue other necessary equitable relief."[60] Thus, *Amy Travel* is important because it represented the Seventh Circuit creating the current prevailing statutory interpretation of § 13(b) and it was the first time a court read an implied legal remedy of restitution damages into § 13(b).[61]

The Seventh Circuit's holding in *Amy Travel* represented the first, but not the last time a court read an implied remedy of restitution damages into § 13(b) of the Act.[62] Thereafter, many circuits followed suit.[63] In fact, the Seventh Circuit would later state that the approach it used in *Amy Travel* became the standard.[64] The Eighth and Eleventh Circuits would go on to hold that § 13(b) authorized the court to utilize "full equitable powers," which included restitution damages, in addition to asset freezes and rescission damages, in fashioning a remedy against violators of the Act.[65] The Second, Fourth, Ninth, and Tenth Circuits also cited to *Amy Travel* in opinions that held that § 13(b), through its preliminary and permanent injunction provisions, absent any limiting language, authorized courts to award restitution damages against defendants as an implied remedy.[66] However, the Fourth Circuit did note that there were arguments of structure, purpose, and history that could weigh against the conclusion that courts have the authority to award restitution damages against violators of the Act.[67] Yet, the Fourth Circuit remained unpersuaded by those arguments due to the Supreme Court's holdings in *Porter* and *Mitchell*.[68]

Courts and judges have gone further than the Fourth Circuit in making their concerns about the statutory interpretation of § 13(b) known.[69] In *F.T.C. v. Shire ViroPharma Inc.*, the Third Circuit

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[60] *Id.*

[61] *Id.* at 572; F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 778–80 (7th Cir. 2019) (detailing *Amy Travel*'s impact on the jurisprudence of courts reading implied legal remedies into § 13(b)).

[62] *Credit Bureau Ctr.,* 937 F.3d at 777–80 (detailing the history of an implied legal remedies provision being read into § 13(b) of the Act).

[63] *Id.* at 779; F.T.C. v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); F.T.C. v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991); F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); F.T.C. v. Pantron I. Corp., 33 F.3d 1088, 1102 (9th Cir. 1994); F.T.C. v. Ross, 743 F.3d 886, 891–93 (4th Cir. 2014).

[64] *Credit Bureau Ctr.*, 937 F.3d at 779.

[65] *Sec. Rare Coin & Bullion Corp.*, 931 F.2d at 1314–15; *Gem Merch. Corp.*, 87 F.3d at 470.

[66] *Bronson Partners*, 654 F.3d at 365; *Ross*, 743 F.3d at 891; *Pantron I. Corp.*, 33 F.3d at 1102; *Freecom Commc'ns*, 401 F.3d at 1203.

[67] *Ross*, 743 F.3d at 891.

[68] *Id.*

[69] F.T.C. v. Shire ViroPharma, Inc., 917 F.3d 147, 155 (3d Cir. 2019) (declining to extend the reach of district courts to award monetary damages under § 13(b)).

analyzed § 13(b) and declined to award monetary damages against the defendant, citing its own precedent in *Murphy v. Millennium Radio Group LLC*: "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[70] Furthermore, in *F.T.C. v. AMG Capital Mgmt.*, Justice O'Scannlain, in his concurrence, disagreed with the prevailing statutory interpretation of § 13(b), and expressed his view that § 13(b) has escaped critical statutory interpretation and that the current interpretation of § 13(b) will be untenable in the future.[71]

D. How the FTC Originally Interpreted its Power Under § 13(b) of the Act

Despite the willingness of courts to interpret § 13(b) as authorizing awards of any ancillary remedies deemed necessary, the FTC stated in 2003 that it would only pursue disgorgement or restitution damages in exceptional cases that illustrated a clear violation of the law where the violators had proper notice of their wrongful conduct.[72] The FTC followed this policy until 2012 when the agency withdrew its 2003 policy statement, claiming it had taken a restrictive view of its own discretion to seek restitution and disgorgement damages.[73]

Furthermore, the FTC expanded its powers by stating that it could seek monetary damage awards irrespective of whether the alleged misconduct was a common business practice or not, meaning the FTC did not need to provide notice of the wrongful conduct to a business before pursuing monetary damages in court.[74] Due to the FTC's policy change and the expansion of its powers under § 13(b), the amount of money courts were awarding the FTC increased.[75] In 2017, the FTC obtained $5.29 billion from defendants in restitution and disgorgement damages under § 13(b), far larger than the $223.7 million the FTC

[70] *Id.* at 156 (quoting Murphy v. Millennium Radio Grp., LLC, 650 F.3d 295, 302 (3d Cir. 2011)).

[71] F.T.C. v. AMG Capital Mgmt., LLC, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring) (stating that the current statutory interpretation of § 13(b) is no longer tenable and providing the reasons for that belief).

[72] Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 FED. REG. 45, 821 (Aug. 4, 2003).

[73] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 FED REG. 47, 070 (Aug. 7, 2012).

[74] *Id.* at 47,071.; Brief for Chamber of Commerce, *supra*, note 5, at 6.

[75] Brief for Chamber of Commerce, *supra* note 5, at 7–8 (detailing the increase in monetary judgments against businesses after the FTC's policy shift on § 13(b) remedies).

obtained in 2011 utilizing § 13(b), a year before the FTC changed its policy on seeking disgorgement and restitution damages under § 13(b).[76] Moreover, the FTC's new policy led to a twenty-three times increase in the average restitution and disgorgement damage awarded by courts under § 13(b) since 2012.[77] This policy change and increase in damage award amounts have led to a precarious feeling amongst businesses for fear of being on the wrong end of a large restitution or disgorgement damage award that could put them out of business.[78]

This awarding of excessive damages that can kill businesses is the reason the prevailing judicial interpretation of § 13(b) must change and accurately reflect the text, structure, and purpose of § 13(b).

III. DISCUSSION

This comment has proceeded by laying out the statutory background of courts reading an implied legal remedy into § 13(b)'s preliminary and permanent injunction provisions. Next, this comment highlights a recent case in which the Seventh Circuit changed its interpretation of § 13(b), argued that other circuit courts should follow its approach illustrating how the prevailing statutory interpretation of § 13(b) is incorrect, and discussed the lack of necessary procedural safeguards for businesses in § 13. Furthermore, this comment argues that the Supreme Court should, now that it has granted *writ of certiorari* in the case of *AMG Capital Mgmt. LLC v. F.T.C.,* provide clarity on the § 13(b) damages circuit split, holding that § 13(b) does not provide for implied damages remedies.

A. How the Seventh Circuit Revisited and Revised its own Statutory Interpretation of § 13(b)

The Seventh Circuit would again play a role in determining whether § 13(b), through its authorization of preliminary and permanent injunctions, absent limiting language, authorizes courts to award any ancillary relief deemed necessary. Through its holding in *F.T.C. v. Credit Bureau Center, LLC*, the Seventh Circuit reversed its own precedent from *Amy Travel*, determining that a court can only award the remedies expressly provided by the text of § 13(b): preliminary and permanent injunctions.[79] The Seventh Circuit embarked on a more thorough textual and structural interpretation of § 13(b) than it had in *Amy Travel*, finding that § 13(b) does not authorize district courts to

[76] *Id.*
[77] *Id.*
[78] *See id.* at 8.
[79] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 786 (7th Cir. 2019).

award restitution damages or other ancillary remedies not expressly provided by § 13(b) and that it would contradict the text of § 13(b) and the structure of the Act to hold otherwise.[80] This holding resulted in a circuit split that is still present, concerning whether courts are authorized by § 13(b) to award any ancillary relief deemed necessary as an implied legal remedy despite no explicit language in § 13(b) authorizing courts to do so.[81]

The Seventh Circuit relied extensively on the Supreme Court case *Meghrig v. KFC Western, Inc.*, in its analysis in *Credit Bureau*.[82] In *Meghrig*, the Supreme Court decided the issue of whether a plaintiff could recover waste clean-up costs as restitution damages under the Resource Conservation and Recovery Act of 1976.[83] The Resource Conservation and Recovery Act of 1976 provided that district courts could use injunctions to restrain any person who contributes to handling the waste and order such person "to take such other action as may be necessary, or both."[84] The Supreme Court declined to find an implied remedy of restitution damages in the Resource Conservation and Recovery Act because it expressly authorized the issuance of mandatory and prohibitory injunctions, and such remedies do not contemplate the awarding of damages as equitable restitution.[85] In addition, the Supreme Court stated in its opinion that, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[86]

Furthermore, the Seventh Circuit in *Credit Bureau* thoroughly examined the text and structure of § 13(b) and concluded that its previous interpretation of the statute was incorrect as § 13(b) does not explicitly authorize courts to grant monetary damage awards.[87] Lastly, the Seventh Circuit discussed the lack of procedural safeguards provided to businesses in § 13 as further reason for finding that § 13(b) does not authorize courts to award restitution damages.[88] The Seventh Circuit reasoned that other sections of the Act explicitly state that a court can award restitution damages against violators and include

[80] *Id.* at 775.
[81] *Id.* at 795–96 (Wood, C.J., dissenting).
[82] *Id.* at 780–82.
[83] Meghrig v. KFC W., Inc., 516 U.S. 479, 481–82 (1996).
[84] *Id.* at 484.
[85] *Id.*
[86] *Id.* at 488 (quoting Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Assn., 453 U.S. 1, 14–15 (1981)).
[87] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 772–75 (7th Cir. 2019).
[88] *Id.* at 783–86.

procedural safeguards for businesses, such as notice and statutes of limitations, that must be adhered to before the FTC can initiate lawsuits seeking restitution damages.[89] In analyzing the new Supreme Court view on implied legal remedies from *Meghrig*, the text and structure of § 13(b), and the lack of procedural safeguards in § 13, the Seventh Circuit determined it was finally time to overturn its own precedent and find that § 13(b) does not authorize district courts to award implied remedies against violators of the Act, like restitution and rescission damages.[90]

The Seventh Circuit's recent opinion in *Credit Bureau* should serve as guidance to other circuit courts around the country. Many circuit courts still adhere to the belief that § 13(b) authorizes implied legal remedies through the absence of any limiting language.[91] Those courts must revisit their interpretations of § 13(b) and overturn their own precedents in order to be in line with the Seventh Circuit's correct view on the statute. In fact, recent Supreme Court holdings—that the Court is reluctant to tamper with the enforcement scheme of a statute and that expressly providing for only one method of enforcement indicates Congress's intent to preclude other methods of enforcement— would require nothing less.[92] Without the clear, express intent of Congress in the statute to provide for monetary damages, the Supreme Court was unwilling to imply such damages into its reading of the statute at issue in *Meghrig*.[93] This more limited reading of implied damage remedies into statutes has been closely adhered to by the Supreme Court since the *Meghrig* decision.[94] Thus, the Supreme Court in deciding the issue of whether § 13(b) authorizes district courts to award restitution damages, would likely conclude that it does not, keeping in line with its recent jurisprudence on implied legal remedies.

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[89] *Id.*; 15 U.S.C. § 45(l), § 57b (2018).

[90] *Credit Bureau Ctr.*, 937 F.3d at 786.

[91] *See, e.g.*, F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011).

[92] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) ("We have therefore been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text.") (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 328 (2015) ("As we have elsewhere explained, the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'") (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998) ("To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose.").

[93] Meghrig v. KFC W., Inc., 516 U.S. 479, 487–88 (1996).

[94] *Great-West Life & Annuity*, 534 U.S. at 209; *Armstrong*, 575 U.S. at 328; *Gesber*, 524 U.S. at 284.

B. How Courts Should Engage in Statutory Interpretation to Reach the Correct Result that § 13(b) Does Not Authorize Courts to Award Restitution Damages as an Implied Legal Remedy

When attempting to determine the purpose and intent of a statute, courts must engage in the process of statutory interpretation.[95] The process of statutory interpretation includes, but is not limited to, looking to the text of the statute, the structure of the statute, canons of construction, and the purpose of the statute.[96] In particular, circuit courts have misinterpreted the meaning of § 13(b) by ignoring its text, its structure, its relation to the Act as a whole (a canon of construction typically utilized by courts to glean statutory intent and purpose), and its purpose.

1. How a Clear, Textual Interpretation of § 13(b) Results in the Conclusion that § 13(b) Does Not Authorize the Awarding of Restitution Damages

A textual interpretation of a statute involves looking directly at the text of the statute and using the plain meaning of the words to determine the statute's purpose.[97] The text of § 13(b) reads as follows:

> (b) Temporary restraining orders; preliminary injunctions.
> Whenever the Commission has reason to believe—. . .
> (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—
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> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's

[95] CONG. RSCH. SRV., R97-589 STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS ii (2014).
[96] *Id.* at 3–5.
[97] *See id.*

> 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: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.[98]

The text of § 13(b) clearly authorizes district courts to award preliminary injunctions against potential violators of the Act, as well as permanent injunctions.[99] However, nowhere in § 13(b) does it state that a district court is authorized to award monetary damages or other forms of equitable relief, outside of preliminary and permanent injunctions, against defendants.[100] A court should abide by the text and enforce a statute by utilizing the remedies the statute expressly provides, not by fashioning a remedy it may think is necessary. Yet, courts simply ignored the text of § 13(b) and found an implied legal remedy of monetary damages in the injunctive provisions of § 13(b) because there is no language stating that courts cannot award an implied remedy.

Such a finding is frightening. Does this mean Congress must always include limiting language in every statute it passes? Does this mean that a court can fashion whatever remedy it desires in any statute that does not possess limiting language? The potential consequences of permitting courts to read implied remedies into a statute that are not provided by the statute are too great to allow such a practice to continue. The power to create statutes and provide for the enforcement of the statutes, including remedies, properly rests with Congress, not the courts.[101] Yet, in interpreting § 13(b) to include implied remedies not explicitly provided by the text, courts are subverting Congress's legislative power, a power delegated only to Congress by the Constitution.[102]

The courts espousing the view that as there is no limiting language in § 13(b) a court can authorize any ancillary remedy it deems

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[98] 15 U.S.C. § 53(b) (emphasis added).
[99] *Id.*
[100] *See id.*
[101] U.S. CONST. art. I, §§ 1, 8.
[102] *Id.*

necessary, point to the Supreme Court's holdings in *Porter* and *Mitchell* in support.[103] However, those courts fail to mention the Supreme Court's clarification of its holding in *Porter*, that an implied legal remedy should be consistent with the language, the policy, and the legislative background of the statute.[104] Here, the implied legal remedy of monetary damages is not consistent with the language of § 13(b), which only provides the remedies of preliminary and permanent injunctions. In fact, the Supreme Court in *Meghrig*, a more recent case, refused to read an implied legal remedy of restitution damages as ancillary relief in addition to the injunctive relief expressly provided by the statute at issue in the case.[105] The Court reasoned that if a statute expressly provides a remedy, courts should be weary of implying any other remedies into the statute.[106] Thus, circuit courts should adhere to the Court's holding in *Meghrig* and conclude that § 13(b) does not authorize a court to grant ancillary remedies outside those it expressly provides.

In addition, the plain meaning of injunction is "a court order commanding or preventing an action."[107] Within the definition of the injunction, words such as damages, monetary relief, restitution, and rescission are absent.[108] Thus, reading an implied monetary remedy into an injunction is contrary to the plain meaning of the word and the courts that have done so with § 13(b) have simply ignored the plain meaning of an injunction.

However, when statutes are ambiguous a court has greater authority to fashion a remedy that suits its own policy preference, but the language of § 13(b) is not ambiguous. Ambiguity is defined as "doubtfulness or uncertainty of meaning or intention."[109] Section 13(b) explicitly states the scope of who it applies to, what it prohibits, what remedies are authorized, and the procedure necessary to apply those remedies.[110] Words such as damages, monetary relief, restitution, and rescission are, yet again, nowhere to be found within the text of § 13(b).[111] Therefore, § 13(b) is not equivocal or ambivalent in its

[103] F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1112–14 (9th Cir. 1982); F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984).

[104] Porter v. Warner Holding Co., 328 U.S. 395, 399–401 (1946) (discussing how the Court's holding was in accordance with language, policy, and legislative background of the statute).

[105] Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996).

[106] *Id.* at 487–88.

[107] *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[108] *See id.*

[109] *Ambiguity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[110] 15 U.S.C. § 53(b) (2018).

[111] *See id.*

meaning, and ultimately, not ambiguous. Hence, courts should not treat it as such by fashioning implied remedies that are not provided by its text. Thus, the prevailing statutory interpretation of § 13(b), which allows implied legal remedies to be read into the statute, is textually incorrect.

The circuit courts of this country have not engaged in a thorough analysis of the text of § 13(b) and have instead fashioned a legal remedy, contrary to the text of § 13(b), which they deem just. In light of the Supreme Court's holding in *Meghrig* that (1) *Porter* and *Mitchell* are not a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and context and (2) injunctions do not contemplate equitable restitution, circuit courts must correct the prevailing statutory interpretation of § 13(b).[112]

2. *How the Structure of the Act Demonstrates that Restitution Damage Awards are not Authorized by § 13(b)*

After undergoing a structural analysis of both § 13(b) and the Act, it is clear that § 13(b) does not authorize district courts to award monetary relief, specifically restitution damages, as an ancillary remedy to preliminary or permanent injunctions. A structural argument looks to the broader purpose and meaning of a statute and asks how the statute is to be interpreted to achieve that purpose or meaning.[113] The clear structural argument here against § 13(b) authorizing ancillary remedies is that two separate provisions in the Act provide authorization for courts to award monetary damages, including restitution damages. Thus, the intent of Congress was not to provide such a remedy under § 13(b), having already provided those remedies elsewhere in the Act.[114] For example, § 5(l) of the Act authorizes district courts to grant equitable relief as they deem appropriate.[115]

Also, § 19(b) of the Act authorizes courts to provide monetary remedies against a violating party that does not adhere to an FTC-issued cease and desist order.[116] In part the statute states, "[s]uch relief may include . . . the payment of damages."[117] The express mention by Congress of "equitable remedies" in § 5(l) and "payment of damages" in § 19(b) demonstrates that it sought to provide for equitable remedies and monetary damages under those sections and only under those

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[112] Meghrig v. KFC W., Inc., 516 U.S. 479, 488 (1996).

[113] MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 35 (Carolina Academic Press, 4th ed. 2018).

[114] 15 U.S.C. §§ 45(l), 57b (2018).

[115] § 45(l).

[116] § 57b(b).

[117] *Id.*

sections since they are explicitly provided by the text of those sections. By including the express authorization to award monetary remedies in § 5(l) and § 19(b), Congress demonstrated its intentionality as to where it wanted to provide the authorization for courts to award monetary relief. If Congress wanted to do the same under § 13(b) it would have done so, as it did with those other two sections.[118] Thus, by expressly providing the authorization to award monetary damages to courts in other sections of the Act and not providing them in § 13(b), Congress intended to restrict the remedies a court is authorized to grant under § 13(b) to those it explicitly provides: preliminary and permanent injunctions. This reasoning would align with the Supreme Court's recent opinion in *Armstrong v. Exceptional Child Center, Inc.*, holding that by expressly providing methods of enforcement under a statute, Congress intended to preclude other methods of enforcement.[119]

Furthermore, by providing injunctive relief remedies under § 13(b) and equitable remedies, like damages, under § 5(l) and § 19(b), Congress made its intent known.[120] Injunctions are forward facing remedies; they are designed to stop conduct before it happens or as it is happening.[121] However, damages are remedies to repair the harm after the harmful conduct occurs, they are backward facing remedies.[122] In *Meghrig*, the Supreme Court implied that by providing injunctions as a remedy, Congress's intent is to ameliorate present or obviate future harms, not compensate past harms.[123] Congress demonstrated its intent with respect to the purpose of § 13(b) by making preliminary and permanent injunctions the only remedies explicitly provided by § 13(b).[124] If Congress had wanted to include backward facing damage remedies in § 13(b) it would have done so, as it explicitly did in § 5(l) and § 19(b) of the Act.[125] By not including backwards facing remedies but rather authorizing forward facing injunctive relief, it is clear that

[118] *Id.*; § 45(l).

[119] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 328 (2015) (citing Alexander v. Sandoval, 532 U.S. 275, 290 (2001)).

[120] *Compare* 15 U.S.C. § 53(b) (2018) (providing preliminary and permanent injunctions as explicit remedies a court is authorized to grant under the statute), *with* § 45(l) (authorizing courts to award other equitable forms of relief), *and* § 57b(b) (authorizing courts to award payment of damages against violators of the Act).

[121] *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996).

[122] *Id.* at 485–86.

[123] *Id.* at 480.

[124] § 53(b).

[125] *Compare id.* (providing no explicit text that a court is authorized to award other ancillary remedies it deems necessary), *with* § 45(l) (authorizing a court to award other equitable forms of relief), *and* § 57b(b) (allowing a court to award payment of damages as a remedy under the section).

Congress wanted § 13(b) to be used only for the purpose of preventing future violations or stopping ongoing violations of the Act, not as a provision providing for monetary damage relief.

Therefore, the prevailing interpretation by circuit courts, that § 13(b) provides for monetary damages and other forms of equitable relief as implied remedies, is structurally incorrect. If Congress had intended for a court to be able to grant monetary damage awards, like restitution damages, under § 13(b) it would have stated its intent to do so in the text of § 13(b), as it did with § 5(l) and § 19(b).[126] Utilizing the textual argument discussed earlier in conjunction with this structural argument allows one to glean Congress's intent with regards to § 13(b), which was simply to provide the injunctive remedies expressly stated in § 13(b). To ignore the textual and structural analysis indicating the lack of Congressional intent to provide for implied monetary damages under § 13(b) is the type of judicial lawmaking that the separation of the powers of government into three branches was designed to prevent. Courts are interpreting the statute inconsistently with the statute's text, as well the structure of the Act as a whole.

3. *Applying the* Expresio Unius est Exclusio Alterius *Canon of Construction*

Statutory interpretation can be a difficult process and in order to glean the meaning of a statute, courts often have to engage with canons of construction.[127] Canons of construction are judge-made rules providing legislatures with knowledge about how courts will interpret the statute.[128] Many canons rely on the text of the statute and thus are textual interpretation-based rules.[129] They are often used to help judges decide difficult legal cases utilizing recognized legal principles without having to resort to instituting a judge's own policy preferences.[130]

When examining § 13(b) using a popular canon of construction, *expresio unius est exclusio alterius*, the majority interpretation of § 13(b) is clearly incorrect. *Expresio unius est exclusio alterius* is a Latin phrase which translates to "the express mention of one thing means the exclusion of another not expressly mentioned."[131] When applying this

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[126] *Compare* § 53(b) (lacking any explicit text authorizing courts to issue remedies other than preliminary and permanent injunctions), *with* § 45(l) (allowing courts to award other equitable forms of relief), *and* § 57b(b) (authorizing courts to award payment of damages against violators of the Act).

[127] *See* Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 917 (2001).

[128] *Id.* at 918.

[129] *Id.*

[130] *Id.*

[131] State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000).

canon of construction to § 13(b), the canon plainly demonstrates that § 13(b) does not authorize district courts to award monetary relief, specifically restitution damages, as implied remedies. The statute explicitly provides preliminary and permanent injunctions as the type of relief a district court is authorized to grant against a violator of the Act under § 13(b).[132]

Nowhere are equitable remedies such as damages, restitution, or rescission mentioned.[133] Therefore, according to the canon, if Congress included the injunctive remedies in § 13(b) and did not provide authorization for other equitable remedies, then Congress intended only to authorize district courts to issue the injunctive remedies provided by § 13(b). In fact, the Supreme Court's reasoning in *Meghrig*, that courts should be weary of implying any other remedies into the statute if a statute expressly provides a remedy, aligns with this canon of construction.[134] Thus, the express mention of preliminary and permanent injunctions as the remedies a court is authorized to grant under § 13(b), precludes a court from providing any other remedies under § 13(b).

However, there are doubts about the use of canons of construction in statutory interpretation.[135] A common critique is that for every canon of construction that can be used to bolster one interpretation of a statute, there is yet another canon that can be used to counter the bolstering canon.[136] Yet, when utilizing this canon, *expresio unius est exclusio alterius,* in conjunction with the textual and structural arguments already discussed in this comment, it is apparent that the prevailing interpretation of § 13(b) is incorrect.

C. How the Purpose of § 13(b), When Enacted in 1973, Demonstrates That § 13(b) was not Meant to Provide any Implied Legal Remedies in Addition to Preliminary and Permanent Injunctions

Congress expressly stated in the 1973 amendment to the Act that introduced § 13(b) that the purpose of the Amendment was to remove

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[132] 15 U.S.C. § 53(b) (2018).

[133] *See id.*

[134] Meghrig v. KFC W., Inc., 516 U.S. 479, 487–88 (1996).

[135] Janet Hetherwick Pumphrey, *Reading Law: The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner*, 98 MASS. L. REV. 13, 14 (2016) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (discussing Karl Llewellyn's critique of canons of construction).

[136] *Id.*

unnecessary delays in FTC investigations.[137] Congress introduced the amendment in order "to insure prompt enforcement of the laws the Commission administers by granting statutory authority to directly enforce subpoenas issued by the Commission and to seek preliminary injunctive relief to avoid unfair competitive practices."[138] Noticeably absent is any reference to authorizing restitution damages. The amendment, when introducing § 13(b), fails to make any reference to monetary damages, restitution damages, or equitable relief; the amendment only mentions preliminary and permanent injunctions.[139]

The absence of such language demonstrates that Congress did not intend § 13(b) to authorize courts to grant ancillary remedies and intended that it only be used to quickly stop conduct in violation of the Act. The absence of ancillary remedies such as restitution or rescission damages from the stated purpose of the Act shows that Congress did not intend for those remedies to be provided by § 13(b). In fact, as stated above, damages are backwards facing remedies; thus, they are utilized to punish past conduct, not to stop current conduct or prevent future conduct, which court-ordered injunctions can do.[140] Therefore, the awarding of monetary damages as an implied legal remedy under § 13(b) is contrary to the Congressional purpose of § 13(b).

D. How the Lack of Initial Procedural Safeguards in § 13, Found in Other Provisions of the Act, Harms Businesses and Indicates the Lack of Congressional Intent to Provide the Authorization for Monetary Damage Awards to be Granted by Courts under § 13

Throughout the Act, procedural safeguards are in place to prevent violators from being subject to arbitrary and excessive damage awards.[141] Yet, § 13 lacks any of the procedural safeguards found in other provisions of the Act that explicitly authorize a district court to grant monetary relief if necessary.[142] In § 5(l) and § 19(b), the Act authorizes district courts to award restitution damages; however, those sections provide procedural safeguards such as notice requirements and

[137] ACT OF NOV. 16, 1973, PUB. L. NO. 93-153, § 408, 87 STAT. 576, 592 (1973) (amending the Act by adding § 13(b) and detailing the purpose for the addition of § 13(b) (codified as 15 U.S.C. § 53 (1973)).

[138] § 408(b).

[139] *Id.*

[140] *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 485–86 (1996); *see also Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[141] 15 U.S.C. §§ 45(a)–(n), 57b(b)–(e) (1914).

[142] *Compare id.* § 53 (lacking any notice or statute of limitations protections), *with* § 45(a)–(n) (providing notice protections through a cease-and-desist order process), *and* § 57b(d) (providing a statute of limitations provision).

statutes of limitations provisions in order to protect defendants from arbitrary and excessive punishment.[143] Section 5 of the Act provides that the FTC must first seek a cease and desist order against a violator's conduct and have a federal court approve that order, and that only a violation by the same actor, after the cease and desist order has been approved, would give rise to the ability of the FTC to seek restitution damages in court.[144] The cease and desist process allows a business to be put on notice that its conduct violates the Act and that it must immediately cease its violating conduct or face further penalties.

Furthermore, § 19(d) provides that no action may be brought by the FTC more than three years after the rule violation occurs.[145] These two procedural safeguards protect businesses from being arbitrarily subjected to excessive damage awards by requiring that a business be notified it is in violation of the Act, have a chance to cure its violation, and by limiting the amount of time that the FTC has to bring suit.[146]

Neither of these protections is found in § 13 which indicates Congress's intent that if the FTC wants to seek restitution damages, it must do so under the sections of the Act that provide businesses with substantive protections, such as § 5 and § 19.[147] In fact, a lack of protections available to businesses in § 13 may be the reason that the FTC has chosen to prosecute violators using § 13, instead of other sections of the Act.[148] The lack of a cease and desist process providing notice to a violating business means that any business could be subjected to a large damage award without ever knowing that its conduct was in violation of the Act. Thus, a business would never have the opportunity to cure its wrongful conduct before being subjected to monetary damage judgments under § 13. When damage awards can be as high as a billion dollars, the lack of protections available to businesses before the FTC brings suit in federal court is concerning and frightening.[149]

Moreover, the lack of a statute of limitations provision in § 13 means businesses could be forced to pay damage awards potentially decades

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[143] § 45 (a)–(n); § 57b(d).

[144] § 45(b).

[145] § 57b(d).

[146] *See id.*; § 45 (a)–(n).

[147] *Compare* § 45(a)–(n) (outlining the necessary procedure for the entire cease and desist order process), *and* § 57b(d) (providing a statute of limitations provision), *with* § 53 (lacking a cease-and-desist order process and a statute of limitations provision).

[148] § 53.

[149] F.T.C. v. AMG Capital Mgmt., LLC, 910 F.3d 417, 422 (9th Cir. 2018) (detailing how the defendant was fined $1.26 billion under § 13(b) for violating the Act).

after the alleged violation. In *Meghrig*, the Supreme Court reasoned that if Congress wanted the Resource Conservation and Recovery Act to provide the authorization to courts to award restitution damages, the absence of a statute of limitations provision would be striking.[150] Therefore, the Supreme Court would likely find the lack of a statute of limitations provision in § 13 indicates Congress's intent to only provide injunctive relief under the section.

The first form of protection a business has from an arbitrary and excessive damage award under § 13 is provided by judges in court after it has been sued by the FTC. Yet, judges and courts have consistently misinterpreted § 13(b) and continued to allow businesses to be subjected to large damage awards contrary to the text, structure, and purpose of § 13(b).

So, does this judicial process really provide any protection at all to businesses? One cannot think Congress intended to subject businesses to large damage awards under § 13 when its purpose was simply to allow the FTC to quickly stop conduct violating the Act, not to pursue remedies for the harm that occurred as a result of the violation.[151] Congress surely meant for § 13(b) to allow the FTC to put a quick end to Act-violating conduct, then allow for the FTC to bring suit seeking damages for the harm done by the violation under separate sections of the Act that provide businesses with some protection, such as prior notice of alleged wrongful conduct, especially when the damage awards are so high that they could put affected businesses out of business.

E. How the Supreme Court can Provide Clarity on the § 13(b) Damages Circuit Split

After the Seventh Circuit's decision in *Credit Bureau*, reversing its own past interpretation of reading implied legal remedies into § 13(b), there has been a circuit split.[152] The Supreme Court will now seize the opportunity to resolve the circuit split concerning § 13(b) via the *AMG Capital Managemen*t case, to which it recently granted *certiorari*, setting oral arguments in the case for January 2021.[153]

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[150] Meghrig v. KFC W., Inc., 516 U.S. 479, 486 (1996) (stating that the absence of a statute of limitations provision would be striking if Congress had meant for the statute to function as a cost-recovery mechanism).

[151] ACT OF NOV. 16, 1973, PUB. L. NO. 93-153, § 408(b), 87 STAT. 576, 591 (1973) (detailing why § 13(b) was being added to the Act) (codified as 15 U.S.C. § 53 (1973)).

[152] F.T.C. v. Credit Bureau Ctr., LLC, 937 F.3d 764, 795 (7th Cir. 2019) (Wood, C.J., dissenting).

[153] AMG Capital Mgmt., LLC v. F.T.C., 910 F.3d 417, *cert granted*, 2020 WL 3865250 (U.S. July 9, 2020) (No. 19-508). The Supreme Court originally granted certiorari to the defendant in *AMG Capital Management* and the FTC in *Credit Bureau Center* consolidating both cases. However, on November 9, 2020, the Supreme Court

AMG Capital Management concerns a Ninth Circuit judgment that the defendant violated the Act in operating a high-interest, short-term payday loan scheme.[154] The district court found the defendant liable for violating the Act and entered a judgment under § 13(b), ordering the defendant to pay $1.26 billion in restitution damages.[155] The defendant appealed to the Ninth Circuit and argued that the district court had no power under § 13(b) to award restitution damages as an ancillary remedy because the text of § 13(b) only authorizes a court to grant preliminary or permanent injunctions.[156] However, the Ninth Circuit, in keeping with its precedent, found that § 13(b)'s preliminary and permanent injunction provisions, absent limiting language, authorized courts to grant any ancillary relief deemed necessary to accomplish justice, which includes restitution damages.[157]

The Supreme Court now has the opportunity to provide clarity and guidance on the issue of whether § 13(b), absent language limiting the remedies provided to only preliminary and permanent injunctions, empowers a court to grant any ancillary relief, including restitution damages, it deems necessary to accomplish justice. In providing this clarity and guidance, the Court should engage in the process of statutory interpretation and find that a textual and structural analysis would weigh in favor of overturning the majority interpretation of § 13(b).

Moreover, the Court should note the lack of protections for businesses in § 13 and determine that Congress did not intend for businesses to be unprotected and subjected to potentially billions of dollars of liability without notice and statute of limitations provisions. Furthermore, the Court should look to the purpose of §13(b) when it was enacted by Congress and find that awarding monetary damages as an implied legal remedy does not put a quick end to Act-violating conduct, but instead provides reparations for the harm committed by the violation, which is contrary to the stated purpose of § 13(b). The purpose of § 13(b) is to quickly stop conduct in violation of the Act,[158] which is done by court-ordered injunctions, not through the use of implied legal remedies of monetary damages.

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decided to deconsolidate the cases and revoke the grant of certiorari to the FTC in the *Credit Bureau Center* case. Oral arguments in the *AMG Capital Management.* case have been set for January 13, 2021.

[154] *AMG Capital Mgmt., LLC*, 910 F.3d at 421.

[155] *Id.* at 422.

[156] *Id.* at 426.

[157] *Id.*; F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994); F.T.C. v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016).

[158] *AMG Cap. Mgmt., LLC*, 910 F.3d. at 426.

In light of its own holding in *Meghrig*, the Court should similarly hold that "where Congress has provided elaborate enforcement provisions for remedying a violation of a federal statute . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies."[159] In fact, it is necessary for the Supreme Court to determine that courts cannot read implied legal remedies into § 13(b), as other government agencies have begun following in the FTC's footsteps by seeking equitable monetary relief under injunction provisions in statutes that do not contain limiting language.[160] Should the Court hold to the contrary, it could have frightening and expensive consequences for businesses, of any industry, all across the country.

IV. CONCLUSION

With the average damage award under § 13(b) having increased twenty-three times since 2012 and damage awards totaling as high as a billion dollars, the time for a change in the statutory interpretation of § 13(b) has arrived.[161] The prevailing interpretation of § 13(b) fails a textual and structural statutory interpretation analysis. Furthermore, § 13 lacks the necessary safeguards of statutes of limitations and cease and desist notice requirements that protect businesses from arbitrary and excessive damage awards. Now is the time for the Supreme Court to provide clarity on this circuit split, by holding in *AMG Capital Management* that, despite the absence of limiting language, § 13(b) only authorizes courts to award preliminary and permanent injunctions, not any ancillary form of relief a court deems necessary. Should the Supreme Court fail to reach such a holding, the consequences for many businesses around the United States could be ruinous.

[159] Meghrig v. KFC W., Inc., 516 U.S. 479, 488 (1996) (quoting Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 14–15 (1981)).

[160] Brief for Chamber of Commerce, *supra* note 5, at 11 (detailing how the Food and Drug Administration and Commodity Futures Trading Commission are receiving disgorgement damage awards from courts that are reading an implied remedy of restitution damages into the Food, Drug, and Cosmetic Act, and the Commodity Exchange Act); *see* U.S. v. Lane Labs-USA Inc., 427 F.3d 219, 234 (3d Cir. 2005); *see also* Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1345 (11th Cir. 2008).

[161] Brief for Chamber of Commerce, *supra*, note 5, at 7.