No. 18-1501

IN THE

Supreme Court of the United States

CHARLES C. LIU and XIN WANG a/k/a LISA WANG,

Petitioners,

v.

SECURITY 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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though this Court has determined that such disgorgement is a penalty.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has regularly appeared before this and other federal courts in cases related to the proper scope of the federal securities laws. *See, e.g., Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018); *CalPERS v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017). In particular, WLF has filed *amicus curiae* briefs urging that the enforcement powers of the Securities and Exchange Commission (SEC) and other federal regulatory agencies be limited to those expressly granted by Congress. *See, e.g., Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

The SEC routinely urges federal courts to impose a disgorgement sanction on those alleged to have violated federal securities laws, despite the absence of any express statutory authorization for such relief. WLF is concerned that such efforts undermine the constitutionally mandated separation of powers. Federal regulatory agency possess only those powers granted to them by Congress. When, as here, statutes are silent regarding the grant of a power to an agency,

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

Congress should be understood to have denied that power.

Congress has supplied the SEC with many tools with which to ensure compliance with the securities laws. The SEC should rely on those tools rather than resorting to the non-statutory enforcement mechanisms it apparently finds more convenient.

STATEMENT OF THE CASE

Petitioners Charles C. Liu and Xin Wang raised $27 million from investors, ostensibly for the purpose of constructing and operating a proton cancer therapy center in California. In 2016, the SEC filed a civil action against Liu and Wang, alleging three counts of securities fraud.

The district court granted summary judgment to the SEC on its claim that Liu and Wang violated Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), which prohibits obtaining money or property through untrue statements or omissions in the offer or sale of securities. Pet. App. 9a-64a. The court stated that because "that violation is sufficient to trigger imposition of the remedies the SEC seeks," it did not need to consider the SEC's remaining claims. *Id.* at 34a.

The court granted each of the remedies requested by the SEC. It permanently enjoined Liu and Wang from violating § 77q(a)(2) and from offering to sell securities in connection with the U.S. government's EB-5 visa program. Pet. App. 62a-63a. It held that civil penalties should be imposed under the

steepest tier authorized by statute, 15 U.S.C. § 77t(d); it imposed a $6.7 million penalty on Liu and a $1.5 million penalty on Wang. *Id.* at 42a, 62a. And the court ordered that Liu and Wang were jointly and severally liable for disgorgement of $26.7 million—calculated based on $27 million obtained from investors minus funds already recovered by the SEC from Liu's and Wang's corporate accounts. *Id.* at 40a-41a, 62a.

Liu and Wang challenged the disgorgement judgment on appeal. In particular, they argued that the district court "lacked statutory authority to award disgorgement," citing this Court's *Kokesh* decision (which came down two months after the district court issued its judgment). Pet. 9th Cir. Br. 48-49. The Ninth Circuit expressly acknowledged that Liu and Wang were raising that argument. Pet. App. 6a (stating that, "[r]elying on *Kokesh*, ... the Appellants argue that the district court lacked the power to order disgorgement"). The appeals court nonetheless affirmed the disgorgement award, concluding that *Kokesh* was not "clearly irreconcilable" with longstanding Ninth Circuit precedent that upheld the SEC's statutory authority to seek (and the federal court's authority to award) disgorgement as a remedy for securities law violations. *Id.* at 7a.

SUMMARY OF ARGUMENT

Federal appeals courts that have upheld disgorgement as a remedy for securities law violations have done so with the understanding that disgorgement of ill-gotten gains is an "equitable" remedy. *See, e.g., SEC v. Cavanaugh*, 445 F.3d 105,

117 (2d Cir. 2006). Based on that understanding, appeals courts have concluded that the SEC possesses statutory authority to seek disgorgement[2] and that federal courts may impose a disgorgement remedy pursuant to their inherent equitable powers.

But *Kokesh* undermines that basic understanding. *Kokesh* determined that "SEC disgorgement constitutes a penalty." 137 S. Ct. at 1643. Penalties—that is, remedies intended to punish culpable individuals—have long been understood to be *legal* remedies issued by courts of law, not equitable remedies. *Tull v. United States*, 481 U.S. 412, 422 (1987).

Federal law authorizes the SEC to seek three categories of remedies in civil enforcement actions against those accused of violating the securities laws: injunctions, monetary penalties, and "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). Disgorgement is not a form of injunctive relief. Nor does the SEC assert that it sought disgorgement from Liu and Wang under its statutory authority to seek civil penalties; indeed, the judgment includes a separate penalty award. So the only possible statutory justification for disgorgement (and the one on which the SEC has relied in the past) is that the award constitutes equitable relief.

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[2] *See* 15 U.S.C.§ 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities law, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

But there is no reason to conclude that Congress, when it authorized "any equitable relief," intended to authorize relief (such as disgorgement) that historically has never been considered equitable in nature. The Court has construed provisions in other federal statutes that expressly authorize "equitable relief" as "refer[ring] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Assocs*., 508 U.S. 248, 256 (1993) (construing ERISA provision authorizing suits for "appropriate equitable relief") (emphasis in original). In the absence of evidence that disgorgement of the sort sought by the SEC was ever available in equity, one cannot plausibly interpret "any equitable relief," as used in § 78u(d)(5), to encompass disgorgement.

The lower courts ordered disgorgement to achieve what they believed would be an appropriate and just outcome: it would be "unjust" not to require wrongdoers to disgorge all the funds they obtained by means of fraud. Pet. App. 7a, 41a. But that rationale effectively writes the word "equitable" out of § 78u(d)(5) and authorizes the award of any relief a court deems "appropriate." As *Mertens* explained, it would "deprive of all meaning the distinction Congress drew" between equitable relief and other forms of relief. 508 U.S. at 258 & n.8 (stating that "'[e]quitable' relief must mean *something* less than *all* relief") (emphasis in original)).

Nor may the SEC justify the disgorgement remedy as an exercise of the inherent powers of the federal courts. SEC Opp. Br. 5 (asserting that disgorgement orders are authorized "because, '[w]hen

Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic powers of equity to provide complete relief'") (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960)). Whatever inherent equitable powers a federal court may possess are limited to the award of *equitable* remedies and, as *Kokesh* makes clear, SEC disgorgement remedies are not equitable in nature.

ARGUMENT

I. THE SECURITIES LAWS AUTHORIZE THE SEC TO SEEK A WELL-DEFINED ARRAY OF REMEDIES, INCLUDING PENALTIES AS WELL AS INJUNCTIONS AND OTHER REMEDIES TYPICALLY AVAILABLE IN EQUITY

In the wake of the 1929 stock market crash and the Great Depression, Congress adopted a series of statutes—including the Securities Act and the Securities Exchange Act of 1934—that imposed extensive federal controls on the securities industry.

Initially, "the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of federal law." *Kokesh*, 137 S. Ct. at 1640. The SEC eventually concluded that the absence of monetary remedies hampered its ability to ensure compliance with the law, and it began requesting courts "to order disgorgement as an exercise of their inherent equity power to grant relief ancillary to an injunction." *Ibid* (citations omitted). The Second Circuit endorsed monetary awards for the first time in 1971, but it made clear that such awards were

authorized only for the purpose of providing restitution to victims of stock fraud, not to punish wrongdoers:

> There is little doubt that § 27 of the [Securities Exchange] Act [15 U.S.C. § 78aa] confers general equity powers on the district courts. ... [W]e hold that the SEC may seek other than injunctive relief in order to effectuate the purposes of the Act, so long as such relief is remedial relief and *is not a penalty assessment*.

SEC v. Texas Gulf Sulpher Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971) (emphasis added).

In the ensuing years, Congress increased the remedies available to the SEC so that the Commission now has available a comprehensive set of enforcement tools. The Insider Trading Sanctions Act of 1984, Pub. L. 98-376, authorizes the SEC to file an enforcement action against any person who bought or sold a security while in possession of material nonpublic information and to seek a penalty of up to "three times the profit gained or loss avoided." 15 U.S.C. § 78u-1(a)(2).[3]

In 1990, as part of the Securities Enforcement Remedies and Penny Stock Reform Act, Congress authorized the SEC to seek monetary civil penalties for

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[3] Congress's decision to adopt a penalty provision was motivated by two concerns. First, in insider trading cases it can be exceedingly difficult to identify a victim to whom to award restitution. Second, many believed that a penalty multiplier was warranted because simply requiring an inside trader to give up his profits if caught would not sufficiently deter future violations.

virtually all securities-law violations. 15 U.S.C. §§ 77t(d) & 78u(d)(3). That statute also authorized the SEC to seek disgorgement of ill-gotten gains in connection with *administrative* enforcement proceedings. 15 U.S.C. §§ 77h-1(e) & 78u-2(e).

Finally, § 305(b) of Sarbanes-Oxley Act of 2002 (codified at 15 U.S.C. § 78u(d)(5)) authorized the SEC in civil enforcement actions to seek, and federal courts to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors." The Court has recognized that these amendments "left the Commission with a full panoply of enforcement tools." *Kokesh*, 137 S. Ct. at 1640. But an express authorization to seek disgorgement of ill-gotten gains in civil actions is not among those tools.

The SEC does not assert that its statutory authority to seek civil penalties, 15 U.S.C. §§ 77t(d) & 78u(d)(3), justifies the disgorgement ordered in this case. Indeed, the judgment includes a separate award of penalties totaling $8.2 million. Nor can the SEC plausibly contend that the disgorgement award qualifies as a statutorily authorized injunction.[4] So

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[4] Section 77t(b) authorizes the SEC to bring an action "to enjoin [securities law violations], and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." A judgment ordering disgorgement does not "enjoin" anything; rather, it requires defendants to pay a sum of money out of their assets. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (statute authorizing actions to "restrain" violations of the Resource Conservation and Recovery Act (RCRA) does not authorize an action seeking compensation for environmental cleanup costs from a party responsible for RCRA violations).

the only possible statutory justification for disgorgement (and the one on which the SEC has principally relied in the past) is § 78u(d)(5), which authorizes civil enforcement actions for "any equitable relief that may be appropriate or necessary for the benefit of investors."[5]

The word "equitable" limits the SEC's civil enforcement authority. The statute does not authorize the SEC to seek *just any* relief that it deems appropriate or necessary; rather, the relief sought must be "equitable" in nature. Moreover, the phrase "equitable relief" has a well-understood meaning: it refers to relief traditionally granted by courts of equity before the merger of courts of law and equity in 1938. In other words, § 78u(d)(5) authorizes SEC disgorgement actions only if such disgorgement awards were traditionally granted by courts of equity.

When Congress has used the term "equitable relief" in other federal statutes, it has been understood to have intended the meaning outlined above. For example, the Employee Retirement Income Security Act of 1974 (ERISA) authorizes aggrieved parties to file suit "to enjoin" proscribed conduct or "to obtain other appropriate equitable relief." 29 U.S.C. § 1132(a). The Court held that the statutory phrase "equitable relief" "refers to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*,

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[5] Following § 78u(d)(5)'s enactment, the SEC began citing the statute as authority for seeking disgorgement. *See, e.g.*, *SEC v. Whitemore*, 659 F.3d 1, 4 (D.C. Cir. 2011).

508 U.S. at 256. Confirming that construction a decade later, the Court stated:

> As we explained in *Mertens*, "'equitable' relief must mean *something* less than *all* relief." 508 U.S., at 258, n.8. Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under [§ 1132(a)] to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority). Such a reading, we said, would "limit the relief *not at all*" and "render the modifier ['equitable'] superfluous." *Id.* at 257-58. Instead, we held that the term "equitable relief" in [§ 1132(a)(3)] must refer to "those categories of relief that were *typically* available in equity .... ." *Id.* at 256.

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002).[6] *Accord*, *Montanile v. Bd. of*

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[6] Dissenting justices argued that because the distinction between courts of law and courts of equity is of limited modern relevance, Congress's use of the phrase "equitable relief" should not be understood to have incorporated that distinction. The Court rejected that argument:

> It is easy to disparage the law-equity dichotomy as "an ancient classification," *post*, at 720 (opinion of GINSBURG, J.), and an "obsolete distinctio[n]," *post*, at 719 (opinion of STEVENS, J.). Like it or

Trustees, 136 S. Ct. 651, 657 (2016).

The Court adopted a similar construction of "equitable relief" as used in Title VII of the Civil Rights Act of 1964. As originally enacted in 1964, Title VII stated that if an employer is found to have engaged in unlawful discrimination, a federal court is authorized, *inter alia*, to issue "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1990). The Court held that § 2000e-5(g)'s authorization of "equitable relief" precluded awards for compensatory or punitive damages. *United States v. Burke*, 504 U.S. 229, 238 (1992).

The timing of § 78u(d)(5)'s adoption lends further support to our proposed interpretation of the statute. Congress adopted § 78u(d)(5) as part of the Sarbanes-Oxley Act in 2002, after *Mertens* and only several months after the Court issued its *Great-West* decision. To the extent that existing court decisions are relevant to discerning congressional intent—and the SEC argues they should be—*Mertens* and *Great-West* suggest that Congress was aware of judicial constructions of the phrase "equitable relief" and inserted the word "equitable" into § 78u(d)(5) to limit

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> not, however, that classification and distinction has been specified by the stature; and there is no way to give the specification meaning—indeed, there is no way to render the unmistakable limitation of the statute a limitation *at all*—except by adverting to the differences between law and equity to which the statute refers.

Id. at 217.

the scope of the "relief" it was authorizing. *See* Russell G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 4 (Nov. 2013), http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/.

Finally, the SEC should not be heard to argue that, quite apart from the statutory provisions cited above, the securities laws *impliedly* grant the Commission authority to seek disgorgement. The Securities Act and the Securities Exchange Act grant the SEC "a full panoply of enforcement tools." *Kokesh*, 137 S. Ct. at 1640. The Court has repeatedly held that "[w]here, as here, 'a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.'" *Sandoz, Inc. v. Amgen, Inc.*, 137 S. Ct. 1664, 1675 (2017) (quoting *Karahalios v. Federal Employees*, 489 U.S. 527, 533 (1989)). *Accord, Meghrig*, 516 U.S. at 488; *Great-West*, 534 U.S. at 209 (given ERISA's "comprehensive" nature, Court expresses "especial[ ] reluctan[ce] to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized in its text").

In sum, the only possible statutory justification for disgorgement is § 78u(d)(5), and that statute authorizes only "equitable relief"—that is, forms of relief typically granted by courts of equity. As explained below, disgorgement does not fit within that definition of "equitable relief."

II. DISGORGEMENT IS NOT A REMEDY TYPICALLY AVAILABLE IN EQUITY

Citing *Mertens*, the Court explained in *Montanile*

that a statutory term authorizing "equitable relief" "is limited to those categories of relief that were *typically* available during the days of the divided bench (meaning, the period before 1938 when courts of law were separate)." 136 S. Ct. at 657. There is absolutely no evidence that pre-1938 equity courts "typically" granted relief akin to the disgorgement remedies routinely sought by the SEC. In the absence of such evidence, § 78u(d)(5) provides no support for the judgment below.

A. Remedies Designed To Punish Were Not Available in Equity

Mertens listed three categories of relief that were "typically" available in equity: injunction, mandamus, and restitution. 508 U.S. at 256. Restitution is generally an equitable form of relief because it generally "is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'" *Tull*, 481 U.S. at 424 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)). But SEC disgorgement does not qualify as restitution because it is not imposed for the purpose of restoring property to stock-fraud victims property that "rightfully belongs" to them. Rather, as *Kokesh* recognized, SEC disgorgement is imposed to penalize wrongdoers and to deter misconduct. 137 S. Ct. at 1643-45. Disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers." *Id.* at 1645. *Tull* held that such remedies do not constitute equitable relief available from courts of equity: "A civil penalty was a type of remedy at common law that could only be enforced in courts of law. 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." 481 U.S. at 422.[7]

A Third Circuit opinion issued this fall provides a thoughtful analysis of *Kokesh*'s impact on the SEC's remedial powers. *SEC v. Gentile*, 939 F.3d 549 (3d Cir. 2019). Although noting that the Court "was careful to reserve the issue," the appeals court detected in *Kokesh* "skepticism that SEC disgorgement is applied in conformity with traditional equitable principles." *Id.* at 562-63 (citing *Kokesh*, 137 S. Ct. at 1640, 1644). The appeals court also expressed skepticism of its own, stating that "[c]ourts of equity do not award as incidental relief damages penal in character without express statutory authority" and that "SEC disgorgement is not authorized by statute" and "lacks any textual basis." *Id.* at 562. Legal scholars have expressed similar skepticism. *See, e.g.,* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17 (2018).

[7] Indeed, even restitution sometimes does not qualify as equitable relief. "[F]or 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." *Great-West*, 534 U.S. at 214 (emphasis added), A plaintiff whose property has wrongfully fallen into the defendant's hands is *not* entitled to equitable relief if the property (or its proceeds) is no longer in the defendant's possession; rather, the plaintiff's only remedy is a claim at law for damages. *Id.* at 213-16. Importantly, the SEC does not contend that the funds it seeks to disgorge from Liu and Wang are still in their possession.

B. Monetary Remedies Provided By Courts of Equity Were Not Akin To SEC Disgorgement

In past disgorgement proceedings, the SEC has cited stray comments by this Court from the small handful of cases in which the Court has used the word "disgorgement." For example, in the course of ruling that a copyright-infringement claim stated an action at law and thus was triable by a jury, the Court stated that it has occasionally "characterized as equitable" claims for monetary relief, "such as actions for disgorgement of improper profits." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998).

That citation is misleading because the *Feltner dicta* refers to a "disgorgement" remedy quite unlike SEC disgorgement. In some instances, equity courts awarded *restitution* (very occasionally referred to as "disgorgement") to plaintiffs in copyright and patent cases. Equity courts deemed it fair in such cases to order a defendant found to have infringed another's patent or copyright to pay the profits generated by his infringement to the injured plaintiff, who was deemed the rightful owner of those profits. As *Kokesh* notes, SEC disgorgement orders lack a similar restitutionary basis.

Throughout American legal history, whether a remedy was classified as legal or equitable had particular significance in the fields of patent and copyright law. Before the merger of law and equity in the 20th century, patentees and copyright owners faced a difficult choice in deciding whether to proceed against infringers at law or in equity. If they were most

interested in enjoining future infringement, they would proceed in equity because injunctive relief was available only in equity, not in courts of law. But throughout most of the 19th century (until 1870 in the case of patents, 1909 in the case of copyrights), damages were unavailable in equitable actions filed against infringers; so a second lawsuit was required to recover damages for past infringement. *See Root v. Lake Shore and Michigan So. Ry. Co.*, 105 U.S. 189, 201 (1881).

Federal courts were sympathetic to this dilemma and thus permitted plaintiffs proceeding in equity to seek "equitable" monetary remedies (referred to as an "accounting") in addition to injunctive relief. The courts permitted patentees and copyright owners to recover in equity the net profit that the defendant earned as a result of his infringement, as a substitute for the damages they might have been awarded in an action at law. In an 1881 patent-law decision, this Court explained that once a federal court acquired jurisdiction to consider a grant of injunctive relief, it could "retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action." *Root*, 105 U.S. at 214. The Court elaborated:

> The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of trust property for their own advantage; that is, to require them to refund the amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring

> jurisdiction, but, in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, for the purpose of preventing multiplicity of suits.

Id. at 214-15.

Feltner was a copyright case. The "disgorgement" relief referenced in that decision is the relief described in *Root*: a restitution award in equity to a patentee or copyright holder (consisting of the profits earned by the defendant as a result of his infringement) in lieu of the damages he might have recovered in an action at law.[8] That disgorgement relief is far afield from the

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[8] Nineteenth century courts recognized a rough equivalence between the equitable monetary remedy (an award of the net profit earned by the defendant as a result of his infringement) and damages at law (awarded for losses suffered by the patentee or copyright holder as a result of the infringement). Indeed, in actions at law, this Court routinely recognized that the amount of the infringer's unjust profit could properly be used as evidence of the *plaintiff's* lost profits. *See, e.g., Suffolk Co. v. Hayden*, 70 U.S. 315, 320 (1865) ("And what evidence could be more appropriate and pertinent [in assessing damages] than that of the utility and advantage of invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or in other words, the losses to the patentee or owner by the piracy instead of the purchase of the use of the invention.").

disgorgement SEC seeks, which would disgorge profits from a wrongdoer not for the purpose of compensating an injured plaintiff but for the purpose of ensuring that the defendant is not "unjustly enriched" by his wrongdoing. Historically, courts in equity did not recognize the relief SEC seeks.

The stark contrast between the equitable relief recognized by 19th-century equity courts and the disgorgement relief SEC seeks is all the greater given SEC's refusal to limit disgorgement to a wrongdoer's net profits. Nineteenth-century equity courts consistently refused to grant monetary relief that exceeded the infringer's net profits derived directly from the infringement, even when the plaintiff presented evidence that his losses far exceeded those net profits or that the defendant could have earned much more from his infringement if he had operated his business more efficiently. *See, e.g., Livingston v. Woodworth*, 56 U.S. 546, 560 (1854) (injured claimants are entitled to claim the defendant's net profits derived from the infringement, "that which ... is theirs, and nothing beyond this"); *Mowry v. Whitney*, 81 U.S. 620, 650 (1871).

C. Other Features Of The Securities Laws Confirm That Congress Did Not Endorse SEC Disgorgement As Permissible "Equitable Relief"

In responding to Liu's and Wang's challenge to disgorgement, the Ninth Circuit did not point to any statutory authority for SEC disgorgement actions. Rather, it simply noted Ninth Circuit precedent that

endorsed SEC disgorgement[9] and added that it would be "unjust" not to order wrongdoers to cough up every dollar they received from defrauded investors. Pet. App. 7a.

The Ninth Circuit's failure to cite statutory provisions authorizing SEC disgorgement is unsurprising; there are none. Moreover, various statutory provisions provide evidence that Congress affirmatively opposed granting the SEC such authority.

Foremost among these are 15 U.S.C. § 77t(d) & 78u(d)(3), which authorize the SEC to seek severe penalties against wrongdoers. For the most severe violations (those involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and which "resulted in substantial loss"), the SEC is authorized to seek a penalty equal to "the gross amount of pecuniary gain." § 77t(d)(3)(B)(iii). Although the district judge imposed a § 77t(d) penalty on Liu and Wang of only $8.2 million (choosing instead to label most of the penalty he imposed as "disgorgement"), a $26.7 million penalty would have been permissible under § 77t(d)(3)(B)(iii)'s "gross amount of pecuniary gain" provision.[10] Given that Congress has expressly authorized a penalty remedy

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[9] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006).

[10] The SEC agrees. *See* SEC 9th Cir. Br. at 49 ("The district court acted within its discretion when it imposed penalties totaling less than a third of the disgorgement amount, even though it would have been well within its discretion in setting the civil penalty equal to the disgorgement amount.").

capable of ensuring that wrongdoers will be deprived of ill-gotten gains, there is little reason to conclude that Congress also authorized the SEC to double that penalty by seeking disgorgement as a form of "equitable relief."

Congress has expressly authorized a penalty multiplier for one specific category of securities-law violators: inside traders. Since 1984, securities law has authorized the SEC to seek penalties of "three times the profit gained or loss avoided" by inside traders. 15 U.S.C. § 78u-1(a)(2). That treble-damages provision strongly suggests that Congress did not authorize the SEC to use a disgorgement remedy as a method of (as here) increasing penalties on other violators to more than 100% of the "gross amount of pecuniary gain." Indeed, there would have been little reason for Congress to impose caps on the penalties awardable under § 77t(d)(3)(B)(iii)—with lower caps applying to less serious violators— if SEC were free to circumvent those caps by seeking additional, massive penalties in the form of disgorgement.

Congress demonstrated its awareness of the disgorgement remedy by expressly authorizing it in some settings but *not* in civil actions filed by the SEC. For example, federal law permits the SEC to seek disgorgement in *administrative* proceedings. 15 U.S.C. § 77h-1(e) ("In any cease-and-desist proceeding ..., the Commission may enter an order requiring accounting and disgorgement."). The Dodd-Frank Act granted new powers to the SEC in 2010 but did not grant the Commission disgorgement authority—yet it simultaneously granted disgorgement authority to two other federal enforcement agencies (the CFTC and the

CFPB). *See* 7 U.S.C. § 13a-1(d)(3)(B) (CFTC disgorgement authority); 12 U.S.C. § 5565(a)(1), (a)(2)(D) (CFPB). Had Congress intended to authorize the SEC to seek a disgorgement remedy in civil actions, one would reasonably expect that it would have done so in the same manner that it used to create other disgorgement remedies: by saying so expressly.

Finally, 15 U.S.C. § 78u(d)(5) imposes an important limitation on any "equitable relief" that the SEC may seek in a civil action: the relief must be "appropriate or necessary for the benefit of investors." As *Kokesh* made clear, the SEC disgorgement remedy is designed to penalize wrongdoers and to deter wrongdoing by others, and only incidentally to benefit the investors harmed by the wrongdoers. While the general population of investors arguably benefits when securities fraud is deterred, that generalized benefit is unlikely what Congress had in mind when it specified that any "equitable relief" must be "for the benefit of investors." A much more plausible interpretation is that § 78u(d)(5) expressly endorses a well-recognized form of equitable relief: recoupment of property lost by investors who were defrauded by the defendant.

III. FEDERAL COURTS' INHERENT EQUITABLE POWERS DO NOT INCLUDE AUTHORITY TO ORDER DISGORGEMENT OF THE SORT SOUGHT BY THE SEC

Nor may the SEC justify the disgorgement remedy as an exercise of the inherent powers of the federal courts. Having provided the SEC with extensive, detailed enforcement powers, it is doubtful that Congress would grant the federal courts "inherent

powers" to award the SEC additional relief not specified in the securities laws. But whatever inherent equitable powers a federal may possess are limited to the award of *equitable* remedies and, as *Kokesh* makes clear, SEC disgorgement remedies are not equitable in nature.

The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits ... in equity." § 1, 1 Stat. 78. The Court has interpreted that jurisdictional provision as authorizing federal courts to grant equitable remedies of the sort traditionally granted by British courts of equity in 1789:

> [T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act. ... The substantive prerequisites for obtaining an equitable remedy ... depend on traditional principles of equity jurisdiction. We must ask, therefore, whether the relief respondents requested here was traditionally accepted by courts of equity.

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, 527 U.S. 308, 319 (1999).

"Disgorgement" as a judicial remedy is a relatively recent invention. Although some appeals courts that have upheld SEC disgorgement have done so by labeling disgorgement an "equitable" remedy, *see, e.g., SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450,

1474-75 (1996), there is no evidence that the High Court of Chancery in 1789 traditionally granted relief at all similar to SEC disgorgement. Legal scholars concur that no such relief was granted. *See, e.g.*, Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 Rev. Banking & Fin. L. 899 (2014).

Some disgorgement proponents have suggested that disgorgement is somewhat analogous to the remedy of accounting, an eighteenth-century equitable remedy to recover the income from one's property wrongfully retained by a fiduciary. A plaintiff who established the right to an accounting was entitled to a money judgment equal to the defendant's ill-gotten gains. But any similarity between SEC disgorgement and the remedy of accounting is superficial at best. *See* DeLuca at 913-16. The SEC claims the right to disgorgement without regard to whether those alleged to have violated the securities laws were fiduciaries, which they often are not. And, of course, alleged violators are never in a fiduciary relationship with the SEC itself.

To support its inherent-equitable-power-to-order-disgorgement argument, the SEC relies principally on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). SEC Opp. Br. 5; SEC 9th Cir. Br. 51. *Porter* is inapposite. It held that the Emergency Price Control Act (EPCA) authorized the federal government, on behalf of tenants, to seek restitution from landlords who collected rents in excess of the permissible maximums established during World War II. 328 U.S.

at 398-99.[11] A decision upholding restitution under a statute that authorizes restitution provides no support for the SEC's assertion that federal courts possess inherent authority to order disgorgement even though that remedy is not granted by the federal securities laws.

Porter noted that the United States, by seeking to enjoin alleged violations of EPCA, had invoked the federal court's equity jurisdiction; the Court stated in *dicta*, "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. But contrary to the SEC's suggestion, that statement does not empower district courts to grant *any* remedy (unless expressly prohibited) that the court deems necessary to afford "complete relief." Rather, *Porter* expressly limited available remedies to those falling within the federal courts' "equitable powers." And, as explained above, disgorgement of ill-gotten gains is not within the equitable powers conferred on federal courts by the Judiciary Act of 1789.[12]

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[11] EPCA authorized district courts, upon finding a statutory violation, to issue an injunction "or other order." *Porter* construed the term "other order" as encompassing restitution orders. 328 U.S. at 399.

[12] The Court confirmed WLF's understanding of *Porter* in its 1996 *Meghrig* decision, which stated, "the Government does not rely on the remedies expressly provided in [RCRA], but rather cites a line of cases holding that district courts retain inherent authority to award *any equitable remedy* that is not expressly taken away from them by Congress. *See, e.g., Porter*." *Meghrig*, 516 U.S. at 487 (emphasis added).

There is also considerable reason to doubt that Congress intends to grant federal courts *any* inherent powers to award remedies not provided for in a statute when, as here, the statute provides a federal enforcement agency with detailed, extensive enforcement powers. In recent decades, the Court has indicated that *Porter*'s "all the inherent equitable powers" *dicta* does not apply to such statutes. For example, in *Meghrig*, both the United States and the plaintiff argued that even though RCRA did not expressly provide the remedy they sought (reimbursement for RCRA clean-up costs), federal courts possessed inherent authority to provide that allegedly "equitable" remedy. Even though RCRA did not expressly bar the requested remedy, *Meghrig* held that federal courts did not possess inherent authority to grant it. The Court explained, "[W]here Congress has provided elaborate enforcement provisions for remedying the violations of a federal statute, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies." *Meghrig*, 516 at 487-88 (citations omitted). "[I]t is an elementary 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." *Id.* at 488 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)).

Here, no less than in *Meghrig*, Congress has created a comprehensive remedial scheme that provides the SEC with a variety of enforcement tools. Those expressly granted tools include disgorgement, but *only* if the SEC chooses to pursue administrative enforcement, not if it files a federal court proceeding.

Under those circumstances, Congress should not be deemed to have granted federal courts the inherent equitable power to grant disgorgement remedies to the SEC—even if disgorgement could properly be classified as an equitable remedy (which it cannot).

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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