No. 18-_____

IN THE
Supreme Court of the United States

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

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 31, 2019

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS

Petitioners Charles C. Liu and Xin Wang a/k/a Lisa Wang were defendants in the district court proceedings and appellants in the court of appeals proceedings.

Respondent Securities and Exchange Commission was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

Beverly Proton Center, LLC f/k/a Los Angeles County Proton Therapy, LLC; Pacific Proton EB 5 Fund, LLC; and Pacific Proton Therapy Regional Center, LLC were defendants in the district court proceedings but did not participate in the court of appeals proceedings.

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Petitioners Charles C. Liu and Xin Wang a/k/a Lisa Wang petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App. 1a-8a) is unpublished but is available at 754 F. App'x 505. The order of the district court granting plaintiff's motion for summary judgment (App. 9a-61a) is reported at 262 F. Supp. 3d 957.

JURISDICTION

The court of appeals entered its judgment on October 25, 2018, and denied a petition for rehearing on January 3, 2019 (App. 65a). On March 22, 2019, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including May 31, 2019. App. 76a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, are reproduced at App. 66a-75a.

INTRODUCTION

This case presents an open and frequently litigated question about the authority of the Securities and Exchange Commission ("SEC") to seek and obtain disgorgement in federal court as a penalty for securities law violations.

The SEC sued petitioners in federal district court for violating the securities laws. By statute, the SEC may obtain only injunctive relief, equitable relief, or civil monetary penalties in such cases. *See* 15 U.S.C. §§ 77t(b), (d), 78u(d)(1), (3), (5). The SEC nevertheless

asked the district court to order disgorgement to the agency of all the funds petitioners raised from investors. *See* Proposed Final Judgment at 3, *SEC v. Liu*, No. SACV 16-00974-CJC, ECF #220-2 (C.D. Cal. Feb. 8, 2017) ("*Liu* Proposed Final Judgment"). The district court ordered that relief, in addition to an injunction and the maximum statutory civil monetary penalty. A Ninth Circuit panel affirmed. Its decision makes clear that it did so because it believed itself bound by circuit precedent that pre-dated this Court's holding in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that disgorgement to the SEC is a penalty.

In seeking such disgorgement here, the SEC was following a well-worn path. Since the 1970s, that agency has routinely piggybacked off its authority to ask for injunctions to seek massive disgorgement awards as a form of "equitable relief." Even after Congress authorized the SEC to seek civil monetary penalties in addition to injunctions, the agency continued to insist that courts can and should order defendants both to pay such monetary penalties *and* to disgorge all funds they have received.

The lower courts have accepted the SEC's assertion that it may obtain "disgorgement" as an equitable remedy. Indeed, as in this case, they have done so even when a disgorgement award exceeds what the defendant unlawfully gained, *see*, *e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 306 (2d Cir. 2014); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990), and even when the award is granted to the SEC instead of returned to the alleged victims, *see Kokesh*, 137 S. Ct. at 1644; *SEC v. Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997).

These decisions cannot survive this Court's reasoning in *Kokesh*. Although this Court had no occasion,

and explicitly declined, to consider whether disgorgement could still be available as equitable relief, the identification of disgorgement as a penalty compels the answer. As then-Judge Kavanaugh noted, *Kokesh* "overturned a line of cases . . . that had concluded that disgorgement was remedial and not punitive." *Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring). Other judges have likewise read *Kokesh* to spell the end of "equitable" disgorgement. *See*, *e.g.*, *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., specially concurring) (*Kokesh* "undermines a premise in our reasoning: that restitution under § 13(b) [of the Federal Trade Commission Act] is an 'equitable' remedy at all"); *Osborn v. Griffin*, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting) (suggesting that *Kokesh* foreclosed "equitable disgorgement").

The Court should grant certiorari to address the fundamental and frequently litigated issue that *Kokesh* raised, but did not reach, and to clarify and harmonize the law as to the availability of agency disgorgement in the absence of statutory authority.

STATEMENT

A. Factual Background

1. The EB-5 Immigrant Investor Program offers lawful permanent residence and an opportunity for citizenship to aliens who make a significant investment in a U.S. commercial enterprise. *See* 8 U.S.C. § 1153(b)(5)(A), (C)(ii); 8 C.F.R. § 204.6(f)(2).

Most individual investors seeking an EB-5 visa send their funds to "regional centers" that recruit investors and coordinate their contributions to enterprises that qualify under the program. *See* U.S. Dep't of State,

Report of the Visa Office 2018, Table V (Pt. 3) (2018).[1] Those individual contributions are treated as limited-partnership interests under U.S. securities law and fall within the ambit of SEC regulations. *See Testimony on the EB-5 Immigrant Investor Program by Stephen L. Cohen, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate* (Feb. 2, 2016).[2]

2. Petitioners Charles C. Liu ("Liu") and Xin Wang ("Wang") operated an allegedly fraudulent EB-5 regional center, the Pacific Proton EB-5 Fund ("EB-5 Fund"), which used marketing companies to recruit Chinese investors seeking U.S. visas. The EB-5 Fund pooled the investments to sponsor a planned cancer treatment center, the Beverly Proton Center, LLC ("Beverly"), in California. The price for each unit in the fund was a $500,000 investment in Beverly in addition to a $45,000 administrative fee. Investors were told that the administrative fee and, at the sole discretion of the fund manager, the invested capital would be used to market and sell additional units. From October 2014 to April 2016, 50 individuals purchased units in the EB-5 Fund, generating $24,712,217 in capital commitments and $2,255,701 in administrative fees.

Construction on Beverly began in 2015, and petitioners hoped to raise the additional funds to complete

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[1] *Available at* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2018.html.

[2] *Available at* https://www.judiciary.senate.gov/imo/media/doc/02-02-17%20Cohen%20Testimony.pdf.

the project through private equity. However, progress on Beverly stalled over internal management disputes.

B. Procedural Background

On May 26, 2016, the SEC sued petitioners, the EB-5 Fund, and Beverly in the Central District of California for allegedly defrauding investors. The SEC claimed that, despite telling investors their money would fund an enterprise that met the EB-5 program's requirements, petitioners misappropriated millions for personal use and funneled $12.9 million to overseas marketers. The SEC brought claims under Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5(a) and (c), 17 C.F.R. § 240.10b-5(a), (c). *See* Compl. ¶ 8, *SEC v. Liu*, No. SACV 16-00974-CJC, ECF #1 (C.D. Cal. May 26, 2016) ("Compl."). Liu was also accused of violating SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b). *See* Compl. ¶ 8.

On April 20, 2017, the district court granted summary judgment to the SEC, holding that petitioners violated Section 17(a)(2) of the Securities Act.[3] App. 9a-61a. The SEC sought a number of remedies.

First, the agency sought an injunction against petitioners participating in any additional EB-5 investments. The district court granted that relief. App. 34a-40a.

Second, the SEC sought civil monetary penalties from the steepest tier available under 15 U.S.C. § 77t(d) and § 78u(d)(3)(B). The district court granted that request as well. It imposed a $6,714,580 fine on

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[3] Because the district court found that petitioners violated Section 17(a), it did not consider the SEC's remaining claims. App. 34a.

Liu and a $1,538,000 fine on Wang based on their direct personal gains from the investors. App. 41a-42a.

Finally, the SEC asked the district court to "[o]rder defendants to disgorge all funds received from their illegal conduct, together with prejudgment interest thereon, and to repatriate any funds or assets they caused to be sent overseas." Compl., Prayer for Relief § V. The SEC notably did not ask that those funds be awarded to the alleged victims of the scheme or represent how it would direct the money. In response to that request, Liu and Wang argued, among other things, that they should not be required to disgorge the nearly $16 million spent on the EB-5 Fund's legitimate business expenses. *See* Defs.' Mem. of Points & Authorities in Opp. to Pl.'s Suppl. Br. Regarding Civil Penalties at 9-10, *SEC v. Liu*, No. SACV 16-00974-CJC, ECF #221 (C.D. Cal. Feb. 15, 2017). Offsetting the lease payments, construction costs, equipment manufacturing, marketing fees, and salaries would have reduced the award from $26,440,304 to $10,482,668. However, the district court ordered disgorgement of the full amount, without accounting for those expenses, and, consistent with the SEC's request, included no requirement that any of the money be returned to the alleged victims. *See* App. 40a-41a, 62a-64a.

Shortly before Liu and Wang appealed the district court's decision to the Ninth Circuit, this Court decided *Kokesh*. The Court there unanimously concluded that the statute of limitations in 28 U.S.C. § 2462, which applies to "any civil fine, penalty, or forfeiture," applied to disgorgements sought by the SEC because those qualified as "penalties." 137 S. Ct. at 1643-44. The Court reserved the question whether

the SEC could nevertheless continue to seek disgorgement (and whether prior case law on that point was correct): "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Id.* at 1642 n.3.

On appeal to the Ninth Circuit, Liu and Wang argued that the district court "lacked statutory authority to award disgorgement" because, among other problems, this Court had held that it was a penalty, not an equitable remedy. Pet'rs C.A. Br. 48-49. However, the Ninth Circuit concluded that it was still bound by pre-*Kokesh* circuit law that had upheld similar disgorgement awards. *See* App. 6a-7a ("*Kokesh* expressly refused to reach" whether the district court lacked the power to order the disgorgement award, "so that case is not 'clearly irreconcilable' with our longstanding precedent on this subject") (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

REASONS FOR GRANTING THE PETITION

I. WHETHER THE SEC MAY OBTAIN DISGORGEMENT IS AN IMPORTANT AND RECURRING QUESTION ON WHICH EXISTING LOWER COURT PRECEDENT IS INCOMPATIBLE WITH THIS COURT'S ANALYSIS

The Ninth Circuit's decision imposed a penalty that Congress never authorized. Congress has authorized the SEC to seek only injunctions, 15 U.S.C. §§ 77t(b), 78u(d)(1), certain civil monetary penalties, *id.* §§ 77t(d), 78u(d)(3), and equitable relief, *id.* § 78u(d)(5). Equitable relief aims to restore the status quo that existed before the wrongdoing was committed. Disgorgement falls outside the scope of such relief because, as this Court held in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), it aims to punish violations of public law and deter others from the same. The Court should grant certiorari to address this important and frequently litigated issue and to clarify the law in the wake of *Kokesh*.

A. Congress Did Not Authorize Disgorgement Penalties

Congress has expressly identified the forms of relief available to the SEC in civil cases such as this one: civil monetary penalties, injunctions, and "appropriate or necessary" equitable relief. 15 U.S.C. §§ 77t(b), (d), 78u(d)(1), (3), (5). Disgorgement does not fall within any of those categories. *See Kokesh*, 137 S. Ct. at 1640 (expressing surprise that the SEC seeks disgorgement when it has "a full panoply of enforcement tools" including the ability to "promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and

injunctive relief for those violations").[4] Indeed, at oral argument in *Kokesh*, no fewer than five Justices noted the lack of any clear statutory authority for disgorgement:

> Justice Kennedy: Is it clear that the district court has statutory authority to do this? . . . [I]s there specific statutory authority that makes it clear that the district court can entertain this remedy?
>
> . . .
>
> Justice Sotomayor: Can we go back to the authority? . . . [I]f they're not doing restitution, how could that be the basis of disgorgement?
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> . . .
>
> Justice Alito: [I]t would certainly be helpful and maybe essential to know what the authority for [disgorgement] is.
>
> . . .
>
> Chief Justice Roberts: [T]he SEC devised this [disgorgement] remedy or relied on this remedy without any support from Congress.
>
> . . .
>
> Justice Gorsuch: Well, here we don't know [when the disgorged money goes to the victim], because there's no statute governing it. We're just making it up.

Oral Arg. Tr. 7-9, 13, 31, 52, *Kokesh v. SEC*, No. 16-529 (Apr. 18, 2017); *see also*, *e.g.*, *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (holding that courts

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[4] By contrast, Congress specifically provided for disgorgement, along with other forms of relief, through SEC administrative proceedings. *See* 15 U.S.C. § 78u-2(e) (allowing the SEC to "enter an order requiring accounting and disgorgement" in an administrative proceeding).

may not provide remedies that are not authorized by the statutory scheme); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (discussing this Court's presumption against implying causes of action).

Here, Congress has specified the remedies available to the SEC (and specifically cabined its authority to obtain monetary penalties), and it has not authorized disgorgement as a form of relief. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) (following the "well-established principle" that courts should not read additional remedies into detailed remedial provisions); *cf. TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'").

Nor is the disgorgement remedy supported by any express or implied authority of the federal courts to grant equitable relief. *But see* Resp. C.A. Br. 50-51 ("federal courts have broad equity powers to issue ancillary relief, including disgorgement of proceeds"). Equity aims to restore the status quo after a wrongdoing, not punish a wrongdoer. *See* Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* § 4.3, at 397 (3d ed. 2018); *Tull v. United States*, 481 U.S. 412, 424 (1987) ("[A] court in equity . . . may not enforce civil penalties."); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (explaining that equity is an "instrument for nice adjustment and reconciliation," not punishment); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 270-72 (1993) (White, J., dissenting) (reviewing scholarship and precedent that determined "courts of equity would not . . . enforce penalties or award punitive damages"); *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (holding that punitive damages were

unavailable in courts of equity); *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 455 (1855) (holding that a statute that extends equity power of the courts over forfeitures does not include the right to award penalties).

Punishment, however, is exactly the aim of disgorgement in cases like this one. As the Court explained in *Kokesh*, "'[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.'" 137 S. Ct. at 1643 (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)) (alteration in original). Indeed, in SEC cases, lower courts routinely order defendants to give up more money than what they personally gained from unlawful activities. *See id.* at 1644-45 (citing *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014); *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990)). "In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off." *Id.* at 1645.

That is precisely the circumstance here. Petitioners have been ordered to give up $26,440,304. Most of that money was spent on lease payments, machines, and marketing efforts for Beverly. As a result, the disgorgement order puts petitioners in a significantly worse position, nearly $16 million in debt, than their position before the alleged fraud. In addition to the statutorily authorized civil monetary penalty, the district court awarded a "disgorgement" penalty in an amount that petitioners did not personally possess in order to deter them, and the general public, from violating securities laws in the future.

In *Kokesh*, this Court further found that the SEC frequently does not return the disgorged funds to the victims. 137 S. Ct. at 1644. Citing *Porter v. Warner*

Holding Co., 328 U.S. 395, 402 (1946), for "distinguishing between restitution paid to an aggrieved party and penalties paid to the Government," this Court held that an order "to pay a noncompensatory sanction to the Government as a consequence of a legal violation" is a penalty. 137 S. Ct. at 1644. As this Court recognized, the failure to return the award to the victims is typical in SEC actions and results in most funds winding up with the SEC and ultimately in the U.S. Treasury. *See id.*; *SEC v. Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983) (noting that "the practical details of the disgorgement" are rarely discussed).

Again, that is precisely the case here, where the relief sought by the SEC and awarded by the district court nowhere specifies that the disgorged funds will go directly (or even indirectly) to the alleged victims. *See* App. 40a-41a, 62a-64a. Indeed, the SEC asked the district court in this case to order that petitioners send the disgorged funds straight to the SEC. *See Liu* Proposed Final Judgment at 3-4.

Finally, *Kokesh* determined that "SEC disgorgement is imposed by the courts as a consequence for violating . . . public laws." 137 S. Ct. at 1643. The Court reasoned that, as is typical for a penalty, disgorgement was ordered to protect the public interest, not to remedy an individual's harm. *Id.* This line between public and private interests also divides legal and equitable relief. Traditionally, the courts of equity did not order restitution to vindicate the public interest. Instead, they ordered restitution to restore justice between the private parties before them. *See Tull*, 481 U.S. at 424 ("Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'")

(quoting *Porter*, 328 U.S. at 402). Again, because this case also involves the same SEC civil enforcement authority, the logic of *Kokesh* directly applies here, and it confirms that the district court should not have awarded disgorgement in this case.

B. The SEC Routinely Relies on "Equitable" Disgorgement To Collect Billions of Dollars in Unauthorized Penalties

The SEC has long asked for, and obtained, disgorgement as a form of equitable relief. *See SEC v. Pardue*, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005) ("Disgorgement has become the routine remedy for a securities enforcement action."); James Tyler Kirk, *Deranged Disgorgement*, 8 J. Bus. Entrepreneurship & L. 131, 134 (2014) ("Today, the legitimacy of disgorgement in SEC enforcement actions is unchallenged.").

The SEC first successfully obtained disgorgement in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd and remanded in part on other grounds*, 446 F.2d 1301 (2d Cir. 1971). *See* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17, 20-21 (2018). The Second Circuit affirmed the award, adding that "the SEC may seek other than injunctive relief in order to effectuate the purposes of the Act." *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971). Even there, however, the court noted that such equitable relief must be "remedial" and thus cannot be "a penalty assessment." *Id.*

By the time Congress authorized civil monetary penalties in 1990, *see* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 101, 201(2), 104 Stat. 931, 932-33, 936-37 (codified in relevant part at 15 U.S.C. §§ 77t, 78u),

seeking disgorgement as equitable relief had become an entrenched agency practice. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("[D]isgorgement is rather routinely ordered for insider trading violations despite a similar lack of specific authorizations for that remedy under the securities law."); *SEC v. Rind*, 991 F.2d 1486, 1493 (9th Cir. 1993) (reviewing the practice of awarding disgorgement as an equitable remedy).

The SEC now routinely seeks disgorgement and, by asking for such relief, has collected billions more dollars than the amounts Congress authorized. *See* Steven Peikin, SEC, *Remedies and Relief in SEC Enforcement Actions* (Oct. 3, 2018) ("[t]he Commission has obtained disgorgement in a wide variety of matters, . . . [and] disgorgement is a central component of meaningful relief");[5] SEC, *Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002*, at 24 (2003) ("[t]he Commission intends to continue . . . aggressively asserting legal arguments for disgorgement").[6] In 2018 alone, the SEC collected $2.51 billion through disgorgement, as opposed to $1.44 billion in civil monetary penalties. *See* SEC, *2018 Annual Report* 11.[7] Earlier this year, in January 2019, the SEC announced an $892 million disgorgement penalty from a single case. *See* SEC, *Court Orders $1 Billion Judgment Against Operators of Woodbridge Ponzi*

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[5] *Available at* https://www.sec.gov/news/speech/speech-peikin-100318.

[6] *Available at* https://www.sec.gov/news/studies/sox308creport.pdf.

[7] *Available at* https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

Scheme Targeting Retail Investors, Press Release 2019-3 (Jan. 28, 2019).[8]

Beyond that, even when there is no public record that the SEC sought disgorgement from an individual, there is a good chance that the agency threatened a steep penalty to reach a favorable settlement. *See*, *e.g.*, Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 Ariz. L. Rev. 1, 17-18 (2018) (finding that the SEC collected $800 million in disgorgement through settlements from 2010 until 2017). Disgorgement is especially risky to defendants because Congress, by remaining silent on this issue, did not limit its scope. That stands in stark contrast to the civil monetary penalties that Congress has authorized – where the permissible amount of a penalty is specified by law, 15 U.S.C. §§ 77t(d), 78u(d)(3)(B). Further, because disgorgement is awarded from a court's equitable discretion, the amount does not have to be proven with any particular rigor. Courts simply ask the SEC for a "'reasonable approximation of profits causally connected to the violation.'" *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011) (quoting *First City Fin.*, 890 F.2d at 1231). The defendant shoulders the burden of showing that the SEC's estimate is unreasonable. *See id.* Such a lopsided standard gives the SEC significant leverage, which means more power to the agency that Congress did not grant.

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[8] *Available at* https://www.sec.gov/news/press-release/2019-3.

II. CIRCUIT COURTS NEED GUIDANCE AFTER *KOKESH*

A. Circuit Courts Have Struggled To Align Their Precedents with this Court's Analysis

The contention that disgorgement is a form of equitable relief faced appropriate skepticism from scholars even before *Kokesh*. *See, e.g.*, Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Proceedings*, 33 Rev. Banking & Fin. L. 899, 930 (2014) ("[O]ne might conclude that the future looks bleak for the continued viability of the SEC's disgorgement remedy. Such a conclusion is overly optimistic, as the remedy's future is hopeless."); George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 74 (2007) ("[I]f the agency seeks personal liability for the defendant or proposes to calculate the [disgorgement] restitution in a manner suggesting punitive relief, the claim is even less likely to [be] found compatible with traditional restitution in equity.").

Nevertheless, before *Kokesh*, the circuit courts consistently held that disgorgement fell within traditional theories of equity. For instance, the Second Circuit held that, "[b]ecause chancery courts possessed the power to order equitable disgorgement in the eighteenth century, we hold that contemporary federal courts are vested with the same authority by the Constitution and the Judiciary Act." *SEC v. Cavanagh*, 445 F.3d 105, 118-20 (2d Cir. 2006); *see also SEC v. Huffman*, 996 F.2d 800, 802-03 (5th Cir. 1993) (describing disgorgement as an equitable injunction in the public interest). *But see* DeLuca, 33 Rev. Banking & Fin. L. at 933 (calling the reasoning

in *Cavanagh* the "fallout of decades of neglect of equitable jurisprudence in American law schools and years of relaxed judicial scrutiny of SEC arguments for disgorgement in the federal courts") (footnote omitted).

But no matter how circuits have justified disgorgement remedies, they all believed (wrongly) that it was remedial, not punitive. *See*, *e.g.*, *SEC v. Teo*, 746 F.3d 90, 106 n.29 (3d Cir. 2014) (drawing the line of equity between remedial and punitive relief); *SEC v. Contorinis*, 743 F.3d at 301 ("disgorgement does not serve a punitive function"); *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (holding that disgorgement cannot be a "*fine* levied against the petitioners as *punishment*"); *First City Fin.*, 890 F.2d at 1231 ("[D]isgorgement may not be used punitively."); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1241 (7th Cir. 1988) (explaining that a monetary penalty could not have been equitable disgorgement); *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) (en banc) (explaining that disgorgement should not be punitive); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."); *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 698 (10th Cir. 2013) ("[d]isgorgement is remedial rather than punitive").[9]

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[9] Because these courts understood disgorgement to be equitable, they approved disgorgement awards alongside civil monetary penalties despite statutory limits on the latter. *See* 15 U.S.C. § 78u(d)(3) (setting out penalty "tiers" with different maximum amounts). For example, the Eleventh Circuit defended the district court's award of disgorgement on top of civil monetary penalties by explaining that they "deal with different concerns."

After *Kokesh*, the notion that disgorgement is remedial and not punitive is untenable. As the Court stated, "[b]ecause disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty." 137 S. Ct. at 1645 (quoting *Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013)) (citation omitted). *See* Roach, 12 Fordham J. Corp. & Fin. L. at 43-44 ("As penalties or disguised fines, disgorgement orders are not part of traditional equitable remedies and the federal district courts have no jurisdiction to hear claims for such remedies.").

For that reason, then-Judge Kavanaugh concluded that *Kokesh* required the D.C. Circuit to revise its approach to SEC enforcement. In *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), he explained that this Court's reasoning in *Kokesh* "overturned a line of cases from [the D.C. Circuit] that had concluded that disgorgement was remedial and not punitive." *Id.* at 305 (Kavanaugh, J., concurring). Those cases upheld the disgorgement power as a way "to prevent unjust enrichment" instead of penalizing wrongdoers. *Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009) (per curiam); *see SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (explaining that disgorgement was an appropriate award because it prevented unjust enrichment without punishing the defendant). As of now, however, the D.C. Circuit's precedents still stand.

SEC v. Merchant Capital, LLC, 486 F. App'x 93, 96 (11th Cir. 2012) (per curiam); *see also SEC v. Sargent*, 329 F.3d 34, 41 (1st Cir. 2003) (distinguishing disgorgement from civil penalties because disgorgement was meant to restore the status quo instead of punish the defendant).

Other circuit courts have relied on pre-*Kokesh* precedent to uphold disgorgement awards under established circuit precedent. *See*, *e.g.*, *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 426-27 (9th Cir. 2018); *SEC v. Hall*, 759 F. App'x 877, 882-83 (11th Cir. 2019) (per curiam); *SEC v. Metter*, 706 F. App'x 699, 702 (2d Cir. 2017); *see also*, *e.g.*, *SEC v. Ahmed*, 343 F. Supp. 3d 16, 26-27 (D. Conn. 2018); *SEC v. Jammin Java Corp.*, No. 2:15-cv-08921 SVW (MRWx), 2017 WL 4286180, at *3 (C.D. Cal. Sept. 14, 2017), *aff'd sub nom. SEC v. Weaver*, No. 17-56423, 2019 WL 2024360 (9th Cir. May 8, 2019).

As in the D.C. Circuit, however, some circuit court judges have concluded that relying on such cases post-*Kokesh* is unsustainable. As Judge O'Scannlain explained in the Ninth Circuit, *Kokesh* "undermines a premise in our reasoning: that restitution . . . is an 'equitable' remedy at all." *AMG Capital Mgmt.*, 910 F.3d at 429 (O'Scannlain, J., specially concurring). Similarly, in the Sixth Circuit, Judge Merritt noted that "'equitable disgorgement' . . . may not even be applicable in SEC contexts for much longer in light of" *Kokesh*. *Osborn v. Griffin*, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting). This is thus not only a frequently litigated issue, but also one that calls for guidance so that circuits can align their case law with this Court's analysis in *Kokesh*.

B. Numerous Other Agencies Seek "Equitable Disgorgement"

The issue here is significant, moreover, not only to the statutory limits of the SEC's enforcement powers,

but also to the appropriate limits on the power of other agencies.[10]

The SEC is one of several agencies that rely on implied equitable powers to seek hefty monetary awards. Nearly 100 statutes allow courts to fashion relief through their equitable powers. *See* DeLuca, 33 Rev. Banking & Fin. L. at 901 n.4. And, like the SEC, many other agencies seek disgorgement under courts' "general" equitable jurisdiction. *See* Roach, 12 Fordham J. Corp. & Fin. L. at 75 n.253.

For instance, the Federal Trade Commission ("FTC") treats disgorgement similarly to the SEC. *See*, *e.g.*, *AMG Capital Mgmt.*, 910 F.3d at 426-27. Much like the SEC, the FTC is authorized by statute to seek injunctive relief, *see* Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b), but has no express authority to seek disgorgement. In 2012, the FTC withdrew a 2003 policy statement because it "create[d]

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[10] The scope of equity also directly affects constitutional rights. For example, the Seventh Amendment does not preserve a right to a trial by jury for claims in equity. By broadly sweeping claims for money damages within the category of equitable relief, disgorgement awards have eroded defendants' rights to a jury trial. *See*, *e.g.*, *Texas Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1321-22, 1326 (Fed. Cir. 2018) (citing *Kokesh* in an analysis of the equitable nature of disgorgement for a trade secret misappropriation claim and concluding the Seventh Amendment did not provide a jury right), *petition for cert. pending*, No. 18-600 (U.S.); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 602 (9th Cir. 2016) (holding that a claim under § 13(b) of the Federal Trade Commission Act was equitable for "Seventh Amendment purposes"); *United States v. Accolade Constr. Grp., Inc.*, No. 15 Civ. 5855 (JCF), 2017 WL 2271462, at *2 (S.D.N.Y. May 23, 2017) (finding that the Seventh Amendment did not provide a right to a jury trial for disgorgement awarded to the Environmental Protection Agency ("EPA") under implied equitable jurisdiction).

an overly restrictive view of the Commission's options for equitable remedies" in antitrust suits by reserving disgorgement for "exceptional cases." FTC, Statement of the Commission, *Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 31, 2012).[11] Now, the FTC regularly seeks and receives hundreds of millions of dollars in disgorgement awards based on implied jurisdiction in equity, and the penalty has become the cornerstone of the agency's enforcement strategy. *See* George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 Wash. & Lee L. Rev. 1271, 1314-15 (2011); *see also*, *e.g.*, *Commerce Planet*, 815 F.3d at 597, 600.

The Food and Drug Administration has likewise been relying on implied equitable powers to seek disgorgement under the Federal Food, Drug, and Cosmetic Act. *See*, *e.g.*, *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762 (6th Cir. 1999); *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 225 (3d Cir. 2005). The Commodity Futures Trading Commission has done the same under the Commodity Exchange Act. *See CFTC v. Co Petro Mktg. Grp., Inc.*, 680 F.2d 573, 582-83 (9th Cir. 1982).[12]

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[11] *Available at* https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf.

[12] Other agencies likewise assert the right to seek disgorgement as equitable relief. *See*, *e.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016) (Consumer Financial Protection Bureau), *cert. denied*, 137 S. Ct. 2291 (2017); *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682, 698 (E.D. Va. 2018) (Federal Energy Regulatory Commission), *appeal pending*, No. 18-2326 (4th Cir.); *Accolade Constr. Grp.*, 2017 WL 2271462, at *2 (EPA).

There is no question that the scope of equity has a significant impact on the remedies available to agencies and thus shapes their power when Congress is silent. Courts frequently misconstrue, and agencies consistently push, the boundaries of equity, especially when it comes to disgorgement. Granting this petition will give the Court a chance not only to resolve the specific question presented as to SEC authority, but also to provide guidance that the lower courts can then apply as to other agencies' requests for disgorgement and other forms of relief under the umbrella of "equity."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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