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 OAK MANAGEMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

Oak Management Corporation is the investment manager of several multi-sector, multi-stage venture capital funds that focus on high-growth opportunities in information technology, the internet and consumer sector, financial services technology, healthcare services and technology, and clean energy. Many of the investors in these funds are major public and private pension funds and educational institutions.[1]

Oak can attest from firsthand experience the importance of truly equitable remedies in cases brought by the Securities and Exchange Commission. One of Oak's former partners—Iftikar Ahmed—defrauded the firm and its funds of tens of millions of dollars over the better part of a decade, before fleeing the country. The SEC filed a complaint against Ahmed; the district court in turn froze all of Ahmed's U.S. assets (amounting to tens of millions of dollars), assigning them to a court-appointed receiver. After the district court found Ahmed civilly liable for securities fraud, it assessed \$21 million in statutorily authorized fines. But it also ordered "disgorgement" of nearly \$42 million in ill-gotten gains, pledged by the government to be returned to the defrauded investors. That sum—although less, taken alone, than the value of investors' losses—will go a long way to remedying the harm caused.

Although labeled "disgorgement" by the district court—as is common in securities cases—the award entered in Oak's case is substantively a restitution

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[1] No counsel for a party authored this brief in whole or in part, and no party other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of the brief. Petitioners have filed a blanket consent to the filing of *amicus* briefs. Respondent consented to the filing of this brief.

award. Restitution is a form of traditional equitable relief available to victims of wrongdoing since time immemorial. Over the centuries, equity courts have developed a number of restitutionary devices, including constructive trusts, equitable liens, and accountings for profits. Each of these remedies—like the so-called disgorgement remedy awarded in Oak's case—requires the defendant to give up wrongfully obtained property and return it to his victims. Such relief both prevents the defendant from profiting from his misconduct and restores the status quo ante to those harmed. Regardless whether it is identified as disgorgement, restitution, or by some other label, there is no clearer example of traditional equitable relief.

The "disgorgement" order entered in the present case involves a very different kind of relief. For one thing, the amount of relief ordered exceeds petitioners' gains from their wrongdoing. For another thing, there is no indication that the money (even if petitioners still possessed it) would be returned to petitioners' victims. The order here is therefore not traditionally equitable in any sense of the word. Rather, it is merely a civil penalty dressed up with the equitable-sounding "disgorgement" label.

In resolving the question presented here, the Court should focus on substance, not form. As petitioners' case shows, the "disgorgement" label is sometimes applied to civil penalties; as Oak's case shows, however, the same label is also applied to equitable restitution. The distinction makes all the difference, because true equitable relief is expressly authorized by the securities laws (see 15 U.S.C. 78u(d)(5)) and would be available pursuant to the court's traditional, inherent power even were it not. Not so of civil penalties.

Petitioners do not meaningfully address the distinction between "disgorgement" as civil penalty and "disgorgement" as equitable restitution. Instead, petitioners take the broad position that *any* relief labelled "disgorgement," regardless of its substance, is categorically off the table in SEC enforcement suits. But this case does not present that question; it asks only whether courts are permitted to assess civil penalties not expressly authorized by statute.

We take no position on the answer to that question. We write only to stress that the Court should limit its holding here to the *substance* of the order entered against petitioners, without getting hung up on the district court's use of the word "disgorgement." As Oak's case demonstrates, courts just as often use that word to describe traditional equitable awards authorized by 15 U.S.C. 78u(d)(5) and the courts' inherent authority. The Court should be careful not to say anything in its decision in this case that might hinder a district courts' authority to enter such equitable relief when warranted.

ARGUMENT

This Court held two years ago, in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), that a claim for disgorgement by the SEC is a claim for a "penalty" within the meaning of 28 U.S.C. 2462, the general statute of limitations for civil penalty actions. Petitioners ask this Court to hold that, in light of *Kokesh*, the SEC lacks authority to seek anything called "disgorgement," because the securities laws authorize only the award of civil monetary penalties and equitable relief—and a "penalty" cannot be equitable relief.

Petitioners paint with too broad a brush. Not all remedies that courts refer to as "disgorgement" are the same; although *some* disgorgement awards (like the one in this case) resemble penalties, others require the defendant to return wrongfully-obtained property to victims. The latter kind of awards are not penalties—they are akin to traditional restitution orders, of the sort that courts of equity have awarded for centuries.

Before going further, a clarification is in order: Consistent with leading treatises, we use the term "restitution" to mean relief that "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain." Dan B. Dobbs, 1 Law of Remedies § 4.1(1), at 555 (2d ed. 1993). Understood in this way, restitution is distinct from damages, which "measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." *Ibid*. Some cases have distinguished restitution and disgorgement differently, suggesting that the measure of restitution is the victim's damage, while the measure of disgorgement is the wrongdoer's profit. See, *e.g.*, *SEC* v. *Drexel Burnham Lambert, Inc.*, 956 F. Supp. 503, 507 (S.D.N.Y. 1997) ("[R]estitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoer of ill-gotten gains.").

These different definitions underscore our central point here—that, rather than focusing on labels, the Court should consider the substance of the relief ordered in any given case. In Oak's case, the SEC described the equitable relief ordered by the district court as "disgorgement." That is the correct label in the *Drexel Burnham* sense. The correct label in the Dobbs treatise sense is "restitution." The substance, which is what matters, is the same either way.

A. Courts in securities cases often order funds "disgorged" from wrongdoers to be paid over to victims as restitution

For reasons unclear, courts and commentators often have described monetary awards obtained by the SEC for violations of the securities laws as "disgorgement," regardless how the money is ultimately disposed of. Overuse of the term "disgorgement" obscures the fact that many of the monetary awards in securities cases are, in fact, traditional restitution. They are, in other words, the kind of equitable relief that courts have ordered for centuries.

1. That was true in the very first case awarding monetary relief at the SEC's behest, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971). There, the district court required certain defendants who had fraudulently purchased stock in Texas Gulf to pay the company the profits they had obtained through the wrongful trades.

The Second Circuit rejected the notion that the award was a "penalty assessment," explaining (correctly) that "[r]estitution of the profits on these transactions merely deprives the [defendants] of the gains of their wrongful conduct." *Texas Gulf*, 446 F.2d at 1308. The defendants had argued that the relief was not restitutionary because "it contains no element of compensation to those who have been damaged" (*i.e.*, those who sold stock to the defendants), but the court disagreed. It explained that Texas Gulf had suffered reputational harm as a result of the insider trading, and that it was permissible for the district court to order restitution to Texas Gulf. *Ibid.*

In the years since *Texas Gulf*, many other courts have awarded or upheld disgorgement that was, in substance, traditional restitution. For example:

- In *SEC* v. *First Pac. Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998), the Ninth Circuit affirmed a district order requiring disgorgement of fraudulently retained proceeds and return of those proceeds to investors as "restitution."

- In *United States* v. *Gartner*, 93 F.3d 633, 635 (9th Cir. 1996), the Ninth Circuit noted that in a prior securities case, the defendant had been ordered "to disgorge the exact amount which he had fraudulently obtained from investors, and the disgorged money was to be returned to the defrauded investors."
- In *SEC* v. *McGinn, Smith & Co.*, 98 F. Supp. 3d 506, 521 (N.D.N.Y. 2015), the district court ratified the SEC's proposal to "return the disgorged profits to defrauded investors."
- In *SEC* v. *P.B. Ventures*, 1991 WL 218115, at *4 (E.D. Pa. Oct. 17, 1991), the district court held that the defendants has been "unjustly enriched" by certain amounts and ordered that those amounts be disgorged "for distribution to investors."
- In *SEC* v. *Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983), the district court directed that a disgorgement award be paid into an escrow account for distribution to "those members of the public who were harmed by [defendant's] conduct."

These awards fall well within the equitable tradition of requiring restitution of ill-gotten gains to the victim of wrongdoing.

2. More recently, Congress expressly granted district courts the authority to order restitutionary disgorgement in the Sarbanes-Oxley Act of 2002. See 15 U.S.C. 78u(d)(5). Accordingly, separate civil penalties assessed against securities wrongdoers may "be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation." 15 U.S.C. 7246(a).

"Against the backdrop of a settled understanding in the courts of appeals that courts had equitable authority to order disgorgement in actions brought by the [SEC]" (BIO 6), Congress must be understood as having authorized courts to order traditional equitable restitution as a remedy for violations of the securities laws. See *SEC* v. *DiBella*, 409 F. Supp. 2d 122, 132 (D. Conn. 2006) (noting "Congress'[s] acknowledgment and encouragement of the SEC's long held authority to seek disgorgement in civil actions").

To be sure, as this Court noted in *Kokesh*, disgorgement awards in securities cases sometimes do more than merely require the return of ill-gotten gains to victims. A disgorgement award may "exceed[] the profits gained as a result of the violation." *Kokesh*, 137 S. Ct. at 1644. And it may be paid to the government, rather than to victims (*ibid.*)—a practice most common in cases where "there are a large number of investors with relatively small claims," such that distribution to investors is infeasible. *SEC* v. *Bhagat*, 2008 WL 4890890, at *1 (N.D. Cal. Nov. 12, 2008) (quoting Thomas Lee Hazen, 5 *Treatise on the Law of Securities Regulation* 26 (2005)).

But not every "disgorgement" award has these penalty-like attributes. As we have just shown, many disgorgement awards in fact take the form of equitable restitution, requiring the defendant to return ill-gotten gains to the victims who are rightly entitled to the funds. See, *e.g.*, *Bhagat*, 2008 WL 4890890, at *1 ("[A] general practice of awarding disgorged funds to the victims of the illegal conduct appears to have emerged."); *SEC* v. *Andes*, 1986 WL 1212, at *3 (E.D. Pa. Jan. 23, 1986) ("[M]ost courts do order that disgorged proceeds be distributed among injured investors.").

B. Oak's case is a quintessential example of traditional restitutionary relief granted under the banner of "disgorgement"

1. The "disgorgement" award entered by the court in Oak's case typifies the sort of restitutionary disgorgement that courts frequently order. The Court should be careful to distinguish this traditional, equitable form of relief from the disgorgement-as-penalty imposed on petitioners.

Iftikar Ahmed formerly worked for Oak as an investment adviser. He was responsible for identifying investment prospects for Oak's various funds. But over a period of nearly a decade, he used a variety of mechanisms to divert money from Oak into personal bank accounts for his own use. In some instances, he falsified deal documents, leading Oak to pay an inflated price and transferring the difference between the inflated price and the actual purchase price to his personal account. *SEC* v. *Ahmed*, 308 F. Supp. 3d 628, 637-638 (D. Conn. 2018) (*Ahmed I*). In other instances, he caused money being paid by or to Oak for various services to be diverted to his own account. *Id.* at 643. In yet another instance, he represented to Oak that it was purchasing shares in a target company at a higher exchange rate than the actual prevailing rate, causing Oak to pay $1.36 million more than the agreed-upon purchase price. He transferred this difference to his personal accounts. *Id.* at 645. In total, Ahmed stole an astonishing sum of money—many tens of millions of dollars—from Oak's investors over the course of many years. *SEC* v. *Ahmed*, 343 F. Supp. 3d 16, 27 (D. Conn. 2018) (*Ahmed II*).

The district court granted summary judgment for the SEC, holding that Ahmed's conduct violated the Investment Advisers Act, the Securities Act of 1933, and the Securities Exchange Act of 1934. *Ahmed I*, 308

F. Supp. 3d at 673. The SEC subsequently obtained $21 million in penalties. It separately asked for "disgorgement" of $43.9 million, representing the proceeds of Ahmed's fraudulent conduct within the limitations period. The SEC stated clearly that the purpose of the disgorgement award was to make the victims whole, asking the court to "endeavor to return $77 million"—including all of the disgorged funds—to the investors bilked by Ahmed's fraud. Remedies Mot. 1-2, D. Conn. No. 3:15-cv-675, ECF No. 886 (May 29, 2018).

2. The contrast between the "disgorgement" award in Oak's case and the "disgorgement" ordered against petitioners in this case could not be starker.

To begin with, the district court in petitioners' case ordered disgorgement of over $26 million that petitioners had raised from their investors—even though that amount exceeded the amount of petitioners' actual gains from their conduct and even though they no longer possess those ill-gotten gains. Pet. App. 40a. In Oak's case, however, Ahmed still owns the assets needed to undo his fraud, and the disgorgement award will be satisfied using those assets.[2] In addition, the

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[2] The assets that Ahmed has been ordered to repay are surely traceable to his fraud, given that the fraud was the source of most of Ahmed's income during the relevant period. See Remedies Mot. at 25. But that does not make a difference in securities-fraud cases like this one, despite petitioners' contrary suggestion (Pet. Br. 31). After all, "money is the quintessential fungible." *Towers Charter & Marine Corp.* v. *Cadillac Ins. Co.*, 894 F.2d 516, 523 (2d Cir. 1990). It should not (and does not) matter for equitable purposes whether a particular dollar is directly traceable to a tainted transaction. Otherwise, it would be a simple matter for wrongdoers to remove from their balance sheets funds from tainted transactions, retaining only "clean" cash that is protected from the reach of an equity court. Such a rule would serve neither justice nor common sense.

SEC did not represent in petitioners' case that the disgorgement award would be paid to petitioners' victims. By contrast, the SEC asked for disgorgement in Oak's case exclusively for the purpose of returning the proceeds of Ahmed's fraud to his victims.

Simply put, not all "disgorgement" awards are created equal. Some, like the one before the Court in this case, work much like civil penalties—both because they target property that the defendants do not presently possess, and because the government would retain the funds recovered. But other disgorgement awards, like the one in Oak's case, are better described as traditionally equitable because they recover property that (1) represents the ill-gotten gains resulting from the defendant's fraud and (2) will be returned to the defendant's victims. The second, restitutionary form of "disgorgement" has deep roots in the common law, and should be analyzed separately.

C. Restitution is an ancient equitable remedy that should be preserved in securities cases

Petitioner argues that disgorgement is incompatible with the historic purposes of equity. Pet. Br. 26. Although that may be true of the kind of "disgorgement-as-penalty" that the courts below ordered, it is *not* true of the restitutionary "disgorgement" that courts regularly order in cases like Oak's for the benefit of victims. Indeed, the power to order the return of ill-gotten gains to a victim and restore the status quo is a quintessential power of equity courts.

1. Ordering the return of wrongfully-obtained property is at the very core of a court's equitable powers

Restitution has been an equitable remedy as long as equity has existed. Indeed, the principles underlying restitution have ancient roots, dating back at least to

Roman law. In addition to contracts and what would now be called torts, Roman law recognized a third kind of "quasi-contract" obligations (*quasi ex contractu*), which arose in circumstances where, although no affirmative agreement of the parties or wrongful act had occurred, fairness and equity counseled in favor of requiring a party that had reaped a benefit to compensate or repay another party. For example, one who was paid money that was not, in fact, owed to him was "under an obligation to return it." Max Radin, *The Roman Law of Quasi-Contract*, 23 Va. L. Rev. 241, 245 (1937). This doctrine of restitution reflected the principle that—in the words of the second-century jurist Pomponius—"[f]or this by nature is equitable, that no one be made richer through another's loss." William W. Goodrich, *Restitution—Modern Application of an Ancient Remedy*, 9 Food, Drug, & Cosmetic L.J. 565, 566 (1954).

Centuries later, English courts developed a variety of restitutionary remedies. Although each went by its own name and had its own characteristics, each had the same fundamental objective: to require the defendant to forfeit an improperly acquired gain and, to the extent possible, restore the status quo ante between the parties.

Some of these remedies arose in law courts. The most notable was assumpsit, which originated as an action to enforce certain express contracts. Over time, assumpsit permitted quasi-contractual claims—*i.e.*, claims that the defendant received an unjust benefit in the absence of any contract between the parties. The function of such a claim was "to give the plaintiff a money judgment that [would] recover the defendant's unjust benefits." Dobbs, *supra*, § 4.2(3), at 580.

Equity developed numerous restitutionary devices of its own. These remedies looked to property in the defendant's possession that rightly belonged to the plaintiff, and required that the defendant give up the property so that it could be returned to its equitable owner. Dobbs, *supra*, § 4.3(1). The paradigmatic forms of restitution in equity, as this Court noted in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), were the constructive trust and equitable lien. An equity court "order[ed] 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." *Id*. at 213 (citing Dobbs, *supra*, § 4.3(1), at 587-588; Restatement of Restitution § 160 (1936); and George E. Palmer, 1 *Law of Restitution* § 1.4, at 17; § 3.7, at 262 (1978)).

A relative of these remedies, the accounting for profits, applied in cases where the property in the defendant's possession had produced profits or income, and required the defendant to restore not only "the property itself, but * * * the net income it produced while defendant held title." Dobbs, *supra*, § 4.3(1), at 588. In each case, a plaintiff who prevailed was entitled to an *in personam* order directing the defendant to return the "funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214.

In short, there can be no doubt that the traditional powers of equity courts include the power to direct a defendant to return property in his possession to the victims of his wrongdoing. Such restitutionary relief is at the core of the federal courts' equitable authority.

2. *A federal court's inherent power to order equity exists independent of its power to order statutorily-authorized remedies*

Petitioners argue that disgorgement is unavailable in this case because Congress did not authorize it in the text of the securities laws. Pet. Br. 15-19. Whatever the merits of that argument with respect to the facts of this case, it fails with respect to disgorgement orders that provide traditional restitution. Such relief is undoubtedly part of the "appropriate or necessary" equitable relief "for the benefit of investors" that Congress expressly authorized in 15 U.S.C. 78u(d)(5). But it also rests on a false premise—that the only remedies that a court may grant in securities cases are those that Congress has expressly created. In fact, the remedies that Congress expressly creates supplement, rather than displace, the traditional equitable powers of federal courts.

When Congress established the federal courts in 1789, it gave them jurisdiction over "all suits * * * in equity." Judiciary Act, § 11, 1 Stat. 73, 78 (1789). That grant of jurisdiction, as this Court has explained, gave federal courts the "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." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.,* 306 U.S. 563, 568 (1939)).

The equitable jurisdiction thus conferred permits federal courts to grant traditional equitable relief, no matter whether that relief is also set forth in the text of an applicable statute. For example, when a statute or rule is silent about whether a time period for acting may be suspended, courts retain the power to toll the deadline on equitable grounds. This authority, as the Court has explained, is based on "the judicial power to promote equity, rather than to interpret and enforce statutory provisions." *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017).

In the same way, courts have inherent equitable authority to award traditional restitution, whether or not it is also provided for in an applicable statute. Indeed, this Court itself has held on several occasions that courts have the inherent power to order restitution. In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400 (1946), the Court held that a district court had "inherent equitable jurisdiction" to order a landlord to refund rents that it had collected in violation of the Emergency Price Control Act of 1942. More recently, the Court awarded partial restitution of one state's gains from breaching a water-rights compact with another state, pursuant to its inherent equitable authority. *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1057 (2015). Thus, a court can order restitution of a defendant's ill-gotten gains in a securities case pursuant to its inherent authority.

3. The Court should limit its holding to the facts of this case and not prejudge courts' authority to order truly equitable relief in securities cases

Although it is clear that courts have both the statutory and inherent authority to order traditional equitable disgorgement in securities cases, the Court need not reach that issue in this case. As we have shown, this case is representative of some—but not all—securities cases involving an order of "disgorgement." The order here, which exceeds the amount of petitioners' ill-gotten gains and would not be paid to harmed investors, is similar in substance to a civil penalty. But many cases, like the SEC's ongoing case against Ahmed, involve awards that are substantively restitutionary.

Despite these differences, Liu asks this Court to hold that any remedy labelled "disgorgement" is impermissible in SEC enforcement actions. In petitioners' view (Br. 19-20), "the scope of equitable authority, as understood over centuries, does not include disgorgement as sought by the SEC." But as Oak's experience shows, that is not always correct.

The Court should limit its holding to the facts of this case. This case is not about truly equitable relief; rather, it is about the district court's authority to order extra-statutory civil penalties under the banner of "disgorgement." In addressing the permissibility of the penalties ordered in this case, the Court should be aware of the SEC's case against Ahmed and others like it, and cautious not to prejudge the merits of true equitable relief in such cases, regardless whether that relief is labelled by the SEC or the court as "disgorgement."

CONCLUSION

The court should decide this case narrowly in light of the limited facts presented.

Respectfully submitted.

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