No. 18-1501

IN THE
Supreme Court of the United States

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

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

The members of the Chamber recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that our markets function fairly and effectively. Those enforcement powers, however, must be exercised within the limits Congress has provided. That includes Congress's decision to limit SEC enforcement actions to seeking civil penalties, injunctions, and "equitable relief"—and not to authorize the form of relief that the

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[1] Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SEC pursues under the label "disgorgement." The Court should reverse the decision of the Ninth Circuit.

SUMMARY OF ARGUMENT

This case boils down to a straightforward principle: if Congress does not give an agency a power, the agency does not have it. Congress did not give the SEC the power to seek disgorgement in judicial proceedings. So, the SEC may not seek disgorgement in judicial proceedings. Congress did give the SEC the authority to seek "injunctions" and "equitable relief," but disgorgement—a monetary penalty requiring payment to the sovereign, not for compensation—is nothing like an "injunction" or "equitable relief." The SEC may think disgorgement is a good idea as a policy matter, but that view is not a substitute for legal authority.

The SEC relies heavily on the doctrine of "ratification," which theorizes that lower-court decisions conferring a power, coupled with Congress's subsequent enactment of statutes in the same general area, are enough to infer that Congress implicitly approved of the lower-court decisions. But the doctrine of implicit ratification should find no favor here. And there is a far easier way for Congress to ratify lower-court decisions: pass a statute ratifying them. That never happened with disgorgement, so the SEC lacks the power to seek disgorgement.

ARGUMENT

In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), this Court concluded that SEC disgorgement was a penalty for purposes of determining the statute of limitations. *Id.* at

1643, 1645. The Court explained that SEC disgorgement is "imposed … as a consequence for violating … public laws," is "not compensatory," and "does not simply restore the status quo." *Id.* at 1643-45. Rather, the defendant pays the judgment "to the United States Treasury," and the SEC may "leave[] the defendant worse off" than the *status quo ante* by requiring "disgorgement" of amounts that "accrue[d] to third parties" and "without consideration of [the] defendant's expenses." *Id.*

The question here, reserved in *Kokesh*, is whether the SEC has the authority to seek a remedy with those features. The answer is no. The SEC, as an administrative agency, "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). And nowhere has Congress authorized the SEC to wield the remedy it calls "disgorgement." The SEC points to its power to "enjoin" securities-law violations, *see* 15 U.S.C. §§ 77t(b), 78u(d)(1), and to seek "equitable relief" that is "appropriate or necessary for the benefit of investors," *id.* § 78u(d)(5). Br. in Opp. at 5. But SEC disgorgement—a classic monetary remedy—is not an injunction. And it disdains all the rules this Court and the treatise writers have identified as defining "equitable relief." To the contrary, this Court held in *Kokesh* that SEC disgorgement serves as a "punitive … sanction," with the "'primary purpose'" of "'deter[ring] violations of the securities laws.'" 137 S. Ct. at 1643, 1645 (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). That holding establishes that SEC disgorgement is not "equitable relief" at all.

I. SEC Disgorgement Is Not An "Injunction."

The SEC's statutory authority "to enjoin" securities-law violations, 15 U.S.C. §§ 77t(b), 78u(d)(1), does not authorize it to seek disgorgement. An injunction compels a party "to do or refrain from doing a particular thing." INJUNCTION, *Black's Law Dictionary* 937 (11th ed. 2019); *accord* Henry C. Black, *A Law Dictionary* 626 (2d ed. 1910) (an "injunction is a writ or order requiring a person to refrain from a particular act," where the injury cannot "be adequately redressed by an action at law"). It is the very opposite of a money judgment like disgorgement, which requires payment from a party's general assets based on past misconduct. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996) ("[N]either [a mandatory or prohibitory injunction] contemplates ... equitable restitution."); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365 (2011) (monetary remedy of "backpay is neither" an "injunction[]" nor a "declaratory judgment[]"). As this Court observed in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), "suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied." *Id.* at 210 (quotation marks omitted).

Indeed, grounding disgorgement in the SEC's injunctive authority would make nonsense of the statutory text. The relevant statutes allow the SEC to seek injunctions "[w]henever it shall appear to the Commission that any person *is engaged or about to engage in*" prohibited conduct. 15 U.S.C. § 77t(b) (emphasis added); *see id.* § 78u(d)(1). If these statutes

authorized disgorgement, the SEC could seek this relief for ongoing violations (*i.e.*, that the defendant "is engaged … in"), or—bizarrely—future violations (that the defendant is "about to engage in"), but not *completed* violations. Congress could not have authorized backwards-looking monetary relief like disgorgement though provisions that require an ongoing or future violation.

Nor, contrary to the SEC's claim, did *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), hold that "a legislative grant of authority to 'enjoin' statutory violations encompasses the power to order a violator 'to disgorge profits.'" Br. in Opp. at 5 (quoting *Porter*, 328 U.S. at 398-99). Instead, *Porter* recognized that monetary relief is *different from* an injunction and held only that equity courts might in some circumstances order monetary relief as "an equitable adjunct to an injunction decree." 328 U.S. at 399. *Porter* thus merely raises, rather than resolves, the question presented in this case: whether the remedy that the SEC terms "disgorgement" qualifies as "equitable relief." Pet. i. It is to that question that *amicus* now turns.

II. SEC Disgorgement Is Not "Equitable Relief."

Disgorgement also is not "equitable relief"—and it certainly is not "equitable relief that may be appropriate or necessary for the benefit of investors," which is all the

statute authorizes the SEC to pursue. 15 U.S.C. § 78u(d)(5).

A. "Equitable Relief" Is Relief That Could Historically Be Obtained In The Courts Of Equity.

Where Congress by statute authorizes "equitable relief," it does not empower courts to do whatever they deem fair, just, or wise. Instead, this Court has understood this phrase as a legal term of art: It "must refer to 'those categories of relief that were typically available in equity.'" *Knudson*, 534 U.S. at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). Likewise, this Court has understood statutory authority to administer suits "in equity" to authorize only "relief … traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999).

This Court carefully guards against hand-wavy invocations of equity. Hence, when litigants invoke equity, this Court examines *with specificity* whether chancery courts typically granted a particular remedy. Especially close to home, the Court did so in *Gabelli*. There, the SEC invoked a "discovery rule" that was the "undisputed doctrine of courts of equity" when a plaintiff sued to redress its own injury. *Gabelli v. SEC*, 568 U.S. 442, 449-50 (2013); *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918). But because the SEC could adduce no evidence that courts of equity had ever recognized that doctrine where the government sued in "an enforcement action," this Court held that the SEC could not rely on it—explaining that the "Government is … a different kind of plaintiff" seeking "a different kind of

relief" from an injured victim. 568 U.S. at 449, 451-52. Similar examples abound. *See Knudson*, 534 U.S. at 213 (although the plaintiff sought "restitution," it did not comply with the requirements for "seek[ing] restitution *in equity*"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (declining to permit damages claim to proceed against nonfiduciary for breach of trust because this relief was not available from a "court of equity" in days "of the divided bench").

These cases establish that the lower courts' initial reasons for adopting the disgorgement remedy were incorrect. The SEC first prevailed upon courts to award "disgorgement" in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301 (2d Cir. 1971); *see Kokesh*, 137 S. Ct. at 1640. The *Texas Gulf Sulphur* court, however, did not identify any historical evidence that "disgorgement" is an equitable remedy. Instead, it reasoned that courts have general "inherent equitable powers … to do justice." 312 F. Supp. at 91. It then concluded that disgorgement would "effectuate the purpose" of the securities laws and "deter future violations." *Id.* at 92. Thus, the court equated the word "equitable" with whatever a court deems fair or wise—the very approach that, under this Court's modern cases, is no longer good law.

B. Disgorgement Was Unavailable In The Courts Of Equity.

Applying the Court's modern approach requires a ruling for petitioners. That is because no court of equity would have awarded the remedy this Court described in *Kokesh*. And the types of relief that equity courts *would*

have awarded—like restitution, constructive trust, and accounting—differ fundamentally from the relief that the SEC seeks as "disgorgement."

1. Disgorgement Does Not Resemble Any Remedy Available To The Sovereign In The Courts Of Equity.

Courts of equity did not permit the sovereign to seek the remedy of "disgorgement." Heavy tomes—Blackstone, Story, Pomeroy, and the Restatement (First) of Restitution—catalog precisely the relief that courts of equity would provide. *See generally* William Blackstone, *Commentaries* (1765-1769); Joseph Story, *Commentaries on Equity Jurisprudence* (1846); John N. Pomeroy, *A Treatise on Equity Jurisprudence* (3d ed. 1905); *Restatement (First) of Restitution* (1937). Nowhere do those treatises mention disgorgement, or any equitable remedy that even resembles disgorgement—a backwards-looking, monetary remedy that the sovereign may obtain as the enforcer of public laws. These treatises detail how the sovereign could bring other types of equitable actions, such as actions to abate public nuisances. *E.g.*, 2 Story § 923, at 251. But they stress that such actions were "rare" and "principally confined to informations seeking preventative relief." *Id.* By contrast, Blackstone relates that when the government sought to obtain money sanctions for public nuisances, it had to do so via "public prosecution," "indictment," and "fine"—not actions in equity courts. 4 Blackstone, *Commentaries* *167-68. There is literally not one historical case ever in which any court of equity awarded a money judgment to the

sovereign against one of its citizens accused of wrongdoing.

2. SEC Disgorgement Cannot Be Analogized To Traditional Equitable Remedies Awarded In Private Litigation.

In an effort to fill that historical gap, lower courts have attempted to analogize disgorgement to remedies that courts of equity would award in litigation between private parties. The Second Circuit, for instance, has compared SEC disgorgement to "the ancient remedies of accounting, constructive trust, and restitution." *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006). Disgorgement, however, differs fundamentally from these remedies.

i. SEC Disgorgement Does Not Restore The Status Quo.

At core, the "recognized power" of equity is to "restor[e] the status quo" by seizing money or property wrongfully obtained by the perpetrator and "ordering the return of that which rightfully belongs to the" victim. *Porter*, 328 U.S. at 402. The flip side is also true: When a remedy is "by no means limited to restoration of the status quo," it goes beyond anything that would be "traditionally considered an equitable remedy." *Tull v. United States*, 481 U.S. 412, 424 (1987); *see id.* (holding on that basis that certain civil penalties did not constitute equitable relief); *accord* 1 Dan B. Dobbs, *Law of Remedies* § 4.1(2), at 557 (2d ed. 1993) ("Restitution rectifies unjust enrichment by forcing restoration").

"SEC disgorgement" is not an equitable remedy under this definition. Although "[s]ome disgorged funds are paid to victims," "other funds are dispersed to the United States Treasury." *Kokesh*, 137 S. Ct. at 1644. It is simply up to the district "court's discretion to determine how and to whom the money will be distributed." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). "[C]ompensat[ing] investors" is not even disgorgement's "primary purpose," *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978), which instead is "to deter violations of the securities laws," *Kokesh*, 137 S. Ct. at 1643 (quoting *Fischbach*, 133 F.3d at 175). Indeed, at the government's urging, courts have held that it need not "make any particular effort to compensate the victims"; instead, compensation is a "matter of grace." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011). In *Kokesh*, this Court held that disgorgement's "noncompensatory" nature rendered disgorgement a "penalty" under § 2462. 137 S. Ct. at 1644. That same feature means it is not "equitable relief." A remedy cannot restore the "status quo"—and so cannot be equitable—when the recovery need not go to injured victims but instead can fill the Treasury.

This Court's cases have drawn the same line. Again and again, this Court has recognized that a remedy may be "equitable" only if it restores misappropriated funds *to the victim*. *Porter* held that under the Emergency Price Control Act of 1942, the Administrator could bring a "restitution" claim that would require landlords to "disgorge" unlawful rents to the tenants who paid them, "restoring the status quo [by] ordering the return of that

which rightfully belongs to the purchaser or tenant." *Porter*, 328 U.S. at 401-02. Then, *Porter* contrasted this compensatory, status quo–restoring remedy with a different remedy, likewise pegged to "the amount of the overcharge," that the Administrator could also pursue: "damages in the nature of penalties" that "go to the United States Treasury." *Id.* at 401-02; *see id.* at 406 n.9 (Rutledge, J., dissenting). This latter relief, the Court stressed, "differs greatly from" remedies that "lie[] within … equitable jurisdiction." *Id.* at 402.

Likewise, in *Knudson*, this Court explained that the essential feature of "equitable relief" is that the defendant has property "belonging in good conscience *to the plaintiff*," and equity will "transfer title … to a plaintiff who was … *the true owner*." *Knudson*, 534 U.S. at 213-14 (emphasis added). It did the same in *Tull*, where the government argued that a suit seeking money sanctions for violations of "the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy." 481 U.S. at 424. This was a "poor analogy," the Court explained, because equitable "[r]estitution is limited to … ordering the *return* of that which rightfully belongs to" the victim. *Id.* (internal quotation marks omitted). And the Court did so again in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), where it recognized that "equitable jurisdiction" extended to "restor[ing] wage losses *to employees* discharged" unlawfully, *id.* at 295-96 (emphasis added), and in *United States v. Moore*, 340 U.S. 616 (1951), which explained that "an action for equitable relief" encompassed an order of "restitution to the tenant of all overcharges" imposed as part of

unlawful rents, *id.* at 618, 621. Treatises say the same thing. *See, e.g.*, *Restatement (First) of Restitution* § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution *to the other*." (emphasis added)).

Never—not once—has this Court or any authority on equity recognized as "equitable" a monetary sanction that is paid to the government as the sovereign enforcer of the laws, with compensation to victims a "matter of grace." *Bronson*, 654 F.3d at 373.[2]

ii. SEC Disgorgement Does Not Accord With Equitable Measures Of Relief.

Disgorgement also cannot be defended as a variety of "accounting, constructive trust, [or] restitution," *Cavanagh*, 445 F.3d at 119, because it departs from how equity courts *measured* their relief.

To begin, each of these remedies pegged its amount to the perpetrator's gains—as befits status quo–restoring remedies. *See, e.g.*, 1 Dobbs, *Law of Remedies*

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[2] The Second Circuit attempted to brush off this fatal flaw by quoting this Court's statement that "chancery courts go 'much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Cavanagh*, 445 F.3d at 118 n.29 (quoting *Grupo Mexicano*, 527 U.S. at 326). *Grupo Mexicano*, however, pointed out only that when such indisputably equitable relief as an injunction is at issue, "the public interest" carries greater weight in the equitable balancing than "only private interests." 527 U.S. at 326 (quotation marks omitted). It did not suggest that legal claims brought by private plaintiffs would transform into equitable claims if brought by the government.

§ 4.3(2), at 592 (constructive trust may in some circumstances "[c]aptur[e] the defendant's gains"); *id.* § 4.3(5), at 608 (similar for accounting).

SEC disgorgement, however, disdains this limit. For example, as *Kokesh* explained, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." 137 S. Ct. at 1644 (quoting *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014)). Similarly, "[i]ndividuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits." *Id.* (citing *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998) ("A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper"); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990)).

Likewise, equity demanded that a defendant required to disgorge gains be permitted to offset the costs of obtaining those gains. 1 Dobbs, *Law of Remedies* § 4.3(5), at 610 (defendant may make "appropriate deductions for expenses he incurred in reaping [his] profits," provided he carries the "burden of proving" them); *see Restatement (Third) of Restitution and Unjust Enrichment* § 51, cmt. a (2011) ("As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement." (quoted in *Kokesh*, 137 S. Ct. at 1644-45)). But "SEC disgorgement sometimes is ordered without consideration of a

defendant's expenses that reduced the amount of illegal profit"—as, indeed, in *Kokesh* itself. *Kokesh*, 137 S. Ct. at 1644.

In these ways as well, the SEC's disgorgement remedy departs from anything that could qualify as "equitable relief."

iii. SEC Disgorgement Imposes A Personal Money Judgment, Rejecting The Tracing Rules Of Equity.

As this Court has explained, for a remedy like "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 214; *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 658-59 (2016) (restitution claim is legal, not equitable, when money comes from defendant's general assets). This rule enforces the core distinction between law and equity: A "'judgment imposing a merely personal liability upon the defendant to pay a sum of money'" is quintessentially "legal" relief; meanwhile, for relief to be equitable, the plaintiff must point to "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 213 (quoting *Restatement (First) of Restitution* § 160, cmt. a, at 641-42 and citing 1 Dobbs, *Law of Remedies* § 4.3(1), at 587–588; 1 G. Palmer, *Law of Restitution* § 1.4, p. 17; § 3.7, at 262 (1978)).

The SEC's disgorgement remedy rejects this equitable rule as well. The SEC has prevailed on courts to hold that, to obtain disgorgement, it need not "trace[] "specific assets … back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016). As a result, "the Federal Reporter is replete with instances in which judges … have permitted the SEC to obtain disgorgement without any mention of tracing"—so much that the practice is regarded as "uncontroversial." *Bronson*, 654 F.3d at 374; *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (disgorgement imposes no "requirement to replevy a specific asset").[3]

Indeed, the SEC has persuaded courts to go so far as to hold that disgorgement may be used to impose a personal money judgment on *third parties* who receive misappropriated funds. As a result, once a third party—however innocent—receives misappropriated funds, the SEC may obtain a money judgment in that amount, and the "SEC is not required to trace specific funds to their ultimate recipients in such a situation." *SEC v. Rosenthal*, 426 F. App'x 1, 3 (2d Cir. 2011); *accord SEC*

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[3] *Knudson* noted a "limited exception for an accounting of profits." 534 U.S. at 214 n.2. Under this remedy, a plaintiff "entitled to a constructive trust on particular property … may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing" them. *Id.* But even this remedy requires the plaintiff to identify "particular property" that is subject to a "constructive trust"; it merely removes the requirement to trace the provable *gains* on that particular property. It does not authorize courts to award equitable relief without *ever* identifying particular property subject to a constructive trust.

v. I-Cubed Domains, LLC, 664 F. App'x 53, 56 (2d Cir. 2016) (same rule).[4] Whether or not such a remedy is wise, it is certainly not "equitable" as the courts of equity would have understood it.

iv. Disgorgement Is Not Equitable.

These several departures from equity add to more than the sum of their parts. The *reason* that equity courts enforced the above-described rules—that judgments must go to victims, that their amount must never exceed the victims' losses and the wrongdoers' gains, and that any recovery must be traced to ill-gotten gains—is that these rules mark the line between equitable relief and punitive sanctions. *See, e.g.*, *Porter*, 328 U.S. at 402 ("equitable jurisdiction" is limited to providing restitution to victims and "differs … from … penalties which go to the United States Treasury"); *Restatement (Third) of Restitution and Unjust Enrichment* § 51, cmt. h ("Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid"). Indeed, this Court has already recognized in *Kokesh* that many

[4] Lower courts have held that "relief defendants" may avoid liability if they can show a "legitimate claim" to the assets received from the wrongdoer. *CFTC v. Walsh*, 618 F.3d 218, 226 (2d Cir. 2010); *see SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). But lower courts "have not developed … guidelines for what qualifies as a 'legitimate claim.'" *Walsh*, 618 F.3d at 226. Whatever those rules prove to be, they will not comply with the practice of equity courts, which would never have contemplated awarding a money judgment against third parties with no requirement to show tracing.

of these same features show that "disgorgement in this context is a punitive, rather than a remedial, sanction"—intended to further disgorgement's "primary purpose of … deter[ring] violations of the securities laws." 137 S. Ct. at 1643, 1645 (internal quotation marks omitted).

Equitable relief and punitive sanctions are like oil and water. "As this Court has long recognized, courts of equity would not—absent some express statutory authorization—enforce penalties." *Mertens*, 508 U.S. at 270. Thus, when a "court of equity" encounters a sanction "in the nature of the penalty, … equity will not assist to enforce at all." *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836). Or put otherwise: "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. City of Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1892). So, because disgorgement functions as punitive relief, aiming at "punishment" and "deterrance," that means—by the same token—that it is not "equitable relief." *See Kokesh*, 137 S. Ct. at 1643 ("deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e]" (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (alterations in original)).

III. Congress Did Not Ratify The SEC's Non-Equitable Disgorgement.

Unable to show that SEC disgorgement is "equitable" in any sense an equity court would recognize, the government falls back on ratification. The Sarbanes-Oxley Act of 2002 amended the Securities Act to authorize the SEC to pursue "equitable relief." And when Congress did so, the government notes, it did not expressly reject lower-court decisions issuing

"disgorgement" awards that were decidedly non-equitable. Br. in Opp. at 5; *see Fischbach*, 133 F.3d at 175; *Banner Fund*, 211 F.3d at 617. Hence, the government says, Congress must have ratified SEC disgorgement as "equitable relief," regardless of how equity courts would have viewed it. The SEC similarly contends that statutes *limiting* remedies in disgorgement cases—such as a statute prohibiting private attorneys' fees awards from any "funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action," 15 U.S.C. § 78u(d)(4)—should be construed as reflecting Congress's implicit *approval* of disgorgement.

Fidelity to basic separation-of-powers principles requires rejecting this argument. The Court has "observe[d]" the "limitations" of ratification arguments as tools for discerning an "expression of congressional intent." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Ratification arguments seek to achieve via congressional silence what the Constitution provides may be accomplished only via bicameralism and presentment. When ratification arguments come into play, Congress by definition has not actually enacted *statutory text* that accomplishes the desired end. If it had, there would be no need to reach ratification. Instead, ratification arguments urge the Court to infer that Congress has implicitly assented to the reasoning or outcomes in lower-court decisions somewhere in the area. *See, e.g.*, *Cent. Bank*, 511 U.S. at 186; *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001); *Patterson v. McLean Credit*

Union, 491 U.S. 164, 175 (1989). Any such endeavor, however, raises a tangle of separation-of-powers and practical problems that testify to this Court's wisdom in strictly limiting its reliance on such arguments. *Cent. Bank*, 511 U.S. at 186.

The separation-of-powers problem is obvious. "Congress may legislate … only through the passage of a bill which is approved by both Houses and signed by the President." *Patterson*, 491 U.S. at 175 n.1. Yet ratification arguments attempt to embed in law lower-court decisions that Congress did not enact and the President did not sign—on the theory that, by *failing* to repudiate those decisions, Congress *approved* them. "Congressional inaction," however, "cannot amend a duly enacted statute." *Id.*

The linked practical problem is that is it is generally "impossible to assert with any degree of assurance that" Congress intended to ratify a specific legal rule applied by lower courts. *Sandoval*, 532 U.S. at 292-93 (quotation marks omitted). To begin, ratification arguments assume a level of congressional awareness of lower-court decisions that is usually unrealistic. And to the extent members of Congress are aware of the broader legal context, the context will rarely compel a single conclusion about Congress's collective intent. *Cf.*, *e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.*, 135 S. Ct. 2507, 2539 (2015) (Alito, J., dissenting) ("It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong."). Hence, as this Court has aptly observed, "we walk on quicksand when we try to find … a controlling

legal principle" via such ratification arguments. *Cent. Bank.*, 511 U.S. at 186 (quoting *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.)).

This case well illustrates the point. Consider the state of play in 2002. True enough, some lower-court decisions had approved "disgorgement" awards that far departed from any relief that could be genuinely called "equitable." *Fischbach*, 133 F.3d at 175; *Banner Fund*, 211 F.3d at 617. But lower courts were also awarding *core* equitable relief like receiverships despite the absence of clear authority for doing so: Before 2002, the "only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws." *Kokesh*, 137 S. Ct. at 1640. So, courts grounded receiveships on the uncertain theory that courts have "inherent equity power to grant [such] relief [as] ancillary to an injunction." *Texas Gulf Sulphur*, 312 F. Supp. at 91. Meanwhile, when Congress legislated in 2002, this Court had recently issued its decisions in *Mertens* (1993) and *Knudson* (2002, merely six months before the Sarbanes-Oxley Act's passage) holding that "the term 'equitable relief'" in the Employee Retirement Income Security Act of 1974 "must refer to 'those categories of relief that were *typically* available in equity.'" *Knudson*, 534 U.S. at 210 (quoting *Mertens*, 508 U.S. at 256).

Now consider, against that backdrop, the variety of views that members of Congress and the President may have held as they voted on and signed the Sarbanes-Oxley Act. Perhaps some indeed were aware of the lower-court decisions approving disgorgement. Perhaps others were focused on the absence of clear statutory

authority for receiveships and other core equitable remedies. Still others may have known how *Mertens* and *Knudson* had interpreted the phrase "equitable relief" and believed (correctly) that SEC disgorgement is not "equitable relief" under those standards—or they may have been aware of those decisions and had no particular views on the abstruse question of what specific relief would have been deemed "equitable" "[i]n the days of the divided bench." *Knudson*, 534 U.S. at 212. A congressperson could hold any of these views (or others) and still vote for the Sarbanes-Oxley Act. Hence, the inference that the government seeks to draw from the 2002 amendments thus is hardly the only one the context permits. The answer to these varied possibilities is, as so often, to stick to the text.[5]

Equally unpersuasive is the SEC's argument that Congress ratified disgorgement by enacting statutes that "presuppose the availability of disgorgement as an equitable remedy in SEC enforcement actions." Br. in Opp. at 6. For one thing, many of these statutes do not presuppose anything at all about disgorgement actions

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[5] Indeed, the government does not even apply the canon of construction it invokes. It invokes the principle providing that, if "a statute uses words or phrases that have already received … uniform construction by inferior courts …, they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 54, at 322 (2012); *see* Br. in Opp. 6. But the only cases that construe the phrase "equitable relief" *in a statute* are *Mertens* and *Knudson*, which reject the government's position. By contrast, the government's cases do not "construe" the phrase "equitable relief"; instead, those cases merely rested on their belief that SEC disgorgement is in some sense equitable.

in court. In 1990, Congress by statute gave the SEC authority to "enter an order requiring accounting and disgorgement" in *administrative* proceedings. 15 U.S.C. § 78u-2(e); *see* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, tit. II, § 202(a), 104 Stat. 931, 937. So, when Congress provided that—for example—civil penalties could "be added to and become part of a disgorgement fund," 15 U.S.C. § 7246(a), it "presupposed" only what it had provided for expressly by statute: that the SEC could obtain disgorgement in administrative proceedings.

More important, to the extent these statutes contemplate disgorgement actions in courts, they presuppose only the reality that courts were *actually awarding* disgorgement. As Justice Alito observed, lawmakers often are "not of one mind about" lower-court doctrines that this Court has not reviewed. *Inclusive Cmtys. Project*, 135 S. Ct. at 2540 (Alito, J., dissenting). But they may be able to reach more limited agreements on how those doctrines—so long as they go forward uncorrected—should unfold. Take, for example, the provision prohibiting "funds disgorged" from being "distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds." 15 U.S.C. § 78u(d)(4). Some of the members who voted for this provision may indeed have approved of lower-court decisions permitting disgorgement. But other members could well have believed that SEC disgorgement is unlawful, or have had no view on the matter—but decided that, to the extent courts continue to award disgorgement, the disgorged amounts at the least should not be available

"as payment for attorneys' fees." It is impossible to choose among these possibilities. And again, the solution to that impossibility is to adhere to construing the text Congress enacted—rather than entertaining the government's assertions about Congress's intent that it never embodied in statute.

Indeed, the SEC's "ratification" argument puts lawmakers into a Catch-22. Suppose lower courts have recognized a particular implied remedy. Suppose that there are neither the votes in Congress to expressly ratify the remedy, nor the votes to repudiate it—perhaps a majority of the House favors the implied remedy as a matter of policy, while a majority of the Senate opposes it. Suppose, finally, that Congress is considering more modest legislation limiting the scope of the implied remedy but not repudiating it. Such proposed legislation would force legislators who oppose the implied remedy into an impossible position. If legislators vote for the limiting legislation, they will be deemed to have "ratified" the implied remedy by voting for legislation that presupposes its existence. If legislators vote against the limiting legislation, then the scope of the implied remedy will increase unabated—and courts might even construe the failure of the limiting legislation as evidence that Congress *wanted* that to occur. *Anything* Congress does will be construed as evidence that Congress agreed with the lower-court decisions conferring on agencies powers that Congress never expressly provided.

For other reasons, too, ratification arguments must be approached with caution. For one thing, ratification arguments will tend to perpetuate interpretive and

methodological approaches that this Court has long rejected. Long ago, this "Court followed a different approach to recognizing implied causes of action than it follows now," and a very different appoach to interpreting statutes. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). But with ratification arguments, such long-discarded approaches gain an afterlife via hoary lower-court decisions that congressional inaction is deemed to have "ratified."

Moreover, ratification operates as a one-way ratchet favoring government power. Ratification arguments typically apply the following syllogism: lower courts have recognized that government has some authority; Congress has enacted some statute in the same area that presupposes that the authority exists, such as by limiting the authority in some way; therefore, Congress ratified the lower-court decisions. But when courts apply that syllogism, they almost always hold that Congress ratified a lower-court opinion *conferring* some implied power. It would be unusual for Congress to enact legislation that ratifies lower-court decisions *declining* to confer a power—because there is no need to limit or regulate the exercise of a power that does not exist. Thus, the ratification doctrine has the perverse effect of ratifying only lower-court decisions expanding agency power, and not lower-court decisions contracting agency power.

Even worse, the ratification doctrine results in the outcome that Congress is deemed to have ratified remedies only when it is *skeptical* of them. If Congress agrees with lower-court decisions conferring some implied remedy, it has no need to limit or alter those

decisions—and so the ratification doctrine would not apply, because Congress will have not enacted any supposedly ratifying legislation. Only when Congress is dissatisfied with how lower courts are applying a doctrine is corrective legislation necessary—yet that is the very corrective legislation that causes courts to infer that Congress approved the remedy being corrected.

For all these reasons, the Court should reject the government's ratification arguments.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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