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

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BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit http://www.sifma.org.[1]

In 1990, Congress, in the Securities Enforcement Remedies and Penny Stock Act of 1990 (the "Remedies Act"), Pub. L. No. 101–420, 104 Stat. 931, authorized the SEC to seek monetary penalties equal to (or even exceeding) the defendant's "pecuniary gain." This case presents the question whether the securities laws also provide Respondent Securities and Exchange

[1] All parties have consented to this filing. This brief was not authored in whole or in part by counsel for any party. No such counsel or any party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Commission (the "SEC"), in judicial enforcement proceedings, the remedy of disgorgement, which the Remedies Act does not mention in the context of such proceedings, and which is often duplicative of penalties the Remedies Act authorizes.

SIFMA does not condone illicit conduct and deeply respects the critical role of the SEC in protecting investors and the securities arena. Certainly, bad actors should not profit from their misconduct. However, the appropriate remedies against wrongdoers who violate the securities laws are the civil penalties Congress has explicitly created, and they are adequate to redress misconduct and prevent illicit windfalls. Congress has not authorized the SEC to obtain disgorgement as an equitable or appropriate remedy *in addition* to the civil penalties. The courts and the SEC should not go beyond the clearly defined remedies Congress has provided.

The SEC asserts its authority to obtain disgorgement derives from two sources and both allow it to seek certain forms of equitable relief. First, the SEC argues disgorgement is implicitly permitted by provisions of the securities laws that authorize federal courts to "enjoin" violations of the Securities Act of 1933 (the "Securities Act"), 48 Stat. 85 (15 U.S.C. § 77a et seq.), as amended, and the Securities Exchange Act of 1934 (the "Exchange Act"), 48 Stat. 891 (15 U.S.C. § 78a et seq.), as amended. Opp. to Cert. at 5 (citing 15 U.S.C. §§ 77t(b), 78u(d)(1)). According to the SEC, this "legislative grant of authority to 'enjoin' statutory violations encompasses the power to order a violator 'to disgorge

profits . . . acquired in violation' of the relevant statutory provisions." Opp. to Cert. at 5 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946)).

Second, the SEC argues disgorgement is authorized by section 21(d)(5) of the Exchange Act, 15 U.S.C. § 78u(d)(5). See Opp. to Cert. at 5-6. Section 21(d)(5) provides:

> 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.

15 U.S.C. § 78u(d)(5).

This Court's decision in *Kokesh v. S.E.C.*, 137 S.Ct. 1635 (2017), however, undermines the SEC's argument that disgorgement is equitable within the meaning of those statutes. The Court unanimously held that disgorgement is subject to a five-year statute of limitations under 28 U.S.C. § 2462, which applies to actions "for the enforcement of any civil fine, penalty, or forfeiture." The Court explained this statute of limitations applies because "SEC disgorgement constitutes a penalty." *Kokesh*, 137 S.Ct. at 1642. It "go[es] beyond compensation, [is] intended to punish, and label[s] defendants wrongdoers as a consequence of violating public laws." *Id.* at 1645 (citation and internal quotation marks omitted). If SEC disgorgement operates as a penalty under the securities laws, it cannot be regarded as equitable under those laws.

In 2016, the SEC commenced this enforcement proceeding against Petitioners in the United States District Court for the Central District of California. After finding Petitioners liable under section 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2), the District Court entered an order enjoining future securities violations and requiring Petitioners to pay approximately $26.7 million in disgorgement and $8.2 million in civil penalties. See Pet. App. 29a-42a, 62a-63a. On appeal to the Ninth Circuit, Petitioners argued the District Court lacked the power to order disgorgement in light of *Kokesh*. The Ninth Circuit affirmed the order of the District Court, holding "disgorgement" is an "equitable remed[y]" and *Kokesh* is not "'clearly irreconcilable'" with "longstanding" precedent authorizing such relief. Pet. App. at 6a-7a. The Ninth Circuit's ruling fails to appreciate that *Kokesh* has undermined the notion that disgorgement is an equitable remedy under the securities laws. The Ninth Circuit's ruling is also unsupported by the relevant statutory text and inconsistent with guidance from this Court on the meaning of the term "equitable relief."

SUMMARY OF ARGUMENT

Congress has never expressly authorized the award of disgorgement in judicial enforcement proceedings brought by the SEC. Nevertheless, the SEC contends (Opp. to Cert. at 5-6) that § 21(d)(5) of the Exchange Act, which allows "equitable relief that may be appropriate or necessary for the benefit of investors,"

permits disgorgement. 15 U.S.C. § 78u(d)(5). In the alternative, the SEC contends (Opp. to Cert. at 5) its authority to order disgorgement derives from sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act, which allow courts to "enjoin" violations. The SEC is mistaken on both counts.

1. Section 21(d)(5) of the Exchange Act does not authorize courts to order disgorgement in judicial proceedings as "equitable relief." This Court has made clear that when a federal statute refers to "equitable relief," the term means categories of relief that were typically available in equity during the days of the divided bench. SEC disgorgement does not meet that test.

a. It is well-established that during the days of the divided bench equity courts had no authority to order civil penalties. That means they could not have ordered disgorgement in an SEC judicial proceeding because, as *Kokesh* found, disgorgement operates as a civil penalty under 28 U.S.C. § 2462, and not a form of equitable restitution. As this Court explained in *Kokesh*, disgorgement is in many cases "not compensatory," often "exceeds the profits gained as a result of the violation," and is "imposed for the purpose of deterring infractions of public laws." 137 S.Ct. at 1643-44.

b. SEC disgorgement also bears none of the hallmarks of a remedy historically available in equity because it is a purely monetary judgment that does not attach to specific funds or property. Nor can it be

analogized to the remedy of an accounting, which was historically available only against a fiduciary.

2. Even if SEC disgorgement could be characterized as equitable, it would not be available under section 21(d)(5) of the Exchange Act. Congress did not authorize all "equitable relief" in that section, but only relief that is "appropriate or necessary for the benefit of investors." SEC disgorgement is not "appropriate or necessary" in an SEC judicial enforcement proceeding because Congress has provided an adequate alternative remedy, namely, civil penalties for violation of the securities laws up to the greater of the defendant's "pecuniary gain" or a fixed minimum.

3. SEC disgorgement is not authorized by provisions enabling courts to "enjoin" securities law violations. Disgorgement is not an injunction. Nor can it be awarded as relief ancillary to an injunction. The text of sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act shows they are forward-looking provisions intended to address ongoing or future violations; they do not authorize backward-looking remedies such as disgorgement by implication.

ARGUMENT

I. SEC DISGORGEMENT IS NOT "EQUITABLE RELIEF" UNDER SECTION 21(d)(5) OF THE EXCHANGE ACT

Section 21(d)(5) of the Exchange Act provides:

> 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.

15 U.S.C. § 78u(d)(5).

This Court has explained that when a federal statute employs the phrase "equitable relief," it "must mean *something* less than *all* relief." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (emphasis in the original) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 258 n. 8 (1993)). It refers to "those categories of relief that were *typically* available in equity" before the merger of law and equity courts. *Id.* at 210 (emphasis in the original) (quoting *Mertens*, 508 U.S. at 256); see *Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 136 S.Ct. 651, 657 (2016). That does not include SEC disgorgement because, as explained below, such disgorgement is not analogous to a remedy typically available in equity.

A. *Kokesh* Established That SEC Disgorgement Operates as a Penalty Under 28 U.S.C. § 2462

To resolve this case, the Court need look no further than *Kokesh*'s holding that "SEC disgorgement constitutes a penalty" under 28 U.S.C. § 2462. 137 S.Ct. at 1642. That conclusion is dispositive because "a court in equity . . . may not enforce civil penalties." *Tull v. U.S.*, 481 U.S. 412, 424 (1987).

In *Kokesh*, this Court held SEC disgorgement is a "penalty" subject to a five-year statute of limitations under 28 U.S.C. § 2462, which applies to actions "for the enforcement of any civil fine, penalty, or forfeiture." This Court observed that "[t]he violation for which [disgorgement] is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh*, 137 S.Ct. at 1643. This Court explained that "[s]anctions imposed for the purpose of deterring infractions of public laws, are inherently punitive. . . ." *Id.* "*Kokesh* overturned a line of cases" that "concluded that disgorgement was remedial and not punitive." *Saad v. S.E.C.*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

Kokesh found there are two unique attributes of SEC disgorgement that make it penal under 28 U.S.C. § 2462. First, "in many cases, SEC disgorgement is not compensatory." *Kokesh*, 137 S.Ct. at 1644. Rather,

"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." *Id.* (citation and internal quotation marks omitted). While "[s]ome disgorged funds are paid to victims," others are often "dispersed to the United States Treasury." *Id.* (citing *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 171 (2d Cir. 1997); *S.E.C. v. Lund*, 570 F.Supp. 1397, 1404-05 (C.D. Cal. 1983)). "When an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Id.*; see also *Saad*, 873 F.3d at 305 (Kavanaugh, J., concurring) (under *Kokesh*, relief that "does not provide anything to the victims to make them whole . . . is a penalty, not a remedy").

The second unique feature that renders SEC disgorgement penal is it often "exceeds the profits gained as a result of the violation." *Kokesh*, 137 S.Ct. at 1644. "In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off." *Id.* at 1645. As this Court observed, see *id.* at 1644-45, this practice deviates from established principles of restitution, under which, "[a]s a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement," since "making the defendant liable in excess of net gains[ ] results in a punitive sanction. . . ." Restatement (Third) of Restitution and Unjust Enrichment (the "Restatement") § 51, Comment *h*, p. 216 (2011); see also D. Dobbs & C. Roberts, Law of Remedies:

Damages, Equity, Restitution ("Dobbs") § 4.4, p. 459 (3d ed. 2018).[2]

"As this Court has long recognized, courts of equity would not—absent some express statutory authorization—enforce penalties or award punitive damages." *Mertens*, 508 U.S. at 270 (White, J., dissenting) (citing *Tull*, 481 U.S. at 422 & n. 7; *Stevens v. Gladding*, 17 How. 447, 454-55 (1855); *Livingston v. Woodworth*, 15 How. 546, 559-60 (1854); 2 J. Sutherland, Law of Damages § 392, p. 1089 (3d ed. 1903); W. Hale, Law of Damages 319 (2d ed. 1912); 1 T. Sedgwick, Measure of Damages § 371, p. 531 (8th ed. 1891)); see also *Tull*, 481 U.S. at 422 ("A civil penalty . . . could only be enforced in courts of law"); *Curtis v. Loether*, 415 U.S. 189, 196 (1974) ("[P]unitive damages [are a] traditional form of relief offered in the courts of law"); *Stolz v. Franklin*, 258 Ark. 999, 1008-09, 531 S.W.2d 1, 7 (Ark. 1975) ("It has been held that one who appeals to a court of equity for relief waives the award of punitive damages as a

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[2] The facts of this case illustrate how SEC disgorgement operates as a punitive measure. The District Court found Petitioners "personally" gained a total of $8.2 million from the Securities Act violations at issue. Pet. App. at 42a. Nevertheless, it ordered disgorgement in the amount of $26.7 million, representing the "total" amount taken from investors. *Id.* at 41a. The court declined to deduct from this $26.7 million amounts Petitioners claimed were spent on " 'legitimate' business expenses." *Id.* Moreover, the $8.2 million Petitioners personally gained was counted twice, because the District Court also awarded civil penalties in the same amount. See *id.* at 42a. Petitioners were ordered to pay in disgorgement and civil penalties more than four times the amount of their combined personal gains, and prejudgment interest. See *id.* at 62a.

matter of right"). "Historically, punitive damages were unavailable in any equitable action on the theory that 'the Court of Chancery as the Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance.' " *Mertens*, 508 U.S. at 270 n. 5 (White, J., dissenting) (quoting *Beals v. Washington International, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978)) (collecting authorities). Accordingly, this Court has held that statutory language authorizing courts to award "equitable relief" does not include penalties and punitive damages. See *id.* at 255 ("And though we have never interpreted the precise phrase 'other appropriate equitable relief,' we have construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments)—'any other equitable relief as the court deems appropriate,' 42 U.S.C. § 2000e–5(g)—to preclude 'awards for compensatory or punitive damages' ") (quoting *U.S. v. Burke*, 504 U.S. 229, 238 (1992)).

Tull is this Court's most recent and authoritative decision on whether a monetary judgment for the federal Government is equitable or punitive. In *Tull*, the Government sued a real estate developer who unlawfully filled in wetlands and sold some of the lots for profit. See 481 U.S. at 415. The District Court denied the defendant's demand for a jury trial and, after a bench trial, ordered him to pay civil penalties under the Clean Water Act (the "CWA"), 33 U.S.C. § 1319(d). See *Tull*, 481 U.S. at 415. This Court held the District Court erred in denying the defendant a jury trial with respect to his liability under the CWA because the

remedy the Government sought was legal, not equitable. "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." *Id.* at 422. Since the CWA seeks to "further retribution and deterrence," it "reflects more than a concern to provide equitable relief." *Id.* at 423. Moreover, the civil penalties the District Court imposed exceeded the defendant's pecuniary gains from the violations, because not all of the lots the defendant filled in were actually sold for profit. See *id*. at 415, 423. Thus, the penalty was not "limited to restoration of the status quo." *Id.* at 424. "[T]he District Court intended . . . to impose punishment," which is "traditionally available only in a court of law." *Id.* at 423.

SEC disgorgement resembles the CWA penalty in *Tull* in all relevant respects. In many cases, the purpose of SEC disgorgement is "retribution and deterrence," not "compensation." *Id.* at 422; see *Kokesh*, 137 S.Ct. at 1644. SEC disgorgement does not necessarily result in any remuneration to victims. See *Kokesh*, 137 S.Ct. at 1644. And SEC disgorgement can exceed the defendant's pecuniary gains, often significantly. See *id.* at 1644-45; cf. *Tull*, 481 U.S. at 415, 423.[3]

[3] Another factor that makes SEC disgorgement punitive is the burden of proof as to the amount. Courts have held that any "risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *S.E.C. v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995) (brackets omitted) (quoting *S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C.

The SEC asserts that "every court of appeals and every district court that has considered the issue after *Kokesh* has determined that nothing in that decision calls into question the availability of disgorgement in SEC enforcement actions." Opp. to Cert. at 9. But neither of the court of appeals decisions cited by the SEC substantively addressed whether *Kokesh* undermines the availability of SEC disgorgement. In *S.E.C. v. Metter*, the Court cited pre-*Kokesh* authority for the proposition that courts have "broad discretion" to order disgorgement, 706 Fed. Appx. 699, 702 (2d Cir. 2017) (quoting *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996)), and assumed without explanation that this precedent survived *Kokesh*. Similarly, in *S.E.C. v. Weaver*, the Ninth Circuit stated that *Kokesh* was "not 'clearly irreconcilable' with [the Ninth Circuit's] longstanding precedent on this subject," 773 Fed. Appx. 354, 357 (9th Cir. 2019) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)), but did not engage in any further analysis.

Nor are the district court cases cited by the SEC persuasive. Many are premised on the view that *Kokesh* merely "clarif[ies] the statutory scope of [28 U.S.C.] § 2462." E.g., *S.E.C. v. Jammin Java Corp.*, No. 2:15-CV-8921 (SVW), 2017 WL 4286180, at *3 (C.D. Cal. Sept. 14, 2017); accord *S.E.C. v. Ahmed*, 343 F.Supp.3d 16, 26 (D. Conn. 2018); *S.E.C. v. Revolutions Medical Corp.*, No. 1:12-CV-3298 (LMM), 2018 WL

Cir. 1989)); accord *S.E.C. v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004). As one treatise has suggested, "the punitive element" of this doctrine "is clear." Dobbs, supra, § 4.4, p. 459 n. 439.

2057357, at *3 (N.D. Ga. Mar. 16, 2018). *Kokesh* applied settled "principles in construing the term 'penalty'" under 28 U.S.C. § 2462. 137 S.Ct. at 1642 (citing *Huntington v. Attrill*, 146 U.S. 657 (1892); *Brady v. Daly*, 175 U.S. 148 (1899)).

The SEC argues "'[t]he words "penal" and "penalty" have been used in various senses' and are 'elastic in meaning.'" Opp. to Cert. at 8 (quoting *Huntington*, 146 U.S. at 666-67). That may be true, but it is beside the point. What matters is not the fact that *Kokesh* labelled SEC disgorgement a penalty, but *why* it did so: because the object of SEC disgorgement is retribution, because it does not necessarily compensate injured investors, and because it often exceeds the defendant's actual gains. Under *Tull*, such a remedy cannot be viewed as equitable.

B. SEC Disgorgement Does Not Otherwise Correspond to a Remedy "Typically Available in Equity"

Even if the Court were to find *Kokesh* inapposite, SEC disgorgement still would not be a form of "equitable relief" under the securities laws, because it does not correspond to any of "'those categories of relief that were typically available in equity' during the days of the divided bench." *Montanile*, 136 S.Ct. at 657 (emphasis omitted) (quoting *Mertens*, 508 U.S. at 256).

To the extent lower courts have addressed whether disgorgement is "equitable," they have generally assumed that monetary remedies are "legal" when

they are measured by a victim's actual damages, and "equitable" when they are measured by the defendant's unjust enrichment. These cases have reasoned that SEC disgorgement is based on the defendant's gains, and is therefore equitable. See, e.g., *S.E.C. v. Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978) ("Disgorgement of profits in an action brought by the SEC . . . appears to fit" the description of "[a] historic equitable remedy" because "the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment"); *S.E.C. v. Jones*, 155 F.Supp.3d 1180, 1184 (D. Utah 2015) (disgorgement is equitable because "the primary purpose of disgorgement is not to compensate victims" but "to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud") (citations and quotation marks omitted); *S.E.C. v. Seibald*, No. 95-CV-2081 (LLS), 1997 WL 605114, at *7 (S.D.N.Y. Sept. 30, 1997) ("The SEC does not sue for common-law damages: it has suffered no loss. The basis of the action [for disgorgement], against all defendants, is equitable").

These assumptions are flawed. "In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." *Great-West*, 534 U.S. at 212 (citations omitted). See Restatement § 4, Comment *c*, at 30 ("The most widespread error is the assertion that a claim in restitution or unjust enrichment is by its nature equitable rather than legal"). Premerger courts of law could order monetary

remedies that would be described as "disgorgement" in modern legal parlance. See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U. L. Rev. 1577, 1599-1600 (2002) ("Through the common counts in general assumpsit, the law courts developed actions based on the notion of unjust enrichment. One of the common counts—the action for 'money had and received'—encompassed a broad range of situations that today would fall within liability based on unjust enrichment") (footnote omitted); 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. 899, 905-06 (2014) (discussing *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 92 Eng. Rep. 303 (K.B. 1705)).

What generally separates legal and equitable restitution is not the way damages are measured (gains versus losses), but, rather, the fact that equity has the ability to "ignore formalities of title," Dobbs, supra, § 4.3(1), p. 397, and "give relief to the claimant via rights in *identifiable assets*." Restatement § 4, Comment *d*, p. 32 (emphasis added); see also 1 G. Palmer, Law of Restitution, § 3.7(b), p. 262 (1978); 2 S. Symons, Pomeroy's Equity Jurisprudence ("Pomeroy"), § 429, p. 198 (5th ed. 1941). As this Court explained in *Great-West*:

> [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. See [1 D. Dobbs, Law of Remedies, § 4.3(1), pp. 587-588 (2d ed. 1993); Restatement of Restitution, § 160, Comment *a*, pp. 641-642 (1936)]; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978). 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. . . . *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*.

534 U.S. at 213-14 (emphasis added).

In *Great-West*, the Court considered whether section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 891, 29 U.S.C. § 1132(a)(3), authorized a lawsuit to enforce a reimbursement provision in an ERISA-governed plan. Section 502(a)(3) of ERISA, similar to section 21(d)(5) of the Exchange Act, permits participants, beneficiaries, and fiduciaries of ERISA plans to bring claims for "appropriate equitable relief." 29 U.S.C. § 1132(a)(3); cf. 15 U.S.C. § 78u(d)(5). After an automobile accident, the plan beneficiaries received payments from the plan for their medical expenses. See *Great-West*, 534 U.S. at 207. The beneficiaries subsequently brought a tort action against the tortfeasors in state court, and then

settled the lawsuit. See *id.* The settlement proceeds were not given directly to the beneficiaries; instead, a portion was placed in a restricted trust and the remainder was given to the beneficiaries' attorneys. See *id.* at 207-08. Under the governing plan documents, the beneficiaries were contractually required to reimburse the plan for benefits received from a third party. See *id.* at 207. The plan's assignee sued the beneficiaries for reimbursement from the settlement proceeds. See *id.* at 208. The assignee argued its claim was for "restitution," which it "characterize[d] as a form of equitable relief" under § 502(a)(3). *Id.* at 212.

This Court held the action was properly dismissed because, despite petitioners' characterization, the claim was not one that would typically be available in equity. The Court observed that "the funds to which petitioners claim an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of [the beneficiaries'] tort action—are not in [the beneficiaries'] possession." *Id.* at 214. "The basis for petitioners' claim is not that [the beneficiaries] hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred." *Id.* (emphasis in the original).

In *Montanile*, this Court addressed facts similar to *Great-West*, except that the beneficiary in *Montanile* actually took possession of the settlement funds. See 136 S.Ct. at 656. After the plan brought an action for reimbursement under section 502(a)(3) of ERISA, the beneficiary claimed he had "spent almost all of the

settlement funds." *Id.* Nevertheless, the District Court held the beneficiary liable for the full amount of the settlement, concluding that, "even if [he] had dissipated some or all of the settlement funds, the [plan] was entitled to reimbursement from [his] general assets." *Id.* This Court held the District Court's order was error because the plan's claim was not for a form of relief typically available in equity. The Court again explained that "[e]quitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets.' " *Id.* at 658-59 (quoting 4 Pomeroy § 1234, p. 694). Thus, "at equity, a plaintiff ordinarily could not enforce any type of equitable lien if the defendant once possessed a separate, identifiable fund to which the lien attached, but then dissipated it all," as the *Montanile* beneficiary had done. *Id.* at 659.

SEC disgorgement cannot be reconciled with *Great-West* and *Montanile*. Like the restitution orders in those cases, SEC disgorgement seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Great-West*, 534 U.S. at 213 (quoting Restatement of Restitution § 160, Comment *a*, pp. 641-42 (1936)). See *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("[W]hen a public entity seeks disgorgement it does not claim any entitlement to particular property. . . ."); *S.E.C. v. Banner Fund Intern.*, 211 F.3d 602, 617 (D.C. Cir. 2000) (describing SEC disgorgement as an "obligation to return a sum equal to the amount wrongfully

obtained, rather than a requirement to replevy a specific asset. . . ."). Because SEC disgorgement "is accomplished exclusively by a judgment for money" and does not "resort to any of the ancillary remedial devices traditionally available in equity," it is purely legal. See Restatement § 4, Comment *d*, p. 32.

SEC disgorgement resembles the legal remedies described in *Great-West* and *Montanile* in another respect: it frequently requires defendants to disgorge funds that are no longer, or never were, in their possession. See *Kokesh*, 137 S.Ct. at 1644; cf. *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 362-63 (2006). "Thus, for example, an insider trader may be ordered to disgorge . . . the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." *Kokesh*, 137 S.Ct. at 1644 (citation and internal quotation marks omitted). Moreover, as this case demonstrates, a defendant may be required to disgorge funds that have already been distributed to third parties or used to pay expenses that reduce the defendant's net profit. See Pet. App. at 41a; see also *S.E.C. v. World Capital Market, Inc.*, 864 F.3d 996, 1007 (9th Cir. 2017) ("[O]ngoing possession of the funds is not required for disgorgement"); *S.E.C. v. Kokesh*, No. 09-CV-1021 (SMV), 2015 WL 11142470, at *10 (D.N.M. Mar. 30, 2015) (requiring defendant "to give up his ill-gotten gains—even those . . . he caused to be paid to third parties"), aff'd, 834 F.3d 1158 (10th Cir. 2016), rev'd, 137 S.Ct. 1635. *Great-West* and *Montanile* establish that an action for restitution cannot be characterized as

equitable where it attempts to reach funds the defendant has dissipated or otherwise does not possess.

Great-West acknowledged "a limited exception" to the general rule that equity acts only upon specific funds or property: an action for an "accounting." 534 U.S. at 214 n. 2. But SEC disgorgement cannot be analogized to an accounting, as the latter historically was available only against a fiduciary:

> The theory of the common law action [of accounting] was that the obligation to account arose out of the relationship created between the parties where one received the property of another to use and manage in the latter's behalf. To establish this obligation, it was necessary to show . . . a fiduciary relationship between the parties. . . .

Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind. L. J. 463, 465 (1985) (footnote omitted); see also Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction* (pt. 2), 2 Harv. L. Rev. 241, 248 (1889) (in proceedings upon a bill of account, "[t]here must be a fiduciary relation between the plaintiff and the defendant"); Dobbs, supra, § 4.3(5), p. 416. For example, in *Root v. Lake Shore & M.S. Ry. Co.*, the Court held that a bill for accounting could not be brought against a non-fiduciary patent infringer where there were no other grounds to invoke equitable jurisdiction: "That would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong." 105 U.S. 189, 214 (1881).

Unlike an action for an accounting, a securities violation—and thus SEC disgorgement—need not be based on a breach of fiduciary duty. To take one example, SEC rule 14e–3(a), 17 C.F.R. § 240.14e–3(a), imposes "a 'disclose or abstain from trading' command that does not require specific proof of a breach of fiduciary duty." *U.S. v. O'Hagan*, 521 U.S. 642, 676 (1997). In addition, some courts have held a defendant may be liable under § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), without breaching a fiduciary duty. See *S.E.C. v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009) (a "hacker" who did not breach a fiduciary duty in obtaining material nonpublic information may be liable under § 10(b)); *S.E.C. v. Cuban*, 634 F.Supp.2d 713, 725 (N.D. Tex. 2009) ("a duty sufficient to support liability under the misappropriation theory can arise . . . absent a preexisting fiduciary or fiduciary-like relationship"), vacated on other grounds, 620 F.3d 551 (5th Cir. 2010). Thus, SEC disgorgement is not analogous to an accounting.[4]

The SEC argues "[t]his Court has repeatedly characterized disgorgement as an equitable remedy." Opp. to Cert. at 5. However, most of the cases the SEC cites preceded *Great-West* and *Montanile* and made this point only in dicta. See *Chauffeurs, Teamsters &*

[4] The term "accounting" has also been applied to actions, even against non-fiduciaries, "where the accounts between the parties were complicated or where there were mutual accounts, or cases where discovery was needed." Eichengrun, supra, at 467; see also Dobbs, supra, § 4.3(5), pp. 415-16. But SEC disgorgement does not resemble this type of action either, because its availability does not depend on the complexity of the case.

Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990); *Tull*, 481 U.S. at 424.

Kansas v. Nebraska, 135 S.Ct. 1042 (2015), although decided after *Great-West*, is inapposite. *Kansas* arose from the Court's original jurisdiction to adjudicate disputes between the States. See *id.* at 1051. The Court ordered Nebraska to disgorge the gains it derived from its breach of an interstate compact, which exceeded the losses suffered by Kansas, the injured party, and said this was equitable relief. See *id.* at 1056-58. But as the Court also explained, "suits between the States . . . are 'basically equitable in nature.'" *Id.* at 1051 (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973)). Therefore, the Court was merely exercising its "equitable apportionment power . . . to prevent one State from taking advantage of another." *Id.* at 1052. *Kansas* has no relevance to the question here, which does not concern a suit between States.

II. BECAUSE CONGRESS HAS EXPRESSLY AUTHORIZED THE SEC TO OBTAIN CIVIL PENALTIES, SEC DISGORGEMENT IS NOT "APPROPRIATE OR NECESSARY FOR THE BENEFIT OF INVESTORS"

Even if SEC disgorgement were considered "equitable relief," that would not automatically make it a permissible remedy. Section 21(d)(5) does not provide a blanket grant of authority to order *all* "equitable relief." Congress has limited the equitable relief a court may order to relief that is "appropriate or necessary for

the benefit of investors." 15 U.S.C. § 78u(d)(5). As required by the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant," *Kungys v. U.S.*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.); see also *Nielsen v. Preap*, 139 S.Ct. 954, 969 (2019), the Court should give effect to that statutory limitation.

This Court has construed the modifiers "necessary" or "appropriate" in similar statutes to preclude equitable relief where an alternative form of relief would be adequate. See generally *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75-76 (1992) ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief"). For example, in *Varity Corp. v. Howe*, this Court ruled that sections 502(a)(3) and (5) of ERISA, which authorize "appropriate equitable relief," 29 U.S.C. § 1132(a)(3), (5), act as "'catchall' provisions . . . for injuries caused by violations that § 502 *does not elsewhere adequately remedy*." 516 U.S. 489, 512 (1996) (emphasis added). "[W]here Congress elsewhere provided adequate relief for a beneficiary's injury" under ERISA, "there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate'" within the meaning of the statute. *Id.* at 515.

Similarly, in *Clinton v. Goldsmith*, this Court held the All-Writs Act—which authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a)—does not authorize

the United States Court of Appeals for the Armed Forces to bar the President and military officials from removing certain military personnel from the rolls of the Air Force. 526 U.S. 529, 537-40 (1999). The Court explained that, although the All-Writs Act does not expressly refer to equitable relief, it is "essentially equitable." *Id.* at 537. Thus, since the servicemembers "demanding to be kept on the rolls" could have brought an action in the federal courts or resorted to other administrative bodies in the military for "alternative remedies," the writ was "unjustifiable either as 'necessary' or as 'appropriate.' " *Id.* at 537-40.

In the securities enforcement context, disgorgement is never "necessary" or "appropriate" because the SEC has statutory authority to collect civil penalties, which are an equivalent, if not stronger, form of relief. The Remedies Act gives the SEC authority to seek civil penalties for violations of the Securities Act, the Exchange Act, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 that may equal, and in some cases exceed, the "gross amount of [the defendant's] pecuniary gain." 15 U.S.C. §§ 77t(d), 78u(d)(3), 80a–41(e), 80b–9(e). See *S.E.C. v. Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013) (defendant's "disgorgeable gain" was his "maximum civil penalty" under § 78u(d)(3)), cert. denied, 572 U.S. 1018 (2014). Some courts have held that, like equitable disgorgement, civil penalties may be based on gains of third parties, see, e.g., *S.E.C. v. Rajaratnam*, 918 F.3d 36, 41-44 (2d Cir. 2019), or funds that the defendant no longer possesses, see, e.g., *S.E.C. v. Inorganic Recycling Corp.*, No.

99-CV-10159 (GEL), 2002 WL 1968341, at *4 (S.D.N.Y. Aug. 23, 2002). Moreover, the consequences for investors of civil penalties or SEC disgorgement are largely the same: in both cases, the proceeds may, but need not be, remitted to the injured investors. See 15 U.S.C. § 7246(a); cf. *Kokesh*, 137 S.Ct. at 1644.[5]

Prior to the Remedies Act, the tools available to the SEC in civil enforcement proceedings were generally limited to injunctions. See *Kokesh*, 137 S.Ct. at 1640. It was during that period, in the 1960's and 1970's, that "most of the seminal SEC disgorgement cases were decided." Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 3 (2013); see, e.g., *S.E.C. v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77, 91 (S.D.N.Y. 1970), aff'd in part and rev'd in part, 446 F.2d 1301 (2d Cir. 1971); *S.E.C. v. Quing N. Wong*, 252 F.Supp. 608, 613 (D.P.R. 1966). As one former Assistant Director of the SEC's Division of Enforcement has commented, "the temptation for the SEC to request and the courts to grant disgorgement based on questionable theories was understandable," but today "there are no compelling reasons to stretch disgorgement beyond its limits." Ryan, supra, at 3.

To continue to allow equitable disgorgement in SEC enforcement proceedings, notwithstanding the availability of civil penalties, would be to effectively

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[5] The Insider Trading Sanctions Act of 1984, Pub. L. No. 98–376, § 2, 98 Stat. 1264, 1264 (1984), as amended, also authorizes the SEC to obtain civil penalties against insider traders up to "three times the profit gained or loss avoided." 15 U.S.C. § 78u–1(2).

expose defendants to *double*-disgorgement: once as a civil penalty, and again as "equitable relief." See *S.E.C. v. Zada*, 787 F.3d 375, 383 (6th Cir. 2015) (observing that an award of disgorgement and civil penalties in the amount of defendant's "'ill-gotten gain'" "effectively double[d] the amount he owes the SEC"). But if the intent of the statute were to authorize double penalties, Congress could have said so explicitly, as it has in numerous other statutory provisions. See, e.g., 15 U.S.C. § 78u-6(h)(1)(C)(ii) (authorizing double back pay for whistleblower retaliation claims under Dodd-Frank); 31 U.S.C. § 3729(a)(1)(G) (allowing "3 times the amount of damages which the Government sustains" in False Claims Act lawsuits); 42 U.S.C. § 1395y(a)(3)(A) (establishing a private cause of action for damages in "an amount double the amount otherwise provided" against insurers under Medicare).[6]

Congress' decision, in the Remedies Act, to enact a provision authorizing civil penalties but not SEC disgorgement in judicial proceedings brought by the SEC, is further evidence that Congress did not intend SEC disgorgement to be available. This Court has repeatedly emphasized that implied remedies are disfavored, especially where a statute already contains explicit mechanisms for its enforcement. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996) ("It is an

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[6] The statutory provision that an action for civil penalties "may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring," 15 U.S.C. §§ 77t(d)(3)(C), 78u(d)(3)(C)(iii), 80a–41(e)(3)(C), 80b–9(e)(3)(C), clarifies that civil penalties are not exclusive of other relief, such as an injunction, but does not authorize equitable disgorgement.

elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (brackets omitted) (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The 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") (quoting *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 97 (1981)).

Finally, the conclusion that disgorgement is not "appropriate" or "necessary" under section 21(d)(5) does not make that provision superfluous. In SEC enforcement proceedings, courts have relied on their equitable powers to grant a range of remedies other than disgorgement. See generally Michael J. Missal and Richard M. Phillips, *The Securities Enforcement Manual: Tactics and Strategies* 218-19 (2d ed. 2007). Most notably, "the SEC has increasingly invoked equitable powers of federal courts to seek the appointment of independent monitors empowered to oversee companies or particular aspects of company operations." *Id.* at 219 n. 196 (collecting examples). In the proceedings against WorldCom, Inc., for example, the District Court explained that, "[u]nder the [court-appointed] Corporate Monitor's watchful eye," the company "replaced its entire board of directors," hired a new CEO, and "fired or accepted the resignation of every

employee accused . . . of having participated in the fraud. . . ." *S.E.C. v. WorldCom, Inc.*, 273 F.Supp.2d 431, 432 (S.D.N.Y. 2003).[7] In light of the vast equitable powers the SEC wields, it cannot plausibly be argued that eliminating the disgorgement remedy will render the provision for "equitable relief" toothless.

III. SEC DISGORGEMENT IS NOT AVAILABLE UNDER PROVISIONS OF THE SECURITIES LAWS AUTHORIZING COURTS TO "ENJOIN" VIOLATIONS

The SEC contends (Opp. to Cert. at 5) that judicial authority to order disgorgement also derives from sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act, which authorize courts to "enjoin" violations. 15 U.S.C. §§ 77t(b), 78u(d)(1). Section 20(b) of the Securities Act states, in relevant part:

> 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 . . . the Commission may . . . bring an action . . . to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 77t(b). Section 21(d)(1) of the Exchange Act contains nearly identical wording. See 15 U.S.C. § 78u(d)(1).

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[7] SIFMA takes no position here on whether this or any other form of equitable relief is authorized under applicable statutes.

But the SEC cannot recast SEC disgorgement as an injunction. As this Court has explained, “neither [a mandatory injunction nor a prohibitory injunction] contemplates . . . ’damages’ or ‘equitable restitution.’ ” *Meghrig*, 516 U.S. at 484. “Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.” *Owner-Operator Independent Drivers Ass’n, Inc. v. Landstar System, Inc.*, 622 F.3d 1307, 1324 (11th Cir. 2010), reh’g en banc denied, 410 Fed. Appx. 295 (11th Cir. 2010), cert. denied, 565 U.S. 814 (2011).

Nor can SEC disgorgement be characterized as an ancillary remedy pursuant to a court’s equitable authority to order an injunction. The Seventh Circuit recently addressed this issue in the context of § 13(b) of the Federal Trade Commission Act (the “FTCA”), 15 U.S.C. § 53(b), which is worded similarly to sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act. Overruling its own precedent, the Seventh Circuit concluded that the statute does not authorize disgorgement as relief ancillary to an injunction. See *F.T.C. v. Credit Bureau Center, LLC*, 937 F.3d 764, 771-86 (7th Cir. 2019) (overruling *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989)); but see *F.T.C. v. AMG Capital Management, LLC*, 910 F.3d 417, 426-27 (9th Cir. 2018) (stating that restitution may be awarded ancillary to an injunction under the FTCA), cert. filed (Oct. 21, 2019); *F.T.C. v. WV Universal Management, LLC*, 877 F.3d 1234, 1239 (11th Cir. 2017) (same), cert. denied, 138 S.Ct. 2679 (2018). As the Seventh Circuit recognized, “[a]n implied restitution remedy doesn’t sit

comfortably with the text of section 13(b) [of the FTCA]," because that section applies only where the defendant is "'violating' or 'about to violate' the law." *Credit Bureau Center*, 937 F.3d at 772. See 15 U.S.C. § 53(b)(1). That language shows the FTCA's injunction provision is "forward-facing," and cannot be read to encompass a backward-facing remedy such as restitution. *Credit Bureau Center*, 937 F.3d at 772. A contrary reading would be untenable because it would "condition the Commission's ability to secure restitution for past conduct on the existence of an ongoing or imminent unlawful conduct." *Id.* at 772-73. These "tensions . . . dissipate if we read section 13(b) to mean what it says: The remedy is limited to injunctive relief." *Id.* at 774.

In reaching its conclusion the Seventh Circuit relied heavily on *Meghrig*, supra, in which this Court held that restitution of prior cleanup costs was not available under the citizen suit provision of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a). That provision authorizes courts to "restrain any person who has contributed or who is contributing to" the handling of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment," or "order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6972(a). As this Court observed in *Meghrig*, the statute's use of language such as "may present" and "imminent" demonstrates that it "was designed to provide a remedy that ameliorates present or obviates the risk of future

'imminent' harms, not a remedy that compensates for past cleanup efforts." 516 U.S. at 485-86.

Meghrig and *Credit Bureau Center* are instructive because sections 20(b) of the Securities Act and 21(d)(1) of the Exchange Act employ similar forward-looking language. Specifically, these provisions apply only when a person "is engaged" or "about to engage" in a violation. 15 U.S.C. §§ 77t(b), 78u(d)(1). Thus, as in *Meghrig* and *Credit Bureau Center*, these provisions cannot be read to authorize disgorgement, which is predicated on past harms.

Finally, *Porter*, supra, cited by the SEC (Opp. to Cert. at 5), does not compel a different conclusion. First, the Court in *Porter* was careful to note that the restitution granted in that case did not operate as a civil penalty. See 328 U.S. at 402; see also *Tull*, 481 U.S. at 424 (distinguishing *Porter*). Because SEC disgorgement operates as a civil penalty under the securities laws, *Porter* is inapposite. Second, the statute at issue in *Porter* expressly authorized the District Court to grant an "injunction . . . *or other order*," *id.* at 399 (emphasis added), and the Court found restitution was "a proper 'other order.'" *Id.* The Securities Act and Exchange Act provisions at issue do not contain analogous language permitting a court to enter an "other order."

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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