Nos. 18-1807

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

SHIRE VIROPHARMA INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Delaware
Civil Action No. 1:17-cv-131-RGA (Hon. Richard G. Andrews)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE URGING AFFIRMANCE

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Dated: August 9, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the Washington Legal Foundation (WLF) makes the following disclosures:

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WLF is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation.

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WLF has issued no stock.

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

WLF is unaware of any such corporation, apart from those identified by the parties.

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any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: August 9, 2018

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has regularly appeared before this Court and other federal courts in numerous cases addressing the statutory authority of federal administrative agencies. *See, e.g.*, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d1179 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017); *United States v. Lane-Labs USA, Inc.*, 427 F.3d 219 (3d Cir. 2005).

WLF believes that the Federal Trade Commission (FTC) has an important role to play in preventing unfair methods of competition in commerce and in protecting consumers from unfair or deceptive practices in commerce. But that role is limited to those activities authorized by Congress in adopting the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41 *et seq.* WLF is concerned that the FTC, in its zeal to carry out what it views as its mission, has strayed beyond the

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[1] Pursuant to Fed.R.App.P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

powers conferred on it by statute. The district court correctly determined that the FTC's powers to file federal-court actions for injunctive relief have been carefully circumscribed by Congress and that the FTC may not invoke the jurisdiction of the federal courts unless it pleads facts demonstrating that the target of its injunctive-relief efforts "is violating or is about to violate" federal law. FTC Act § 13(b), 15 U.S.C. § 53(b).

The district court determined that the FTC failed to plead such facts but offered the Commission an opportunity to amend its complaint. Instead of taking that opportunity, the FTC filed this appeal and argues that Section 13(b)'s "about to violate" language should not be enforced as written. WLF is particularly disturbed by the FTC's unprecedented assertion that its decision to invoke the district court's jurisdiction is not subject to judicial review.

WLF also disputes the FTC's assertion that the sky will fall if the district court's decision is affirmed. The decision was based on the language and history of the FTC Act and will have little or no impact on the proper interpretation of other statutes. More importantly, the decision provides the FTC with ample authority to prevent businesses from engaging in unfair methods of competition. Moreover, the FTC Act is but one of many means by which federal and state governments regulate competition to ensure that it is conducted fairly; that

regulation will continue unabated even if this Court rejects the FTC's efforts to expand its regulatory footprint.

STATEMENT OF THE CASE

The facts of this case are set out in detail in Appellees' Brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In 2006, Defendant Shire ViroPharma Inc. ("ViroPharma") petitioned the federal government to urge the Food and Drug Administration (FDA) to maintain its longstanding guidance regarding how drug companies could establish that their generic products were "bioequivalent" to Vancocin, an antibiotic marketed by ViroPharma and widely used to treat potentially life-threatening intestinal infections. In its 2017 complaint, the FTC alleged that ViroPharma's petitioning efforts were an unfair method of competition, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and improperly delayed FDA approval of generic forms of Vancocin. The FTC argues that ViroPharma's petitioning activity was a "sham" and thus not protected by the First Amendment.

The complaint sought to invoke federal-court jurisdiction based on Section 13(b) of the FTC Act, which authorizes the FTC to bring an action in federal district court to enjoin violations of the FTC Act upon a showing that the defendant

"is violating, or is about to violate" the Act. The complaint conceded that ViroPharma's petitioning activity was not on-going; it had ended by 2012. Nor did it allege that ViroPharma "is about to" engage in an unfair method of competition. The FTC's allegations regarding the possibility of future violations said nothing about *when* those violations might occur and were limited to the following:

> Absent an injunction, there is a cognizable danger that ViroPharma will engage in similar conduct causing future harm to competition and consumers. ... ViroPharma has the incentive and opportunity to engage in similar conduct in the future. At all relevant times, ViroPharma marketed and developed drug products for commercial sale in the United States, and it could do so in the future. Consequently, ViroPharma has the incentive to obstruct or delay competition to these or other products.

Complaint, ¶¶ 150-51.

ViroPharma filed a motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), arguing that the FTC had failed to allege facts sufficient to establish its right to proceed under Section 13(b). The district court granted the motion with leave to amend. The court held that Section 13(b) requires the FTC to adequately allege that the defendant "is violating, or is about to violate" the law—without regard to what type of injunctive relief the FTC ultimately seeks. Slip op. at 7. The court rejected the FTC's claim that the "about to violate" standard can be satisfied by lesser factual allegations—such as that a past violation is "likely to recur" or "there exists some cognizable danger of recurrent

violations." *Id.* at 9.

Examining the complaint's factual allegations, the court concluded that the FTC had alleged "nothing by way of facts that plausibly suggest ViroPharma 'is about to violate' any law." Slip op. at 11. The court noted that the complaint's allegations regarding ViroPharma's future conduct were limited to those set forth in Paragraphs 150 and 151 (cited above) and stated that "those allegations, without more, [do not] plausibly suggest that ViroPharma is 'about to violate' any law enforced by the FTC, particularly when the alleged misconduct ceased almost five years before filing of the complaint." *Id.* at 12.

The court granted the FTC "leave to amend its complaint within a reasonable time" in order to supplement its factual allegations regarding ViroPharma's future conduct. Slip op. at 14. Rather than availing itself of that opportunity, the FTC immediately appealed to this Court.

SUMMARY OF ARGUMENT

Section 13(b) of the FTC Act ought to be construed in accordance with its plain language. Among the requirements it imposes on any complaint filed by the FTC for injunctive relief: the Commission must plead factual allegations demonstrating that the defendant "is violating, or is about to violate" a law enforced by the Commission. The phrase "about to violate" suggests some degree

of immediacy. The temporal requirement imposed by that language cannot be satisfied, as the FTC has attempted to do in the complaint, by alleging that "there is a cognizable danger that ViroPharma will engage in similar conduct" at some unspecified time in the future. Complaint ¶ 150.

This plain-meaning interpretation of Section 13(b) is supported by its legislative history. Before 1973, the FTC was authorized to initiate *administrative* proceedings against a company alleged to have engaged in unfair methods of competition. But it lacked statutory authority to file federal-court actions to enjoin the company pending completion of administrative proceedings. As a result, the illegal activity might continue until the FTC completed administrative proceedings and could issue a cease-and-desist order. Congress adopted Section 13(b) in 1973 to permit the FTC, in appropriate cases, to bring an immediate halt to unfair methods of competition (as well as unfair or deceptive practices) while administrative proceedings continued. In other words, the purpose of Section 13(b) was to provide the FTC with the power to prevent violations that were happening or "about to" happen, not the power to seek injunctions merely because there was some likelihood that a past violator might again violate the law at some unspecified future date.

On appeal, the FTC claims that its determination that ViroPharma is "about

to" violate the FTC Act is "committed to agency discretion" and thereby not subject to judicial review. FTC Br. 23-26. It bases that highly startling claim on Section 13(b)'s "reason to believe" language; it asserts that courts should not be permitted to second guess whether the FTC really has "reason to believe" that a company is about to violate the law. *Ibid*.

As ViroPharma correctly points out, the FTC waived its reason-to-believe argument by failing to raise it in the district court. More importantly, nothing in Section 13(b) suggests that Congress intended to exempt the FTC from the normal rules of pleading. Rule 8(a) of the Federal Rules of Civil Procedure requires that anyone filing a complaint must including a statement demonstrating "the grounds upon which the court's jurisdiction depends" and "a showing that the pleader is entitled to relief." In a Section 13(b) case, that includes factual allegations from the FTC indicating that the defendant "is about to violate" the law. Federal courts are quite capable of determining whether the FTC's factual allegations are sufficient to make the requisite about-to-violate showing—and therefore there is no reason to conclude that Congress intended to eliminate judicial scrutiny of the FTC's invocation of federal-court jurisdiction. Indeed, the legislative history of the 1973 amendments to the FTC Act demonstrates that Congress explicitly rejected claims that the "reason to believe" language should be interpreted as

exempting FTC filings from judicial review.

Rather than focusing its statutory-interpretation arguments on the actual language of Section 13(b), the FTC devotes much of its brief to reciting a parade of horribles that supposedly will come to pass if the district court judgment is affirmed. *See, e.g.*, FTC Br. 34-38. Those concerns are greatly exaggerated. Even in the absence of authority to file suit against companies alleged to have previously engaged in unfair methods of competition but who are not "about to" do so again, the FTC continues to have powerful tools to remedy past violations through the initiation of administrative proceedings. Should the FTC determine during the course of administrative proceedings that the company is about to repeat its violations, Section 13(b) authorizes the Commission to go into federal court and seek an immediate preliminary injunction against the violation.

Moreover, the FTC is not the only game in town; other federal agencies, particularly the Justice Department, are empowered to bring court actions to enjoin unlawful competition, as are state governments. And numerous state and federal laws authorize private litigants to assert claims for damages if they have been injured by unlawful competition. The FTC asserts that its effectiveness will be impaired if the "about to violate" language is enforced as written. If that is the Commission's concern, it should take those concerns to Congress and request that

the FTC Act be amended, not simply ignore the statutory limitations on its litigating authority.

Nor is the district court's ruling a cause for concern for other federal agencies. While several other statutes include language similar to the FTC's "about to violate" language, none of those statutes include agency-litigating authority that even remotely resembles the overall structure and history of the FTC Act. The FTC focuses much of its attention on supposed similarities between the FTC Act and the federal securities laws. The contrasts between those two statutes are much larger than the similarities, and there are no reasons to suppose that the district court's rationale, if adopted by this Court, would call the SEC's litigating authority into question.

ARGUMENT

I. THE FTC DOES NOT SATISFY SECTION 13(b)'S "IS ABOUT TO VIOLATE" REQUIREMENT BY ALLEGING MERELY THAT THE DEFENDANT IS LIKELY TO VIOLATE THE LAW AT SOME UNSPECIFIED FUTURE DATE

The FTC alleges that ViroPharma engaged in an unfair method of competition when it petitioned FDA in an effort to persuade FDA not to change its bioequivalency guidance for Vancocin. It concedes that any illegal conduct ended no later than 2012. Yet the FTC did not file suit against ViroPharma under Section 13(b) for another five years, during which time ViroPharma divested all its

interests in Vancocin. The FTC contends that it has adequately pled a claim for injunctive relief based on its allegation that "ViroPharma has the incentive and opportunity to continue to engage in similar conduct in the future." Complaint ¶ 150. The district court correctly determined that the FTC's allegations were insufficient to satisfy the prerequisites for a Section 13(b) action. A complaint alleging merely that a business is likely to repeat its violations at some unspecified future occasion has not sufficiently alleged that a past violator "is about to" violate the law.

A. The FTC's Alternative Interpretation of "Is About to Violate" Is Inconsistent with the Plain Meaning of Section 13(b)'s Language

The FTC faults the district court for requiring it to plead facts demonstrating that ViroPharma's future violations were "imminent." FTC Br. 31-32. That argument mischaracterizes the district court's opinion. It never used the word "imminent." Rather, the district court merely held that Section 13(b)'s "about to violate" language imposes a temporal requirement on the pleadings; it requires the FTC to plead facts demonstrating that the defendant is poised to violate the law at some point within a specified time frame. Slip op. at 5-7.

Based on case law construing other federal statutes, the FTC argues that Section 13(b) requires it to allege no more than that "there is a reasonable

likelihood of a further violation in the future" or perhaps merely "that a future violation may occur," FTC Br. 28, 31, and that "such a showing may be based on the defendant's past conduct." *Id.* But that argument does violence to the plain meaning of "is about to violate."[2] *See Castro v. U.S. Dep't of Homeland Security*, 835 F.3d 422, 429-30 (3d Cir. 2016) ("If the statute is unambiguous, we must go no further. The statute must be enforced according to its plain meaning, even if doing so may lead to harsh results.").

As ViroPharma has demonstrated, dictionaries uniformly attach a temporal limitation to the phrase "is about to." ViroPharma Br. at 19 (citing five dictionary definitions over the past 50 years, each stating that the phrase connotes a near-term event). Given the FTC's concession that Section 13(b)'s "is about to violate" language applies without regard to the relief the FTC ultimately plans to seek (*i.e.*, a temporary restraining order, a preliminary injunction, or a permanent injunction),

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[2] That argument also misconstrues the case law on which the FTC purports to rely. For example, it relies on *Aaron v. SEC*, 446 U.S. 680 (1980), to support its contention that Section 13(b)'s "about to violate" requirement is satisfied by a showing that a future violation "may occur" at an unspecified future time. FTC Br. at 31. But the language from *Aaron* on which the FTC relies is quoted wildly out of context. *Aaron* did not consider any issues regarding whether the SEC must demonstrate that securities-law violations are likely to occur in the near term in order to obtain an injunction. Rather, the case focused solely on scienter requirements in securities fraud cases; the language quoted by the FTC held merely that evidence of scienter can be relevant in assessing whether the SEC is authorized to seek injunctive relief under federal securities law. 446 U.S. at 701.

FTC Br. at 23 n.8, that language requires the FTC to plead more than simply a likelihood that the defendant will repeat its past violations at some unspecified future time.

B. The Plain-Meaning Interpretation of Section 13(b) Is Supported by Its Legislative History

The legislative history confirms that Congress adopted Section 13(b) to authorize the FTC to take quick action to prevent violations of the law, not to grant the Commission sweeping new enforcement powers.

Congress created the FTC in 1914 to combat unfair methods of competition in commerce—part of the Progressive Era's efforts to "bust the trusts"—and to combat unfair or deceptive acts or practices in commerce. For the majority of its existence, the FTC's principal enforcement tool was the initiation of administrative proceedings against businesses suspected of engaging in unfair methods of competition. *See* FTC Act § 5(b), 15 U.S.C. § 45(b). Congress authorized the Commission, at the conclusion of those proceedings, to issue cease-and-desist orders against offending businesses, enforceable in federal court. *Ibid*.
But administrative proceedings were (and are) often lengthy, and the FTC lacked any means of preventing a business from continuing its unfair methods of competition while those proceedings continued.

Congress adopted Section 13(b) in 1973 to address that perceived gap in federal government enforcement authority. By authorizing the FTC to request an injunction against a business that "is violating, or is about to violate" the law, Congress ensured that action could be taken to prevent continued violations during the period before completion of an FTC administrative proceeding. As explained by the Senate Report on the bill that ultimately led to adoption of Section 13(b):

> The purpose of [the provision authorizing FTC actions for injunctive relief] is to permit the Commission to bring an immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded.

S. Rep. 93-151, at 30 (1973). The Senate Report makes plain that Congress's intent was to ensure the availability of near-term enforcement authority when there was evidence that a business "is violating, or is about to violate" the law, not to enhance otherwise-available enforcement tools against past violators. That intent is confirmed by the title that Congress assigned to Section 13(b): "Temporary Restraining Orders; Preliminary Injunctions."[3]

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[3] Section 13(b) concludes with a provision stating, "That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." The Senate Report stated that a permanent-injunction remedy was included in Section 13(b) to allow the Commission: (1) to seek a permanent injunction in those instances in which a federal court might be reluctant (for procedural reasons) to grant a preliminary injunction; and (2) to avoid the need for

In support of its idiosyncratic interpretation of the phrase "is about to," the FTC relies largely on case law interpreting other federal statutes that include "is about to" language. The structure of those statutes is much different from the FTC Act's; and, importantly, none of them has a legislative history even remotely similar to the history leading to adoption of Section 13(b). For example, the Securities Act of 1933 and the Securities Exchange Act of 1934 have since their inception authorized the SEC to seek injunctive relief against those violating the securities laws. *See* 15 U.S.C. § 77t(b), 15 U.S.C. § 78u(d)(1). In other words, unlike Section 13(b), those provisions were not belatedly added to the securities laws for the express purpose of adding a stop-gap measure that provided an avenue for relief until SEC administrative proceedings could be completed. Throughout

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a lengthy administrative proceeding in "routine fraud cases." S. Rep. 93-151, at 31. Section 13(b) does not specify the standard a federal district court should apply in considering an FTC request for a permanent injunction in a Section 13(b) case. WLF notes, however, that the precise standard for granting relief in a Section 13(b) case is not at issue here. Rather, the issue is whether the FTC has met the statutory standard for invoking federal court jurisdiction: factual allegations that the defendant "is violating, or is about to violate" the law. As the FTC concedes in its brief, that standard applies regardless of the form of injunctive relief (*i.e.*, preliminary or permanent) ultimately sought by the FTC. A number of federal appeals courts have held that the FTC is entitled to seek monetary equitable relief (*e.g.*, disgorgement or restitution) in some Section 13(b) actions, even though the statute does not mention monetary relief. But no court has held that the FTC is entitled to maintain a Section 13(b) action for monetary equitable relief without first satisfying the "is violating, or is about to violate" pleading requirement.

its history, the SEC has relied primarily on lawsuits, not administrative proceedings, to prevent securities-law violations.

C. Section 13(b)'s Near-Term Focus Requires the FTC to Demonstrate the Need for a Near-Term Remedy

As explained above, the language and structure of the FTC Act, as well as its legislative history, indicate that the FTC is authorized to file suit under Section 13(b) only when it is in need of near-term injunctive relief: the defendant "is violating, or is about to violate" the law. The two types of near-term relief available under Section 13(b) are a temporary restraining order and a preliminary injunction. It is therefore appropriate to look to Third Circuit case law governing the issuance of preliminary injunctions to determine whether the FTC has pleaded sufficient factual allegations to state a claim under Section 13(b).

This Court has repeatedly stated that a preliminary injunction is an "extraordinary remedy" that should be granted "only in limited circumstances." *Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc.*, 765 F.3d 205, 210 (3d Cir. 2014). Traditional principles of equity impose strict limits on the issuance of preliminary injunctions, and "a court is not free to depart from traditional principles of equity merely because it believes such a departure would further a statute's policy goals." *Id.* at 216. In other words, the FTC's efforts to broaden its

statutory authority to maintain a Section 13(b) action for injunctive relief cannot be justified by arguments that broadened authority would advance the FTC Act's purpose of preventing unfair methods of competition. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (stating that an injunction is an "extraordinary remedy" and that "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

Thus, in *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980), this Court overturned the district court's issuance of a preliminary injunction, ruling that the plaintiff had failed to demonstrate that the conduct it sought to prevent was likely to recur in the near term. The Court explained that a requisite for injunctive relief is "a presently existing actual threat; an injunction may not be used simply to eliminate a possibility of a remote future injury." *Ibid.* Similarly, *Campbell Soup Co. v. Conagra, Inc.*, 977 F.2d 86 (3d Cir. 1992), overturned a preliminary injunction issued to a company that sought to prevent a competitor from making use of a trade-secret baking process. The Court held that injunctive relief was improper in light of evidence that the defendant had ceased using the baking process and had no near-term plans to resume doing so. *Id.* at 93. Citing *Continental Group*, the Court stated that "there must be a substantial threat of impending injury before an injunction will issue." *Id.* It

explained that "[w]ere [the defendant] to resume its efforts [to use the trade-secret baking process] or indicate resumption was imminent, the situation would be different and [the plaintiff] would be free to seek appropriate equitable relief." *Id.*

Applying this Court's injunctive-relief standards, the district court's dismissal should be affirmed. The FTC has not pleaded factual allegations sufficient to satisfy the prerequisites for maintaining an action under Section 13(b). The FTC has merely alleged (without supporting factual allegations) that "ViroPharma has the incentive and opportunity to continue to engage" in unfair methods of competition, and that "[a]bsent an injunction, there is a cognizable danger that ViroPharma will engage in similar conduct" at some unspecified time in the future. Complaint ¶¶ 150-151. Because the FTC has not pleaded facts suggesting that ViroPharma "is about to" engage in unfair methods of competition within any specified time period, the complaint was properly subject to dismissal under Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

Indeed, the district court's dismissal should be affirmed even if the Court were to accept the FTC's standard and to substitute the words "there is a reasonable likelihood of further violation in the future" for the actual language contained in Section 13(b) ("is about to violate"). The FTC's complaint does not contain any factual allegations suggesting that there is "a reasonable likelihood"

that ViroPharma will resume the petitioning activity that the FTC finds objectionable. The likelihood of resumption is particularly slim in light of the uncontested facts that: (1) ViroPharma did not engage in any petitioning in the five years before the FTC filed suit; (2) ViroPharma divested its interests in Vancocin several years before the FTC filed suit; (3) the FTC has not alleged that ViroPharma markets brand-name drugs that face any near-term threat of generic competition and thus has no incentive to engage in petitioning designed to delay competition; and (4) future petitions are unlikely to succeed in delaying competition given Congress's Food, Drug, and Cosmetic Act amendments that direct FDA not to delay generic-drug marketing approvals simply because petitions from brand-name drug companies are unresolved.

It is conceivable, of course, that the FTC could plead factual allegations in a new complaint that satisfy Section 13(b)'s "is about to violate" standard. But given that the FTC declined the district court's invitation to file an amended complaint, there is no basis for reversing the district court's judgment.

II. THE LEGAL SUFFICIENCY OF THE FTC'S FACTUAL ALLEGATIONS THAT A DEFENDANT "IS ABOUT TO VIOLATE" THE FTC ACT IS SUBJECT TO JUDICIAL REVIEW

On appeal, the FTC claims that its determination that ViroPharma is "about to" violate the FTC Act is "committed to agency discretion" and thereby not

subject to judicial review. FTC Br. 23-26. The FTC waived that argument by failing to raise it in the district court. If the Court chooses to address the FTC's claim on its merits, it should reject the argument emphatically. The FTC is making an extraordinary claim that would upend well-accepted precepts regarding judicial review.

The FTC bases its "committed to agency discretion" argument on Section 13(b)'s "reason to believe" language. The statute states that the FTC is authorized to file suit for injunctive relief when, among other things, it "has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by" the FTC. The FTC argues that the "reason to believe" language is an indication that the adequacy of the FTC's complaint is committed to agency discretion. FTC Br. 23. The FTC is arguing, in other words, that no matter how insubstantial the factual allegations in its complaint, a court must accept that the complaint is sufficient to withstand a Rule 12(b) motion to dismiss whenever the FTC avers that it has "reason to believe" that a defendant "is about to" engage in unfair methods of competition, or unfair or deceptive acts or practices. That assertion is contrary to accepted rules of pleading, finds no support in the case law, and is contradicted by the FTC Act's legislative history.

First, Rule 8(a) of the Federal Rules of Civil Procedure requires that anyone

filing a complaint must include a statement demonstrating "the grounds upon which the court's jurisdiction depends" and "a showing that the pleader is entitled to relief." In a Section 13(b) case, that requirement includes factual allegations from the FTC that there exist reasons to believe that the defendant "is about to violate" the law.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A bare allegation by the FTC that "we have reason to believe that the defendant is about to violate the law," when unaccompanied by supporting factual allegations, quite obviously does not "state a claim to [injunctive] relief that is plausible on its face." Federal courts are quite capable of determining whether the FTC's factual allegations in a Section 13(b) complaint are sufficient to make the requisite about-to-violate showing—and therefore there is no reason to conclude that Congress intended to eliminate judicial scrutiny of the FTC's invocation of federal-court jurisdiction.

The appeals court decisions cited by the FTC lend no support to its "committed to agency discretion" argument. For example, *Standard Oil Co. v. FTC*, 596 F.2d 1381 (9th Cir. 1979), *rev'd on other grounds*, 449 U.S. 232 (1980), addressed a challenge by an oil company to the FTC's decision to initiate an

administrative investigation of the oil industry; the appeals court determined that the Administrative Procedure Act does not authorize such challenges. Quite apart from the fact that the decision was later reversed, the appeals court's interpretation of the APA has no relevance when, as here, a federal agency is seeking to invoke the jurisdiction of the federal courts rather than (as in *Standard Oil*) to prevent a federal court from interfering with its internal decision-making.

The legislative history of the FTC Act demonstrates that Congress did not intend to exempt the adequacy of Section 13(b) complaints from generally applicable pleading requirements. Congress adopted Section 13(b) in 1973 as part of the Trans-Alaska Pipeline Authorization Act, P.L. 93-153. The House Conference Report accompanying that legislation, H.R. Conf. Rep. 93-624 (Nov. 7, 1973), included a brief discussion of Section 13(b):

> The inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction. This new language is intended to codify the decisional law of *Federal Trade Commission v. Nat'l Health Aids*, 108 F. Supp. 340 [(D.Md. 1952)], and *Federal Trade Commission v. Sterling Drug Inc.*, 317 F.2d 669 [(2d Cir. 1963)], and similar cases which have defined the judicial role to include the exercise of such independent judgment.

H.R. Conf. Rep. 93-624 at 16.

Nat'l Health Aids and *Sterling Drug Co.*, the cases whose standard of review

Congress intended to emulate in adopting Section 13(b), confirm that Congress did *not* intend to eliminate judicial scrutiny of the FTC's invocation of federal-court jurisdiction. Both cases involved the FTC's authority, under Section 13(a) of the FTC Act, 15 U.S.C. § 53(a), to seek court injunctions against false advertisements. Section 13(b)'s introductory language is virtually identical to the previously enacted introductory language of Section 13(a); the latter authorizes the FTC to seek a district-court injunction against dissemination of an advertisement:

> Whenever the Commission has reason to believe 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 advertisements in violation of [Section 12 of the FTC Act].

In *Nat'l Health Aids*, the FTC made the same committed-to-agency-discretion argument that it is making here; that is, the FTC argued that the courts were not permitted to review its determination that there was "reason to believe" that the defendant was "engaged in" or was "about to engage in" the dissemination of false advertising. Both the Maryland district court and the Second Circuit rejected a committed-to-agency-discretion interpretation of Section 13(a). *Nat'l Health Aids*, 108 F. Supp. at 346 (stating that "it was hardly the intention of Congress to require a district court in the exercise of the extraordinary remedy of injunction to proceed affirmatively merely on the basis of the reasonable belief of

the administrative agency"); *Sterling Drug*, 317 F.2d at 677 (affirming denial of the FTC's preliminary injunction motion and stating, "Not even the Commission contends that in a proceeding under section 13(a) the judge is merely a rubber stamp, stripped of the power to exercise independent judgment on the issue of the Commission's 'reason to believe.'"). Because the House Report stated that Congress, when adopting Section 13(b), intended to "to codify the decisional law" of *Nat'l Health Aids* and *Sterling Drug* regarding "the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction," the legislative history confirms that the FTC is mistaken in asserting here that its decision to invoke the district court's Section 13(b) jurisdiction is not subject to judicial review.

III. AFFIRMING THE DISTRICT COURT'S DECISION WILL NOT UNDERMINE THE EFFECTIVENESS OF THE FTC ACT

Rather than focusing its statutory-interpretation arguments on the actual language of Section 13(b), the FTC devotes much of its brief to reciting a parade of horribles that supposedly will come to pass if the district court judgment is affirmed. *See, e.g.*, FTC Br. 34-38. Those concerns are greatly exaggerated. Even in the absence of authority to file suit against companies alleged to have previously engaged in unfair methods of competition but who are not "about to" do so again,

the FTC continues to have powerful tools to remedy past violations through the initiation of administrative proceedings. Should the FTC determine during the course of administrative proceedings that the company is about to repeat its violations, Section 13(b) authorizes the Commission to go into federal court and seek an immediate preliminary injunction against the violation.

Moreover, it is only in recent years that the FTC has regularly sought to use its Section 13(b) litigating authority to obtain injunctions against past violators without regard to whether it could demonstrate that they are "about to" repeat their violations. In the first decades following enactment of Section 13(b), the FTC rarely invoked its new litigation authority in competition cases except for the purpose of delaying a merger or acquisition pending completion of administrative proceedings.

Indeed, a document on the FTC's website suggests that a reluctance to use Section 13(b) litigating authority is still official FTC policy. *See* Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, § II.B.2 (available at www.ftc.gov/about-ftc/what-we-do/enforcement-authority) (last visited August 8, 2018) ("In the competition context, the Commission has used Section 13(b) primarily for the purpose of obtaining preliminary injunctive relief against corporate mergers or

acquisitions pending completion of an FTC administrative proceeding."). Requiring the FTC to cut back somewhat on its aggressive use of Section 13(b) litigating authority will not, as the FTC claims, "thwart the purposes of Section 13(b), limiting its effectiveness as an enforcement tool," FTC Br. 34, given that the FTC has not sought to assert such powers until recently.

The FTC asserts that the decision below will make it easier for a wrongdoer to evade sanctions by ceasing its wrongdoing as soon as it "g[e]ts wind that the FTC [i]s investigating its activities," thereby "render[ing] itself immune from suit in federal court unless the FTC c[an] allege and prove" that it is about to resume its activities. FTC Br. at 35. The FTC's concern is overblown. For one thing, the FTC would likely have little difficulty invoking its Section 13(b) litigating authority by demonstrating that wrongdoers of the sort they describe are merely on hiatus and are poised to renew their violations as soon as they think that regulators are no longer watching closely. More importantly, the situation they posit hardly grants "immunity" to wrongdoers, given that the FTC can initiate administrative proceedings against them.

Moreover, there are numerous other government safeguards against unfair methods of competition, and unfair or deceptive acts or practices. The U.S. Department of Justice plays an active role in enforcing the antitrust laws, as do

various state government agencies. For example, the Justice Department just this week filed its papers in the U.S. Court of Appeals for the District of Columbia Circuit in an effort to block the merger between AT&T Inc. and Time Warner Inc., which Justice contends would harm competition and consumers. *United States v. AT&T Inc.*, No. 18-5214 (D.C. Cir.). Private citizens regularly file claims pursuant to federal and state statutes designed to recover damages incurred due to unfair methods of competition in commerce. Indeed, this Court has recently adjudicated at least two private suits involving claims similar in nature to those asserted against ViroPharma: claims that a brand-name pharmaceutical company harmed competition by taking steps to delay generic competition. *In re Flonase Antitrust Litig.*, 879 F.3d 61 (3d Cir. 2017); *Mylan Pharmaceuticals, Inc. v. Celgene Corp.*, No. 15-8017 (3d Cir. Mar. 5, 2015) (order denying permission to appeal under 28 U.S.C. § 1292(b)).

Congress likely had those other safeguards in mind when it imposed limitations on the FTC's Section 13(b) litigation authority. WLF notes that Congress has expressly authorized other federal agencies to initiate enforcement action against entities that have violated the law, without regard to whether the agencies have evidence that targeted entities are likely to repeat their violations. For example, the Commodities Exchange Act (CEA) authorizes the Commodities

Future Trading Commission to seek injunctive relief to address past, present, or future violations where the defendant "has engaged, is engaged, or is about to engage" in a violation of the CEA. 7 U.S.C. § 13a-1(a). Similarly, the Investment Advisors Act of 1940 permits the SEC to seek injunctions for past, present, or future violations where the defendant "has engaged, is engaged, or is about to engage" in violations of the Act. 15 U.S.C. § 80b-9(d).

If the FTC believes that the effectiveness of its enforcement efforts requires that it be permitted to file lawsuits against past violators without regard to the likelihood that they will be repeat offenders in the near term, it should ask Congress to amend the FTC Act by adopting language similar to the language in the two statutes cited above. It should not continue on the path adopted in this case: asserting litigation authority not granted by Congress, and then telling the courts that they are powerless to review its conduct.

Finally, there is little reason to heed the FTC's warning that the decision below will substantially impair the enforcement powers of other agencies whose enabling statutes include language similar to Section 13(b)'s "about to violate" language. The Court should decide this case on the basis of the language, structure, and history of the FTC Act, secure in the knowledge that the other statutes cited by the FTC—particularly the federal securities laws—have their own

unique structure, history, and case law that will render the Court's interpretation of Section 13(b) largely irrelevant to those discrete areas of the law.

CONCLUSION

Amicus curiae WLF respectfully requests that the Court affirm the district court judgment.

Respectfully submitted,

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Dated: August 9, 2018

CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH WORD COUNT AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I, Richard A. Samp, counsel for *amicus curiae* Washington Legal Foundation, certify, pursuant to Local Appellate Rule 28.3(d), that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(7) and Local Appellate Rules 31.1(c) and 32.1(c), that the foregoing brief of Washington Legal Foundation is proportionately spaced and has a typeface of 14-point Times New Roman, and contains 6,499 words, and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that I scanned the electronic file using a virus detection program (VIPRE Business, Version 5.0.4464), and it did not detect a virus.

Dated: August 9, 2018

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2018, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to Local Appellate Rule 31.1, seven paper copies of this brief (identical to the electronic version) were deposited in the U.S. Mail on August 9, 2018, addressed to the Clerk of the Court.

/s/ Richard A. Samp
Richard A. Samp