

**PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION:
THE URGENT NEED TO FIX SECTION 13(b) OF THE FTC ACT
Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE**

UNITED STATES HOUSE OF REPRESENTATIVES

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I. INTRODUCTION

Chair Schakowsky, Ranking Member Bilirakis, and Members of the Subcommittee, I am Rebecca Kelly Slaughter, Acting Chairwoman of the Federal Trade Commission, and I am pleased to appear before you today. In this testimony, we express our gratitude for the introduction of H.R. 2668 and explain why legislation is so urgently needed to address legal challenges to critical authority that enables the FTC to do its job of protecting consumers and competition.

House bill 2668, which Congressman Cárdenas introduced last week, addresses the two significant judicial limitations to Section 13(b) of the FTC Act. First, late last week, the Supreme Court ruled that courts can no longer award refunds to consumers in FTC cases brought under 13(b), reversing four decades of case law that the Commission has used to provide billions of dollars of refunds to harmed consumers. Second, some courts recently have ruled that the Commission cannot seek injunctive relief under 13(b) in cases where the unlawful conduct is no longer occurring, even if there is a reasonable likelihood that it will re-occur. The discussion below elaborates on these challenges and illustrates why we so appreciate that, with the introduction of H.R. 2668, Congress is acting to clarify one of the FTC's most essential tools.¹

II. LEGISLATION IS NEEDED TO ENSURE EQUITABLE MONETARY RELIEF UNDER SECTION 13(b) OF THE FTC ACT

Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many

¹ This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions do not necessarily reflect the views of the Commission or any other Commissioner.

others.² More recently, in the wake of the pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams.³ Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including \$11.2 billion in refunds to consumers during just the past five years.⁴ Section 13(b) is a critical tool in support of our enforcement missions, but its effectiveness has been substantially curtailed by recent judicial decisions, which have significantly weakened the Commission’s ability to protect consumers from deceptive, unfair, or anticompetitive practices.

Section 13(b) of the FTC Act has been the agency’s primary and most effective way of returning money to consumers that was unlawfully taken from them. The relevant portion of Section 13(b), often referred to as the “second proviso,” authorizes the FTC to sue directly in federal court for violations of the FTC Act and states that “in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”⁵ Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money. For decades, no court held to the contrary. In 1994, Congress ratified

² 15 U.S.C. § 53(b).

³ See, e.g., FTC Press Release, *FTC Sues California Marketer of \$23,000 COVID-19 “Treatment” Plan*, <https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan> (July 31, 2020).

⁴ See Tableau, *FTC Refunds to Consumers*, https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.

⁵ 15 U.S.C. § 53(b).

its intent to enable the FTC to obtain monetary remedies when it expanded the venues available for FTC enforcement cases, strengthening the Commission’s ability to bring redress cases.⁶

Recent judicial rulings, however, indicate a dramatic shift in how courts are interpreting and applying Section 13(b) in FTC cases. For example, in 2019, the Seventh Circuit, in *FTC v. Credit Bureau Center, LLC*,⁷ overruled its three decades of precedent and held that Section 13(b) no longer allows the FTC to obtain monetary relief. The *Credit Bureau Center* opinion held that the word “injunction” in the statute allows only behavioral restrictions and not monetary remedies. Last fall, the Third Circuit, in *FTC v. AbbVie Inc.*,⁸ relying heavily on the analysis in *Credit Bureau Center*, similarly concluded that the Commission could not obtain any monetary relief under Section 13(b). In *AbbVie*, for example, the court held that the defendant drug company violated the antitrust laws by engaging in sham litigation to keep out generic competition, but it nonetheless reversed the district court’s award of \$448 million meant to repay overcharged consumers. The net effect of the *AbbVie* ruling is that an adjudicated violator is nonetheless free to keep enormous ill-gotten profits extracted from consumers, based on a legal interpretation of Section 13(b) that no court of appeals had adopted before 2019.

This dramatic shift culminated in last week’s decision by the U.S. Supreme Court in *AMG Capital Management, LLC v. FTC*, which held that equitable monetary relief such as

⁶ Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15–16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790–91. As the Senate Report noted, “Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress. . . . The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts.” *Id.*

⁷ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

⁸ *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020).

restitution or disgorgement is not authorized by the text of Section 13(b).⁹ That is why we call on you to fix our statute to clarify the FTC’s tools.

III. LEGISLATION IS ALSO NEEDED TO ENSURE THAT THE FTC CAN KEEP HARMFUL CONDUCT FROM RE-OCCURRING

In addition to the decisions that eliminate the FTC’s ability to use 13(b) to return money to consumers, two other recent Third Circuit decisions reinterpreting Section 13(b) jeopardize the FTC’s ability to enjoin illegal conduct in federal court. In *FTC v. Shire ViroPharma, Inc.*, a case involving a drug company’s alleged abuse of the FDA’s citizen-petition process to delay generic competition, the court held that the FTC can bring enforcement actions under Section 13(b) only when a violation is either ongoing or “impending” at the time the suit is filed.¹⁰ That decision unnecessarily limits the Commission’s ability to obtain injunctive relief for consumers who have been harmed by unlawful conduct that occurred entirely in the past. And, in the Third Circuit’s decision in *FTC v. AbbVie*, the court cited *Shire ViroPharma* in dicta while agreeing that the FTC cannot sue under Section 13(b) unless conduct is imminent or ongoing.¹¹ Notably, in its motion to dismiss the Commission’s antitrust complaint, Facebook has cited these decisions and argued that Section 13(b) bars the federal court suit.¹²

These decisions hamper the Commission’s longstanding ability to protect consumers by enjoining defendants from resuming their unlawful activities when the conduct has stopped but there is a reasonable likelihood that the defendants will resume their unlawful activities in the

⁹ See *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ___, slip op. (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf. *AMG* was an appeal by defendants from a 2018 Ninth Circuit ruling in which the court re-affirmed its precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief, a judgment that the Supreme Court reversed. See *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

¹⁰ *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

¹¹ *AbbVie*, 976 F.3d at 376.

¹² Memorandum in Support of Facebook, Inc.’s Motion to Dismiss FTC’s Complaint, *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590-JEB (D.D.C.).

future. These decisions also limit the FTC's ability to settle cases efficiently. Targets of FTC investigations now routinely argue that they are immune from suit in federal court because they are no longer violating the law, despite a likelihood of re-occurrence, and they make these arguments even when they stopped violating the law only after learning that the FTC was investigating them.

Overall, these recent decisions have significantly limited the Commission's primary and most effective tool for providing refunds to harmed consumers, and, if Congress does not act promptly, the FTC will be far less effective in its ability to protect consumers and execute its law enforcement mission.

IV. CONCLUSION

We respectfully request that Congress act to clarify Section 13(b) of the FTC Act and revive the FTC's ability to enjoin illegal conduct and return to consumers money they have lost, which will greatly assist our efforts to protect consumers.

We look forward to continuing to work with the Subcommittee, Committee, and Congress, and we would be happy to answer your questions.