No. 23-900

IN THE

Supreme Court of the United States

DEWBERRY GROUP, INC.,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an award of the "defendant's profits" under the Lanham Act, 15 U.S.C. § 1117(a), can include an order for the defendant to disgorge the distinct profits of legally separate non-party corporate affiliates.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. All parties to the proceeding are named in the caption.

2. Petitioner Dewberry Group, Inc., f/k/a Dewberry Capital Corporation, is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Cases (continued) **Page(s)**

Statutes and Rules **Page(s)**

Statutes and Rules (continued) **Page(s)**

Other Authorities

Other Authorities (continued) **Page(s)**

Other Authorities (continued) **Page(s)**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 77 F.4th 265. The order of the district court on cross-motions for summary judgment (Pet. App. 96a-120a) is not reported but is available at 2021 WL 5217016. The order of the district court directing disgorgement of profits (Pet. App. 62a-95a) is not reported but is available at 2022 WL 1439826.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2023. A petition for rehearing was denied on September 19, 2023 (Pet. App. 122a). On December 11, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 16, 2024, and the petition was filed on that date. The petition was granted on June 24, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

In the Lanham Act, Congress specified the remedies available for federal trademark-infringement claims. On top of requesting injunctive relief, damages, and costs, a plaintiff may seek the "defendant's profits." 15 U.S.C. § 1117(a). But not every one of these authorized remedies is available in every case. Sometimes there is no impending risk of infringement, precluding an injunction. Sometimes the plaintiff, like respondent here, suffered no demonstrable damages. And sometimes the defendant, like petitioner here, has not earned any profits from the purported infringement. In that event, the Act does not authorize any profits-disgorgement remedy because there are no "defendant's profits" to disgorge.

Despite the Lanham Act's plain language limiting any profits-disgorgement award to the defendant's own profits, the courts below ordered petitioner to disgorge nearly $43 million in profits that it never earned or received and that were instead obtained only by *non*-parties—legally separate affiliates of petitioner that respondent never sued and whose liability was never adjudicated. Respondent never attempted to pierce the corporate veil to treat those distinct affiliates as alter egos of petitioner, and both courts below disclaimed any need to do so. The Fourth Circuit, over Judge Quattlebaum's strong dissent, nevertheless affirmed the district court's decision to treat petitioner and its non-party affiliates "as a single corporate entity for the purpose of calculating revenues" attributable to the infringement, and endorsed the district court's directive requiring petitioner to disgorge profits that it never received. Pet. App. 39a.

That conclusion contravenes the Lanham Act's text and eviscerates the bedrock rule of corporate separateness. The Fourth Circuit and respondent have sought to rationalize the profits-disgorgement order based on two other phrases in Section 1117(a). But this Court has held that Congress must speak "directly" if it wishes to override the presumption that, unless "the corporate veil" is "pierced," federal law treats legally separate entities as distinct. *United States* v. *Bestfoods*, 524 U.S. 51, 63 (1998) (citation omitted). Neither phrase invoked by the court of appeals or respondent comes close.

The Fourth Circuit reasoned that the Act's incorporation of "the principles of equity" to govern disgorgement and other monetary relief, 15 U.S.C. § 1117(a), empowers courts to disregard generally applicable legal principles in order to maximize disgorgement awards for trademark registrants. But that language has the exact opposite effect. The principles-of-equity proviso *constrains* disgorgement to traditional equitable limits—which permit courts to order disgorgement only of any net profits a defendant received. Because petitioner earned no net profits, principles of equity precluded the courts below from requiring petitioner to disgorge its affiliates' profits.

In this Court, respondent has abandoned the court of appeals' rationale and instead staked everything on language allowing a court to award a "just" sum if the amount of profits is "inadequate" or "excessive." 15 U.S.C. § 1117(a); see Br. in Opp. 2-4, 22-30. That language likewise does not displace the presumption of corporate separateness and only leads back to traditional equitable principles that determine what makes an award "just." In no event does the just-sum provision permit circumvention of the very limitations that Section 1117(a) itself incorporates.

By asserting power to order disgorgement of profits earned by legally separate non-parties absent direct statutory authorization, the lower courts usurped Congress's policymaking prerogative to decide whether to displace deeply rooted rules of corporate law. And the decision below is bad policy besides. Contrary to the court of appeals' conjecture, there is no need to allow courts deciding Lanham Act cases to disregard corporate boundaries: Plaintiffs injured by the acts of affiliated entities can either sue all the infringing entities or pursue veil-piercing under traditional principles. Respondent here simply declined to follow either path. The Fourth Circuit's purpose-driven approach also creates problems of its own: It would needlessly unsettle business expectations, distort the Act's burden-shifting scheme, and muddle the established framework for contributory infringement.

Because the Lanham Act does not authorize the lower courts' disregard of corporate separateness, this Court should reverse the disgorgement award.

A. Legal Background

A trademark is a "word, name, symbol, or device" that a person uses "to identify and distinguish his or her goods" from "those manufactured or sold by others." 15 U.S.C. § 1127. Although "federal law does not create trademarks," Congress has conferred "'important legal rights and benefits'"—including a federal cause of action—on registrants of trademarks that are used in interstate or foreign commerce. *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U.S. 138, 142 (2015) (citation omitted). Congress has repeatedly revisited and carefully calibrated the remedial scheme in enactments spanning a century and a half.

Congress passed the first federal trademark legislation as part of an omnibus bill updating the patent and copyright laws. Act of July 8, 1870, ch. 230, 16 Stat. 198. That law provided that, upon registration, trademark owners had a cause of action against anyone who reproduced or imitated the mark. An owner could seek "damages for such wrongful use of said trade-mark" and also had a "remedy according to the course of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor." § 79, 16 Stat. 211.

After this Court held the 1870 trademark law exceeded Congress's Article I authority because it lacked a commerce element, *Trade-Mark Cases*, 100 U.S. 82, 93-98 (1879), Congress took another run at a registration system. The Trademark Act of 1881 was limited to trademarks used "in commerce with foreign nations, or with the Indian tribes." Ch. 138, § 1, 21 Stat. 502. But it carried forward the same remedies as the

1870 statute: "damages," as well as a "remedy according to the course of equity to enjoin the wrongful use of such trade-mark * * * and to recover compensation therefor." § 7, 21 Stat. 504. As this Court explained, the measure of "compensation" at equity was "an account of the profits realized by the infringer." *Root* v. *Railway Co.*, 105 U.S. 189, 214 (1882).

In the Trademark Act of 1905, Congress expanded registration for trademarks "used in commerce * * * among the several States." Ch. 592, § 1, 33 Stat. 724. The Act provided distinct remedies along the law-equity divide. Section 16 allowed courts to award "actual damages" and authorized courts to increase the award up to "three times the amount" of damages. 33 Stat. 728. Section 19 separately empowered courts "to grant injunctions, according to the course and principles of equity," and to order "profits to be accounted for by the defendant." 33 Stat. 729. The Act set forth a burden-shifting procedure under which "the plaintiff [was] required to prove defendant's sales only," and the "defendant must prove all elements of cost which are claimed" from its profits." *Ibid.* Section 19 also made clear that courts of equity had ancillary authority to award the plaintiff damages in addition to the defendant's profits. *Ibid.*

Following the merger of law and equity, Congress enacted the Lanham Act, ch. 540, 60 Stat. 427 (1946) (15 U.S.C. § 1051 *et seq.*), which further refined the remedial framework. The Act likewise authorizes courts to "grant injunctions, according to the principles of equity." § 34, 60 Stat. 439 (15 U.S.C. § 1116(a)). The Act also consolidates the monetary remedies for trademark infringement, providing that a prevailing "plaintiff shall be entitled * * * to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action," and it expressly makes all of those forms of monetary relief "subject to the principles of equity." § 35, 60 Stat. 439-440 (15 U.S.C. § 1117(a)); see *Getty Petroleum Corp.* v. *Bartco Petroleum Corp.*, 858 F.2d 103, 111 (2d Cir. 1988).

Section 35 of the Lanham Act retained the 1905 Act's provision allowing damages awards to be multiplied up to "three times" and its burden-shifting procedure for proving profits. 60 Stat. 440. Section 35 also added a provision allowing for adjustments to profits-based awards, patterned on existing copyright law. That provision states that "[i]f the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." *Ibid.*; cf. Act of Mar. 4, 1909, ch. 320, § 25(b), 35 Stat. 1081 (copyright statute permitting court to award "in lieu of actual damages and profits such damages as to the court shall appear to be just" within statutory ranges, without being "regarded as a penalty").

The Lanham Act's principal architect, Edward Rogers, "emphasized that the provision to increase or decrease recovery based on an infringer's profits was simply a recognition of the problems of proof facing plaintiffs." *Getty Petroleum*, 858 F.2d at 111 (citing *Trade-Marks: Hearings on H.R. 102, H.R. 5461, and S. 895 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents*, 77th Cong., 1st Sess. 203-205 (1941) (*1941 Hearings*)). Rogers also cautioned that, if an award of a just sum "exceed[ed] the total amount of the defendant's sales," the result would be "a penalty there, and you do not want to do [that]." *1941 Hearings* 205. Consistent with that admonition, Congress further specified as to both enhanced-damages and adjusted-profits awards that "[s]uch sum in either of the above circumstances shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a).

B. Facts And Procedural History

1. After playing quarterback for the Georgia Tech Yellow Jackets and the Calgary Stampeders in the 1980s, John Dewberry hung up his cleats and went into business. He invested his Stampeders' signing bonus into founding petitioner, originally named Dewberry Capital Corporation, to assist in developing, leasing, and managing commercial properties. Louise Tutelian, *The Look of Then, the Comforts of Now*, N.Y. Times (May 21, 2009), tinyurl.com/4mc3u97w.

Petitioner itself does not own or lease any commercial properties. Pet. App. 43a-44a; see J.A. 72. Rather, petitioner supported around 30 affiliated operating companies by providing accounting, human-resources, legal, and real-estate-development services. Pet. App. 4a; see J.A. 71. Those affiliates, in turn, owned and leased commercial property to tenants in Florida, Georgia, South Carolina, and (formerly) Virginia, and received all revenues from the leases. Pet. App. 4a; see J.A. 73-74, 85-87. Petitioner and its affiliates are under Mr. Dewberry's common ownership, but the affiliates are all distinct corporate entities that file separate tax returns. Pet. App. 82a; see J.A. 83-84. Petitioner maintained separate bank accounts and accounting records for each affiliate and received a fee for providing these services. Pet. App. 44a, 83a; see J.A. 72-73, 81-82.

2. In 2006, petitioner and respondent, another real-estate entity, became embroiled in a trademark dispute. Pet. App. 4a-5a. Respondent also claims to provide real-estate-development services in Florida, Georgia, South Carolina, and Virginia. *Id.* at 3a-4a. Petitioner asserted senior common-law rights in the "Dewberry" mark, while respondent asserted a federally registered trademark in "Dewberry." *Id.* at 4a. The parties resolved those dueling claims in a settlement agreement that allowed respondent to use its registered "Dewberry" mark, allowed petitioner to use "Dewberry" subject to certain limits for commercial real-estate services, and required petitioner to use a "DCC" mark rather than "Dewberry" for certain services performed in Virginia. *Id.* at 5a-6a.

In 2017, petitioner rebranded itself as Dewberry Group, Inc., and created several sub-brands (Dewberry Living, Dewberry Office, and Studio Dewberry). Pet. App. 7a. Petitioner also produced marketing materials that used the "Dewberry Group" and "Studio Dewberry" marks. *Id.* at 8a. Petitioner's affiliates then used these materials to market commercial properties to tenants. *Id.* at 39a.

3. In 2020, respondent filed this suit under the Lanham Act, claiming that the rebranding infringed respondent's mark. Pet. App. 9a; see J.A. 1-38. Respondent named petitioner as the sole defendant. J.A. 4. The district court granted summary judgment to respondent on liability. Pet. App. 96a-120a.

Following a three-day bench trial on remedies, the district court issued an order requiring petitioner to disgorge nearly $43 million in profits earned by its affiliates, none of which is a party to the litigation. Pet.

App. 62a-95a. The court acknowledged that respondent had "not provided direct evidence of lost sales" or any other measure of damages. *Id.* at 79a. Respondent also offered no evidence that petitioner itself had earned any profits from the infringement. See *id.* at 39a. In fact, petitioner showed that it had suffered losses for the years in question. J.A. 102, 262, 272, 282.

Although petitioner itself earned no profits from the infringement, the district court ruled that the Lanham Act authorizes disgorgement from petitioner of the non-party affiliates' profits. The court rejected any need for veil-piercing, Pet. App. 82a, which respondent disclaimed, J.A. 331 ("That [respondent] did not name the [affiliates] as defendants or allege contributory infringement or alter-ego liability is of no moment."). Instead, the court reasoned "that, but-for the revenue generated by the [affiliates], [petitioner] as a single tax entity would not exist" because petitioner provides services only to its affiliates and has relied on Mr. Dewberry to cover significant losses "over the past 30 years." Pet. App. 84a. The court considered such circumstances sufficient, without any application of veil-piercing principles, to treat petitioner and its affiliates "as a single corporate entity when calculating the revenues and profits" in light of "the equitable purposes of the Lanham Act's disgorgement remedy." *Id.* at 85a-86a.

Having decided to disregard corporate separateness in favor of a "single corporate entity" theory when calculating petitioner's profits, the district court determined that the combined profits of the affiliated entities totaled $53.7 million. Pet. App. 85a-86a. The court then invoked its authority "to adjust an award up or down as circumstances demand" under the just-sum provision. *Id.* at 87a. Because the affiliates entered into some of the leases before the infringement period, and because some of the hotel-owning affiliate's revenues did not implicate the infringement, the court reduced the profits by 20%. *Id.* at 88a-94a.

The district court accordingly ordered petitioner to disgorge $42,975,725.60—its affiliates' profits, as reduced. Pet. App. 94a; J.A. 335. The court also awarded respondent attorneys' fees and issued an injunction limiting petitioner's use of respondent's "Dewberry" mark for commercial real-estate-development services. Pet. App. 11a-12a.

4. The court of appeals affirmed the disgorgement order in a divided decision. Pet. App. 3a-48a.

a. The panel majority held that the district court properly "treated [petitioner] and its affiliates as a single corporate entity for the purpose of calculating revenues generated by [petitioner's] use of infringing marks." Pet. App. 39a-40a. The majority acknowledged that petitioner "did not receive the revenues from its infringing behavior directly." *Id.* at 45a. And it noted that petitioner had "show[n] losses on its tax returns" and had earned no profits on any of the marketed properties. *Id.* at 39a (citation omitted). But the majority deemed it sufficient that petitioner and its affiliates were under common ownership and that petitioner had provided "branding for its affiliates, who in turn generate profits using that branding on their lease, loan, and other promotional materials." *Ibid.*

The majority rejected petitioner's argument that the district court could order petitioner to disgorge its affiliates' profits only if respondent succeeded in "piercing their corporate veils." Pet. App. 43a. In its view, the district court could "conside[r] the revenues of entities under common ownership with [petitioner]," wholly apart from veil-piercing. *Ibid.* The majority invoked the Lanham Act's proviso that a "grant of profit disgorgement is 'subject to the principles of equity,'" which it construed as granting the district court broad "discretion" to "weig[h] the equities of the dispute." *Id.* at 45a (quoting 15 U.S.C. § 1117(a); other internal quotation marks omitted). The majority also reasoned that, "while [petitioner] did not receive the revenues from its infringing behavior directly, it still *benefited* from its infringing relationship with its affiliates" that did receive those revenues. *Ibid.* And the majority pointed to policy concerns, positing that "[a]dmonishing courts for using their discretion" to disregard corporate separateness would "ris[k] handing potential trademark infringers the blueprint for using corporate formalities to insulate their infringement from financial consequences" and would undermine the Lanham Act's broader "purpose." *Ibid.* (citation omitted).

b. Dissenting on the disgorgement issue, Judge Quattlebaum objected to the "use of revenues from separate companies," which are "affiliated with" petitioner but not parties to the case, to order disgorgement by petitioner itself. Pet. App. 58a. He observed that "§ 1117(a) speaks to the *infringer's* profits." *Id.* at 59a (emphasis added). And he noted that respondent had claimed only that petitioner, "not third parties, was the infringer." *Ibid.* As a result, the district court's order requiring petitioner to disgorge "revenues from the affiliated companies"—undisputedly "separate corporate entities"—that "were never realized by [petitioner]" itself was "incorrect as a matter of law." *Id.* at 60a.

Judge Quattlebaum also disagreed with the majority's policy concern that respecting "'corporate formalities'" in this context would "insulate" infringement from financial consequences. Pet. App. 58a-59a. He explained that "[t]here is no loophole that lets these entities infringe with impunity," because a Lanham Act plaintiff can either join affiliates as defendants or else seek to "pierce" the defendant's "corporate veil." *Id.* at 59a. But Judge Quattlebaum "kn[e]w of no law that allows courts * * * to disregard those options and simply add the revenues from non-parties to a defendant's revenues for purposes of evaluating the defendant's profits." *Ibid.*

5. The Fourth Circuit denied rehearing en banc. Pet. App. 122a.

SUMMARY OF ARGUMENT

A. The Lanham Act does not authorize an award of profits earned by a defendant's non-party affiliates.

1. The Lanham Act's plain language permits courts to order disgorgement only of the "*defendant's* profits." 15 U.S.C. § 1117(a) (emphasis added). The ordinary meaning of "defendant" in federal civil litigation is a person or entity named in the complaint and alleged to be liable. A *non*-party to the litigation, whose liability is never adjudicated, cannot qualify. Section 1117(a) elsewhere uses "defendant" in that familiar sense, providing that the "defendant must prove" any "cost[s] or deduction[s]" that it seeks to exclude from recoverable profits. *Ibid.* Only a party in litigation can be assigned a burden of proof.

A court in a Lanham Act suit cannot order a defendant to disgorge profits earned by a non-party affiliate unless the corporate veil is pierced. Under the Act's text, only the defendant's own profits are fair game. And a non-party affiliate's profits cannot be deemed the defendant's profits unless the plaintiff pierces the veil and proves that the defendant and the affiliate are the same corporate person.

2. That straightforward reading of Section 1117(a) forecloses the profits-disgorgement award in this case. The Fourth Circuit affirmed an award ordering petitioner to disgorge nearly $43 million in profits earned solely by its affiliates. But respondent named and served, and the district court adjudicated the liability of, only one defendant: petitioner, which undisputedly earned no profits from the infringement. Respondent never sought to pierce the corporate veil separating petitioner from its affiliates, and both courts below disclaimed any veil-piercing rationale. There were thus zero "defendant's profits" for petitioner to disgorge.

B. Neither the Fourth Circuit nor respondent has offered any way to read "defendant's profits" to include profits earned by non-parties. Instead, each relies on other language in Section 1117(a) in an attempt to justify that award. Both proffered justifications suffer from the same defect: The Lanham Act nowhere directly states that courts can disregard corporate separateness in calculating profits-disgorgement awards. To the contrary, the language highlighted by the court of appeals and respondent only confirms that the profits-disgorgement order here is unlawful.

1. Any contention that the Lanham Act permits courts to order a defendant to disgorge the profits of its non-party affiliates faces a steep climb over the presumption that federal statutes respect the principle of corporate separateness. This Court has made clear that Congress must "'speak directly'" to displace the "bedrock principle" of "respect for corporate distinctions." *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998) (citation omitted). That strong presumption not only reflects Congress's likely intent but also ensures that the legislative policy judgment whether to depart from that baseline is made by Congress, not the courts. When a federal statute does not "directly" say otherwise—and when "the corporate veil" has not been properly "pierced," *ibid.*—courts cannot impose liability or craft remedies that disregard corporate distinctions.

2. Far from "directly" overriding corporate separateness, the statutory language the Fourth Circuit invoked reinforces that the Lanham Act does not authorize disgorgement of non-parties' profits. The court of appeals misread the Act's proviso that profits disgorgement and other monetary remedies are "'subject to the principles of equity'" as a permission slip to disregard corporate separateness, based on a case-specific "weigh[ing]" of "the equities." Pet. App. 45a (quoting 15 U.S.C. § 1117(a); other internal quotation marks omitted). But that proviso instead serves only to confirm that the novel remedy embraced below is unlawful.

Even absent statutory text expressly invoking equitable principles, this Court construes federal statutes authorizing equitable remedies to incorporate the traditional limitations that courts of equity applied. And an *explicit* statutory statement that the principles of equity control, like the one in Section 1117(a), leaves no doubt that remedies are subject to "the limitations upon [their] availability that equity typically imposes." *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 211 n.1 (2002).

The award in this case ordering petitioner to pay profits earned solely by its affiliates contravenes three traditional equitable limitations. *First*, equity follows the law and will not "create a remedy in violation of law." *Rees* v. *Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874). The applicable law here includes the bedrock rule of corporate separateness that controls absent veil-piercing, so equity cannot override that barrier. *Second*, courts of equity limited disgorgement to a defendant's own net profits. They would not calculate collective profits "against multiple wrongdoers under a joint-and-several liability theory" even when the defendant itself made no profits but an affiliate of the defendant did. *Liu* v. *SEC*, 591 U.S. 71, 82-83 (2020). *Third*, equity will not enforce a penalty. Requiring a defendant to disgorge profits "that accrue[d] to his affiliates * * * could transform any equitable profits-focused remedy into a penalty." *Id.* at 90.

3. Respondent has not defended the Fourth Circuit's rationale in this Court. Instead, respondent relies on Section 1117(a)'s language permitting a court to award a "sum" that is "just" when the amount of profits is "inadequate or excessive." 15 U.S.C. § 1117(a). But that language, read in context, merely permits adjustments to the defendant's profits—not an award of someone else's profits. So like the reference to principles of equity, the just-sum language does not empower a court to order disgorgement of non-party affiliates' profits, let alone with the clarity *Bestfoods* requires for a statute to override the rule of corporate separateness.

By permitting a court to award a "just" sum, Congress did not jettison "traditional equitable principles" confining profits awards, but expressly reinforced those limits. *Starbucks Corp.* v. *McKinney*, 144 S. Ct. 1570, 1576-1577 (2024). Courts of equity could adjust profits-disgorgement awards—for instance, if evidentiary issues made it difficult to prove a defendant's profits. But no recognized equitable principle allowed courts to disregard the corporate form absent veil-piercing. Congress made those limits plainer still in Section 1117(a) by insisting that any sum awarded "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). A court's "discretion" to award a "just" sum (*ibid.*) is confined by those limits. At minimum, Congress's conferral of that discretion does not "directly" supersede the background rule of corporate separateness. *Bestfoods*, 524 U.S. at 63.

Moreover, reading the just-sum provision to greenlight disregard of corporate separateness would upend the Lanham Act's reticulated remedial scheme. The just-sum provision is a safety valve that works in tandem with the Act's "meticulously detailed" remedial machinery. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967). It is not a bypass that allows courts to abandon the statutorily prescribed remedies at will. The statutory history confirms that the provision was designed to address difficulties of proving the defendant's profits, not to render the Act's remedial framework nugatory by authorizing all-purpose relief in the unfettered discretion of the courts. If any alterations to that framework are appropriate, that is a policy call for Congress, which is demonstrably up to the task, having refined statutory trademark-infringement remedies many times over decades.

Properly construed, the just-sum provision cannot plausibly sustain the award in this case. It is undisputed that petitioner earned $0 in profits from the purportedly infringing activity. Permitting the district court to sidestep centuries of corporate law, and to transform that $0 in profits into a $43 million award based on profits earned only by non-parties, cannot be defended as "just" under any measure. Respondent's suggestion that the Act authorized that outsized award to capture petitioner's "true profits" because its affiliates reaped those earnings, Br. in Opp. 23, 27 (citation omitted), is simply ersatz veil-piercing without the requisite proof. But respondent and both courts below disclaimed reliance on veil-piercing principles. As a result, requiring petitioner to disgorge $43 million in profits it never received would also plainly constitute a "penalty" that the Lanham Act expressly forbids. 15 U.S.C. § 1117(a).

C. The Fourth Circuit went astray based largely on a misplaced policy concern that respecting corporate separateness would provide a blueprint for infringers to evade responsibility. Policy considerations are never a license to disregard clear statutory text or context. And the court's worry is unfounded in any event. The Lanham Act's robust, detailed remedial scheme provides an array of tools to compensate plaintiffs, deter wrongdoing, and prevent future infringement. For example, a plaintiff who (unlike respondent) was injured by infringement that earned the defendant no profit may still seek damages (which the court may enhance). And plaintiffs injured by the actions of multiple affiliated entities can sue them all or proceed on a veil-piercing theory. Respondent simply declined to pursue any of those avenues. Rewriting the statute to undo respondent's strategic choices would cause much more harm than good: The court of appeals' reasoning unsettles investment expectations, inflates profits awards to exorbitant levels, and offers no administrable guideposts to addressing corporate separateness under other federal statutes.

* * * * *

Because petitioner, the only defendant in this case, earned no profits and respondent made no attempt to pierce the corporate veil, the judgment below affirming the disgorgement award should be reversed.

ARGUMENT

THE LANHAM ACT DOES NOT PERMIT COURTS TO ORDER A DEFENDANT TO DISGORGE THE PROFITS OF NON-PARTY AFFILIATES ABSENT VEIL-PIERCING

The Lanham Act's plain language answers the question presented. The Act authorizes an award of the "defendant's profits." 15 U.S.C. § 1117(a). Absent veil-piercing, that language clearly precludes ordering a defendant to disgorge profits earned by non-party affiliates. The Fourth Circuit and respondent have no answer to that controlling text. They rely instead on two other statutory passages, but neither phrase they invoke overcomes the strong presumption from *United States* v. *Bestfoods*, 524 U.S. 51 (1998), that federal statutes respect corporate separateness. To the contrary, both phrases reinforce traditional equitable limitations that prohibit ordering a defendant to disgorge profits it never received. The courts below erred in ordering petitioner to disgorge profits that were earned by its non-party affiliates, without piercing the corporate veil.

A. The Lanham Act Permits Disgorgement Of Only The "Defendant's Profits"

In Section 35 of the Lanham Act, 15 U.S.C. § 1117, Congress provided an assortment of potential monetary remedies for trademark infringement. One such remedy is recovery of "defendant's profits." *Id.* § 1117(a). That text means what it says: A court may order an infringing defendant to disgorge such "defendant's profits." The court cannot compel a defendant to repay profits earned by others, including by non-party affiliates whom the plaintiff never sued and whose liability was never adjudicated, unless the plaintiff pierces the corporate veil.

That straightforward, indeed obvious, reading of Section 1117(a) resolves this case. Respondent named petitioner as the lone defendant and disclaimed any attempt to pierce the corporate veil. The court of appeals therefore erred in affirming an order requiring petitioner, which undisputedly earned no profits, to disgorge an amount equal to its non-party affiliates' profits.

1. The "defendant" in Section 1117(a) is the named party found liable, not a non-party never sued

Since 1946, the Lanham Act has provided that "the plaintiff shall be entitled * * * to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." § 35, 60 Stat. 439-440 (15 U.S.C. § 1117(a)). "[P]rofits" of the "defendan[t]" are the gains of the party that is named in the case and has been found liable for infringement, not the assets of anyone else—including (absent veil-piercing) corporate affiliates of the defendant that the plaintiff never sued and the court never found liable.

The Lanham Act does not define "defendant," which therefore carries its ordinary meaning. See *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79, 85 (2018). When Congress enacted the Lanham Act, the term "defendant" meant simply a "person against whom an action is brought." *Funk & Wagnalls New Practical Standard Dictionary* 349 (1946); accord *Webster's New International Dictionary of the English Language* 687 (2d ed. 1949) ("A person required to make answer in an action or suit in law or equity, or in a criminal action."); *Black's Law Dictionary* 541 (3d ed. 1933) ("[T]he party against whom relief or recovery is sought in an action or suit."). "Defendant" has the same meaning today. *Black's Law Dictionary* 528 (12th ed. 2014) ("A person sued in a civil proceeding or accused in a criminal proceeding."); 4 *Oxford English Dictionary* 377 (2d ed. 1989) ("[a] person sued in a court of law; the party in a suit who defends; opposed to plaintiff").

Reading that "text in context," *Fischer* v. *United States*, 144 S. Ct. 2176, 2183 (2024) (citation omitted), confirms that Congress used "defendant" in Section 1117(a) in that simple, ordinary sense. The statute requires "the plaintiff * * * to prove defendant's sales only," and it then shifts the burden to the "defendant [to] prove all elements of cost or deduction claimed." 15 U.S.C. § 1117(a). The "defendant" who bears that burden of proof necessarily is a named party to the case, not a non-participant in the litigation. And it is a settled "'rule of statutory construction' that 'identical words used in different parts of the same act'"—here, in the same subsection—"'are intended to have the same meaning.'" *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (citation omitted).

By authorizing a successful plaintiff to recover "defendant's profits," 15 U.S.C. § 1117(a), Congress thus limited disgorgement to the profits of the specific party named in the suit and found liable. This Court has cautioned, including in the context of Section 1117(a), against "read[ing] into statutes words that aren't there." *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 590 U.S. 212, 215 (2020); see, *e.g.*, *Bittner* v. *United States*, 598 U.S. 85, 94 (2023). The *expressio unius* canon applies with particular force when, as in Section 1117(a), Congress has gone to the trouble of singling out a particular participant (here, the "defendan[t]") for specific treatment. 15 U.S.C. § 1117(a). Just last Term, the Court held that a statute's grant of authority concerning a "debtor" in bankruptcy implied the absence of like authority as to *non*-debtors. *Harrington* v. *Purdue Pharma L.P.*, 144 S. Ct. 2071, 2083 (2024). So too here, Section 1117(a)'s enumeration of the "defendant's profits" leaves no space for courts to award profits of non-defendants.

The law recognizes a "rare exception" when legally separate corporate entities may be treated as each other's alter egos because a court has pierced the corporate veil separating the entities' legal identities. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003). That narrowly limited circumstance allows a court to treat profits of a defendant's non-party affiliate as the defendant's own. In *Rubber Co.* v. *Goodyear*, 76 U.S. (9 Wall.) 788 (1870), for example, a master appointed to calculate profits "stated two accounts: one against the Providence Company and the other against the Columbian Company, which he f[ound] to be the Providence Company *under another name*" because "[t]he business as to both was so intermingled and confused that approximate results only * * * were attainable by but one process." *Id.* at 802 (emphasis added). The master thus imposed joint liability for total profits. *Ibid.*

Absent veil-piercing, however, profits earned by another entity are not the "defendant's profits," and the defendant cannot be ordered to repay them. 15 U.S.C. § 1117(a); see, *e.g.*, *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) (holding that a corporate officer could claim losses from his dealings with the corporation because "in no sense c[ould] the corporation be regarded as his alter ego, or agent"). Any effort to reach others' profits through the named defendant is "in substance" an attempt to add new parties to the case while holding the wrong party liable. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939) (L. Hand, J.), aff'd, 309 U.S. 390 (1940). That is not disgorgement of "defendant's profits" in any sense of those words.

2. The disgorgement order here defies the Lanham Act's plain language

The order affirmed below violates the Lanham Act by requiring petitioner to disgorge profits earned by others. Petitioner was and is the only defendant in the case. Respondent was required to "name all the parties" in its complaint, Fed. R. Civ. P. 10(a), and to procure a summons "directed to the defendant," Fed. R. Civ. P. 4(a)(1)(B). Petitioner was the lone defendant named in the complaint, J.A. 4, and the only defendant served, J.A. 39. Respondent also never moved to amend its complaint to add new parties or to "chang[e] the party * * * against whom a claim is asserted." Fed. R. Civ. P. 15(a), (c)(1)(C). Under Section 1117(a)'s plain language, the courts below could order disgorgement of profits earned (if any) only by petitioner.

Petitioner undisputedly earned no profits from the infringement that could be disgorged under Section 1117(a). Respondent did not deny that petitioner suffered net *losses* for the relevant years. Pet. App. 82a-83a; see J.A. 262, 272, 282. Only petitioner's affiliates—never made parties to the litigation—earned profits: Third parties paid rents to the affiliates directly. Pet. App. 82a-83a; J.A. 73-74, 84-86. Those profits never passed through the hands of petitioner, which received only accounting and management fees from the affiliates. J.A. 81-82; see Pet. App. 60a (Quattlebaum, J., dissenting) (citing *American Rice, Inc.* v. *Producers Rice Mill, Inc.*, 518 F.3d 321, 339-340 (5th Cir. 2008)). And even respondent admits that the courts below "ordered disgorgement of more than just 'defendant's profits.'" Br. in Opp. 27. After all, disgorgement of "defendant's profits," 15 U.S.C. § 1117(a), was impossible because the only defendant—petitioner—had none.

Respondent also never sought to pierce the corporate veil between petitioner and its non-party affiliates. Pet. App. 86a. To the contrary, respondent disavowed any attempt at veil-piercing before both the district court, J.A. 331, and the Fourth Circuit, Br. in Opp. App. 55a. The district court and court of appeals also both eschewed the need for veil-piercing, under any body of law. Pet. App. 43a, 82a; see *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153, 1162 (11th Cir. 2022) (applying state veil-piercing law); cf. *Bestfoods*, 524 U.S. at 64 n.9 (reserving judgment on whether federal or state law would govern veil-piercing under federal statute because no attempt to pierce the veil was made). Because the corporate veil remains intact, the affiliates' profits cannot be treated as petitioner's. The judgment requiring petitioner to disgorge nearly $43 million in profits earned only by its affiliates thus violates the Lanham Act and should be reversed.

B. Nothing In The Lanham Act Authorizes District Courts To Disregard Corporate Separateness In Ordering Disgorgement

The court of appeals and respondent have no direct answer to the Lanham Act's language limiting disgorgement to "defendant's profits." 15 U.S.C. § 1117(a). Despite that unambiguous text and respondent's decision to forgo any theory of veil-piercing, the courts below treated petitioner and its non-party affiliates "as a single corporate entity for the purpose of calculating revenues." Pet. App. 39a. That reasoning rests on the premise that courts can disregard the corporate form in trademark cases whenever they deem doing so to be necessary to maximize recovery for trademark registrants. But as this Court made clear in *Bestfoods*, federal statutes are presumed to respect corporate separateness unless Congress "speak[s] directly" to displace that bedrock rule in statutory text. 524 U.S. at 63 (citation omitted).

The Fourth Circuit and respondent have touted two contenders. The court of appeals invoked the

Lanham Act's proviso that monetary remedies are "subject to the principles of equity" as authority to disregard corporate separateness. Pet. App. 45a (citations omitted). At the petition stage, respondent abandoned that rationale and instead pointed to language permitting a court that finds a profits award "excessive" or "inadequate" to award a "just" sum. 15 U.S.C. § 1117(a); Br. in Opp. 24-25. *Bestfoods* lands the same knockout blow on both: Neither provision comes close to supplying a "direc[t]" statement that courts may disregard corporate separateness. Rather, both reinforce traditional equitable limitations that foreclose this kind of extraordinary remedy.

1. Federal statutes respect corporate separateness unless Congress directly displaces that principle

Any argument that the Lanham Act allows courts to ignore corporate separateness without veil-piercing must overcome the strong interpretive presumption that federal statutes respect the corporate form. Congress legislates not in a vacuum, but against "the backdrop of the common law." *Comcast Corp.* v. *National Ass'n of African American-Owned Media*, 589 U.S. 327, 335 (2020). When "a common-law principle is well established," this Court "take[s] it as given that Congress has legislated with an expectation that the principle will apply." *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991); see, *e.g.*, *Minerva Surgical, Inc.* v. *Hologic, Inc.*, 594 U.S. 559, 572 (2021).

To displace a longstanding common-law principle in a particular statutory context, Congress must "speak directly to the question." *Bestfoods*, 524 U.S.

at 63 (citation omitted). The common-law rule otherwise controls under the federal statute. And the Lanham Act is no exception. This Court has read the Act "in accordance with [its] common-law foundations." *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003); see, *e.g.*, *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U.S. 138, 148-149 (2015) (issue preclusion); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 853-854 (1982) (contributory infringement).

One such well-settled common-law principle is the presumption of corporate separateness—that legally distinct corporations are separate legal persons and must be treated as such. *Anderson* v. *Abbott*, 321 U.S. 349, 361-362 (1944). The rule that "a parent corporation * * * is not liable for the acts of its subsidiaries" dates back centuries and is "deeply 'ingrained in our economic and legal systems.'" *Bestfoods*, 524 U.S. at 61-63 (citation omitted). Businesses depend on that stable baseline when structuring their activities and planning their investments. "Limited liability is the rule not the exception," this Court has said, "and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson*, 321 U.S. at 362.

In *Bestfoods*, this Court held that federal statutes must be construed to respect corporate separateness unless Congress "speak[s] directly to the question" and displaces that background principle. 524 U.S. at 63 (citation omitted). Mere "congressional silence" on "a matter as fundamental as the liability implications of corporate ownership" means that the "venerable common-law" rule continues to control. *Id.* at 62-63. Applying that presumption, the *Bestfoods* Court held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*., does not displace the rule of corporate separateness. 524 U.S. at 60. Because "nothing in CERCLA purports to reject th[at] bedrock principle," the Court held that a CERCLA defendant can be liable for an affiliate's cleanup costs "when (but *only* when) the corporate veil may be pierced." *Id.* at 62-63 (emphasis added).

This Court has also underscored the importance of corporate separateness in other contexts. For example, it has held that "foreign affiliates" of a domestic corporation "possess[ed] no rights under the First Amendment" because "the corporate veil" had not been pierced. *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 591 U.S. 430, 435-436 (2020). The Court also has followed "the general rules regarding corporate formalities" in requiring a showing of veil-piercing for subsidiaries of foreign-state-owned corporations to claim sovereign immunity. *Dole Food*, 538 U.S. at 476. And, tracking its approach to corporate affiliates, the Court has applied the principle of separateness to corporations and their officers. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001).

The principle of corporate separateness constrains courts not only when imposing liability for corporate affiliates' acts, but also when crafting remedies for violations. See *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960). Treating affiliates' assets as separate at the remedial stage follows from black-letter law that "[t]he properties of two corporations are distinct," even if "the same shareholders own or control both." *Dole Food*, 538 U.S. at 475 (quoting 1 William

Fletcher, *Cyclopedia of the Law of Corporations* § 31, p. 514 (rev. ed. 1999)). As this Court stressed, one corporation "does not own or have legal title" to an affiliate's assets. *Ibid.* So a defendant cannot be deemed to own another's property—such as its profits—absent veil-piercing.

Whether to depart from these foundational principles is ultimately a choice for Congress—not the courts. The clear-statement rule recognized in *Bestfoods* (and echoed in other cases) keeps the ball with Congress, where it belongs. *Bestfoods*, 524 U.S. at 62-63. If Congress wants to allow courts to disregard corporate distinctions in a particular setting, it is free to say so. But courts cannot make that policy judgment, and accordingly must not treat "congressional silence" as license to "rewrite this well-settled rule." *Ibid.*

2. The Lanham Act's incorporation of "the principles of equity" reinforces respect for corporate separateness

The Fourth Circuit identified nothing in the Lanham Act that overcomes the *Bestfoods* presumption and supports stretching "defendant" to include nonparties. The court hung its hat on Section 1117(a)'s statement that disgorgement and other monetary relief are all "subject to the principles of equity." Pet. App. 45a (quoting 15 U.S.C. § 1117(a)). It read that phrase to invest district courts with broad "discretion" to dispense with corporate separateness (without any veil-piercing) based on their case-specific "weigh[ing]" of "the equities." *Ibid.* (citation omitted). But the phrase has the exact opposite effect. Far from "directly" overriding corporate separateness, *Bestfoods*, 524 U.S. at 63 (citation omitted), the Act's incorporation of equitable principles reinforces traditional limits on remedial discretion and confirms that courts cannot order defendants to disgorge non-party affiliates' profits absent veil-piercing.

a. Traditional equitable restrictions on disgorgement govern awards of defendant's profits

When Congress authorizes an equitable remedy, it does not "expect [courts] to break with historic principles of equity." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). Statutory grants of equitable authority do not give courts "the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Rather, a federal statute's adoption of an equitable remedy "incorporate[s]" the "old soil" of "the traditional standards in equity practice." *Taggart* v. *Lorenzen*, 587 U.S. 554, 560-561 (2019) (citation omitted). This Court accordingly requires a "clear command from Congress" to depart from traditional limits on equitable remedies. *Starbucks Corp.* v. *McKinney*, 144 S. Ct. 1570, 1576 (2024). Like the *Bestfoods* presumption, the *Starbucks* clear-command rule reinforces congressional primacy on quintessentially legislative questions of remedies afforded by federal law. See *Egbert* v. *Boule*, 596 U.S. 482, 491-492 (2022).

That rule applies with greater force when, as here, Congress expressly incorporates "the principles of equity" into a statute. 15 U.S.C. § 1117(a). This Court reads such provisos to mean that a statute "contain[s] the limitations upon [the remedy's] availability that equity typically imposes." *Great-West Life & Annuity*

Insurance Co. v. *Knudson*, 534 U.S. 204, 211 n.1 (2002). This Court recently confirmed that "the term 'principles of equity'" in Section 1117(a) captures "fundamental rules that apply more systematically across claims and practice areas"—not idiosyncratic rules good for trademarks only. *Romag*, 590 U.S. at 217.

b. The disgorgement order in this case violates traditional principles of equity

The Lanham Act's incorporation of the "principles of equity" does not clearly displace the presumption of corporate separateness and instead forecloses the disgorgement order here in three independent ways.

First, the award flouts the maxim that "equity follows the law." That venerable rule means that equity "has no power to change or unsettle" the "rights or the situation of parties [that] are clearly defined and established by law." *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893) (citation omitted); see *Grupo Mexicano*, 527 U.S. at 321-323 & n.6. "Wherever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." 2 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 425, p. 190 (5th ed. 1941); see also 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 13, p. 16 (1836) (Story) (explaining that equity is "subservient" to law and cannot "contradict or overturn the grounds or principles thereof"). Courts of equity thus could not "create a remedy in violation of law," *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Rees* v. *Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)), which could deprive defendants of due process, *e.g.*, *Rees*, 86 U.S. (19 Wall.) at 122-123, and raise serious separation-ofpowers concerns, *e.g.*, *Grupo Mexicano*, 527 U.S. at 332-333.

As explained above, a common-law principle—the presumption of corporate separateness—already supplies the governing rule: Corporate affiliates must be treated as legally distinct entities absent veil-piercing or a specific statutory directive. *Bestfoods*, 524 U.S. at 63. Courts of equity would have treated the property of petitioner and its affiliates as presumptively separate and would not invent a remedy that attempts to "abate the rigor of the common law." *Grupo Mexicano*, 527 U.S. at 321 (quoting 1 Story § 12, at 14-15). Although equity sometimes disregarded corporate separateness if affiliates operated as alter egos or if "fraud or injustice" would otherwise result, *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (citation omitted), respondent made no attempt to pierce the corporate veil, see p. 24, *supra*.

Second, even apart from its respect for corporate separateness, equity traditionally limited disgorgement to the profits "actually received by the defendant." *Coupe* v. *Royer*, 155 U.S. 565, 583 (1895). The underlying theory of disgorgement is that a defendant who receives profits from unlawful conduct is deemed to hold those profits "in trust for the benefit" of the plaintiff. *Ambler* v. *Whipple*, 87 U.S. (20 Wall.) 546, 559 (1874). Courts of equity would order such a defendant to return "the net profits from wrongdoing, that is, 'the gain made upon any business or investment, when both the receipts and payments are taken into the account.'" *Liu* v. *SEC*, 591 U.S. 71, 83 (2020) (citation omitted). Inherent in that constructive-trust approach is that the defendant has actually received the profits; a defendant cannot be deemed a trustee of something over which it has no control. As this Court has explained, equity thus "generally awarded profits-based remedies against individuals" using an *individualized* calculation of net profits, "not against multiple wrongdoers under a joint-and-several liability theory." *Id.* at 82-83.

When a defendant's net profits were zero, equity did not allow disgorgement of property that another received, as several decisions from before and near the Lanham Act's enactment confirm. This Court, for example, reasoned that an infringer who "has realized no profit from the use of the invention" "cannot be called upon to respond for profits" in rejecting an attempt to hold a city liable for the profits a construction company earned from installing a road (at the city's behest) that infringed a patent. *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 138 (1878). Because "the contractors and not the city realized" the profits, the city, which "made no profit at all," could not be ordered to disgorge the contractors' profits. *Id.* at 140. The Court ruled the same way when a plaintiff sought to recover the defendant's profits but introduced evidence only of "what certain third companies were alleged to have made" from similar infringing devices. *Keystone Manufacturing Co.* v. *Adams*, 151 U.S. 139, 146 (1894). The *Keystone Manufacturing* Court reversed because the profits-disgorgement order impermissibly awarded "*not the defendant's profits, but those realized by other companies*." *Id.* at 148 (emphasis added). In the run-up to the Lanham Act, courts followed these traditional principles and forbade orders that required a defendant to disgorge profits obtained by another, even if a related entity or a co-infringer. See, *e.g.*, *Sammons* v. *Colonial Press*, 126 F.2d 341, 345-346 (1st Cir. 1945); *Washingtonian Publishing Co.* v. *Pearson*, 140 F.2d 465, 467 (D.C. Cir. 1944); *Amusement Corp. of America* v. *Mattson*, 138 F.2d 693, 697 (5th Cir. 1943).

The general requirement that the defendant have actually received the property runs through this Court's remedial decisions beyond the specific context of profits disgorgement. From its earliest days, the Court recognized that restitution could not be ordered against defendants that "were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it." *Jennings* v. *Carson*, 8 U.S. (4 Cranch) 2, 21 (1807) (Marshall, C.J.); see *Penhallow* v. *Doane's Administrators*, 3 U.S. (3 Dall.) 54, 88, 104, 119-120 (1795) (Paterson, Iredell, and Cushing, JJ., seriatim) (reversing order that held defendants jointly liable for damages in excess of what each defendant received). And the Court applied traditional principles governing forfeiture in rejecting joint-and-several liability for criminal forfeiture when the defendant "never obtained tainted property as a result of the crime." *Honeycutt* v. *United States*, 581 U.S. 443, 454 (2017). Under the traditional principles of equity described in *Liu* and reflected across this Court's cases, petitioner cannot be ordered to disgorge profits that its affiliates alone received.

Third, equity will not "len[d] its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873). In England, it was "more properly the business of a Court of Equity to relieve against a penalty than to assist the recovery of it." *Jones* v. *Meredith*, 2 Comyns 661, 663, 92 Eng. Reg. 1257, 1258 (Exch. 1739). Soon after the Founding, this Court and others in this country likewise held that, when a plaintiff requested a remedy "in the nature of a penalty," courts of equity would "not assist to enforce at all." *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836); accord *Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 433 (N.Y. 1820). And this Court recently reiterated that, "while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to 'punish culpable individuals.'" *SEC* v. *Jarkesy*, 144 S. Ct. 2117, 2129 (2024) (citation omitted).

Requiring a defendant to disgorge profits "that accrue[d] to his affiliates" could, as this Court has noted, "transform any equitable profits-focused remedy into a penalty." *Liu*, 591 U.S. at 90. Such a remedy does not require the defendant to hand over property it received that rightly belongs to the plaintiff (the classic rationale for equitable disgorgement); instead, it forces a defendant who did *not* profit from wrongdoing to divert or raise funds from other sources. The Court long ago recognized that abandoning "*actual* gains and profits acquired by the defendants" as the measure of disgorgement would improperly "conver[t] a court of equity into an instrument for * * * punishment." *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 559 (1854) (emphasis added). That is precisely what the disgorgement order in this case does: Petitioner was ordered to disgorge nearly $43 million in profits it never saw that were earned by others. See pp. 10-11, *supra*.

In short, the judgment in this case violates three independent principles of equity. An award of defendant's profits under the Lanham Act cannot defy the legal baseline of corporate separateness, calculate profits on a collective basis, or impose a penalty that exceeds the defendant's actual gains. In all these ways, the principles of equity cement rather than displace the *Bestfoods* presumption.

3. An award of a "just" sum cannot disregard corporate separateness

In this Court, respondent has not argued that an award of "defendant's profits" can include profits of entities other than the actual defendant, such as the non-parties whose profits were the object of the disgorgement order here. Nor has it defended the Fourth Circuit's reliance on Section 1117(a)'s principles-of-equity proviso. Instead, respondent relied at the petition stage on the Lanham Act's statement that, if the court "find[s] that the amount of the recovery based on profits is either inadequate or excessive," it "may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." 15 U.S.C. § 1117(a); see Br. in Opp. 23-25.

The just-sum provision cannot be read to empower courts to disregard corporate separateness by imposing monetary awards based on profits of non-party affiliates. That provision is a safety valve that comes into play only after the district court has properly calculated the "defendant's profits" through a defendant-focused burden-shifting test for sales and deductions. Congress drew on traditional equitable discretion to allow courts to adjust an award of the defendant's profits when proof problems make the calculation unjustly low or when an award of full disgorgement is unjustly high. But that language certainly does not directly override the common-law corporate-separateness principle, so it cannot sustain the award in this case.

a. The just-sum provision does not overcome the *Bestfoods* presumption

The provision permitting courts to award a "sum" that is "just" if a profits award is "inadequate or excessive," 15 U.S.C. § 1117(a), does not overcome the *Bestfoods* presumption. That provision, which authorizes adjustments to an award of the defendant's profits, reinforces traditional limitations on equitable relief and does not clearly authorize courts to disregard corporate separateness in calculating profits.

i. As the Court explained last Term, Congress's use of "just" in connection with statutory remedies does not authorize courts "to jettison the normal equitable rules" but instead *invokes* the "traditional equitable principles governing" those remedies. *Starbucks*, 144 S. Ct. at 1576-1577. The same "principles of equity" that constrain an award of "defendant's profits" thus limit an award of a "just" sum. 15 U.S.C. § 1117(a); see pp. 31-35, *supra*.

In particular, the just-sum provision builds on a long tradition of courts' adjusting profits-disgorgement awards to account for evidentiary difficulties in determining the exact measure of profits. This Court has observed that proof problems can prevent an accurate calculation of what "profits ha[ve] been made" through infringement. *Westinghouse Electric & Manufacturing Co.* v. *Wagner Electric & Manufacturing Co.*, 225 U.S. 604, 618 (1912). If "it [wa]s impossible to make a mathematical or approximate apportionment" of profits, a court of equity could adopt a measure of relief that appropriately compensated the injured party. *Id.* at 620.

The just-sum provision's history underscores that Congress was concerned with adjustments to profits-disgorgement awards, not wholesale departures from the limitations of equity. The legislative record reflects concerns that courts had interpreted the profits-disgorgement remedy under the Trademark Act of 1905 as "too ironclad" in requiring full disgorgement even when the recovery was "excessive" and in allowing "no recovery at all" when the plaintiff was unable to prove the amount that the defendant actually profited. *1941 Hearings* 204-205. But no one so much as whispered that respect for the corporate form or traditional veil-piercing principles were frustrating recovery of profits in trademark cases.

Moreover, the model Congress used for the Lanham Act's just-sum provision—the remedial provision of the Copyright Act of 1909—was also concerned principally with problems of proof, not problems of corporate separateness. The 1909 Act had authorized courts to choose a just sum within a statutory range of $250 to $5,000 as a replacement for both profits and actual damages. § 25(b), 35 Stat. 1081. And the trigger for statutory damages in copyright law likewise was evidentiary difficulties. See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); *Washingtonian Publishing*, 140 F.2d at 466. As this Court recognized shortly before that law was passed, the remedial flexibility under copyright's predecessor just-sum provision accounted for the "many cases [in which] it would be quite difficult to prove the exact amount of damages." *Brady* v. *Daly*, 175 U.S. 148, 154 (1899). The 1909 Act did not authorize courts to disregard corporate separateness in calculating profits, see *Sheldon*, 106 F.2d at 51, and nothing in the Lanham Act's history, much less its text, supports taking that dramatic step.

ii. Contrary to respondent's assertion, Section 1117(a)'s language entrusting adjustment of profits to a court's "discretion" does not grant courts "[u]nlimited" authority to award any amount, based on any evidence, that strikes them as fair. Br. in Opp. 23 (citation omitted). A "motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (brackets omitted) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)). And traditional practices developed over the years act to "narro[w]" the "channel[s] of discretion" in which courts operate. Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 772 (1982); see *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 103-104 (2016).

One important restriction on discretion is that the just-sum provision does not authorize awards that would penalize a defendant for its affiliates' profits. Courts of equity permitted recovery of profits only as a "measure of compensation." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 259 (1916). In *Rubber Co.*, for example, this Court upheld an enhanced profits award when the defendants kept their books in a way that made "an account impossible as to the business done in their name," but the Court cautioned that equity "makes the wrong-doer liable for *actual*, not possible, gains." 76 U.S. (9 Wall.) at 803-804 (emphasis added). And although equity courts had flexibility to adjust profits awards, courts could not order the defendant to pay profits earned by others, which would necessarily "penalize the infringer." *Westinghouse*, 225 U.S. at 620; see p. 35, *supra*.

When it built the just-sum provision into the Lanham Act, Congress took special care to reinforce that principle expressly. Section 1117(a) provides that any monetary relief awarded, including under the just-sum provision, "shall constitute compensation and not a penalty." § 35, 60 Stat. 440 (15 U.S.C. § 1117(a)). Congress thus ensured that a profits award, even as adjusted, would remain "'compensation for the injury the [holder] has sustained'"—and not become a form of "punishment" unrelated to profits the defendant actually received. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456 (1932) (quoting *Mowry* v. *Whitney*, 81 U.S. (14 Wall.) 620, 653 (1872)). Disregarding corporate separateness in ordering a defendant to pay profits "which have accrued to another" is neither just nor compensatory, but instead would constitute the very penalty that the Lanham Act forbids. *Liu*, 591 U.S. at 90 (citation omitted).

iii. The broader statutory context confirms that the just-sum provision does not empower courts to abandon corporate separateness. Respondent's contrary interpretation would bring the just-sum provision into conflict with the statutory scheme.

The Lanham Act creates a reticulated framework detailing exactly the sorts of monetary remedies courts can award in trademark cases. The statute expressly identifies three forms of monetary relief (actual damages, profits, and costs), authorizes qualified enhancement of damages up to three times their amount, and lays out a burden-shifting scheme for calculating profits. 15 U.S.C. § 1117(a). And the statute also makes all monetary recovery "subject to the principles of equity." *Ibid.* The just-sum provision serves as a safety valve to the profits-disgorgement provision. See pp. 37-39, *supra*.

Reading the provision to give courts power to disregard corporate separateness by ordering disgorgement of non-party affiliates' profits would upend Section 1117(a)'s carefully calibrated scheme. If the district court had unbridled discretion to bring in the profits of third parties, there would be no reason for Congress to require the district court first to assess the "*defendant's* profits" through a formalized burden-shifting test that turns on "defendant's sales" and defendant's proof of deductions and then to follow the "principles of equity" that require individualized calculation of net profits. 15 U.S.C. § 1117(a) (emphasis added). Respondent's expansive reading—allowing the district court to throw all that effort out the window and impose any award, based on anybody's profits, that the court deems appropriate—would nullify those defendant-centric provisions and defy the principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

For that reason, this Court has long refused to read into the just-sum provision novel remedies that clash with the statute's finely tuned structure. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Court considered whether district courts could award attorneys' fees under Section 1117(a). *Id.* at 714-715. The Court observed that

Congress enacted the Lanham Act against a settled background principle—namely, the American rule, under which each side typically bears its own attorneys' fees. *Id.* at 717-718. Far from evincing any intent to depart from that rule, Congress had "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed." *Id.* at 719. Those remedies included "compensatory recovery measured by the profits that *accrued to the defendant* by virtue of his infringement." *Ibid.* (emphasis added). Given those detailed provisions, this Court declined to read an "implicit" grant of unusual remedial authority into Section 1117(a)'s general discretionary language. *Id.* at 720. Only Justice Stewart took the view that the just-sum provision permitted the award of attorneys' fees whenever appropriate under "the 'circumstances of the case.'" *Id.* at 722-723 (dissenting opinion) (quoting 15 U.S.C. § 1117(a)).

The Court's reasoning in *Fleischmann* all but resolves this case. Like the American rule for attorneys' fees, the presumption of corporate separateness is a "bedrock principle" of U.S. law. *Bestfoods*, 524 U.S. at 62. Section 1117(a) "prescribe[s] intricate remedies," none of which allows disgorgement of affiliates' profits through the defendant. *Fleischmann*, 386 U.S. at 719. So no amount of pleas to "discretion" or "the general equity power 'to do equity in a particular situation'" can justify a court's disregard for the traditional rules governing relief under the Act. *Ibid.*

Congress's actions since *Fleischmann* also are inconsistent with the notion that the just-sum provision allows "[u]nlimited enhancement" of profits. Br. in Opp. 23; see *Pugin* v. *Garland*, 599 U.S. 600, 605 n.1 (2023) (statutory context includes the broader "*corpus* *juris* of which [the statute is] a part, including later-enacted statutes" (citation omitted)). Congress authorized treble profits for intentional use of counterfeit marks. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1503(2)(B), 98 Stat. 2182 (15 U.S.C. § 1117(b)). Congress also added statutory damages for willful uses of counterfeit trademarks. Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 7, 110 Stat. 1388; Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 104, 122 Stat. 4259; see 15 U.S.C. § 1117(c). When Congress has wanted to authorize departures from the net-profits rule for disgorgement, it has done so using clear, confined language. This later "particularized legislation" would have been "unnecessary" if, as respondent suggests, the just-sum provision already were an all-purpose grant of unlimited discretion to award whatever number based on whoever's profits struck a court as appropriate under the circumstances. *Fischer*, 144 S. Ct. at 2187. That surplusage confirms that the more modest interpretation of the just-sum provision "is the superior one." *Ibid.*

In short, innovating new forms of relief under the Lanham Act is properly reserved to Congress, not courts. This Court's refusal to read novel, expansive remedies into the just-sum provision keeps Congress in charge of remedial policy. See *Grupo Mexicano*, 527 U.S. at 332. Consider the coda to *Fleischmann*: a statutory amendment allowing courts to award attorneys' fees in "exceptional" cases. Act of Jan. 2, 1975, Pub. L. No. 93-600, § 3, 88 Stat. 1955 (15 U.S.C. § 1117(a)). If Congress wants to depart from a background rule, it knows how to do so. Congress has not "directly" displaced the settled principle of corporate separateness in the just-sum provision or elsewhere in the Lanham Act. *Bestfoods*, 524 U.S. at 63 (citation omitted). Courts must give effect to that policy choice.

b. The award in this case far outstrips the limits of the just-sum provision

Properly construed, the just-sum provision cannot justify the district court's award in this case. Neither of the lower courts purported to rely on the provision to capture the profits of petitioner's affiliates. See Cert. Reply 3-4. And like the lower courts' misunderstanding of the principles of equity, respondent's adventurous use of the just-sum provision jumps the guardrails in Section 1117(a) that prevent courts from creating a novel equitable remedy requiring the defendant to disgorge a non-party's profits.

For starters, adherence to the limits on relief mandated by the statute's incorporation of traditional "principles of equity" cannot itself render "inadequate" the "amount of the recovery based on profits" so as to justify invocation of the just-sum provision. 15 U.S.C. § 1117(a). Equity has long provided that a court can order a defendant to disgorge only its own net profits and cannot recover "benefits that accrue to [its] affiliates." *Liu*, 591 U.S. at 90; see pp. 33-34, *supra*. Section 1117(a) would be at war with itself if a court could declare the principles of equity *themselves* "inadequate" and "[un]just."

Moreover, requiring petitioner to disgorge over $40 million in profits it never received cannot be "just." 15 U.S.C. § 1117(a). Courts can adjust the measure of a defendant's profits when, for example, the factfinder "ha[s] trouble identifying the precise amount of profits generated by a defendant's infringement" or "the defendant engage[s] in discovery 'stonewalling' that prevent[s] the plaintiff from identifying its total infringing sales." *Max Rack, Inc.* v. *Core Health & Fitness, LLC*, 40 F.4th 454, 473 (6th Cir. 2022) (citation omitted). But any "flexibility is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322. Allowing courts to issue "a type of relief that has never been available before," and that has been rejected "by longstanding judicial precedent," would amount to a rule "not of flexibility but of omnipotence." *Ibid.*

Respondent's proposed use of the just-sum provision involves that sort of omnipotence. Calling the leap from $0 in petitioner's net profits to nearly $43 million in affiliates' net profits an "adjustment," as respondent repeatedly does (Br. in Opp. 3, 9, 25, 27, 29), "might be good English"—"but only because there is a figure of speech called understatement and a literary device known as sarcasm." *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994). There is nothing "just" about such an award when Congress has given no "clear command" that courts can abandon traditional equity practice, including its requirement of an individualized calculation of net profits. *Starbucks*, 144 S. Ct. at 1576-1577; see *Liu*, 591 U.S. at 90.

Respondent argues that reliance on the affiliates' profits represents merely an evidentiary shortcut "to capture the infringer's 'true profits,'" on the theory that petitioner is responsible for all profits of its "'non-arms' length' * * * affiliates." Br. in Opp. 23-25 (citations omitted). But that is just a junior-varsity form of the veil-piercing principles that respondent and both courts below disclaimed. The affiliates' profits would be petitioner's "true" profits only if "true" veil-piercing principles supported treating the affiliates' property as petitioner's own profits. See *Dole Food*, 538 U.S. at 475. Because respondent never attempted to satisfy the genuine veil-piercing standard, the just-sum provision cannot salvage the judgment ordering petitioner to disgorge third parties' profits.

The district court's order shows what sorts of adjustments the just-sum provision *was* meant to perform. The court invoked the just-sum provision not as justification for deeming non-party affiliates' profits to be the "defendant's profits," see Cert. Reply 4, but rather to "adjust" the calculation of what the court had already determined to be the presumptive disgorgement award—specifically, to impose a 20% haircut given substantial doubts that certain profits were attributable to the infringement, Pet. App. 87a; see *id.* at 88a-94a; see also pp. 10-11, *supra*. Putting aside the court's error in treating the affiliates' profits as "defendant's profits" to begin with, those modest tweaks fall inside the boundaries of the traditional equitable practices to which the just-sum provision refers. The leap across the chasm from petitioner's $0 in profits to the non-party affiliates' profits does not.

If any doubt remained, the Lanham Act's reminder that any sum awarded "shall constitute compensation and not a penalty" would shut the door on respondent's proposed use of the just-sum provision. 15 U.S.C. § 1117(a). Again, respondent concedes that the judgment in this case "ordered disgorgement of more than just 'defendant's profits.'" Br. in Opp. 27. Respondent also did not even try to prove actual damages below. See Pet. App. 79a. As this Court observed in *Liu*, "impos[ing] disgorgement liability on a wrongdoer for benefits that accrue to his affiliates * * * could transform any equitable profits-focused remedy into a penalty." 591 U.S. at 90. The disgorgement the district court ordered here is thus an impermissible "penalty"—plain and simple.

* * *

Neither the Lanham Act's reference to "the principles of equity" nor its allowance for a "just" sum empowers courts to disregard corporate separateness in calculating profits for disgorgement. Because the judgment in this case violates the statutory scheme, this Court should reverse.

C. The Fourth Circuit's Policy Concerns Are Misplaced

The Fourth Circuit approved the district court's profits-disgorgement order not because the court of appeals thought "defendant's profits" means something other than what it says, but because it believed that respecting corporate separateness would "ru[n] counter to" the "purpose of section 1117" by allowing infringers to "insulate their infringement from financial consequences." Pet. App. 45a (citation omitted). That policy-laden reasoning was improper, unwarranted, and counterproductive.

1. "No statute pursues a single policy at all costs," and courts "are not free to rewrite [a] statute * * * as if it did." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023). "[V]ague notions of a statute's 'basic purpose'" cannot overcome specific remedial limitations. *Great-West*, 534 U.S. at 220 (citation omitted). For the Lanham Act, like any other statute, "the place for reconciling competing and incommensurable policy goals" is "before policymakers," and the courts' "limited role is to read and apply the law those policymakers have ordained." *Romag*, 590 U.S. at 219.

Policy-driven rewriting is especially inappropriate for Section 1117(a). Congress spent decades refining those remedial provisions. See pp. 5-8, *supra*. And this Court's decisions have left no doubt that, if Congress wants to authorize remedies against legally distinct corporate affiliates, it must speak clearly to that effect. *Bestfoods*, 524 U.S. at 63. Because Congress has not molded Section 1117(a)'s remedies to overcome that traditional rule, the courts cannot do that work for it.

2. The lower courts' disregard of corporate separateness also is a solution in search of a problem.

The Lanham Act features an array of remedies to compensate plaintiffs, deter wrongdoing, and prevent future infringement. Prevailing parties can recover "any damages" they sustain. 15 U.S.C. § 1117(a). Courts can increase those damages by up to three times. *Ibid.* Statutory damages are available for certain trademark claims, *id.* § 1117(c)-(d), as are attorneys' fees "in exceptional cases," *id.* § 1117(a). And for plaintiffs concerned with ongoing infringement, the Lanham Act authorizes injunctions. *Id.* § 1116(a). In light of this abundance of remedies, it is not the end of the world if, in a given case, a plaintiff is not entitled to a profits-disgorgement award.

Plaintiffs also are not without recourse when it comes to profits earned by affiliated entities. This Court has recognized, in addition to direct infringement, claims for secondary infringement against those who "induce[d]" the infringement. *Inwood*

Laboratories, 456 U.S. at 853-854. And if all affiliates are named as defendants and found to be liable, a plaintiff then can seek an award of "defendant's profits" as to each. 15 U.S.C. § 1117(a). Plaintiffs also can attempt to pierce the corporate veil in appropriate cases. *First National City*, 462 U.S. at 629. Litigants have relied on veil-piercing for centuries, *Bank of United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 75 (1809) (party argument), and there is no need to abandon that project now.

In the end, the correct result here is a product of respondent's litigation strategy, not any defect in Section 1117(a)'s design. See Pet. App. 59a-60a (Quattlebaum, J., dissenting). Having chosen not to pursue any of the available alternatives, respondent is poorly positioned to cry foul now.

3. The Fourth Circuit's policy-driven solution is not merely needless, but also profoundly harmful.

Freewheeling disregard of corporate separateness would introduce substantial uncertainty into business operations. Corporations structure their affairs—deciding to go into a new line of business, create an affiliate, and so forth—with the expectation that each link in the corporate chain will be responsible only for its own assets and liabilities (absent unusual circumstances that justify veil-piercing). See *Anderson*, 321 U.S. at 362. The Fourth Circuit's approach destabilizes that state of affairs, exposing companies to massive and difficult-to-predict liability for their affiliates' profits and threatening to deter productive business ventures.

The court of appeals' view also would dramatically alter the balance when it comes to the Lanham Act's burden-shifting scheme. Federal trademark law provides that "the plaintiff shall be required to prove defendant's sales only" and that the defendant in turn "must prove all elements of cost or deduction claimed." 15 U.S.C. § 1117(a). By making the defendant's revenues the starting point for recovery, Congress accepted that "[t]here may well be a windfall to the trade-mark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark." *Mishawaka Rubber & Woolen Manufacturing Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 206-207 (1942). But the court of appeals' reasoning would multiply that risk many times over. A Lanham Act defendant could no longer rely on its own gains as a cap on the profits it could be ordered to disgorge and would face the possibility of being forced to disgorge the gains of every one of its legally distinct affiliates. Nothing indicates Congress meant to impose that staggering burden and uncertainty on all businesses exposed to trademark claims.

The harmful consequences do not end with the Lanham Act. If adopted, the Fourth Circuit's approach would similarly distort other statutory frameworks that mirror the Act. The modern copyright statute, for instance, authorizes awards of "the infringer's profits" and relies on a similar burden-shifting scheme. 17 U.S.C. § 504(b). The securities laws allow the SEC to obtain "any equitable relief" from alleged violators, including disgorgement of profits. *Liu*, 591 U.S. at 80-81. And the Employee Retirement Income Security Act likewise permits an award of "any profits of [a] fiduciary" and "other equitable * * * relief." 29 U.S.C. § 1109(a). For each of those statutes, one could follow the Fourth Circuit's lead in divining a "fundamental desire" to protect the interests of authors, investors, and employees. Pet. App. 45a. The reasoning below would equally justify abandoning corporate formalities and allowing courts to order disgorgement of the profits of non-party affiliates in those contexts.

The court of appeals' approach would be hopeless to administer, too. Courts and regulated entities alike may reasonably disagree on what "fundamental desire" drove Congress to pass a law and whether corporate separateness hinders that platonic objective. Pet. App. 45a. Take the Lanham Act itself: Surmising Congress's gestalt purpose would require consideration of legislators' statements spanning many proposed bills and debates between 1924 and 1946. See James M. Koelemay, Jr., *Monetary Relief for Trade-Mark Infringement Under the Lanham Act*, 72 Trademark Reporter 458, 481-485 (1983).

That is not the sort of stable, predictable system needed to give businesses a sense of the risks they face. This Court chose another path in *Bestfoods* for good reason.

* * * * *

Because the Lanham Act does not displace the presumption of corporate separateness, the focus properly remains on petitioner's profits, not on its affiliates' profits. And the undisputed evidence showed that petitioner had zero profits during the relevant period. When, as here, there is no legal basis to order disgorgement, this Court should reverse the judgment as to the profits award. See, *e.g.*, *AMG Capital Management, LLC* v. *FTC*, 593 U.S. 67, 82 (2021); *McLean* v. *Fleming*, 96 U.S. 245, 258 (1878).

CONCLUSION

The judgment of the court of appeals affirming the disgorgement order should be reversed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

15 U.S.C. § 1117. Recovery for violation of rights

(a) Profits; damages and costs; attorney fees

When a violation of any right of the registrant of a mark registered in the Patent and Trade-mark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(b) Treble damages for use of counterfeit mark

In assessing damages under subsection (a) for any violation of section 1114(1)(a) of this title or section 220506 of Title 36, in a case involving use of a counterfeit mark or designation (as defined in section

1116(d) of this title), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever amount is greater, together with a reasonable attorney's fee, if the violation consists of—

(1) intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in section 1116(d) of this title), in connection with the sale, offering for sale, or distribution of goods or services; or

(2) providing goods or services necessary to the commission of a violation specified in paragraph (1), with the intent that the recipient of the goods or services would put the goods or services to use in committing the violation.

In such a case, the court may award prejudgment interest on such amount at an annual interest rate established under section 6621(a)(2) of Title 26, beginning on the date of the service of the claimant's pleadings setting forth the claim for such entry of judgment and ending on the date such entry is made, or for such shorter time as the court considers appropriate.

(c) Statutory damages for use of counterfeit marks

In a case involving the use of a counterfeit mark (as defined in section 1116(d) of this title) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of—

(1) not less than \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or

(2) if the court finds that the use of the counterfeit mark was willful, not more than \$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.

(d) Statutory damages for violation of section 1125(d)(1)

In a case involving a violation of section 1125(d)(1) of this title, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per domain name, as the court considers just.

(e) Rebuttable presumption of willful violation

In the case of a violation referred to in this section, it shall be a rebuttable presumption that the violation is willful for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation. Nothing in this subsection limits what may be considered a willful violation under this section.

Act of July 8, 1870, ch. 230, § 79, 16 Stat. 211

That any person or corporation who shall reproduce, counterfeit, copy, or imitate any such recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action in the case for damages for such wrongful use of said trade-mark, at the suit of the owner thereof, in any court of competent jurisdiction in the United States, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use. * * *

Trademark Act of 1881, ch. 138, § 7, 21 Stat. 503-504

That registration of a trade-mark shall be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy or colorably imitate any trade-mark registered under this act and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefore in any court having jurisdiction over the person guilty of such wrongful act; and the courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy.

Trademark Act of 1905, ch. 592, §§ 16, 19, 33 Stat. 728-729

SEC. 16. That the registration of a trade-mark under the provisions of this Act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon on in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

* * * * *

SEC. 19. That the several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section 16 of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed.

Lanham Act, ch. 540, § 35, 60 Stat. 439-440 (1946)

When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 31(1)(b), and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.