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 OF ANDY ALTAHAWI AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBERT G. HEIM
Counsel of Record
JONATHAN E. TEMCHIN
TARTER KRINSKY & DROGIN LLP
1350 Broadway
New York, NY 10018
(212) 216-1131
rheim@tarterkrinsky.com

Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Amicus Andy Altahawi is an individual residing in the State of Florida with over 24 years of experience in the securities industry. In June 2019 Altahawi reached a settlement with the U.S. Securities and Exchange Commission ("SEC"), without admitting or denying the SEC's allegations, that required him to disgorge approximately $21 million in alleged ill-gotten gains to the SEC, plus pay an additional $2.9 million in civil penalties to the SEC. *SEC v. Longfin Corp.*, 1:18-CV-02977 (SDNY)(DLC). The disgorgement amount was based on Altahawi's sales of the common stock of LongFin Corp. ("LongFin") that he earned as a consultant to the company. The SEC brought its enforcement action even though Altahawi was provided with a legal opinion letter from an experienced securities attorney concluding that he was permitted to sell his LongFin shares. The SEC has not distributed Altahawi's disgorged funds to any investors.

If the Court rules in favor of Petitioners and holds that the SEC does not have the power to seek or obtain disgorgement from a federal court Altahawi has an interest in ensuring that the Court's decision is applied retroactively so as to allow him the opportunity to recoup the funds that he paid in disgorgement. Altahawi has an interest in bringing to the Court's attention the legal arguments set forth below in favor

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[1] Petitioners and respondent have filed blanket consent letters with the Court. Pursuant to Supreme Court Rule 37.6 amicus states that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus or his counsel contributed monetarily to the preparation or submission of this brief.

of retroactivity of any decision the Court may make holding that the SEC does not have the power to seek or obtain disgorgement.

SUMMARY OF ARGUMENT

The court below was mistaken in holding that the SEC could seek and obtain disgorgement in its enforcement action in federal court. The SEC is not authorized by any statute to seek disgorgement and federal courts, as courts of limited jurisdiction, are not authorized by the Constitution or The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (Sept. 24, 1789) to award disgorgement in SEC actions as an equitable remedy. In *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 n.3 (1939) this Could held that the remedies that federal courts can award in equity are limited to those remedies that were being administered by the English Court of Chancery in 1787. Disgorgement of the type that the SEC seeks in its enforcement actions – which is not tied to the identifiable proceeds of alleged wrongdoing and which does not necessarily compensate harmed investors – bears no resemblance to the types of equitable remedies that were available in English Chancery Court. Because SEC disgorgement is a punitive remedy this Court held in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) that disgorgement was a "penalty" for purposes of 28 U.S.C. § 2462.

If the Court rules that the SEC does not have the power to seek or obtain disgorgement the decision should be retroactively applied to litigants like Altahawi who have paid substantial amounts to the SEC under unauthorized disgorgement orders. As a

general rule, judicial decisions in the civil context apply retroactively. In fact, this Court has held "we have…established a firm rule of retroactivity of judicial decisions." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). The retroactive application of any decision in favor of Petitioners should not be limited to cases that are still open or on direct appeal because such a result would be manifestly unjust. The Court may reduce the impact of any retroactive application of a decision favorable to Petitioners by limiting the relief to litigants like Altahawi whose disgorgement payments have not been distributed to investors by the SEC.

ARGUMENT

I. FEDERAL COURTS DO NOT HAVE THE POWER TO AWARD DISGORGEMENT IN SEC ENFORCEMENT ACTIONS

A. Congress Has Never Authorized the SEC to Seek Disgorgement in Federal Court

Congress has never authorized the SEC to seek disgorgement in federal court. The SEC, a federal agency created by the Securities Exchange Act of 1934. (15 U.S.C. § 78(a)) (the "Exchange Act"), can lawfully seek in court only those remedies Congress has authorized it to seek. *See, e.g., Am. Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring) ("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, and as this Court persistently has recognized, a statutory silence on the granting of a power is a denial of that power to the

agency.") Congress's decision not to grant the SEC the power to seek disgorgement in federal court is not a legislative oversight. Congress has authorized the SEC to seek disgorgement in the context of the SEC's administrative proceedings, s*ee, e.g.*, 15 U.S.C. §§ 77h-1(e),78u2(e), -3(e)), and Congress' failure to grant the SEC the power to seek disgorgement in federal court can be considered a deliberate withholding of that power.

Moreover, federal courts are courts of limited jurisdiction and can lawfully impose only those remedies that Congress has authorized in the relevant statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (holding that federal courts, being courts of "limited jurisdiction," "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree" (internal citation omitted)). Without specifically mentioning disgorgement, certain provisions of the federal securities laws allow the SEC to seek, and a federal court to grant, equitable relief that may be appropriate or necessary. *See e.g.* Section 21(d) of the Exchange Act, providing that "[i]n 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." 15 U.S.C. § 78u(d)(5)(emphasis added). Also, Section 27(a) of the Exchange Act provides that the "district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of

all suits *in equity* and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa(a) (emphasis added).

Federal courts, therefore, may award disgorgement to the SEC only if disgorgement comes within the federal courts' statutory power to grant equitable relief. When awarding disgorgement in SEC cases federal courts generally cite either: (i) the courts' inherent power to grant equitable remedies ancillary to their explicit statutory power to grant injunctive relief. *See, e.g., SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (holding that because the Exchange Act does not restrict the equitable remedies of district courts, disgorgement is available "simply because the relevant provisions . . . vest jurisdiction in the federal courts"); or (ii) the statutory provisions for "equitable relief" discussed above. *See, e.g., SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991) ("The disgorgement remedy [the district court judge] approved in this case is, by its very nature, an equitable remedy . . . ."; *First City Financial Corp., Ltd.*, 890 F.2d at 1230 (D.C. Cir. 1989); *SEC v. Certain Unknown Purchasers of Common Stock of and Call Options for Common Stock of Santa Fe Int'l Corp.*, 817 F.2d 1018, 1020 (2d Cir. 1987) ("The disgorgement remedy approved by the district court in this case is, by its nature, an equitable remedy.")[2]

[2] The SEC first sought and obtained disgorgement in federal court in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92–94 (S.D.N.Y. 1970); *aff'd in part and rev'd in part*, 446 F.2d 1301, 1307–08 (2d Cir. 1971), and has done so many times since. *See generally* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 Duke L.J. 641, 641–42 n.3 (1977).

B. An Equitable Remedy is Within a Federal Court's General Equitable Powers Only if the Remedy Was Within the Power of the High Court of Chancery in England at the Time of the Adoption of the Constitution

Determining whether disgorgement comes within a federal court's equity jurisdiction must start with an analysis of Article III of the United States Constitution and Section 11 of the Judiciary Act of 1789, which bestow equity jurisdiction upon the federal courts. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. 3, § 1. With regards to equity jurisdiction "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States…" U.S. Const. art. 3 § 2. The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (Sept. 24, 1789) states that "[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."

This Court has held that

> [t]he 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the

> English Court of Chancery at the time of the separation of the two countries.

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 n.3 (1939)

In *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999) this Court held that

> The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits ... in equity." § 11, 1 Stat. 78. We have long held that "[t]he 'jurisdiction' thus conferred ... is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W 1. Southern, Inc.*, 306 U. S. 563, 568 (1939). *See also, e. g., Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 382, n. 26 (1949); *Guaranty Trust Co. v. York*, 326 U. S. 99, 105 (1945); *Gordon v. Washington*, 295 U. S. 30, 36 (1935).

Grupo, 527 U.S. at 318. The *Grupo* Court went on to hold that "[s]ubstantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act of 1789 (1 Stat. 73)." A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928). (*Id.*) Therefore under *Grupo*, the ability of a federal court to award disgorgement is within a federal court's general equitable powers if, but

only if, the remedy was granted by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act of 1789. Russell G. Ryan, *The Equity Façade of Disgorgement*, 4 Harv. Bus. L. Rev. Online 1 at 4 (2013).

C. Disgorgement Does Not Fall Within a Federal Court's Equity Powers Because it Was not Within the Power of the High Court of Chancery in England at the Time of the Adoption of the Constitution

The federal securities laws do not define the term "disgorgement." Because "the term "disgorgement" became common only recently courts have looked by analogy at what they have viewed as functionally equivalent equitable remedies when determining whether disgorgement historically falls within a federal court's equity powers. *SEC v. Cavanaugh*, 445 F.3d 105, 118-19 (2d Cir. 2006). One such analogous remedy courts have looked at is restitution.

> However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity….Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy … when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought. *Reich v.*

> *Continental Casualty Co*., 33 F.3d 754, 756 (CA7 1994) (Posner, J.)

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212-13(2002)(internal citations omitted)

This Court has acknowledged that there is a historical distinction between restitution at law and restitution in equity. With regards to restitution at law the *Knudson* Court stated

> In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common law writ of assumpsit.…In such cases, the plaintiff's claim was considered *legal* because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." … Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

Knudson, 534 U.S. at 213 (2002) (emphasis added).

With regards to restitution in equity the *Knudson* Court went on to say

> In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, 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.… A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." … Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Knudson, 534 U.S. at 213-14 (emphasis added). Restitution in this equitable context can be defined as the "return or restoration of some specific thing to its rightful owner or status." Black's Law Dictionary (11th ed. 2019)

SEC disgorgement orders by and large fail the test for restitution in equity set forth in *Knudson*. SEC disgorgement orders are not analogous to restitution in equity because the agency's disgorgement orders are not limited to disgorging specific funds or property derived from the alleged wrongdoing. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)("[D]isgorgement is an equitable obligation to

return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset")(D.C. Cir. 2000); *SEC v. Whittemore*, 691 F. Supp. 2d 198, 207 (D.D.C. 2010) (holding that whether a defendant retained the funds is "not germane" and how she spent them is "irrelevant"); *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (noting that the manner in which defendants "chose to spend" their gains is "irrelevant" to disgorgement). Further, SEC disgorgement orders are not analogous to restitution in equity because the disgorged proceeds are not necessarily returned to injured investors by the SEC.

Other federal courts have held that they have the power to award disgorgement in SEC enforcement cases because disgorgement is analogous to the historical equity remedies of accounting and constructive trust (*Cavanaugh*, 445 F.3d at 119-20). However, the remedies of accounting and constructive trust were limited to turning over the specific funds or property that were subject of the dispute (*Knudson*, 534 U.S. at 213-14) whereas SEC disgorgement orders are not so limited. Moreover, the remedy of accounting was limited to circumstances where there existed a fiduciary relationship between the plaintiff and defendant. An accounting is a "general equitable remedy to recover the income from another's property wrongfully retained *by [a] fiduciary*" Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 467 (1985)(emphasis added). The SEC has never viewed its ability to seek disgorgement as being limited solely to cases where a fiduciary relationship exists between the alleged wrongdoer and the victim.

Likewise, the analogy to a constructive trust does not provide support for a federal court's power to award disgorgement. The remedy of constructive trust can refer to two separate equitable remedies – one is the remedial constructive trust and the other is the institutional constructive trust. Both types of constructive trusts, like an accounting, historically only allowed plaintiffs to claim proceeds that are directly tied to the alleged wrongdoing – which again is not a limitation that applies to SEC disgorgement orders. The remedial constructive trust is a remedy for unjust enrichment that requires a defendant to relinquish "identifiable property ... and its traceable product" to a claimant. *Restatement (Third) of Restitution and Unjust Enrichment* § 55(1) & (2), at 296 (2011) An institutional constructive trust is "a substantive principle of liability normally imposed where a fiduciary relationship exists," H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 Law & Contemp. Probs. 7, 11 (1993) which permits beneficiaries to recover trust assets and their traceable product from express trustees in breach of their duties or from "takers with notice of an express trust." John P. Dawson, *Unjust Enrichment: A Comparative Analysis* at 27 (1951). As noted, the institutional constructive trust requires that there be a breach of a fiduciary duty by the defendant, which is another important difference from SEC disgorgement orders which have no such requirement.

D. This Court's Holding in *Kokesh v. SEC* that SEC Disgorgement is a Penalty Demonstrates that Disgorgement is not Analogous to Historical Equitable Remedies.

Providing further support for the argument that SEC disgorgement is not analogous to historical equitable remedies is this Court's holding that disgorgement constitutes a penalty within the meaning of 28 U.S.C. § 2462. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). § 2462 establishes a 5-year limitations period for an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture. The *Kokesh* Court reached its holding, in part, because "SEC disgorgement is imposed for punitive purposes." (*Kokesh*, 137 S. Ct. at 1643)

The *Kokesh* Court also based its holding on the determination that SEC disgorgement is not compensatory to harmed investors. The *Kokesh* Court stated

> As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is "within the court's discretion to determine how and to whom the money will be distributed." [*SEC v. Fischbach Corp.*, 133 F. 3d 170 at 175 (2d Cir. 1997)] Courts have required disgorgement "regardless of whether the disgorged funds will be paid to such investors as restitution." *Id.*, at 176; *see id.*, at 175 ("Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly

> secondary goal")…When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty. *See Porter v. Warner Holding Co*., 328 U. S. 395, 402 (1946) (distinguishing between restitution paid to an aggrieved party and penalties paid to the Government).

Kokesh, 137 S. Ct. at 1644.

The *Kokesh* decision also criticized the SEC's overzealous efforts in seeking disgorgement and how these efforts moved disgorgement in SEC enforcement actions further away from the equitable purpose of restoring the status quo and into the arena of imposing punitive sanctions. For example, *Kokesh* disapprovingly cited *SEC v. Contorinis,* 743 F.3d 296 (2d Cir. 2014), a case where the SEC recovered third-party profits from an insider trader who never received the profits, and *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998) a case where the SEC recovered disgorgement from a tipper when the ill-gotten gains were in fact earned by the person he tipped. The *Kokesh* Court viewed these two cases as examples of how the SEC used disgorgement as a penalty and not merely as a way to restore the status quo. *See also* Patrick Butler*, Saving Disgorgement from Itself: SEC Enforcement After Kokesh v. SEC*, 68 Duke Law Journal 333 (2018). These examples of overzealousness by the SEC in seeking disgorgement are in contrast with the limited conception of disgorgement that federal courts employed when the SEC first started seeking disgorgement. *See SEC v. Blatt*, 583 F.2d 1325, 1335

(5th Cir. 1978)("Disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing.")

In sum, SEC disgorgement orders bear very little resemblance to the historical equitable remedies that were within the jurisdiction of the High Court of Chancery in England at the time of the adoption of the Constitution. Indeed, legal scholars have recognized the anomaly of calling the disgorgement relief sought by the SEC an equitable remedy. "When the [SEC disgorgement] order makes no pretense of requiring the actual disgorgement of anything the defendant possesses or has access to, it is neither disgorgement nor an exercise of equitable power. It is a mere personal liability to pay a money judgment—*the quintessence of a remedy at law*." Russell G. Ryan, *The Equity Façade of Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 2-3 (2013)(emphasis added). *See also* Francesco A. DeLuca, *Sheathing Restitutions's Dagger Under the Securities Acts: Why Federal Courts are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 Rev. Banking & Fin. L. 899 (2014).

E. Ruling that the SEC Does not have the Power to Seek or Obtain Disgorgement would Not Diminish the SEC's Enforcement Program

The SEC has numerous statutory remedies at its disposal to enforce the federal securities laws. If this Court holds that the SEC does not have the power to seek or obtain disgorgement from federal courts it would not diminish the effectiveness of the SEC's enforcement program. For example, the SEC can seek

injunctions against those that violate the securities laws (*see, e.g.*, § 20(b) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77t(b) and § 21(d)(1) of the Exchange Act, 15 U.S.C. § 78u(d)(1) and civil monetary penalties can also be imposed. *See, e.g.* Section 20(d) of the Securities Act 15 U.S.C. § 77t(d) and Section 21(d)(3) of the Exchange Act 15 U.S.C. § 78u(d). The funds collected by the SEC as civil penalties can also be distributed by the agency to harmed investors pursuant to the "fair funds" provision in § 308 of the Sarbanes–Oxley Act of 2002. 15 U.S.C. § 7246. In fact, Altahawi paid a $2.9 million civil penalty to settle, without admitting or denying, the SEC's claims against him. Civil penalties in particular provide strong deterrence against violations of the federal securities laws and can be used to deprive wrongdoers of ill-gotten gains in appropriate cases. In addition, the SEC also has the express statutory power to seek disgorgement in its own administrative proceedings. 15 U.S.C. § 78u-2(e).

II. IF THE COURT DECIDES THE SEC DOES NOT HAVE THE POWER TO SEEK OR OBTAIN DISGORGEMENT THE DECISION SHOULD BE APPLIED RETROACTIVELY

A. There is a Presumption that Judicial Decisions Will Apply Retroactively

As a general rule, judicial decisions in the civil context apply retroactively. In fact, this Court has stated "we have…established a firm rule of retroactivity" of judicial decisions. (*Harper*, 509 U.S. at 97). "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past

facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

This Court has recognized that "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed "[j]udicial decisions ... for near a thousand years." *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). The rule of retroactivity "derived from the Blackstonian notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'"" *Linkletter v. Walker*, 381 U.S. 618, 622–23 (1965) (quoting 1 W. Blackstone, Commentaries *69), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987).

This Court in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991) stated

> [A] decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with *res judicata* and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, *see Kuhn v. Fairmont Coal Co.,* 215 U. S. 349, 372 (Holmes, J., dissenting), and is in

> keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. *See Mackey v. United States,* 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, *see [American Trucking Associations, Inc. v. Smith,* 496 U.S. 167] at 201 (1990) (Scalia, J., concurring in judgment)*; Linkletter v. Walker,* 381 U. S. at 622-623 (1965)*,* according to which the courts are understood only to find the law, not to make it.

James B. Beam Distilling Co. v. Georgia, 501 U.S. at 535.

This presumption in favor of retroactivity also applies to this Court's decisions concerning the statutes that confer equity powers on district courts in SEC enforcement actions. "Although retroactive application is disfavored for legislation and administrative rules, judicial interpretations of existing statutes and regulations are routinely given retroactive application on the theory that courts do not make new law but simply state what the statutes and regulations meant before as well as after the court's decision." *SKF USA, Inc. v. U.S.*, 512 F.3d 1326, 1330 (Fed. Cir. 2007), *citing Rivers v. Roadway Express, Inc*., 511 U.S. 298, 311–12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student...."); *Landgraf v. USI Film Products*, 511 U.S. 244, 278–79 & n. 32 (1994)(noting the "firm rule of retroactivity" for

"a new rule announced in a judicial decision"); *Halpern v. Principi*, 384 F.3d 1297, 1302 (Fed.Cir. 2004) ("[W]here a court announces the meaning of a statute, the court proclaims what the statute has meant since enactment.")."

Therefore, if this Court were to rule in favor of Petitioners and hold that the SEC does not have the power to seek or obtain disgorgement, either under the federal court's general equitable powers or by virtue of the federal securities statues, then this decision should apply retroactively to litigants such as Altahawi who were defendants in SEC actions that sought and obtained disgorgement.

B. The Presumption of Retroactivity Should not be Limited to Cases that are Still Open or on Direct Review

This Court in *Harper* held that "when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97. The Court's limitation of the retroactive effect of judicial decision to cases that are still open or on direct review has been criticized. In the criminal context "refusing to apply a new rule of criminal procedure to all defendants incarcerated as a result of trials in which that rule had not been observed necessarily involved some arbitrariness. It kept all people in jail who were unfortunate enough to have had their unconstitutional convictions affirmed before June 19,

1961." (*Linkletter*, 381 U.S. at 641 (Black, J., dissenting). Limiting the retroactive effect of new rules in the criminal context to cases on direct review has been defended not so much as a logical feature of retroactivity but as an aspect of the restricted purpose of habeas corpus in federal courts, which is a concern not present in civil cases. Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law,* 62 The American Jnl. Of Comp. Law 37 at 59 (2014).

Therefore, the retroactive application of a decision in favor of Petitioners should not be limited to cases that are in active litigation or on appeal and should apply to any case where the SEC sought and obtained disgorgement, as least in so far as the SEC has not distributed the disgorged funds to harmed investors. The Court may also consider limiting the retroactive effect of a decision in Petitioners' favor to the five year limitations period set forth in 28 U.S.C. § 2462 and discussed in *Kokesh*. Limiting the retroactive effect of the Court's decision to cases that are active or on direct review would be manifestly unjust to litigants such as Altahawi.

C. Reasonable Reliance on Prior Decisions Does Not Prevent Retroactive Application of Judicial Decisions

In arguing against the retroactive application of a decision in favor of Petitioners the SEC may state that it reasonably relied on prior court decisions granting the agency's disgorgement requests. However, the SEC's reasonable reliance on prior decisions is not grounds to deny full retroactivity.

> The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon [prior] law…But, this type of justification --often present when prior law is overruled -- is the very sort that this Court, in *Harper* found insufficient to deny retroactive application of a new legal rule…

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995).

Therefore, we respectfully request that this Court make clear that any decision in favor of Petitioners in this matter is made fully retroactive to cases such as Altahawi's.

CONCLUSION

For all the foregoing reasons we respectfully submit that the lower court decision should be reversed, the Court rule that the SEC cannot seek or obtain disgorgement from a federal court and that the Court's decision be applied in a fully retroactive manner.

Respectfully submitted,

ROBERT G. HEIM
Counsel of Record
JONATHAN E. TEMCHIN
TARTER KRINSKY & DROGIN LLP
1350 Broadway
New York, NY 10018
(212) 216-1131
rheim@tarterkrinsky.com

Counsel for Amicus Curiae

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