No. 18-1501

IN THE
Supreme Court of the United States

CHARLES C. LIU AND XIN WANG A/K/A LISA WANG,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

HERVÉ GOURAIGE
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-5989

MICHAEL K. KELLOGG
Counsel of Record
GREGORY G. RAPAWY
BENJAMIN S. SOFTNESS
JULIA L. HAINES
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

December 16, 2019

QUESTION PRESENTED

Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though this Court has determined that such disgorgement is a penalty.

PARTIES TO THE PROCEEDINGS

Petitioners Charles C. Liu and Xin Wang a/k/a Lisa Wang were defendants in the district court proceedings and appellants in the court of appeals proceedings.

Respondent Securities and Exchange Commission was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

Beverly Proton Center, LLC f/k/a Los Angeles County Proton Therapy, LLC; Pacific Proton EB 5 Fund, LLC; and Pacific Proton Therapy Regional Center, LLC were defendants in the district court proceedings but did not participate in the court of appeals proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

A. Statutory and Regulatory Background 3

B. These Proceedings 7

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. THE SEC MAY NOT SEEK DISGORGEMENT IN FEDERAL COURT BECAUSE CONGRESS HAS NOT AUTHORIZED IT 15

A. Congress Authorized the SEC To Seek a Range of Enumerated Remedies, Not Including Disgorgement in Civil Proceedings 15

B. Under *Kokesh*, the Government's Argument That Disgorgement Is a Form of Equitable Relief Fails 19

1. Penalties are not available at equity 20

2. *Kokesh* establishes that this disgorgement remedy is a penalty 22

3. The SEC's disgorgement remedy is not traditionally available equitable relief 26

4. The SEC's disgorgement remedy is not an injunction 33

C. No Other Statutory Provisions Indicate That Congress Authorized Disgorgement 35

II. THE SEC IS WELL EQUIPPED TO REGULATE FINANCIAL MISCONDUCT WITHOUT SEEKING PUNITIVE DISGORGEMENT IN FEDERAL COURT 40

A. The SEC Can Seek Disgorgement in Administrative Proceedings 40

B. In Federal Court, the SEC May Seek Penalties Equal to the Defendant's "Pecuniary Gain" 42

CONCLUSION 43

ADDENDUM:

Securities Act of 1933, 15 U.S.C. § 77a *et seq.*:

§ 8A(a), 15 U.S.C. § 77h-1(a) .... Add. 1

§ 8A(e), 15 U.S.C. § 77h-1(e) .... Add. 2

§ 8A(f), 15 U.S.C. § 77h-1(f) .... Add. 2

§ 8A(g), 15 U.S.C. § 77h-1(g) .... Add. 2

§ 17(a)(2), 15 U.S.C. § 77q(a)(2) .... Add. 4

§ 20(b), 15 U.S.C. § 77t(b) .... Add. 5

§ 20(d), 15 U.S.C. § 77t(d) .... Add. 6

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*:

§ 21(d), 15 U.S.C. § 78u(d) ....Add. 8

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376:

§ 744, 124 Stat. 1735 (codified at 7 U.S.C. § 13a-1(d)(3)) ....Add. 14

§ 1055(a), 124 Stat. 2029-30 (codified at 12 U.S.C. § 5565(a))................................Add. 15

TABLE OF AUTHORITIES

Page

CASES

Aaron v. SEC, 446 U.S. 680 (1980) 29

Alexander v. Sandoval, 532 U.S. 275 (2001)............ 39

Beals v. Washington Int'l, Inc., 386 A.2d 1156 (Del. Ch. 1978) 24

Bird v. Wilmington & M.R.R. Co., 29 S.C. Eq. (8 Rich. Eq.) 46 (1855) 21

Brady v. Daly, 175 U.S. 148 (1899) 26

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 38, 39, 40

Craig v. Hukill, 16 S.E. 363 (W. Va. 1892) 21

Cross v. McClenahan, 54 Md. 21 (1880).................. 21

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 29, 30

DHS v. MacLean, 135 S. Ct. 913 (2015).................. 18

Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) 18

Douglas v. Independent Living Ctr. of S. California, Inc., 565 U.S. 606 (2012) 33

Ellis v. Davis, 109 U.S. 485 (1883)........................... 28

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005) 37-38

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 35, 38

FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417 (9th Cir. 2018), *petition for cert. pending*, No. 19-508 (U.S. Oct. 18, 2019)........................... 22

FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019)... 34

FTC v. Leshin, 719 F.3d 1227 (11th Cir. 2013) 32

Gordon v. Lowell, 21 Me. 251 (1842)........................ 21

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 27

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 2, 17, 26, 27, 30, 31, 32, 33

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999)......26, 27, 28

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) 18, 19

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 24

Helvering v. Hallock, 309 U.S. 106 (1940) 35

Huntington v. Attrill, 146 U.S. 657 (1892)............... 26

Kokesh v. SEC, 137 S. Ct. 1635 (2017)....1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 16, 19, 22, 23, 24, 25, 26, 27, 30, 32, 35, 40, 42

Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 (1932) 30

Limelight Networks, Inc. v. Akamai Techs., Inc., 572 U.S. 915 (2014) 19

Livingston v. Woodworth, 56 U.S. (15 How.) 546 (1854) 1, 20, 21, 24, 30

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 15

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 15

Meghrig v. KFC W., Inc., 516 U.S. 479 (1996) 16, 34

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 16, 17, 26, 34

Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003)...... 12

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960) 34

Montanile v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016) 31, 32

Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981) 16

Osborn v. Griffin, 865 F.3d 417 (6th Cir. 2017).. 22-23, 27

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 38, 39

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) 40

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 25, 31, 34

Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019) 18

Root v. Lake Shore & M.S. Ry. Co., 105 U.S. 189 (1882) 29, 30

Robers v. United States, 572 U.S. 639 (2014) 36

Robinson v. Robinson, 53 N.E. 854 (Mass. 1899)...... 28

Rotkiske v. Klemm, No. 18-328, 2019 WL 6703563 (U.S. Dec. 10, 2019) 19

Saad v. SEC, 873 F.3d 297 (D.C. Cir. 2017)............ 22

Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) 25

Sandoz Inc. v. Amgen Inc., 137 S. Ct. 1664 (2017) 15

SEC v. Banner Fund Int'l, 211 F.3d 602 (D.C. Cir. 2000) 32

SEC v. Clark, 915 F.2d 439 (9th Cir. 1990) 24

SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978) 7

SEC v. Contorinis, 743 F.3d 296 (2d Cir. 2014) 24

SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) 23

SEC v. Gentile, 939 F.3d 549 (3d Cir. 2019) 33

SEC v. Huffman, 996 F.2d 800 (5th Cir. 1993) ... 7, 31

SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984) 16

SEC v. Materia, 745 F.2d 197 (2d Cir. 1984) 37

SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072 (9th Cir. 2010) 32

SEC v. Shapiro, 494 F.2d 1301 (2d Cir. 1974) 32

SEC v. Texas Gulf Sulphur Co.:

312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd and remanded in part*, 446 F.2d 1301 (2d Cir. 1971) 6, 23, 27, 39

446 F.2d 1301 (2d Cir. 1971) 22

SEC v. Warde, 151 F.3d 42 (2d Cir. 1998) 24

SEC v. Whittemore, 659 F.3d 1 (D.C. Cir. 2011)...... 32

Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006) 31

Stark v. Wickard, 321 U.S. 288 (1944) 15

Stevens v. Cady, 23 F. Cas. 8 (C.C.D.R.I. 1854) (No. 13,395) 21

Stevens v. Gladding, 58 U.S. (17 How.) 447 (1855) 21

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 39

Tastyeast, Inc., *In re*, 126 F.2d 879 (3d Cir. 1942) 21

Tull v. United States, 481 U.S. 412 (1987) 20, 21, 27, 31

United States v. Bernard, 202 F. 728 (9th Cir. 1913) 21

United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906) 28

Wallace v. Cutten, 298 U.S. 229 (1936) 15

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 33

Westgate-California Corp., *In re*, 642 F.2d 1174 (9th Cir. 1981) 21

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 37

Young v. Scott, 25 Va. (4 Rand.) 415 (1826) 21

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. amend. VII 27

Act of July 8, 1870, ch. 230, § 55, 16 Stat. 198, 206 29

Clean Water Act of 1977, Pub. L. 95–217, 91 Stat. 1566 18

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 ....1, 3, 13, 17, 18, 41

§ 744, 124 Stat. 1735 (codified at 7 U.S.C. § 13a-1(d)(3)(B)) 17

§ 1055(a)(1), 124 Stat. 2029-30 (codified at 12 U.S.C. § 5565(a)(1)) 18

§ 1055(a)(2)(D), 124 Stat. 2029-30 (codified at 12 U.S.C. § 5565(a)(2)(D)) 18

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 26

Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* 34

Judiciary Act of 1789, ch. 20, 1 Stat. 73 27

Patent Act of 1836, ch. 357, 5 Stat. 117 20

§ 17, 5 Stat. 124 20

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 937 39

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* 3, 9

§ 8A, 15 U.S.C. § 77h-1 28

§ 8A(a), 15 U.S.C. § 77h-1(a) 4

§ 8A(e), 15 U.S.C. § 77h-1(e) 5, 17

§ 8A(f), 15 U.S.C. § 77h-1(f) 4

§ 8A(g)(1), 15 U.S.C. § 77h-1(g)(1) 5

§ 8A(g)(2), 15 U.S.C. § 77h-1(g)(2) 5

§ 8A(g)(2)(C), 15 U.S.C. § 77h-1(g)(2)(C) 5

§ 17(a), 15 U.S.C. § 77q(a) 9

§ 17(a)(2), 15 U.S.C. § 77q(a)(2) 9

§ 20, 15 U.S.C. § 77t... 18, 28

§ 20(b), 15 U.S.C. § 77t(b)........................ 4, 5, 19, 35

§ 20(b)(1), 15 U.S.C. § 77t(b)(1) 33

§ 20(d), 15 U.S.C. § 77t(d)...................................... 10

§ 20(d)(2)(A)-(C), 15 U.S.C. § 77t(d)(2)(A)-(C) 5, 16, 17

§ 20(d)(2)(C), 15 U.S.C. § 77t(d)(2)(C).................. 10

Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 ....17, 37, 40

§ 102, 104 Stat. 935 (codified at 15 U.S.C. § 77h-1(e)) 17, 40-41

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* 3

§ 10(b), 15 U.S.C. § 78j(b) 9

§ 12(j), 15 U.S.C. § 78*l*(j) 4

§ 15(b)(4), 15 U.S.C. § 78*o*(b)(4) 4

§ 20A(b)(2), 15 U.S.C. § 78t-1(b)(2) 37, 39

§ 21, 15 U.S.C. § 78u 18, 28

§ 21(d), 15 U.S.C. § 78u(d) 5, 35, 40

§ 21(d)(1), 15 U.S.C. § 78u(d)(1) 19, 33

§ 21(d)(3)(B), 15 U.S.C. § 78u(d)(3)(B) 5, 10

§ 21(d)(3)(B)(ii), 15 U.S.C. § 78u(d)(3)(B)(ii) 42

§ 21(d)(4), 15 U.S.C. § 78u(d)(4) 37, 39

§ 21(d)(5), 15 U.S.C. § 78u(d)(5) 5, 19, 30

§ 21F(a)(4)(A), 15 U.S.C. § 78u-6(a)(4)(A) 36

§ 21F(g)(3)(A)(i), 15 U.S.C. § 78u-6(g)(3)(A)(i) 36

§ 21F(g)(3)(A)(ii), 15 U.S.C. § 78u-6(g)(3)(A)(ii) 36

7 U.S.C. § 13a-1 18

8 U.S.C. § 1153(b)(5)(A) 7

11 U.S.C. § 523(a)(19) 36

15 U.S.C. § 7246(a) 36

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2462 .... 11, 25

8 C.F.R. § 204.6(h)(1)-(3) 7

17 C.F.R. § 240.10b-5 (SEC Rule 10b-5) 9, 39

LEGISLATIVE MATERIALS

H.R. 4344, 116th Cong. (2019) (Investor Protection and Capital Markets Fairness Act) 39-40

S. Rep. No. 101-337 (1990) 37

Testimony on the EB-5 Immigrant Investor Program by Stephen L. Cohen, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate (Feb. 2, 2016), *available at* https://www.judiciary.senate.gov/imo/media/doc/02-02-17%20Cohen%20Testimony.pdf 8

ADMINISTRATIVE MATERIALS

Securities & Exch. Comm'n:

Annual Report of the SEC for the Fiscal Year Ended June 30, 1975, *available at* https://www.sec.gov/files/1975.pdf 7

Div. of Enforcement, *2019 Annual Report*, *available at* https://www.sec.gov/files/enforcement-annual-report-2019.pdf.............. 7, 42

Div. of Enforcement, *Annual Report: A Look Back at Fiscal Year 2017*, *available at* https://www.sec.gov/files/enforcement-annual-report-2017.pdf 42

How Investigations Work, https://www.sec.gov/enforce/how-investigations-work.html (last visited Dec. 6, 2019) 4, 43

Information for Harmed Investors, https://www.sec.gov/divisions/enforce/claims.htm (last visited Dec. 6, 2019) 7

Press Release, *Petrobras Reaches Settlement With SEC for Misleading Investors* (Sept. 27, 2018), *available at* https://www.sec.gov/news/press-release/2018-215............................... 42

What We Do, https://www.sec.gov/Article/whatwedo.html (last visited Dec. 6, 2019)............ 3

OTHER MATERIALS

Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17 (2018) 23

William Blackstone, *An Analysis of the Laws of England* (5th ed. 1762).. 33

Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 Yale J. Reg. 1 (2017) 41

Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Proceedings*, 33 Rev. Banking & Fin. L. 899 (2014) 27, 29

1 Dan B. Dobbs, *Law of Remedies* (2d ed. 1993)..... 21, 29, 31

John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 3 Duke L.J. 641 (1977) 27

George W. Keeton, *An Introduction to Equity* (6th ed. 1965) 34

Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 2 Harv. L. Rev. 241 (1889) 29

Oral Arg. Tr., *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529) (Apr. 18, 2017)......2, 16, 17, 31

John J. Park, *What Are Courts of Equity?* (1832) 21

1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (3d ed. 1905)................................ 33

4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (Spencer W. Symons ed., 5th ed. 1941)... 31

Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973 (2011) 22

Restatement of Restitution (1937) 32

Restatement (Third) of Restitution and Unjust Enrichment (2011)...31, 32

Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886):

Vol. 1 33

Vol. 2 ....20, 21

INTRODUCTION

It is fundamental that an agency has only the authority to act that Congress confers upon it. Here, Congress has given the Securities and Exchange Commission ("SEC" or "Commission") a range of "enforcement tools" that it can use in a civil proceeding in federal court. *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017). Those tools include significant monetary penalties — within constraints established by Congress — as well as injunctive and other "equitable" relief.

But Congress did not authorize the SEC to obtain limitless monetary penalties under the label "disgorgement." Instead, it explicitly allowed the SEC to seek that relief only in *administrative* proceedings. And under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") — which had plenty to say about the SEC's authority — Congress authorized the Commodity Futures Trading Commission ("CFTC") and the Consumer Financial Protection Bureau ("CFPB"), *but not the SEC*, to ask federal courts to order disgorgement. The lack of statutory authorization for disgorgement means the SEC cannot seek that additional remedy.

The SEC cannot avoid that limitation on its authority by claiming that disgorgement is a form of "equitable relief." This Court concluded unanimously in *Kokesh* that the same SEC disgorgement remedy at issue here "bears all the hallmarks of a penalty." 137 S. Ct. at 1644. And, as this Court has long understood, "penalt[ies]" are outside "the well-established rules of equity jurisprudence." *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559 (1854).

Even aside from *Kokesh*, disgorgement as sought by the SEC is not within the scope of equity. Where a statute authorizes the federal courts to provide

"equitable relief," the Court looks to whether the disputed remedy would have been available from a court of equity "[i]n the days of the divided bench." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). The SEC's disgorgement remedy lacks the required pedigree — it was invented by creative agency lawyers in the 1960s and 1970s. It is unlike any historically grounded equitable remedy.

The SEC has also suggested that the Court can ignore the restrictions Congress placed on the SEC, the analysis in *Kokesh*, and long-established understandings of the limits of equity, because language in a few scattered provisions of the U.S. Code purportedly presupposes disgorgement authority. But presuppositions are not affirmative grants of agency authority. In any event, the references to "disgorgement" in most of those provisions are best understood to reflect Congress's decision to authorize disgorgement in administrative proceedings, but not federal court actions.

What happens if the SEC is denied its *ultra vires* disgorgement power? Not much. It can still seek disgorgement in administrative proceedings, as it regularly does. It still has a "panoply" of authorized enforcement tools in federal court, *Kokesh*, 137 S. Ct. at 1640, such as injunctive relief, qualifying "equitable relief," and statutorily defined financial penalties that regularly reach nine figures in a single case. And it can still ask Congress to expand its authority if it requires yet more enforcement tools.

"[T]he SEC devised this remedy . . . without any support from Congress." Oral Arg. Tr. 31, *Kokesh v. SEC*, No. 16-529 (Apr. 18, 2017) ("*Kokesh* Oral Arg. Tr.") (Roberts, C.J.). In our constitutional system, that is reason enough to reverse.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App. 1a-8a) is unpublished but is available at 754 F. App'x 505. The order of the district court granting plaintiff's motion for summary judgment (App. 9a-61a) is reported at 262 F. Supp. 3d 957.

JURISDICTION

The court of appeals entered its judgment on October 25, 2018, and denied a petition for rehearing on January 3, 2019 (App. 65a). On March 22, 2019, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including May 31, 2019 (App. 76a); the petition was filed on that date and granted on November 1, 2019 (JA111). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and the Dodd-Frank Act are reproduced in the Addendum to this brief.

STATEMENT

A. Statutory and Regulatory Background

1. "Congress established the Securities and Exchange Commission in 1934 to enforce the newly-passed securities laws, to promote stability in the markets and, most importantly, to protect investors." SEC, *What We Do*, https://www.sec.gov/Article/whatwedo.html. To serve those ends, Congress authorized the Commission "to prescribe rules and regulations as necessary or appropriate in the public interest or for the protection of investors," "to conduct investigations into possible violations of the federal securities laws," and to "initiate enforcement actions" when wrongdoing is discovered. *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) (citation and alteration omitted).

Although "[i]nitially[] the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations," *id.*, Congress has since created a detailed, comprehensive enforcement scheme. To enforce statutory prohibitions against insider trading, market manipulation, and unlawful securities offerings, the SEC now may commence a civil action in federal district court or initiate proceedings before an administrative law judge. *See* 15 U.S.C. § 77t(b) (authorizing SEC to "bring an action in any district court"); *id.* § 77h-1(a) (authorizing SEC to hold hearings and "enter an order" in cease-and-desist proceedings); *see also* SEC, *How Investigations Work*, https://www.sec.gov/enforce/how-investigations-work.html ("SEC, *How Investigations Work*") ("Whether the Commission decides to bring a case in federal court or within the SEC before an administrative law judge may depend upon various factors.").[1] According to the SEC, "when the misconduct warrants it, the Commission will bring both proceedings." *Id.*

The remedies available to the SEC depend upon the kind of proceeding the agency selects. In administrative proceedings, the agency can issue orders "requiring a person to cease and desist from committing or causing a violation" of the securities laws or requiring affirmative "steps to effect compliance" with the law, 15 U.S.C. § 77h-1(a); "issue an order to prohibit" a person "from acting as an officer or director" of a publicly traded company, *id.* § 77h-1(f); and "impose

---

[1] Although the SEC can pursue most violations in both judicial and administrative proceedings, a few are reserved for administrative enforcement. *See*, *e.g.*, 15 U.S.C. § 78*l*(j) (action to suspend registration of public companies that fail to timely register); *id.* § 78*o*(b)(4) (follow-on proceeding to bar person from the securities industry).

a civil penalty" under specified dollar-amount limits in three "tiers" depending upon the severity of the conduct, *id.* § 77h-1(g)(1), (2). In administrative proceedings, "the Commission may [also] enter an order requiring accounting and disgorgement, including reasonable interest." *Id.* § 77h-1(e).

Different remedial provisions govern in federal court. There, the SEC can seek "a permanent or temporary injunction" punishable by contempt, including an injunction preventing a defendant from serving on boards of directors. *Id.* § 77t(b); *see also id.* § 78u(d). Additionally, although in administrative cases the SEC may seek only fines limited to a specific dollar amount, *see*, *e.g.*, *id.* § 77h-1(g)(2)(C) ($150,000 per violation by "a natural person"), the SEC in district court may seek civil penalties — again in "tiers" — measured by "the gross amount of pecuniary gain to [the] defendant as a result of the violation." *Id.* § 77t(d)(2)(A)-(C); *see also id.* § 78u(d)(3)(B). Congress also authorized district courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." *Id.* § 78u(d)(5). It did not mention disgorgement.

2. Despite the lack of a statutory provision authorizing the remedy, for decades the SEC has asked district courts "to order disgorgement as an exercise of their inherent equity power to grant relief ancillary to an injunction." *Kokesh*, 137 S. Ct. at 1640 (citation omitted). The SEC sought that remedy, and the courts granted it, "[i]n the absence of statutory authorization for monetary remedies." *Id.*

In 1990, however, "as part of the Securities Enforcement Remedies and Penny Stock Reform Act, Congress authorized the Commission to seek monetary civil penalties" of statutorily specified amounts. *Id.*

That Act "left the Commission with a full panoply of enforcement tools: It may promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and injunctive relief for those violations." *Id.*

Nonetheless, "[i]n the years since the Act, . . . the Commission has continued its practice of seeking disgorgement in enforcement proceedings" in federal court. *Id.* Courts have granted those requests and issued orders "to 'deprive defendants of their profits in order to remove any monetary reward for violating'" the law and to provide "'an effective deterrent to future violations.'" *Id.* (quoting *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970), *aff'd in part, rev'd and remanded in part on other grounds*, 446 F.2d 1301 (2d Cir. 1971)) (alteration omitted).

The disgorgement orders secured by the SEC in litigation do not "simply return[] the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644. They frequently include requirements to pay amounts equal to the benefits accrued by third parties as a result of the violation, and they sometimes are not offset by "a defendant's expenses that reduced the amount of illegal profit." *Id.* In short, SEC disgorgement often "leaves the defendant worse off." *Id.* at 1645.

In addition, although "disgorgement" has been called a "form of restitution," *id.* at 1640 (alteration omitted), SEC disgorgement typically does not return any funds to the victims, *see id.* at 1644 (describing SEC disgorgement as "a noncompensatory sanction [paid] to the Government"). Rather, when defendants (or administrative respondents) disgorge funds to satisfy a judgment, the agency, "*in its discretion, may* seek to distribute these funds for the benefit

of harmed investors." SEC, *Information for Harmed Investors*, https://www.sec.gov/divisions/enforce/claims.htm (emphasis added).

Such discretionary distributions are the exception, not the rule. For example, in fiscal year 2019, parties to Commission enforcement actions were ordered to pay $3.248 billion in disgorgement and $1.101 billion in civil penalties. Harmed investors received $1.2 billion: 37% of total disgorged funds, and 27% of funds disgorged and paid in penalties. *See* SEC, Div. of Enforcement, *2019 Annual Report* 16-17 ("*2019 SEC Enforcement Division Report*").[2] The rest was "dispersed to the United States Treasury." *Kokesh*, 137 S. Ct. at 1644. That approach is consistent with the SEC's longstanding view that its "primary function" is "not to obtain damages for injured individuals." SEC, *Annual Report of the SEC for the Fiscal Year Ended June 30, 1975*, at 97-98;[3] *see also SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) ("[T]he primary purpose of disgorgement is not to compensate investors."); *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("[d]isgorgement does not aim to compensate the victims").

B. These Proceedings

1. Federal immigration law makes visas available "to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise." 8 U.S.C. § 1153(b)(5)(A). Although such "engag[ements]" can take many forms, *see*, *e.g.*, 8 C.F.R. § 204.6(h)(1)-(3); App. 10a & n.1, many individual investors seeking a visa through this "Immigrant

---

[2] *Available at* https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

[3] *Available at* https://www.sec.gov/files/1975.pdf.

Investor Program" send money to "regional centers" that aggregate qualifying investments into designated qualifying commercial enterprises. Cohen Testimony[4] at 2. The government treats those investments as "securities" subject to the "provisions of the federal securities laws." *Id.*

Petitioners Charles C. Liu ("Liu") and Xin Wang ("Wang") operated one such regional center, the Pacific Proton EB-5 Fund ("Fund"), which recruited Chinese investors seeking U.S. visas. The stated purpose of the Fund was to pool the investments in order to construct a cancer treatment center, the Beverly Proton Center, LLC ("Beverly Center"), in California. Fifty investors each contributed $500,000 in capital plus a $45,000 administrative fee to fund the Beverly Center's development and construction. App. 12a. As relevant here, the project raised a total of $24,712,217 in capital contributions and $2,255,701 in administrative fees. App. 13a.[5]

Beyond those funds, petitioners hoped to raise additional funds through private equity to complete the project. The Fund advised participants that, at the "discretion" of the fund manager, their investments could be allocated not only to move the construction forward, but also to market the project to additional investors as "circumstances and opportunities" dictated.

---

[4] *See Testimony on the EB-5 Immigrant Investor Program by Stephen L. Cohen, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate* (Feb. 2, 2016) ("Cohen Testimony"), *available at* https://www.judiciary.senate.gov/imo/media/doc/02-02-17%20Cohen%20Testimony.pdf.

[5] A portion of one $500,000 capital investment was made prior to the relevant time period; the capital investment total is thus just under $25,000,000 (50 x $500,000). App. 13a n.4.

See Decl. of Jacob A. Regenstreif, Ex. 5, *SEC v. Liu*, No. SACV 16-00974-CJC, ECF No. 7-4, at 470 (C.D. Cal. May 26, 2016) ("*Liu*").

The Beverly Center made halting progress. The Center executed a lease, and construction preparation began in 2015. App. 18a-19a. Following a management dispute, however, Liu relocated the Center, commissioned designs for its construction, and — before these proceedings began — made a deposit on medical equipment. App. 19a.

2. On May 26, 2016, the SEC sued petitioners, the Fund, and the Beverly Center in the Central District of California, bringing claims under Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* Compl. ¶ 8, *Liu*, ECF No. 1 (C.D. Cal. May 26, 2016). The SEC alleged that, contrary to the representations made to raise capital, petitioners misappropriated millions of dollars by diverting funds to overseas marketing firms and paying themselves salaries. App. 14a-17a.

On April 20, 2017, the district court granted summary judgment to the SEC, holding that petitioners violated Section 17(a)(2) of the Securities Act.[6] App. 9a-61a. Of the approximately $27 million total that petitioners raised, the court found that:

- about $12.9 million was invested in marketing the project overseas, App. 14a;

---

[6] *See* 15 U.S.C. § 77q(a)(2) ("It shall be unlawful for any person in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact . . . ."). Because the district court found that petitioners violated Section 17(a), it did not consider the SEC's remaining claims. App. 34a.

- about $4.5 million was expended on property development, App. 18a-19a;
- $234,899.19 remained in the investment account, App. 40a; and
- $6,714,580 and $1,538,000 were paid to Liu and Wang, respectively, App. 29a.

The district court then granted each remedy the SEC sought. *First*, the court issued a permanent injunction barring petitioners from participating in the Immigrant Investor Program. App. 34a-40a, 63a-64a.

Second, the district court ordered petitioners to pay the SEC civil penalties at the highest (third) "tier" authorized under 15 U.S.C. § 77t(d) and § 78u(d)(3)(B). App. 41a-42a, 62a. Third-tier penalties are available when a violation "involve[s] fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and can equal "the gross amount of pecuniary gain" to a particular defendant. 15 U.S.C. § 77t(d)(2)(C). In this case, the court imposed "third tier penalties" equal to the "personal gain" of each petitioner: $6,714,580 for Liu and $1,538,000 for Wang. App. 42a.

Third, the district court granted the SEC's request for disgorgement under the court's "equity powers." SEC Mot. for Summ. J. at 20, *Liu*, ECF No. 199 (C.D. Cal. Jan. 4, 2017) ("SEC SJ Mot.") (JA106); *see* App. 40a-41a, 62a. The SEC argued that the court should order disgorgement equal to the full amount petitioners raised from investors, whether or not petitioners had legitimately expended some of those funds to develop the Beverly Center. *See* SEC SJ Mot. 20-23 (JA106-10). The SEC's request followed from what it told the court was the appropriate punitive purpose of disgorgement: it "is designed" "to deter others

from violating securities laws by making violations unprofitable" to the law violator. *Id.* at 20 (JA106). The SEC never proposed to return the disgorged funds to investors, nor did it suggest that the court place any other restrictions on the agency's use of the funds. *See* Proposed Final Judgment at 3-4, *Liu*, ECF No. 220-2 (C.D. Cal. Feb. 8, 2017) ("*Liu* Proposed Final Judgment") (proposed order).

Opposing the SEC's request, petitioners argued that any disgorgement award should not include the millions spent on the project's legitimate business expenses, such as marketing, construction costs, and lease payments. *See* Defs.' Opp. to SEC's Mot. for Summ. J. at 25, *Liu*, ECF No. 211 (C.D. Cal. Jan. 17, 2017). Such a disgorgement order, petitioners reasoned, "would constitute a penalty assessment." *Id.* at 24 (emphasis and quotation marks omitted).

The district court disagreed. It ruled that every dollar petitioners collected from investors — subtracting only what remained in the account at the time of judgment — was subject to disgorgement, whether or not petitioners had used those dollars for legitimate expenses and whether or not petitioners still possessed those funds. App. 41a. The court reasoned that it had "broad, discretionary equitable power to order the disgorgement of ill-gotten gains to deprive a wrongdoer of unjust enrichment and to deter others from violating securities laws." App. 40a. The court did not order that the SEC return the disgorged funds to allegedly harmed investors. App. 41a.

3. Shortly after the district court entered final judgment, this Court decided *Kokesh*, which held that SEC disgorgement orders were penalties subject to the five-year statute of limitations period in 28 U.S.C. § 2462. Accordingly, Liu and Wang argued in the

Ninth Circuit that, under *Kokesh*, the district court "lacked statutory authority to award disgorgement" because a penalty is not an award of equitable relief. *See* Br. for Defendants-Appellants at 48-49, *SEC v. Liu*, No. 17-55849, Doc. No. 14 (9th Cir. Dec. 21, 2017) ("The federal courts are without power to award penalties absent explicit congressional authority.").

The Ninth Circuit rejected that argument and affirmed. App. 1a-8a. Because this Court's decision in *Kokesh* reserved the question of the SEC's statutory authority to seek disgorgement, *see* 137 S. Ct. at 1642 n.3, the court held that it remained bound by pre-*Kokesh* circuit precedents upholding analogous disgorgement orders. *See* App. 6a-7a ("*Kokesh* expressly refused to reach" whether the district court lacked the power to order the disgorgement award, "so that case is not 'clearly irreconcilable' with our longstanding precedent on this subject") (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Petitioners subsequently petitioned for rehearing and rehearing en banc. The Ninth Circuit denied that request. App. 65a.

4. This Court granted certiorari. JA111.

SUMMARY OF ARGUMENT

I.A. Congress has not granted the SEC the power to seek disgorgement in federal court. Instead, it has provided the SEC with other specific enforcement tools, including civil monetary penalties. When, as here, Congress provides a comprehensive remedial scheme, the absence of a particular remedy is understood as intentional. That presumption has added force in this case, because Congress *has* explicitly authorized the SEC to seek disgorgement in administrative proceedings, but not in federal court enforcement cases. The Dodd-Frank Act, moreover, explicitly granted the CFTC and the CFPB, but not the SEC, authority to seek disgorgement in federal court cases.

B. This Court's analysis in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), forecloses the SEC's argument that its authority to seek equitable relief and injunctions justifies the disgorgement remedy at issue here.

This Court, other courts, and commentators have understood for centuries that equity does not authorize punishment. In *Kokesh*, the Court unanimously concluded that the exact same SEC disgorgement remedy at issue here "bears all the hallmarks" of a penalty. *Id.* at 1644. That conclusion resolves this case. Although *Kokesh* restricted its holding to the scope of a statute of limitations for "penalties," the Court's logic and understanding of the nature of SEC disgorgement requests apply equally here.

Beyond that, disgorgement was not traditionally or typically available in historical courts of equity. Under this Court's cases, that, too, disqualifies the SEC from seeking disgorgement as a form of equitable relief. And because injunctions are an equitable remedy, the SEC's power to enjoin conduct likewise cannot justify the disgorgement remedy.

C. Scattered references to "disgorgement" in the U.S. Code are no substitute for an actual authorization to seek that relief, passed by a majority of both houses of Congress and signed by the President. Most of the provisions to which the government looks are naturally read to refer to the SEC's power (which Congress actually granted) to seek disgorgement in *administrative* proceedings. None of them comes close to demonstrating a congressional intent to "ratify" the rulings of lower courts holding that disgorgement is available as an equitable remedy.

II. Enforcing the law as Congress wrote it would not leave the SEC unable to protect investors. Congress has given the SEC ample enforcement tools to protect investors from wrongdoers. In particular, Congress has empowered the Commission to seek monetary penalties measured by "the gross amount of pecuniary gain" to the defendant. By definition, such a penalty allows the SEC to force a defendant to surrender its ill-gotten gains. And that of course is in addition to the power to seek disgorgement in administrative proceedings. If the SEC needs still more tools, it must appeal to Congress, not the courts.

ARGUMENT

I. THE SEC MAY NOT SEEK DISGORGEMENT IN FEDERAL COURT BECAUSE CONGRESS HAS NOT AUTHORIZED IT

A. Congress Authorized the SEC To Seek a Range of Enumerated Remedies, Not Including Disgorgement in Civil Proceedings

1. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *accord Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."). That fundamental principle applies with particular force where an agency seeks an "enlargement" of its statutory authority "for the purpose of making [an action] punishable." *Wallace v. Cutten*, 298 U.S. 229, 237 (1936) (Brandeis, J.) (citation omitted).

As this Court has stressed, when Congress constructs "an enforcement scheme . . . with . . . evident care," the explicit authorization of certain remedies is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 147 (1985). Rather, the absence of a particular remedy creates a "presumption that [the] remedy was deliberately omitted." *Id.* at 147 & n.15 (collecting cases) (citation omitted); *see also*, *e.g.*, *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (holding that, where "a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies") (citation omitted).

Moreover, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981) (emphasis added); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487-88 (1996) (relying on Congress's creation of "elaborate enforcement provisions" in declining to infer an additional remedy) (citation omitted); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (noting this Court's "unwillingness to infer causes of action in [a] . . . statute's carefully crafted and detailed enforcement scheme").

2. Congress has created a comprehensive scheme for enforcement of the securities laws. *See Kokesh*, 137 S. Ct. at 1640 & n.1 (describing the SEC's "full panoply of enforcement tools"); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741 (1984) (referring to "the complex of statutes governing the SEC's investigative power"). That scheme gives the SEC the authority to seek extensive relief in federal court, including through defined tiers of civil monetary penalties. *See* 15 U.S.C. § 77t(d)(2)(A)-(C); *Kokesh*, 137 S. Ct. at 1640. However, as multiple members of this Court observed during the oral argument in *Kokesh*, no language in any of those statutory provisions grants the SEC its asserted power to seek disgorgement.[7]

---

[7] *See Kokesh* Oral Arg. Tr. 31 ("[T]he SEC devised this remedy . . . without any support from Congress.") (Roberts, C.J.). *See also*, *e.g.*, *id.* at 7-8 ("[I]s there specific statutory authority that makes it clear that the district court can entertain this remedy?") (Kennedy, J.); *id.* at 9 (pushing counsel to identify the source of the agency's disgorgement authority) (Sotomayor, J.); *id.* at 13 ("[I]t would certainly be helpful and maybe essential to know

The SEC's enumerated grants of power would be "pointless," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002), if the SEC could also seek additional remedies Congress never bothered to name. Under this Court's precedent, it should not presume that Congress "simply forgot" disgorgement. *Mertens*, 508 U.S. at 254 (citation omitted). Further, it would be particularly strange to imply an additional power to seek disgorgement without any limit or cap where Congress expressly authorized specific, limited monetary penalties in separate "tiers" based on the nature of the alleged misconduct. *See* 15 U.S.C. § 77t(d)(2)(A)-(C).

Two other pieces of statutory context provide further evidence that Congress did not intend any unspoken grant of disgorgement authority. *First*, in the same statute that permits the SEC to seek tiered monetary penalties in court, Congress also gave the agency the power to order "accounting and disgorgement" in — and *only* in — administrative proceedings. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 102, 104 Stat. 931, 935 ("Penny Stock Reform Act") (codified at 15 U.S.C. § 77h-1(e)).

Second, as part of the 2010 Dodd-Frank Act, Congress authorized the CFTC to seek "disgorgement" in "*any* action," including those brought in court. *E.g.*, Pub. L. No. 111-203, § 744, 124 Stat. 1376, 1735 (codified at 7 U.S.C. § 13a-1(d)(3)(B)) (emphasis added). Significantly, Congress structured the provision authorizing the CFTC to sue in federal court

---

what the authority for [disgorgement] is.") (Alito, J.); *id.* at 52 ("Well, here we don't know [when the disgorged money goes to the victim], because there's no statute governing it. We're just making it up.") (Gorsuch, J.).

much like the provisions authorizing the SEC to do so — but the CFTC provision creates a disgorgement remedy, and the SEC provision does not. *Compare* 7 U.S.C. § 13a-1 *with* 15 U.S.C. § 77t *and id.* § 78u. A separate provision gives a similar "disgorgement" remedy to "[t]he court . . . in [certain] action[s]" brought by the CFPB. Dodd-Frank Act § 1055(a)(1), (a)(2)(D), 124 Stat. 2029-30 (codified at 12 U.S.C. § 5565(a)(1), (a)(2)(D)).

This Court has long recognized the presumption that "Congress acts intentionally when it omits language included elsewhere," especially when the included language is in "close proximity." *DHS v. MacLean*, 135 S. Ct. 913, 919 (2015); *see also Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) (Congress "'acts intentionally when it uses particular language in one section of a statute but omits it in another'") (quoting *MacLean*, 135 S. Ct. at 919); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (applying canon to Dodd-Frank Act). Here, Congress's acts addressing the subject of agency enforcement powers generally and disgorgement specifically, while leaving out any judicial disgorgement authority for the SEC, trigger that presumption with great force.

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), is also instructive. The plaintiffs there argued that a statutory allowance to sue for conduct "in violation" of the Clean Water Act of 1977 authorized suit for completed violations. *Id.* at 57. Although acknowledging that the language was not unambiguous, the Court disagreed with the plaintiffs, reasoning that "the prospective orientation" of the language "could not have escaped Congress' attention" when, "in . . . other statutory provisions," Congress "avoid[ed] this prospective

implication by using language that explicitly targets wholly past violations." *Id.*; *see also Rotkiske v. Klemm,* No. 18-328, 2019 WL 6703563, at *4 (U.S. Dec. 10, 2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision."); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 922-23 (2014) (adjacent subsection reinforced interpretation by showing that, "when Congress wishes to impose liability for [certain conduct], it knows precisely how to do so").

B. Under *Kokesh*, the Government's Argument That Disgorgement Is a Form of Equitable Relief Fails

Against this statutory evidence, the government has argued that bare statutory references to equitable and injunctive authority provide the agency with the power to seek disgorgement — even, as here, "disgorgement" that goes far beyond any alleged profits obtained by the defendants and that is not returned to the alleged victims of the violation. *See* 15 U.S.C. §§ 77t(b) (authorizing the SEC to "bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted"), 78u(d)(1) (same), 78u(d)(5) ("[T]he [SEC] may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

Those arguments cannot survive this Court's analysis in *Kokesh*. It is black-letter law that equitable jurisdiction does not authorize penalties, and *Kokesh* concluded that the SEC's disgorgement remedy is just such a penalty. Even beyond that basic point, the scope of equitable authority, as understood over centuries,

does not include disgorgement as sought by the SEC. Disgorgement therefore also does not fall within the SEC's power to seek injunctions, which are of course a quintessential equitable remedy.

1. Penalties are not available at equity

As this Court, other courts, and scholars have long understood, "it is against the general principles of equity to aid in the enforcement of penalties." 2 Joseph Story, *Commentaries on Equity Jurisprudence* ¶ 1494, at 819 (13th ed. 1886) ("Story, *Commentaries*"). "Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull v. United States*, 481 U.S. 412, 422 (1987).

This Court described that principle as already "well-established" more than 160 years ago. *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559 (1854). There, the Court reviewed a monetary award in a patent-infringement case that, purportedly in equity,[8] required the defendants to pay more "than the profits they have actually received" and included a "penalty of interest." *Id.* The Court reversed, explaining that it was improper for "a court of equity" to issue an award "for the punishment" of the defendants' conduct." *Id.*[9] In "the courts of law," the plaintiffs might have sought "not compensation merely, but vengeance." *Id.* In equity, they were "allowed to claim

[8] The case arose under § 17 of the Patent Act of 1836, ch. 357, 5 Stat. 117, 124, which invoked lower federal courts' "equity" powers.

[9] The Court observed in the alternative that, "*were* it consistent with equity practice," a punitive award "would" be inappropriate on the facts of the case. *Livingston*, 56 U.S. (15 How.) at 560 (emphasis added).

that which, *ex aequo et bono*, is theirs, and nothing beyond this." *Id.* at 560.

This Court, other federal courts, state courts, and scholars have reiterated this principle numerous times. *See*, *e.g.*, *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 455 (1855) (refusing to enforce "bill for . . . penalties" as beyond "the usual and known jurisdiction exercised by courts of equity"); *Tull*, 481 U.S. at 422; *In re Westgate-California Corp.*, 642 F.2d 1174, 1178 (9th Cir. 1981) (noting "[t]he time-honored maxim that equity will not enforce a penalty"); *In re Tastyeast, Inc.*, 126 F.2d 879, 881 (3d Cir. 1942) ("[A] court of equity . . . will . . . not enforce a penalty."); *United States v. Bernard*, 202 F. 728, 732 (9th Cir. 1913) ("a court of equity . . . has no authority to assess exemplary damages"); *Stevens v. Cady*, 23 F. Cas. 8, 9 (C.C.D.R.I. 1854) (No. 13,395) ("a court of equity does not enforce forfeitures or penalties").[10]

---

[10] *See also Craig v. Hukill*, 16 S.E. 363, 364 (W. Va. 1892) ("The elementary books on equity jurisprudence state the rule as almost an axiom, that equity never enforces a penalty or forfeiture.") (citing Justice Story); *Cross v. McClenahan*, 54 Md. 21, 24 (1880) (a court of equity "*never* enforces a penalty"); *Bird v. Wilmington & M.R.R. Co.*, 29 S.C. Eq. (8 Rich. Eq.) 46, 57 (1855) (applying to equity court "waives all claim for vindictive damages"); *Gordon v. Lowell*, 21 Me. 251, 257 (1842) (equity "does not aid in the infliction of penalties"); *Young v. Scott*, 25 Va. (4 Rand.) 415, 418 (1826) ("A Court of Equity has no jurisdiction to enforce penalties") (Green, J.); 2 Story, *Commentaries* ¶ 1494, at 818-19; 1 Dan B. Dobbs, *Law of Remedies* § 3.11(1), at 460 & n.53 (2d ed. 1993) ("Dobbs") (citing *Livingston* as an example of "[t]he traditional rule . . . that equity would not award punitive damages"); John J. Park, *What Are Courts of Equity?* 24 (1832) ("courts of equity are courts merely of *administrative*, *declaratory*, and *protective* jurisprudence; while courts of law are principally courts of *resolutory* and *retributive* jurisprudence").

Indeed, this limitation on equitable remedies is so well established that many major equity treatises decline to address penalties at all. *See* Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973, 998-99 (2011) (describing how treatises have dealt with penalties and equitable remedies separately). Consistent with this long-settled rule, even in affirming the SEC's first successful request for disgorgement, the Second Circuit stressed its understanding that the remedy could qualify as equitable only if it were "remedial relief and . . . not a penalty assessment." *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971).

2. *Kokesh* establishes that this disgorgement remedy is a penalty

Applying this settled principle to this case requires reversal. As then-Judge Kavanaugh recognized, this Court's unanimous decision in "*Kokesh* overturned" prior lower court cases that "had concluded that disgorgement was remedial and not punitive." *Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring).[11] Indeed, *Kokesh* identified multiple

[11] Other judges have likewise understood that *Kokesh* undermines decisions approving disgorgement authority as remedial. For example, Judge O'Scannlain (joined by Judge Bea) agreed that existing Ninth Circuit case law supported disgorgement, but argued for en banc consideration to correct the Ninth Circuit's analysis in the wake of *Kokesh*. *See FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., specially concurring) ("Because our interpretation wrongly authorizes a power that the statute does not permit, we should rehear this case en banc to relinquish what Congress withheld."), *petition for cert. pending*, No. 19-508 (U.S. Oct. 18, 2019). Judge Merritt similarly stated that disgorgement "may not even be applicable in SEC contexts for much longer in light of" *Kokesh*. *Osborn v.*

reasons why disgorgement as sought by the SEC "bears all the hallmarks of a penalty." 137 S. Ct. at 1644; *see also id.* at 1642 (a "penalty is a punishment") (citation omitted).

First, as the Court explained, "SEC disgorgement is imposed by the courts as a consequence for violating . . . public laws." *Id.* at 1643. The Court reasoned that, as is typical for a penalty, courts have ordered disgorgement to protect the public interest, not to remedy harm suffered by an individual. *See id.*

Second, "SEC disgorgement is imposed for punitive purposes." *Id.* From the first cases permitting disgorgement, the justification has been "the need 'to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations.'" *Id.* (quoting *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970), *aff'd in part, rev'd and remanded in part on other grounds*, 446 F.2d 1301 (2d Cir. 1971)) (alteration in original). Thus, "'[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.'" *Id.* (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)) (alteration in original). The SEC said just that in seeking disgorgement here, acknowledging that the remedy "is designed" "to *deter others* from violating securities laws by making violations unprofitable." SEC SJ Mot. 20 (JA106) (emphasis added).

Griffin, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting); *see also* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17, 27-30 (2018) ("There is no equitable remedy of disgorgement.") (quoting Professor Samuel Bray).

Consistent with that purpose, the SEC routinely asks for and gets disgorgement orders forcing defendants to pay amounts far exceeding their personal gains from unlawful activities. *See Kokesh*, 137 S. Ct. at 1644-45 (citing *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014); *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990)). "In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off." *Id.* at 1645. Such orders are inconsistent with the traditional role of equity as an "instrument for nice adjustment and reconciliation," not punishment. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); *see also Livingston*, 56 U.S. (15 How.) at 559*; Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (an "Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance").

This case illustrates that point as well. As the district court calculated, the amount the defendants "personally" gained from the alleged scheme was just over $8 million total — about $6.7 million for Liu and $1.5 million for Wang. App. 42a. Yet the disgorgement order requires the defendants to pay nearly $27 million — "the entire amount raised less the money paid back to the investors." App. 7a. Neither the district court nor the court of appeals allowed any reduction for the defendants' "expenses that reduced the amount of" their actual "illegal profit." *Kokesh*, 137 S. Ct. at 1644. Accordingly, the disgorgement award here is a penalty that "does not simply restore the status quo; it leaves the defendant[s] worse off." *Id.* at 1645.[12]

---

[12] Worse, the court imposed the disgorgement penalty in this case "jointly and severally." App. 62a. Requiring that each

Third, Kokesh explained that SEC disgorgement is also "not compensatory" because the SEC usually does not return disgorged funds to the victims. *Id.* at 1644. Citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946), which "distinguish[ed] between restitution paid to an aggrieved party and penalties paid to the Government," the Court held that an order "to pay a noncompensatory sanction to the Government as a consequence of a legal violation" is a penalty. 137 S. Ct. at 1644.

Again, in this case, the relief sought by the SEC and awarded by the district court nowhere contemplates that the disgorged funds will go directly (or even indirectly) to the alleged victims. *See* App. 40a-41a, 62a-64a. Rather, the SEC asked the district court to order petitioners to send the funds straight to the government. *See Liu* Proposed Final Judgment at 3-4; *see also supra* pp. 10-11.

Kokesh's detailed explanation of why the exact same remedy at issue here constitutes a penalty cannot be confined to the interpretation of the statute of limitations in 28 U.S.C. § 2462. Nothing in *Kokesh* suggests that the term "penalty" had a special meaning in the context of the statute of limitations. On the contrary, because this Court presumes that well-known terms of art conform to "standard civil usage" when used in a statute, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-58 (2007), it follows that a case about the standard meaning of a common term such as "penalty" should carry weight when the same term appears in another context.

---

defendant bear responsibility for the other's share creates another way in which the liability of each individual exceeds the value of that individual's allegedly ill-gotten gain.

Kokesh itself took that approach by (1) drawing its understanding of what constitutes a "penalty" from a case that interpreted the term in a separate context, *see Huntington v. Attrill*, 146 U.S. 657 (1892) (enforceability of foreign-court judgment); and (2) citing a decision defining a penalty in the context of a remedial statute — not a statute of limitations — as further support for this Court's consistent application of that definition, *see Brady v. Daly*, 175 U.S. 148 (1899) (liability for copyright infringement). *See generally Kokesh*, 137 S. Ct. at 1642. Thus, although the *Kokesh* Court limited its express holding to the statute of limitations issue presented, *see id.* at 1642 n.3, the Court's reasoning — joined by all nine Justices — still effectively disposes of this case.

3. The SEC's disgorgement remedy is not traditionally available equitable relief

Even apart from *Kokesh*, the aim and function of disgorgement as sought by the SEC is inconsistent with the historical understanding of equity's limitations. That centuries-old understanding bolsters the conclusion that disgorgement as ordered here is not an equitable remedy.

When determining the scope of equity for both constitutional and statutory purposes, this Court has repeatedly held that a remedy qualifies as "equitable" only if that remedy was "*typically* available in equity" before the merger of law and equity. *Mertens*, 508 U.S. at 256 (interpreting Employee Retirement Income Security Act of 1974 ("ERISA")). This analysis is one that the Court has said it is "accustomed to pursuing, and will always have to pursue," not just in interpreting ERISA but also "in other contexts." *Great-West*, 534 U.S. at 217; *see, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308,

318-19 (1999) (interpreting Judiciary Act of 1789); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) ("familiar" "form" of analysis governs application of Seventh Amendment's guarantee of jury trial in "Suits at common law" to action: whether suit would have been brought in law or equity "'in the courts of England prior to the merger of the courts of law and equity'") (quoting *Tull*, 481 U.S. at 417). The Court has also clarified that the inquiry considers general equity practice rather than isolated instances; that a remedy may have been awarded in "rare cases" is not sufficient to demonstrate that it was "typically" available at equity. *Great-West*, 534 U.S. at 210-11.

That interpretive approach forecloses the SEC's claim that disgorgement is an equitable remedy. Disgorgement was never part of the historical understanding of equity. Rather, it was "largely the brainchild of SEC lawyers of the late 1960s and early 1970s." Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 Rev. Banking & Fin. L. 899, 908-09 (2014); *see Osborn*, 865 F.3d at 470 n.1 (Merritt, J., dissenting) (calling "equitable disgorgement" an SEC invention). The SEC first obtained a disgorgement award in 1970 in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y.). *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 3 Duke L.J. 641, 641 (1977) (calling *Texas Gulf Sulphur* the "first" disgorgement case); *see also Kokesh*, 137 S. Ct. at 1640 (explaining that SEC disgorgement "[b]eg[an] in the 1970's").

Nor does disgorgement have any close historical analogue in equity, as the Court has required in other cases. For example, in *Grupo Mexicano*, the Court

rejected the government's position that a preliminary injunction was available by analogy to a Founding-era action at equity "known as a 'creditor's bill.'" 527 U.S. at 319. The creditor's bill was available only to creditors with a judgment in hand against their debtor; it was premised on the "rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor." *Id.* at 319-20. That element of the Founding-era action precluded authorization of a preliminary — that is, pre-judgment — injunction 200 years later. *See id.*

Likewise, SEC disgorgement cannot be equated with the historical equitable remedy of accounting. As an initial matter, any analogy to accounting makes the government's textual problem worse: just as with "disgorgement," Congress gave the SEC explicit authority to order an "accounting" in administrative proceedings, *see* 15 U.S.C. § 77h-1, but did not include a similar provision in § 77t and § 78u. That aside, historical practice limited the equitable accounting remedy to circumstances not present here or in the mine run of SEC disgorgement efforts.

An equitable claim for an accounting — where not specifically authorized by statute — was typically a remedy for a defendant's breach of trust or of fiduciary duty. *See*, *e.g.*, *United States v. Bitter Root Dev. Co.*, 200 U.S. 451, 477-78 (1906) (rejecting an accounting for unlawfully harvested timber for lack of "any fiduciary relationship between the [defendants] and the government"); *Ellis v. Davis*, 109 U.S. 485, 494 (1883) (affirming dismissal of a bill in equity in part because "[t]he defendant did not sustain towards the complainants at any time any relation of trust and confidence" and "was not their agent"); *Robinson v. Robinson*, 53 N.E. 854, 854 (Mass. 1899) (Holmes, J.) (describing

an "action of account" under an English statute as "like the accountability of a trustee," and adding that "[t]he relation between the parties is fiduciary").[13] Securities violations, by contrast, need not and often do not involve any breach of fiduciary duty. *See, e.g.*, *Aaron v. SEC*, 446 U.S. 680, 695 (1980) ("Section 10(b) . . . applies with equal force to both fiduciary and non-fiduciary transactions in securities."). No fiduciary breach was alleged in this case.

In some cases, courts of equity would also hear claims for an accounting where authorized by statute, as in the case of patent infringement, *see Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 200 (1882) (discussing Act of July 8, 1870, ch. 230, § 55, 16 Stat. 198, 206); where needed "to avoid multiplicity of suits and to do complete justice," *id.* at 207; where "the 'accounts between the parties' [we]re of such a 'complicated nature' that only a court of equity c[ould] satisfactorily unravel them," *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); or where the more extensive discovery historically available in equity but not at law was needed, *see* 1 Dobbs § 4.3(5), at 610. None of those factors is present here or in securities cases generally.

[13] *See also* 1 Dobbs § 4.3(5), at 610-11 ("Equity traditionally took jurisdiction to enforce . . . an accounting because there was a substantive duty to account on the part of the fiduciary."); *id.* at 611-12 & n.29 (discussing twentieth-century cases involving profits recoveries against non-fiduciaries and noting that "[a]gainst a non-fiduciary the case might not be considered to be an 'equitable' one unless there is another basis for equitable jurisdiction"); Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 2 Harv. L. Rev. 241, 248 (1889) (listing the "requirement" for an obligation to account that "there must be a fiduciary relation between the plaintiff and the defendant"); DeLuca, 33 Rev. Banking & Fin. L. at 913-16 ("The presence of a fiduciary relationship . . . was essential to empower a court of equity to grant a money judgment in the form of an accounting.").

The governing statutes do not authorize a judicial accounting; since law and equity have merged, different remedies no longer require multiple lawsuits; complexity is now "rare[ly]," *Dairy Queen*, 369 U.S. at 478, if ever, a reason to take a case from a federal jury; and discovery no longer depends on equity jurisdiction.

Further, the role of equitable accounting, where available, was to return to injured parties "that which . . . is theirs, and nothing beyond this." *Livingston*, 56 U.S. (15 How.) at 560 (accounting for patent infringement); *see also Leman v. Krentler-Arnold Hinge Last Co.,* 284 U.S. 448, 456 (1932) ("In a suit in equity . . . , profits are recoverable not by way of punishment but to insure full compensation to the party injured."). That is not true of disgorgement orders, where funds often are "dispersed to the United States Treasury," *Kokesh*, 137 S. Ct. at 1644, rather than to any victim.[14] Also, unlike disgorgement, which frequently makes "the defendant liable in excess of net gains," *id.* at 1645, accounting is limited to wrongfully obtained profits. That limitation protects the defendant from "the severity of the punishment to which they might be subjected in an action at law for damages." *Root*, 105 U.S. at 215. SEC disgorgement includes no such protection. On the contrary, it often "leaves the defendant worse off." *Kokesh*, 137 S. Ct. at 1645.

Restitution can also sometimes involve a monetary award in equity, *see Great-West*, 534 U.S. at 212-13,

---

[14] That not only removes disgorgement from the realm of equity, but also would render disgorgement beyond the SEC's statutory authority to seek "equitable relief" *even if* disgorgement were equitable, because the SEC's statutory authority here is conditioned on the relief being "for the benefit of investors." 15 U.S.C. § 78u(d)(5). That condition is not met when funds are paid to the government.

but that, too, does not help the SEC. Restitution, like accounting, restores something wrongfully taken from its original possessor. *See Tull*, 481 U.S. at 424 ("Restitution . . . [']order[s] the return of that which rightfully belongs to the purchaser or tenant.'") (quoting *Porter*, 328 U.S. at 402); Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. e (2011) ("Restitution restores something to someone, or restores someone to a previous position."); 1 Dobbs § 4.1(2), at 557 ("Restitution rectifies unjust enrichment by forcing restoration to the plaintiff."). Here, as is usual in SEC enforcement actions, the agency did not commit to return money to victims. *See SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) (SEC disgorgement "does not aim to compensate the victims," and "[i]t is not restitution"); *Kokesh* Oral Arg. Tr. 40 (government counsel: disgorgement is "not restitution in full, because restitution goes back to the harmed parties").

Great-West further makes clear that, "for restitution to lie in equity, the action generally must seek . . . to restore to the plaintiff *particular funds or property*." 534 U.S. at 214 (emphasis added); *see also Montanile v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 658-59 (2016) ("[e]quitable remedies" are generally "'directed against some specific thing . . . rather than a right to recover a sum of money generally'") (quoting 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1234, at 694 (Spencer W. Symons ed., 5th ed. 1941)); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 362-63 (2006) (approving restitution as equitable because the plaintiff "sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [defendants'] assets generally"). Where, by contrast, a restitution order imposes a "'merely personal liability upon the defendant to pay a sum

of money,'" it is "considered legal," not equitable. *Great-West*, 534 U.S. at 213 (quoting Restatement of Restitution § 160 cmt. a (1937)); *accord* Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt. d.

Disgorgement under SEC practice seeks payment of a sum without consideration of whether the defendant retained a particular asset or fund, and also without "consideration of a defendant's expenses that reduced the amount of illegal profit," *Kokesh*, 137 S. Ct. at 1644.[15] This case demonstrates the point: the district court found that Liu and Wang gained $6,714,580 and $1,538,000, respectively, from their alleged scheme. The rest of the funds they had received were no longer in their possession. Yet the court ordered them to disgorge — *jointly and severally*, so certainly without targeting any particular funds — nearly $27 million. That is the type of "'merely . . . personal claim'" that this Court has called "a quintessential action at law." *Montanile*, 136 S. Ct. at 659 (quoting Restatement of Restitution § 215(1)).

Nor can the SEC overcome the lack of a historical analogue by arguing that disgorgement orders are "'in the public interest.'" *Kokesh*, 137 S. Ct. at 1643 (quoting SEC's brief). Equity lacks the policymaking

---

[15] *See SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011) ("[A] disgorgement order pertains to 'a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a *specific asset*,' and 'establishes a *personal liability*, which the defendant must satisfy regardless [of] whether he retains the selfsame proceeds of his wrongdoing.'") (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)) (emphases added; alteration in original); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010); *SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); *see also FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013).

power necessary to further goals broader than the circumstances of the case. *See* 1 Story, *Commentaries* ¶ 14, at 12 (it is not the job of equity to remedy "the defects of positive legislation"); William Blackstone, *An Analysis of the Laws of England* 4 (5th ed. 1762) (equity addresses itself to "Matters of private Right"). In our constitutional system, law is made by the legislature, which is competent to weigh competing policy concerns; and equity, the longstanding maxim holds, "'follows the law.'" *Douglas v. Independent Living Ctr. of S. California, Inc.*, 565 U.S. 606, 619-20 (2012) (Roberts, C.J., dissenting) (quoting 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 425 (3d ed. 1905)). Thus, where law authorizes a complete enforcement scheme, the agency may pursue the relief included in that scheme. But where law withholds or limits a remedy, equity may not invent another to fill the gap, no matter how appealing the invention may seem. *See Great-West*, 534 U.S. at 218 (rejecting "novel and expansive view of equity" where Congress "limit[ed] the relief available").

4. The SEC's disgorgement remedy is not an injunction

The limits on the SEC's authority to seek equitable relief also mean that — contrary to the government's suggestion in its brief in opposition (at 5) — agency authority to ask a court "to enjoin" violations of the law cannot justify disgorgement. *See* 15 U.S.C. §§ 77t(b)(1), 78u(d)(1). Injunctions are a form of equitable relief. *See*, *e.g.*, *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 311 (1982) ("It goes without saying that an injunction is an equitable remedy."). Like other forms of equitable relief, injunctions are understood *not* to be punitive. *See SEC v. Gentile*, 939 F.3d 549, 563 (3d Cir. 2019) (Hardiman, J.). Beyond that, to state "the obvious," disgorgement "isn't an injunction."

FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 771 (7th Cir. 2019) (Sykes, J.). Disgorgement is an order to pay money. An injunction is a remedy governing conduct that "restrain[s] the commission or the continuance of some wrongful act, or the continuance of some omission." George W. Keeton, *An Introduction to Equity* 256 (6th ed. 1965).

Cases such as *Porter v. Warner Holding Co.*, on which the SEC has relied, are not to the contrary. The statute in *Porter* authorized not only injunctive relief, but also any "other order." *See Porter*, 328 U.S. at 397. That explicit language was the *Porter* Court's basis for concluding that Congress "contemplate[d] a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399. Moreover, although the *Porter* Court stated that the statutory "other order" allowance encompassed an order "to disgorge" profits, *id.* at 398-99, the case actually involved a restitution order to victims harmed by excessive rent, *see id.* at 402. The purpose was to "restor[e] the status quo [by] ordering the *return* of that which rightfully belongs *to the purchaser or tenant*." *Id.* (emphases added). The money did not go to the Treasury.[16]

---

[16] *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), also cited by the SEC, similarly affirmed a remedy "*restor[ing]* wage losses *to employees* discharged in violation of" the Fair Labor Standards Act of 1938. 361 U.S. at 296 (emphases added). Moreover, *Mitchell* gave no indication that the statutory scheme it was construing was the sort of "carefully crafted" (*Mertens*, 508 U.S. at 254) framework that triggers a presumption against implying additional remedies. *See Meghrig*, 516 U.S. at 487-88 (rejecting reliance on *Porter* and other cases concerning "inherent" equitable authority where "limited remedies described in" the "elaborate enforcement provisions" demonstrated Congress did not intend "to authorize by implication additional judicial remedies") (citation omitted).

C. No Other Statutory Provisions Indicate That Congress Authorized Disgorgement

The government's brief in opposition cited (at 6-7) a handful of statutory provisions that it claimed "presuppose" that the SEC has a disgorgement power no statute gives it. But agencies obtain authority from Congress's actions, not Congress's presuppositions. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (an agency's power "must always be grounded in a valid grant of authority from Congress," and the Court "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop") (citation omitted). The statutory provisions cited by the SEC certainly do not require the Court to ignore historical limits on the scope of equity, its own on-point analysis in *Kokesh*, or the ordinary principles of statutory interpretation that demonstrate Congress's decision to limit SEC disgorgement power to administrative proceedings.

The SEC's "presupposition" argument asks this Court to infer that, even though disgorgement is neither an "injunction" nor "equitable relief," 15 U.S.C. §§ 77t(b), 78u(d), Congress adopted the misreading of those words that has prevailed in courts of appeals by mentioning disgorgement without correcting those courts' errors. This Court has long recognized that such inferences are rarely, if ever, valid. *See Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."). The provisions cited by the SEC do not come close to establishing affirmative congressional intent to convey to the agency the disgorgement powers withheld by § 77t(b) and § 78u(d).

1. To begin with, most of the provisions on which the SEC relies do not even presuppose judicial (as opposed to administrative) disgorgement. For example, 15 U.S.C. § 7246(a) states that, if "civil penalt[ies]" are awarded "in any judicial *or administrative* action brought by the Commission under the securities laws," the amount of those penalties may "be added to and become part of a disgorgement fund *or other fund* established for the benefit of the victims of such violation." (Emphases added.) That language does not indicate that the SEC can seek disgorgement in court. It covers a range of remedies the SEC might obtain in any type of proceedings, including monetary penalties under the statutory formula in court and disgorgement in administrative proceedings. *See Robers v. United States*, 572 U.S. 639, 643-44 (2014) ("[T]he law does not require legislators to write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed.").

Similarly, 11 U.S.C. § 523(a)(19) exempts from bankruptcy discharge certain debts arising from a "violation of . . . the Federal securities laws" and "result[ing] . . . from . . . any court *or administrative* order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment." (Emphasis added.) That language is again naturally read to apply to a broad range of authorized orders in court cases as well as disgorgement in administrative cases.

The same logic dispenses with the SEC's references to 15 U.S.C. § 78u-6(a)(4)(A), which refers to a range of "penalties, disgorgement, and interest" "with respect to any judicial *or administrative* action," and to 15 U.S.C. § 78u-6(g)(3)(A)(i)-(ii), which refer to "monetary

sanction[s]" resulting from "any judicial *or administrative* action[s]" that are "added to a disgorgement fund *or other fund*." (Emphases added.)

In all of these instances, each word of the statute can be given meaning without any assumption that the SEC can seek disgorgement in court. It is implausible that Congress hid a ratification of agency authority to compel massive disgorgements in such "mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

2. The SEC does identify two statutory provisions referring to judicial disgorgement, but those provisions at most show that Congress knew that some courts were entering disgorgement orders; Congress did not endorse or authorize such orders. One provision is 15 U.S.C. § 78t-1(b)(2), which provides for an offset in certain private damages actions for amounts that a "person may be required to disgorge, pursuant to a court order"; the other is 15 U.S.C. § 78u(d)(4), which prohibits (without SEC authorization) any private attorneys' fees awards from any "funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action."[17]

---

[17] A Senate Banking Committee report in 1990, at the time of the Penny Stock Reform Act — the text of which authorized disgorgement in administrative, but not judicial, proceedings, *see supra* p. 17 — similarly stated in a footnote that "[c]ourts in civil proceedings currently may order disgorgement under their equitable powers." S. Rep. No. 101-337, at 8 n.7 (1990) (citing *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984)). That statement — while an accurate description of then-current (but erroneous) Second Circuit law — does not suggest the Committee thought it was granting such authority in 1990 and certainly cannot amend the earlier version of the statute that the Second Circuit was interpreting in *Materia*. *See Exxon Mobil Corp. v. Allapattah Servs.,*

Neither provision demonstrates the kind of affirmative congressional action necessary to ratify previously unauthorized court determinations. The distinction between congressional action and inaction has constitutional weight because "'Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President.'" *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). In that system, a mere "'failure to overturn a statutory precedent,'" *id.* (quoting *Patterson*, 491 U.S. at 175 n.1) — especially one never endorsed by this Court — deserves, at most, "little weight in the interpretive process," *id.* at 187. Here, Congress never passed and the President never signed any bill authorizing the remedy that the SEC sought against petitioners. That is sufficient reason to conclude that the SEC lacks the power it exercised.

In the few cases where this Court has found implicit legislative ratification of judicial or administrative actions, the evidence of congressional intent has been far stronger than anything here. *See*, *e.g.*, *Brown & Williamson*, 529 U.S. at 155, 156 (pointing to Congress's "creati[on of] a distinct regulatory scheme for cigarettes and smokeless tobacco," and its "persistent[] act[ions] to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health," to interpret the jurisdiction of

---

Inc., 545 U.S. 546, 568 (2005) (noting that, although members of this Court disagree about "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I," such materials at best "have a role . . . only to the extent they shed a reliable light on the *enacting* Legislature's understanding of otherwise ambiguous terms") (emphasis added).

the Food and Drug Administration as excluding tobacco regulation); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165-66 (2008) (Congress "ratified the implied right of action" under SEC Rule 10b-5 by passing the Private Securities Litigation Reform Act of 1995, an entire statutory framework regulating private securities litigation).

Where, as here, the side arguing from congressional silence can point "only [to] isolated amendments" addressing the matter at hand, this Court has "spoken . . . bluntly" in refusing to find "'affirmative congressional approval.'" *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Central Bank of Denver*, 511 U.S. at 186); *Patterson*, 491 U.S. at 175 n.1 (rejecting reliance on the "passage of an attorney's fee statute" related to a contested cause of action and on the "failure of an amendment to a different statute") (emphases omitted). Sections 78t-1(b)(2) and 78u(d)(4) match well with *Alexander*'s description of "isolated amendments." They show Congress ameliorating the worst consequences of disgorgement orders combined with private damages and creating a presumption that any disgorgement funds should not go to private attorneys, but they do not reflect any legislative consensus that the SEC should be able to seek judicial disgorgement orders in the first place.

Finally, another reason that the Court should disregard Congress's failure to overrule *Texas Gulf Sulphur* is that — as is often the case — there is countervailing evidence suggesting a different legislative understanding of the SEC's disgorgement authority. Congress is now considering legislation that would amend the securities laws to authorize the SEC to seek disgorgement in federal court proceedings. Section 2 of the Investor Protection and Capital Markets

Fairness Act would amend 15 U.S.C. § 78u(d) to include a provision allowing courts to grant "additional relief" including "[d]isgorgement in the amount of any unjust enrichment obtained as a result of the act or practice with respect to which the Commission is bringing such an action or proceeding." H.R. 4344, 116th Cong. § 2 (2019) (passed House Nov. 18, 2019; referred to Senate Committee on Banking, Housing, and Urban Affairs). Those actions suggest that at least the current House of Representatives — which has the benefit of *Kokesh* — thinks that existing law does not authorize judicial disgorgement and that any such remedy should be explicitly limited to the amount of "unjust enrichment." *See Central Bank of Denver*, 511 U.S. at 187 (observing that conflicting but "'equally tenable inferences'" may frequently be drawn from "failed legislative proposals") (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

II. THE SEC IS WELL EQUIPPED TO REGULATE FINANCIAL MISCONDUCT WITHOUT SEEKING PUNITIVE DISGORGEMENT IN FEDERAL COURT

Limiting the SEC to the remedies Congress actually granted it would not impose any undue limitation on its ability to enforce the federal securities laws and protect the Nation's investors. Rather, as this Court observed in *Kokesh*, Congress's enactments have "left the Commission with a full panoply of enforcement tools." *Kokesh*, 137 S. Ct. at 1640.

A. The SEC Can Seek Disgorgement in Administrative Proceedings

Foremost, Congress has authorized the SEC to seek in administrative proceedings the very relief it sought here. Section 102 of the 1990 Penny Stock Reform Act

expressly provides that "[i]n any cease-and-desist proceeding" — that is, any administrative proceeding — "the Commission may enter an order requiring accounting and disgorgement, including reasonable interest." 104 Stat. 935 (codified at 15 U.S.C. § 77h-1(e)). The SEC's administrative authority was further enlarged in the Dodd-Frank Act. Prior to that enactment, much of the SEC's most potent enforcement powers were limited to actions in federal court. The Dodd-Frank Act changed that by empowering the agency to "pursue most sanctions for violations of the securities laws," including civil penalties, in both "federal court[s]" and "administrative proceeding[s]." Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 Yale J. Reg. 1, 4, 7 (2017).

Perhaps not surprisingly, the SEC has embraced its expanded adjudicative authority. A recent empirical analysis found "a decline in the number of court actions and an increase in the number of administrative proceedings post-Dodd-Frank." *Id.* at 4. And, in particular, the volume of disgorgement the SEC has obtained in administrative proceedings has significantly increased in administrative proceedings relative to civil actions. *Id.* at 23-24. In general, the SEC has "shift[ed] some of its cases from federal court to administrative tribunals," resulting in "a substantial increase in the SEC's leverage" over alleged wrongdoers. *Id.* at 31.

Given that trend, it is hard to imagine that limiting what the SEC may pursue *in court* to the remedies Congress actually authorized would hobble the agency's enforcement efforts.

B. In Federal Court, the SEC May Seek Penalties Equal to the Defendant's "Pecuniary Gain"

Further bolstering the SEC's enforcement authority is the power to seek civil penalties in amounts commensurate with those that it has sought using the (agency-invented) disgorgement remedy. For example, 15 U.S.C. § 78u(d)(3)(B)(ii) authorizes the Commission to seek and obtain civil penalties equal to "the gross amount of pecuniary gain" to the defendant as a result of the violation if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Such a penalty would, by definition, deprive the defendant of its ill-gotten profits — in line with the original theoretical underpinnings of the disgorgement remedy. *See Kokesh*, 137 S. Ct. at 1640.

These penalties are not just theoretical. In the last five fiscal years alone, SEC proceedings have resulted in more than *$5 billion* in penalties; awards in individual cases were routinely for $100 million or more.[18] Indeed, penalties calculated according to pecuniary gain were imposed in this case. *See supra* p. 10.

* * *

The menu of remedies available to the SEC leaves it more than amply equipped to enforce the securities laws without imposing remedies Congress never authorized. According to the SEC, it need not even

---

[18] *See 2019 SEC Enforcement Division Report* 16; SEC Press Release, *Petrobras Reaches Settlement With SEC for Misleading Investors* (Sept. 27, 2018), *available at* https://www.sec.gov/news/press-release/2018-215; SEC, Div. of Enforcement, *Annual Report: A Look Back at Fiscal Year 2017*, at 10, *available at* https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

choose whether to proceed in court or within the agency. It says it has the option to "bring both" federal court and administrative proceedings. SEC, *How Investigations Work*. Whether or not that is so, this much is clear: disgorgement may be ordered in the latter forum, but not the former.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL K. KELLOGG
Counsel of Record
GREGORY G. RAPAWY
BENJAMIN S. SOFTNESS
JULIA L. HAINES
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

HERVÉ GOURAIGE
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-5989

December 16, 2019

ADDENDUM

TABLE OF CONTENTS

Page

Securities Act of 1933, 15 U.S.C. § 77a *et seq.*:

§ 8A(a), 15 U.S.C. § 77h-1(a) .... Add. 1

§ 8A(e), 15 U.S.C. § 77h-1(e) .... Add. 2

§ 8A(f), 15 U.S.C. § 77h-1(f) .... Add. 2

§ 8A(g), 15 U.S.C. § 77h-1(g) .... Add. 2

§ 17(a)(2), 15 U.S.C. § 77q(a)(2) .... Add. 4

§ 20(b), 15 U.S.C. § 77t(b) .... Add. 5

§ 20(d), 15 U.S.C. § 77t(d) .... Add. 6

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*:

§ 21(d), 15 U.S.C. § 78u(d) .... Add. 8

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376:

§ 744, 124 Stat. 1735 (codified at 7 U.S.C. § 13a-1(d)(3)) .... Add. 14

§ 1055(a), 124 Stat. 2029-30 (codified at 12 U.S.C. § 5565(a)) .... Add. 15

STATUTORY PROVISIONS INVOLVED

1. Sections 8A(a), (e), (f), and (g) of the Securities Act of 1933, 15 U.S.C. § 77h-1(a), (e)-(g), provide:

§ 77h-1. Cease-and-desist proceedings

(a) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

* * *

(e) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(f) Authority of the Commission to prohibit persons from serving as officers or directors

In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 77q(a)(1) of this title or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title, or that is required to file reports pursuant to section 78*o*(d) of this title, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

(g) Authority to impose money penalties

(1) Grounds

In any cease-and-desist proceeding under subsection (a), the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing, that—

(A) such person—

(i) is violating or has violated any provision of this subchapter, or any rule or regulation issued under this subchapter; or

(ii) is or was a cause of the violation of any provision of this subchapter, or any rule or regulation thereunder; and

(B) such penalty is in the public interest.

(2) Maximum amount of penalty

(A) First tier

The maximum amount of a penalty for each act or omission described in paragraph (1) shall be $7,500 for a natural person or $75,000 for any other person.

(B) Second tier

Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $75,000 for a natural person or $375,000 for any other person, if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person or $725,000 for any other person, if—

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in—

(I) substantial losses or created a significant risk of substantial losses to other persons; or

(II) substantial pecuniary gain to the person who committed the act or omission.

(3) Evidence concerning ability to pay

In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the ability of the respondent to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of the ability of the respondent to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon the assets of the respondent and the amount of the assets of the respondent.

2. Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), provides:

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

* * *

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

* * *

3. Sections 20(b) and (d) of the Securities Act of 1933, 15 U.S.C. § 77t(b), (d), provide:

§ 77t. Injunctions and prosecution of offenses

* * *

(b) Action for injunction or criminal prosecution in district court

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

* * *

(d) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 77h-1 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipu-

lation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) Procedures for collection

(A) Payment of penalty to Treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(B) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) Remedy not exclusive

The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) Jurisdiction and venue

For purposes of section 77v of this title, actions under this section shall be actions to enforce a liability or a duty created by this subchapter.

(4) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 77h-1 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with such an order, each day of the failure to comply with the order shall be deemed a separate offense.

* * *

4. Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d), provides:

§ 78u. Investigations and actions

* * *

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in

acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d)

of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) Money penalties in civil actions

(A) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) Amount of penalty

(i) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) Second tier

Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation

described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) Third tier

Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) Procedures for collection

(i) Payment of penalty to treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(ii) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) Remedy not exclusive

The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) Jurisdiction and venue

For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) Prohibition of attorneys' fees paid from commission disgorgement funds

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) Equitable Relief

In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) Authority of a court to prohibit persons from participating in an offering of penny stock

(A) In general

In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) Definition

For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

* * *

5. Section 744 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1735 (codified at 7 U.S.C. § 13a-1(d)(3)), provides:

§ 13a-1. Enjoining or restraining violations

* * *

(d) Civil penalties

* * *

(3) Equitable remedies

In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including—

(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and

(B) disgorgement of gains received in connection with such violation.

* * *

6. Section 1055(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 2029-30 (codified at 12 U.S.C. § 5565(a)), provides:

§ 5565. Relief available

(a) Administrative proceedings or court actions

(1) Jurisdiction

The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) Relief

Relief under this section may include, without limitation—

(A) rescission or reformation of contracts;

(B) refund of moneys or return of real property;

(C) restitution;

(D) disgorgement or compensation for unjust enrichment;

(E) payment of damages or other monetary relief;

(F) public notification regarding the violation, including the costs of notification;

(G) limits on the activities or functions of the person; and

(H) civil money penalties, as set forth more fully in subsection (c).

(3) No exemplary or punitive damages

Nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.

* * *