No. 23-3757

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff - Appellee, v. JAMES D. NOLAND, Jr., LINA NOLAND, SCOTT HARRIS, and THOMAS G. SACCA, Defendants - Appellants.	**No. 23-3757** D.C. No. 2:20-cv-00047-DWL U.S. District Court for Arizona, Phoenix **REPLY BRIEF**

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Advance Appendix: The Most Relevant Provisions of the Federal Trade Commission Act

For ease of reference in following this brief's analysis, under the controlling case of *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67 (2021), these are the most relevant provisions of the Federal Trade Commission Act:

Section	United States Code
§ 5	15 U.S.C. § 45
§ 13(b)	15 U.S.C. § 53(b)
§ 19	15 U.S.C. § 57b

Section 5 of the Federal Trade Commission Act
[codified as 15 U.S.C. § 45]

"Unfair Methods of Competition Unlawful; Prevention by Commission"

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of

competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall

appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set

aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph1 (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to

such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been

dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate," in case a mandate has been recalled

prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain

a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice

is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

Section 13(b) of the Federal Trade Commission Act
[codified as a subsection of 15 U.S.C. § 53]

"False Advertisements; Injunctions and Restraining Orders"
[Section 13(b) is in yellow highlight]

(a) Power of Commission; jurisdiction of courts

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 [**15 U.S.C. § 52**] of this title, and

(**2**) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 [**15 U.S.C. § 45**] of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 [**15 U.S.C. § 45**] of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28 [**28 U.S.C. § 1391**]. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit

under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

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 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. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28 [**28 U.S.C. § 1391**]. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Service of process; proof of service

Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications

Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

Section 19 of the Federal Trade Commission Act
[codified as 15 U.S.C. § 57b]

"Civil Actions for Violations of Rules and Cease and Desist Orders Respecting Unfair or Deceptive Acts or Practice"

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or

practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies 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.

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Legal Argument

1. The FTC has exceptionally limited power to seize assets, appoint receivers, demand disgorgement, and seek other sorts of equitable relief.

The FTC's Answering Brief rests, in large part, on a basic misunderstanding and misstatement of the highly restricted power that Congress granted to the FTC in the original and amended provisions of the Federal Trade Commission Act. Congress only granted strictly limited injunctive and sanction powers to the FTC.

Our constitutional form of government allows only a carefully circumscribed and narrow grant of power to federal agencies when, as here, a grant of such power infringes on the Seventh Amendment right to a jury trial. *Securities and Exchange Commission v. Jarkesy*, 144 S.Ct. 2117 (2024). As *Jarkesy* cautioned, Congress cannot "concentrate the roles of prosecutor, judge and jury in the hands of the Executive Branch." *Id.* at 2139. Thus, the FTC does not have the right to assume for itself more powers than those that Congress granted to it when seeking monetary or injunctive relief for past, present, or future violations of the FTC Act.

There are three key provisions of the FTC Act that the FTC purported to rely on to seize, freeze, and dissipate Defendants' assets, to seek disgorgement of money and assets, and to place assets into a costly receivership that accomplished nothing worthwhile, that gave no meaningful benefit to consumers, that destroyed Defendants' businesses—and that thoroughly violated the FTC Act. These are the three key provisions of the FTC Act:

Section 5: 15 U.S.C. § 45 "Unfair methods of competition unlawful; prevention by commission."

Section 13(b): 15 U.S.C. § 53(b) "False advertisements; injunctions and restraining orders."

Section 19: 15 U.S.C. § 57b "Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices"

For good reason, we took the unusual step of quoting those three provisions in the "Advance Appendix" that appears at the start of the opening brief.

We did that to emphasize at the start that those three provisions are intricate, interconnected, highly detailed, and powerfully protective of the rights of those that the FTC claims are violators of the FTC Act. There appears to be no other federal statutory scheme that provides such a high level of protection for claimed violators of the FTC Act. That high level of protection is a wary congressional counterweight to the massive powers that an unchecked FTC could use—and has used—against claimed violators. Indeed, this very case highlights the FTC's overreaching, callous, and deliberate abuse of its congressionally-limited powers.

In the FCT Act, Congress gave the FTC power to prevent unfair methods of competition, 15 U.S.C. § 45(a)(1), and to prevent unfair or deceptive acts or practices, 15 U.S.C. § 45(a)(2). The FTC Act lets the FTC exercise its enforcement authority primarily through complex, highly protective administrative proceedings, which are set out in § 5 of the FTC Act (codified as 15 U.S.C. § 45), and through

limited ancillary court actions.

Section 5 of the FTC Act describes the steps the FTC must normally take to exercise its authority and protect claimed violators. In our case, the FTC did not follow those steps. These are some of the most basic steps when a claimed violator receives an adverse administrative ruling, loses in the administrative adjudication process, and winds up with a final penalty:

First, if the FTC supposedly has "reason to believe" that a party "has been or is using any unfair method of competition or unfair or deceptive act or practice," it can file a complaint against the claimed violator. § 5(b) [15 U.S.C. § 45(b)].

Second, the FTC serves the complaint on the claimed violator and sets a date and place for a hearing before an Administrative Law Judge. § 5(b) [15 U.S.C. § 45(b)].

Third, the claimed violator has the right to appear and show cause why the FTC should not enter a cease and desist order against the claimed violator. § 5(b) [15 U.S.C. § 45(b)].

Fourth, the hearing testimony must be "reduced to writing and filed in the office of the FTC. § 5(b) [15 U.S.C. § 45(b)].

Fifth, if, after the hearing, the FTC is "of the opinion that the method of competition or the act or practice in question is prohibited," it must make a report in writing that states its findings as the facts. § 5(b) [15 U.S.C. § 45(b)].

Sixth, the FTC shall then issue and cause to be served on the claimed violator an order requiring the claimed violator to cease and desist from using that act or practice. § 5(b) [15 U.S.C. § 45(b)].

Seventh, within 60 days after that, the claimed violator may file a petition for review in the United States Court of Appeals within any circuit where the method of competition for the act or practice in question was used or where the claimed violator resides or carries on business. § 5(c) [15 U.S.C. § 45(c)].

Eighth, the FTC then files the record with the United States Court of Appeals. § 5(c) [15 U.S.C. § 45(c)].

Ninth, after the petition is filed, the United States Court of Appeals has jurisdiction of the proceeding and of the question determined in that proceeding and, once the record is filed, has the power to make and enter a decree affirming, modifying, or setting aside the FTC's order. § 5(c) [15 U.S.C. § 45(c)].

Tenth, the judgment and decree of the United States Court of Appeals are final, "except that the same shall be subject to review by the Supreme Court" by a petition for writ of certiorari. § 5(c) [15 U.S.C. § 45(c)].

Eleventh, if the claimed violator violates a final FTC order, the claimed violator is liable to pay a civil penalty. § 5(l) [15 U.S.C. § 45(l)].

Twelfth, "in a case of a violation through continuing failure to obey or neglect to obey a final order of the" FTC that was made final after going through

the above detailed § 5 process, federal district courts "are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the" FTC. § 5(l) [15 U.S.C. § 45(l)].

Here is, in part, where the FTC erred. It did not go through a single one of the detailed, mandatory § 5 administrative steps that Congress created to protect claimed violators.

Instead, the FTC leaped directly into the United States District Court for the District of Arizona and demanded that it order temporary, preliminary, and permanent injunctive relief, rescission and reformation of contracts, restitution, the refund of monies paid, disgorgement of supposedly ill-gotten monies, and other equitable relief, including an order for immediate access to all property and asserts, the turnover of all business record an asset freeze, and appointment of a receiver with massive, comprehensive powers to take over Defendants' businesses and assets—and pay itself and its helpers out of those assets. *See, e.g.*, Doc. 001, sealed Complaint; Doc. 007, sealed motion for TRO, asset freeze, appointment of temporary receiver; Doc. 035, amended Complaint.

On February 28, 2020, less than two months after the FTC filed its original sealed Complaint on January 8, 2020, the ball game was over. The fight would limp on for many costly months, but the FTC had carte blanche, took control over

everything Defendants owned, and mismanaged their assets for many months.

On February 28, 2020, confronted with the FTC's claim that it had the facts and the legal right to get such massive equitable relief, the trial court granted practically everything the FTC asked for, including a preliminary injunction, an asset freeze and seizure, and the appointment of a receiver. (Doc. 109). The receiver would then systematically spend, dissipate, and waste most of Defendants' assets, obtain handsome personal compensation for doing that, and run the Defendants' businesses into the ground.

The FTC claimed it had the right to do that under §§ 13(b) and 19 of the FTC Act. (*See*, *e.g.*, Doc. 035, ¶ 1). The FTC was wrong.

It is true that, in the 1970s, Congress authorized the FTC to seek a few additional judicial remedies beyond the highly restrictive remedies Congress had originally provided in § 5 [15 U.S.C. § 45]. In 1973, Congress added § 13(b) [15 U.S.C. § 53(b)], which let the FTC go directly to the district court (before the FTC issued any cease-and-desist order) to obtain a "temporary restraining order or a preliminary injunction" and "in proper cases" to obtain a court-ordered "permanent injunction." § 13(b) [15 U.S.C. § 53(b)].

In that same 1973 legislation, Congress also amended § 5(l) [15 U.S.C. § 45(l)] to authorize district courts to award civil penalties against respondents who violate final cease and desist orders, and to "grant mandatory injunctions and such

other and further equitable relief as they deem appropriate in the enforcement of such final orders of the" FTC.

Then, in 1975, Congress enacted § 19 [15 U.S.C. 57b(b)], which lets district courts grant "such relief as the court finds necessary to redress injury to consumers," including by the "refund of money or return of property." § 19 [15 U.S.C. § 57b(b)].

But Congress specified that the vast legal and equitable consumer redress that was potentially available under § 19 could be sought ***only*** against those who have "engage[d] in any unfair or deceptive act or practice . . . with respect to which the [FTC] has issued a final cease and desist order which is applicable to such person." §19 [15 U.S.C. § 57b(a)(2)].

Here, there was never any cease-and-desist administrative order. In our case, the FTC never went through the detailed administrative § 5 [15 U.S.C. § 45] process to obtain any cease-and-desist order. Therefore, the FTC had no right to assert to the district court that it had authority under § 5 [15 U.S.C. § 45] or under § 19 [15 U.S.C.§ 57b] to seek mandatory injunctions or other sorts of harsh equitable relief.

The problem in our case goes back to the 1970s, when the FTC started to use § 13(b) to get court orders providing for permanent injunctions and other equitable relief—and to obtain court-ordered monetary relief—without bothering to go

through the mandatory administrative proceedings that § 5 requires. *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67, 72-73 (2021). All along, the FTC's leadership ***knew*** that what the FTC was doing was wrong and was overreaching, but the FTC got away with that in one federal appellate court after another, until the Supreme Court called an end to that in *AMG*. *Id*. at 73.

In our case, the FTC misused § 13(b) to obtain massive equitable and monetary relief against the Defendants. In *AMG*, the Supreme Court concluded that, under the terms of § 5(l) and § 19, Congress had *solely* given the federal district courts "the authority to impose limited monetary penalties and to award monetary relief in cases where the [FTC] has issued cease and desist orders, *i.e.*, where the [FTC] has engaged in administrative proceedings" under § 5. *AMG*, 593 U.S. at 77.

Here, it is undeniable that the FTC absolutely never engaged in any cease-and-desist administrative proceedings under § 5 of the FTC Act. Despite that, the FTC knowingly misled the district court into granting the unlawfully broad injunctive relief and monetary penalties that it was requesting. The FTC's ploy worked at the district court. The district court gave to the FTC everything it asked for and could have hoped to get. We trust that, with this explication of the controlling principles, the FTC's ploy will not work at this Court.

In *AMG*, the Supreme Court emphasized that the FTC may only use § 13(b)

to obtain monetary relied (1) first, by invoking its administrative procedures under § 5 and (2) by then using the redress provisions of § 19. *AMG*, 593 U.S. at 77. In *AMG*, the Supreme Court added that the FTC could use § 13(b) to get injunctive relief ***only*** when § 5 "administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief." *Id*. at 78. The Supreme Court held that Congress could not have intended for the FTC to use § 13(b) as a substitute for the mandatory interplay of §§ 5 and 19 of the FTC Act. *Id*. at 78.

The FTC cannot simply "avoid the conditions and limitations" of § 19 which, after all, requires a cease-and-desist order before there can be any broad injunctive relief. *AMG*, 593 U.S. at 80. In AMG, the Supreme Court held that that it had to conclude "that § 13(b) as currently written does not grant the [FTC] authority to obtain equitable monetary relief." *AMG*, 593 U.S. at 81.

Section 13(b)'s words are controlling and illuminating. Section 13(b) only comes into play when several conditions are present. First, the FTC must have "reason to believe" that someone "is violating, or is about to violate, any provision of law." 15 U.S.C. § 53b. The FTC must also have "reason to believe" that "enjoining" the claimed violations would be in the interest of the public. 15 U.S.C. § 53b. The enjoining would remain in place "pending the issuance of a complaint by the [FTC] and until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final."

15 U.S.C. § 53b.

If those specific conditions are met, the FTC "may bring suit in a district court of the United States to enjoin any such act or practice." 15 U.S.C. § 53b.

It is only ***after*** a "proper showing that, weighing the equities and considering the [FTC's] likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, [that] a temporary restraining order or a preliminary injunction may be granted without bond." 15 U.S.C. § 53(b).

Nothing in § 13(b)'s plain words supports equitable monetary remedies such as asset freezes and seizures, disgorgement, complete takeover of a business, appointing a receiver, or anything of that equitable nature. The words are clear. It is ***only*** when the FTC has reason to believe that there are present (not past) or prospective violations of the FTC Act that the FTC has any right to bring a suit in a federal district court to seek a temporary restraining order or a preliminary injunction to enjoin any such violative act or practice. 15 U.S.C. § 53(b).

The statute is clear, specific, and remarkably limited. Under § 13(b), the FTC can seek a temporary restraining order or a preliminary injunction to halt the act or practice that is supposedly presently violating or is about to violate the FTC Act. The statutory purpose is simple: ***Stop*** the alleged ongoing or threatened violation of the FTC Act at once. That is all that § 13(b) allows.

There is no need or justification for seizing assets, appointing any sort of

receiver, forcing disgorgement, or granting any other variety of equitable or injunctive relief to do that. Section 13(b) is simply a form of judicial cease-and-desist order enforceable through a TRO or through a preliminary injunction. In proper cases, a district court may even "issue" a "permanent injunction."

But whether through a TRO, through a preliminary injunction, or through a permanent injunction, stopping ongoing or future violations of the FTC Act is § 13(b)'s sole statutory purpose.

Grabbing and freezing asserts, ordering the disgorgement of funds and/or property, appointing a receiver, seizing all of an accused violator's business records, running businesses into the ground, and assessing damages and sanctions are nowhere authorized within § 13(b)'s plain words. Section 13(b) is, instead, a highly limited statute meant to stop present or threatened violations. Congress never meant for § 13(b) to provide the FTC with an unfettered platform for an ongoing assault on and conquest of a defendant's livelihood, business, and assets.

Of course, 15 U.S.C. § 53(b) does not let the FTC seek any sort of monetary penalties from a district court ***before*** completion of the administrative adjudication process. *See* § 45(l) and *AMG*, 593 U.S. at 75. "It is highly unlikely," after all, "that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the [FTC] Act, via § 13(b), had already implicitly allowed the [FTC] to obtain that same monetary relief and more without satisfying

those conditions and limitations." *Id.* at 77 (emphasis in original).

The Supreme Court added that it was also not "likely that Congress, without mentioning the matter, would have granted the [FTC] authority so readily to circumvent its traditional § 5 administrative proceedings." *AMG*, 593 U.S. at 78. The FTC asked the district court to misinterpret and misapply the terms of §§ 1, 13(b), and 19 of the FTC Act. The district court understandably went along since the FTC had previously persuaded a number of federal circuit and district courts to misinterpret and misapply §§ 1, 13(b), and 19. We ask this Court to apply *AMG* and the plain words of §§ 1, 13(b), and 19 to undo, as far as possible, the damage that the FTC deliberately and knowingly caused the Defendants to suffer.

2. There was no basis for a "compensatory contempt sanction" based on the supposed revenue received from consumers.

The FTC argues that the district court properly awarded a "compensatory contempt sanction" that was supposedly based on the alleged revenues that Defendants had purportedly received from consumers. *AB* at 24-26.

But the FTC never provided the district court with any reasonable or reliable method for calculating any such civil compensatory contempt sanctions. Then, in its September 18, 2023 "Final Order of Permanent Injunction and Monetary Judgment," the district court awarded contempt sanctions of $7,306,873.14 against James D. Noland, Jr., Scott A Harris, and Thomas G. Sacca. (1-ER-014, 1-ER-026) (SER 114).

The district court concluded that the Supreme Court's 2021 *AMG* opinion did not affect the scope of relief available in the "contempt action." (SER-116). But the so-called "contempt action" was part and parcel of the FTC action brought against the Contempt Defendants when the FTC previously failed to limit its demands for relief to the narrow ones authorized by §§ 5, 13(b), and 19 of the FTC Act. The only reason there were any supposed damages upon which later contempt proceedings could be based was because the FTC asked for and obtained monetary relief to which it was not entitled under §§ 5, 13(b), and 19 of the FTC Act.

The district court surmised that *AMG* was limited to deciding that § 13(b) did not give the FTC authority to obtain equitable monetary relief. (SER-117). That is far too limited a view of the landmark *AMG* opinion. After all, *AMG* carefully explained that the FTC can only assert any sort of equitable monetary relief by complying with the interlocking, mandatory cease-and-desist administrative and legal procedures that Congress created in §§ 5, 13(b), and 19 of the FTC Act.

The district court concluded that the supposedly harmed consumers should have a chance to get all of their money back. (SER-118). Based on that, one would think that the FTC would have been ordered to identify those consumers and make sure that they got their money back. But that conclusion would be wrong.

Actually, the $7,306,873.14 "civil compensatory contempt sanction" was

entered in favor of the FTC alone. (1-ER-026, ¶ IX(A)). There is no hint in the record that the FTC ever did or ever will pay one penny of that massive $7,306,873.14 "civil compensatory contempt sanction" to any consumer. Perhaps the FTC has paid something to a consumer. But the FTC has apparently never provided any proof of that to the district court or to this Court. Perhaps it now will provide such proof to this Court in a clear and verifiable manner.

The Answering Brief claims "any money the FTC recovers on the judgment will be paid back to the consumers from whom it was taken in the first place." (*AB* at 26). But that is not what the district court actually ordered.

The district court actually ordered that: "All money paid to the [FTC] pursuant to this Order *may* be deposited into a fund administered by the [FTC] or its designee to be used for equitable relief, including consumer redress and any attendant expense for the administration of any redress fund. . . . Upon full satisfaction or the Judgment, if there is any money left over after administering and paying consumer redress, the FTC will either return that money to the Individual Defendants or ask the Court for permission to use the funds for some other purpose." (1-ER-027, ¶ X(D) (emphasis added)).

And so, the money "***may*** be deposited" into a consumer redress fund, or it may not be deposited. That is apparently up to the FTC. The FTC is also supposed to return to the Individual Defendants any money left over after administering and

paying consumer redress *or* the FTC can ask the district court to use the money for some other FTC purpose—a purpose not related to consumer redress. In other words, the massive "civil compensatory contempt sanction" goes to the FTC, which may use it for consumer redress or not use it for that, and which can ask that it go to some other purpose altogether.

The Answering Brief glides over the fundamental problem. That problem is that, because most consumers benefitted from products distributed to them by the Contempt Defendants, there should have been an offset for that general, extensive benefit. (SER-120-122). The district court noted that the FTC, on its part, relied "on an all-or-nothing methodology to meet its initial burden of proof." (SER-121). In other words, the FTC sought to recover the $7,306,873.14 "civil compensatory contempt sanction" without any sort of offset or other adjustment.

The basis for the $7,306,873.14 "civil compensatory contempt sanction" is both simple and simplistic. What the FTC sought at the district court and wants now is the sum of "the amounts that consumers paid the defendants less any refunds, returns, or commissions paid to the consumers." *AB* at 24. The trouble with that approach is that it fails to account for the fact that most consumers, as the district court itself grudgingly acknowledged, indicated that they had in fact received substantial benefits from the products they received. (SER-120-122). The district court chose to disregard and downplay that evidence—but it was so

extensive that the district court's decision to disregard and downplay the evidence was an abuse of discretion.

The district court's approach and conclusion are antithetical to controlling Supreme Court precedent. "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1965). "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss." *Id*. at 304.

The more recent case of *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017), held that, when a sanction is "imposed pursuant to civil procedures," it "must be compensatory rather than punitive in nature," and may do nothing more than redress the wronged party for the losses that the wronged party sustained. A "sanction counts as compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based." *Id*. (quoting *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 834 (1994)).

The $7,306,873.14 "civil compensatory contempt sanction" was not set by or calibrated to the purported damages supposedly caused by the bad-faith acts on

which it was allegedly based and had no relationship to any of the consumers' actual losses. Under controlling United States Supreme Court precedent, it was therefore invalid. It therefore must be set aside.

3. The district court allowed excessive relief under § 19 of the FTC Act.

In the Answering Brief, the FTC contends that the district court had properly awarded $6,829 under § 19 of the FTC Acts for violations of the "Merchandise Rule." *AB* at 27-32.

The Merchandise Rule requires all mail-based, internet-based, and phone-based sellers to have a reasonable basis to believe that orders will ship either "within [the] time clearly and conspicuously stated in [a] solicitation; or . . . if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from a buyer." 16 C.F.R. § 435.2(a)(1).

If a seller cannot comply with these shipping requirements, the seller must clearly and conspicuously, and without prior demand, give the buyer the option to either consent to the delay or cancel and receive a prompt refund. 16 C.F.R. § 435.2(b)(1). If a seller fails to provide this option and has not shipped the merchandise in accordance with 16 C.F.R. § 425.2(a)(1), it must deem an order canceled and provide a prompt refund to the buyer. 16 C.F.R. § 435.2(c)(5).

A seller's purported failure to maintain "records or other documentary proof establishing its use of systems and procedures which assure the shipment of

merchandise" in accordance with paragraph (a) creates a "rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time." 16 C.F.R. § 435.2(a)(4). Similarly, a seller's failure to maintain records relating to the requirements of paragraphs (b) and (c) creates a rebuttable presumption that the seller failed to comply with those requirements. 16 C.F.R. § 435.2(d).

As noted in the opening brief, based solely on purported violations of two FTC rules—the pertinent one being the Merchandise Rule—the FTC persuaded the district court it should freeze and seize all of Defendants' assets and appoint and compensate a Receiver with massive powers who hired costly lawyers and pricey consultants. Appointing and compensating a receiver and a large staff, freezing, seizing, and dissipating assets does not come within the scope of the regular § 19 remedies of "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(a)(1) & 57b(b).

For the purported violations of the Merchandise Rule, the FTC demanded $561,798.80 in damages. (Doc579at97:21-22). But even the district court itself found the FTC had failed to provide even a "reasonable estimate" of the damages allegedly caused by any Merchandise Rule violation. (Doc570at100:9-10).

And so, despite having no evidence at all at the start of the case concerning any Merchandise Rule violations or damages, the FTC wasted hundreds of

thousands of dollars of Defendants' assets and received insignificant damages of some $6,829, which was 1.2% of what it had demanded for Merchandise Rule damages. That was based on five alleged instances where consumers purportedly requested refunds and possibly did not get them. (Doc-579at105:4-6).

In the Answering Brief, the FTC tries to justify its all-encompassing injunctive remedies and its massively costly and intrusive receivership, the seizure of Defendants' assets, and other acts based on relatively minor violations of the Merchandise Rule. To justify its incredible legal and equitable assault on the Defendants, the FTC claims § 19 allows a lawsuit for "monetary relief." *AB* at 37.

In limited circumstances, § 19 does authorize the FTC to "commence a civil action" seeking relief "necessary to redress injury to consumers" resulting from an unfair or deceptive act or practice, including rescission, reformation, the refund of money, and the payment of damages. 15 U.S.C. § 57b(a)(1) & 15 U.S.C. § 57b(b). But what § 19 does ***not*** do is to routinely allow for injunctive or equitable relief. Of course, it was hardly necessary for the FTC to use scorched-earth injunctive methods to recover a relatively inconsequential $6,829 amount for the supposed benefit of a handful of consumers.

The FTC wrongly built an incredibly costly house of cards based on relatively minor violations. It cannot justify its massive injunctive and equitable assault on the Defendants by relying on the Merchandise Rule and § 19 as the

alleged justification.

4. The district court had no right to enjoin Defendants from engaging in a lawful occupation.

The FTC claims that the district court properly enjoined the Defendants from ever having any involvement in the profession of multi-level marketing. But there is nothing inherently illegal or improper in multi-level marketing programs. *See, e.g.*, *Torres v. S.G.E. Management, L.L.C.*, 838 F.3d 629, 634-35 (5th Cir. 2016).

As the Opening Brief explained: "Courts and legislatures recognize a distinction between legitimate programs (known as multi-level marketing systems) and illegal schemes." *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 480 (6th Cir. 1999). "All multilevels are not considered per se deceptive and unlawful." *State ex rel. Stratton v. Sinks*, 741 P.2d 435, 440 (N.M. App. 1987). This Court itself has specifically held that not all multi-level marketing "businesses are illegal pyramid schemes," and so, to determine if "a MLM business is a pyramid, a court must look at how the MLM business operates in practice." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014).

Multi-level marketing companies, which "now make up a majority of the direct sales industry," offer two "business opportunities"—"one is to make direct sales to consumers as a distributor" and "the other is to build a 'downline' of other distributors" that "consists of each person they recruit directly, as well as anyone recruited by those direct recruits, and so on down the line." Lindsay B. Maher,

Comment, 108 Minn. L. Rev. 1587, 1594-95 (Feb. 2024).

The question the FTC dodges is the district court's alleged right to permanently ban someone from engaging in a lawful occupation. The district court could probably enjoin Defendants from engaging in creating or operating pyramid schemes. *See* Dan B. Dobbs, 1 *Law of Remedies* § 2.9(3) at 232 (2nd ed. 1993) ("The rule often repeated is that courts will not enjoin a crime in order to protect personal rights" but they "would enjoin a crime to protect property rights.").

On the other hand, we have found no American precedent that would let any court ban a person from engaging in a lawful profession. "It requires no argument," in fact, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In addition, "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

Sometimes the law is not just clear. Sometimes it is clearly just. Here, when the district court banned the Individual Defendants from engaging in the lawful profession of multi-level marketing, it clearly violated the Fifth and Fourteenth

Amendments to the United States Constitution. The district court's decision to ban the Individual Defendants from engaging in a lawful profession is constitutionally, legally, and morally wrong—and should be vacated.

5. The Receiver's actions are properly at issue.

The FTC claims that the Receiver's actions are not properly before this Court in this appeal. But under the facts of this case, appointment of a receiver was an error that cost the Defendants massively. As the opening brief explained, the Receiver and the Receiver's assorted helpers charged and obtained hundreds of thousands of dollars for dissipating the Defendants' assets and for destroying the Defendants' businesses. The end result of that hurly-burly was an insignificant award of damages that may never reach any supposedly wronged consumer.

As discussed above and in the opening brief, under the provisions of §§ 5, 13(b), and 19 of the FTC Act, the FTC had no statutory authority and no need to obtain appointment of a Receiver or to obtain other massive equitable remedies.

A Receiver is supposed to be a "disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated)." *Black's Law Dictionary* 1524 (12th ed. 2024). Here, however, the district court appointed the Receiver to "be solely the agent of this Court in acting as Receiver under this Order." (Doc. 109, ¶ XIII). From the start, therefore, the Receiver was

not acting on behalf of the Defendants whose assets it seized and dissipated.

The facts indicate the Receiver acted solely in conformity with the interests of the FTC. Indeed, nothing in the record indicates the Receiver even once opposed anything the FTC requested.

As discussed in the opening brief, the Receiver acknowledged being "in the position of having to defend the corporate defendants" but supposedly was "not aware of a good faith basis to oppose most aspects of the FTC's complaint against the corporate defendants and does not anticipate spending the Receivership Estate's limited resources to fight a losing battle" since that would supposedly "reduce the recovery of former consumers from the Receivership Estate." (Doc-123-at2:27to3:3). The lawyers who all determinedly and diligently defended the Corporate Defendants all had good-faith bases for their lively and unrelenting defense. That did not matter to the Receiver, whose sole goal was to serve the district court and the FTC.

By February 1, 2022, the Receiver frankly admitted that the Receivership Estate could not afford to manage or even participate in an active defense of the Corporate Defendants because the Receivership Estate was likely insolvent with regard to professional administrative expenses. (Doc-464at1). That insolvency resulted from the Receiver and the Receiver's helpers dissipating the assets of the Defendants. There was therefore nothing left to defend the Corporate Defendants.

On top of that, the Receiver admitted that the Receiver and the Receiver's legal counsel "did not share the Individual Defendants' view of the merits of the case." (Doc464at2).

The Receiver sought to excuse its failure to fund or facilitate the defense of any of the Defendants because the FTC had supposedly "agreed that it will not seek damages against the Corporate Defendants that are in excess of its claims against the Individual Defendants." (Doc464at8:6-8). The Receiver refused to acknowledge the reality of the situation and claimed the "Corporate Defendants are not being left 'defenseless.'" (Doc464at9:2-4).

But in fact the Receiver abandoned all of the Defendants, used the frozen and seized assets to pay itself, its lawyers, and its consultants for administrative busywork that enriched themselves and did not help the Defendants or anyone else, that did not provide identifiable, ever-paid redress to any consumer, and that did nothing to oppose or ameliorate the FTC's attack on the Defendants.

Imposing a receivership in the first place and then keeping the receivership in place as it dissipated the Defendants' assets and ruined the Defendants' businesses were acts that the district court undertook: (1) despite intense opposition from the Defendants, (2) despite increasing evidence that there never had been any sort of substantial or meaningful violations of the FTC Act, and (3) despite the utter lack of any justification for a receivership under §§ 5, 13(b), and 19 of the

FTC Act.

Therefore, everything the Receiver took from the assets of the Defendants should be disgorged, plus interest. The Receiver should also reimburse for the lost profits and lost business opportunities the receivership caused. On remand, after a suitable evidentiary hearing, the district court can determine the exact amount that will place the Defendants in the position they would have been had the unjustified and destructive receivership not been imposed on them in the first place.

Conclusion

For the reasons set out above, Appellants ask the Court to vacate the Judgment and to remand this matter for further proceedings consistent with its resolution of this appeal. Because of the exceptional importance of what should happen on remand to remedy this situation and provide suitable redress to the Defendants for the man losses they have suffered, we reiterate the basics of the conclusion that appeared in the opening brief:

This Court should direct that, on remand:

(1) the asset freeze and receivership that are in place should be immediately and fully lifted;

(2) all assets, companies, property, and other items that were frozen and improperly swept into the receivership should be returned at once to Defendants' full and complete control;

(3) the district court should order the Receiver to account for all inventory it failed to sell when it had the opportunities to do so, and the district court must direct the Receiver to compensate the Defendants for the resulting losses;

(4) the district court must order the Receiver to disgorge all money, plus interest, that it took from Defendants' accounts and assets during the receivership, and well as to reimburse the Defendants for all lost profits and lost business opportunities that the receivership caused;

(4) because the district court committed fundamental constitutional error when it imposed a blanket prohibition on the Individual Defendants preventing them from engaging in their chosen legal and proper profession of multi-level marketing, the district court must extirpate that prohibition on remand;

(5) the district court must make a full and proper determination of the amount, if any, that should be assessed as supposed civil compensatory sanctions under the clear, long-standing, and controlling principles that civil compensatory sanctions: (a) may only be awarded in the amount that will actually compensate a complainant for sustained losses; and (b) must be based on

evidence of a complainant's actual losses. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1965).

(6) any determination of any compensatory sanction amount should be the result of the comprehensive and highly protective administrative protections and procedures that §§ 5 and 19 of the FTC Act require; and

(7) the district court should enter such other and further remedies as needed to compensate Defendants fully for the consequences of the FTC's improper acts—which the district court had approved and authorized—performed in violation of the provisions of §§ 5, 13(b) and 19 of the FTC Act.

Appellants are hopeful that these strong remedies will not only, as far as possible, return them to the status quo ante, but will also educate the FTC that it must always conduct its operations within the scope of the limited and highly protective statutes that Congress enacted and occasionally amended—including §§ 5, 13(b), and 19 and the related provisions of the FTC Act.

DATED this 30th day of October, 2024.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Plaintiffs/Appellants

Form 8. Certificate of Compliance for Brief
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I am the attorney or self-represented party.

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I hereby certify I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Signature: /s/ David L. Abney **Date:** October 30, 2024