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 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are members of Congress who are familiar with the nation's securities laws, have participated in drafting them, or serve on committees with jurisdiction over the federal financial regulatory agencies, including the Securities and Exchange Commission (SEC). *Amici* are thus well-positioned to address the question whether courts may order disgorgement for violations of the nation's securities laws. As *amici* well know, disgorgement is a critical tool to deter violations of the nation's securities laws and to compensate victims, and for that reason, Congress has repeatedly, through a series of laws passed over the past several decades, made clear that the SEC may seek disgorgement when it brings civil actions. Specifically, Congress has codified—again and again—the availability of court-ordered disgorgement in the text of amendments to the nation's securities laws and has even relied upon the existence of court-ordered disgorgement in structuring certain aspects of the nation's securities laws. This Court should respect Congress's plan and affirm that district courts have the authority to order disgorgement for violations of the nation's securities laws.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the Securities and Exchange Commission (SEC) has relied on district courts' authority to order disgorgement to ensure that those who violate the nation's securities laws cannot benefit from their ill-gotten gains. In this case, Petitioners obtained nearly $27 million from foreign investors seeking to utilize the EB-5 Immigrant Investor Program, which provides a pathway to obtaining a visa for foreign nationals who invest in American enterprises. Pet. App. 1a-2a. Though Petitioners claimed the money would fund a cancer-treatment center, they instead transferred millions of dollars to their personal bank accounts, and diverted millions more to overseas marketers, all in violation of the terms of the offering documents. *Id.* at 2a. The SEC filed suit in federal court, and the district court concluded that Petitioners violated Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), which prohibits obtaining money in the offer or sale of any securities through untrue statements or misleading omissions. Pet. App. 62a-63a. As a remedy, the district court ordered Petitioners to disgorge $26.7 million, the "reasonable approximation of the profits causally connected to [their] violation," imposed civil monetary fines, and enjoined Petitioners from further violations. Pet. App. 41a.

Petitioners now argue that the district court lacked authority to order disgorgement because, in their view, Congress "allowed the SEC to seek that relief only in *administrative* proceedings." Pet. Br. 1. That argument, however, ignores decades of precedent holding that disgorgement falls within the general equitable powers that Congress gave district courts the authority to exercise when they are hearing cases involving violations of the nation's securities laws. More importantly, that argument ignores that Congress has expressly codified this authority in the text of amendments to the nation's securities laws and has premised legislation on the existence of disgorgement authority. In doing so, Congress has made clear that district courts have authority to order disgorgement for violations of the nation's securities laws. This Court should not disturb Congress's legislative plan.

ARGUMENT

I. FOR NEARLY FIFTY YEARS, THE COURTS OF APPEALS HAVE UNANIMOUSLY HELD THAT DISGORGEMENT FALLS WITHIN THE GENERAL EQUITY POWERS THAT CONGRESS CONFERRED UPON DISTRICT COURTS.

In 1934, Congress passed the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (Exchange Act), which, among other things, created the SEC, prohibited certain conduct in the securities industry, and empowered the SEC to enforce those rules and regulate the industry. Specifically, the SEC was authorized to "bring an action in the proper district court of the United States . . . to enjoin . . . acts and practices" that "constitute a violation of the provisions of this title." *Id.* § 21(e), 48 Stat. at 900. Further, Section 27 of that law provides in relevant part that

> [t]he district courts . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of *all suits in equity and actions at law* brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

Id. § 27, 48 Stat. at 902-03 (emphasis added). The Exchange Act built upon the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (Securities Act), passed a year earlier, which prohibited deceit, misrepresentations, and other fraud in the sale of securities. Section 22 of that law provided that

> district courts of the United States . . . shall have jurisdiction of offenses and violations under this title and . . . of *all suits in equity and actions at law* brought to enforce any liability or duty created by this title.

Id. § 22(a), 48 Stat. at 86 (emphasis added).

This Court has recognized that "the jurisdiction of the District Court to enjoin acts and practices made illegal by [an] Act and to enforce compliance with [an] Act" means that the court retains "all the inherent equitable powers . . . for the proper and complete exercise of that jurisdiction," including the power to "compel[] one to disgorge profits, rents or property acquired in violation of" the Act. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946). Relying on that precedent, the courts of appeals have long held that district courts' authority to enjoin violations of the nation's securities laws in suits in equity includes the authority to order disgorgement of profits obtained as a result of unlawful conduct. *See id.* at 399 ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.").

The first court of appeals to apply this principle to securities actions was the Second Circuit in *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971). That court held that section 27 of the Exchange Act "confers general equity power upon the district courts," *id.* at 1307-08, and that the SEC can therefore "seek *other than* injunctive relief in order to effectuate the purposes of the Act," *id.* at 1308 (emphasis added), including "[r]estitution of the profits on these transactions" to "deprive[] the appellants of the gains of their wrongful conduct." *Id.* In short, "the requirement of restitution . . . was a proper exercise by the trial judge of the district court's equity powers." *Id.*

Over the following years, multiple other courts of appeals adopted the Second Circuit's reasoning. *See, e.g.*, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws," and "is available simply because the relevant provisions of the [Exchange Act] vest jurisdiction in the federal courts."); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) ("Once the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the defendant's] fraud."); *SEC v. Wash. Cty. Util. Dist.*, 676 F.2d 218, 227 (6th Cir. 1982) ("the district court should order [the defendant] to disgorge a sum of money equal to the total value of all of the payments he received"); *SEC v. Blatt*, 583 F.2d 1325, 1355 (5th Cir. 1978) ("The trial court acted properly within its equitable powers in ordering [the defendant] to disgorge the profits that he obtained by fraud.").

Thus, by 1984 when Congress began passing a series of securities laws to bolster the protections afforded by the Securities Act and the Exchange Act, numerous courts of appeals had held that district courts had the power to order disgorgement in securities cases. As the next Section explains, acting against that backdrop, Congress repeatedly codified in the text of the laws it passed what the courts had previously recognized—that districts courts have the authority to order disgorgement in response to violations of the nation's securities laws—and indeed relied on the existence of that authority in making decisions about how best to structure the nation's securities laws.

II. CONGRESS HAS CODIFIED THE AUTHORITY OF DISTRICT COURTS TO ORDER DISGORGEMENT IN THE TEXT OF THE NATION'S SECURITIES LAWS.

Beginning with the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (ITSA), and continuing through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (Dodd-Frank), Congress has repeatedly codified the availability of court-ordered disgorgement in the text of its Acts and has also made explicit that courts are authorized to order disgorgement in the reports accompanying those Acts. *See* Resp. Br. 22 ("Congress has . . . enacted numerous provisions that presuppose the availability of a disgorgement remedy and address the proper uses of funds disgorged in SEC suits."). The text and history of these laws demonstrate Congress's recognition of the important role that disgorgement plays in enforcement of the nation's securities laws and its plan that courts be able to exercise that authority.

1. Congress first confirmed district courts' disgorgement power in the ITSA. Among other things, the ITSA amended the Exchange Act to authorize the SEC to seek court-ordered civil monetary penalties for insider trading and tipping violations. Specifically, the ITSA amended the Exchange Act to provide that:

> the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by [a violator] . . . . The

> amount of such penalty shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase or sale.

ITSA § 2, 98 Stat. at 1264. Importantly, Congress explained that "[t]he actions authorized by this paragraph may be brought *in addition to any other actions* that the Commission or the Attorney General are entitled to bring." *Id.* (emphasis added).

The report of the House Committee on Energy and Commerce (the only written report accompanying the ITSA) made clear exactly what Congress had in mind when it included that "any other actions" phrase: courts' longstanding authority to issue injunctive relief and to order disgorgement. Explaining the SEC's existing authority when Congress was considering the ITSA, the report noted that "the Commission may request that the court order certain equitable relief, such as the disgorgement (giving up) of illegal profits," as well as injunctive relief. H.R. Rep. 98-355, at 7 (1983). Congress, however, believed that these "existing remedies . . . may provide inadequate deterrence," because an injunction "serves only a remedial function" and "[d]isgorgement of illegal profits . . . merely restores a defendant to his original position without extracting a real penalty for his illegal behavior." *Id.* The SEC had therefore requested that Congress "enact legislation to provide a civil penalty." *Id.* at 8.

Importantly, the House report specified that the new civil penalty in the ITSA was intended to exist *in addition to* disgorgement. As the report said:

> The new penalty may be used *in addition to* existing remedies available to the Commission. Thus, in appropriate insider trading

> cases, the Commission may seek: (1) a court order enjoining the violator from breaking the law again; (2) *disgorgement of ill-gotten gains* which may, if appropriate, be paid into an escrow fund so that traders or other private parties damaged by the insider trading can obtain compensation for their losses; and (3) the imposition of the new civil money penalty payable to the U.S. Treasury.

Id. (emphasis added). Congress went on to reiterate—again and again—its expectation that courts would continue to order disgorgement. *See id.* at 10 ("a broker-dealer who executes a trade for an inside trader . . . may also be enjoined and *required to 'disgorge' the unlawful profits* of the primary violator," and "the legislation does not affect these remedies" (emphasis added)); *id.* at 20 ("[t]he Act creates an additional remedy for insider trading . . . in addition to seeking other remedies such as an injunction *or disgorgement*" (emphasis added)).

In short, at every turn, the House report made clear that Congress expected that district courts would continue to order disgorgement in cases brought under the Exchange Act alongside the new civil money penalty in the ITSA.

2. Were there any doubt as to what Congress meant in the ITSA, Congress *explicitly* codified court-ordered disgorgement authority four years later in the text of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (ITSFEA). Among other things, the ITSFEA amended the Exchange Act to establish an express private right of action for investors who traded securities at the same time and of the same class as a person found to have violated an insider-trading prohibition. The ITSFEA included an important caveat, however:

> (2) OFFSETTING DISGORGEMENTS AGAINST LIABILITY.—The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person *may be required to disgorge, pursuant to a court order* obtained at the instance of the Commission, in a proceeding brought under section 21(d) of [the Securities Exchange Act of 1934 for an injunction] relating to the same transaction or transactions.

Id. § 5, 102 Stat. at 4681 (emphasis added). In other words, the ITSFEA provided that defendants subject to a disgorgement order should not bear duplicative liability for damages incurred by contemporaneous traders. In this way, Congress made clear in the text of the law that it fully expected courts to order disgorgement, referencing that authority in the provision's text and heading. Indeed, the provision integrated court-ordered disgorgement into the new private-right-of-action scheme that Congress created in the ITSFEA. This provision would make no sense if, as Petitioners argue, disgorgement were not an available remedy.

In addition to this provision, the ITSFEA amended the civil monetary penalty provision of the ITSA, extending its coverage to "controlling persons" whose employees engage in illegal tipping or trading, and specifying that the provision applied to tippers irrespective of a tippee's liability. Importantly, the ITSFEA retained the ITSA provision clarifying that "[t]he actions authorized by this section may be brought *in addition to any other actions* that the Commission or the Attorney General are entitled to bring." *Id.* § 3(a)(2), 102 Stat. at 4679 (amending Exchange Act, 15 U.S.C. § 78a et seq., § 21A(d)(3)) (emphasis added).

As with the ITSA, the House report accompanying the ITSFEA specified that these "other actions" included court-ordered disgorgement. Congress authorized the district courts to impose penalties in addition to ordering disgorgement because, as Congress explained, "[t]he public interest nature of Commission actions necessitates that the Commission's ability to obtain the full scope of equitable and other relief available in appropriate cases remain unimpaired." H.R. Rep. 100-910, at 20 n.16 (1988). Indeed, the report explained that "if a tipper's communication resulted in profits to his direct tippee and to remote tippees as well, *the Commission could obtain disgorgement* from the tipper of the profits of both the direct and remote tippees," and on top of that, the Commission could also "seek an ITSA penalty of up to three times that amount." *Id.* (emphasis added). In short, Congress continued to expect the Commission to request, and courts to grant, disgorgement in insider-trading actions, and it premised its amendments in the ITSFEA on the existence of that authority.

3. Next, Congress again confirmed the existence of disgorgement authority when it passed the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (Remedies Act). Building on the ITSA and the ITSFEA, the Remedies Act authorized the SEC to seek civil monetary penalties for a number of other types of securities law violations in addition to insider trading. Each of the four civil monetary penalty provisions in the Act included language stating that the remedy is "not exclusive," and that the "actions authorized by this subsection may be brought *in addition to any other action* that the Commission or the Attorney General is entitled to bring." *See, e.g.*, *id.* § 101, 104 Stat. at 933 (amending the Securities Act, 15 U.S.C § 77t, § 20(d)(3)(C)) (emphasis added).

As with the ITSA and the ITSFEA, the House Committee on Energy and Commerce report made clear that actions for disgorgement were among those "other action[s]" that Congress was referencing in the Remedies Act. *See, e.g.*, H.R. Rep. 101-616, at 1380 (1990) ("legislation would . . . authorize the federal courts to order the payment of civil money penalties, *in addition to disgorgement*, for a broad range of violations of the federal securities laws" (emphasis added)); *id.* at 1384 ("authority to seek or impose substantial money penalties, *in addition to the disgorgement of profits*, is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator" (emphasis added)); *id.* at 1389 ("penalties could be imposed *in addition to orders of disgorgement* directing a defendant to return the full amount of profits derived from a violation" (emphasis added)); *id.* at 1398 ("The Committee anticipates that, in appropriate cases, the Commission will seek civil penalties in conjunction with actions seeking injunctive and/or other equitable relief, *including disgorgement*." (emphasis added)).

The Senate Banking Committee report likewise repeatedly referenced the availability of court-ordered disgorgement. *See, e.g.*, S. Rep. No. 101-337, at 8 n.7 (1990) ("Courts in civil proceedings currently may order disgorgement under their equitable powers."); *id.* at 10 ("authority to seek or impose substantial money penalties, *in addition to the disgorgement of profits*, is necessary for the deterrence of securities law violations that otherwise would provide great financial returns to the violator" (emphasis added)); *id.* at 13 ("if a violation involves fraud and resulted in substantial losses to other persons, a court (*in addition to ordering* *disgorgement of profits*) may assess a civil penalty equal to a violator's gain" (emphasis added)).

To be sure, as Petitioners emphasize, Pet. Br. 40-41, the Remedies Act also included provisions that empowered the SEC to enforce securities laws via administrative actions, rather than court actions, and allowed the SEC to require "accounting and disgorgement, including reasonable interest." *See, e.g.*, Remedies Act, § 102, 104 Stat. at 935 (amending Securities Act of 1933, 15 U.S.C § 77 et seq., § 8A(e)). But the House report specified that "[t]he Commission, of course, will continue to be able to seek disgorgement in its civil injunctive actions." H.R. Rep. No. 101-616, at 1402. Likewise, the Senate report made clear that while the legislation "authorizes the SEC to seek court orders imposing civil money penalties," "[t]hese penalties may be imposed in addition to orders of disgorgement directing a defendant to return the full amount of profits derived from a violation, and other forms of equitable relief." S. Rep. No. 101-337, at 16.

Notably, the Senate Banking Committee considered adding language explicitly authorizing courts to order disgorgement in civil actions, but determined that there was no need to add such language because the SEC's authority to obtain disgorgement was already clear under existing statutes. Specifically, after noting that "[t]he penalty provision of the . . . Act [was] intended to be independent of disgorgement," Senator Donald Riegle Jr. asked then-SEC Chairman Richard Breeden for "clarifying language . . . to ensure that both disgorgement and the penalties provided in the bill can be obtained from securities law violators." *See Hearing on S.647 Before the Subcomm. on Sec. of the Comm. on Banking, Housing and Urb. Aff.*, 101st Cong. 426 (1990) (written responses of Richard Breedan, Chairman, SEC). Chairman Breedan responded that "[t]he Commission did not include such language in the legislation as submitted, because it did not believe that the language was necessary." *Id.* Citing the prior language from the ITSA and the ITSFEA, the Chairman explained that those statutes "ma[de] clear that a penalty action is not an exclusive remedy, and that *an action for disgorgement also would be available in appropriate cases*." *Id.* (emphasis added). The Chairman went on to cite cases in which courts have "ordered disgorgement and penalties in the same case," and noted that "[t]he legislative history of ITSA reflects that Congress and the Commission intended that other remedies, including disgorgement, continue to be available to the Commission." *Id.*

4. Five years later, Congress again explicitly codified court-ordered disgorgement in the text of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (PSLRA), which imposed certain limits on the ability of securities lawyers to file securities actions simply to collect attorneys' fees. Notably, the Act amended the Securities Act and the Exchange Act to prevent lawyers from taking portions of disgorged funds as attorneys' fees:

> PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, *funds disgorged as the result of an action brought by the Commission in Federal court*, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

Id. § 103(b)(1), 109 Stat. at 756 (emphasis added). As with the ITSFEA, Congress integrated court-ordered disgorgement into its new scheme limiting attorneys' fees in securities cases. The Act's reference to "funds disgorged as a result of an action brought by the Commission in Federal court" would make no sense if Congress believed that, as Petitioners argue, courts lack any authority to order disgorgement.

5. Congress again confirmed the existence of disgorgement authority in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (Sarbanes-Oxley), which repeatedly references court-ordered disgorgement. For instance, one of the many reforms contained in that Act—the so-called "Fair Funds" provision—required that civil monetary penalties be added to disgorgement funds for the benefit of victims of securities law violations. Prior to Sarbanes-Oxley, "while monies disgorged by a securities law violator were typically distributed to identifiable injured parties . . . , monies attained through the imposition of civil monetary penalties were required to be dispersed only to the U.S. treasury." Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. Rev. 895, 913 (2018). Sarbanes-Oxley changed that by providing the following:

> CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any *judicial* or administrative action brought by the Commission under the securities laws . . . the Commission *obtains an order requiring disgorgement against any person for a violation of such laws* or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to

> such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and *become part of the disgorgement fund* for the benefit of the victims of such violation.

Sarbanes-Oxley § 308(a), 116 Stat. at 784 (emphasis added). In passing Sarbanes-Oxley, Congress relied on the existence of court-ordered disgorgement to implement its new policy of distributing civil penalties to the victims of securities violations, using disgorgement funds as the mechanism for those distributions. If court-ordered disgorgement were not possible, the plan to distribute the proceeds of civil monetary penalties to victims that Congress put in place when it passed Sarbanes-Oxley could not have worked. Thus, as with the references to disgorgement in the ITSFEA and the PSLRA discussed above, this provision's reference to "an order requiring disgorgement" in a "judicial" action would make no sense if courts lacked the authority to order disgorgement. *Id.*[2]

[2] Petitioners neglect to even respond to this language from Sarbanes-Oxley. Instead, they reference a later version of this provision, currently codified at 15 U.S.C. § 7246(a), which provides that "[i]f, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws . . . the amount of such civil penalty shall . . . be added to and become part of a disgorgement fund *or other fund*." *See* Pet. Br. 36. Importantly, however, the version of this provision that was passed in Sarbanes-Oxley did not include the "or other fund" language. Rather, Sarbanes-Oxley relied on the SEC's ability to "obtain[] an order requiring disgorgement" and create a "disgorgement fund" in a "judicial . . . action" specifically. Sarbanes-Oxley § 308(a), 116 Stat. at 784.

Significantly, Congress's decision to include the proceeds from civil monetary penalties obtained in *judicial* proceedings in this provision was a deliberate one. At the time, the SEC's authority to order civil monetary penalties in its administrative proceedings was limited to "actions against broker dealers, investment advisors, and clearing agencies." Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 339 (2015). To "force other securities violators, in particular issuers and their officers and directors, to pay civil fines, the SEC had to sue in federal court." *Id.* For that reason, Congress specifically included disgorgement funds resulting from *judicial* actions within the "Fair Funds" provision's ambit. Indeed, holding that the SEC lacked the authority to seek disgorgement in civil actions would have severely hamstrung the SEC's ability to compensate victims with funds obtained from civil monetary penalties where the violators extended beyond "regulated entities and their associated persons." Nagy, *supra*, at 913.

Next, the "Fair Funds" provision included a related requirement that the SEC "review and analyze" "enforcement actions by the Commission over the five years preceding the date of the enactment of this Act that have included proceedings to obtain civil penalties *or disgorgements* to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors." Sarbanes-Oxley § 308(c)(1), 116 Stat. at 785 (emphasis added). At the end of that provision, Sarbanes-Oxley specified that "the term 'disgorgement fund' means a fund established in any administrative *or judicial proceeding* described in subsection (a)," *id.* § 308(e), 116 Stat. at 785 (emphasis added)—which is the subsection describing "judicial or administrative action[s] brought by the Commission under the securities laws," *id.* § 308(a), 116 Stat. at 784. There could be no "disgorgement fund" in "judicial proceedings" if Petitioners are correct that courts lack any authority to order disgorgement.

Finally, Sarbanes-Oxley included a broad provision authorizing the SEC to seek equitable relief in judicial proceedings:

> EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, *any equitable relief* that may be appropriate or necessary for the benefit of investors.

Id. § 305(b), 116 Stat. at 779 (emphasis added). "Any," of course, "has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). And disgorgement is undoubtedly appropriate for the benefit of investors, both to dissuade future wrongdoing and to compensate victims of violations of the securities laws through disgorgement funds. When coupled with the "Fair Funds" provision and other references to disgorgement described above, this equitable relief provision "remov[es] any lingering doubt about the availability of disgorgement in judicial proceedings." Barbara Black, *Should the SEC Be a Collecttion Agency for Defrauded Investors?*, 63 Bus. Law. 317, 326 (2008).

The Senate Banking Committee's report confirmed that this "Equitable Relief" provision was included to expand the SEC's authority to seek court-ordered disgorgement. As the report explained:

> For a securities law violation, currently an individual *may be ordered to disgorge funds* that he or she received "as a result of the violation." *Rather than limiting disgorgement to these gains*, the bill will permit *courts* to impose any equitable relief necessary or appropriate to protect, and mitigate harm to, investors.

S. Rep. No. 107-205, at 27 (2002) (emphasis added). The report therefore explicitly says that the "Equitable Relief" provision was adopted to maintain courts' authority to order disgorgement. That interpretation also makes sense in light of Sarbanes-Oxley's broader purpose: to prevent future accounting scandals like Enron by "improv[ing] the responsibility of public companies for their financial disclosures." *Id.* at 23. By contrast, it would make no sense to interpret this "Equitable Relief" provision to somehow end—through such ambiguous language—courts' long-standing authority to order disgorgement in securities cases.

6. Congress reaffirmed that courts retain disgorgement authority in Dodd-Frank. Specifically, Section 922 of Dodd-Frank, which permits the SEC to "pay an award to . . . whistleblowers who voluntarily provided original information to the [SEC] that led to the successful enforcement of [a] covered judicial or administrative action," Dodd-Frank § 922(a), 124 Stat. at 1842, references district courts' authority to order disgorgement in SEC enforcement actions, describing the amount of compensation to whistleblowers in terms of a percentage of the total "monetary sanctions imposed in the action," and defining "monetary sanctions" to include, "with respect to any judicial or administrative action," "any monies, including penalties, disgorgement, and interest, ordered to be paid; and . . . any monies deposited into a disgorgement fund or other fund . . . as a result of such action or any settlement of such action." *Id.* Once again, then, Congress referenced disgorgement in the context of judicial actions in Dodd-Frank.

On top of that, Dodd-Frank also amended Sarbanes-Oxley's "Fair Funds" provision to eliminate the requirement of a disgorgement order to send the proceeds of a civil penalty to victims of a securities law violation. This change was made because the text of Sarbanes-Oxley implied that when "a defendant did not reap any profits from his or her securities law violation, and thus could not be ordered to pay disgorgement," that "impeded the creation of any compensatory fund into which the payment of civil monetary penalties could be placed." Nagy, *supra*, at 918. The new provision read:

> CIVIL PENALTIES TO BE USED FOR THE RELIEF OF VICTIMS.—If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, *be added to and become part of a disgorgement fund* or other fund established for the benefit of the victims of such violation.

Dodd-Frank § 929B, 124 Stat. at 1852 (emphasis added). While uncoupling the existence of a disgorgement order from the authority to send the proceeds of a civil penalty to the victims of securities law violations, the text of that amendment continues to recognize that disgorgement is a type of remedy a court can order in a "judicial action."

7. While acknowledging that at least "two statutory provisions refer[] to judicial disgorgement," Pet. Br. 37 (referencing the ITSFEA and the PSLRA provisions), Petitioners dismissively suggest that "a few scattered provisions of the U.S. Code" cannot reveal Congress's intent, *id.* at 2. But those "scattered provisions of the U.S. Code" specifically reference "disgorge[ment], pursuant to a court order," 15 U.S.C. § 78t-1(b)(2), and "funds disgorged as the result of an action brought by the Commission in Federal court," *id.* § 78u(d)(4), respectively. It would be extraordinary for Congress to incorporate court-ordered disgorgement into statutory schemes, and to directly refer to that authority in the text of those statutes, if Congress in fact believed that courts *lacked* that authority altogether.

To be sure, as Petitioners emphasize, this Court in *Alexander v. Sandoval* concluded that "isolated amendments" to one part of a statute could not ratify a judicial interpretation of a different part of that statute, simply because Congress failed to amend that part. 532 U.S. 275, 292 (2001). But that principle has no bearing here. In *Sandoval*, Congress made two amendments to Title VI, but failed to act with regard to the implied private right of action at issue in that case, and this Court rejected the argument that Congress impliedly ratified judicial decisions upholding that implied private right of action. *Id.* at 291-92. As the Court explained, the amendments have little "to do with implied causes of action," and so these "isolated amendments" to other aspects of Title VI cannot represent "affirmative congressional approval" of courts' statutory interpretation upholding an implied private right of action. *Id.* at 292 (internal citations and quotation marks omitted). That accords with this Court's explanation in other cases that congressional approval of a judicial interpretation of a statute requires "something other than mere congressional silence and passivity," *Flood v. Kuhn*, 407 U.S. 258, 283 (1972), and must go "beyond the failure of Congress to act," *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

There is clearly "something more" than a failure to act here, however. Congress has specifically and repeatedly referenced courts' authority to order disgorgement in the statutory text of several enacted laws, and it has relied on the existence of such authority in determining how best to structure other aspects of the nation's securities laws. These statutory enactments go "far beyond mere inference and implication," and rather "clearly evince[] a desire" to maintain court-ordered disgorgement, *Flood*, 407 U.S. at 284. *See* Resp. Br. 24 ("the rationale for applying the prior-construction principle is substantially more compelling here than in the typical case"). Petitioners cite no case law—and *amici* are aware of none—that suggests this Court can simply ignore the plain text of statutes that Congress has passed when those statutes reference, incorporate, and rely on the authority Petitioners claim to be lacking.[3]

Finally, Petitioners note that Congress is currently considering legislation that would add additional language authorizing the SEC to seek

[3] Notably, Petitioners barely mention, let alone respond to, the substantial, detailed analyses in the legislative reports described above in which Congress has repeatedly and consistently explained that courts have the power to order disgorgement. *See Bob Jones Univ.*, 461 U.S. at 601-02 ("references in Congressional committee reports . . . cannot be read other than as indicating approval" of a judicial interpretation); *Saxbe v. Bustos*, 419 U.S. 65, 78-79 (1974) ("voluminous report . . . describing the practice [in question] in some detail . . . reveals a congressional acceptance of the system").

disgorgement in judicial actions. Pet. Br. 39-40 (citing H.R. 4344, 116th Cong. (2019)). But the primary purpose of that legislation is to put in place a 14-year statute of limitations for actions seeking disgorgement, responding to this Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which limited that period to five years. *See* 165 Cong. Rec. H8930 (daily ed. Nov. 18, 2019) (statement of Rep. Ann Wagner) ("This bill is the result of the Supreme Court's *Kokesh* decision, which restricted the SEC's disgorgement authority to 5 years."); *id.* (daily ed. Nov. 18, 2019) (statement of Rep. Al Green) (same); *id.* at H8931 (daily ed. Nov. 18, 2019) (statement of Rep. Bill Huizenga) ("As a result of the *Kokesh* case, the Supreme Court decision has significantly limited the SEC's ability to obtain disgorgement in certain long-running frauds."). Given that the purpose of the bill is to expand the period during which the SEC can obtain disgorgement, it is utterly unremarkable that the text of the bill would reiterate the authority of courts to order disgorgement.

Moreover, "several equally tenable inferences may be drawn" from the existence of this proposed legislation, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal citation and quotation marks omitted), including that legislators believe that despite Congress's clear plan, as evidenced by the numerous provisions of enacted law referencing court-ordered disgorgement described above, there is a chance that courts could nonetheless wrongly hold that courts lack disgorgement authority. Indeed, more than one legislator has noted this litigation as the impetus for that legislation. *See* 165 Cong. Rec. H8930 (daily ed. Nov. 18, 2019) (statement of Rep. Al Green) ("the SEC is currently in litigation before the Supreme Court over whether it even has the authority to obtain disgorgement for investors"); *id.* at H8931 (daily ed. Nov. 18, 2019) (statement of Rep. Ben McAdams) ("within the next year, the Supreme Court will hear arguments and possibly decide to remove any disgorgement action from the SEC").

In any event, the existence of unenacted bills now does not change what Congress has previously enacted. Congress has already said—repeatedly, in several statutes—that courts have the authority to order disgorgement. Laws that have not passed provide this Court with no basis for disregarding laws that have.

* * *

As described above, in a series of laws passed to amend the nation's securities laws between 1984 and 2010, Congress has repeatedly codified courts' authority to order disgorgement in the text of statutes and indeed has integrated that authority into its amendments to the nation's securities laws. Congress has also confirmed that courts have the authority to order disgorgement in legislative reports accompanying those laws. That text and history confirm that Congress has authorized district courts to order disgorgement in SEC actions. *See* Resp. Br. 23 (confirming court-ordered disgorgement "harmonizes, gives effect to, and makes sense of the other statutory provisions that Congress has enacted in this field"). This Court should not disturb that plan.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX:

LIST OF AMICI

U.S. Senate

Brown, Sherrod
Senator of Ohio

Blumenthal, Richard
Senator of Connecticut

Cortez Masto, Catherine
Senator of Nevada

Klobuchar, Amy
Senator of Minnesota

Reed, Jack
Senator of Rhode Island

Smith, Tina
Senator of Minnesota

Van Hollen, Chris
Senator of Maryland

Warner, Mark R.
Senator of Virginia

U.S. House of Representatives

Waters, Maxine
Representative of California

Clay, Wm. Lacy
Representative of Missouri

LIST OF *AMICI* - cont'd

Cleaver, Emanuel
Representative of Missouri

Dingell, Debbie
Representative of Michigan

Foster, Bill
Representative of Illinois

Gabbard, Tulsi
Representative of Hawai'i

Green, Al
Representative of Texas

Heck, Denny
Representative of Washington

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Meeks, Gregory W.
Representative of New York

Scott, David
Representative of Georgia

Sherman, Brad
Representative of California

Vargas, Juan
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LIST OF *AMICI* - cont'd

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Wexton, Jennifer
Representative of Virginia