HOW FEDERAL AGENCIES SUE ON VICTIMS' BEHALF: PARENS PATRIAE, EQUITABLE REMEDIES, AND PROCEDURES

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Introduction

Imagine a national bank's practices violated a federal banking regulation and thereby cost some people their savings. Criminal charges or civil penalties may be appropriate but might not make defrauded victims whole. If the victims see a lawsuit as not worth the effort or they struggle to attract appropriate representation, then no private legal action would undo the bank's harm. Enter the Office of the Comptroller of the Currency ("OCC"). If the illegal actions enriched the bank or "involved a reckless disregard for the law," the OCC could issue a cease-and-desist order requiring the bank to pay restitution to victims.[1] If the bank were to violate that order, the OCC could seek enforcement through a federal court.[2]

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1 12 U.S.C. § 1818(b)(6) (2018); *Enforcement Action Types*, Off. of the Comptroller of the Currency, https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/enforcement-action-types/index-enforcement-action-types.html (last visited Mar. 3, 2021). Such cease-and-desist orders have been related to large penalties imposed on banks. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 1996 (2012) (describing a $394 million OCC settlement with banks over "mortgage foreclosure abuses"); Press Release, Office of the Comptroller of the Currency, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (Apr. 13, 2011), https://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html (describing the OCC imposing cease-and-desist orders); Press Release, Office of the Comptroller of the Currency, OCC Settles Civil Money Penalties Against Large National Bank Mortgage Servicers for $394 Million; Penalty Assessment Coordinated with Servicers' Actions and Payments Under Federal-State Settlement (Feb. 9, 2012), https://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-20.html (describing the penalty as a settlement of the cease-and-desist orders).

2 12 U.S.C. § 1818(d).

Now imagine that the OCC's cease-and-desist order was only an injunction or a penalty owed to the government and did not include restitution. This could occur if the OCC's authorizing statute did not permit "restitution" or if the OCC did not invest the resources to find proof of enrichment or reckless disregard.[3] If the OCC believed the bank was threatening to violate its injunction or penalty order, then it could still seek enforcement through a federal court. There, under most circuits' current standards and potentially beyond statutes' authorization,[4] the OCC might seek and the court could grant restitution that was not in the original OCC order.

Now imagine resetting the scenario and adding another twist: the victims sue the bank, and the OCC separately argues before a federal court that the bank should pay restitution as part of its order's enforcement. Although the OCC's role marshals public resources to advocate for victims' interests, only the private collective action has established court procedures to ensure different victims are adequately represented and restitution is distributed appropriately.[5] Courts would not force the wrongdoer to pay full restitution in two lawsuits, so to the extent the OCC suit adjudicates, liquidates, and distributes victim restitution, that suit cannot only expand on statutes' explicit remedies but also sidestep the court's victim-protecting procedures.

Much of these hypothetical OCC actions hinge on statutes, which vary across agencies and their areas of enforcement. However, one cross-agency step that courts have scrutinized recently is federal courts' ability to allow and grant an agency's request for victim compensation when statutes do not explicitly allow it. This ability to "strip wrongdoers of their ill-gotten . . . net profits" appears in cases and statutes as "restitution," "accounting," or "disgorgement" depending on the era, and it is based on equitable principles that aim to assist victims without becoming punitive.[6] Not all instances of restitution or disgorgement are within courts' equitable power, though. A pair of Supreme Court cases recently differentiated between, on the one hand, disgorgements that were penalties and therefore did not benefit from courts' equitable powers and, on the other hand, disgorgements that were implicit in a statute that granted "equitable relief."[7] While the former type of disgorgement is primarily punitive, in the public interest, and often does not benefit victims,[8] the latter is usually given to victims.[9] In the Supreme Court's 2020 term, *AMG Capital Management, LLC v. FTC* examined a circuit split over scenarios like the hypothetical OCC lawsuit in which an agency

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3 *Id.* § 1818(b)(6).

4 *See infra* subsections I.B.1 (describing the basis for the court exercising its equitable authority to grant such a remedy in the absence of a statutory prohibition) and I.B.2 (describing the current circuit split that has emerged over this).

5 Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 530–32, 535, 538–39 (2011) [hereinafter Zimmerman, *Distributing Justice*]; *see infra* Section II.A.

6 Liu v. SEC, 140 S. Ct. 1936, 1942–44 (2020).

7 *Id.* at 1940 (citing Kokesh v. SEC, 137 S. Ct. 1635 (2017)).

8 *Kokesh*, 137 S. Ct. at 1643–44.

9 *Liu*, 140 S. Ct. at 1940.

seeks disgorgement as an equitable extension of a statute's language.[10] As this Note describes,[11] the Supreme Court's 2020 ruling in *Liu v. SEC* and other decisions suggest the Court will rein in situations like the OCC hypothetical but uphold precedents that recognized courts' broad equitable remedies.

Even after *AMG Capital Management* clarifies what courts can do when they hear agency cases, the frameworks around how and when agencies can seek redress for victims will remain thin even as agencies disburse billions to victims annually. The Securities and Exchange Commission ("SEC") alone ordered $3.6 billion of disgorgements in fiscal year 2020,[12] and calendar year 2019 saw the Federal Trade Commission (FTC) disburse $136 million of consumer "redress" and record $1.2 billion of "new redress, disgorgement[,] and civil contempt awards."[13] Even though the 2017 *Kokesh v. SEC* case found that SEC disgorgements are penalties rather than equitable relief,[14] the SEC subsequently concentrated on "investigations which hold the most promise for returning funds to investors."[15] The basis for classifying SEC disgorgements as penalties under *Kokesh* may therefore be weaker now or in the future. Agencies as diverse as the United States Postal Service (USPS) and the Food and Drug Administration (FDA) all have processes for benefitting victims of wrongdoing, and these processes' procedures vary.[16] Despite this range, cases examining what agencies can do in federal courts focus on equity in the federal courts, not on the standing of administrative agencies.

10 FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 427, 435 (9th Cir. 2018), *cert. granted*, 2020 WL 3865250 (U.S. July 9, 2020) (No. 19-508) (affirming precedent that gave a broad reading to court remedies the FTC could seek); FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 779, 785 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020) (No. 19-825), *cert. vacated*, 2020 WL 6551765 (U.S. Nov. 9, 2020) (No. 19-825) (creating a circuit split by overturning Seventh Circuit precedent and reading FTC remedies narrowly). The Ninth Circuit case the Supreme Court reviewed was consolidated with the conflicting Seventh Circuit case until the Supreme Court vacated its grant of certiorari to the Seventh Circuit case. *AMG Cap. Mgmt.*, 2020 WL 3865250; *Credit Bureau Ctr.*, 2020 WL 3865251, 2020 WL 6551765. One explanation why the Court dismissed the Seventh Circuit case but heard the Ninth Circuit case is the appointment of Justice Barrett who, in her former role on the Seventh Circuit, voted on whether the circuit would hear the case en banc. Amy Howe, *Justices Grant New Cases Involving Challenges to Social Security Administration Judges*, SCOTUSBLOG (Nov. 9, 2020), https://www.scotusblog.com/2020/11/justices-grant-new-cases-involving-challenges-to-social-security-administration-judges/. A majority of Seventh Circuit judges voted against hearing the case en banc. *Credit Bureau Ctr.*, 937 F.3d at 767 n.1.

11 *See infra* Part I.

12 SEC, DIV. OF ENF'T, 2020 ANNUAL REPORT 17 (2020). Average disgorgements in the previous five fiscal years equaled $2.9 billion. *Id.*

13 *Stats & Data 2019*, FTC, https://www.ftc.gov/reports/annual-highlights-2019/stats-and-data (last visited Oct. 3, 2020). It is not clear how much of the $1.2 billion is restitution and how much is penalties.

14 Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

15 SEC, DIV. OF ENF'T, 2019 ANNUAL REPORT 21 (2019).

16 Zimmerman, *Distributing Justice*, *supra* note 5, at 504, 507.

By defining this aspect of agencies' purview through federal courts' limitations, courts have linked judicial power to agencies' executive power and given limited direction to agencies. Such direction could address procedural shortcomings or improve statutes' effectiveness at compensating victims.

In contrast to the relationship between agency lawsuits and courts' powers, the equitable doctrine of parens patriae permits states, tribes, and territories to sue on behalf of citizens, but only when there is a sovereign or quasi-sovereign interest at stake.[17] Applying at least some elements of this doctrine to federal agencies would give a foundation for agencies' victim-compensating actions that is independent from courts' powers and emphasizes victims' interests.

This Note adds to the literature about federal agency actions on victims' behalf by incorporating recent cases and comparing cases about courts' power to parens patriae cases. Part I describes these two lines of cases: the parens patriae cases that define what states can do in federal court, and the cases on courts' equitable powers in agency suits through *Kokesh*, *Liu*, and *AMG Capital Management*. Part II then considers potential practical issues with current agency processes, including a simple empirical analysis of the SEC's records and how they might reflect the agency's internal strategy and deadlines. Part III considers how a federal parens patriae framework distinct from states' parens patriae standing could orient agency suits to victims' benefit without contradicting existing law.

I. How the Government Can Sue on Citizens' Behalf

Before proceeding, it is worth contextualizing agency lawsuits on citizens' behalf. A wronged individual suing a private party for money is a quintessential form of litigation. Such suits reach a federal court if, among other things, the plaintiff has standing, like if a federal statute identifies the defendant's action toward the plaintiff as an injury and then specifies a remedy.[18] If there are enough individual plaintiffs, a lawsuit against one defendant enters the realm of class action suits. Because of the added coordination challenges among individual participants and in awards' distribution, some literature has compared class action settlement funds to miniature private administrative agencies.[19] If the alleged wrongdoing harms the collective public interest as defined in statutes and regulations, prosecutors and regulators press criminal charges or impose monetary penalties that wrongdoers often pay into the public coffers. For example, many of the SEC's disgorge-

17 Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 493–94 (2012).

18 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (identifying an injury in fact, a causal connection between a defendant's conduct and the plaintiff's injury, and judicial redressability as essential elements of standing).

19 Zimmerman, *Distributing Justice*, *supra* note 5, at 512 (quoting Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 921 (1996)).

ments fall here under *Kokesh* because of their emphasis on punishment and deterrence even though statutes do not define them as penalties.[20]

There are other situations, though, in which a plaintiff brings a suit to rectify a wrong without suffering a particularized injury, yet the plaintiff still has standing and can access federal courts. One such variant is qui tam cases, through which private plaintiffs help enforce the public's laws (i.e., a private plaintiff seeks redress for the public's injury). In a sense, a statute that establishes private rights of action creates an enforcement mechanism, but the resulting cases hinge on the harm the plaintiff suffered and not the public's harm. Another variant that has evolved in recent decades is roughly the opposite of a qui tam case of private enforcement of public interests: the public in the form of a government entity uses the courts to extract compensation for the alleged wrongdoer's victims.

Three distinct types of these public actions are worth noting with respect to federal courts. One has been described as "criminal class actions" where federal prosecutors settle criminal charges with corporate defendants in exchange for the defendants' creation of "victim restitution funds" that operate like private class action suits' funds.[21] While such cases' patterns can inform analysis of other federal actors' suits, these settlements are outside this Note's focus on civil case proceedings. A second version involves state attorneys general who "long have understood their role to include a compensatory function" and seek victim compensation through state and federal courts.[22] These cases operate under statutes' authorization or parens patriae.[23] Third, federal actors like administrative agencies may bring a civil suit against a party to undo results from infractions of federal law and to benefit victims. For example, SEC disgorgements like the one from *Liu* might be in this category as they benefit victims and might not be so large as to be penalties. This area defined by statutes and equitable principles is this Note's focus. Figure 1 maps this contextualization with this Note's focus in the lower right.

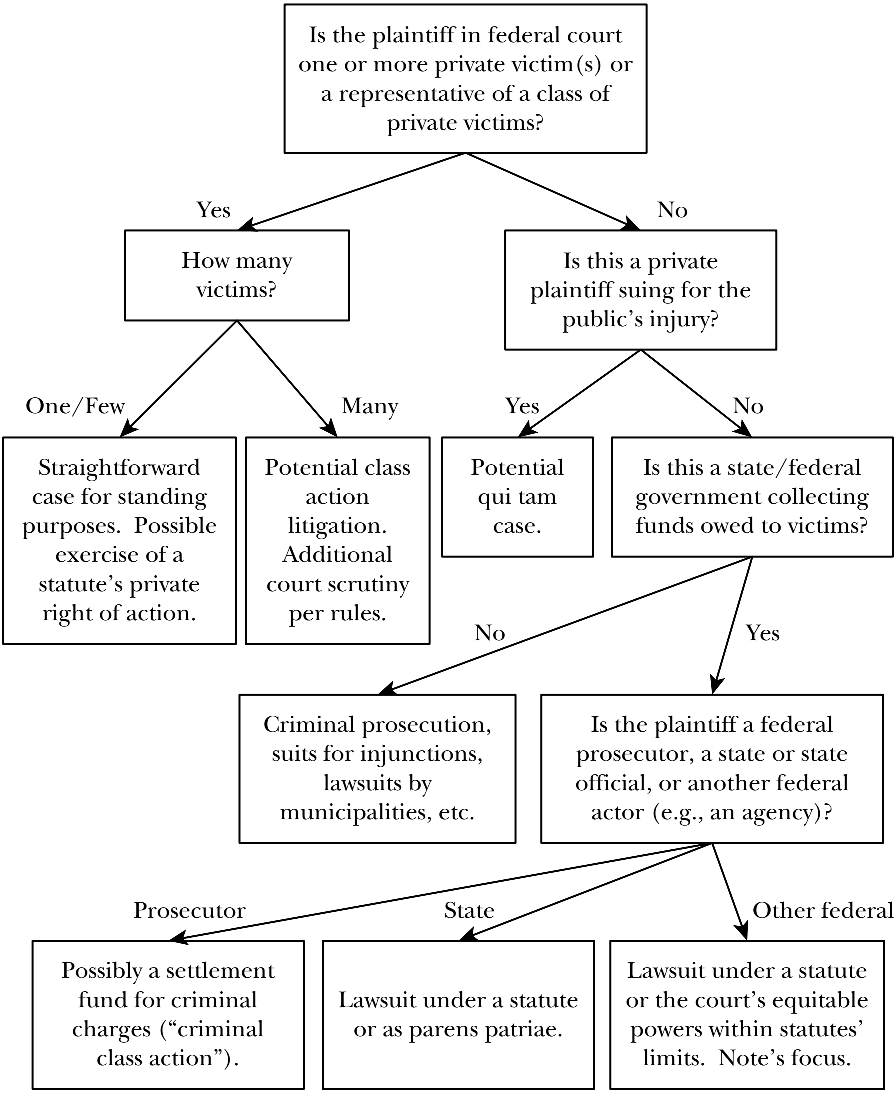
20 Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017).

21 Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1390 (2011).

22 Lemos, *supra* note 17, at 488 & n.5. State regulators are absent from this list; as their claims derive from state regulations, they would look to state courts, and cases of theirs that occur in federal courts would apply state law.

23 *See id.* at 493, 495.

Figure 1: Cases in Note's Focus in Context of Other Cases



A. *Parens Patriae for State Actors*

As described below, federal courts have an ongoing debate concerning the extent of their authority to grant equitable remedies to federal agencies.[24] Because the statutes in those cases gave agencies a foot in the courthouse door, those cases did not examine whether agencies can access federal courts but instead assessed what agencies can do once in court. To reach that second question, states, territories, and tribes must overcome the hurdle

24 *See infra* Section I.B.

of standing. Courts have developed the nebulous doctrine of parens patriae to assess whether these nonfederal sovereigns clear that hurdle.[25] Although the doctrine has only gained traction with nonfederal actors, parens patriae offers a perspective on federal government suits that is distinct from the debate on courts' equitable remedies. Since a court must resolve standing questions before reaching the equitable remedies question, this Note examines the first matter first.

1. Precedent and Approaches to Parens Patriae

Courts began to recognize states' parens patriae standing in the early twentieth century as a gap emerged between situations that allowed states to sue on citizens' behalf and situations in which states lacked standing. The former group included when a state validly asserted its particular interest as a sovereign under the Constitution, such as the state's interest in other sovereigns recognizing the state's sovereignty within its boundaries.[26] The latter group included when a state had no sovereign interest, like when it was "merely sponsoring the claims of a small number of individual citizens"[27] rather than suing as the "real party in interest."[28] As the Supreme Court crystallized its position on these types of state interests, it had to assess states' attempts to assert interests that were not squarely sovereign or specific to a limited set of private parties.

Over the twentieth century and beyond, the Court invoked the increasingly broad doctrine of parens patriae (literally "parent of the country") as it granted standing to states asserting injuries to these "quasi-sovereign" interests.[29] A quasi-sovereign interest was "a judicial construct that d[id] not lend

25 *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.*, Barez, 458 U.S. 592, 600–01 (1982).

26 *See id.* at 601; RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 280 (7th ed. 2015) (noting how "the prevailing view" on interstate sovereignty disputes was that these disputes were "not justiciable at common law, [but] were made justiciable by the Constitution"). There were also situations in which a state had standing but for a non-sovereign interest, such as when it sued as the proprietor of land or a particular business endeavor (e.g., specific tax revenues). *See* FALLON ET AL., *supra*, at 279–80; *Alfred L. Snapp & Son*, 458 U.S. at 601–02. In those non-sovereign cases, the state was suing for itself and not for its citizens.

27 FALLON ET AL., *supra* note 26, at 279.

28 *Alfred L. Snapp & Son*, 458 U.S. at 601–02; FALLON ET AL., *supra* note 26, at 279.

29 *Alfred L. Snapp & Son*, 458 U.S. at 600–01 (tracing the term's early common-law origins that were separate from its current use in American standing law); *see* FALLON ET AL., *supra* note 26, at 281–83 (tracing courts' widening jurisdiction). *But see* Lemos, *supra* note 17, at 493–94 (connecting parens patriae with both sovereign and quasi-sovereign interests but speaking to parens patriae in both the state court and federal court contexts). Although the terminology and caselaw's evolution lend themselves to seeing sovereign interests, quasi-sovereign interests, and non-sovereign interests as a spectrum, the Supreme Court has described each of them plus states' interests as a proprietor as four sets of interests that "stand apart" from one another. *Alfred L. Snapp & Son*, 458 U.S. at 602.

itself to a simple or exact definition,"[30] but some broad characteristics emerged across cases. The interest had to be concrete enough to satisfy Article III's actual controversy requirement, distinct enough from private interests that the state was a real party, and (generally) relevant to a "sufficiently substantial segment of [the state's] population."[31] For example, one state had a quasi-sovereign interest when inflated railroad rates harmed its population's "general progress and welfare."[32] In another case in which only a tiny fraction of a territory's population had claims against several companies, the territory had a quasi-sovereign interest because the claims reflected the entire population's ability to participate in a federal program and the threat of widespread discrimination against the population.[33] The fact the plaintiff was not a state did not affect the case's parens patriae analysis.[34] This case, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel., Barez*, is the Supreme Court's most extensive recent look at the parens patriae doctrine.[35] As part of its knowingly imprecise description of quasi-sovereign interests, that opinion suggested that a state generally had a quasi-sovereign interest when it would have tried to address the claimed injury through lawmaking if it could have.[36] Since states have successfully claimed far-reaching interests in cases involving a limited number of its citizens, it remains unclear how narrow a case must be before a state lacks parens patriae standing.[37]

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30 *Alfred L. Snapp & Son*, 458 U.S. at 601.

31 *Id.* at 601, 602, 607–08; *see* FALLON ET AL., *supra* note 26, at 280–81; Lemos, *supra* note 17, at 495.

32 FALLON ET AL., *supra* note 26, at 281–82 (quoting Georgia v. Pa. R.R. Co., 324 U.S. 439, 444 (1945)).

33 *See Alfred L. Snapp & Son*, 458 U.S. at 609–10.

34 *See id.* at 608–10, 608 n.15 (Puerto Rico "ha[d] a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State"). Courts have applied *Alfred L. Snapp & Son* to American Indian tribal governments' parens patriae claims. *See, e.g.*, United States v. Santee Sioux Tribe of Neb., 254 F.3d 728, 734 (8th Cir. 2001) (concluding the case involved too small a portion of the tribe's citizens to support a parens patriae claim); Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d 1292, 1310–12 (D.N.M. 2018) (assessing the tribe's parens patriae claim and concluding it failed to assert a quasi-sovereign interest distinct from its citizens' interest).

35 *See* Lemos, *supra* note 17, at 494.

36 *Alfred L. Snapp & Son*, 458 U.S. at 607.

37 *See* FALLON ET AL., *supra* note 26, at 282 (raising the question of whether "any serious limit [exists] on parens patriae standing" after *Alfred L. Snapp & Son*); Lemos, *supra* note 17, at 495 (citing *Alfred L. Snapp & Son*, 458 U.S. at 607). *Alfred L. Snapp & Son* was unlike a number the earlier key Supreme Court cases on the parens patriae doctrine as it began in a district court rather than under the Supreme Court's original jurisdiction. As a result of the limited precedent differentiating the two types of cases, it was possible "special considerations" would limit the Supreme Court's original jurisdiction over states' suits but not limit district courts' jurisdiction. *Alfred L. Snapp & Son*, 458 U.S. at 603 n.12; *see also id.* at 610–12 (Brennan, J., concurring). Because the Court avoided exploring the distinction between district court parens patriae jurisdiction and Supreme Court original parens patriae jurisdiction, this identified a lever future Courts could pull to adjust parens patriae's limits instead of describing those limits.

The haziness of quasi-sovereign interests has paralleled the indistinct contours of federal courts' doctrine for using those interests.[38] A recurring explanation for the parens patriae doctrine has been that a state joining the Union "surrender[ed] certain sovereign prerogatives" that could defend its citizens' interests, like the ability to employ diplomacy or force.[39] From that perspective, parens patriae gave states a tool for protecting its citizens' interests after that surrender by recognizing that quasi-sovereign interests could imbue a case with adequate "concrete adverseness" to satisfy standing.[40] As the doctrine included states' protection of private interests, "the state's interest may be parasitic on the interests of individual citizens" rather than something the state alone could assert because the aggregate effect of those individual interests is an interest specific to the state.[41] Going even further, one reading of parens patriae precedent is that determining if a state has standing through a quasi-sovereign interest is more a question of where a state can sue (i.e., in federal versus state court) rather than a question of whether the state can sue.[42]

This majority approach to parens patriae is not without controversy, however. Rather than seeing parens patriae as opening courts to states that had quasi-sovereign interests, *Massachusetts v. EPA*'s four-justice dissent argued parens patriae added a hurdle states must clear to achieve standing.[43] From this view, parens patriae gave a state standing but needed the state to show both that its citizens satisfied standing's usual requirements and that it had a distinct quasi-sovereign interest.[44] Absent the other elements of standing, a state having a quasi-sovereign interest was not enough to ensure the case was adequately concrete for a federal court to hear it.[45] This is consistent with a minority of courts that have limited states' parens patriae authority to interests that could not be pursued through private litigation (e.g., discrimination against an entire state but not particular instances of discrimination).[46] Although this view of parens patriae is not courts' predominant thinking, it may gain greater traction if the Supreme Court's large minority

38 It is worth noting that some federal statutes authorize state actors to sue on their citizens behalf and refer to those state actors as parens patriae. *See, e.g.*, 15 U.S.C. § 15c (2018). As those statutes use the phrase "parens patriae" as descriptors around explicit statutory authorization, those are irrelevant to this Section's description of courts' parens patriae doctrine.

39 Massachusetts v. EPA, 549 U.S. 497, 518–19 (2007) (describing how "States are not normal litigants for the purposes of invoking federal jurisdiction"); *see Alfred L. Snapp & Son*, 458 U.S. at 603–04 (quoting Missouri v. Illinois, 180 U.S. 208, 241 (1901)).

40 Massachusetts v. EPA, 549 U.S. at 517, 519 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); *see Alfred L. Snapp & Son*, 458 U.S. at 604.

41 *See* Lemos, *supra* note 17, at 494–95 (describing this as the majority approach that "[p]roperly understood" *Alfred L. Snapp & Son*).

42 *See id.* at 495 n.38.

43 *See* Massachusetts v. EPA, 549 U.S. at 538 (Roberts, C.J., dissenting).

44 *See id.*

45 *See id.*

46 *See* Lemos, *supra* note 17, at 494.

becomes a majority or if Congress legislates guidance on courts' parens patriae jurisdiction.[47] Of course, the doctrine can evolve in the other direction if the Court continues parens patriae's expansion or Congress removes court-imposed limits.[48]

2. The Federal Government and Current Parens Patriae Law: A Poor Fit

One area where parens patriae has not been widely invoked or applied is suits by federal actors on citizens' behalf. Exceptions exist. Almost a decade before the Supreme Court enlarged and loosely codified the parens patriae doctrine in *Alfred L. Snapp & Son*, the Ninth Circuit's assessment of a state plaintiff's standing asserted, "the federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens."[49] Although the Ninth Circuit cited a number of Supreme Court precedents in support of this,[50] those precedents had state rather than federal plaintiffs and did not accord the federal government the same authority they granted states.[51] A later Ninth Circuit case quoted the earlier Ninth Circuit case's assertion about the federal government but only to show parens patriae did not extend to municipalities.[52] Court of appeals cases that cited either of these two cases did not apply parens patriae standing to federal government plaintiffs.

The Ninth Circuit was not the only circuit to suggest the federal government could assert a claim as parens patriae. Two years after *Alfred L. Snapp & Son*, the Second Circuit joined the expansion of the "[o]nce quite limited" doctrine by describing "the state or the United States [as] present[ing] itself 'in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.'"[53] The United States and a state were both plaintiffs in the case, and the court recognized their distinct claims as parens patriae.[54] The

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47 *See id.* at 497 (citing cases that describe parens patriae as a prudential standing doctrine rather than a constitutional one).

48 *See id.*; FALLON ET AL., *supra* note 26, at 281–82.

49 *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973). The case concerned a state plaintiff, so the observations about state plaintiffs supported the court's conclusion. However, the added point about the federal government did not support the conclusion except to the extent that it may have illustrated the parens patriae principle the court applied to the state's claim.

50 *Id.*

51 *See, e.g.*, Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257–60, 265 (1972) (discussing a state's ability to act as parens patriae at length but dismissing the United States' ability to "recover for economic injuries to its sovereign interests" under the statutory framework); Georgia v. Pa. R.R. Co., 324 U.S. 439, 445–52 (1945) (examining the state's ability as parens patriae); North Dakota v. Minnesota, 263 U.S. 365, 375–76 (1923) (mentioning only states in the context of parens patriae).

52 United States v. City of Pittsburg, 661 F.2d 783, 786–87 (9th Cir. 1981).

53 United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984) (emphasis in original) (quoting Louisiana v. Texas, 176 U.S. 1, 19 (1900)).

54 *Id.* at 986.

Supreme Court case the Second Circuit quoted to support this was a dispute between two states, so the Supreme Court had only considered a state's claim on citizens' behalf.[55] Court of appeals decisions that cited the Second Circuit's decision did not apply its conclusion about the federal government, and only a few published district court opinions have built on the Second Circuit's position.[56]

Whether the federal government can claim parens patriae standing to sue on citizens' behalf may depend on the federal injury and whether the court follows the majority view of parens patriae. If a statute authorizes a particular federal government claim, then parens patriae is irrelevant since the statute allows the federal government into court.[57] A question about parens patriae's applicability would be more appropriate if a large number of citizens have similar federal claims and the federal government wishes to sue on behalf of those claims.[58]

Under the majority view that the parens patriae doctrine helps states have their day in court, recognition of federal government parens patriae standing would not fit well. If the doctrine exists as a substitute for the sovereign powers states surrendered to join the United States, then the United States government, which received its sovereign prerogatives from the people and states,[59] never experienced a similar surrender or exchange. A federal government parens patriae power would thus just expand the set of recognized federal powers, raising federalism concerns as the federal government would take citizen advocacy positions like Puerto Rico's antidiscrimination interest in *Alfred L. Snapp & Son* and Massachusetts's climate change position

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55 Louisiana v. Texas, 176 U.S. at 19.

56 *See, e.g.*, United States v. Bliss, 132 F.R.D. 58, 60–61 (E.D. Mo. 1990) (recognizing the United States' interest); FTC v. First Cap. Consumer Membership Servs., Inc., 206 F.R.D. 358, 364 (W.D.N.Y. 2001) (framing the FTC as "a guardian or representative of all of its citizens"); United States v. N.Y.C. Hous. Auth., 326 F.R.D. 411, 417 (S.D.N.Y. 2018) (finding the federal government acting as parens patriae would adequately represent proposed intervenors).

57 The scope of what remedies such statutes give federal agencies is the focus of Section I.B.

58 One hypothetical based on *Alfred L. Snapp & Son* would be if a large company abused a federal employment program to discriminate against citizens born in a variety of western states just because they were born in those states. Based on *Alfred L. Snapp & Son,* the federal government could try to claim a quasi-sovereign interest in the aggregated discriminatory injuries. Another hypothetical is that a defendant is unjustly enriched by violating federal law but the relevant statute only mentions lawsuits by wronged parties, not by the government. If the defendant harmed enough people, the federal government might sue on behalf of all those private injuries by claiming to act as parens patriae on the basis of the quasi-sovereign interest of all citizens' general economic well-being. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.*, Barez, 458 U.S. 592, 607 (1982) (describing states' "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general"). The latter hypothetical is akin to the FTC lawsuits described in subsection I.B.2 if the statute did not allow FTC injunctions.

59 Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

in *Massachusetts v. EPA*.[60] Modern federal interests are broad, and the lower limit for states' quasi-sovereign interests is small and hazy, so a federal executive that can have parens patriae standing would also raise separation of powers questions over this substantial executive authority. The history and usage of parens patriae standing under the majority view therefore raise potentially fatal concerns for applying the entire doctrine to the federal government.

In contrast, the minority view of parens patriae is more compatible with including the federal government. If parens patriae exists to ensure sovereign-brought cases are adequately concrete for adjudication, then it would be counterintuitive for this added hurdle to apply to sovereigns that have general lawmaking abilities, but not to a sovereign that has constitutionally limited powers. Whereas the majority's reasoning conjures the image of an exchange where parens patriae standing is the payoff, the minority view implies parens patriae standing is the trade-off: the sovereign can have standing but only if it has a quasi-sovereign interest that is distinct from the claims of citizens who would have standing. Parens patriae could then operate as a framework for federal courts to check if they should hear federal executive officials' legal claims. From this perspective, it is not surprising that the Ninth Circuit case that referred to both federal and state governments as parens patriae found the government plaintiff did not claim an appropriate injury.[61] Additionally, the core question in the Second Circuit case that recognized federal government parens patriae was whether the government plaintiffs adequately represented their citizens.[62] This is closer to the minority's emphasis on a sovereign having concrete standing than the majority's emphasis on respecting sovereigns' authority.[63] As a result, a future refocusing of the parens patriae doctrine toward the minority's more inquisitive approach could open parens patriae standing to the federal government.

In summary, courts generally have not granted the federal government or its agencies parens patriae standing, so under current law, a federal actor seeking to sue in federal court on citizens' behalf should look for a statute authorizing such a lawsuit. If the statute permits the federal actor's desired remedy, the federal actor has a clear path. If the statute does not specifically state that remedy, then the actor is in the territory covered by the next Sec-

60 *Alfred L. Snapp & Son*, 458 U.S. at 608; Massachusetts v. EPA, 549 U.S. at 521.

61 *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973).

62 United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984–88 (2d Cir. 1984) (finding sovereigns suing as parens patriae presumably provided all of their citizens adequate representation).

63 This is not to say the Second Circuit case fits squarely within the minority approach to parens patriae. The case presumes a sovereign acting as parens patriae adequately represents its citizens, which conflicts with parens patriae standing being a check for standing plus a quasi-sovereign interest. Even so, the case casually erased the distinction between federal and state sovereigns when the question concerned whether the sovereign's case would be thorough and adverse enough for the court to hear it. *See id.* Cases like *Alfred L. Snapp & Son* that centered on whether a sovereign had the authority to bring a case did not erase that distinction. *See* 458 U.S. 592, 594, 607 (1982).

tion of this Note. Even though federal actors are unlikely to receive parens patriae standing, the doctrine adds some nuance to their citizen-benefitting cases. The federal government may have a distinct quasi-sovereign interest in resolving an injury to a substantial segment of the American population or an injury that affects an interest (e.g., a lack of discrimination) shared by the entire citizenry. For example, if someone defrauded investors, the SEC or another federal actor would arguably have a quasi-sovereign interest in the victims' receiving restitution because that restitution would improve national capital markets' efficiency and the enforcement of laws protecting that efficiency. Again, most courts would not recognize standing for this quasi-sovereign interest, but the interest would exist. Based on the emphases in the current majority and minority views, the most likely way a federal actor would receive parens patriae standing is if the minority's more cautious recognition of parens patriae standing gains traction. For now, though, the federal government will probably sit on these quasi-sovereign interests.

B. *Equitable Jurisdiction for Federal Agencies*

1. Through the 2019–2020 Term

When a federal statute allows a federal regulator to bring a suit in federal court, the core question over decades of cases has been the extent of the federal courts' power under statutes and equity, not the authority of the agency bringing the suit. Federal victim compensation funds have a long history extending from the early 1800s, when Congress compensated victims of natural disasters, through the twenty-first century.[64] However, federal processes of extracting funds from wrongdoers for victims' benefit only received Supreme Court scrutiny after World War II.

a. Complete Relief Through Courts' Equitable Powers: *Porter* and *Mitchell*

Less than a decade after it recognized agencies' ability to pursue financial sanctions through civil litigation,[65] the Supreme Court in *Porter v. Warner Holding Co.*[66] set an example that it still cites favorably.[67] During this period of broad deference to agencies,[68] the Court found that an agency official

64 Zimmerman, *Distributing Justice*, *supra* note 5, at 518–19. Examples of recent compensation funds include the September 11 Victim Compensation Fund and a fund for victims of a massive oil spill in the Gulf of Mexico. *Id.*

65 *See* Helvering v. Mitchell, 303 U.S. 391, 400, 402 (1938).

66 328 U.S. 395 (1946).

67 *See* Liu v. SEC, 140 S. Ct. 1936, 1943 (2020).

68 *See* Zimmerman, *Distributing Justice*, *supra* note 5, at 521 & n.89. Justice Murphy, who wrote the Court's opinion in *Porter*, wrote the majority opinion in *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194 (1947). That case was deferential to agencies as "the choice made between proceeding by general rule or by individual, *ad hoc* litigation [i.e., how agencies implemented policy under the APA] is one that lies primarily in the informed discretion of the administrative agency [rather than a court]." *Id.* at 203. Justice Frankfurter

"invoked the jurisdiction of the District Court to enjoin" statutorily prohibited actions, so "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction," barring a prohibition that is a "necessary and inescapable inference" from a statute.[69] The vague language of the statute that the case reviewed permitted the "exercise of the District Court's equitable discretion,"[70] where the powers within that discretion "assume[d] an even broader and more flexible character" when "the public interest is involved . . . than when only a private controversy is at stake."[71] While the statute at issue did not explicitly permit victim restitution, the court could grant it for either of two reasons: restitution was an "equitable adjunct" to what the statute explicitly permitted, or restitution was "appropriate and necessary to enforce compliance with the Act."[72] A court granting restitution therefore "g[a]ve effect to [the statute's] purposes" including "[f]uture compliance" in addition to "restoring the status quo and ordering the return of that which rightfully belongs to the" victim.[73] Subsequent suits could pursue the dual goals of enforcement and compensation, and this ruling is the basis of more recent tension between administrative suits and private class action suits for the same wrongdoing.[74]

The Court applied and built on *Porter* in 1960 in a case brought by the Labor Department on behalf of specific employees. Under the statute at issue in *Mitchell v. Robert DeMario Jewelry, Inc.*,[75] district courts had jurisdiction to "restrain violations of [the statute] . . . [p]rovided, [t]hat no court shall have jurisdiction . . . to order the payment to employees of unpaid minimum wages . . . as liquidated damages."[76] Looking to *Porter*, the Court concluded that Congress's entrustment of a statute's enforcement to a federal court included a "cognizan[ce] of the historic power of equity to provide complete

dissented in both *Porter* and *Chenery II*. *See Porter*, 328 U.S. at 408; *Chenery II*, 332 U.S. at 218. The only other *Chenery II* dissenter (ignoring justices who did not participate) was Justice Jackson, who did not participate in *Porter*. *See Porter*, 328 U.S. at 403; *Chenery II*, 332 U.S. at 209.

69 *Porter*, 328 U.S. at 397–98. For a more thorough examination of this case, see Zimmerman, *Distributing Justice*, *supra* note 5, at 522–25.

70 *Porter*, 328 U.S. at 399 (The statute "expressly authorizes the District Court . . . to grant 'a permanent or temporary injunction, restraining order, or other order' . . . [where] 'other order' contemplates a remedy . . . entered in the exercise of the District Court's equitable discretion."). *But see* Zimmerman, *Distributing Justice*, *supra* note 5, at 522 ("Because the EPCA gave the agency power to obtain injunctive relief against landlords [(i.e., because of the injunction and not the statute's 'other order' wording)] . . . , the Court held that the OPA was entitled to seek other equitable remedies available in federal court . . . .").

71 *Porter*, 328 U.S. at 398.

72 *Id.* at 399–400.

73 *Id.* at 400, 402.

74 Zimmerman, *Distributing Justice*, *supra* note 5, at 522, 524.

75 361 U.S. 288 (1960).

76 *Id.* at 289 (quoting the Fair Labor Standards Act of 1938, ch. 676, § 17, 52 Stat. 1060, 1069, *amended by* the Fair Labor Standards Amendments of 1949, ch. 736, § 15, 63 Stat. 910, 919–20) (emphasis removed)).

relief in the light of the statutory purposes."[77] This was consistent with the contemporaneous judicial approach that identified broad judicial power to advance statutes' goals.[78] The statute's "central aim" in *Mitchell* was to rely on victims to raise their claims, and the case's agency plaintiff had acted on those claims, so courts could allow restitution so employees would not have a monetary incentive to stay quiet about violations.[79]

At the same time it read Congress's grant of power to courts broadly, the Court narrowly read an amendment to the statute that limited judicial powers in suits brought by an agency on victims' behalf.[80] The amendments that prohibited courts from ordering "the payment . . . of unpaid minimum wages" also gave an agency power to "recover unpaid wages . . . in the clearest cases" where courts had settled issues of law.[81] The Court found "no indication in the language of [the amendments], or in the legislative history, that Congress intended [the limitation] to have a wider effect," and the "amendments evidence a purpose to make only limited modifications in the nature and extent of the Secretary's power to obtain reimbursement of unpaid compensation."[82] *Porter*'s broad equitable powers and emphasis on a statute's purposes therefore led the *Mitchell* Court to see extensive implicit powers and narrow limitations within statutes about agency suits on victims' behalf. If an equitable remedy supported the statute's purpose and was not clearly blocked by the statute, courts had extensive freedom to grant remedies.[83]

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77 *Id.* at 291–92.

78 For example, *J.I. Case Co. v. Borak* a few years after *Mitchell* cited both *Porter* and *Mitchell* and concluded, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. 426, 433–34 (1964). *Borak*'s approach to identifying implied private causes of action in a statute has been replaced with a "more cautious course" that focuses on statutory intent and blocks judge-created causes of action that conflict with that intent. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (citing Piper v. Chris-Craft Indus., 430 U.S. 1, 42, 45–46 (1977); Cort v. Ash, 422 U.S. 66, 68–69 (1975)); *see* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

79 *Mitchell*, 361 U.S. at 292–93, 296.

80 *See id.* at 294.

81 *Id.* at 289, 294 (quoting the Fair Labor Standards Act of 1938, ch. 676, § 17, 52 Stat. 1060, 1069, *amended by* the Fair Labor Standards Amendments of 1949, ch. 736, § 15, 63 Stat. 910, 919–20) (citing the Fair Labor Standards Amendments of 1949, ch. 736, § 14, 63 Stat. 910, 919)).

82 *Id.* at 294–95.

83 *See* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1190 (1992) (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946)) (*Porter* and *Mitchell* together require, "[f]irst, the payment of restitution must further the 'policy of the act' . . . [and s]econd, the statutory scheme must not contain 'by a necessary or inescapable inference' a restriction on the exercise of such authority.").

b. Pushing and Pulling: Supreme Court Cases Between *Mitchell* and *Kokesh*

Since *Mitchell*, Supreme Court cases have supported public entities' broad ability to seek monetary redress. In *California v. American Stores Co.*,[84] Justice Stevens indirectly quoted *Porter* in reasoning that Congress intended a statute's "provision should be construed generously and flexibly pursuant to principles of equity."[85] The Court did not distinguish *American Stores* from cases like *Porter* even though *American Stores*'s plaintiff was a state rather than a part of the federal government. The opinion continued to say, "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief[, but] . . . [a] private litigant, however, must have standing . . . [and prove harm] to his own interests in order to obtain relief."[86] Like *Porter*, this case noted that equity extends farther to grant relief for the public interest than it does for private interests.[87] Years later, Justice Breyer in *F. Hoffman-La Roche Ltd. v. Empagran*[88] leveraged *American Stores* and other cases to differentiate a case between private litigants from precedents where the federal government was the plaintiff.[89] Whereas "[p]rivate plaintiffs . . . are far less likely to be able to secure broad relief," "[a] Government plaintiff has legal authority broad enough to allow it to" pursue "redress" and "the relief necessary to protect the public from" conduct contrary to a statute.[90]

At the same time, a couple cases have identified or implied limitations on equitable reliefs courts can grant for the benefit of victims. In the class action suit of *Mertens v. Hewitt Associates*,[91] Justice Scalia articulated a narrower view of equitable relief than *Porter* and *Mitchell* implied.[92] As the Court quoted favorably long after *Mertens*, Justice Scalia observed that historically there were "many situations . . . [where] an equity court could establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."[93] Justice Scalia continued by finding that equitable relief can include "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)" that were a subset of what a court of equity could grant.[94] Conse-

84 495 U.S. 271 (1990).

85 *Id.* at 294–95; *see* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (quoting *Porter*, 328 U.S. at 398).

86 *Am. Stores Co.*, 495 U.S. at 295–96.

87 *See id.* at 295 (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

88 542 U.S. 155 (2004).

89 *Id.* at 170–71.

90 *Id.*

91 508 U.S. 248 (1993).

92 *See id.* at 256–58.

93 Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 147 (2016) (alteration in original) (quoting *Mertens*, 508 U.S. at 256).

94 *Mertens*, 508 U.S. at 256.

quently, the statute at issue that granted equitable relief was clear enough as to prohibit inferring a damages remedy.[95] In contrast to *Mitchell*'s concern for a statute's central aim, *Mertens* rejected the class action litigants' appeal to the legislation's purpose: "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration," especially for a statute as "complex and detailed" as the one at issue.[96]

In a similar vein, *Meghrig v. KFC Western, Inc.*[97] applied a "plain reading of [a statute's] remedial scheme" to find a private plaintiff could not pursue a certain form of compensation related to environmental clean-up.[98] Congress could have provided that remedy but did not, and the Court read a limited purpose in the statute such that the requested relief was incompatible.[99] *Alexander v. Sandoval* further marked how the Court's approach to identifying remedies from statutes had changed over time.[100] Without statutory intent to create a private remedy, "a [private] cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[101] The Court had "abandoned" the *Mitchell*-like approach of previous decades under which it would provide "remedies as are necessary to . . . the congressional purpose."[102]

c. Equitable Remedies' Limits from History: *Kokesh* and *Liu*

Amid this growing textualism and general tightening of courts' relief, two recent Supreme Court cases about SEC disgorgements separated agency disgorgements into equitable disgorgements and statute-authorized penalties. In the more recent of them, *Liu v. SEC*,[103] Justice Sotomayor's eight-justice majority opinion considered whether a disgorgement was allowed under the district court's equitable jurisdiction using the lens of *Mertens*'s "categories of relief that were *typically* available in equity."[104] Since "equity never 'lends its aid to enforce a forfeiture or penalty'" that forces a wrongdoer to "pay[ ] more than a fair compensation to the person wronged,"[105] equity courts historically restricted the stripping of "wrongdoers['] . . . ill-

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95 *See id.* at 260.

96 *Id.* at 261–62.

97 516 U.S. 479 (1996).

98 *Id.* at 484.

99 *See id.* at 485–86.

100 532 U.S. 275 (2001).

101 *Id.* at 286–87.

102 *Id.* at 287 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–56 (2017) (first quoting Alexander, 532 U.S. at 287; and then quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)).

103 140 S. Ct. 1936 (2020).

104 *Id.* at 1942 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

105 *Id.* at 1941, 1943 (first quoting Marshall v. Vicksburg, 15 Wall. 146, 149 (1873); and then quoting Tilghman v. Proctor, 125 U.S. 136, 146 (1888)).

gotten gains" to "an individual wrongdoer's net profits" to avoid the remedy becoming punitive.[106] Courts have used a variety of names for these equitable remedies, such as accounting, restitution, and disgorgement.[107] Even so, the Court identified a pattern across such rulings as cases limited these remedies to "net profits from wrongdoing after deducting legitimate expenses" unless an undertaking's "entire profit" is from "wrongful activity."[108]

Curiously, the Court quoted *Porter* in support of this limitation on equitable disgorgements. *Porter*'s recognition of a district court's equitable jurisdiction allowed "disgorge[ments of] profits, rents or property acquired in violation of the" statute in the case.[109] *Liu* quoted *Porter*'s use of "profits" and skipped over rents and property.[110] Because *Porter*'s scope included landlords, rents, and property amounted to the revenues and assets acquired through violations, each of which is likely greater than *Liu*'s net profits. This may reflect the Court's difficulty stitching precedents into a cohesive narrative, but it also implicitly reins in *Porter*'s broad equitable powers. *Liu* did not mention *Mitchell*, so there is no attempt to reconcile a profit-based cap on restitution with *Mitchell*'s blessing of far-reaching "complete [equitable] relief in light of the statutory purposes."[111] That being said, *Liu* quoted *Porter* to highlight district courts' ability to marshal whatever equitable powers statutes do not prohibit,[112] so *Porter* and *Mitchell* cleared courts' restraints within equitable relief's scope as *Liu* identified that scope's outer bounds.

The amount of a disgorgement is not the only way it could move beyond *Liu*'s parameters of equitable relief. In *Kokesh v. SEC*, the Court focused exclusively on the question of whether certain SEC disgorgements were penalties without considering equity's scope, which *Liu* later resolved as excluding penalties.[113] According to Justice Sotomayor's *Kokesh* opinion, penalties punish for offenses against the state or public rather than for offenses against individuals, and they have punishment and deterrence as their purpose rather than compensation.[114] Reflecting the muddled terminology for equitable disgorgements that *Liu* cataloged, *Kokesh*'s disgorgements were penalties because they were for harms to the United States, prioritized punishment and deterrence, and treated compensation as a secondary goal.[115]

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106 *Id.* at 1942.

107 *See id.* at 1942–44.

108 *Id.* at 1944–46 (quoting Root v. Lake Shore & M.S. Ry. Co., 105 U.S. 189, 203 (1881)).

109 Porter v. Warner Holding Co., 328 U.S. 395, 398–99 (1946).

110 *Liu*, 140 S. Ct. at 1943 (quoting *Porter*, 328 U.S. at 398–99).

111 Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960).

112 *See Liu*, 140 S. Ct. at 1946–47 (quoting *Porter*, 328 U.S. at 398).

113 *See* Kokesh v. SEC, 137 S. Ct. 1635, 1642 & n.3 (2017); *Liu*, 140 S. Ct. at 1941, 1946.

114 *See Kokesh*, 137 S. Ct. at 1642 (quoting Huntington v. Attrill, 146 U.S. 657, 667–68 (1892)).

115 *See id.* at 1643–44; *Liu*, 140 S. Ct. at 1941, 1942–44 (summarizing *Kokesh* and discussing the historical usage of different terms). As part of its analysis, *Kokesh* cited *Porter* for distinguishing between statute-derived penalties owed to the government and equitable

Liu added to *Kokesh*'s emphasis on a disgorgement's characteristics over the relevant statute's terminology for the disgorgement. Under existing statutes, SEC disgorgements after *Kokesh* could conform to equity's limits.[116] In dicta, *Liu* also offered guidance to district courts about equitable remedies: they "generally require[ ]" the agency to "return" wrongful gains to "wronged" parties,[117] they require individual rather than joint-and-several liability except for "partners engaged in concerted wrongdoing,"[118] and they require deduction of legitimate expenses.[119] Historical disgorgements that violated any one of these principles were in "considerable tension with equity practices,"[120] suggesting the measure of whether a disgorgement sought in federal court is equitable is more a checklist than a balancing of factors.

Because of these cases, federal courts' equitable disgorgements had elements of clarity above simmering tension after *Liu*. Although *Liu*'s guidance leaves open questions and may be difficult to apply,[121] a court can tell if an agency is seeking an equitable remedy from the financial remedy's amount, purpose, and intended distribution. If any of those suggest the remedy is punitive or does not benefit those who were wronged, then the requested remedy is outside the court's equitable jurisdiction, and the agency needs a legal basis for the remedy to continue. Provided an agency seeks a remedy that satisfies *Liu*'s requirements, *Porter* and other cases suggest courts have broad jurisdiction to grant that remedy. *Porter*, *American Stores*, and their progeny noted how equitable powers are greater and more flexible in the public's interest than in private suits. *Porter* and *Mitchell* also described equitable disgorgements as supporting statutes' goals and shoring up compliance. Together, these points give agencies considerable freedom to add restitution-oriented disgorgements to enforcement actions. This sizable authority in courts and the agencies that bring suits appears to conflict with cases like *Mertens*, *Meghrig*, and *Sandoval* as those cases stressed statutory text's limits on remedies, narrow understandings of congressional intent, and a resistance to court-created remedies to further a statute. Cases like *American Stores* may reconcile these more textual cases with broad *Porter*-based powers in that government plaintiffs do not need to meet at least some of the jurisdictional hurdles *Mertens, Meghrig*, and *Sandoval* identify for private plaintiffs.[122] Still, this tension speaks to the Court's evolving approaches to both statutory inter-

restitution paid to wronged parties. *Kokesh*, 137 S. Ct. at 1644 (citing *Porter*, 328 U.S. at 402).

116 *See Liu*, 140 S. Ct. at 1946.

117 *Id.* at 1947–48; *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 253 (1993).

118 *Liu*, 140 S. Ct. at 1949.

119 *Id.* at 1949–50. This principle parallels the binding limitation of equitable remedies to profits. *See id.* at 1942–46.

120 *Id.* at 1946.

121 *See, e.g.*, *Liu*, 140 S. Ct. at 1948–49 (flagging open questions about whether disgorgements paid to the Treasury can be for wronged parties' benefit and therefore consistent with equitable principles).

122 *See infra* notes 169–72, 175 and accompanying text.

pretation and the judiciary's role, and the Supreme Court has yet to resolve it.

2. FTC Circuit Split and Supreme Court Review

Recently, a circuit split has crystallized around FTC disgorgements. Judges have reached conflicting views on whether the statute authorizing the FTC to seek permanent federal court injunctions also allows disgorgements and what the limits on any allowed disgorgements are. At stake are cases that have ordered defendants to pay hundreds of millions of dollars.[123] Two camps are taking shape. A majority of the circuits with on-point decisions follow cases like *Porter* and *Mitchell* to grant the FTC broad equitable remedies including disgorgements.[124] A second camp including the Seventh and Third Circuits has recently emerged, which reads *Porter*'s equitable powers narrowly and emphasizes statutory text. The Supreme Court heard a case on this matter in January 2021, so it is likely the core of this circuit split will be resolved soon.

a. The Ninth Circuit: *FTC v. AMG Capital Management*

The earliest of the recent cases on FTC disgorgements represents the majority view and is the case the Supreme Court heard in the October 2020 Term.[125] In this case, *FTC v. AMG Capital Management*, Judge O'Scannlain for the Ninth Circuit approved of an FTC disgorgement as not inconsistent with Ninth Circuit precedent and *Kokesh*, which at the time was the Supreme Court's latest word on agency-sought disgorgements.[126] With respect to the

123 *See* Zimmerman, *Distributing Justice*, *supra* note 5, at 534 (quoting FTC, THE FTC IN 2009: THE ANNUAL REPORT OF THE FED. TRADE COMM'N 45 (2009) (examining the FTC as an example of agency litigation because of the scale of its litigation, such as the 83 judgments ordering $371.2 million over March 2008–February 2009); *see also* FTC v. AbbVie, Inc., 976 F.3d 327, 338 (3d Cir. 2020) (reviewing a $448 million disgorgement from one defendant).

124 *See* FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 779 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020) (No. 19-825), *cert. vacated*, 2020 WL 6551765 (U.S. Nov. 9, 2020) (No. 19-825) (citing cases from the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits and overturning Seventh Circuit precedent that was consistent with these other circuits); Brief of the Federal Trade Commission at 28 n.12, FTC v. Credit Bureau Center, LLC, 937 F.3d 764 (2019) (Nos. 18-2847, 18-3310), 2019 WL 1300373 (citing the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuit precedents the court's opinion cited but also including a First Circuit precedent and an unpublished Third Circuit precedent); Zimmerman, *Distributing Justice*, *supra* note 5, at 533–34, 534 n.158 (summarizing the evolution of the statute and relevant case law with examples).

125 *See* FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 427 (9th Cir. 2018), *cert. granted*, 2020 WL 3865250 (U.S. July 9, 2020) (No. 19-508); *Supreme Court of the United States October Term 2020: For the Session Beginning January 11, 2021*, U.S. SUP. CT. (Nov. 25, 2020), https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalJanuary2021.html.

126 *See AMG Cap. Mgmt.*, 910 F.3d at 427.

award of an equitable disgorgement,[127] the key question was whether "injunction" in § 13(b) of the FTC Act permitted the equitable relief without any mention of disgorgements or general equitable relief.[128] This is different from the question in *Liu* where a statute explicitly allowed the SEC to seek equitable relief in civil actions and the Court had to determine what that equitable relief encompassed.[129]

The Ninth Circuit recognized parallels between the SEC penalty in *Kokesh* and this case's FTC disgorgement.[130] Still, a textual challenge to the scope of the FTC's authorization in light of *Kokesh* was "squarely foreclose[d]" by Ninth Circuit precedent.[131] That precedent, which followed earlier Ninth Circuit cases, built on *Porter* to conclude § 13(b)'s injunctive relief "invoked the court's equity jurisdiction," so the statute permitted courts to use their "inherent power to deprive defendants of their unjust gains from past violations, unless the Act restrict[ed] that authority."[132] Because *Kokesh* explicitly avoided exploring courts' authority and because Ninth Circuit precedent emphasized "complete relief" over adherence to equitable relief's historical bounds, *Kokesh* and the precedent were not irreconcilable, so the panel could not overturn the precedent.[133]

Despite concluding the FTC could seek equitable disgorgements, Judge O'Scannlain added a special concurrence to argue the *Porter*-based precedent should be reheard en banc and overturned because of the text and history.[134] Judge O'Scannlain found the definition of "injunction" on its own and in the context of § 13(b) did not include monetary relief.[135] Simi-

127 The FTC's case had been bifurcated into a liability phase and a relief phase, and the circuit court's opinion began by not overturning the liability phase's conclusion in the FTC's favor. *See id.* at 422, 426. The opinion then proceeded to consider the relief phase. *See id.* at 426.

128 *See id.* at 426 (citing 15 U.S.C. § 53(b) (2018)).

129 *See* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020). Section 13(b), says, "a preliminary injunction may be granted" if, among other factors, it "would be in the public interest" after "weighing the equities." 15 U.S.C. § 53(b). Separately, the FTC "may seek . . . [and] the court may issue, a permanent injunction" if it is "in the interest of the public." *Id.*

130 *See AMG Cap. Mgmt.*, 910 F.3d at 426.

131 *Id.*

132 *Id.* at 427 (quoting FTC v. Com. Planet, Inc., 815 F.3d 593, 598, 599 (9th Cir. 2016)) (recognizing the precedential value of a case that parallels *Porter*'s language); *see* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

133 *AMG Cap. Mgmt.*, 910 F.3d at 427. Having found an equitable monetary remedy was permissible, the court proceeded to assess the amount of that remedy using an approach *Liu* later rejected. *Compare id.* at 427–28 (quoting *Com. Planet*, 815 F.3d at 603) (measuring a defendant's unjust gains as "the defendant's net revenues . . . , not by the defendant's net profits"), *with Liu*, 140 S. Ct. at 1946 ("[C]ourts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses."). The *AMG Capital Management* opinion concluded by quickly dispatching a challenge to the term "proper cases." *AMG Cap. Mgmt.*, 910 F.3d at 428.

134 *AMG Cap. Mgmt.*, 910 F.3d at 429 (O'Scannlain, J., specially concurring).

135 *See id.* at 430–31; *cf.* Ward, *supra* note 83, at 1191–94 (arguing restitution did not fit within § 13(b) in light of other sections in the statute).

lar to *Meghrig*'s statutory interpretation that limited legal remedies' range, Judge O'Scannlain reasoned Congress could have included monetary relief had it intended such a relief.[136] The statutory scheme across different sections of the FTC Act reinforced this conclusion, including how monetary relief under § 13(b) would sidestep another section's procedural checks or render another section redundant.[137]

Even if "injunction" permitted equitable relief, the FTC disgorgement matched *Kokesh*'s characteristics of penalties, and Supreme Court precedent meant penalties were not equitable remedies.[138] Whereas cases on courts' equitable power deserved historical analysis and such analysis suggested FTC disgorgements did not resemble equitable remedies, Ninth Circuit precedent had avoided such analysis in favor of embracing *Porter* and broad equitable relief.[139] Other circuits matched the Ninth Circuit's position and lack of satisfactory historical or statutory analysis.[140] Judge O'Scannlain concluded by citing the evolution in the Court's approach reflected in *Sandoval* and other cases that shifted responsibility for defining relief from courts to Congress.[141] The concurrence was therefore a call to action to discard a far-reaching reading of *Porter* that sought "complete relief" in favor of following the approaches of relatively recent non-FTC cases to confine *Porter* more narrowly within a statute's text and equity's history.

b. The Seventh Circuit: *FTC v. Credit Bureau Center, LLC*

Judge O'Scannlain's opinion was one of the sources cited in the Seventh Circuit's 2019 rejection of the *Porter*-based circuit consensus in *FTC v. Credit Bureau Center, LLC*.[142] That case overturned a 1989 Seventh Circuit precedent because the precedent did not reflect how cases like *Meghrig* and *Sandoval* approached statutory interpretation and courts' bases for relief.[143] On behalf of the three-judge panel, Judge Sykes traced the 1989 precedent's origins from *Porter* and *Mitchell* to a 1982 Ninth Circuit case that connected

136 *See AMG Cap. Mgmt.*, 910 F.3d at 431 (O'Scannlain, J., specially concurring).

137 *See id.* at 432. *But see* FTC v. Credit Bureau Ctr., 937 F.3d 764, 795–97 (7th Cir. 2019) (Wood, C.J., dissenting) (looking across different sections to identify possible remedies).

138 *See AMG Cap. Mgmt.*, 910 F.3d at 433–34 (O'Scannlain, J., specially concurring) (citing Tull v. United States, 481 U.S. 412, 422 (1987)). This is consistent with the later *Liu* opinion. *See Liu*, 140 S. Ct. at 1941.

139 *See AMG Cap. Mgmt.*, 910 F.3d at 434–36 (O'Scannlain, J., specially concurring).

140 *See id.* at 436 (citing cases from the Fourth, Seventh, Eighth, and Eleventh Circuits as the only other circuits to "engage with the issue at any length").

141 *See id.* at 436–37 (first citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017); then citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015); and then citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

142 *See* 937 F.3d 764, 779, 786 n.4 (7th Cir. 2019). The Supreme Court granted this case certiorari and consolidated it with *FTC v. AMG Capital Management*, but it vacated that grant of certiorari. *See supra* note 10.

143 *See Credit Bureau Ctr.*, 937 F.3d at 780–81, 782, 786; *cf. AMG Cap. Mgmt.*, 910 F.3d at 436–37 (O'Scannlain, J., specially concurring).

Porter and *Mitchell* with FTC cases.[144] That case led other circuits, including the Seventh, to infer with little analysis that disgorgements could be an "ancillary relief" that "was 'necessary to effectuate the exercise' of the [courts'] power to issue an [FTC-requested] injunction" under § 13(b) of the FTC Act.[145] Over time, the Supreme Court had shifted its approach for identifying forms of judicial relief to tools *Meghrig* exemplified: plain reading of statutory text, clear and specific purposes of particular statutory sections, and respect for Congress's choices to not state or imply particular reliefs.[146] On this basis and the basis of *Sandoval*'s narrower search for remedies, *Porter* and *Mitchell* may recognize broad equitable powers subject to statutes' constraints, but courts had identified tighter constraints after the Seventh Circuit considered FTC disgorgements in 1989.[147] The Seventh Circuit used *Meghrig*'s approach to statutory interpretation to find equitable disgorgement was incompatible with § 13(b) as it would lack procedural safeguards.[148]

In applying cases like *Meghrig* that concerned private plaintiffs, the court addressed the criticism that *Porter* differentiated public and private plaintiffs by saying that equitable powers are broader in cases involving the public interest. It did so by concluding the type of plaintiff is irrelevant based on *Porter*'s precedent.[149] In that precedent, the private parties' dispute involved the public interest because it touched on "a matter of public concern" and statutes related to the subject were "a declaration of public interest and policy."[150] Through that lens, *Meghrig*'s private dispute over environmental clean-up costs under a statute involved the public interest too, so *Meghrig*'s broad statutory limits and narrow search for implied remedies was not specific to private plaintiffs.[151] In other words, the court recognized a greater scope in which *Porter* supported enhanced flexibility for equitable powers so *Meghrig*'s limitations could cover that entire scope.

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144 *See Credit Bureau Ctr.*, 937 F.3d at 777; *see also* Ward, *supra* note 83, at 1192–93 (describing the 1982 Ninth Circuit case as a "botched effort" to reconcile § 13(b) restitution with the rest of the statute). In 2020, Judge Sykes became the Seventh Circuit's chief judge. *Sykes, Diane S.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/sykes-diane-s (last visited Dec. 31, 2020).

145 *Credit Bureau Ctr.*, 937 F.3d at 778–79 (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571, 572 (7th Cir. 1989)); *cf. AMG Cap. Mgmt.*, 910 F.3d at 436 (O'Scannlain, J., specially concurring).

146 *See Credit Bureau Ctr.*, 937 F.3d at 779–81 (citing Meghrig v. KFC W., Inc., 516 U.S. 479, 484, 485–86 (1996)); *cf. AMG Cap. Mgmt.*, 910 F.3d at 431 (O'Scannlain, J., specially concurring).

147 *See Credit Bureau Ctr.*, 937 F.3d at 782–83. The opinion describes a D.C. Circuit case that reached a similar conclusion to fit *Meghrig* within *Porter*'s caution about statutory limits. *Id.* at 783 (citing United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005)).

148 *See id.* at 772–75, 783–84; *cf.* Ward, *supra* note 83, at 1191, 1193–94 (arguing similarly).

149 *Credit Bureau Ctr.*, 937 F.3d at 784 (citing Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

150 *Id.* (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

151 *See id.* at 784–85.

The opinion's approach implicitly assumed *Porter* carried forward the prior case's understanding of the public interest rather than expanding or refining it, which is a nontrivial assumption for a post-New Deal Court like *Porter*'s that built on precedent that was nearly a decade old. The opinion's expansive reading of *Porter*'s "public interest" also had no clear perimeter, but this haziness also affects the alternative of limiting the public interest to a nebulous set of subject matters involving a government plaintiff. A Seventh Circuit precedent reinforced the court's wide understanding of the public interest as it treated a government-suit statutory provision the same as the private-suit provision that *Meghrig* reviewed, and that comparison meant *Porter*-based equitable reliefs under the government-suit provision were "dead."[152] Weighing stare decisis against these interpretative criticisms of the Seventh Circuit's FTC precedent, the court overturned the precedent and broke from other circuits.[153] The Seventh Circuit's focus on precedents' evolution contrasted with Judge O'Scannlain's prioritization of definitions, equity's historical uses, and *Kokesh*'s implications,[154] yet both opinions highlight *Meghrig*-like statutory interpretations that curtail equitable remedies' reach.

Per Seventh Circuit rules on cases that overturn precedent and create a circuit split, *Credit Bureau Center* was circulated among Seventh Circuit judges for consideration for an en banc review, and a majority did not support such a review.[155] Chief Judge Wood wrote a dissent to this denial of review that defended the Seventh Circuit's *Porter*-based precedent,[156] but some of her arguments are weaker following *Liu*. She began by examining the scope of the statute's explicit remedy. Citing a broad definition of "injunction" and *American Stores*'s description of "divestiture" as "a form of injunctive relief" under "traditional principles of equity,"[157] Chief Judge Wood found the *Credit Bureau Center* majority "reject[ed] th[e] straightforward reading of the statute" that would allow the FTC to use any tools under injunction's wide umbrella.[158] *American Stores*'s divestiture and *Credit Bureau Center*'s equitable restitution were "almost identical" as "both require[d] the wrongdoer to turn over property that was unlawfully obtained," so *American Stores* permitted FTC disgorgements under § 13(b).[159]

This argument does not appear valid, especially after *Liu*. The majority noted the equitable remedy of "injunction" had a broad definition yet

152 *Id.* at 785 (quoting United States v. Apex Oil Co., 579 F.3d 734, 737 (7th Cir. 2009)).

153 *See id.* at 786.

154 The Seventh Circuit's opinion does not mention *Kokesh*, which might reflect how *Kokesh* was a recent ruling. The opinion's reliance on precedent like *Meghrig* that was more established than *Kokesh* implicitly bolstered the opinion's claim that courts' approaches had shifted substantially since *Porter*, *Mitchell*, and even the 1989 precedent.

155 *Credit Bureau Ctr.*, 937 F.3d at 767 n.1.

156 *See id.* at 786–87 (Wood, C.J., dissenting).

157 *Id.* at 788 (quoting California v. Am. Stores Co., 495 U.S. 271, 275, 281 (1990)).

158 *Id.* at 787.

159 *Id.* at 788.

excluded "other discrete forms of equitable relief like restitution."[160] Cases like *Liu* recognized equitable disgorgements within broad statutory language like "equitable relief" rather than more specific references to injunctions like § 13(b)'s.[161] Even *Porter* with its broad equitable powers framed disgorgements within the statute's "other order" language instead of "injunction" so that disgorgements were "equitable adjunct[s] to an injunction" or "appropriate and necessary to enforce compliance with" the statute including injunctions to that end.[162] If courts see divestiture as a discrete form of equitable relief, Wood's *American Stores* reasoning contradicted these cases by finding *American Stores* divestiture within "injunction."[163] Even if courts granted disgorgements with FTC injunctions as *Porter*-style equitable adjuncts, *Kokesh* and *Liu* required that equitable disgorgements benefit wronged parties rather than just punish or strip assets from wrongdoers like divestiture would.[164] Wood's use of *American Stores*'s divestitures toward FTC disgorgements is therefore untenable.

Chief Judge Wood continued by arguing that the *Credit Bureau Center* panel conflated cases about who can sue under implied rights of action with cases about the scope of available remedies.[165] Per her argument, cases like *Sandoval* are inapplicable to the FTC as the agency had an express right of action for injunctive relief and was a government plaintiff rather than a private one.[166] The latter distinction was important as the government could enforce laws private actors could not and only it "ha[d] legal authority broad enough to allow it to carry out [a law's] mission."[167] Chief Judge Wood was right that the scope of equitable remedies that agencies can seek is distinct from implied rights of action, yet *Sandoval* and related cases illustrated an interpretative approach and judicial outlook that is not confined to implied rights of action. *Liu*'s effort to stay within equity's historical bounds and not

160 *Id.* at 771–72 (majority opinion); *see* FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 430–31 (9th Cir. 2017) (O'Scannlain, J., specially concurring) (finding a similar definition and exclusions); *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) ("'[E]quitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).").

161 *See* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

162 Porter v. Warner Holding Co., 328 U.S. 395, 399–400 (1946). *Mitchell* identified its statute as "Congress entrust[ing] to an equity court the enforcement of prohibitions contained in a regulatory enactment," so it too does not place disgorgements within the definition of "injunction." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960).

163 *See* California v. Am. Stores Co., 495 U.S. 271, 280–81 (1990).

164 *See supra* notes 114–16 and accompanying text.

165 *See Credit Bureau Ctr.*, 937 F.3d at 789 (Wood, C.J., dissenting).

166 *See id.* at 789–90.

167 *Id.* at 790 (quoting F. Hoffman-La Roche Ltd. v. Empagran, 542 U.S. 155, 170 (2004)) (citing RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2107 (2016) (applying a limiting presumption to private causes of action but not government ones)).

discern a broad congressional grant of authority in statutory text was consistent with *Sandoval*'s hesitation to find implicit causes of action.[168]

Chief Judge Wood's distinction between government and private plaintiffs is harder to dismiss. She quoted the *American Stores*-based reasoning of *F. Hoffman-La Roche* that found the government could seek the equitable remedy of divestiture in more cases than private plaintiffs could.[169] Even so, the *American Stores* Court continued from what *F. Hoffman-La Roche* quoted to describe how private plaintiffs must demonstrate injury and standing in ways the government did not,[170] so Chief Judge Wood's distinction may be more relevant to plaintiffs' access to courts than their potential remedies once in court. Chief Judge Wood also claimed a case that "attach[ed] great weight to Navy's interest in realistic training of sailors" was an example of a case that linked the public interest and whether the plaintiff was part of the government,[171] but this is a stretched interpretation.[172] Chief Judge Wood's next

168 *See* Liu v. SEC, 140 S. Ct. 1936, 1942–46, 1947 (2020) (exploring equity's history and denying the argument that Congress incorporated courts' broad prevailing meaning of "disgorgement" into statutes); *cf.* Alexander v. Sandoval, 532 U.S. 275, 294 (2001) (Stevens, J., dissenting) (indicating the majority disregarded "prevailing principles of statutory construction" that would permit an implied private cause of action).

169 *See Credit Bureau Ctr.*, 937 F.3d at 789 (Wood, C.J., dissenting) (quoting F. Hoffman-La Roche Ltd. v. Empagran, 542 U.S. 155, 170 (2004)); California v. Am. Stores Co., 495 U.S. 271, 295–96 (1990) (citing, among other cases, *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), which was the basis for *Porter*'s broadening of equitable remedies for public interests and led *FTC v. Credit Bureau Center* to sidestep the distinction between private and government plaintiffs); *supra* notes 149–51 and accompanying text.

170 *See Am. Stores*, 495 U.S. at 295–96.

171 *Credit Bureau Ctr.*, 937 F.3d at 793 (Wood, C.J., dissenting) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 26–27 (2008)).

172 The case weighed the Navy's interest in sonar training exercises against those exercises' effect on marine mammals and the consequences of those effects. The Court "conclude[d] that the balance of equities and consideration of the overall public interest . . . tip strongly in favor of the Navy. . . . Of course, military interests do not always trump other considerations . . . . The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments" about the case's issue. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 26–27 (2008). Chief Judge Wood flagged the weight given to the Navy's interests, which appears to refer to the Court's deference to the Navy's definition of its affected interest. *Credit Bureau Ctr.*, 937 F.3d at 793 (Wood, C.J., dissenting). However, the Court's weighing of military interests against the environmentalists' (as opposed to accepting the military's interests as the public interest) cuts against the government having particular authority to define the public interest. Chief Judge Wood also posited that disgorgements are distinctly available to government plaintiffs, so the government's involvement in a case had a key role in defining the public interest. *See Credit Bureau Ctr.*, 937 F.3d at 793 (Wood, C.J., dissenting) (first quoting Kokesh v. SEC, 137 S. Ct. 1635, 1643 (2017); and then quoting FTC v. Bronson Partners, LLC, 654 F.3d 359, 372 (2d Cir. 2011)). The Second Circuit case Chief Judge Wood cited relied on other circuits' prior conclusions. *See Credit Bureau Ctr.*, 937 F.3d at 779, 779 n.3; FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 436 n.3 (9th Cir. 2018) (O'Scannlain, J., specially concurring). Chief Judge Wood countered the majority's brushing aside of the Second Circuit case by delving into its argument. That exploration included identifying FTC disgorgements as equitable adjuncts to injunctions and noting FTC disgorgements' parallels to SEC disgorgements. *See Credit Bureau*

argument of note was a challenge to the *Credit Bureau Center* majority's reliance on *Meghrig* and related cases on implied remedies.[173] First, *Meghrig* was irrelevant to considerations of equitable remedies since its analysis involved straightforward statutory interpretation without exploring equity's scope.[174] With respect to *Meghrig*'s scope, Chief Judge Wood is correct that it did not include a *Liu*-like examination of equitable remedies and did not concern FTC authorizations. However, it showed an approach to statutory interpretation for implied remedies that mirrored contemporary cases' textualism and offered the majority one roadmap for assessing FTC remedies' scope.

Second, the *Credit Bureau Center* majority cited a slew of cases to claim "a sweeping rejection of implied remedies," but these cases all had critical distinctions from cases like *Credit Bureau Center*.[175] Like *Meghrig*, these cases are more applicable if the majority was correct that there is no meaningful distinction between government and private plaintiffs. Furthermore, Chief Judge Wood stressed the cited cases' scopes while the majority emphasized their methodologies and conclusions.[176] Relying on equity's history more than details from statutes' text, *Liu* separated disgorgements into those that were penalties and those that were equitable. Despite not grounding its distinction in the sort of textual analysis *Credit Bureau Center* did, *Liu* could illustrate a possible middle ground between *Credit Bureau Center*'s elimination of implied remedies and Chief Judge Wood's disregard for *Meghrig*-style searches for statutory limits: courts can segment one type of remedy by the remedy's case-specific characteristics.

The Supreme Court removed *Credit Bureau Center* from its docket,[177] but that case's arguments may inform how the Court resolves Judge O'Scannlain's two *AMG Capital Management* opinions. In reaching a similar conclusion to Judge O'Scannlain's special concurrence, *Credit Bureau Center* provided a more detailed history of how the current majority emerged and

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Ctr., 937 F.3d at 794–95 (Wood, C.J., dissenting). *Porter* supported disgorgements as equitable adjuncts, but *Kokesh* and *Liu* identified much of the SEC's disgorgements as inequitable. *See supra* sub-subsection I.B.1.c. Chief Judge Wood's quote from *Kokesh* supported *Kokesh*'s conclusion that SEC disgorgements were oriented on enforcement over victim compensation and so were penalties. *See Credit Bureau Ctr.*, 937 F.3d at 793 (quoting *Kokesh*, 137 S. Ct. at 1643). Since *Liu v. SEC*, 140 S. Ct. 1936, 1941 (2020) treated penalties as legal remedies (rather than equitable ones) and the public interest's scope is relevant to *Porter*'s guidance for equitable remedies, Chief Judge Wood's argument blurs post-*Liu* legal and equitable realms.

173 *Credit Bureau Ctr.*, 937 F.3d at 792, 793–94 (Wood, C.J., dissenting). Chief Judge Wood argued just before this that one of the majority's precedents was irrelevant because the Court's hesitation to grant the remedy centered on the case's type of class action suit. Since the defendant Credit Bureau "must merely turn over to the FTC a single lump sum[,] . . . [this transfer wa]s the end of the court's involvement with the equitable relief in this case." *Id.* at 791–92. *Liu*'s concern about disgorgements benefitting wronged parties invalidated this argument. *See* Liu v. SEC, 140 S. Ct. 1936, 1948 (2020).

174 *Credit Bureau Ctr.*, 937 F.3d at 792 (Wood, C.J., dissenting).

175 *See id.* at 793–94.

176 *Compare id.*, *with id.* at 781–82 (majority opinion).

177 *See supra* note 10.

added more precedents to argue the Court had shifted to *Meghrig*'s methodology. It also punctured the uncertain barrier between cases like *Porter* with government plaintiffs and cases like *Meghrig* with private plaintiffs. Chief Judge Wood's dissent included stronger legal analysis than Judge O'Scannlain included in the Ninth Circuit ruling. Chief Judge Wood's most compelling parts were her defense of equitable powers' greater scope for government plaintiffs and her challenges to the relevance of the majority's precedents. If the Court supports Chief Judge Wood's and some circuits' distinction between types of plaintiffs, *Credit Bureau Center*'s reasoning for denying FTC disgorgements would be weaker but might still triumph as its textual approach resembles how the Court tackled subjects like implied rights of action. If the Court agrees with *Credit Bureau Center* and applies *Meghrig* to government plaintiff cases, *Porter* would apply to cases with non-government plaintiffs to the extent it applies anywhere, the Court could still deem some of *Credit Bureau Center*'s cited cases irrelevant, and the Court could trace its own narrative across cases like it did in *Liu*.[178]

c. The Third Circuit: *FTC v. AbbVie*

In September 2020, the Third Circuit joined the Seventh Circuit in opposing courts' ability to grant disgorgements to the FTC under § 13(b) of the FTC Act.[179] In *FTC v. AbbVie, Inc.*, Judge Hardiman described the relevant sections of the statute and then immediately contextualized the key § 13(b) language using the history-focused *Liu* opinion and the textual *Meghrig* opinion.[180] Like Judge O'Scannlain's special concurrence and *Credit Bureau Center*, *AbbVie* found the statute's text did not support disgorgements following both § 13(b)'s context and a limited definition of "injunction."[181] The Third Circuit then noted its circuit precedents supporting § 13(b) disgorgements were not binding before praising *Credit Bureau Center* as "thorough and well-reasoned."[182] Next, the opinion rejected the FTC's argument that statutory amendments changed § 13(b)'s remedies or referred to restitution as a § 13(b) remedy.[183]

178 *See supra* notes 103–08 and accompanying text.

179 *See* FTC v. AbbVie Inc., 976 F.3d 327, 374–79, 381 (3d Cir. 2020).

180 *Id.* at 375.

181 *See id.* at 376–77 (citing *Credit Bureau Ctr.*, 937 F.3d at 775); FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 430–32 (9th Cir. 2018) (O'Scannlain, J., specially concurring); *Credit Bureau Ctr.*, 937 F.3d at 772–75; *cf.* Ward, *supra* note 83, at 1191, 1191–94 (arguing restitution was incompatible with § 13(b)'s context).

182 *See AbbVie*, 976 F.3d at 377 (citing *Credit Bureau Ctr.*, 937 F.3d at 764, 785; *AMG Cap. Mgmt.*, 910 F.3d at 429 (O'Scannlain, J., specially concurring)). This included a conclusion that the relevant portion of a Third Circuit precedent was unbinding dictum. *Id.* (citing FTC v. Mag. Sols., LLC, 432 F. App'x 155, 158 n.2 (3d Cir. 2011)).

183 *Id.* at 377; *cf. Credit Bureau Ctr.*, 937 F.3d at 775 (reaching the same conclusion using similar reasoning in the lead-up to its core analysis of precedents' evolution and *Meghrig*'s applicability).

With such comparatively simple arguments addressed, *AbbVie* proceeded to assess how *Porter* and *Mitchell*'s broad equitable powers as applied in the Third Circuit fit with the question presented.[184] After summarizing *Porter* and *Mitchell*, the court described a 2005 Third Circuit case that understood those cases as "chart[ing] an analytical course . . . : (1) a district court sitting in equity may order restitution unless there is a clear statutory limitation on the district court's equitable jurisdiction and powers; and (2) restitution is permitted only where it furthers the purposes of the statute."[185] Whereas statutes like *Porter*'s and *Mitchell*'s included vague terms like "other order" or "restrain violations" and thereby did not limit courts' equitable power, § 13(b) included no such vagueness by specifying that injunctions were the appropriate equitable remedy.[186] The statute therefore had "a clear statutory limitation on the district court's equitable jurisdiction and powers" under the Third Circuit's *Porter* and *Mitchell* framework that was in addition to limits in the section's context and the statutory scheme.[187] The statute therefore barred courts from granting disgorgements.

One possible criticism of this approach is that it flipped *Porter*'s presumption when it allowed the government to seek a disgorgement. *Porter* presumed courts' equitable powers were available unless a statute blocked them while *AbbVie* presumed the statute's listed remedies are the complete list of available remedies unless Congress added a vague term.[188] A counter to this is that it is unclear what would satisfy *Porter*'s "necessary and inescapable inference"[189] if a list of specific remedies does not, especially if current cases gravitate nearer *Sandoval*-like textualism than *Mitchell*-like purposivism as *Credit Bureau Center* argued.[190]

AbbVie's decision against the FTC on the basis of the Third Circuit's *Porter* and *Mitchell* framework contrasts with how Judge O'Scannlain's special concurrence and *Credit Bureau Center* approached *Porter* and *Mitchell*. The special concurrence only cited *Porter* as the basis for the precedent it wanted to overturn.[191] *Credit Bureau Center* framed *Porter* as the foundation of creep-

184 *AbbVie*, 976 F.3d at 377–79.

185 *Id.* at 378 (quoting United States v. Lane Labs-USA, Inc., 427 F.3d 219, 225 (3d Cir. 2005)); *cf.* Ward, *supra* note 83, at 1190 (identifying a similar pair of requirements).

186 *See AbbVie*, 976 F.3d at 379; *supra* notes 70–71, 75–76 and accompanying text; *see also* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020) (examining the scope of disgorgements under a statute's "equitable relief"); *cf.* Ward, *supra* note 83, at 1194–95, 1197 (identifying FTC disgorgements as outside *Porter* and *Mitchell*'s scope due to material differences in the statutes, yet finding those differences in their operation rather than in the wording of remedies).

187 *AbbVie*, 976 F.3d at 378–79.

188 *Id.*; Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

189 FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 776 (7th Cir. 2019) (quoting *Porter*, 328 U.S. at 398).

190 *Id.* at 779–81 (identifying a statute's list of remedies as implicitly barring other remedies).

191 FTC v. AMG Cap. Mgmt., 910 F.3d 417, 435 (9th Cir. 2018) (O'Scannlain, J., specially concurring).

ing precedents, an example of outdated statutory interpretation, and a case that clashed with more recent cases like *Meghrig*.[192]

Credit Bureau Center's simplistic reference to the Third Circuit case that identified that circuit's *Porter* framework offers one way to reconcile *Credit Bureau Center*'s FTC-restricting outcome with *Porter*. Based on that reference, *AbbVie*'s Third Circuit precedent limited *Meghrig*'s reluctance to find implied remedies to elaborate remedial schemes.[193] This would mean *AbbVie* implicitly recognized the FTC's remedial scheme including § 13(b) as simpler than the scheme in *Meghrig*, so *Porter* and *Mitchell*'s limitations on equitable remedies applied while *Meghrig*'s did not. This would be an incomplete read of the Third Circuit's precedent and how *AbbVie* did not examine § 13(b) with *Meghrig*.

Instead of focusing on the complexity of the remedial scheme, *AbbVie*'s Third Circuit precedent distinguished *Meghrig* from *Porter* and *Mitchell* for several reasons that meant *Meghrig* did not apply to FTC disgorgements while *Porter* and *Mitchell* did. *Meghrig* involved a citizen-suit remedy instead of an enforcement action, *Meghrig*'s statute imposed greater restrictions on equitable powers than *Porter*'s and *Mitchell*'s did, and *Meghrig*'s proposed remedy resembled damages more than equitable restitution.[194] *AbbVie*'s identification of statutory limitations paralleled part of the analysis that had differentiated *Meghrig*.[195] *AbbVie*'s outcome offers the Supreme Court a way to deny FTC disgorgements in *AMG Capital Management* by using *Porter* and *Mitchell* separate from Judge O'Scannlain's textual and historical analysis and *Credit Bureau Center*'s application of *Meghrig* under a broad definition of *Porter*'s public interest.

d. Possible Outcomes of *AMG Capital Management*'s Supreme Court Ruling

Faced with *AMG Capital Management*'s question of whether courts can grant the FTC disgorgements under § 13(b) of the FTC Act's authorization of injunctions, the Supreme Court can reach one of three conclusions. It could say that statutes specifically authorizing injunctions categorically allow disgorgements, sometimes allow disgorgements, or categorically prohibit disgorgements.

A categorical approval would support the circuit split's majority position that traces back to the Supreme Court's *Porter* decision that recognized courts' broad equitable powers.[196] It would also support other agencies' pur-

192 *Credit Bureau Ctr.*, 937 F.3d at 777–78, 779–80, 782.

193 *See id.* at 782–83; United States v. Lane Labs-USA, Inc., 427 F.3d 219, 232 (3d Cir. 2005).

194 *Lane Labs-USA*, 427 F.3d at 231.

195 *See* FTC v. AbbVie Inc., 976 F.3d 327, 379 (3d Cir. 2020) (finding the specification of one equitable remedy bars other equitable remedies); *cf. Credit Bureau Ctr.*, 937 F.3d at 782 (saying some circuits "have concluded that a statute displaces equitable authority when it specifies a particular remedy").

196 *See supra* sub-subsection I.B.2.c.

suits of disgorgements like the Introduction's OCC hypothetical. However, *Porter*'s reasoning in light of Judge O'Scannlain's *AMG Capital Management* special concurrence, *Credit Bureau Center*, and *AbbVie* suggest that most circuits stretched *Porter*'s bounds.[197] Additionally, *Liu*'s overall approach, selective quoting of *Porter*, and lack of references to *Mitchell*'s quest for "complete relief"[198] suggest the *AMG Capital Management* Court will again build its equitable remedies argument forward from equity's history rather than backward from § 13(b)'s purpose. This would mirror the Court's evolution from *Mitchell*'s purposivist era to more recent textual cases like *Sandoval*.[199] On the matter of *Sandoval* and its limit on implied rights of action, an unequivocal ruling in the FTC's favor would probably be limited to government plaintiffs under the majority definition of *Porter*'s public interest to avoid friction with *Sandoval* and other private implied rights of action cases. *Liu* explored the boundaries of equitable disgorgements while *AMG Capital Management* explores whether such disgorgements are available at all, but that distinction is unlikely to support *AMG Capital Management* using an approach that is substantially different from *Liu*. *Liu* and the recent circuit opinions therefore indicate that categorical support of FTC disgorgements is unlikely.

A ruling between categorical support of FTC disgorgements and categorical denial of them is more likely than categorical support but is far from assured. Just as *Liu* recently used historical disgorgements to find that some SEC disgorgements are equitable and some are not,[200] *AMG Capital Management* could conclude § 13(b) supports some FTC disgorgements but not others. The Court could reach this conclusion by combining the views of *Credit Bureau Center* and Chief Judge Wood's *Credit Bureau Center* dissent. *Credit Bureau Center* found that a number of cases together supported a thorough search for statutory restrictions on courts' equitable powers in the manner of the Supreme Court's *Meghrig* decision, and Chief Judge Wood argued these cases were materially different from *Credit Bureau Center*'s situation.[201] The Court could find that some of *Credit Bureau Center*'s comparisons are valid and others are not, which would allow courts to read § 13(b)'s and similar statutes' limitations differently in different situations. For example, the Court could agree with Chief Judge Wood that *Porter*'s availability of courts' equitable powers is greater for government plaintiffs than for private plaintiffs when both seek injunctions, so *Meghrig*'s restraint is not as applicable to § 13(b) as *Credit Bureau Center* believed. A conclusion in this direction might provide a compromise between justices, but it would create potentially complicated caveats subject to courts' edits. This approach also risks a creeping expansion of certain situations' relief, which *Credit Bureau Center* criticized.[202]

197 *Id.*

198 *See supra* notes 103–04, 109–12 and accompanying text.

199 *See supra* sub-subsection I.B.1.b.

200 *See supra* notes 103–08 and accompanying text.

201 *See supra* notes 146–47, 173–76 and accompanying text.

202 *See supra* notes 144–45 and accompanying text.

Alternatively, the Court could allow some FTC disgorgements by distinguishing *Meghrig* from the less restrictive *Porter* and *Mitchell* opinions. It could follow some or all of the ways the Third Circuit differentiated those cases in *AbbVie* and its precedents,[203] or the Court could create its own. A result from balancing *Porter*, *Mitchell*, and *Meghrig* might be neater than one from wading through all the cases *Credit Bureau Center* cited, but it would still be a potentially complicated and creeping set of caveats.

On the basis of the recent relevant opinions, the Supreme Court's most probable ruling on *AMG Capital Management* is to deny disgorgements when a statute only refers to injunctions. Despite the numerous circuit precedents and Chief Justice Wood's defense of them in her *Credit Bureau Center* dissent, the Judge O'Scannlain *AMG Capital Management* special concurrence, *Credit Bureau Center*, and *AbbVie* offer strong arguments against the FTC's position. This is especially true after *Liu* identified constraints on equitable remedies.

Each of those three opinions against the FTC emphasized its own facet of the text and history to reach its conclusion. Judge O'Scannlain's focus on FTC disgorgements' compatibility with historical equitable remedies[204] could support a Supreme Court ruling that does not explore *Porter* and *Mitchell* much. This could be consistent with how *Liu* quoted *Porter* only briefly and incompletely since both *Liu* and the new ruling could represent an implicit paring back of *Porter*. As *Porter* dies a slow, quiet death, though, courts may have trouble telling to what extent it remains good law.

A ruling that embraces *Credit Bureau Center* would remove the barriers between *Porter* and cases like *Meghrig*, so it would spread *Porter* to more types of cases but restrain its significance in those cases.[205] Given the breadth of the restrictions *Credit Bureau Center* identified as it connected *Porter* with an earlier case,[206] a Supreme Court decision in this direction should identify the extent to which *Porter* clarified or focused courts' equitable power instead of just following historical practice.

The Court could instead rule against the FTC following a less disruptive path offered by *AbbVie*. That path applies *Porter* and *Mitchell*, focuses on the statute's text and context, and keeps *Meghrig*'s reluctance to find implied remedies away from cases like *AMG Capital Management*.[207] This option is particularly attractive as it uses a simple textual analysis of statutes' stated remedies and does not tinker with *Porter*, *Mitchell*, or *Meghrig*. However, the Justices may favor a bolder outcome that cleans up the law if they agree with *Credit Bureau Center* that courts have moved beyond the philosophies underlying *Porter* and *Mitchell*.[208]

So, what do the cases from *Porter* through *AMG Capital Management* mean for the government's ability to sue on citizens' behalf? *Liu* stated

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203 *See supra* notes 193–95 and accompanying text.

204 *See supra* sub-subsection I.B.2.a.

205 *See supra* sub-subsection I.B.2.b.

206 *See supra* notes 149–51 and accompanying text.

207 *See supra* sub-subsection I.B.2.c.

208 *See supra* notes 146–48 and accompanying text.

courts can grant typically available equitable remedies like injunctions and, within several constraints, disgorgements.[209] Per the most likely outcome of the Supreme Court's *AMG Capital Management* decision in which it rules against the FTC, statutes concerning agency suits in federal courts limit agencies' available remedies to what the statute specifically authorizes unless the statute permits a broad type of relief like "equitable relief," "other order," or actions that "restrain violations."[210] The extent to which government plaintiffs are entitled to greater exercise of courts' equitable powers may depend on the Court's approach to deciding against the FTC. Under either *AbbVie* or a version of *Credit Bureau Center* that adds Chief Judge Wood's differentiation of government plaintiffs, *Porter* supports a special status for government plaintiffs to act in the public interest and therefore benefit from a fuller range of courts' equitable powers. Under Judge O'Scannlain's logic or a full adoption of *Credit Bureau Center*, government plaintiffs may lack such a special status. Despite this uncertainty, these outcomes reflect what remedies an agency can seek from a federal court. They say little about how an agency chooses to seek particular remedies or the process an agency follows when it pursues an allowed remedy (e.g., how it calculates disgorgements for victims' benefits). *Liu*'s concern that equitable disgorgements benefit victims[211] added an element of agencies' process into the definition of equitable remedies, so the Court is wary about agencies' processes but has avoided giving more than loose standards.

II. Shortcomings of Agencies' Victim Restitution Suits

A. *Existing Scholarship's Theoretical Concerns*

Several authors have looked beyond what government plaintiffs can seek for victims to raise concerns with how government plaintiffs approach such suits. Many of these concerns fall into one of three buckets. First, government victim restitution lawsuits risk removing the victims' role in pursuing their claims. Second, as the government develops its case strategy, it has a variety of incentives other than ensuring victims receive the full extent of their valid claims. Third, government cases' inner workings and procedures have little guidance for how the government represents a case and distributes funds. The parens patriae cases described in Section I.A of this Note say little on a case's mechanics once a government actor has standing.[212] Section

209 *See* Liu v. SEC, 140 S. Ct. 1936, 1942–46 (2020).

210 *Id.* at 1940; Porter v. Warner Holding Co., 328 U.S. 395, 397–98 (1946); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 289 (1960) (citation omitted); *see supra* note 186 and accompanying text.

211 *Liu*, 140 S. Ct. at 1948.

212 *See supra* Section I.A. One exception is how a few circuits presume a parens patriae plaintiff adequately represented its subdivisions and citizens, *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 984–88 (2d Cir. 1984), which amplifies rather than diminishes the reason to assess how and how well the government provides that representation.

I.B's cases on federal courts' equitable power to grant remedies show that equitable disgorgements must benefit victims, but they otherwise say little about how agencies manage these cases and remedies.[213] These process criticisms are then distinct from the previous Sections' debates and precedents.

1. Victim Input on Their Claims

With respect to the risk of eliminating victim input and autonomy, government suits can prevent victims from seeking private lawsuits or sideline their participation in litigation. For victims in many situations, this may be a minor issue because private litigation is "unavailable or impractical," so lawsuits brought by government actors like the SEC might be victims' only feasible avenue for restitution.[214] In fact, one study of SEC distributions to victims found that over half had no parallel private litigation.[215] Government lawsuits can therefore resemble private class action lawsuits that give victims access to adjudication and "serve[ ] an important democratic function, allowing groups of individuals to collectively petition and redress widespread harm."[216] That being said, victims who would not pursue private litigation would want the government case to provide fair remedies.[217] If the government plaintiff drives the case with minimal victim input, there is a risk that the proceeding is not fair and transparent to all victims and that victims will not receive the potential psychological benefits of active participation.[218]

Government actions can also hamper victims' access to courts and judicial restitution by jeopardizing whatever private litigation the victims bring. The American Bar Association and other organizations have claimed some FTC disgorgements "duplicate or distort remedies available in private litigation,"[219] and the government may give victims access to a public settlement fund it arranged outside of litigation only if the victims "waive the right to sue."[220] If the government and the victims pursue independent cases, this

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213 *See supra* note 211 and accompanying text.

214 Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 336 (2015).

215 *See id.* at 371 (attributing the lack of private actions to victims not filing them and to courts dismissing cases before reaching their merits).

216 Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1116 (2010) [hereinafter Zimmerman, *Funding Irrationality*].

217 *See* Zimmerman, *Distributing Justice*, *supra* note 5, at 509–12 (discussing objectives of private class action settlements).

218 *See* Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811, 829 (2019) (discussing the potential disconnect between a large number of class action victims and their shared lawyers); Zimmerman, *Funding Irrationality*, *supra* note 216, at 1108 (discussing these issues in the context of public compensation funds created outside of court and class action settlements). While these sources do not describe government lawsuits at these points in their arguments, their theoretical concerns for cases that aggregate victims' claims are relevant to government actions on behalf of a group of victims.

219 Zimmerman, *Distributing Justice*, *supra* note 5, at 535.

220 Zimmerman, *Funding Irrationality*, *supra* note 216, at 1119.

could result in contradictory decisions and interpretations in addition to "confusion over the preclusive effect of judgments by alternative enforcers."[221] Given courts' aversion to redundant cases that reduce courts' efficiency and risk multiple awards over one set of behavior,[222] courts may have good reasons not to hear a victim's private litigation if the victim's claim is in the scope of a government lawsuit. For reasons like these, advocates for potential defendants have argued that certain government lawsuits eliminate the need to allow private litigation, and the Supreme Court has cited agency lawsuits as a policy reason not to expand a type of liability to private lawsuits.[223]

2. Agency Litigators' Objectives

Limited input into a government case or preclusion from bringing a private claim might not be a substantial concern to victims if the government's goals in its case align with the victims'. However, it is clear government plaintiffs have objectives besides ensuring each victim receives what is fair. One of those is the government's goal of enforcing the law and deterring wrongdoing. The SEC's prioritization of enforcement over victim restitution informed the *Kokesh* Court's ruling that certain disgorgements were penalties, so the law's highest levels recognize government plaintiffs' varied objectives.[224] If there are enough victims or the wrongdoing has implications that affect a substantial segment of the population, the government could have a distinct quasi-sovereign interest in enforcement that, if the government actor were a state, would support a parens patriae lawsuit.[225]

An enforcement goal in a lawsuit in addition to the goal of righting victims' wrongs is not strictly bad. One of the benefits of class action litigation is its ability to have a deterrent effect, especially on large defendants that cause diffuse injuries,[226] and similar deterrence by a public suit may prevent future wrongdoing. However, the government's enforcement interest may not align with winning victims' full claims. Government prosecutors have at times prioritized reforming defendants' practices over holding defendants accountable.[227] Furthermore, a government actor may have political reasons not to enforce laws in a manner that causes high-level officials to rein in the actor's autonomy.[228] Application of or shifts in the government's approach to enforcement may result in outcomes that are subject to limited judicial

221 Bornstein, *supra* note 218, at 825–26.

222 *Id.* at 828.

223 *See* Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 319 (2008).

224 *See* Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017); *supra* sub-subsection I.B.1.c (describing the case and its relation to other cases).

225 *See supra* subsection I.A.1.

226 *See* Zimmerman, *Funding Irrationality*, *supra* note 216, at 1116.

227 *See* Zimmerman & Jaros, *supra* note 21, at 1394.

228 *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 878 (2014).

review,[229] which can be dangerous to victims' interests if, as described above, government actions block private pursuit of those interests.

While enforcement considerations can lead government plaintiffs to seek less than the total of victims' claims, they could lead government plaintiffs to seek large judgments in ways that do not match victims' goals. A judgment for victims gives the government actor that earned it a quantified, easily published, and readily comparable measure of the actor's effort and effectiveness.[230] Government plaintiffs can demonstrate their importance to their stakeholders by citing a high number of such judgments or the size of those judgments.[231] Federal agencies publish and present these numbers when they compile their annual reports, testify to Congress, or advocate for their budgets.[232] There is also evidence that some agencies draw particular attention to their enforcement action statistics when they are under greater scrutiny and are trying to build their reputation as enforcers.[233] On one hand, incentives that encourage potential government plaintiffs to enforce laws vigorously and undo victims' harm can boost the quantity of victims that receive restitution and the quality of each victim's restitution.

On the other hand, those incentives can encourage government plaintiffs to pursue cases in a manner that amplifies the plaintiff's statistics, potentially at victims' expense. A plaintiff like an agency looking to amplify its numbers may favor easy cases over complicated ones, and that plaintiff could be faster than victims to settle a case for the sake of quick headlines or annual totals.[234] The low rate at which government cases collect on their penalties indicates that government plaintiffs at least sometimes prioritize reputation-boosting, readily published penalty assessments over the actual receipt of the funds.[235] One 2011 survey of agency collection rates found that agencies typically collect "well below 50%" of what they were owed, and some agencies collected far less than that.[236] Although that scholarship concerned penalties that government actors passed along to general treasury

229 *See* Zimmerman & Jaros, *supra* note 21, at 1400–01, 1406 (discussing this concern in the context of criminal actions by federal prosecutors and describing federal prosecutors' increased focus on restitution after some corporate fraud scandals).

230 *See* Lemos & Minzner, *supra* note 228, at 876.

231 *See id.* at 877.

232 *See id.* at 874, 881 (describing how "[f]ederal agencies tout their enforcement successes to the most important decisionmaker, Congress, and do so in the budget context").

233 *See id.* at 882–83.

234 *See id.* at 890, 897, 900 (describing the potential drawbacks and benefits of government actors having financial or reputational incentives in lawsuits); Bornstein, *supra* note 218, at 825 n.69 (quoting Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 328–29 (2016) (considering how parallel private and public litigation over one set of wrongdoing can lead "enforcers . . . to cut corners, strike sweetheart deals, or engage in inefficient gamesmanship")).

235 *See* Lemos & Minzner, *supra* note 228, at 884, 886.

236 Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 475–76 (2011). Some of the discussed agencies subsequently had periods of higher collection rates, but those may have had idiosyncratic explanations. *See* Lemos & Minzner, *supra* note 228, at 884–85.

funds,[237] it is conceivable that analogous incentives would lead a government suing for victims to prioritize headline-worthy settlement and judgments over extended processes like fund collection and distribution. Because government plaintiffs might care most about the numbers Congress sees and victims care most about the numbers in their bank accounts, a shared interest in large outcomes is not enough to ensure government plaintiffs fully represent the claims of their lawsuits' victims.

Government plaintiffs could have additional, selfish incentives in addition to the enforcement, political, and stakeholder incentives that may influence their actions. If there are parallel public and private cases about the same wrongdoing, there is a risk that both plaintiffs will shirk responsibility for investing the time and resources to build a case or press certain arguments.[238] Even if there is no parallel litigation, government litigators whose jobs and paychecks do not depend on their cases' success might not invest as much energy in a case as a private attorney.[239] They could also tailor the case in ways that reflect their personal preferences and career prospects rather the government's or victims' goals.[240] Of course, private attorneys can also underperform or improperly prioritize their personal benefits, but victims stand a better chance of catching and rectifying such behavior in their lawyers than in the government's lawyers, especially if a government plaintiff is not transparent with victims.

3. Comparatively Few Procedures

Because government-brought cases can decrease victims' access to courts and juggle a host of interests besides victim compensation, it would be reasonable to expect government entities that often sue on victims' behalf to have extensive procedures for these cases. In addition to that, the parallels between an administrative agency's victim restitution and a class action settlement fund suggest the former's procedures would be at least as robust as the latter's.[241] This suggestion has become stronger as the government has taken a more active role in victim compensation in recent decades, which has blurred the line between public and private enforcement.[242]

This expectation of comprehensive government procedures would be mistaken. Government plaintiffs like federal agencies can learn from the established procedures and safeguards for class action suits.[243] In the con-

237 *See* Lemos & Minzner, *supra* note 228, at 886.

238 *See* Bornstein, *supra* note 218, at 825.

239 *See* Lemos & Minzner, *supra* note 228, at 889.

240 *See id.* at 889, 891 (describing the risks of government lawyers drifting away from agency goals and third parties capturing influence over government lawyers).

241 *See* Zimmerman, *Distributing Justice*, *supra* note 5, at 512.

242 *See* Lemos & Minzner, *supra* note 228, at 862.

243 *See, e.g.*, Sant'Ambrogio & Zimmerman, *supra* note 1, at 1999 (examining adjudication processes within agencies and how they can improve by aggregating claims in a manner resembling class action suits). Professor Zimmerman has written about the lessons class action can teach agencies in several articles.

text of agency suits for victims, Adam Zimmerman noted how courts check if "large representative settlements" like class action settlements allow absent parties to participate, possess a "harmony of interests between the class representative and other parties," and preclude private litigation.[244] Part of courts' review of these suits is an assessment of the aggregated claims' variation (i.e., how similar the claims are) and viability (i.e., do class members have the means and incentive to litigate on their own).[245] Professor Zimmerman's reference to state attorney general actions facing these same checks[246] dovetails with how some parens patriae cases are concerned about the parens patriae providing adequate representation.[247] Relative to class action suits, courts owe agencies greater flexibility and discretion as they exercise prosecutorial discretion and allocate their resources.[248]

Still, the potential shortcomings of agency procedures are concerning. The SEC, for example, had some procedures that paralleled class action settlements' procedures for distributing funds.[249] However, distributions following those procedures did "not provide victims an active role in the distribution plan's design, receive consistent judicial review, or follow regular guidelines to determine when recouped funds should go to the U.S. Treasury."[250] The FTC similarly had limited procedures and safeguards,[251] and the FDA has sent hundreds of millions of dollars of restitution to the U.S. Treasury instead of victims under its loose standards for doing so.[252] These agencies may have changed their procedures since Zimmerman reviewed them, especially after *Kokesh* and *Liu* referred to funds' distribution as they parsed agencies' authorization.[253] Such revisions might address immediate concerns without offering a comprehensive improvement to victim access or conflicting interests. A considerable amount of literature has examined the interplay of victims' claims and public enforcement, which has led scholars to propose promising solutions within agencies and states.[254] However, the

244 Zimmerman, *Distributing Justice*, *supra* note 5, at 514.

245 *See id.* at 516–17.

246 *See id.* at 514.

247 *See supra* note 62 and accompanying text.

248 *See* Zimmerman, *Distributing Justice*, *supra* note 5, at 551.

249 *See id.* at 532.

250 *Id.* at 530–33 (describing the issues and an instance in which the SEC's distribution of a wrongdoer's assets "arguably frustrated the remedies available to creditors in bankruptcy").

251 *See id.* at 535–36.

252 *See id.* at 536–39 (describing a 2003 case in which the FDA deposited $500 million of victim restitution with the Treasury with a court's approval).

253 *See* Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017); Liu v. SEC, 140 S. Ct. 1936, 1948–49 (2020) *supra* sub-subsection I.B.1.c. *Kokesh* and *Liu* involved the SEC and narrowed the acceptable scope of SEC disgorgements. *AMG Capital Management* is likely to restrain FTC disgorgements. *See supra* sub-subsection I.B.2.d. These three decisions may have prompted or might prompt agencies to revise their procedures.

254 *See, e.g.*, Bornstein, *supra* note 218, at 813, 836 (citing much of this literature and proposing a model of "co-equal, co-counselstyle collaboration" between public and private attorneys when statutes authorize action by both agencies and individuals); Myriam Gilles

ongoing development of Supreme Court case law about federal agencies' remedies mean this literature has not yet combined the latest cases in that field with existing doctrines like parens patriae and procedural recommendations.

B. An Empirical Check: Date Distributions of SEC Administrative Proceedings Reflect Goals Beyond Compensating Victims and Enforcement

In the previous subsection, one of the potential issues with government plaintiffs advancing victims' claims is that the plaintiffs may have objectives in the case and fund distribution that conflict with victims' goals. As an illustration of how agencies may have interests other than the compensation of victims when they seek disgorgements, Figures 2 and 3 highlight several patterns in the timing of orders related to certain funds the SEC operates for the benefit of harmed investors. Following a statutory evolution that began in 1990, current federal statutes allow the SEC to place disgorgements and civil penalties in such funds.[255] That evolution shifted the SEC from treating disgorgements as pure enforcement actions that benefitted the U.S. Treasury to treating them as both enforcement actions and victim compensation.[256]

The SEC has sought money for these compensation funds through federal courts or administrative proceedings.[257] Based on the SEC's history of collecting and distributing billions of dollars each year, the SEC arguably has

& Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623, 669–72 (2012) (advocating for states to increase their use of their parens patriae authority by hiring private attorneys).

255 A federal court first recognized the SEC's ability to seek disgorgements from defendants in 1971. Congress codified this and nudged the SEC toward using disgorgements for nonenforcement goals like benefitting victims with the Penny Stock Reform Act of 1990, which "expressly authorized the SEC to design rules for the distribution of such awards." Zimmerman, *Distributing Justice*, *supra* note 5, at 527–28 (first citing SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971) (showing the SEC could seek disgorgements in federal court); and then citing 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2018)). The cited statute subsections have not substantively changed since that article's publication. 15 U.S.C. §§ 78u-2(e) ("In any proceeding in which the Commission . . . may impose a penalty under this section, the Commission . . . may enter an order requiring accounting and disgorgement"), 78u-3(e) ("In any cease-and-desist proceeding [by the Commission] under subsection (a), the Commission may enter an order requiring accounting and disgorgement."). The Fair Funds Act within the Sarbanes-Oxley Act of 2002 as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 expanded this power as the SEC can pursue "any equitable relief that may be appropriate or necessary for the benefit of investors." Zimmerman, *Distributing Justice*, *supra* note 5, at 529 n.129 (quoting still-current language from 15 U.S.C. § 78u(d)(5) (2018)). Those acts also allow the SEC to add "a civil penalty" from "any judicial or administrative action brought by the Commission under the securities laws" to a disgorgement fund. 15 U.S.C. § 7246 (2018); *see* Black, *supra* note 223, at 324–27 (describing the Fair Funds Act and limitations on it that are no longer in the statute); Velikonja, *supra* note 214, at 341–42.

256 Zimmerman, *Distributing Justice*, *supra* note 5, at 520.

257 Velikonja, *supra* note 214, at 350–51 ("Between 2002 and 2013, the SEC ordered $14.46 billion distributed through 243 fair funds, of which 143 were created in judicial

"the most extensive and sustained effort by a public agency to compensate the victims of misconduct."[258] In fiscal year 2020 (October 2019–September 2020) alone, "parties in the [SEC's] actions and proceedings were ordered to pay a total of $3.589 billion in disgorgement of ill-gotten gains," and the SEC "returned $602 million to harmed investors" across ninety-one funds and administrators.[259] Even though the Supreme Court ruled that SEC disgorgements like *Kokesh*'s are penalties that have punishment and deterrence as goals ahead of victim compensation,[260] the SEC's disgorgements offer perhaps the most thorough and accessible set of records related to an agency's victim-compensating actions.

The SEC's efforts to collect money for victims through federal courts are within this Note's focus, and its efforts to achieve a similar goal through administrative proceedings are not. However, there is no consolidated database of records for court-ordered funds and their disbursements, and the SEC's website compiles all orders for funds created through administrative proceedings.[261] Examined at a high level, these administrative proceeding orders can reflect agency-wide strategies or resource allocations without the need to construct a database of court proceedings. Despite the potential benefit to the literature from such a database, the SEC plans to soon launch an internal Disgorgement and Penalties System,[262] and this might allow it to start publishing an official case list like its administrative proceedings list.

Even a simple review of the hundreds of compiled administrative proceeding documents can illustrate patterns through their dates. The SEC's actions to create compensation funds clearly balance multiple goals: they are enforcing the law and deterring wrongdoing in addition to compensating victims. Those objectives would predict more actions in periods with more identified wrongdoing, but there is no clear reason these goals would cause intra-year seasonality across multiple years. If anything, victim compensation, enforcement, and deterrence should lead administrative proceedings' distribution within a year to resemble the ebbs and flows of general white-collar

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proceedings and 100 in administrative proceedings."). For the statutory basis for the SEC's authority to use these avenues, see 15 U.S.C. § 7246 (2018).

258 Velikonja, *supra* note 214, at 334.

259 SEC, DIV. OF ENF'T, *supra* note 12, at 17–18.

260 Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017).

261 *Distributions in Commission Administrative Proceedings: Notices and Orders Pertaining to Disgorgement and Fair Funds*, SEC, https://www.sec.gov/litigation/fairfundlist.htm (last visited Oct. 2, 2020). An earlier version of this website's records formed the core of another paper's more comprehensive empirical analysis of SEC disbursements. Velikonja, *supra* note 214, at 348.

262 SEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2019, at 42 (2019) (promising implementation in fiscal year 2020). This "comprehensive" system will "improve both financial and programmatic reporting of enforcement actions." Caryn E. Kauffman, *Message from the Chief Financial Officer*, *in* SEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2019, *supra* at 46. As of the start of fiscal year 2021, the system is not yet operational and public. The fiscal year 2020 target date was already behind the original plan for a fiscal year 2019 implementation. SEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2017, at 51 (2017).

business (e.g., with lulls around the winter holiday season or the height of summer when vacations and beaches beckon). Whereas the SEC may have limited control over the timing of court proceedings that depend on judges' schedules, the timing of administrative proceedings can offer a particularly direct glimpse into the SEC's objectives and strategy.

However, the SEC's administrative proceedings do not match this prediction. The SEC follows the federal government's fiscal year and publishes its accomplishments in reports for years ending in September.[263] Two of the eye-catching numbers in each year's Division of Enforcement annual report are the total disgorgement and penalties ordered and the total amount returned to investors.[264] In administrative proceedings, the conclusion to order disgorgement or penalties usually appears in records that include the phrase "Making Finding" in the title, and records approving the repayment of funds to specific harmed investors usually have titles with the phrases "Disbursement" or "Payment of Certain Funds." If the Commission had not found that a case's defendant should disgorge funds, the case would not appear on this website, so all of the conclusive findings should add to the SEC's number and value of its victories. Based on the one hundred distinct "Making Finding" records and ninety-eight distinct repayment-related records from fiscal years 2013–2020, Figures 2 and 3 suggest these orders occur more frequently right before the annual reporting cutoff and less frequently right after it.[265]

263 *See, e.g.*, Velikonja, *supra* note 214, at 357; *supra* notes 230–33 and accompanying text.

264 For fiscal years 2015–2020, total disgorgements and penalties totaled $4,194 million, $4,083 million, $3,789 million, $3,945 million, $4,349 million, and $4,680 million. For the same period, total funds disbursed to harmed investors totaled $158 million, $140 million, $1,073 million, $794 million, $1,197 million, and $602 million. SEC, DIV. OF ENF'T, *supra* note 12, at 17–18.

265 On October 1, 2020, I saved PDF copies of the SEC's online pages listing the records for disgorgement and fair fund administrative proceedings. *Distributions in Commission Administrative Proceedings*, *supra* note 261; *Archive of Terminated Fair Funds and Disgorgement Plans*, SEC, https://www.sec.gov/litigation/fairfundlist-archive.htm (last visited Oct. 2, 2020). I then copied the now-stable data from the PDF into a spreadsheet, where I removed extraneous data like headers and consolidated information that had been broken apart through my copying (e.g., long record titles). This created a population of 114 active funds and 135 terminated funds. Some of these had multiple recorded findings, multiple disbursement orders, or ultimately transferred their funds to the U.S. Treasury instead of to victims (e.g., in cases with a hard-to-define set of harmed investors). Using spreadsheet formulas, I flagged the records that used the term "Disbursement" or "Payment of Certain Funds" since those documents marked fund outflows and excluded outflows to the U.S. Treasury or administrative costs. I similarly flagged records that used the term "Making Findings" to identify when SEC adjudications imposed disgorgements or penalties: record titles' syntax varied too much for a longer search phrase, and the term's vagueness is not a major issue since the SEC must have found a disgorgement or penalty appropriate for the website to include the record. For each of the two document types, I eliminated instances of multiple equivalent records occurring on the same day (e.g., findings for different parties in one proceeding). This left 233 records of findings and 256 disbursement records. I then extracted the dates from each record and grouped the results. Almost all of the

FIGURE 2: MONTH OF SEC ADMINISTRATIVE RROCEEDING FINDINGS, FY 2013–2020

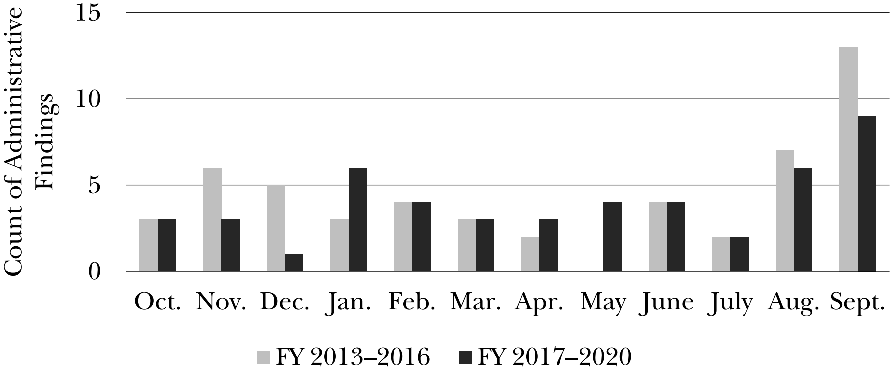
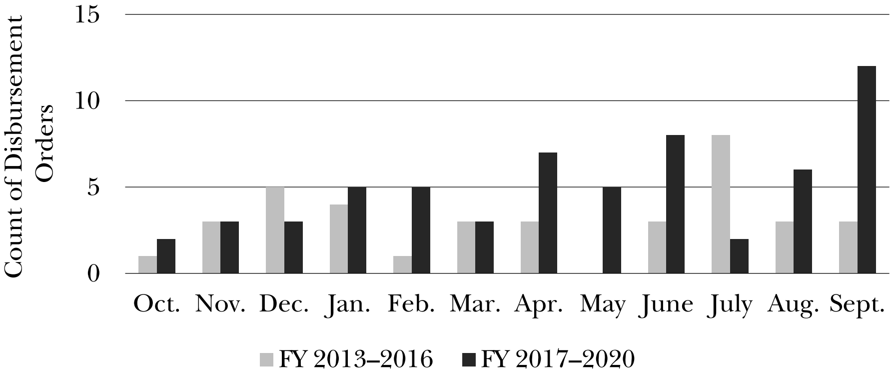


FIGURE 3: MONTH OF SEC ADMINISTRATIVE PROCEEDING DISBURSEMENT ORDERS, FY 2013–2020



The figures show more than an end-of-fiscal-year uptick. There also appears to have been a shift from the SEC during President Obama's second term to the SEC during President Trump's tenure. Fiscal years 2013–2016 saw the SEC complete an elevated number of administrative findings but not disbursement orders in Augusts and Septembers. Fiscal years 2017–2020 also saw an August–September uptick in administrative findings, and they addi-

records were from after the passage of the Sarbanes-Oxley Act in 2002 that expanded how the SEC could compensate investors. *See supra* note 255. Figures 2 and 3 build on the one hundred findings and ninety-eight disbursements from fiscal years 2013–2020. In contrast to an initial post-Sarbanes-Oxley period and the Great Recession, 2013–2020 saw annual counts of both record types roughly stabilize. That time period has the added benefit of being about half under the Obama Administration and about half under the Trump Administration. The records with dates through fiscal year 2012 do not show the same build-up through September that Figures 2 and 3 show, but an absence of earlier years' reporting benchmarks and the clean-up of the financial crisis may have drowned out pressures related to annual reporting deadlines.

tionally exhibit an upward trend in disbursement orders over the year. Using each document type's full 2013–2020 data once they are aggregated by quarter, a straightforward chi-squared test indicates both document types' date distributions are significantly different from a uniform distribution across the year at a 90% confidence level.[266]

Although counts are low enough that data processing errors or outliers could have a nontrivial effect, the charts and numbers indicate aseasonal motivations like law enforcement or victim compensation do not fully explain how the SEC handles these administrative proceedings. It is possible the irregular pattern stems from something as simple as calendar-based staffing changes, such as junior attorneys ending fixed-duration tenures for the Commission (which signed the catalogued records) or the Enforcement Division. That concern does not obviously apply to the SEC,[267] but even if it did, that would show agency actions fitting to priorities other than the public interest and victims' interests.

To the extent the seasonal pattern reflects agency-wide thinking, the pattern in administrative proceedings suggests that the SEC's approach to court proceedings for victims' benefit may also face high internal bureaucratic pressures. While the SEC is unusually active among federal agencies in its pursuit of disgorgements, internal pressures that shape when and how the SEC pursues disgorgements can influence how other agencies seek victim compensation.

The administrative proceedings' pattern aligns with the theoretical observations of Lemos, Minzner, and others about potential issues with regulators' motivations in suing for citizens' benefit.[268] Annual checkpoints might encourage SEC adjudicators and litigators to drive proceedings forward rather than dawdle, but there is a risk that SEC officials' deadlines cause them to disburse funds sloppily or settle for disgorgements below what private litigators would seek. Additionally, the shift in the administrative pro-

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266 Some months like May had low counts of records in the 2013–2020 data, which could undermine a chi-squared test's ability to reach valid results across twelve monthly data bins. Summing data across quarters (October–December, January–March, April–June, and July–September) eliminated that issue. This summation found there were twenty-one administrative findings in Q1 of fiscal years 2013–2020, twenty-three in Q2, seventeen in Q3, and thirty-nine in Q4. This produced a chi-squared value of 11.20, which is above the 6.25 critical value for a chi-squared distribution with three degrees of freedom (because there are four quarters) at a 90% confidence level. The summation also found there were seventeen disbursement orders in Q1 of fiscal years 2013–2020, twenty-one in Q2, twenty-six in Q3, and thirty-four in Q4. This produced a chi-squared value of 6.57.

267 The SEC website's page for Entry Level Attorneys is solely about the Chair's Attorney Honors Program, which is a two-year development program that rotates through offices and divisions. *Chair's Attorney Honors Program*, SEC (June 26, 2020), https://www.sec.gov/ohr/chairs-attorney-honors-program. For that to affect a once-a-year uptick like Figures 2 and 3 show, these junior staffers would have to either have only two rotations in their two-year program or the junior attorneys are far more productive in one period of the year.

268 *See supra* notes 228–40 and accompanying text.

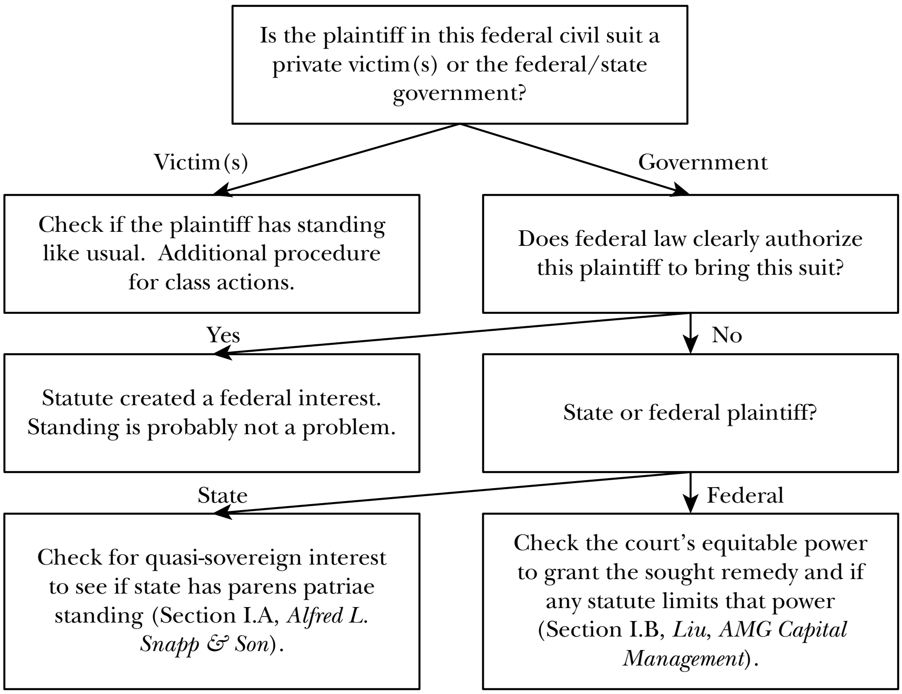
ceeding date distribution from the Obama years to the Trump years raises the possibility that changes in agency strategy or personnel can have a material impact on how the SEC approaches victim compensation.[269] Such changes in approaches do not necessarily prioritize assistance to these cases' victims. They could emphasize the SEC's other stated goal of enforcement, but they could also reflect organizational changes or changes in officials' style and competence. Such changes could be good. As times change and new leaders enter office, an evolution in agency actions could showcase accumulating expertise or reallocate resources to match what voters selected at the ballot box. Even so, to the extent that the SEC extracts and distributes funds for victims' benefit in lieu of private lawsuits, there is a risk of inconsistent justice when a staffing change in Washington can substantially affect a private party's redress from a private wrongdoer. This analysis of SEC records does not indicate anything shocking: deadlines encourage agency officials to meet them, and agency actions may change when victims' interests in those actions do not. That being said, this is an intuitive complement to other authors' concern about an agency's objectives as that agency actively participates in victim compensation.

III. A Potential Starting Point for Federal Parens Patriae

Based on the cases described in this Note's previous parts, a federal judge in a civil case follows a thought process roughly summarized in Figure 4 when deciding if the court has jurisdiction to hear claims for the plaintiff's desired remedy. This assumes that other matters like personal jurisdiction and venue have been satisfied and this is not an unusual type of case that is outside this Note's scope (e.g., qui tam actions).

269 Another explanation is that the 2017 *Kokesh* ruling caused the SEC to reassess how it approached disgorgements. However, that would readily explain a shift in what cases the SEC pursued, the amounts it pursued in those cases, and how it planned to use disgorged funds. It is less clear how the ruling would affect the SEC's calendar.

FIGURE 4: ISSUES DEPENDENT ON PLAINTIFF TYPE IN FEDERAL CIVIL SUITS



If the plaintiff is a victim, a group of victims, or an entire class of victims, the judge must assess if this is the right plaintiff to bring this claim and seek this remedy. If the plaintiff is a state that lacks explicit federal authorization to bring this suit, the judge must assess if the state has a quasi-sovereign interest and is thereby the right plaintiff to bring this claim and seek this remedy for its citizens. If the plaintiff is a federal agency that lacks explicit statutory authorization, *Liu* suggests the judge does not assess whether the agency is the right plaintiff to bring this claim for its citizens.

Following *Liu*, the judge should instead become self-reflective and consider the extent of the court's equitable power. Under *Porter* and *Mitchell*, this power is extensive and especially broad when the plaintiff acts in the public interest. If *AMG Capital Management* rules against the FTC by adopting the Third Circuit's *AbbVie* reasoning or some compromise between circuit opinions instead of following Judge O'Scannlain's or the Seventh Circuit's reasoning, precedent supports the government having particular authority to identify the public interest. If so, the court's equitable powers to grant remedies to a federal agency are not subject to some or all of the limitations suggested by *Meghrig*, *Sandoval*, or other cases with private plaintiffs from the last few decades. The judge would also have to check that statutes do not limit the court's equitable powers, which under the likely *AMG Capital Management* decision would mean seeing if statutes specifically allow certain equitable remedies and implicitly bar others. If the statute is silent on government equitable remedies or authorizes a vague, open-ended list of equitable remedies, the court's equitable powers are at the agency's disposal for victims' benefit.

Although these concerns with private, state, and federal plaintiffs all revolve around the federal court's jurisdiction to hear the plaintiff's case, the concerns for the first two rely on the plaintiff to build up its argument for standing and why it should be allowed into court. Federal agencies seeking equitable relief file their claims with the privilege of the broadest extent of courts' equitable power, and the court must decide from complaints and answers if Congress prevented it from exercising that equitable power as the plaintiff wants. Whether the agency plans to give awarded funds to the Treasury or to victims influences that decision under *Kokesh* and *Liu*, but the details of victim disbursements and the agency's likelihood of representing all victims fully and faithfully have no clear bearing on the court's decision because they do not affect the court's equitable powers. As a federal agency pursues a variety of objectives, including some that may seem arbitrary or selfish, agencies' path to the full extent of courts' permitted equitable powers risks shortchanging victims.

The linkage between what courts can grant and what agencies can pursue also raises at least three potential separation of powers issues. First, courts reading Congress's silence or vagueness as allowing them to exercise a broad range of equitable remedies may permit agencies to have abilities Congress had not intended. Second, agencies may pull courts to the edges of their authority to adjudicate actual cases and controversies. Agencies' claims may fall within permitted equitable remedies without the cases clearly demonstrating the concrete adverseness other types of plaintiffs must prove. This is particularly concerning when agency lawsuits lack class action suits' standardized reviews and agencies can be less transparent than other plaintiffs' suits. Third, another possible problem is courts' ability as a co-equal branch of government to check the executive branch's agencies. If courts ever expand their equitable powers' scope (e.g., because of a reassessment of history, ambitious judges, or novel circumstances), courts' current approach would cause the executive's power to grow in tandem as the executive can seek more remedies subject to statutory constraints. Across these separation of powers frictions, courts' approach to agency lawsuits quietly amplifies executive power through the federal courts.

Recognition of a new federal parens patriae doctrine would decouple agencies' authority from courts' equitable powers with the introduction of a standing threshold that agencies must cross. Courts can do this by copying much of the existing minority view of the parens patriae doctrine discussed in subsection I.A.1 and applying it exclusively to the federal government. As represented in the *Massachusetts v. EPA* dissent, this minority view sees the parens patriae doctrine less as a channel into court and more as an added hurdle the government must overcome by showing that citizens have standing and the plaintiff has a quasi-sovereign interest that is distinct from victims' interests.[270] As cases like *Alfred L. Snapp & Son* showed, courts can be generous to government plaintiffs when identifying quasi-sovereign interests,[271] so adding a federal parens patriae review to agency suits would not choke off agencies' access to judicial equitable remedies. Explicit discussion of quasi-sovereign interests like enforcement would necessitate examination of agencies' objectives and interests in a case. This could allow courts to turn away agency cases when they would lack adequate adverseness or when they would fail to remedy victims' injuries.[272] Court scrutiny of agency cases can also allow courts to apply at least some of class action litigation's existing checks to federal agency claims, thereby improving the fairness and transparency of agency cases that proceed. Some of these checks may be inappropriate for a federal agency due to the agency's discretion in its resource allocation and the government's special role in identifying the public interest. Still, a federal parens patriae doctrine would start the conversation of identifying what specific checks are appropriate.

A federal parens patriae doctrine would be consistent with existing legal conclusions. Since the majority view of the parens patriae doctrine's origin and application does not include the federal government, a distinct federal parens patriae doctrine would not affect the existing state-oriented doctrine. It would also probably not require any substantial changes to *Liu* and *AMG Capital Management*. Because parens patriae standing is a prudential doctrine, statutes can change where courts can and cannot recognize it.[273] Satisfying federal parens patriae standing should include having an appropriate judicial remedy, and parens patriae cannot override Congress, so Congress's statutory limitations on remedies under *Liu* and *AMG Capital Management* would be unaffected by a federal parens patriae standing doctrine. *AMG Capital Management* might differentiate government and private plaintiffs explicitly in its argument, implicitly in how it applies cases like *Meghrig*, or in its silence on logic like *Porter*'s or *American Stores*'s. In that event, the development of a new standing check specific to the federal government carries that differentiation forward. If *AMG Capital Management* blurs the public-private distinction like *Credit Bureau Center* did, then federal parens patriae remains worthwhile as it could align Figure 4's terminal nodes: federal plaintiffs would face a standing gauntlet like other types of plaintiffs instead of accessing whatever courts can provide. Federal parens patriae should therefore slip into current legal frameworks with relative ease.

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270 *See supra* notes 43–45 and accompanying text; Massachusetts v. EPA, 549 U.S. 497, 538–40 (2007) (Roberts, C.J., dissenting).

271 *See supra* notes 29–38 and accompanying text.

272 *Kokesh* and *Liu* considered whether restitution benefitted victims and did not consider how effectively that restitution redressed the injury. It is therefore possible for an agency seeking a *Liu*-compliant equitable disgorgement to estimate a wrongdoer's net profits inaccurately or below what a reasonable group of victims would estimate. Standing's check for whether a sought remedy would redress the alleged injury would provide courts with a firmer way to monitor for this sort of underestimation.

273 *See supra* note 47 and accompanying text.

In doing so, this doctrine can replace the current silence in agency procedures and the potential separation of powers issues. Whereas agencies' equitable remedies are grounded in equitable powers that are not affected by agency procedures, federal parens patriae standing would depend on how the agency intends to pursue a case and handle awarded funds since these can show if the sought remedy would address victims' injuries. Courts' checks on agency processes under a federal parens patriae doctrine would then improve how often agency cases assist victims appropriately. In the separation of powers realm, a standing circuit breaker between what agencies can seek and what courts can provide would allow courts to identify situations when Congress did not limit the courts but intended to constrain agencies, in which case the agency cannot have standing for unattainable remedies. Federal parens patriae standing would also help courts stay squarely within actual cases and controversies by barring cases without sufficient adverseness. Finally, the doctrine could allow courts' equitable powers to grow or evolve without executive power moving in lockstep because some of those changes would not affect what agencies could seek in court within federal parens patriae's requirements.

Conclusion

This Note has tried to bring together three distinct threads of scholarship and precedents to understand how federal agencies sue in federal court on behalf of wrongdoing's victims. The first was the parens patriae doctrine, which remains hazy and debated but does not generally facilitate federal agency lawsuits. The second concerned the ongoing debate over the equitable remedies federal agencies can receive. When statutes do not explicitly authorize a right of action and remedy for an agency, cases since the 1940s have empowered federal agencies to seek whatever equitable remedies courts can provide. *Kokesh* and *Liu* showed that these remedies follow historical practice subject to the limits that statutes impose. The Supreme Court's upcoming *AMG Capital Management* decision will address whether a statute that lists specific equitable remedies also permits other equitable remedies. In light of *Liu*, the opinions on this subject from the Ninth, Seventh, and Third Circuits offer compelling reasons for the Supreme Court to find that Congress limited agencies to the listed equitable remedies. Under the less disruptive approaches the Court could take to reach this outcome, doctrine under *Porter* and subsequent cases would remain largely unchanged subject to moderately elevated recognition of statutes' limitations. The implications of a more disruptive approach are harder to predict but could restrict *Porter*'s significance and place *Meghrig*-like limits on agencies' implied remedies.

This Note's third thread was the group of issues in how agencies litigate for victims. Agency processes can harm victims' access to courts, skew lawsuits away from victim restitution, and face minimal procedural checks. While some of these problems had little more than one-off examples as proof or have been studied mostly outside the context of agency lawsuits, the dates of SEC administrative proceedings are consistent with previous authors' concern that agencies may act in self-serving ways that do not further restitution or enforcement.

Based on these three fields, courts should consider introducing a new federal parens patriae doctrine that would apply specifically to lawsuits by the federal government. Such a doctrine can build on existing parens patriae analysis that readily recognizes quasi-sovereign interests while forcing agencies through a meaningful standing check before they can access the judicial equitable powers permitted under *Liu* and *AMG Capital Management*. Recent cases' focus on courts' equitable powers contrasts with how individual plaintiffs, class action plaintiffs, and state plaintiffs access courts. A federal parens patriae doctrine would therefore fix federal plaintiffs' place in the constellation of possible plaintiffs and potentially improve the remedies victims receive through agency action. A natural next step in developing the framework of a federal parens patriae doctrine is to examine how courts scrutinize class action litigation to see which of those tests courts should apply to federal agencies. The nuances of what an agency can do is also likely to shift after the Supreme Court publishes its *AMG Capital Management* opinion, so the proposed federal parens patriae model should shift accordingly. Even with these sizable open ends, federal parens patriae offers a new yardstick for measuring how agencies work for victims and how courts can improve agency litigation's results.