

RETURNING TO THE STATUTORY TEXT: WHY THE LANGUAGE OF SECTION 13(B) REQUIRES COURTS TO NARROWLY CONSTRUE THE FTC'S ABILITY TO OBTAIN INJUNCTIVE RELIEF

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ABSTRACT

The Federal Trade Commission (FTC) enforces over 70 laws in the areas of antitrust and consumer protection, and one valuable tool to support their enforcement is Section 13(b) of the Federal Trade Commission Act ("Section 13(b)"). Section 13(b), among other features, grants the FTC authority to seek an injunction in district court against any defendant that is "about to violate" one or more of those laws. For the past three decades, courts have adopted a permissive judicial interpretation of that language, authorizing injunctions against defendants when the allegedly impending violations were only "likely to recur" based on past misconduct. This is known as the "likelihood of recurrence" standard.

Recently, the Third Circuit's holding in *FTC v. Shire Viropharma, Inc.* potentially upends the longstanding dominance of that permissive judicial interpretation. *Shire* found that the "likelihood of recurrence" standard was incompatible with the statutory text of Section 13(b). In particular, the court found that the phrase "about to violate" sets a benchmark for seeking injunctive relief that is higher than the "likelihood of recurrence" standard. In other words, for the FTC to seek injunctive relief, the alleged violation needs to truly be about to occur rather than merely likely to occur.

An examination of the plain meaning and congressional intent, which can be discerned from the legislative history, of Section 13(b) shows that the statute does indeed set a standard for awarding injunctive relief that is higher than the "likelihood of recurrence" standard. Namely, Section 13(b) requires that future violations be

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imminent or impending—not merely likely—for injunctive relief to be granted. Since the “likelihood of recurrence” test does not comport with the plain meaning or congressional intent of the statute, courts should no longer use it when determining if a defendant is “about to violate” the law. Instead, courts should undertake an analysis that is true to the text, and carefully and properly consider whether future violations are genuinely about to occur.

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I. INTRODUCTION

The Federal Trade Commission (FTC)—founded over a hundred years ago during the Progressive Era—was once largely toothless.¹ That began to change in the 1970s when the bipartisan agency was given greater authority under the Federal Trade Commission Act (“FTC Act”) to enforce its findings by obtaining injunctive relief for consumers in

1. See discussion *infra* Section II.A.1.

federal court.² That authority—codified in Section 13(b) of the FTC Act (“Section 13(b)”)—states that

Whenever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC] . . . the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.³

The statutory language “is violating, or is about to violate” has recently come under increased scrutiny.⁴ For decades, the broad judicial construction of the phrase “about to violate” has greatly expanded the scope of Section 13(b) and the ability of the FTC to employ the courts to enforce consumer protections.⁵ Recently, however, the Third Circuit rejected the Ninth Circuit’s expansive construction of the statute, which had found that “likelihood of recurrence” satisfies the statute’s “about to violate” standard.⁶

Like the Third Circuit, this Note argues that the Ninth Circuit’s interpretation is unsupported by the text and congressional intent of Section 13(b). Ultimately, the Supreme Court will have to resolve this split. If it follows the Third Circuit’s narrow construction of the statute, the circumstances under which the FTC can seek injunctive relief from district courts will be significantly reduced. Namely, the FTC may be unable to seek injunctive relief against defendants whose violations have ceased but are still likely to recur.

Part II of this Note examines the history of Section 13(b) and how the “likelihood of recurrence” test became the judicial default. Part III examines recent caselaw that challenges the predominance of the “likelihood of recurrence” test. Part IV argues that, in determining whether to grant injunctive relief against a defendant, the “likelihood of recurrence” test is unfaithful to the statutory text and congressional intent of Section 13(b).

2. See discussion *infra* Section II.A.2.

3. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b).

4. See discussion *infra* Part III.

5. Specifically, its ability to pursue past violations. See discussion *infra* Section II.B.2.

6. Compare *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 155-56 (3d Cir. 2019), with *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

II. SECTION 13(B) AND THE “LIKELIHOOD OF RECURRENCE” STANDARD

In response to concerns about the adequacy of the FTC’s enforcement mechanisms, the 93rd Congress amended the FTC Act to add Section 13(b).⁷ Section 13(b) grants the FTC the ability to seek temporary restraining orders, preliminary injunctions, and permanent injunctions in district court, so long as the defendant “is violating” or “is about to violate” any of the laws enforced by the agency.⁸ When the FTC began using Section 13(b), many courts grappled with how to determine whether the FTC had met its initial burden of showing that the defendant is “about to violate” the law.⁹ Specifically, in cases where a defendant had previously violated the law and the FTC alleged that it was about to violate the law again, courts increasingly began to use the “likelihood of recurrence” test.¹⁰ Under this standard, so long as the FTC demonstrates that a past violation is “likely to recur,” the court will find that the FTC has met its burden of showing that the defendant is “about to violate” the law.¹¹

Section II.A introduces the historical background and legislative history that gave rise to Section 13(b). Section II.B then examines the caselaw that led to the near-universal use of the “likelihood of recurrence” test in cases where the FTC is alleging that a defendant is “about to violate” the law.

A. THE CREATION OF SECTION 13(B)

As the administrative state grew dramatically in the 1970s, weak enforcement mechanisms constrained the FTC and commentators criticized the agency for its correspondingly lackluster efforts to protect

7. See discussion *infra* Section II.A.

8. Federal Trade Commission Act § 13(b). Note that the language of Section 13(b) encompasses only ongoing or future violations (“is violating or is about to violate”), not past violations. See also *AMG Cap. Mgmt. v. FTC*, No. 19-508, 2021 U.S. LEXIS 2108, at *1348 (Apr. 22, 2021). Nonetheless, the FTC often pursues past violations under Section 13(b) anyway, with great success, by alleging that the past violator “is about to violate” the law again and must be enjoined. See discussion *infra* Section II.B.2.

9. See discussion *infra* Section II.B.

10. See *id.*

11. See *id.*

consumers.¹² For decades, the FTC had been limited to enforcing its laws through a process known as administrative adjudication.¹³ Unfortunately, this wholly-internal process was slow, burdensome, and did little to remedy illegal conduct.¹⁴

1. The Historical Basis for Section 13(b)

When the FTC was founded in the early 1900s, lawmakers were mainly concerned with the rise of monopolies, cartels, and other anti-competitive actors.¹⁵ In response, Congress passed the FTC Act, which prohibited anti-competitive conduct and tasked the FTC with policing such violations.¹⁶ A little over twenty years later, an increase in consumer frauds spurred further expansion of the FTC's jurisdiction to cover frauds and deception against consumers.¹⁷ To that end, Congress amended the FTC Act in 1938 to ban "unfair or deceptive acts or practices," giving the FTC sole jurisdiction to police such violations.¹⁸

Despite such wide mandates to police anti-competitive conduct and consumer fraud, Congress only granted the FTC limited remedies to

12. See EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 66-73 (1969) (describing the cease-and-desist remedy as inadequate and criticizing FTC enforcement as inconsistent and haphazard).

13. Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)).

14. See Trans-Alaska Pipeline Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973) (noting that the current system of administrative adjudication hampers the FTC's investigative and law enforcement functions); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 62-64 (1969), reprinted in 1 J. REPRINTS FOR ANTITRUST L. & ECON. 885, 952-54 (1969) (addressing inadequacy of then-existing remedies for FTC Act violations).

15. See Woodrow Wilson, Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (Jan. 20, 1914), H.R. Doc. No. 625, 63d Cong., 2d Sess. 3 (1914) (arguing that legislative action needed to be taken against detrimental monopolies).

16. Ch. 311, 38 Stat. at 719.

17. See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1157 (1992) (noting the need "to address a national crisis in the advertising and sale of drugs and devices that could endanger health").

18. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111, 111 (1938) (amending the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914)).

carry out these mandates.¹⁹ Under Section 5 of the FTC Act, whenever the FTC uncovered anti-competitive conduct or consumer fraud, the foremost remedy was to issue “an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.”²⁰ The only way to issue this cease and desist order was for the FTC to initiate litigation through an internal administrative adjudication process.²¹ If, at the end of that adjudication, an administrative law judge found that there were violations of the law, he could then issue a cease and desist order.²²

The problem with this approach was that the internal adjudicative process was slow and the cease and desist remedy was not a particularly effective deterrent against violators.²³ First, an administrative adjudication could take years.²⁴ Second, while that process played out, there was nothing to stop the defendant from continuing to engage in the anti-competitive or fraudulent conduct.²⁵ For instance, a defendant could continue its process of acquiring a company even if the FTC was suing to block the acquisition on antitrust grounds.²⁶ Likewise, a defendant accused of scamming consumers via false advertisements could continue to run them up until the moment a final decision was rendered.²⁷ Third, if a party was ultimately found liable, a cease and desist order was not a particularly formidable remedy, because the FTC could not seek a

19. *Id.* at 114-15. The only limited exception, at the time, involved false advertisements for “food, drugs, devices, or cosmetics.” Only in those such cases could the FTC seek a different remedy: litigation in federal district court.

20. *Id.* at 112.

21. See, e.g., A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, FTC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/LRB8-G549>] (last modified May 2021).

22. *Id.*

23. See EDWARD F. COX ET AL., *supra* note 12, at 72-73.

24. See *id.* (estimating four years as the average duration of an investigation and noting that some extend more than twenty years).

25. See *id.* at 73 (noting that alleged violators can continue their illegal conduct up until the moment a final cease and desist order is granted).

26. See Letter from Lewis A. Engman, Chairman, Fed. Trade Comm’n, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 CONG. REC. 36,610 (1973) (explaining how the inability of the FTC to obtain preliminary injunctive relief allows illegal conduct to continue unabated).

27. See *id.*

contempt order if a defendant violated its cease and desist order.²⁸ For a party engaged in illegal conduct, there was little incentive to not violate the law because they could continue to act unlawfully even once sued and, if ultimately found guilty, were simply prohibited from engaging in that conduct without additional repercussions.²⁹

Overall, the FTC's ability to enforce its laws was constrained by a cumbersome administrative adjudication process and weak remedies.³⁰ So, in 1973, the agency turned to Congress for help.³¹

2. *The Legislative History of Section 13(b)*

In the early 1970s, the United States faced a dire energy crisis.³² U.S. oil production was in a steep decline and fraying international relations spurred many members of the Organization of the Petroleum Exporting Countries (OPEC) to curtail the amount of oil exported to the United States.³³ In response, Congress hurriedly worked to pass legislation authorizing the construction of a crucial new domestic oil pipeline in Alaska.³⁴ This legislation, called the Trans-Alaska Pipeline Authorization Act, was introduced into Congress on March 1, 1973.³⁵ As the bill worked its way through Congress, Senator Henry Jackson of Washington, at the behest of the FTC, offered up an amendment that would increase the agency's enforcement powers.³⁶ This amendment would ultimately add Section 13(b) to the FTC Act.³⁷ Specifically, the

28. See EDWARD F. COX ET AL., *supra* note 12, at 73 (noting the general lack of concern exhibited by respondents).

29. *Id.*

30. See *supra* notes 19-29 and accompanying text.

31. See *supra* notes 26-27.

32. See Richard Nixon, 37th President, United States of America, Address to the Nation About Policies to Deal with the Energy Shortages (Nov. 7, 1973), <https://www.presidency.ucsb.edu/node/255503> [<https://perma.cc/36KQ-JHRT>].

33. *Id.*

34. See MESSAGE FROM PRESIDENT NIXON, H.R. DOC. NO. 187, 93d Cong., 2d Sess. 1-4 (1973), *reprinted in* 119 CONG. REC. 36,620-22 (1973) (detailing Congress' work to achieve energy self-sufficiency).

35. See Trans-Alaska Pipeline Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973).

36. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1988). See 119 CONG. REC. 22,980 (1973) (statement of Sen. Jackson) (explaining how Section 53(b) will enable the FTC to seek injunctive relief in federal district courts).

37. See § 408, 87 Stat. at 591 (adding Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1988)).

amendment would empower the FTC to sue, in district court, for a temporary injunction whenever it had reason to believe that a defendant was violating or was “about to violate” any of the FTC’s laws.³⁸ Additionally, the amendment contained a second provision that would even allow the FTC to seek, in district court, a permanent injunction in “proper cases . . . after proper proof.”³⁹

The congressional intent of Section 13(b) is best explained by examining the legislative history.⁴⁰ A report by the Senate Commerce Committee (“Commerce Committee Report”) focused on how, even after the FTC initiates an internal adjudication, the perpetrator can nonetheless continue to violate the law until a final order is issued.⁴¹ That oversight incentivizes defendants to delay the administrative proceedings as long as possible, since they could freely violate the law up until the administrative law judge issues a cease and desist order.⁴² In light of this, the stated purpose of Section 13(b) was to remove this constraint and make certain that there would be “prompt enforcement” of the FTC’s laws.⁴³

This sentiment was echoed during the congressional floor debates.⁴⁴ Representative Neal Smith of Iowa recognized the acute need to halt potentially illegal conduct “while the litigation winds its way through final decision.”⁴⁵ Representative John Melcher of Montana saw the legislation as a key tool in removing “procedural roadblocks” and allowing the FTC to act “in a quick and effective manner” to better combat illegal conduct.⁴⁶ Other representatives also noted that, since Section 13(b) would be preliminarily used to enjoin defendants from violating the law, there would no longer be an incentive for defendants to prolong administrative proceedings.⁴⁷ In sum, members of Congress

38. *Id.* at 592.

39. *Id.*

40. *See infra* notes 41-52 and accompanying text.

41. S. REP. NO. 93-151 (1973) (accompanying S. 356).

42. *Id.*

43. § 408, 87 Stat. at 591 (1973).

44. *See infra* notes 45-47 and accompanying text.

45. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith).

46. 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher).

47. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith) (“The possibility of injunction should give serious second thoughts to those who plan a quick ‘killing’ and withdrawal before retribution occurs.”). *See also id.* at 36,610 (remarks of Rep.

supported Section 13(b) as a measure that would empower the courts to both provide greater consumer protections and ease some of the procedural constraints on the FTC's enforcement authority.⁴⁸

There was also much discussion surrounding the portion of Section 13(b) that would authorize the FTC to seek permanent injunctive relief.⁴⁹ While many in Congress thought permitting the FTC to seek preliminary injunctions was a rational, measured response to a legitimate procedural loophole, allowing the FTC to seek permanent injunctions—thereby completely bypassing the internal administrative process altogether—represented a remarkable increase in the FTC's enforcement abilities.⁵⁰ Yet, despite the potential for significantly-increased injunctive power, the legislative history suggests a more measured purpose.⁵¹ First, as noted in the Commerce Committee Report, the permanent injunction provision was intended to provide for the quick disposition of cases involving run-of-the-mill fraud, such as blatantly deceptive advertisements.⁵² The Commerce Committee Report explained how, in such “proper cases” after The FTC proffered “proper proof,” the district court would be able to dispose of the case by issuing a permanent injunction—a remedy that is essentially the same as the cease and desist order that caps the arduous administrative process but in a much shorter time frame.⁵³ Second, there were concerns from the judiciary that limiting its role to issuing a preliminary injunction with no control over the FTC's subsequent internal administrative adjudication would reduce its oversight on the case.⁵⁴ Allowing judges to hear the entire case and issue a permanent injunction would placate these concerns by giving district courts total control over the disposition of the matter.⁵⁵

Johnson) (explaining how enjoined parties would no longer find it advantageous to delay FTC proceedings).

48. § 408, 87 Stat. at 591 (“[T]he investigative and law enforcement responsibilities of the [FTC] have been restricted and hampered because of inadequate legal authority . . . to seek preliminary injunctive relief . . .”).

49. See *infra* notes 50-54.

50. Compare Federal Trade Commission Act, 15 U.S.C. § 53(b), with Federal Trade Commission Act, 15 U.S.C. § 45(b).

51. S. REP. NO. 93-151 (1973) (accompanying S. 356) (explaining the history of bill).

52. *Id.* at 30-31.

53. *Id.* at 44, 52.

54. *Id.* at 30-31.

55. *Id.*

In sum, Section 13(b) revolutionized the FTC's ability to enforce its laws.⁵⁶ At a minimum, the FTC could now ask a court to temporarily enjoin illegal conduct while the agency's administrative proceedings played out.⁵⁷ Even better, for garden-variety violations, the FTC could also request a court to permanently enjoin the illegal conduct, a remedy that was just as good, if not better, than what the FTC previously could only get at the end of an arduous administrative adjudication.⁵⁸

B. SECTION 13(B) IN ACTION: THE RISE OF THE "LIKELIHOOD OF RECURRENCE" STANDARD

This Section will examine the caselaw that developed as the FTC began using its powers under Section 13(b) to litigate directly in federal district court. Section II.B.1 explains the FTC's initial difficulty in bringing Section 13(b) cases. Section II.B.2 examines how the "likelihood of recurrence" test became the paramount standard used by courts when determining if the FTC has shown that a defendant is "about to violate" the law.

1. *A Slow Start and a Constitutional Challenge*

After Section 13(b) was passed, the FTC did not exactly rush to district court to seek injunctions through its newly-delegated authority.⁵⁹ In fact, five years after Section 13(b) was passed, the General Accounting Office criticized the FTC for not making better use of its new Section 13(b) powers.⁶⁰ Then, in the 1980s, the FTC began to use its Section 13(b) authority more frequently, especially in consumer fraud cases.⁶¹ These initial actions invited a broad constitutional challenge to

56. See *infra* notes 57-58 and accompanying text.

57. Federal Trade Commission Act, 15 U.S.C. § 53(b).

58. *Id.* See S. REP. NO. 93-151 (1973) (accompanying S. 356) (explaining history of bill).

59. Letter from Gregory J. Ahart, Director, U.S. Gen. Acct. Office, to Michael Pertschuk, Chairman, Fed. Trade Comm'n, in 889 ANTITRUST & TRADE REG. REP. (BNA) A-24, F-1 (Nov. 16, 1978).

60. *Id.* See also COMPTROLLER GENERAL, VICTIMS OF UNFAIR BUSINESS PRACTICES GET LIMITED HELP FROM THE FEDERAL TRADE COMMISSION, H.R. DOC. NO. 78-140, at 23-24 (1978).

61. See, e.g., *FTC v. Pharmatech Research, Inc.*, 576 F. Supp. 294 (D.D.C. 1983). See also *Report of the American Bar Association Section of Antitrust Law Special*

Section 13(b).⁶² *FTC v. American National Cellular* challenged the constitutionality of Section 13(b), claiming that giving the FTC the ability to seek injunctive relief essentially granted the agency law enforcement authority in violation of the separation of powers.⁶³ The Ninth Circuit disagreed and upheld the constitutionality of the statute.⁶⁴

2. The “Likelihood of Recurrence” Test Emerges

After fending off a challenge to the constitutionality of Section 13(b), the FTC began to use its Section 13(b) authority much more frequently, especially for consumer protection cases.⁶⁵ In fact, by the late 1990s, the FTC was litigating the majority of its consumer fraud cases in district courts instead of through administrative adjudication.⁶⁶

As the FTC increasingly asserted its Section 13(b) authority, conflict arose over the “is violating, or is about to violate” language in the statute.⁶⁷ In particular, there was confusion regarding how to determine whether a defendant is “about to violate” the law.⁶⁸ The statute neither defined the word “about” nor explained how to distinguish a party that merely has the potential to violate the law from a party that is on the verge of violating the law.⁶⁹ As a result, courts faced a dilemma over how to define common words⁷⁰ and phrases when they appear in a statute.⁷¹ This phenomenon is not unusual; words and phrases that are easily understood in everyday parlance can quickly

Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 78-85 (1989) (Kirkpatrick II) [hereinafter *The Kirkpatrick Report*].

62. *FTC v. Am. Nat’l Cellular*, 810 F.2d 1511, 1513 (9th Cir. 1987).

63. *Id.*

64. *Id.* at 1514.

65. *See The Kirkpatrick Report*, *supra* note 61, at 78-85.

66. *See* Stephen Calkins, *Articles and Comments: An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 432 (1997) (“[M]ost FTC consumer protection enforcement is now conducted directly in court under [Section 13(b)], rather than by means of administrative adjudication.”).

67. *See, e.g., FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

68. *Id.*

69. *See* Federal Trade Commission Act, 15 U.S.C. § 53(b).

70. *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560 (2012) (analyzing how to define the word “interpreter”).

71. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (analyzing how to define the phrase “law enforcement officer”).

devolve into complicated legal quagmires as each party pushes interpretations beneficial to their cause.⁷²

At first, courts simply dodged parties' attempts to convince them to establish a standard for determining whether a defendant is "about to violate" the law.⁷³ One court even came to the tortured conclusion that a defendant's past violations (which all parties agreed had stopped) were actually still ongoing, all so the court would not have to answer the potentially precedent-setting question of how to evaluate whether a defendant is "about to violate" the law.⁷⁴

Eventually, however, courts began to coalesce around a standard for determining whether a defendant is "about to violate" the law.⁷⁵ Decades before Congress added Section 13(b) to the FTC Act, the Supreme Court ruled in *United States v. W.T. Grant Co.* that injunctive relief can be granted against any defendant who previously violated the law so long as there is a "cognizable danger of recurrent violation."⁷⁶ Eventually, the Ninth Circuit became the first court to apply that standard to a Section 13(b) case, ruling that its decision to grant injunctive relief hinged on whether the defendant's violations were "likely to recur."⁷⁷ The Ninth Circuit did not seem to think that the "likelihood of recurrence" standard was in tension with the plain text of Section 13(b), which requires that violations be about to occur, not merely likely to occur.⁷⁸

Despite this potential friction, numerous courts across the country, when faced with a defendant who had already violated the law and may

72. See also *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); Kevin Aguirre, *Willfulness in a Post-Robare World: Evidence of Subjective Intent, Not Negligence Conduct, is Needed to Show Willful Violations of Securities Laws*, 25 FORDHAM J. CORP. & FIN. L. 501 (2020) (discussing judicial interpretation of the term "willful," as found in various provisions of the securities laws). See generally *Taniguchi*, 566 U.S. 560; *Ali*, 552 U.S. 214.

73. See, e.g., *FTC v. Va. Homes Mfg. Corp.*, 509 F. Supp. 51, 56-57 (D. Md. 1981), *aff'd*, 661 F.2d 920 (4th Cir. 1981). This was the first case where the FTC sought a permanent injunction under its Section 13(b) authority.

74. *Id.* at 56-58 (ruling that, although the defendant had stopped distributing the unlawful warranty services, the fact that those warranties remained in public circulation was sufficient to infer that violations were ongoing).

75. See, e.g., *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

76. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This is known as the "likelihood of recurrence" test.

77. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087-88 (9th Cir. 1985).

78. See *id.*

be “about to violate” the law again, have since adopted the “likelihood of recurrence” test to determine whether to grant an injunction.⁷⁹ Under this test, violations are likely to recur if there is a “cognizable danger of future violations.”⁸⁰ These “cognizable danger” factors can include:

The degree of scienter, whether the conduct was an isolated instance or recurrent, whether the defendants’ current occupations position them to commit future violations, the degree of harm consumers suffered from defendants’ unlawful conduct, and defendants’ recognition of their own culpability and the sincerity of their assurances (if any) against future violations.⁸¹

Notably, some of those factors consider past conduct while others consider potential indicators of future violations.⁸²

Ostensibly, both types of factors must be present, since Section 13(b) does not allow injunctive relief based on past violations alone.⁸³ Nonetheless, courts have allowed the FTC to seek injunctive relief

79. *E.g.*, *FTC v. USA Fin.*, 415 F. App’x 970, 975 (11th Cir. 2011); *FTC v. Accusearch*, 570 F.3d 1187, 1201-02 (10th Cir. 2009); *FTC v. Elegant Sols.*, No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); *FTC v. BF Labs*, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); *FTC v. Home Assure*, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); *FTC v. Nat’l Urological Grp.*, No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); *FTC v. Crescent Publ’g Grp.*, 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a preliminary injunction because “there is a material likelihood of future violations”); *FTC v. Equinox Int’l Corp.*, CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

80. *FTC v. Citigroup*, 239 F. Supp. 2d 1302, 1306 (N.D. Ga. 2001) (quoting *FTC v. Magui Publishers*, No. 89–3818, 1991 WL 90895, at *15 (C.D. Cal. Mar. 28, 1991)).

81. *Magui*, 1991 WL 90895, at *15.

82. *See id.* Compare forward-looking factors such as “whether the defendant’s current occupations position them to commit future violations” with backward-looking factors such as “the degree of harm consumers suffered from defendants’ unlawful conduct.” *Id.*

83. Federal Trade Commission Act, 15 U.S.C. § 53(b) (establishing that the FTC can seek injunctive relief only when a defendant “is violating, or is about to violate” the law).

solely based on past violations.⁸⁴ One court ruled that “the protracted and systematic nature of [the defendant’s] past conduct and the degree of harm consumers suffered from it would certainly permit an inference of future misconduct and likelihood of recurrent bad acts.”⁸⁵ Far from even pretending to consider whether the defendant was “about to violate” the law, the court ruled in favor of the FTC based solely on the defendant’s “past conduct” and “degree of harm consumers suffered.”⁸⁶ At least one other district court has taken a similar approach.⁸⁷

In another case, a court stretched its application of the “likelihood of recurrence” test to find that “an extensive history of violations does beget an inference that future violations are likely to occur.”⁸⁸ Under this reasoning, for the FTC to satisfactorily show that a defendant is “about to violate” the law, all the agency needs to do is show an “[e]xtensive history of violations.”⁸⁹ All told, these cases demonstrate how, despite the text of Section 13(b), merely alleging past violations can be sufficient for a court to infer that additional violations are about to occur.⁹⁰

The “likelihood of recurrence” standard is so entrenched that even courts noting its potential incompatibility with the plain text of Section 13(b) use it anyway.⁹¹ For instance, one court, upon analyzing whether a defendant was “about to violate” the law, noted that Section 13(b) required it to “independently assess whether violations are *imminent*.”⁹² Yet, despite recognizing this imminency requirement, the court went ahead and analyzed the claims under the “likelihood of recurrence”

84. See, e.g., *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

85. *Id.* at *12.

86. *Id.*

87. See *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013) (issuing a preliminary injunction after finding that the “alleged violations . . . are likely to recur in the future given the *past* alleged violations of the FTC Act” (emphasis added)).

88. *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12-13 (N.D. Tex. Mar. 15, 1990).

89. *Id.*

90. *Id.*; *Shopper Sys.*, 2013 U.S. Dist. LEXIS 204102, at *9; *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

91. See *infra* notes 92-94 and accompanying text.

92. *FTC v. Merch. Servs. Direct*, No. 13-CV-0279, 2013 U.S. Dist. LEXIS 114960, at *4 (E.D. Wash. Aug. 13, 2013) (emphasis added).

test.⁹³ The court did not explain why it recognized the necessity of one standard (that violations must be “imminent”) but disregarded it entirely and employed another (that violations need only be “likely to recur”).⁹⁴

In sum, the “likelihood of recurrence” test is now the well-established principle used by courts when determining if a defendant accused of past violations is “about to violate” again.⁹⁵ Although the “about to violate” language in Section 13(b) suggests that injunctive relief should only be awarded if violations are “about” to occur, rather than merely “likely” to occur, courts continue to use the “likelihood of recurrence” standard.⁹⁶ Additionally, some courts have awarded

93. *Id.* at *9–10.

94. *Id.* at *4, *9–10.

95. *See* FTC v. USA Fin., 415 F. App’x 970, 975 (11th Cir. 2011); FTC v. Accusearch, 570 F.3d 1187, 1201-02 (10th Cir. 2009); FTC v. Elegant Sols., No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); FTC v. BF Labs, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); FTC v. Home Assure, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); FTC v. Nat’l Urological Grp., No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); FTC v. Crescent Publ’g Grp., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a preliminary injunction because “there is a material likelihood of future violations”); FTC v. Equinox Int’l Corp., CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

96. *See* FTC v. Evans Prods. Co., 775 F.2d 1084, 1087-88 (9th Cir. 1985); FTC v. USA Fin., 415 F. App’x 970, 975 (11th Cir. 2011); FTC v. Accusearch, 570 F.3d 1187, 1201-02 (10th Cir. 2009); FTC v. Elegant Sols., No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); FTC v. BF Labs, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); FTC v. Home Assure, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); FTC v. Nat’l Urological Grp., No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); FTC v. Crescent Publ’g Grp., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a

injunctive relief based solely on past violations – a result that may stray even further afield from the text of Section 13(b).⁹⁷

III. THE CRUSADE AGAINST THE “LIKELIHOOD OF RECURRENCE” STANDARD

For over three decades, the “likelihood of recurrence” test enjoyed widespread acceptance by courts hearing Section 13(b) cases.⁹⁸ Recently, however, there has been some significant pushback, especially in the Third Circuit.⁹⁹ This Part examines recent caselaw that imperils the supremacy of the “likelihood of recurrence” standard.

A. *SHIRE VIROPHARMA* AND A NEW STATUTORY INTERPRETATION

Recently, the ordinary power of courts to issue permanent injunctions has been threatened by a narrow judicial construction of the “about to violate” language of Section 13(b).¹⁰⁰ Shire ViroPharma, Inc. (“Shire”)—a pharmaceutical company—produced a lucrative drug for the treatment of a life-threatening intestinal infection.¹⁰¹ When a competitor wanted to create a cheaper generic equivalent, Shire barraged the FDA with dubious filings designed to delay the equivalent’s approval.¹⁰² Five years after Shire lost that battle with the FDA, the FTC sued, alleging that Shire had engaged in the anticompetitive practice of “sham petitioning.”¹⁰³ It invoked Section 13(b) to seek a permanent injunction, claiming that although the sham petitioning process for that

preliminary injunction because “there is a material likelihood of future violations”); *FTC v. Equinox Int’l Corp.*, CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

97. See *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013); *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12–13 (N.D. Tex. Mar. 15, 1990); *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

98. See discussion *supra* Section II.B.2.

99. See *FTC v. Shire ViroPharma*, 917 F.3d 147, 156–159 (3d Cir. 2019).

100. *Id.*

101. Complaint for Injunctive and Other Equitable Relief at 1, *FTC v. Shire ViroPharma*, 917 F.3d 147 (3d Cir. 2019).

102. *Id.* at 16-21.

103. *Id.* “Sham petitioning” is the practice of petitioning in bad faith before an executive agency to ensure that the approval of a competitor’s product is delayed or denied.

drug had ceased, there was a danger that Shire could engage in similar sham petitioning with another drug in the future.¹⁰⁴ The FTC argued they had satisfied the “about to violate” statutory language of Section 13(b) by showing a past violation and a reasonable likelihood of recurrent future conduct.¹⁰⁵

Shire prevailed in the district court.¹⁰⁶ On appeal to the Third Circuit, the court affirmed.¹⁰⁷ In the opinion, Chief Judge Smith cited Section 13(b) as constraining the courts’ customary power to issue permanent injunctions, specifically noting that the “about to violate” language of the statute plainly establishes a burden that is higher than the “likelihood of recurrence” standard that the FTC put forth.¹⁰⁸ The panel’s tone—criticizing the FTC for “trot[ting] out” the argument that remedial legislation should be liberally construed—suggests a hostility to the FTC’s mission and little concern over Shire’s allegedly unlawful campaign to protect its monopoly that burdened insurers and patients with high costs for a vital medicine.¹⁰⁹ As for establishing the “exact confines” of the “about to violate” language, the Third Circuit left that task “for another day.”¹¹⁰

B. THE VARIED RESPONSES TO *SHIRE*

The judicial response to *Shire* has not been uniform.¹¹¹ One court found *Shire* unpersuasive and ruled that the “about to violate” pleading standard can be met, even if the illegal conduct has stopped, so long as the FTC presents evidence that violations “could” resume.¹¹² Compared to *Shire*, this opinion presents an even looser interpretation of Section

104. *Id.* at 44-45.

105. Plaintiff Federal Trade Commission’s Opposition to Shire ViroPharma Inc.’s Motion to Dismiss at 8-10, *FTC v. Shire ViroPharma*, No. 17-cv-00131, 2018 U.S. Dist. LEXIS 45727 (D. Del. Mar. 20, 2018).

106. *FTC v. Shire ViroPharma*, No. 17-cv-00131, 2018 U.S. Dist. LEXIS 45727, at *19 (D. Del. Mar. 20, 2018).

107. *FTC v. Shire ViroPharma*, 917 F.3d 147, 161 (3d Cir. 2019).

108. *Id.* at 156, 159.

109. *Id.* at 158.

110. *Id.* at 160.

111. See *infra* notes 112-22 and accompanying text.

112. *FTC ex rel. Yost v. Educare Ctr. Servs.*, 433 F. Supp. 3d 1008, 1012–14 (W.D. Tex. 2020). The court was particularly concerned that the defendant still maintained the “intact infrastructure” used in the previous violations. *Id.*

13(b), one where “could violate” is now synonymous with “about to violate.”¹¹³

Additionally, two district courts in the Ninth Circuit declined to follow *Shire*.¹¹⁴ This is hardly surprising considering that the Ninth Circuit was the first to adopt the “likelihood of recurrence” test, which remains the binding precedent in that circuit.¹¹⁵ Neither district court ruling was appealed.¹¹⁶

Shire did convince a district court in the Eleventh Circuit to take a fresh look at the “ordinary meaning” of Section 13(b)’s text; it concluded that the “likelihood of recurrence” standard did not accurately reflect the language of the statute.¹¹⁷ The court found that “about to violate” “evokes imminence, as if the offending action could be resumed with little delay.”¹¹⁸ By contrast, “[l]ikelihood of recurrence is less immediate than ‘about to.’ It is similar to a preponderance, ‘more likely than not.’”¹¹⁹ Despite abrogating the “likelihood of recurrence” standard, the court did not assert any new framework for determining whether a defendant is “about to violate” the law.¹²⁰ It hinted that the FTC must show that there is some “imminence” as to the violations but did not establish any factors that courts could use to analyze whether a defendant is “about to violate” the law.¹²¹ Regardless, this ruling, coupled with *Shire*, suggests a potential for widespread change in how courts interpret the “about to violate” requirement of Section 13(b) cases.¹²²

113. Compare *FTC v. Shire ViroPharma*, 917 F.3d 147, 155-57 (3d Cir. 2019), with *Educare Ctr. Servs.*, 433 F. Supp. 3d at 1013-14.

114. See *FTC v. Elec. Payment Sols. of Am.*, No. 17-02535, 2019 U.S. Dist. LEXIS 157978, at *25-26 (D. Ariz. Aug. 28, 2019); *FTC v. Adept Mgmt.*, No. 16-cv-720, 2019 U.S. Dist. LEXIS 96061, at *1 (D. Or. June 7, 2019).

115. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

116. See *FTC v. Elec. Payment Sols. of Am.*, No. 17-02535, 2019 U.S. Dist. LEXIS 157978, at *25-26 (D. Ariz. Aug. 28, 2019); *FTC v. Adept Mgmt.*, No. 16-cv-720, 2019 U.S. Dist. LEXIS 96061, at *1 (D. Or. June 7, 2019).

117. *FTC v. Hornbeam Special Situations*, No. 17-cv-3094, 2018 U.S. Dist. LEXIS 204340, at *12-13 (N.D. Ga. Oct. 15, 2018). This ruling came before *Shire* was affirmed by the Third Circuit.

118. *Id.* at *13.

119. *Id.* at *13-14.

120. *Id.* at *16.

121. *Id.* at *13-14.

122. See discussion *supra* Section III.B.

IV. ANALYSIS

Section III introduced the current debate over whether the “likelihood of recurrence” standard is the appropriate test to determine, under Section 13(b), whether a defendant is about to violate the law. This Section will argue that the “likelihood of recurrence” test should not be used because it is unfaithful to the plain meaning and congressional intent of Section 13(b).

A. THE “LIKELIHOOD OF RECURRENCE” TEST IS INCOMPATIBLE WITH THE PLAIN MEANING OF SECTION 13(B)’S TEXT

The plain meaning of the “about to violate” language of Section 13(b) demands a standard that is higher than the “likelihood of recurrence” standard.¹²³ Generally, when interpreting a statute, the first step is to consider the plain meaning of the statutory text.¹²⁴ If the text of the statute has a plain, unambiguous meaning, that interpretation will control absent extenuating factors.¹²⁵

When courts evaluate the plain meaning of statutory text, some factors that are often considered include the common usage or dictionary definition of the word or phrase.¹²⁶ In fact, courts often turn to dictionary definitions when a word or phrase is undefined in a statute, as is the case here.¹²⁷ According to Merriam-Webster, a leading American English-

123. See *infra* notes 124-32 and accompanying text.

124. See generally *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560 (2012); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008).

125. The bar for a court to disregard the plain, unambiguous meaning of a statute is incredibly high. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (ruling that Tennessee Valley Authority (TVA) must comply with the plain meaning of particular language in the Endangered Species Act, even though doing so would force the TVA to abandon a \$100 million dam construction project that was already well underway); *United States v. Locke*, 471 U.S. 84, 93-94 (1985) (upholding a statutorily-set filing deadline of “prior to December 31st” because it was clear and unambiguous, even though the agency all but admitted that it was a scrivener’s error and did not intend to foreclose filings made on December 31st).

126. See generally *Bostock*, 140 S. Ct. 1731; *Taniguchi*, 566 U.S. 560; *Ali*, 552 U.S. 214.

127. E.g., *Taniguchi*, 566 U.S. at 566-70 (using dictionary definitions to differentiate between an “interpreter” and a “translator”); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (using the dictionary definition of “marketing” to interpret a statute).

language dictionary, the adverb “about” is defined as “almost” or “on the verge of.”¹²⁸ This definition is clear, well-established, commonly recognized, and non-technical. As such, the ordinary meaning of “about to” is clear and unambiguous.¹²⁹

Returning to Merriam-Webster, the word “likely” is best defined as “probably.”¹³⁰ This clearly does not evoke the same level of imminence or immediacy that is required under the plain meaning of Section 13(b)’s statutory text.¹³¹ Put simply, the phrases “likely to” and “about to” are not interchangeable.¹³²

As such, the “likelihood of recurrence” test inadvertently sets a standard that is lower than what is required by the plain meaning of the “about to violate” language of Section 13(b). Since the “likelihood of recurrence” test does not comport with the plain meaning of the text, courts should no longer use it when determining if a defendant is “about to violate” the law. Instead, courts should undertake an analysis that stays true to the plain meaning of the statutory text. Under such an analysis, the phrase “about to violate” should be interpreted as it is commonly understood. The examination should primarily consider whether the defendant is on the verge of violating the law, and other factors that help inform whether the violations are imminent, rather than merely likely.

B. THE “LIKELIHOOD OF RECURRENCE” TEST IS UNFAITHFUL TO THE CONGRESSIONAL INTENT OF SECTION 13(B)

Additionally, the congressional intent discerned from the statute’s legislative history suggests that the “likelihood of recurrence” test is not the appropriate standard for Section 13(b) cases.¹³³ Generally, if the

128. *About*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/about> [<https://perma.cc/8S5C-L4B8>] (last visited Apr. 5, 2021).

129. *See Asgrow Seed Co.*, 513 U.S. at 187-89 (finding that the ordinary meaning of a word in a statute is clear if there is a standard and well-accepted definition of that word).

130. *Likely*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/likley> [<https://perma.cc/C929-S4YF>] (last visited Apr. 5, 2021).

131. *See Taniguchi*, 556 U.S. at 566-70 (ruling that a translator cannot be considered an “interpreter” because it requires a different skillset and entails different job functions).

132. *See id.*

133. *See infra* notes 134-44 and accompanying text.

plain meaning of the text is clear, that interpretation will control, and the statutory analysis will end there.¹³⁴ Courts will look past the plain meaning of the statutory text only if there is a severe and irreconcilable conflict between the plain meaning of the text and the express intent of the legislature.¹³⁵

Here, the purpose and legislative history of Section 13(b) are not irreconcilable with its plain meaning and, in fact, both actually support an interpretation of the text grounded in its plain meaning.¹³⁶ The legislative history makes clear that Section 13(b) was designed to serve two goals: to halt ongoing illegal conduct while the FTC is prosecuting it and to halt pending conduct (typically mergers) that the FTC believes would be illegal if it came to fruition.¹³⁷ Essentially, it was intended to be a “gap filler” that removed minor procedural hurdles and supplemented the agency’s existing legal authority.¹³⁸

Instead, far from being a mere gap filler, Section 13(b) now serves as the conduit through which the FTC litigates almost all of its enforcement actions.¹³⁹ Of course, there is nothing wrong with the FTC deciding to make the most of this valuable enforcement tool—one that has become all the more salient as the FTC combats novel issues, such as data privacy and information security.¹⁴⁰ Instead, the pivotal issue is that the widespread use of the “likelihood of recurrence” test has

134. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (ruling that the plain meaning of the term “sex” must control, even though doing so expands the scope of the statute well beyond what Congress had likely anticipated when they originally passed the statute).

135. See *King v. Burwell*, 576 U.S. 473, 497-98 (2015) (refusing to adopt the plain meaning of a word in the statute because doing so would doom the very program created by the statute).

136. See *infra* notes 137-45 and accompanying text.

137. See discussion *supra* Section II.A.

138. See *id.*

139. See Calkins, *supra* note 66.

140. See Letter from Chairman Joseph J. Simons, Fed. Trade Comm’n Chairman, Noah Joshua Phillips, Fed. Trade Comm’n Comm’r, Rohit Chopra, Fed. Trade Comm’n Comm’r, Rebecca Kelly Slaughter, Fed. Trade Comm’n Comm’r, and Christine S. Wilson, Fed. Trade Comm’n Comm’r, to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce (Oct. 22, 2020), <https://www.adlawaccess.com/wp-content/uploads/sites/793/2020/10/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act.pdf> [<https://perma.cc/57KE-L6RL>] (noting that recent adverse caselaw threatens the FTC’s ability to use its Section 13(b) authority to combat issues of data security and privacy).

enabled the agency to bring cases under Section 13(b) that were never intended to be under the statute's purview: cases where the illegal conduct is neither ongoing nor imminent.¹⁴¹ Since the 1980s, the FTC has used the "likelihood of recurrence" test to convince courts that an allegation of past illegal conduct alone is sufficient to trigger its Section 13(b) authority to issue injunctive relief.¹⁴² This should not be allowed to continue.

Nothing in the legislative history suggests that Congress intended for Section 13(b) to give the FTC authority to seek injunctive relief for violations that occurred solely in the past.¹⁴³ The FTC already has an avenue for litigating such cases: internal administrative adjudication.¹⁴⁴ In those cases, where the violations occurred in the past and are no longer ongoing, none of the important procedural and practical concerns that spurred the adoption of Section 13(b) are present.¹⁴⁵

In sum, the widespread acceptance of the "likelihood of recurrence" test has caused injunctive relief to be awarded in cases that were never intended to be covered by Section 13(b).¹⁴⁶ As discussed in Section IV.A., the plain meaning of the phrase "about to violate" demands that the "likelihood of recurrence" test be discontinued, an argument that is further supported by an examination of the congressional intent of Section 13(b). For those reasons, courts should no longer use the "likelihood of recurrence" test when determining if a defendant is "about to violate" the law.

141. See discussion *supra* Section II.B.2.

142. See *id.*

143. See discussion *supra* Section II.A.2.

144. Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45(b).

145. Section 13(b) was intended to solve the problem that the FTC had no way to halt impending or ongoing illegal conduct while they prosecuted it. When the FTC prosecutes conduct that is no longer ongoing, that problem is not present. See *supra* notes 23-26 and accompanying text.

146. See Federal Trade Commission Act, 15 U.S.C. § 53(b) (mandating violations must be either "ongoing" or "about" to occur); *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986); *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013) (issuing a preliminary injunction after finding that the "alleged violations . . . are likely to recur in the future given the past alleged violations of the FTC Act" (emphasis added)); *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12-13 (N.D. Tex. Mar. 15, 1990).

V. CONCLUSION

In 1973, the FTC gained the authority to seek injunctive relief in federal district court so long as it had reason to believe that a defendant “is violating, or is about to violate” any of the laws enforced by the agency.¹⁴⁷ Since then, courts have predominantly used the “likelihood of recurrence” test – which asks whether past violations are “likely to recur” – to determine whether a defendant is “about to violate” the law.¹⁴⁸ Recently, however, the dominance of the “likelihood of recurrence” test has come under scrutiny as courts question whether the principle is more permissive in granting injunctive relief than the text of Section 13(b) requires.¹⁴⁹

An examination of the plain meaning and congressional intent, which can be discerned through the legislative history, of Section 13(b) shows that the statute does indeed set a bar for awarding injunctive relief that is higher than the “likelihood of recurrence” standard.¹⁵⁰ Namely, Section 13(b) requires that future violations be imminent or impending – not merely likely – for injunctive relief to be granted.¹⁵¹ Since the “likelihood of recurrence” test does not comport with the plain meaning or congressional intent of the statute, courts should no longer use it when determining if a defendant is “about to violate” the law.¹⁵² Instead, courts must undertake an analysis that is true to the text, an analysis that must carefully and properly consider whether future violations are truly about to occur.¹⁵³

It is an immense power to be able to sue a party for violations that are yet to occur. This resolution would appropriately restrain that power by preventing the FTC from bringing cases against parties where their violative conduct is only likely to recur.¹⁵⁴ Importantly, this resolution does not take away the FTC’s power to proactively sue for future violations.¹⁵⁵ For instance, the FTC can still sue a party if their violative conduct becomes so imminent that they are truly about to violate the

147. Federal Trade Commission Act, 15 U.S.C. § 53(b).

148. See discussion *supra* Section II.B.

149. See discussion *supra* Section III.B.

150. See discussion *supra* Part IV.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

law.¹⁵⁶ And, of course, the FTC can still sue a party once it is actively violating the law.¹⁵⁷ In this way, interpreting the statute under its plain meaning and intent strikes a careful balance that prevents agency overreach while ensuring that Section 13(b) remains a powerful tool for protecting consumers.¹⁵⁸

156. *Id.*

157. *Id.*

158. *Id.*