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

REPLY BRIEF FOR PETITIONERS

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Congress has never given the SEC authority to seek and obtain an order of disgorgement from a district court. As a matter of ordinary statutory construction, that conclusion is inescapable. It is shown by the absence of "disgorgement" from the detailed system of penalties and other relief that the SEC may seek in court; by the contrast with administrative proceedings, where statutory text authorizes "accounting and disgorgement"; and by comparing the SEC's authorities to those of other agencies, to which Congress made court-ordered "disgorgement" available.

The SEC focuses its contrary argument on the phrase "equitable relief" in 15 U.S.C. § 78u(d)(5), which it claims includes the remedy it calls disgorgement. That claim rises or falls on the meaning of the phrase "equitable relief." And it falls for two clear reasons: SEC disgorgement is a penalty, which equity will not enforce; and SEC disgorgement is not relief typically available in equity, differing fundamentally from remedies that were.

All but conceding those points, the SEC urges the Court not to decide for itself whether SEC disgorgement is "equitable relief." Instead, the agency says, the Court should find that the statute codified a line of circuit decisions permitting the agency to seek disgorgement without statutory authority. According to the SEC, it no longer matters whether those decisions were right, or even whether the words "equitable relief" ordinarily include disgorgement, because Congress meant – without ever saying so – to bless the decisions by authorizing "equitable relief."

The SEC is wrong. It matters that the statute does not authorize disgorgement by its terms. It matters that SEC disgorgement was never historically "equitable relief." If "it is ultimately the provisions of

our laws . . . by which we are governed," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), then government agencies must point to a provision of law that authorizes a particular penalty. It is not enough that the agency has asserted such authority for some time in the past. Nor is it enough that some circuit courts – employing reasoning the SEC barely now defends – have acquiesced. A statute must say it, and here no statute does.

ARGUMENT

I. THE SEC MAY NOT SEEK DISGORGEMENT IN FEDERAL COURT BECAUSE CONGRESS HAS NOT AUTHORIZED IT

A. Disgorgement Is Not "Equitable Relief" Under § 78u(d)(5)

1. *Kokesh* establishes that the SEC's disgorgement remedy is a penalty

The SEC cannot find authority for disgorgement in 15 U.S.C. § 78u(d)(5), which enables the agency to "seek . . . any equitable relief that may be appropriate or necessary for the benefit of investors." The term "equitable relief" in § 78u(d)(5) excludes penalties because "court[s] of equity" are not "instrument[s] for . . . punishment," *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559 (1854). What the SEC calls disgorgement is a penalty for the reasons this Court gave unanimously in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *See* Pet. Br. 20-26.

The SEC contends (at 32-33) that *Kokesh* did not use the term "penalty" in the same sense as the many authorities stating that equity does not punish or penalize. But it fails to show any meaningful distinction between the characteristics of SEC disgorgement analyzed in *Kokesh* and the ones that define what is (and is not) equitable relief.

First, "SEC disgorgement is imposed . . . as a consequence for violating . . . public laws" – that is, for a "violation . . . against the United States rather than an aggrieved individual." *Kokesh*, 137 S. Ct. at 1643. The SEC responds (at 33-34) that public laws can also be enforced though non-penal measures such as "injunctions and declaratory judgments." But *Kokesh* did not suggest that every remedy under a public law involves a penalty. It merely treated the assertion of "'harm to the public at large,'" 137 S. Ct. at 1643 (quoting SEC's brief), as evidence that disgorgement is punitive. That remains true here.

Second, "SEC disgorgement is imposed for punitive purposes," because its "primary purpose . . . is to deter violations of the securities laws." *Id.* at 1643-44 (citation omitted). The SEC responds (at 34) that "equitable remedies often have a deterrent effect," quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), as saying that "'[t]he historic injunctive process was designed to deter.'" But the SEC leaves out half the Court's sentence: "The historic injunctive process was designed to deter, *not to punish*." *Id.* (emphasis added).[1] The threat of injunction may have some incidental deterrent effect; few defendants enjoy being ordered to stop breaking the law. But *Kokesh* reasoned that "deterrence is *not* simply an incidental effect" of SEC disgorgement, which is "inherently punitive." 137 S. Ct. at 1643 (emphasis added).

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[1] Even as to deterrence, *Hecht* likely meant deterrence of future violations by those enjoined. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998) ("injunctive" relief "is aimed at deterring petitioner from violating [a statute] in the future"). That specific-deterrence rationale is not the general deterrence *Kokesh* describes.

To reach that conclusion, *Kokesh* applied the same test this Court has traditionally used to distinguish equitable remedies from penalties. Equitable remedies "restor[e] the status quo," such as by "ordering the return of that which rightfully belongs" to the plaintiff. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); *see Tull v. United States*, 481 U.S. 412, 422 (1987) (equity would "extract compensation or restore the status quo"); *Livingston*, 56 U.S. (15 How.) at 560 (equity claimants receive "that which, *ex aequo et bono*, is theirs, and nothing beyond this"). A remedy not "limited to restoration of the status quo," *Tull*, 481 U.S. at 424, is not equitable. That mirrors this Court's reasoning that SEC disgorgement "does not simply restore the status quo," but "leaves the defendant worse off." *Kokesh*, 137 S. Ct. at 1645.

Third, "SEC disgorgement is not compensatory." *Id.* at 1644. The SEC errs in suggesting (at 34) that *Kokesh* meant only that disgorgement is not "compensatory damages." The Court's analysis of whether the remedy was "compensatory" focused on "funds . . . paid to victims" as opposed to those "dispersed to the United States Treasury," 137 S. Ct. at 1644; and cited *Porter*'s distinction between "restitution paid to an aggrieved party and penalties paid to the Government," *id.* Restitution, whether legal or equitable, is not compensatory damages, *see Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002), but is compensatory in the relevant sense that it goes to an aggrieved private party.

The SEC does not dispute that disgorged funds often do not go to harmed investors or that petitioners were ordered to pay the Treasury. But it insists (at 36) that it "aims to return disgorged funds to injured investors where possible," citing its 2019 annual report. That

report suggests otherwise: its table of "net inflows and outflows . . . related to disgorgement and penalties" shows "Collections" of $1.47 billion and "Transfers and Deposits to the U.S. Treasury General Fund" of almost three-quarters as much ($1.08 billion).[2] Also, just four large actions under the Foreign Corrupt Practices Act of 1977 ("FCPA") yielded $687 million of disgorgement in 2019 and $1.08 billion in 2018.[3] The Treasury appears to have kept the entirety of those nine- and ten-figure sums, as the SEC concedes (at 37) that there is no "clear universe of injured investors" for bribery-related recoveries.

Nevertheless, the SEC contends, payment to the Treasury serves the "traditional purpose" of "ensur[ing] that a wrongdoer 'shall not profit by his wrong.'" Br. 37-38 (quoting *Rubber Co. v. Goodyear*,

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[2] SEC, *Agency Financial Report: Fiscal Year 2019*, at 90 ("*SEC 2019 Financial Report*"), https://www.sec.gov/files/sec-2019-agency-financial-report-508-11-26-19.pdf. The SEC appears to rely (at 36) on a statement that total 2019 disgorgement and penalties "assets . . . include . . . $149.9 million *to be transferred* to the U.S. Treasury General Fund," *SEC 2019 Financial Report* 90 (emphasis added), but the accompanying table shows that figure is much less than total 2019 transfers and deposits. Our opening brief relied (at 7) on the $3.248 billion figure reported for 2019 by the Enforcement Division. The SEC clarifies (at 36) that its actual 2019 intake was materially less because relief "ordered" is less than amounts "collected"; also, there is a "time lag." Some parties to SEC enforcement actions might appreciate similar flexibility for their own annual reports. Regardless, as set forth in the text, in 2019 the SEC transferred to the Treasury three-quarters of what it "[c]ollect[ed]."

[3] *See* Richard L. Cassin, *Ericsson's FCPA disgorgement is second biggest. But is it legal?*, FCPA Blog (Dec. 10, 2019) ($540 million from Ericsson and $147 million from Fresenius in 2019, $933.5 million from Petrobras and $143 million from Panasonic in 2018), https://fcpablog.com/2019/12/10/ericssons-fcpa-disgorgement-is-second-biggest-but-is-it-legal/.

76 U.S. (9 Wall.) 788, 804 (1870)). That maxim, although venerable, is not the whole of equity. As this Court has said, it is equally "'inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, . . . to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged.'" *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 235 U.S. 641, 647 (1915) (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145-46 (1888)). The Treasury is not the "person wronged" here, and SEC disgorgement goes beyond "fair compensation." Accordingly, SEC disgorgement is punishment, not equitable relief.

2. The SEC's disgorgement remedy is not traditionally available equitable relief

Even if SEC disgorgement were not a penalty, it still would not be "equitable relief" because it was not "typically available in equity." *Great-West*, 534 U.S. at 210 (applying the interpretation given ERISA § 502(a)(3) in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)). The government contends (at 29-30) that, because § 78u(d)(5) was "enacted in 2002," its "meaning turns on the principles of equity that prevailed at that time." But ERISA was enacted in 1974, and this Court has not read it to refer to 1970s-era equity jurisprudence. *See Montanile v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) (*Mertens*, *Great-West*, and later cases look to "the period before 1938 when courts of law and equity were separate"). If anything, the enactment date of § 78u(d)(5) cuts against the SEC. Anyone who wanted to know in July 2002 how this Court would construe "equitable relief" could have done no better than read the January 2002 decision in *Great-West*.

The SEC fails to show (at 30-31) that differences between the securities laws and ERISA should lead to a different definition of "equitable relief." As *Great-West* and *Mertens* explained, "'"[e]quitable" relief must mean *something* less than *all* relief,'" 534 U.S. at 209 (quoting 508 U.S. at 258 n.8) (emphases in *Mertens*), to protect ERISA's "'carefully crafted and detailed enforcement scheme,'" *id.* (quoting 508 U.S. at 254). *Great-West* also rejected the argument that the "content" of "the statutory term 'equity'" should undergo a "rolling revision" based on later judicial decisions. *Id.* at 217.

Here, there is a similarly detailed enforcement scheme, *see* Pet. Br. 4-6, 16-18, which the SEC's interpretation similarly disrupts by creating a penalty that often exceeds the capped statutory amounts. Here, too, that interpretation would leave the meaning of "equitable relief" open to change. That is shown by the SEC's prominent but misplaced reliance (at 7-9, 40) on the definition of "disgorgement" from the innovative 2011 Third Restatement of Restitution to interpret a 2002 statute. Moreover, that work even declares that whether "rights conferred by statute may be judicially enforced via 'equitable relief'" is "outside [its] scope." Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt. a (2011).

Nor can the SEC find plausible historical precedent for its disgorgement remedy. It candidly concedes (at 45) that "[o]ne could view the award of disgorgement in this setting as a substantial departure from traditional norms." We agree. The attempted analogy (at 9, 31-32) to an "accounting" fails because the same characteristics that make SEC disgorgement a penalty also distinguish it from that traditional equitable remedy. The SEC cites no case in which this

Court allowed the government to seize funds for the Treasury through an equitable accounting; nor any in which this Court permitted "profits" in an accounting to exceed the net gains from wrongful conduct.[4]

The SEC fails to solve the net-gain problem by pointing (at 40-42) to courts' discretion in accounting actions to disallow inequitable expenses. The SEC seeks and obtains disgorgement against individuals who "never received any profits," *Kokesh*, 137 S. Ct. at 1644 (citing insider-trading cases), going far beyond mere allowance of expenses. Further, the district court here did not disallow particular expenses as inequitable but rejected all expenses whatsoever. App. 41a (calculating disgorgement as "total investment minus funds remaining"). Indeed, the court ordered disgorgement of nearly $27 million yet found that Liu "personally took from investors" about one-fourth of that ($6.7 million) and Wang's "direct personal gain" was less than one-seventeenth ($1.5 million). App. 42a. Traditional accounting, by contrast, focused on a defendant's net gain – necessarily less than gross gain. *See* Bray & Smith Br. 16-18.[5]

Other traditional limits on accounting rule out its use in securities fraud cases even by a private plaintiff

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[4] *Jackson v. Smith*, 254 U.S. 586 (1921), *cited in* Resp. Br. 32, is not to the contrary. That case imposed joint-and-several liability for "profits" on several individuals (which may have exceeded individual gains, *see* Pet. Br. 32) but not as part of an accounting. *See Smith v. Jackson*, 48 App. D.C. 565, 576 (1919) (remedy was a "constructive trust"), *rev'd*, 254 U.S. 586 (1921).

[5] The SEC asserts (at 41) that Liu and Wang "siphon[ed]" for themselves additional money paid to marketing companies. But this is review of a summary judgment, and the district court did not rule out a genuine dispute as to whether Liu or Wang received additional amounts. Only the $6.7 million and $1.5 million gains were "undisputed." App. 42a.

seeking only profits. As petitioners showed in their opening brief (at 28-30), the duty to account typically arose from a trust or fiduciary relationship, with exceptions inapplicable here. The SEC counters (at 31) that "courts of equity have long ordered those who commit fraud to account for their profits." Its sole authority involved a defendant who invited his friend and brother-in-law to "join" him in a real-estate "venture," *Dickson v. Patterson*, 160 U.S. 584, 585-86 (1896) – that is, a fiduciary.[6]

Amici Professor Laycock and his colleagues dig deeper into the equity fraud cases, but they, too, have no fraud case compelling an accounting without a relationship of trust and confidence.[7] They also point to intellectual-property cases ordering accountings before Congress authorized that practice by statute. Laycock Br. 9-12. Those pre-statutory cases provided an accounting as "incidental to some other equity," to avoid a separate jury trial. *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 215-16 (1882).[8] Remedies available only through equity courts' "ancillary jurisdiction

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[6] *See Dickson*, 160 U.S. at 592 (Dickson "had reason to expect . . . frank disclosure" from Patterson); *cf. Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) ("Joint adventurers . . . owe . . . the duty of the finest loyalty.").

[7] *See* Laycock Br. 19-21 (citing *Dickson, supra*; *Brooks v. Conston*, 72 A.2d 75, 77 (Pa. 1950) ("confidential relation . . . between the parties"); *Lang v. Giraudo*, 40 N.E.2d 707, 710 (Mass. 1942) (defendant "insinuated herself into the plaintiff's confidence"); *Falk v. Hoffman*, 135 N.E. 243, 243 (N.Y. 1922) (Cardozo, J.) (two stockholders "assured" a third that "they were acting solely for his benefit" and "not gaining any profit or advantage")).

[8] *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456 (1932) ("'a court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a

to award complete relief" do not count as "'typically available' in equity." *Montanile*, 136 S. Ct. at 660-61.

3. This Court's more recent cases do not support the SEC's disgorgement remedy

The SEC fares no better in relying (at 8-9) on cases decided after the merger of law and equity. Some cases describe "disgorgement" as "equitable," but none is referring to the strange hybrid the SEC calls "disgorgement." All but one referred to compensation for a private plaintiff whose rights were violated. *See*, *e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. 663, 686-87 (2014) (discussing statutory award of profits from copyright infringment); *Tull*, 481 U.S. at 424 (equating "disgorgement" generally with "restitution"); *Porter*, 328 U.S. at 396-97 (describing government's proposed "decree requiring . . . a refund"); *see also* Pet. Br. 7, *Porter*, No. 793 (U.S. Apr. 22, 1946) (proposal sought "refunds . . . to tenants"), 1946 WL 50577.[9] None identified as "equitable" an order for a payment to the Treasury as a consequence for violation of a public law.

Similarly, the SEC identifies no case in which this Court has classed as "equitable" an order requiring a

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patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief'") (quoting *Tilghman*, 125 U.S. at 148); *Root*, 105 U.S. at 215-16 ("a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained").

[9] *See also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (stating generally that "actions for disgorgement of improper profits" are "equitable" because they are "restitutionary") (alteration and citation omitted); *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 352 (1998) (similar). The only non-private plaintiff was a State suing on an interstate compact; this Court applied contract principles by analogy. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056-58 (2015).

defendant to "disgorge" more than that defendant's gains. Instead, the cases observe that only a "fraction of the [defendant's] income" was "at risk," *Petrella*, 572 U.S. at 687; that a fine greater than the defendant's gain would exhibit "inten[t] not simply to disgorge profits but also to impose punishment," *Tull*, 481 U.S. at 423; or that potential awards were a "'spectrum' between no profits and full profits," *Kansas*, 135 S. Ct. at 1058. None justifies a purportedly "equitable" remedy that "leaves the defendant worse off." *Kokesh*, 137 S. Ct. at 1645.

As *amici* Professors Bray and Smith explain (at 22-24), "'[d]isgorgement' was never the name of any particular equitable remedy"; at best, it is an "umbrella term for a number of remedies," including constructive trusts, accounting, and others. Creating a punitive disgorgement remedy not among those old ones is a legislative act. Congress has done so for the CFTC and CFPB, and for the SEC in administrative proceedings. But its mere reference to "equitable relief" in a statute with a comprehensive enforcement scheme does not create a similar remedy for the SEC.

B. Section 77t(d)(3)(C) Does Not Save the SEC's Disgorgement Remedy

When Congress in 1990 created tiered systems of monetary penalties for securities violations, it included several savings clauses. One is 15 U.S.C. § 77t(d)(3)(C), which provides that civil penalty actions "may be brought in addition to any other action that the [SEC] or the Attorney General is entitled to bring." On its face, § 77t(d)(3)(C) does not say whether disgorgement is among the "other action[s]" that the SEC "is entitled to bring." Nor does it, as the SEC contends (at 15-16), displace the principle that courts will not supplement a comprehensive statutory scheme of remedies.

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), this Court rejected "equitable restitution of money previously spent on cleanup efforts" under the Resource Conservation and Recovery Act of 1976 ("RCRA"). *Id.* at 487. A savings clause in RCRA preserves "any right which any person . . . may have under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f). This Court cited that clause, but still applied the "'elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" 516 U.S. at 488 (quoting *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)). RCRA's remedial scheme did not preempt other statutes or the common law, but did signal that courts should not craft new remedies for RCRA itself.[10]

Here, the SEC and the Attorney General have many statutory ways to enforce the securities laws. Under the Securities Act itself, there are administrative cease-and-desist proceedings, *see* 15 U.S.C. § 77h-1; bars on individuals acting as directors and officers of public companies, or offering penny stocks, *see id.* §§ 77t(e), 77t(g); and criminal prosecutions, *see id.* § 77x. Other administrative, civil judicial, and criminal actions exist under other statutes.[11] Preserving those statutory remedies gives § 77t(d)(3)(C) ample work without reading in nonstatutory actions.

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[10] *See also Sea Clammers*, 453 U.S. at 14-18 (rejecting "implication [of] additional judicial remedies," based on statute's "elaborate enforcement provisions," despite savings clause).

[11] Examples include the Exchange Act, 15 U.S.C. §§ 78f, 78j-1(d), 78u-1, 78u-2, 78u-3; Trust Indenture Act of 1939, *id.* § 77yyy; Investment Company Act of 1940, *id.* §§ 80a-9, 80a-41, 80a-48; and Investment Advisers Act of 1940, *id.* §§ 80b-3(e)-(f), 80b-3(i)-(j).

For example, the SEC has successfully invoked § 78u(d)(3)(C)(iii), an Exchange Act savings clause nearly identical to § 77t(d)(3)(C), to defeat an argument that civil penalties should be reduced based on a criminal fine. *See SEC v. Rajaratnam*, 918 F.3d 36, 46 (2d Cir. 2019).

II. CONGRESS DID NOT RATIFY THE SEC'S DISGORGEMENT REMEDY

The SEC says (at 13) that this Court need not determine whether *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971), which first gave the agency a disgorgement remedy, was "correctly decided," conceding that *Texas Gulf Sulphur* reflects an outdated "understanding of courts' remedial authority." True enough, but *Texas Gulf Sulphur* also relied on the incorrect premise that the SEC was not seeking "a penalty assessment" – even though the inside-tipper defendant was ordered to pay so-called "restitution" of "profits derived by his tippees," not by him personally. *Id.* at 1308. It was and is wrong for the reasons given in *Kokesh*, even apart from the general turn against judicially created causes of action.

The SEC errs in contending (at 13-14) that Congress "ratified" *Texas Gulf Sulphur*, making it part of the statute and immune from scrutiny. The rule the SEC invokes – the "prior-construction canon" – concerns identical language that Congress reenacts. There is no such language here: *Texas Gulf Sulphur* was not interpreting the phrase "equitable relief." Also, the relevant decisions of the circuit courts as of 2002 were not so many nor so uniform as the SEC contends. The well-recognized "limitations" on interpreting "acquiescence . . . as an expression of congressional intent," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994), thus apply with particular force.

A. The Prior-Construction Canon Does Not Save the SEC's Disgorgement Remedy

The SEC's ratification argument turns on the canon of "prior construction": "if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017); *see Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Justice Frankfurter's metaphor that " 'a word . . . obviously transplanted from another legal source . . . brings the old soil with it' "). That rule is a guide to the meaning of statutory text. Where "[t]he language of . . . two provisions is nowhere near identical," the canon "has no application." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015).

Here, the SEC identifies a phrase that it claims gives it judicial disgorgement authority: the words "any equitable relief," 15 U.S.C. § 78u(d)(5), enacted in 2002. But the phrase "any equitable relief" was not in the Exchange Act when the Second Circuit decided *Texas Gulf Sulphur*. Instead, that court said it was granting "an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief," because the Exchange Act did not " 'circumscribe the courts' powers to grant appropriate remedies.' " 446 F.2d at 1307-08 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970)). That is, the court found no basis in the securities laws for its ruling, but thought it could do whatever Congress had not prohibited. The decisions the SEC lists (at 12) as "follow[ing] *Texas Gulf Sulphur*" took the same approach. Several of the pre-2002 decisions concerned the appropriate measure of disgorgement and merely assumed that

authority for disgorgement existed.[12] Those that discussed authority relied on no particular statutory words or phrases.[13] The D.C. Circuit even conceded a "lack of specific authorization[] for th[e] remedy." *First City Fin.*, 890 F.2d at 1230.[14]

The SEC's position is thus not really a prior-construction argument. If there was a relevant prior construction of "equitable relief" in 2002, it was in *Mertens* and *Great-West*. The substance of the agency's position is that this Court should not decide whether SEC disgorgement is "equitable relief" because some circuits so ruled before 2002 and Congress did not say otherwise in the Sarbanes-Oxley Act of 2002. Such an "absence of corrective legislation," *Helvering v. Hallock*, 309 U.S. 106, 121 (1940), does not change the meaning of statutes. *See* Pet. Br. 35-36, 38; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 54, at 326 (2012) ("Scalia & Garner") (rejecting reliance on "mere failure

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[12] *See SEC v. MacDonald*, 699 F.2d 47, 52-55 (1st Cir. 1983) (en banc); *SEC v. Washington Cty. Util. Dist.*, 676 F.2d 218, 227 (6th Cir. 1982); *see also SEC v. Randolph*, 736 F.2d 525, 529-30 (9th Cir. 1984) (reversing rejection of consent decree).

[13] *See SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455-56 (3d Cir. 1997); *SEC v. Ridenour*, 913 F.2d 515, 517-18 (8th Cir. 1990); *SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Gotchey*, No. 91-1855, 1992 WL 385284, at *2 (4th Cir. Dec. 28, 1992) (per curiam).

[14] *SEC v. Lipson*, 278 F.3d 656 (7th Cir. 2002), described disgorgement as "equitable relief" available under "section 21(d) of the [Exchange] Act," *id.* at 662-63, but could not trace it to any textual authorization of "equitable relief." Also, *Lipson*'s case-specific analysis rested on the "breach of fiduciary obligation," *id.* at 663, a tie to historical equity missing from many disgorgement cases, including this one. *See* Pet. Br. 28-29.

of a legislature to correct extant . . . intermediate-court[] or agency interpretations”).

Further, a coherent prior-construction argument needs not only an “existing statutory text” but also judicial decisions that have “settled the meaning” of that text. *Lightfoot*, 137 S. Ct. at 563. In our federal system, where “[i]t is this Court’s responsibility to say what a statute means,” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994), the meaning of a statute is usually settled by this Court. In *Armstrong*, this Court described a question of statutory meaning as “*un*settled” before this Court answered it, 135 S. Ct. at 1386-87, even though “multiple Federal Courts of Appeals” had all come down the same way, and this Court later agreed, *id.* at 1394-95 (Sotomayor, J., dissenting). Although the Court has occasionally accepted “uniform constructions [of] inferior courts,” Resp. Br. 23 (citation and emphasis omitted), that is the exception, not the rule.

In any event, the SEC’s claim (at 12) of judicial “consensus” is exaggerated. Of the government’s 11 cited appellate decisions, two came after 2002 and are irrelevant;[15] one involved a consent decree and did not reach the merits of a disgorgement remedy, *Randolph*, 736 F.2d at 529-30; one was unpublished and non-precedential, *Gotchey*, 1992 WL 385284; at least two involved orders for payment to injured private parties, not (as here) the Treasury, *MacDonald*, 699 F.2d at 52, 54; *Blatt*, 583 F.2d at 1335-36 & n.30; and one relied on a breach of fiduciary duty (absent here), *Lipson*, 278 F.3d at 663. All together, the pre-2002

[15] *SEC v. Maxxon, Inc.*, 465 F.3d 1174 (10th Cir. 2006); *SEC v. Calvo*, 378 F.3d 1211 (11th Cir. 2004).

support for SEC disgorgement as the agency now defends it comes down to four circuits at most.[16]

In addition, most of the circuit decisions came before 1990, when Congress gave the SEC tiered civil penalties in judicial cases and disgorgement authority in administrative proceedings. That "carefully integrated" scheme is "strong evidence that Congress did *not* intend to authorize other remedies." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *see* Pet. Br. 5, 16-18. The pre-1990 decisions were thus not construing "precisely the same" statute – much less precisely the same "word or phrase" – now in force. Scalia & Garner § 54, at 323 (noting tension between the prior-construction canon and the principle that "context is as important as sentence-level text"). The difference is another reason for the Court to give its own answer to the question presented.

B. The Other Provisions Cited by the SEC Did Not Ratify *Texas Gulf Sulphur*

It is common ground that several other statutes passed between 1998 and 2010 "reflected [Congress's] awareness of," Resp. Br. 6, judicial disgorgement orders; but awareness is not authorization. It is also common ground that "statutes that presuppose the availability of a disgorgement remedy in SEC enforcement suits cannot by [them]sel[ves] make [disgorgement] proper." *Id.* at 26; *see* Pet. Br. 35. Nevertheless, the SEC relies (at 26) on five scattered statutory references to disgorgement as "contextual evidence." Neither contextually nor otherwise do those references show that "equitable relief" under § 78u(d)(5) includes disgorgement.

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[16] *Cf. Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 335 (1934) (six circuits on point, two more generally consistent; at the time, there were 11 circuits), *cited in* Resp. Br. 23.

First, the SEC describes as an "endorsement" Congress's 1988 decision to "'diminish[]'" private insider-trading damages by "'the amounts, if any, that [a] person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission,'" plus praise in the findings for the agency's "'vigorous[], effective[], and fair[]'" enforcement of its "'rules and regulations.'" Br. 14-15 (quoting 15 U.S.C. §§ 78t-1(b)(2), 78u-1 note). Those were indeed kind words, but they gave the SEC no new authority. The words "if any" in § 78t-1(b)(2) are neutral as to whether the SEC obtains a disgorgement order in any particular case, or any case at all.

Second, the SEC contends (at 15-17), relying heavily on legislative history, that the lack of judicial disgorgement authority in the 1990 Penny Stock Reform Act "reflected Congress's apparent understanding that courts *already* had power to award disgorgement." Any such "apparent understanding" passed neither house of Congress and was not signed by the President. What did is a statute with "carefully integrated civil enforcement provisions," *Massachusetts Mut.*, 473 U.S. at 146, which "includes particular language" about disgorgement in "one section," while "omit[ting] it in another," *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). The controlling presumption is that Congress knew what that statutory structure meant.

The SEC's claim (at 16) that it makes "little sense" to authorize disgorgement only in administrative proceedings is a nearly explicit request to "supply [an] omission[]" in a statute, which "transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). In any event, Congress might have thought that the judicial penalty of up to "gross pecuniary gain," absent from administrative

proceedings, was more significant than "accounting and disgorgement." *Compare* 15 U.S.C. § 77h-1(e) *and* § 77h-1(g) *with id.* § 77t(d); *see also supra* pp. 7-9 (describing limits on traditional accounting).

Third, the SEC relies (at 17-18) on the bar in the 1995 PSLRA on the use of disgorged funds to pay private attorneys' fees. The SEC does not contend that this provision shows approval (if anything, it suggests curtailing overreach, *see* Pet. Br. 39), but only that Congress "recognized" what the agency and the courts were doing.

Fourth, the SEC points out (at 18-19) that, at the time of its enactment, a fair-fund provision in Sarbanes-Oxley referred to "an order requiring disgorgement against any person" obtained "in any judicial or administrative action." Pub. L. No. 107-204, § 308(a), 116 Stat. 745, 784. The provision was later amended to delete "an order requiring disgorgement against any person." *See* 15 U.S.C. § 7246(a), *quoted in* Pet. Br. 36. Even in its original form, § 7246(a), like the SEC's other references, reflects awareness, not approval; and if Congress's original wording somehow implied approval, then removing that wording must imply disapproval.

Fifth, and finally, the SEC relies (at 21) on provisions of the 2010 Dodd-Frank Act that authorize the CFTC to seek judicial disgorgement orders (referring to it as an "equitable remed[y]") and that create whistleblower incentives. The CFTC provision shows that Congress "knows how to adopt the omitted language," *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019), and knew long before *Kokesh* that a bare reference to equity would not include disgorgement. The whistleblower provisions (codified at 15 U.S.C. § 78u-6) do not even presuppose judicial disgorgement orders, as our opening brief shows (at 36-37).

The SEC also says that its earlier- and later-enacted statutory references shed light on § 78u(d)(5) as part of the "'context of the *corpus juris*.'" Br. 26 (quoting *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality)). *Branch* explained that courts can sometimes "'gather[] from a subsequent statute . . . what meaning the legislature attached to the words of a former statute.'" 538 U.S. at 281 (plurality) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845)).[17] Here, each reference merely shows Congress recognizing that some courts were ordering disgorgement – with or without statutory authority – and telling them neither to continue nor to stop. As *amicus* Chamber of Commerce explains (at 17-25), it is impossible from such stuff to determine Congress's views, and unwise even to try.

III. THE SEC HAS AMPLE TOOLS TO PROTECT INVESTORS

Reversal here would still leave the SEC the "full panoply of enforcement tools," *Kokesh*, 137 S. Ct. at 1640, granted by statute. That panoply is large. *See supra* pp. 12-13 & n.11. Requiring the SEC to use those statutory tools rather than make up new ones would in no way interfere with the vigorous enforcement of the securities laws.

The SEC protests (at 42-43) that "forbidding courts to order disgorgement . . . would make it easier for wrongdoers to keep their ill-gotten gains." That is not so. The SEC would retain its ability under § 77t(d) to seize "gross pecuniary gain" in court. It would lose only the ability to get a full statutory penalty and add on an even larger penalty in the guise of nonstatutory

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[17] Thus, later grants of judicial disgorgement authority to other agencies weigh against the SEC, which did not get one. *See* Pet. Br. 10-11.

equitable relief. The SEC would also retain the ability to order "accounting and disgorgement" through its own administrative process, plus significant monetary penalties there as well.

The agency's fear (at 44) that administrative law judges lack the power "to ensure that disgorgement orders are paid" is unjustified. Congress authorized the SEC to sue in district court to enforce its own administrative orders. *See* 15 U.S.C. § 78u(e); *see also*, *e.g.*, *Pierce v. SEC*, 737 F. Supp. 2d 1068, 1077-78 (N.D. Cal. 2010). The agency offers no reason to think that remedy is inadequate.

Further, the SEC also has (it says) the option to seek penalties in both judicial and administrative proceedings. The agency objects (at 44) that this would lead to a "multiplicity of suits." It advertises its ability to pursue multiple proceedings on its website, *see* Pet. Br. 4, so the burden does not seem insurmountable. And, for truly egregious offenses, nothing this Court does here will affect criminal enforcement.

In any event, this Court's role is not to decide how much deterrence is enough or to draw the line past which enforcement vigor becomes overreach. That is Congress's responsibility. This Court's role is to construe the statute that Congress passed. That statute does not authorize the SEC to seek disgorgement in civil cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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