No. 16-345

In The
Supreme Court of the United States

CHARLES GUGLIUZZA,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE, SCHOOL OF LAW
401 East Peltason Drive
Irvine, California 92697-8000
Telephone: (949) 824-7722
echemerinsky@law.uci.edu

CALDWELL LESLIE & PROCTOR, PC
MICHAEL V. SCHAFLER
AMY E. POMERANTZ
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040

Attorneys for Petitioner Charles Gugliuzza

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

There is great confusion in the law as to what relief is permissible under statutes that allow for only "equitable restitution." The Ninth Circuit's decision has added to that confusion and deepened a split among the Circuits as to what relief is permissible under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)), which authorizes only suits to "enjoin" challenged acts or practices.

In opposing Petitioner Charles Gugliuzza's petition for certiorari, the Federal Trade Commission ("FTC") tries to downplay the confusion and conflicts. It stresses that certiorari should be denied because it is settled that Section 13(b) permits ancillary monetary relief. (Brief of the Respondent in Opposition [hereafter "Br. Opp."] at 15-16.) That point, however, is not disputed. But this does not address the central issue presented in this case: Whether a court may, under the rubric of "equitable restitution," impose a monetary award far in excess of any ill-gotten gains in the defendant's possession even though the statute, Section 13(b), authorizes only "enjoin[ing]" impermissible conduct.

This Court's prior decisions indicate that a court may not: Equitable restitution must not seek "to impose personal liability[,] . . . but to restore the plaintiff particular funds or property *in the defendant's possession*." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (emphasis added). Yet the Ninth Circuit's decision below upheld a judgment

against Mr. Gugliuzza in the amount of $18.2 million – more than six times the $3 million he received in total compensation from his employer, Commerce Planet and thus more than six times the maximum total amount of ill-gotten gains that ever were in his possession. The award against Mr. Gugliuzza, which was legal in nature because it ordered the payment of funds untethered to Mr. Gugliuzza's unjust gain, never would have been permitted under the law of several other Circuits – a crucial point the FTC never denies. It is precisely this Circuit split, as to the appropriate scope of equitable restitution under a statutory provision authorizing only injunctive relief, that requires resolution by this Court.

The FTC also suggests that this Court should deny certiorari because the $18.2 million award against Mr. Gugliuzza can be justified under a theory of "joint and several liability." (Br. Opp. at 17-18.) But this Court never has held that joint and several liability as a form of *equitable restitution* can exceed the amount of a defendant's unjust enrichment. Moreover, other Circuits have expressly held that joint and several liability is *not* permissible as a form of equitable restitution when, as here, it causes a defendant to be forced to pay more than his or her ill-gotten gains. *See, e.g.*, *Pereira v. Farace*, 413 F.3d 330, 333, 339-40 (2d Cir. 2005); *F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). This is why it is so important that this Court grant review to clarify when – if ever – an award under a statute authorizing only equitable relief may include the repayment of money never

possessed by the defendant on a joint and several liability theory.

Finally, if the FTC is correct that an award of equitable restitution may include monetary relief that vastly exceeds the defendant's ill-gotten gains, let alone the ill-gotten gains in his possession, there is no meaningful distinction between traditionally legal damages and equitable remedies. And if there is no meaningful difference between the two, Mr. Gugliuzza should have been accorded a jury trial under the Seventh Amendment. The FTC stresses, however, that Mr. Gugliuzza was not entitled to a jury trial because the Court properly imposed an equitable remedy of ancillary monetary relief – rather than damages – under Section 13(b) with joint and several liability with Mr. Gugliuzza's co-defendants. (Br. Opp. at 20.) But the FTC ignores the fact that under the decisions of many other lower courts, the award here would have been considered "legal restitution" triggering Mr. Gugliuzza's Seventh Amendment right to a jury trial. *See, e.g.*, *Pereira*, 413 F.3d at 333; *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 577-78 (7th Cir. 2004); *Goettsch v. Goettsch*, 29 F.Supp.3d 1231, 1242 (N.D. Iowa 2014). Indeed, even the Ninth Circuit recognized this confusion in the law and said that it regarded it "as a matter the Supreme Court must resolve." (App. 16).

The permissible scope of equitable restitution arises frequently in cases arising under Section 13(b) and under a myriad of other federal statutes that provide exclusively for injunctive relief. (*See* Petition for

Writ of Certiorari at 27-28 (describing the issue arising under other statutes)). In *Great-West*, this Court drew a distinction between "legal" and "equitable" restitution. 534 U.S. at 215 ("restitution is 'not an *exclusively* equitable remedy,' and whether it is legal or equitable in a particular case . . . remains dependent on the nature of the relief sought.") But there is great confusion in the law as to the distinction between legal and equitable restitution, which is crucial in terms of the permissible remedy and whether a jury trial is available. This case presents an ideal vehicle for providing much needed clarification of this important issue that has divided and is continuing to divide the Circuits.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND THE CONFLICT WITH THIS COURT'S PRECEDENT IN TERMS OF THE SCOPE OF WHAT CAN BE AWARDED AS "RESTITUTION" UNDER A FEDERAL LAW THAT AUTHORIZES ONLY INJUNCTIVE RELIEF

A. The Ninth Circuit's Ruling Conflicts with Decisions of This Court

Prior decisions of this Court have held that if a statute allows solely for injunctive relief, the plaintiff may seek only a remedy that is traditionally viewed as equitable. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). In the context of ancillary monetary relief, that means that courts may impose only "equitable restitution" – namely, "*the return of identifiable funds* (or property) belonging to the plaintiff and *held by the*

defendant." *Great-West*, 534 U.S. at 216 (emphases added). This Court cautioned that "[w]ithout this rule of construction, a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id.* at 211 n.1.

The FTC attempts to distinguish *Great-West* and *Mertens* by arguing that those cases arose under the ERISA statute, not Section 13(b) of the Federal Trade Commission Act. (*See* Br. Opp. at 14 ("The ERISA provision at issue in *Mertens* and *Great-West* is materially different from the provision of the FTC Act at issue here.").) But in both *Great-West* and *Mertens* this Court was describing the general principle of what is permissible as equitable restitution; it was not interpreting ERISA's specific statutory language.

In fact, the FTC Act's statutory language makes the award here even more questionable than the awards in those ERISA cases. As the FTC notes, "[t]he ERISA provision authorizes the award of injunctive and 'other appropriate equitable relief.'" (Br. Opp. at 14 (citation omitted).) Yet Section 13(b) allows the FTC only to "enjoin" impermissible practices. Congress failed to provide anything like the "other equitable relief" clause found in the analogous ERISA statute. If it is impermissible under ERISA to award monetary relief beyond the ill-gotten gains in the possession of the defendant, as *Great-West* and *Mertens* held, it is even clearer that such relief must be impermissible under Section 13(b).

B. Circuit Courts Are Divided as to Whether Monetary Relief beyond a Defendant's Disgorgement of Ill-Gotten Gains May Be Awarded under Section 13(b)

In conflict with the Ninth Circuit's decision, other Circuits have held that a plaintiff's recovery under Section 13(b) is limited to the money "in the defendant's possession that could 'clearly be traced' to . . . 'the plaintiff.'" *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006) (citation omitted); *see also Washington Data*, 704 F.3d at 1326 (holding that Section 13(b) "does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment" (internal quotation marks and citation omitted)). The controlling authority in both the Second and Eleventh Circuits provides that "*a damages award based on consumer losses would be improper.*" *Washington Data*, 704 F.3d at 1326 (emphasis added). Yet a damages award based on consumer losses is exactly what the Ninth Circuit affirmed here.

Forced to contend with this unambiguous Circuit split, the FTC attempts to side-step the question presented by asserting that "[e]very court of appeals to consider the issue – seven in addition to the Ninth Circuit – [has held] . . . that the district court in a Section 13(b) case may award monetary relief, including restitution or disgorgement." (Br. Opp. at 15.) This is beside the point because there is no dispute that monetary relief in the form of equitable restitution or disgorgement is permissible. The central issue in this case is whether an award of monetary relief in an amount exceeding

the ill-gotten gains in the defendant's possession is permissible under a statute authorizing only equitable relief. On this point, the Circuits are split. While the Ninth Circuit's decision below affirms the $18.2 million award against Mr. Gugliuzza and rejects the argument that the monetary award amounts to legal damages since it vastly exceeded the amount of ill-gotten gains he received or held, other Circuits have limited equitable remedies to the disgorgement of ill-gotten gains in the defendant's possession. If Mr. Gugliuzza's appeal had been heard in the Second or Eleventh Circuits, the monetary award would have been at least $15 million less. It is precisely this Circuit split that this Court needs to resolve.

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND A CONFLICT WITH THIS COURT'S DECISIONS AS TO WHETHER A COURT MAY IMPOSE JOINT AND SEVERAL LIABILITY UNDER A FEDERAL STATUTE ALLOWING ONLY INJUNCTIVE RELIEF

This case presents another important and related question on which the Ninth Circuit's decision below conflicts with this Court's precedent and the law of other Circuits: Whether courts may, under Section 13(b) or statutes allowing only for equitable relief, impose joint and several liability to expand the permissible scope of equitable restitution beyond the ill-gotten gains in the defendant's possession. Here, even though Mr. Gugliuzza received only $3 million dollars from his

association and employment with Commerce Planet, the FTC argues that the $18.2 million award against him nevertheless constitutes "equitable restitution" under a theory of joint and several liability. The FTC declares – without any citation to authority – "When a defendant is subject to joint-and-several liability for a restitution award, the judgment will often exceed that particular defendant's own illicit gain." (Br. Opp. at 18.) But not only is the FTC's rule-swallowing reasoning at odds with the law of this Court and of three Circuit Courts of Appeals, it is particularly troubling where, as here, an officer of a public corporation is held *personally* liable for the entire amount that the *corporation* illicitly gained, including from periods both before and after he was being compensated by the corporation. The threat of such massive personal liability is enough to force most individual defendants into settling.

Notably, while the FTC insists that joint and several liability can exist in equity cases (Br. Opp. at 17), it fails to point to a *single case* holding that equitable restitution imposed on a particular defendant can exceed his or her ill-gotten gain. In fact, as explained above, this Court has explicitly held the opposite: Equitable restitution is limited to "*the return of identifiable funds* (or property) belonging to the plaintiff and *held by the defendant*." *Great-West*, 534 U.S. at 216 (emphases added). The Ninth Circuit's application of a joint and several liability theory cannot be reconciled with this Court's limits on equitable relief.

It also is worth noting that, here, the District Court did not originally base its $18.2 million monetary award against Mr. Gugliuzza on a joint and several liability basis, or even suggest such a possibility. As the Ninth Circuit stated: "[W]e note that the judgment entered against Gugliuzza does not actually hold him jointly and severally liable for Commerce Planet's restitution obligations." (App. at 16.) Rather, joint and several liability was the Ninth Circuit's *post-hoc* solution. It remanded the case to the District Court to justify the award under this theory, and the District Court has since followed its prompt. (Br. Opp. at 8 (citing District Court order of August 25, 2016)).

The Ninth Circuit's application of joint and several liability also conflicts with decisions of other Circuits. In *Pereira*, for example, the Second Circuit held that a judgment finding several corporate officers jointly and severally liable for restitution was a *legal* remedy rather than an equitable remedy because the defendant "never possessed the funds in question." 413 F.3d at 339-40. The Court stressed that "a *defendant must possess the funds at issue* for the remedy of equitable restitution to lie against him." *Id.* (emphasis added). This is clearly in conflict with the Ninth Circuit's approach in this case.

III. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND A CONSTITUTIONAL ISSUE OF NATIONAL IMPORTANCE IN TERMS OF THE AVAILABILITY OF A JURY TRIAL UNDER THE SEVENTH AMENDMENT WHEN A COURT AWARDS MONETARY RELIEF IN EXCESS OF THE ILL-GOTTEN GAINS IN THE DEFENDANT'S POSSESSION

If an award under Section 13(b) need not be limited to the defendant's ill-gotten gains, as the FTC maintains, then there is little difference between the imposition of legal and equitable restitution. And if in virtually all respects the imposition of equitable restitution mirrors legal restitution, it follows that a defendant has a Seventh Amendment right to a jury trial. The Ninth Circuit acknowledged the tension between its approach and this Court's decision in *Great-West* limiting equitable relief, but said that this is "a matter [that] the Supreme Court must resolve." (App. at 16.) Strikingly, the FTC ignores this tension and the explicit request for clarification from the Ninth Circuit.

The FTC says that this Court has ruled that "a court in equity could 'award monetary restitution as an adjunct to injunctive relief.' " (Br. Opp. at 19 (citation omitted)). But again, the issue is not whether a monetary award ancillary to injunctive relief is permissible. That point is well established and uncontested. The question is whether there can be a monetary award as a form of equitable restitution that is far greater than the defendant's ill-gotten gains and if so, whether these circumstances require a jury trial given that

such an award was not traditionally available in the courts of equity.

The FTC also asserts that "Petitioner does not identify any court of appeals decision that has held the Seventh Amendment jury-trial right to be applicable to a Section 13(b) case where restitution was calculated in that manner." (Br. Opp. at 20.) But many other courts have held that the Seventh Amendment right to a jury trial applies when a court issues a restitution order that is greater than the defendant's gains. The Second Circuit's decision in *Pereira*, for instance, is exactly on point and directly conflicts with the Ninth Circuit's decision below.

In *Pereira*, the Second Circuit concluded that corporate defendants were entitled to a jury trial where the trial court ruled that the corporate defendants were "jointly and severally" liable to plaintiffs for restitution. 413 F.3d at 333. Emphasizing that the defendants "never possessed the funds in question and thus were not unjustly enriched," the Second Circuit concluded that, therefore, "the remedy sought against them cannot be considered equitable" under *Great-West*. *Id.* at 339. The Second Circuit held that by definition "the remedy sought was legal and thus [defendants] were entitled to a jury trial." *Id.* at 339-41. Other courts, both within the Second Circuit and in other circuits, have also come to this conclusion. *See*, *e.g.*, *Goettsch*, 29 F.Supp.3d at 1242 (finding that plaintiffs sought *legal* restitution because the funds sought by the plaintiffs could not be "traced to particular funds in the defendants' possession," and thus defendants

were entitled to a jury trial); *Sivolella v. AXA Equitable Funds Mgmt., LLC*, Nos. 11-4194 (PGS), 13-312 (PGS), 2013 WL 4096239, at *3 (D.N.J. July 3, 2013) ("claims for legal restitution are triable to a jury"), *adopted in full*, 2013 WL 4402331 (D.N.J. Aug. 15, 2013); *see also Bethea v. Merchs. Commercial Bank*, No. 11-51, 2015 WL 1577976, at *4 (D.V.I. Apr. 2, 2015); *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, No. 02 C 3293, 2005 WL 2405797, at *3 (N.D. Ill. Sept. 28, 2005); *Bona v. Barasch*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003).

CONCLUSION

For all these reasons, this Court should grant Mr. Gugliuzza's petition for certiorari.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
401 East Peltason Drive
Irvine, California 92697-8000
Telephone: (949) 824-7722

CALDWELL LESLIE & PROCTOR, PC
MICHAEL V. SCHAFLER
AMY E. POMERANTZ
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040

Attorneys for Petitioner Charles Gugliuzza