No. 18-1501

IN THE

Supreme Court of the United States

CHARLES C. LIU, ET AL.,
Petitioners,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. One of the ways that AFPF educates and advocates for those ideas is by submitting *amicus curiae* briefs to this, and other, courts.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission ("SEC" or "Commission") has wrongly conscripted the power of a court sitting in equity to grant complete relief—including ancillary legal damages—to expand its statutory power to seek equitable relief to include the imposition of personal liability for multimillion-dollar judgments in the name of disgorgement. The SEC's success in obtaining an extra-textual monetary award in *Securities & Exchange Commission v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92-94 (S.D.N.Y. 1970),

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

aff'd in part, 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971), was the beachhead that allowed its sister agencies access to similar feints—largely successful—at expanding their authority beyond the text of their statutes. As a result, when it comes to monetary awards, Congressional limits are largely ignored, making the separation of powers essentially non-existent in the sphere of agency disgorgement awards. The collateral effect is the undermining of fundamental constitutional rights, such as the right to a jury trial; common law rights, such as the right to dispose of assets prior to entry of a judgment; and statutory procedural and substantive rights. The mishmash of fictions that combine to maximize the size of monetary awards, as if they were legal damages, but to minimize defendants' opportunities for redress and due process demonstrates the failure to protect individual liberty and the rule of law.

ARGUMENT

I. THE SEC'S "EXPANSION" OF SECTIONS 77T AND 78U VIOLATES THE SEPARATION OF POWERS.

A. Congress Specified the Types of Relief Available under the Securities Laws.

The SEC is a creature of statute and has only those powers that Congress conferred upon it. *See La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986); *see also Lyng v. Payne*, 476 U.S. 926, 937 (1986). Thus, whether the SEC may obtain disgorgement in federal court turns on whether Congress has statutorily granted it the power to seek such relief. Congress has not.

"After rampant abuses in the securities industry led to the 1929 stock market crash and the Great

Depression," Congress enacted a series of laws regulating the securities industry. *Kokesh v. Sec. & Exch. Comm'n*, 137 S. Ct. 1635, 1639–40 (2017). "The second in the series—the Securities Exchange Act of 1934—established the [SEC] . . . to enforce federal securities laws." *Id.* at 1640.

The SEC Act of 1934 granted the SEC rulemaking authority, as well as the authority to investigate potential securities law violations. *See id.* It also authorized the SEC to bring enforcement actions in federal district court. *See id.* But "the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws." *Id.* (citing 1 T. Hazen, Law of Securities Regulation §1:37 (7th ed., rev. 2016)).

Fifty years later, "Congress first gave the SEC statutory authority to impose civil penalties for insider trading violations in 1984. Congress did so again in 1988." Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 Bus. Law. 318, 323 (2008); *see* Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264, 1264–65 (codified at 15 U.S.C. § 78u).

In 1990, Congress further expanded the SEC's enforcement remedies, authorizing the agency to seek *civil penalties* in federal district courts—not disgorgement—for any violation of the federal security statutes. *See* Securities Enforcement Remedies and Penny Stock Reform Act, Pub. L. No. 101-429, §§ 101, 202, 104 Stat. 931, 932–33, 937–38 (1990) (codified at 15 U.S.C. §§ 77t, 78u-2). Congress also granted the SEC authority to seek disgorgement in *administrative* proceedings under certain circumstances. *See id.* §§ 202(a), 203, 104 Stat. at

937–40 (codified at 15 U.S.C. §§ 78u-2(e) (authority to enter an order requiring an accounting and disgorgement), 78u-3(e) (authority to enter an order requiring an accounting and disgorgement)).

In 2002, Congress amended the SEC Act of 1934 to authorize the Commission to seek "any equitable relief that may be appropriate or necessary for the benefit of investors." Sarbanes-Oxley Act, Pub. L. No. 107-204, § 305(b), 116 Stat. 745, 779 (2002) (codified at 15 U.S.C. § 78u(d)(5)). But, again, Congress did not grant the SEC disgorgement powers.

In 2010, Congress further empowered the SEC to pursue financial penalties through its *administrative* process. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862 (2010).

Despite this series of amendments, at no point has Congress granted the Commission the power to pursue disgorgement in federal court. Instead, in federal court actions, Congress has authorized the SEC to seek only injunctions, 15 U.S.C. § 77t(b), 78u(d)(1), certain civil monetary penalties, *id.* § 77t(d), 78u(d)(3), and equitable relief, *id.* § 78u(d)(5).

B. The SEC Rejects Congress's Statutory Scheme.

For the first thirty-plus years of its existence, the SEC never claimed in federal court congressional authorization to seek money damages under equity. It was not until the mid-1960s that the SEC "first argued in federal court for the right to seek" disgorgement. John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977

Duke L. J. 641, 641 (1977).[2] As one commentator put it in 1977:

> Nowhere within the statutory framework of the federal securities laws did Congress provide that the SEC would have the power to make a violator of the anti-fraud provisions disgorge tainted profits. Nor is there any direct reference in the legislative history surrounding the passage of the 1933 or 1934 Acts which would encourage the utilization of such an enforcement tool by the SEC.[3] It would appear that this dearth of legislative support dissuaded the Commission for some three decades from testing in court the right to obtain such relief.

Id. at 642. Instead, for thirty years, the Commission was content to occasionally strong-arm "voluntary" restitution in settlements, *see id.* at 643, as opposed to asking federal courts to endorse this overreach.

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[2] "A much earlier effort by the SEC to achieve such a right was abortive." Ellsworth, *supra* at 641 n.1.

[3] "In fact, the legislative history of the 1934 Act has been cited against the SEC's position on disgorgement." *Id.* at 642 (citing *Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 & n.7 (2d Cir. 1971); *see* S. Rep. 792, 73d Cong., 2d Sess., 1934, at p. 22; H.R. Rep. 1383, 73d Cong., 2d Sess., 1934, at p. 27.

What changed? Long before other agencies[4]—most prominently the Federal Trade Commission ("FTC")[5]—first weaponized dicta from a World-War II era Supreme Court case interpreting Section 205(a) of the Emergency Price Control Act of 1942, *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946), to claim extra-statutory disgorgement powers (erroneously referred to as "equitable monetary relief"), a law professor, Louis Loss, latched onto *Porter* as a vehicle the SEC could use to expand its statutory authority. "In the early 1960s the Commission's policy of friendly persuasion to achieve restitution came under criticism from securities law expert Professor Louis Loss." Ellsworth, *supra* at 643–44. Professor Loss contended

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[4] "Various agencies have piggybacked on the SEC's efforts to convince courts that they may order disgorgement to secure disgorgement orders of their own." 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, 909 (2014).

[5] As a former FTC official has candidly advised regarding the FTC's premeditated extra-statutory expansion of Section 13(b) of the FTC Act to include disgorgement remedies: "Don't overlook the value of basic research. Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there, however, research into the case law interpreting statutes conferring similar injunctive authority on other agencies led to the *Porter* line of cases, providing critical support for a broad interpretation of Section 13(b)." David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* at 22 (Paper, FTC 90th Anniversary Symposium) (Sept. 23, 2004), *available at* http://bit.ly/2kUIIcf. The Seventh Circuit recently rejected this extra-statutory and unconstitutional *Porter*-based expansion of the FTC's powers. *See Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019).

that two Supreme Court decisions post-dating the 1933 Securities Act and 1934 SEC Act interpreting different statutes granted the SEC disgorgement powers under the guise of equity. *See id.* at 644. "Professor Loss saw support for his claim that the SEC was not limited to injunctions alone in combating securities fraud in *Porter v. Warner Holding Co.*" *Id.* at 644.

So, too, did the SEC engage in a campaign of creative lawyering to expand its powers to accord with its views about the purpose of the securities laws:

> The remedy is largely the brainchild of SEC lawyers of the late 1960s and early 1970s. Stanley Sporkin, the Deputy Director of the SEC's Enforcement Division when courts began granting disgorgement, argued that courts could grant disgorgement pursuant to their equitable powers. Specifically, Sporkin argued "that an equity court traditionally has been able to mold the kinds of remedies that are required to do justice." Adopting Sporkin's argument, early courts ordering disgorgement in SEC enforcement proceedings premised their disgorgement orders on their equitable authority to grant relief that would effectuate the purposes of the securities acts as incidental to the grant of an injunction.

Deluca, *supra* at 909; *see* Stanley Sporkin, *SEC Developments in Litigation and the Molding of Remedies*, 29 Bus. Law. 121, 122–23 (1974)

(discussing SEC's disgorgement arguments).[6] *But cf. Henson v. Santander Consumer USA Inc.,* 137 S. Ct. 1718, 1725 (2017) ("No statute yet known pursues its stated purpose at all costs.") (cleaned up).

The SEC used *Porter* and other case law of similar vintage to pave the way for its disgorgement claims.[7] It succeeded. Beginning with *Securities & Exchange Commission v. Texas Gulf Sulphur Co*., the SEC convinced courts to bless its invented disgorgement powers. *See* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17, 20 (2018) ("There is general agreement that the penalty phase of *Texas Gulf Sulphur* was the first time a court determined that the SEC had authority to seek disgorgement[.]"); Comment,

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[6] As a former Director of the Division of Enforcement of the SEC, put it: "It used to be that we were satisfied with merely going into court, obtaining a consent decree and leaving it up to the private bar to sue and obtain money damages. But we have found that in many cases this approach seems to be a waste of effort and detrimental to the interests of the investing public." Sporkin, *supra* at 122.

[7] *Porter* should also be viewed in context. Congress granted the Price Controls Board broad powers under the Emergency Price Control Act to limit profiteering during wartime. Section 205(a) allowed that agency to apply for a "permanent or temporary injunction restraining order, or other order[.]" *Porter*, 328 U.S. at 397 (emphasis added); *see id.* at 405 (Rutledge, J., dissenting) (rejecting broad construction of "other order" to include restitution). *Porter* "held that restitution was a proper 'other order' under section 205(a)." *Credit Bureau Ctr*., *LLC*, 937 F.3d at 776. Unlike in *Porter*, "[n]either the statutory language nor the legislative history of the 1933 or 1934 Acts, however, could offer such assistance to the SEC's cause." Ellsworth, *supra* at 645. This remains true today.

Equitable Remedies In SEC Enforcement Actions, 123 U. Pa. L. Rev. 1188, 1190 & n.13 (1975) (discussing *Texas Gulf Sulphur*'s reliance on *Porter* and *Mitchell*). Before this "landmark decision," "Federal courts previously limited the SEC largely to the relief authorized by the" SEC Acts of 1933 and 1934. Patrick L. Butler, Note, *Saving Disgorgement from Itself: SEC Enforcement After* Kokesh v. SEC, 68 Duke L.J. 333, 336 (2018).

In *Texas Gulf Sulfur*, however, the SEC urged the district court "to provide [disgorgement,] a remedy which, in accord with the congressional purpose of the 1934 Act, will protect the investing public by providing an effective deterrent to future violations." *Tex. Gulf Sulphur Co.*, 312 F. Supp. at 92. The district court obliged. *See id.*; *cf. Sec. & Exch. Comm'n v. R. J. Allen & Assocs., Inc.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974) ("The word 'disgorgement' appears to be a term of modern vintage utilized in connection with [SEC] suits seeking to deprive the defendants of the gains from their wrongful conduct as an ancillary remedy to fully effect the deterrent force that is essential to adequate enforcement of the federal securities laws."). *But see Henson*, 137 S. Ct. at 1725.

Since then, the SEC has continuously and aggressively expanded its disgorgement powers for the punitive purpose of deterrence. As one Commissioner explained in 1985: "[D]isgorgement is now a regular weapon in the enforcement arsenal and it is used, since the landmark decision in *Texas Gulf Sulphur*, to deprive those who illegally trade while in possession of inside information of their ill-gotten gains." Aulana L. Peters, Comm'r, Sec. & Exch. Comm'n, Address to the Wash. State Bar Ass'n Nw.

Sec. Inst.: Ancillary Relief and Remedies: Exotic, Extraordinary or Just Plain Effective?, at 6–7 (Feb. 23, 1985), *available at* http://bit.ly/2LWwE4D. "In the years since [*Texas Gulf Sulphur*], it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that the primary purpose of disgorgement orders is to deter violations of the securities laws[.]" *Kokesh*, 137 S. Ct. at 1643; *cf. Secs. & Exch. Comm'n v. Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) ("[D]isgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture[.]").

Yet "[o]ver time, courts came to accept as a truism the notion that disgorgement is inherently an ancillary equitable remedy."[8] Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, Harv. Bus. L. Rev. Online at 3 (2013); *cf. Fed. Trade Comm'n v. Hornbeam Special Situations, LLC,* No. 17-3094, 2018 WL 6254580, at *6 (N.D. Ga. Oct. 15, 2018) ("The difficulty of statutes like § 53(b) arises from the accretions of time, those well-meaning or oversighted judicial glosses that encrust themselves upon a law through loose interpretation. . . . These meta-textual pontifications seem good in the short run, but a long journey on even a narrowly wrong heading can be ruinous."). Indeed, the *exact* phrase "disgorgement is

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[8] "The most persuasive argument for ancillary relief in federal securities law is that the Supreme Court and many lower courts have approved such relief and that almost no judicial precedent has questioned it. These precedents must be carefully scrutinized, however, to gauge the depth of their support of ancillary relief." George W. Dent, Jr., *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 869 (1983).

an equitable remedy" can be found in dozens of SEC enforcement cases. *See* Ryan, *supra* at 1 n.3.

As one commentator explained: "[D]isgorgement sought by the SEC in federal court exists as purely a judicial creation, legitimized by the Second Circuit in 1971" in *Texas Gulf Sulphur*.[9] Butler, *supra* at 336. This origin constitutes an "impermissible exercise of judicial creativity, and it contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies." *Fed. Trade Comm'n v. AMG Capital Mgmt.*, *LLC*, 910 F.3d 417, 437 (9th Cir. 2018) (O'Scannlain, J., specially concurring) (addressing a similar error of statutory interpretation regarding Section 13(b) of the FTC Act), *petition for cert. filed*, No. 19-508 (Oct. 21, 2019).

It is also important to note that this body of implied "equitable monetary relief" case law has, as the Seventh Circuit recently explained in the context of the FTC's efforts to piggy-back on the SEC's disgorgement power-grab, "developed in the shadow of two decisions that took a capacious view of implied remedies: *Porter v. Warner Holding Co.* and *Mitchell v. Robert DeMario Jewelry, Inc.*" *Credit Bureau Ctr., LLC*, 937 F.3d at 776 (citations omitted).[10] "The

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[9] "Significantly, most of the seminal SEC disgorgement cases were decided before Congress first empowered the agency in 1990 to seek monetary penalties against securities law violators." Ryan, *supra* at 3.

[10] "The Supreme Court's understanding of implied remedies evolved after *Porter* and *Mitchell*." *Credit Bureau Ctr., LLC*, 937 F.3d at 779. The Court's post-*Porter* and -*Mitchell* "decisions collided with *Porter* and *Mitchell* in *Meghrig v. KFC Western,*

precedents that agencies, like the SEC, rely on to justify disgorgement and restitution remedies as ancillary to injunctive authority—*Porter* . . . and *Mitchell*—have been described as relics from an era in which the Supreme Court considered it a 'duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose,' rather than to hone to the statute's text." M. Sean Royal, *et al.*, *Are Disgorgement's Day's Numbered?*, 32 Antitrust ABA 94, 96 n.31 (Spring 2018). *Porter* and similar cases of its vintage fit uneasily within the Court's current model of statutory interpretation.

Worse still, the widespread reliance on *Porter* and *Mitchell* to categorize restitution as equitable relief may well be based on a fundamental misreading of those cases, which granted monetary relief based on the Court's power to grant full relief—both equitable and legal—but did not purport to subsume the monetary award into the stable of traditional equitable remedies.

> The Court's opinions in *Porter* and *Mitchell* share circumstances that have confused subsequent opinions regarding implied jurisdiction and equitable remedies. First, neither opinion held that the monetary remedies at issue were remedies in equity. Both opinions state that the proposed remedies may better resemble remedies at law, but that the remedies were sufficiently

Inc." *Id.* at 780 (citing 516 U.S. 479 (1996)). "Since *Meghrig*, the Court has adhered to this more limited understanding of judicially implied remedies." *Id.* at 781.

> ancillary to legitimate claims for injunctive relief. This 'clean-up' doctrine, or doctrine of complete relief, precluded the need to evaluate the proposed remedies.

George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 24 (2007)

Later courts thus erred in presuming that *Porter* redefined restitution as equitable rather than as compensatory damages:

> The Court in *Porter* had no occasion to distinguish compensatory damages from restitution, but rather was faced with deciding whether monetary relief incidental to an injunction could be awarded without circumventing the scheme of treble damages and attorney's fees set forth in section 205(e). Furthermore, "restoration of a loss to the plaintiff" does not distinguish restitution from compensation or damages when the loss is that of money. The Court's language should not be read as providing a meaningful distinction between restitution and compensation.

Id. at 25 n.81 (citation omitted).

This interpretation of *Porter* is consistent with the Court's later reliance on the distinction between equitable relief and legal damages. For example, this Court has "long rejected the argument that 'equitable relief' . . . means 'whatever relief a court of equity is

empowered to provide in the particular case at issue,' including ancillary legal remedies." *Montanile v. Bd. of Trustees of Nat.'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660 (2016). And "[w]hile equity courts sometimes awarded money decrees as a substitute for the value of the equitable lien, they were still legal remedies, because they were 'wholly pecuniary and personal.'" *Id*. at 660–61. In "many situations . . . an equity court could establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." *Mertens v. Hewitt Assocs*., 508 U.S. 248, 256 (1993). And "'Since *all* relief available . . . could be obtained from a court of equity, limiting the sort of relief obtainable . . . to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*." *Id*. at 257.

Indeed, the Court in *Great-West Life & Annuity v. Knudson* went to some length to distinguish equitable restitution from legal restitution, writing that "not all relief falling under the rubric of restitution is available in equity." 534 U.S. 204, 212 (2002). Legal restitution, the Court explained was when the plaintiff "sought 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.'" *Id*. at 213 (citing Restatement of Restitution § 160, Comment a (1936)). By contrast, equitable restitution was available "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id*. (citations omitted). Because *Great-West* did not overrule *Porter* and *Mitchell*, this rubric distinguishing legal from equitable restitution must

be consistent with the Court's grant of *legal* monetary relief that was ancillary to the equitable relief in *Porter*.

C. Inapposite Precedent Cannot Override a Statute's Plain Language

The SEC's mansion of favorable precedent is built upon statutory quicksand. "SEC disgorgement is not authorized by statute." *Sec. & Exch. Comm'n v. Gentile*, 939 F.3d 549, 562 (3d Cir. 2019); *see Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390 (2d Cir. 1973) ("The SEC has no express statutory authority to seek rescission, restitution, or other forms of equitable monetary relief."). There is no textual foundation for its claimed disgorgement powers. And "[w]ithout any textual basis, it is hard to see where the Supreme Court would look for a clear statement of congressional intent to deviate from equitable traditions. Indeed, at the *Kokesh* oral argument several Justices expressed frustration that the lack of statutory text made it hard to define SEC disgorgement." *Gentile*, 939 F.3d at 562. Thus, as Justice Gorsuch observed in reference to SEC disgorgement, "because there's no statute governing it. We're just making it up." Oral Arg. Tr. at 52:14–16, *Kokesh v. Sec. & Exch. Comm'n*, No. 16-529 (U.S. Apr. 18, 2017). Agencies only possess powers Congress *affirmatively chooses* to delegate to them. *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Congress did not do so here. That should end the matter.

Congress is not required to expressly negate an agency's claimed administrative powers, as the SEC appears to have long assumed. "Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On

the contrary, . . . a statutory silence on the granting of a power is a denial of that power to the agency." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring); *see Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

Nor is there any indication in the Acts or legislative history that Congress intended to provide the SEC broad authority to obtain disgorgement or even considered the possibility. *See* Ellsworth, *supra* at 642 & n.6; Dent, *supra* at 930 ("Since the legislative history expresses no support for disgorgement, restitution, or rescission, can these remedies be justified?"). The watchdog of congressional intent simply didn't bark here. *See Finnegan v. Leu*, 456 U.S. 431, 441 n.12 (1982).

A contrary result does violence to the statutory scheme. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *see also United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005).

The SEC's wayward *Porter*-based arguments for disgorgement fare no better. Nor can judicial precedent interpreting different statutes, enforced by different agencies, override plain language and structure. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (rejecting "analogies to other statutory regimes").

The SEC may seek to elide the lack of textual basis for its claimed disgorgement powers by averring "congressional ratification" based on "subsequent legislative history." This should be rejected out-of-hand. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part).

This Court should also reject any attempt by the SEC to trot out the old adage that remedial statutes should be broadly construed. *See, e.g.*, *Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147, 158 (3d Cir. 2019); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). If anything, Sections 77t and 78u should be *narrowly* construed to protect defendants' due-process rights. *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (due process requires fair notice).

The SEC's slow accretion of power has gone too far and gone on too long. It is time for this Court to prune back the agency's overreach and stop the real-world harm this overreach has caused.

II. THE SEC'S EXTRA-TEXTUAL PRECEDENT HAS SPREAD TO OTHER AGENCIES, FURTHER UNDERMINING SEPARATION OF POWERS.

The SEC's reliance on the *Porter/Mitchell* line of cases to justify its monetary demands has spread to other agencies, which have either adopted the SEC's legal theory or relied directly on SEC precedent. This proliferation, irrespective of the text of the individual agencies' controlling statutes, highlights the assault on separation of powers that extra-textual monetary remedies create under the guise of equity. The Court should clarify that the statute means what it says, and that *Porter/Mitchell* cannot be used to confect new agency powers by conferring courts' equitable powers to Executive Branch agencies.

A. The FTC Leads the Way with Extra-Textual Monetary Demands Under a Statute that Allows Only for Injunctions.

The FTC's reliance on the *Porter/Mitchell* line of cases buttressed by SEC precedent to justify its monetary demands represents the highwater mark in agency divergence from their statutory moorings.

Section 13(b) of the Federal Trade Commission Act provides that the FTC "may seek and . . . the court may issue, a permanent injunction," but it grants no authority for monetary awards. 15 U.S.C. § 53(b). Nevertheless, the FTC has established a practice, with the imprimatur of the courts, of demanding so-called "equitable monetary relief"—which courts have granted pursuant to their equitable powers. *See, e.g.*, *Fed. Trade Comm'n v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (affirming award of $487,500 in reliance on *Porter* and *Sec. & Exch. Comm'n v. Blatt*, 583 F.2d 1335 (5th Cir. 1978)); *Fed. Trade Comm'n v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011) (affirming award of $1,942,325 in reliance on *Porter* and *Texas Gulf Sulphur*); *Fed. Trade Comm'n v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (affirming award of $18.2 million in reliance on *Porter*, *Secs. & Exch. Comm'n v. First Pac. Bancorp*, 142 F.3d 1186(9th Cir.1998), and *Hateley v. Sec. & Exch. Comm'n*, 8 F.3d 653 (9th Cir.1993)); *see also Stats & Data 2017 – Annual Highlights 2017*, Fed. Trade Comm'n, http://bit.ly/2mwz7sj (last visited Dec. 18, 2019) ($5.29 billion in consumer protection "redress and disgorgement," in 2017, with $269 million, or ~ 5%, paid to consumers from the FTC.). *But see Credit Bureau Ctr., LLC*, 937 F.3d at 767 ("[S]ection 13(b)'s grant of authority to order

injunctive relief does not implicitly authorize an award of restitution.”).[11]

B. The FDA Has No Statutory Authority for Equitable Monetary Relief but Pursues it Anyway.

As with the FTC, Congress expressly granted the Food and Drug Administration (“FDA”) authority to enforce its authority through injunctions without any mention of accompanying monetary relief.[12] Nevertheless, relying on *Porter* and sundry SEC cases, the FDA has sought, and courts have granted, restitution. *See, e.g.*, *Universal Mgmt. Servs.,Inc.*, 191 F.3d at 760–61, 763 (relying on *Porter, Mitchell,* and *Blatt*); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1054–55, 1061 (10th Cir. 2006) (relying on *Porter*, *Mitchell*, and *Sec. & Exch. Comm’n v. Fischbach Corp.*, 133 F.3d 170 (2d Cir.1997)); *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 236 (3d Cir. 2005) (relying on *Porter, Mitchell*, and *Sec. & Exch. Comm’n v. First City Fin. Corp.*, 890 F.2d 1215 (D.C. Cir. 1989)).

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[11] The circuit split regarding whether monetary awards may be had in Section 13(b) actions has been presented to the Court in two petitions for writ of certiorari. *See Publishers Bus. Servs., Inc. v Fed. Trade Comm’n*, No. 19-507; *AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, No. 19-508.

[12] The FDA has also been provided two additional remedies: criminal prosecution and seizure. *See United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760 (6th Cir. 1999).

C. The EPA Has Secured Extra-Textual Monetary Awards in Reliance on SEC Caselaw.

Similarly, the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq*., authorizes "specific enforcement", including empowering federal district courts to restrain or compel activity to comply with the statute. The TSCA does not provide for monetary awards. *Id.* § 2616. Nevertheless, the EPA has secured disgorgement as an equitable award under the *Porter/Mitchell* line of cases and in reliance on SEC precedent. *See United States v. Accolade Constr. Grp., Inc*., No. 15-5855, 2017 WL 2271462, at *2 (S.D.N.Y. May 23, 2017) ("[A]lthough disgorgement of profits under the TSCA involves the payment of money, it is nevertheless equitable in nature.") (citing *Porter*, *Mitchell*, and *Cavanagh*).

D. FERC Also Relies on *Porter* to Pursue Monetary Awards.

Under its statute, the Federal Energy Regulatory Commission ("FERC") has authority to impose civil penalties and revoke licenses but has no express authority to extract monetary equitable relief. 16 U.S.C. § 823b. Still, like the other agencies discussed here, FERC has relied on the *Porter* rubric to pursue monetary awards.

In a case that exemplifies courts' conflation of equitable power and agency *ultra vires* monetary demands, FERC brought suit in *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC* to affirm and enforce a penalty order that imposed civil penalties and disgorgement. 345 F. Supp. 3d 682 (E.D. Va. 2018), *appeal docketed,* No. 18-

2326 (4th Cir. Nov. 5, 2018). The agency included disgorgement in its penalty order before any court was involved and without any statutory authority to do so. Thus, the court's equitable powers could not have been the basis for the disgorgement originally ordered by the agency.

Accordingly, the defendant moved to dismiss, arguing that the FERC statute did not provide for disgorgement. *Id.* at 697. Instead of basing its ruling on whether the statute granted authority to the Commission to impose disgorgement, the court looked to the statute to see whether the court had been restricted from granting equitable relief. *Id.* at 698. Finding no statutory limitation on the court's authority, the court denied the motion to dismiss the disgorgement count because *it* could grant the disgorgement that FERC ordered as a result of the administrative proceeding. *Id.* at 698 (citing *Porter*).

The legal construction in *Powhatan* is particularly pernicious because it appears the court tapped its own equitable power to grant disgorgement and back-fed the power into the Commission to legitimize agency exercise of authority that Congress did not grant, thus simultaneously violating the Executive–Legislative element of separation of powers and the Legislative–Judicial element to vest all power—legislative, interpretive, and enforcement—into a single branch of government.

E. The CFTC Secures Legal Damages in the Name of Equity.

By contrast, the Commodities Futures Trading Commission ("CFTC") is authorized by statute to seek an injunction or restraining order, a writ of mandamus, civil penalties, *and* equitable remedies such as restitution or disgorgement. 7 U.S.C. § 13a-1. But the CFTC still relies on *Porter* and *Mitchell* to expand the "ancillary relief" it may garner to attain its monetary demands and relies on SEC cases to fill in the gaps. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Grp., Inc.*, 680 F.2d 573, 584 (9th Cir. 1982); *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) ("The Commodity Exchange Act contains no provision similar to section 27 of the Securities Exchange Act, but neither does it have any provision restricting the equitable power of the district court.").

It seems that congressionally enumerated powers to seek relief are never enough when *Porter/Mitchell* and a bevy of SEC precedent can be relied on to expand the agency's scope.

F. The CFPB Relies on SEC Caselaw to Enlarge Its Already Expansive Power.

The Consumer Financial Protection Bureau ("CFPB") has a broader range of statutory authority, and yet, courts still look to SEC cases to inform their interpretation of the agency's monetary demands. Under the Consumer Financial Protection Act ("CFPA"), the CFPB may seek a permanent or temporary injunction, restitution, and disgorgement. 12 U.S.C. §§ 5564(a), 5565; *see Consumer Fin. Prot.*

Bureau v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016). While the CFPA expressly allows for equitable monetary relief, the CFPB relies on SEC cases to fill in the gaps in its own statute. *Gordon*, 819 F.3d at 1195 (defining disgorgement by citing *Sec. & Exch. Comm'n v. JT Wallenbrock & Assocs*., 440 F.3d 1109 (9th Cir.2006)); *Consumer Fin. Prot. Bureau v. NDG Fin. Corp*., No. 15-5211, 2016 WL 7188792, at *20 (S.D.N.Y. Dec. 2, 2016) (citing *Cavanagh* for the proposition that "disgorgement is proper even where the relief defendant is not accused of any wrongdoing").

* * * *

The shadow cast by *Porter/Mitchell* and the adoption of its rationale to interpret the Securities Act and the Securities Exchange Act to include unstated monetary remedies has infiltrated other agencies across the federal government and seriously displaced congressional will. Variation of congressionally granted authority across agencies has little bearing on the scope of relief agencies seek when they facilely evade the limits of their statutes by relying on SEC precedent and convince courts to confer on them the judiciary's equitable powers.

III. TRANSFERENCE OF JUDICIAL EQUITABLE POWERS TO AGENCIES TO BYPASS LIMITED STATUTORY REMEDIES THREATENS INDIVIDUAL RIGHTS.

As Justice Gorsuch explained in his dissent in *Gundy v. United Sates*, "[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about

safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law." 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). So too here. While the issue in *Gundy* was the limit of Congress's power to delegate legislative authority to the Executive, when it comes to importing judicial equitable power into agencies, the lines of authority become blurred across all three branches.

After *Texas Gulf Sulphur*, a series of fictions has developed to make this judicial creature behave as equitable relief when convenient to limit defendants' recourse or as legal damages when needed to maximize agency recovery, thus undermining reasonable expectations and the rule of law.

The SEC has been clear that it seeks disgorgement "in order to prevent future violations of the law by those who have already violated Rule 10b-5 and to deter violations by others who may contemplate them," and not "as an instrument for particular individuals." Ellsworth, *supra* at 648–49 (citations omitted). Because the "appropriate contrast between compensating damages and unjust enrichment is that the former aims to restore the plaintiff to her ex ante position while the latter aims to restore the defendant to her ex ante position," Roach, *supra* at 9 (citations omitted), by denying compensatory intent, the SEC forsook the benefits of legal damages in favor of equitable relief.

Nevertheless, the monetary awards the SEC secures bear all the hallmarks of legal damages.

- Moneys sought are not limited to specific, identifiable funds—the award does not apply to a *res*.

- Calculation of the judgment amount is not limited to the degree of the defendant's benefit—disgorgement is not designed to "restore the defendant to her *ex ante* position," but rather is calculated based on what the victims spent.
- The judgment creates personal liability for the defendant.
- Liability may be joint and several, which, by definition, is intended to "restore the plaintiff to her ex ante position", a legal concept, without consideration of the effect on a defendant.
- And, as the Court held in *Kokesh*, disgorgement in SEC cases "operates as a penalty" that is "imposed for punitive purposes." 137 S. Ct. at 1643, 1645.

Thus, monetary awards in SEC cases are not limited to simply devolving unjust enrichment.

This distinction is not purely academic, but rather, can severely prejudice the defendant by depriving him of constitutional and other legal rights. By labeling their monetary demands as "equitable" relief, the SEC deprives defendants of their Seventh Amendment right to a jury trial. *See, e.g., Sec. & Exch. Comm'n v. Petrofunds, Inc.*, 420 F. Supp. 958, 960 (S.D.N.Y. 1976) (denying demand for jury trial because relief sought by SEC "springs out of the policy of public enforcement of the provisions of the securities laws and exists as an exercise of the equity powers of the federal courts."). The Seventh Amendment preserves the right to trial by jury in "[s]uits at common law, where the value in controversy shall exceed twenty

dollars." U.S. Const. amend. VII. "Suits at common law," as used in the Seventh Amendment, comprise "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830). "The Seventh Amendment thus applies . . . to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998). Whether an SEC action is equitable or legal requires an examination of "both the nature of the statutory action *and the remedy sought*." *Id.* (emphasis added); *see also Tull v. United States*, 481 U.S. 412, 417–18 (1987). Because cases such as *Liu* sound in fraud—a classic legal action—the first element is satisfied and the second inquiry becomes paramount.

By fallaciously applying the tautology that any award by a court sitting in equity must be an equitable award (notwithstanding the courts' power in equity to grant full relief—including ancillary legal damages) the fundamental analytical step of properly categorizing the remedy sought is simply bypassed. Restitution, for example, may be equitable "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-W. Life & Annuity Ins. Co.*, 534 U.S. at 213. With a fungible asset like money, such traceability would be rare. By contrast, legal restitution applies in cases such as this one when the

plaintiff seeks "'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.'" *Id.*

The Seventh Amendment's protection of the jury trial right is crucial in cases like these where the action is based on extra-textual judge-made law that exceeds statutory authority. But that right is nullified through the expedient of labeling disgorgement as equitable relief.

In addition to losing the constitutional right to a jury trial, characterization of wholly personal liability as equitable relief has been used to prohibit recourse by judgment debtors to the Federal Debt Collection Procedures Act of 1990 ("Debt Act"), 28 U.S.C. § 3001 *et. seq*., which permits an individual debtor to exempt from collection under the Debt Act any property that would be exempt from debt collection under the state law of the debtor's domicile. *See Sec. & Exch. Comm'n v. Huffman*, 996 F.2d 800, 801–02 (5th Cir. 1993).

The Debt Act defines a "debt" as "an amount that is owing to the United States on account of a . . . penalty, restitution, . . . or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States." 28 U.S.C. § 3002(3)(B). Despite the apparent applicability of this definition to SEC disgorgement awards, *Huffman* held that disgorgement is "more akin to an injunction in the public interest" and thus "not a debt under the Debt Act." *Huffman*, 996 F.2d at 802–03.

Similarly, the presumption that disgorgement in SEC cases is equitable relief has been used to bypass the general rule affirmed in *Grupo Mexicano de*

Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999), that a defendant may not be prohibited from disposing of assets pending adjudication of a claim for money damages. In SEC cases, asset freezes are routinely granted to preserve funds for disgorgement. *See, e.g.*, *Sec. & Exch. Comm'n v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005) ("[T]he SEC also seeks the legal remedy of civil damages. But the asset freeze is justified as a means of preserving funds for the equitable remedy of disgorgement.").

Equating disgorgement with an injunction would also divert judgment debtors from relying on the procedural protection of Federal Rule of Civil Procedure 69(a), toward Rule 70, which allows a party who fails to comply with an order to be held in contempt. Fed. R. Civ. P. 70. Thus may an order to pay be converted into the risk of contempt under the court's power to enforce compliance with its orders, including risk of indefinite imprisonment. *E.g., Sec. & Exch. Comm'n v. Kenton Capital, Ltd.*, 983 F. Supp. 13, 17 (D.D.C. 1997) (failure to identify assets sufficient to pay the judgment within 30 days to result in issuance of a warrant and confinement of defendant until he fully complies with the order). Accordingly, the limited "equitable" remedies enumerated by Congress become massive civil monetary awards and "civil" incarceration—none of which is contemplated by the statute.

IV. SEPARATION OF POWERS PRINCIPLES NECESSITATE RESTRICTION OF AGENCY AUTHORITY TO THOSE SET BY CONGRESS

The SEC is not a legislative body, but instead must implement Congress's intent. It has not done so here. Congress has authorized the SEC to seek only injunctions, 15 U.S.C. § 77t(b), 78u(d)(1); certain civil monetary penalties, *id.* § 77t(d), 78u(d)(3); and equitable relief. *Id.* § 78u(d)(5). If the SEC wants more enforcement options, it must convince Congress, not the judiciary. *Henson*, 137 S. Ct. at 1726.

The SEC will likely seek to justify its *ultra vires* overreach by pointing to a line of federal appellate court decisions mistakenly and uncritically accepting its wayward *Porter*-based arguments. But this Court has never accepted the SEC's purported "equitable disgorgement" powers. *See* Oral Arg. Tr. at 52:18-21, *Kokesh v. Sec. & Exch. Comm'n*, No. 16-529 (U.S. Apr. 18, 2017) ("Ms. Goldenberg: There are almost 50 years of precedents on how this should work and I think the way it worked is--; Justice Gorsuch: Not in this Court."). Nor should it. Such longstanding misapplication of *Porter* to allow the SEC to augment its statutory remedies by arrogating the equitable power of the court should not be allowed to stand.

The SEC's overreach imperils individual rights and has set off a cascade of entrepreneurial, extra-textual activity among other agencies that violates the separation of powers.

CONCLUSION

The Court should rule in favor of Petitioners and reverse the holding of the Ninth Circuit.

Respectfully submitted,

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