ORAL ARGUMENT NOT YET SCHEDULED

No. 26-5028

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

META PLATFORMS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
No. 20-cv-3590 (Hon. James E. Boasberg)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF META PLATFORMS, INC. AND AFFIRMANCE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Chamber of Commerce of the United States of America certifies as follows:

A. PARTIES AND AMICI

Except for the Chamber of Commerce of the United States of America and any other amici curiae that have filed or may file briefs in support of Defendant-Appellee, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Opening Brief of the Federal Trade Commission and the Response Brief for Defendant-Appellee Meta Platforms, Inc.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Opening Brief of the Federal Trade Commission and the Response Brief for Defendant-Appellee Meta Platforms, Inc.

C. RELATED CASES

This case has not previously been on review before this Court or any other court. The Chamber is not aware of any related cases pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Chamber of Commerce of the United States of America submits the following disclosure statement:

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

CIRCUIT RULE 29(d) CERTIFICATE

Pursuant to D.C. Circuit Rule 29(d), the Chamber of Commerce of the United States of America certifies that a separate amicus brief is necessary. This brief provides the unique perspective of the world's largest business organization, which has represented the interests of its members for over a century. The Chamber's members operate in every sector of the economy, and the Chamber's extensive experience with antitrust enforcement and statutory limits on agency authority—including repeated participation in litigation involving Section 13(b) of the Federal Trade Commission Act—will assist the Court in resolving the issues presented.

/s/ Judson O. Littleton
Judson O. Littleton

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GLOSSARY

Commission or FTC	Federal Trade Commission
FTC Act	15 U.S.C. § 41 *et seq.*
Section 2	15 U.S.C. § 2
Section 5(b)	15 U.S.C. § 45(b)
Section 13(b)	15 U.S.C. § 53(b)
Section 16	15 U.S.C. § 26
Section 19	15 U.S.C. § 57b

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The scope of enforcement powers granted by Congress to the Federal Trade Commission is an important issue to the Chamber's members. Clearly defining and enforcing the limits of these powers enables industries and markets to function effectively. The Chamber repeatedly has filed amicus briefs addressing the scope and meaning of Section 13(b) of the FTC Act. *See, e.g.*, Amicus Curiae Br., *AMG Cap. Mgmt., LLC* v. *FTC*, 593 U.S. 67 (2021)

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and 29(a)(4)(E), amicus curiae states that all parties to this appeal have consented to the filing of this brief, and that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

(Nos. 19-508 & 19-825); Amicus Curiae Br., *FTC* v. *AbbVie Inc.*, No. 18-2621 (3d Cir. June 12, 2019); Amicus Curiae Br., *FTC* v. *AMG Cap. Mgmt., LLC*, No. 16-17197 (9th Cir. Mar. 14, 2019).

INTRODUCTION

Breaking up a business is the most drastic remedy known to antitrust law, and Congress set a high bar to imposing it. When it empowered the Commission to go directly to federal court to seek such remedies rather than first completing its traditional administrative process, Congress conditioned that power on two critical requirements. The Commission may proceed only against a company that "is violating, or is about to violate" the law, and a court may enter permanent relief only "in proper cases" and "after proper proof" of that violation. 15 U.S.C. § 53(b).

The Commission now seeks to avoid those safeguards. It argues that it satisfies Section 13(b)'s requirement of a present or impending violation once and for all when it files a complaint. On that view, a violation in 2020 entitles the FTC to structural relief to address any supposed "lingering harm" in 2026, even if a district court finds—here, after a six-week trial—that no present violation exists. As the district court explained, that "is not the [statutory scheme] that Congress passed." *FTC* v. *Meta Platforms, Inc.* ("*Meta II*"), 811 F. Supp. 3d 67, 88 (D.D.C. 2025). And the Commission cannot point to a single case in the 50-plus years since Section 13(b) was enacted that has recognized the power it asserts today.

The Commission's reading not only is an attempt to rewrite the statute Congress wrote, but also would have substantial destabilizing effects. Businesses treat completed deals as final, and they hire, invest, and build accordingly. Many of those deals (like the one challenged in this case) even were reviewed by the government at the time. But under the Commission's theory, no deal would ever truly be final: A company could integrate an acquisition for a decade, watch the market change around it, and still be broken up over competitive conditions that no longer exist. An injunction's job is to stop a violation. Where there is none, a breakup stops nothing; it only destroys years of work.

This is not the Commission's first attempt to read more into Section 13(b) than Congress put there. Five years ago, a unanimous Supreme Court rejected the Commission's claim that the same provision authorizes monetary relief. *AMG Cap. Mgmt., LLC* v. *FTC*, 593 U.S. 67, 70 (2021). That same year, the Commission complained to Congress that courts had interpreted Section 13(b) to preclude injunctive relief once unlawful conduct ceases, and it asked for a fix: retrospective "has violated" language. Congress declined. The Commission now calls the same reading it previously complained of "entirely novel," FTC Br. 2, and asks this Court for the amendment Congress would not give it.

The district court applied the statute as written at every stage of this six-year case. Its interpretation adheres to Section 13(b)'s text and structure, is confirmed by Supreme Court and court of appeals precedent, matches what the Commission itself has told Congress, and tracks how courts—including this Court—read similar language in other enforcement statutes. The counterarguments from the Commission and amici States rely on implausible textual readings, cases decided under other statutes, and practical concerns that ordinary civil procedure already answers. None of that can rewrite the statute Congress enacted. The district court's careful and considered judgment should be affirmed.

ARGUMENT

I. The Commission Must Prove A Present Or Impending Violation Of Law To Obtain A Permanent Injunction Under Section 13(b).

Section 13(b) authorizes the Commission to seek an injunction against a person who "*is* violating, or *is about to* violate" the law, and it permits a permanent injunction only "in proper cases" and "after proper proof."

15 U.S.C. § 53(b) (emphases added). The statute thus establishes a straightforward sequence. The Commission may sue under Section 13(b) once it has "reason to believe" a defendant is violating or about to violate the law. *Id.* But the Commission must *prove* a present or impending violation before obtaining a permanent injunction. It cannot obtain an injunction against a violation that occurred in the past. Text and structure, governing precedent, the Commission's own statements to Congress, and analogous enforcement statutes all lead to that conclusion.

A. Section 13(b)'s text and structure require proof that a defendant is violating or is about to violate the law.

1. The district court correctly held that Section 13(b) permits the FTC to "seek to enjoin only conduct that currently violates the law or imminently will." *Meta II*, 811 F. Supp. 3d at 88. Statutory interpretation "begins with the text," *Ross* v. *Blake*, 578 U.S. 632, 638 (2016), and here the text permits no other reading. Section 13(b) opens with a single overarching predicate—it authorizes the FTC to go directly to federal court and sue a person who "is violating, or is about to violate" the law. 15 U.S.C. § 53(b). That key phrase is stated in the present tense, and courts must honor Congress's chosen "verb tense." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). The present tense includes the "future as well as the present," but "generally does

not include the past." *Carr* v. *United States*, 560 U.S. 438, 448 (2010) (emphasis added; quotation marks omitted).

The tense fixes both when the Commission may sue and what it may ask a federal court to enjoin. Section 13(b) authorizes suit "to enjoin any *such* act or practice." 15 U.S.C. § 53(b) (emphasis added). The word "such" ties the object of the suit to the ongoing or impending violation just described. Conduct that has ceased and is not about to recur is neither ongoing nor impending. Section 13(b) therefore operates only prospectively, not against conduct that has come and gone.

Congress knows how to reach past conduct—and did so elsewhere in the same Act. Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act," the omission is presumed to be "intentional[]." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted). Most notably, Section 5(b), the FTC Act's original enforcement mechanism, authorizes administrative proceedings against any person that "*has been* or is using any unfair method of competition." 15 U.S.C. § 45(b) (emphasis added). When Congress later created Section 13(b) to allow a direct path to federal court, it conspicuously omitted that backward-looking language and authorized suit *only* against present or impending violations. *See id.* § 53(b).

Two years later, Congress went the other direction again. It added Section 19, which expressly authorizes courts to "redress injury" caused by completed conduct through retrospective remedies such as "refund[s]" or "damages." *Id.* § 57b(b). And as might be expected for a provision authorizing such retrospective relief, Congress set a limitations clock on the Commission's right to sue. *Id.* § 57b(d) (Commission must bring suit within three years of the violation). By contrast—as might be expected for a provision authorizing only forward-looking relief against ongoing or imminent conduct—Section 13(b) contains no such limitations period. In short, Sections 5(b) and 19, by their terms, reach completed violations. Section 13(b), by its terms, does not. Congress indisputably knows the difference.[2]

2. The Commission does not really dispute that Section 13(b) contemplates prospective relief. It instead argues that the statute's overarching predicate condition is merely a "pleading requirement," satisfied

[2] Congress has used the backward-looking formulation in other injunction provisions. For instance, less than a year after enacting Section 13(b), Congress authorized the Commodity Futures Trading Commission to seek injunctions against any person who "has engaged, is engaging, or is about to engage in" a violation. 7 U.S.C. § 13a-1(a).

at filing and irrelevant thereafter. FTC Br. 20–24. But words in a statute draw meaning from their "context" and their "place in the overall statutory scheme." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 13(b) poses the same temporal question at every stage, under a burden that "rises as a case progresses." *Meta II*, 811 F. Supp. 3d at 88.

To sue, the Commission needs "reason to believe" a person is violating or is about to violate the law. 15 U.S.C. § 53(b). To obtain preliminary relief, it must make a "proper showing" of its "likelihood of ultimate success" in proving that same violation. *Id.* And to win a permanent injunction "in proper cases," the Commission may secure that ultimate success only through "proper proof"—that is, "proof that the 'act or practice' that it seeks to enjoin is an ongoing or imminent violation of the law." *Meta II*, 811 F. Supp. 3d at 88. In other words, the Commission may begin with belief, but it cannot obtain ultimate relief without proof of the same present or impending violation.

The district court correctly drew that distinction from the outset. In 2021, it explained that "reason to believe" is "the statutory trigger for when [the Commission] may bring suit," but to "actually succeed," the Commission must persuade the court that "a violation is either ongoing or about to occur." *FTC* v. *Facebook, Inc.* ("*Facebook I*"), 560 F. Supp. 3d 1, 27 (D.D.C. 2021) (quotation marks omitted); *accord FTC* v. *Facebook, Inc.* ("*Facebook II*"), 581 F. Supp. 3d 34, 58–60 (D.D.C. 2022).

None of the Commission's other attempts to elide the predicate "is violating, or is about to violate" requirement holds up under scrutiny. The Commission asserts (at 21–22) that Section 13(b) says nothing about what it must prove on the merits and that Section 2 of the Sherman Act *alone* provides the governing merits standard. That is wrong. Section 2 defines the underlying antitrust "provision of law" being violated, 15 U.S.C. § 53(b), but Section 13(b) defines *when* that violation must exist for the Commission to seek an injunction. The FTC must satisfy both. It also observes (at 27) that when a "non-FTC plaintiff—government or private" sues to enjoin Sherman Act violations, "courts do not assess the defendant's conduct at the time of the final decision." True enough. *Those* plaintiffs sue under statutes that impose no such condition. But Section 13(b) is what permits the Commission to take a substantive violation "directly to court," *AMG*, 593 U.S. at 72, and the Commission cannot invoke this authority without satisfying the conditions Congress attached to it. Because proof that a defendant violated Section 2 many years ago does not establish that the defendant "is violating" or "is about to violate" it, such proof cannot support relief under Section 13(b).

3. The Commission's fallback argument—that suits seeking only a permanent injunction rest on the section's "second proviso" alone and are not "contingent on anything preceding it," FTC Br. 30–32—makes even less sense.[3] The proviso explains what is necessary to obtain a specific remedy; it is not a freestanding cause of action divorced from the rest of the statute. Standing alone, the proviso is an orphan—it names no defendant, describes no conduct, and identifies no law whose violation may be enjoined. Its own terms point backward: The proviso operates only "in proper cases" and "after proper proof," but a case or proof is "proper" only by reference to the requirements stated above. Read in isolation, the proviso would nonsensically require "proper proof" of nothing in particular.

The Commission's own position illustrates the problem. It acknowledges elsewhere that every Section 13(b) case must involve some actual "violat[ion]." FTC Br. 21. But the second proviso mentions no violations at all. Indeed, the only provision of Section 13(b) that does is the opening clause. Accordingly, even under the Commission's theory, "proper proof" takes at least some of its content from the opening clause, yet the

[3] The second proviso reads in full: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

Commission offers no basis for giving meaning to "violat[ion]" but discarding the temporal condition. Its construction would lead to bizarre results. The FTC acknowledges (at 30) that it must make a proper showing of a likely present or impending violation as a "precondition[]" for preliminary relief. But a permanent injunction—the graver remedy—could, on the Commission's view, rest on proof of a violation that ended long ago.

The Commission also cites a series of Section 13(b) cases for the proposition that it can bring cases seeking only permanent injunctions. FTC Br. 33–34. No one disputes that, but doing so doesn't somehow reduce the Commission's burden. Those cases establish that permanent-injunction suits may skip "administrative proceedings." *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1110–11 (9th Cir. 1982); *see, e.g.*, *United States* v. *JS&A Grp., Inc.*, 716 F.2d 451, 456–57 (7th Cir. 1983). None holds that such suits may obtain permanent injunctive relief without showing that the defendant "is violating, or is about to violate" the law. 15 U.S.C. § 53(b).

The Commission's cases discussing "general provisos" are just as inapt. Even those cases recognize that, consistent with the district court's reading, the "customary" function of a proviso is "to refer only to things covered by a preceding clause." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005); *see*

Republic of Iraq v. *Beaty*, 556 U.S. 848, 857–58 (2009) (provisos are "presumptively . . . confined to the subject-matter of the principal clause" (quotation marks omitted)). To be sure, it is "possible to use a proviso" to confer an "independent" power when context so indicates, *Alaska*, 545 U.S. at 106, and the Commission perplexingly suggests that Congress's use of the term "[p]rovided further" in the second proviso, in contrast to "[p]rovided, however" in the first, provides such context, FTC Br. 30–32. But both provisos attach to the sentence governing relief in "such action"—referring to the "suit" that Section 13(b)'s opening clause authorizes only against a person who "is violating, or is about to violate" the law. 15 U.S.C. § 53(b). Moreover, it is implausible that Congress would relieve the FTC of the overarching predicate showing under Section 13(b) by changing "however" to "further." To the contrary, all relevant "indications," *Beaty*, 556 U.S. at 859, cut in the opposite direction. The second proviso uses "provided further" for the simple reason that it follows the first proviso also using "provided." The proviso cannot operate on its own and so necessarily draws its subject from the preceding text.

4. Finally, the Commission protests that a present-violation requirement makes the benchmark a moving target: If "now" means the date

of decision, courts might rely on post-trial evidence; if it means trial, "[a] trial is not a fixed point in time." FTC Br. 23 n.2. All of this is a red herring. The district court assessed whether the Commission had proved that Meta "is currently violating the antitrust laws," *FTC* v. *Meta Platforms, Inc.* ("*Meta I*"), 2025 WL 3211824, at *1–2 (D.D.C. June 3, 2025), based on the evidence presented "[a]t trial," *Meta II*, 811 F. Supp. 3d at 88. That is how every other civil case works—liability turns on "the evidence adduced at trial." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted). Any post-discovery evidence entered the trial record under ordinary evidentiary rules. *See infra* Part II.C. There is nothing unusual or unworkable about testing the Commission's claims against "the complete trial record." *Dupree* v. *Younger*, 598 U.S. 729, 734 (2023).

B. The Supreme Court and the courts of appeals construe Section 13(b) as a forward-looking injunction provision.

The Supreme Court in *AMG* all but confirmed the district court's reading of Section 13(b). Reading the section "as a whole," the Court held that it "focuses upon relief that is prospective, not retrospective," emphasizing that Congress deliberately used the phrases "is violating" and "is about to violate"—"not 'has violated.'" 593 U.S. at 75–76. That language, the Court explained, speaks to "when the Commission may request injunctive relief," not merely when it may file a complaint. *Id.* at 76. The Court also declined to read the second proviso in isolation as the FTC urges here, observing that it is "directly related" to the preceding injunctive authority and simply permits the Commission to "go one step beyond the provisional." *Id.*

In reaching its conclusion, the Court sided with courts of appeals that already had rejected the Commission's attempt to use Section 13(b) to obtain backward-looking relief. *See* 593 U.S. at 81. In particular, the Seventh Circuit likewise had interpreted Section 13(b) as serving a "forward-facing role: enjoining ongoing and imminent future violations." *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 774 (7th Cir. 2019).

The Commission tries to dismiss both decisions as addressing "the totally separate issue" of monetary relief, making any broader discussion mere "dicta." FTC Br. 24, 34 n.6. But the statute's prospective character was a "necessary antecedent" to both decisions, *In re Grand Jury Investigation*, 916 F.3d 1047, 1052–53 (D.C. Cir. 2019), not dicta. Both courts withheld retrospective remedies *because* Section 13(b) authorizes only "prospective" ones. *AMG*, 593 U.S. at 76.

Other circuits have long applied the same rule. The Ninth Circuit, for example, has recognized that Section 13(b) "only contemplate[s] ongoing or future violations" and "cannot be used to remedy past violations." *FTC* v. *Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). The Commission attempts to confine that case to the pleadings stage, FTC Br. 24, but the court stated a rule governing when an injunction "will issue," not only when a complaint may be filed, *Evans*, 775 F.2d at 1087.

The Commission cites two Third Circuit decisions, FTC Br. 20–21, but those cases also support the district court's interpretation. In *FTC* v. *Shire ViroPharma Inc.*, the court referred to Section 13(b)'s predicate condition as a "pleading requirement" because the case arose on a motion to dismiss. 917 F.3d 147, 158 (3d Cir. 2019). But the court also expressly stated that whether a person "is violating, or is about to violate" the law "relates to the merits of a Section 13(b) claim," and that the Commission had to have "evidence" of such a violation. *Id.* at 154, 156. Congress, it explained, gave the Commission the authority to address completed conduct elsewhere in the FTC Act—specifically, in Section 5(b)'s broader "has been or is" framing. *Id.* at 155, 159. The Third Circuit's subsequent decision in *FTC* v. *AbbVie Inc.*—one of the two rulings the Supreme Court sided with in *AMG*, *see* 593 U.S. at 81—drives the point home. 976 F.3d 327 (3d Cir. 2020). Discussing Section 13(b)'s application to preliminary and permanent injunctions, the court explained that where conduct is "neither imminent nor ongoing, there is nothing to enjoin, and the FTC cannot sue under Section 13(b)." *Id.* at 376. Neither *Shire* nor *AbbVie* holds that satisfying the present-violation requirement in a complaint eliminates the need to prove that same condition on the merits.

C. Even the Commission has acknowledged that Section 13(b) does not reach past conduct.

The Commission already knows all of this. In April 2021, four months after filing this suit, the Commission complained to Congress that courts had held that it "cannot seek injunctive relief under 13(b) in cases where the unlawful conduct is no longer occurring." *The Urgent Need To Fix Section 13(b) of the FTC Act: Hearing Before the Subcomm. on Consumer Prot. & Commerce of the H. Comm. on Energy & Commerce*, 117th Cong. 1, 1 (Apr. 27, 2021) (prepared statement of the FTC). The Commission lamented that those decisions foreclosed relief for "unlawful conduct that occurred entirely in the past," warning that this very case hung in the balance: "Facebook has cited these decisions and argued that Section 13(b) bars the federal court suit." *Id.* at 4.

The Commission asked Congress to fix the problem by inserting "has violated" immediately before "is violating" in Section 13(b)—similar to Section 5(b). H.R. 2668, 117th Cong. § 2(a)(1)(A) (as passed by House, July 20, 2021).

The House passed the proposal, but it died in the Senate. *H.R. 2668—All Actions*, Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/2668/all-actions (last visited Aug. 26, 2026). A new bill introduced less than a month ago would again insert "has violated" into Section 13(b). *See* H.R. 10003, 119th Cong. § 2(a)(1)(A) (as introduced July 30, 2026).

Grasping at straws, the Commission now tells this Court that all of that was completely unnecessary. The Commission had it right the first time and is wrong in arguing otherwise to this Court now. Congress has declined the Commission's requests to expand its authority, and it is not this Court's role to override that decision. *See FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352, 355 (1941) (FTC's prior "unsuccessful attempt . . . to secure from Congress" the asserted power meant its reading "ought to await a clearer mandate from Congress"); *West Virginia v. EPA*, 597 U.S. 697, 724–25 (2022) (rejecting agency claim of power to achieve what "Congress had conspicuously and repeatedly declined to enact itself").

D. This Court and others construe analogous enforcement statutes the same way.

Section 13(b)'s formula is not unique to the FTC Act. Congress repeatedly has conditioned injunctive enforcement on proof of a present or impending violation, and courts hold agencies to those temporal limits.

This Court did so just two years ago in construing the Foreign Agents Registration Act, which authorizes suit "[w]henever . . . any person is engaged in or about to engage in" a violation and permits an order enjoining "such acts." 22 U.S.C. § 618(f). The government argued—just as the Commission does here—that the statute permitted "injunctions for long-ago completed violations." *Att'y Gen.* v. *Wynn*, 104 F.4th 348, 354 (D.C. Cir. 2024). This Court disagreed. The provision, it explained, "describes both *when* the government can sue and *what* it can ask for when it does." *Id.* Congress's "use of the present tense indicates that it meant to refer to present and future acts, not past ones." *Id.* The statute did "not allow suit against an individual who 'failed' to comply in the past," and the Court affirmed dismissal because the conduct had ceased years before suit. *Id.* at 354–55.

The securities laws parallel Section 13(b) even more closely. They authorize the Securities and Exchange Commission to sue "[w]henever" a person "is engaged or [is] about to engage" in a violation and permit an injunction "upon a proper showing." 15 U.S.C. §§ 77t(b), 78u(d)(1). Construing that language, the Supreme Court held that a "proper showing" requires "at a minimum, proof that a person is engaged in or is about to engage in a substantive violation." *Aaron* v. *SEC*, 446 U.S. 680, 700–01 (1980). There too, the overarching filing-stage condition identifies what the agency must later prove to obtain ultimate relief.

II. The Commission's And States' Remaining Objections Cannot Substitute For The Proof Section 13(b) Requires.

Unable to reconcile their theory with Section 13(b)'s text, the Commission and the States retreat to general antitrust doctrine, supposed consequences for consummated acquisitions, and practical enforcement concerns. All the statute demands, however, is that permanent structural relief address current illegality proved at trial. That requirement ensures that the Commission can proceed against continuing violations and commits any practical concerns to the familiar tools of civil litigation.

A. General antitrust and Section 16 decisions do not displace Section 13(b)'s present-violation requirement.

The Commission argues that the district court "conflated" liability and remedy because, in its view, current market conditions are relevant only "at the *remedy* phase." FTC Br. 25; *see* States Br. 11. That argument merely rehashes its misreading of Section 13(b). Of course current conditions may inform the scope of prospective relief once liability has been established. But Section 13(b) *also* makes current conditions relevant to establishing liability in the first place, to the extent those conditions bear on whether the Commission has proven a present or impending violation. That showing is itself an "essential element" of the Commission's Section 13(b) claim. *Meta I*, 2025 WL 3211824, at *1. The district court correctly required the Commission to prove current illegality before considering what relief an established violation might warrant.

The antitrust-equity cases the Commission invokes do not suggest otherwise. They arose under the Sherman or Clayton Acts—statutes that, in contrast to Section 13(b), contain no "is violating, or is about to violate" condition. *See, e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 630–31 (1953) (Clayton Act § 8); *United States* v. *Or. State Med. Soc'y*, 343 U.S. 326, 328 (1952) (Sherman Act §§ 1–2); *United States* v. *Microsoft Corp.*, 253 F.3d 34, 45–47 (D.C. Cir. 2001) (en banc) (Sherman Act §§ 1–2). The same is true of the Commission's and States' cases examining market conditions at filing or bifurcating liability and remedies: Each and every one of them arises under a statute that nowhere requires proof of a present or impending violation. *See* FTC Br. 21–22; States Br. 7–14. Those decisions might inform the relief appropriate after a violation has been established, but they do not eliminate the separate liability showing Section 13(b) requires.

The States make the same category error with Section 16 of the Clayton Act. *See* States Br. 7–8. That statute authorizes relief against "threatened loss or damage" under traditional equitable principles; it contains neither "is violating, or is about to violate" nor "proper proof." 15 U.S.C. § 26. Decisions measuring Section 16 liability by the facts at the time of filing cannot erase language Congress placed in Section 13(b). And if the statutes impose different requirements on different enforcers, that is Congress's design—a "coherent enforcement scheme," *AMG*, 593 U.S. at 78—not "fragment[ation]." States Br. 15–17. Moreover, nothing in the decision below touches the States' own authority under Section 16.

B. Section 13(b) does not immunize consummated transactions.

The Commission and the States assert that requiring proof of a current or impending violation would "depriv[e] courts of the ability to remedy past violations that threaten to recur or continue to cause harm." FTC Br. 16, 26; *see* States Br. 16. Not so. Even the district court rejected any categorical bar to challenging old acquisitions, explaining that "an injunction under Section 13(b) is a theoretically available remedy in a Section 2 challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock." *Facebook I*, 560 F. Supp. 3d at 31–32; *accord Facebook II*, 581 F. Supp. 3d at

58–60. On that view, before closing, an unlawful acquisition may be "about to violate" the law; after closing, continued ownership may be "violating" it; and if the Commission can show that unlawful conduct is genuinely poised to recur, then it can show that the defendant is "about to violate" the law. *See Facebook I*, 560 F. Supp. 3d at 31–32. What it cannot do is ask a court to enjoin a violation that ceased long ago.

This case illustrates the distinction. The district court did not reject the Commission's claims because the transactions happened a long time ago. It allowed that theory to proceed and held the Commission to its Section 13(b) burden: proving on the trial record that Meta's continued ownership of Instagram and WhatsApp amounts to unlawful monopoly maintenance—which required proving that Meta "has monopoly power now." *Meta II*, 811 F. Supp. 3d at 88. After six weeks of trial, the court found that the Commission had not met its burden, because whatever power Meta may have once held "seems to have slipped from Meta's grasp." *Id.* at 123.

There is nothing surprising about that course of events. A company does not hold still while an enforcement action winds through discovery and trial. It keeps hiring, investing, and building, and its employees, customers, and business partners commit to the enterprise as it exists, not as it looked when the complaint was filed. Competitors move too. The district court found as much here: Whatever the competitive landscape looked like when the Commission filed suit in 2020, it had changed dramatically by the time of trial. *See id.* at 97. Requiring current, "proper proof," 15 U.S.C. § 53(b), before imposing structural relief ensures that the "most drastic" decree in antitrust law, *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), responds to the market it will actually govern.

C. Section 13(b) provides for prompt enforcement while requiring proper proof.

The Commission's and States' remaining objections ask the Court to enlarge Section 13(b) for practical reasons. But if the Commission regards its existing tools as "too cumbersome or otherwise inadequate," it knows who to ask. As the Supreme Court put it, it may "ask Congress to grant it further remedial authority." *AMG*, 593 U.S. at 82. The Commission did so just five days later, *see supra* Part I.C, but Congress declined.

The Commission's first practical complaint is that requiring proper proof at trial supposedly "incentivizes defendants to engage in delay tactics." FTC Br. 29 n.3. The States similarly argue that a defendant could "avoid liability simply by delaying the verdict." States Br. 17–18. For one thing, if a defendant's alleged monopoly power is gone by the time of trial, that is simply competition at work, not gamesmanship. For another, Section 13(b) itself answers any delay concern by authorizing temporary and preliminary relief while proceedings continue. *See* 15 U.S.C. § 53(b). The States' own legislative history confirms that Congress sought "to insure prompt enforcement of the laws" by empowering the Commission "to seek *preliminary* injunctive relief." H.R. Rep. No. 93-624, at 16–17 (1973) (Conf. Rep.) (emphasis added); *see* States Br. 17 (quoting same). Courts also routinely expedite cases, enforce schedules, compel discovery, and sanction obstructions. Those familiar tools handle actual delay without eliminating the predicate Congress required for permanent relief. The fact that the Commission did not employ such tools here is no basis to rewrite the statute.

The Commission next contends that the district court's interpretation invites "strategic, mid-litigation conduct" and allows post-discovery developments to become "unvetted cornerstones" of the defense. FTC Br. 28–29. Ordinary civil procedure addresses this concern too. Courts regularly manage later-developing facts through supplementation, focused discovery, and remedies tailored to prejudice. The district court followed those everyday procedures here, admitting recent evidence only after weighing its relevance, availability during discovery, good cause, and any prejudice. Order at 1, *FTC*

v. *Meta Platforms, Inc.*, No. 20-cv-3590 (D.D.C. Apr. 2, 2025), Dkt. 503; *Meta I*, 2025 WL 3211824, at *1–2. Such safeguards ensure a fair evidentiary record without freezing the relevant facts at filing.

Finally, the States argue that a "liability determination (even without a remedy)" deters misconduct by "send[ing] a message as to what is and is not permissible." States Br. 14. But Congress authorized the Commission to stop violations, not to send messages. The Court should apply Section 13(b) as written and affirm.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the length limits, typeface, and type-style requirements of Federal Rules of Appellate Procedure 29(a) and 32(a), as it contains 5,406 words and was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expanded BT font.

I hereby certify that on August 27, 2026, I caused a true and correct copy of this brief to be electronically filed through the Court's CM/ECF system, which will send a notice of filing to all registered users.

August 27, 2026

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