No. 18-1501

In the Supreme Court of the United States

CHARLES C. LIU, ET AL., *PETITIONERS*

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

Constitutions & Statutes

Other Authorities

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors of law who teach and write about subjects that include the law of remedies and equity. They have expertise that bears directly on the question before this Court: Whether the Securities and Exchange Commission (SEC) may seek and obtain punitive "disgorgement" from a court as "equitable relief" for a securities law violation.

Amici are:

Samuel L. Bray, Professor of Law at Notre Dame Law School.[2] Professor Bray has written extensively about the law of remedies, with a particular focus on equitable remedies.

Henry E. Smith, Fessenden Professor of Law at Harvard Law School. Professor Smith has written extensively on the nature of equity and its functional relevance in current law. His work centers on how equity relates systematically to the rest of the law in both its substantive and remedial aspects.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether the SEC may seek and obtain awards of "disgorgement" that this Court has recognized "bear[] all the hallmarks of a penalty." *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1644 (2017). Disgorgement, as it is often

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[1] All parties have consented to the filing of this brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

[2] Institutional affiliations are provided for identification purposes only.

awarded to the SEC, "is imposed by the courts as a consequence for violating * * * public laws." *Id.* at 1643. It is imposed for expressly "punitive purposes," *ibid.*, including to "protect the investing public by providing an effective deterrent to future violations" of the securities laws, *ibid.* (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970)). In many cases, including this one, SEC disgorgement vastly "exceeds the profits gained as a result of the violation" and thus goes well beyond "simply return[ing] the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644. And SEC disgorgement "is not compensatory," because there is no requirement that the funds awarded be returned to the victims of the defendant's wrongdoing." *Ibid.*

No statute expressly authorizes the SEC to pursue this punitive form of "disgorgement" in enforcement actions brought in federal court.[3] To the contrary, the SEC's "full panoply of enforcement tools," *Kokesh*, 137 S. Ct. at 1640, includes authority to seek civil penalties that are generally measured by "the gross amount of *pecuniary gain* to [the] defendant as a result of the violation," 15 U.S.C. §§ 77t(d)(2)(A)-(C), 78u(d)(3)(A)-(B) (emphasis added). But Congress has not extended the same authorization to pursue awards of "disgorgement" that may (and often do) vastly exceed the defendant's gain.

The SEC instead seeks to locate a basis for punitive "disgorgement" in its statutory authorization to "enjoin" threatened violations of the securities laws and to seek "any equitable relief that may be

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[3] *Amici* take no position on the remedies available in administrative proceedings.

appropriate or necessary for the benefit of investors." Br. in Opp. 5 (quoting 15 U.S.C. § 78u(d)(1), (5)). Under this Court's precedents, however, statutory references to "equitable relief" and "equitable remedies" are understood to authorize not whatever remedies might be good or useful, but rather a specific body of remedies: the remedies traditionally available in courts of equity. See, *e.g.*, *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 362 (2006); *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 94-95 (2013).

"Disgorgement," in the form sought by the SEC, cannot be squared with that understanding. It is a longstanding blackletter rule—with well-grounded historical and functional justifications—that equitable remedies do not punish. SEC disgorgement, by contrast, "bears all the hallmarks of a penalty." See *Kokesh*, 137 S. Ct. at 1644. It is therefore fundamentally inconsistent with the traditional conception of equity.

Nor is there any analogue for SEC "disgorgement" in traditional equity practice. To be sure, equitable relief does include certain equitable restitutionary remedies—including accounting for profits, constructive trust, and equitable lien. But, consistent with the traditional understanding of equity, each of those remedies contains built-in limitations that are calibrated to avoid punishing the defendant. Accordingly, they differ in kind from the punitive form of "disgorgement" sought by the SEC here, and they offer no support for treating this novel form of relief as though it were a part of traditional equity practice.

ARGUMENT

"DISGORGEMENT," IN THE FORM SOUGHT BY THE SEC, IS NOT "EQUITABLE RELIEF" THAT THE SEC MAY OBTAIN FROM A COURT

A. The SEC Is Authorized To Pursue Only Traditional Equitable Remedies In Federal Court Enforcement Actions

1. The SEC's statutory authority to pursue "equitable relief," 15 U.S.C. § 78u(d)(5), encompasses only traditional equitable remedies. As this Court has made clear, a statutory reference to "equitable relief" points to "the kinds of relief 'typically available in equity' in the days of 'the divided bench,' before law and equity merged." *McCutchen*, 569 U.S. at 94-95 (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). The critical question is therefore whether the remedy at issue is one "traditionally viewed as 'equitable.'" *Mertens*, 508 U.S. at 255; see also *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 439 (2011) (asking whether a remedy was, "traditionally speaking," available at equity); *Grupo Mexicano de Desarrollo S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (reading the Judiciary Act of 1789's reference to "all suits * * * in equity" as invoking "traditional principles of equity jurisdiction") (quotation marks omitted).[4]

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[4] This Court's recognition that "equitable relief" is a reference to a technical body of law—*viz.*, the remedies traditionally available at equity—accords with this Court's repeated affirmation in recent cases that traditional equitable principles remain part of American law. See, *e.g.*, *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (incorporating "traditional principles of equity practice" into bankruptcy statutes); *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960-61 (2017) (looking to "traditional role of laches in equity" and "purpose for which the defense developed in the equity courts");

By reading statutory references to equitable remedies as embodying the "traditional" (*Amara*, 563 U.S. at 439) or "historic" (*McCutchen*, 569 U.S. at 98) contours of equity, this Court has decisively rejected an alternative—and far broader and more malleable—understanding of the term. Indeed, this Court has frequently confronted general appeals to the breadth and flexibility of equity, of the sort the SEC relies upon here in suggesting that an award of disgorgement can be justified by reference to "the historic power of equity to provide complete relief." Br. in Opp. 5 (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960)). While recognizing that "equity is flexible" and capable of development and change, this Court has cautioned that this "flexibility is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322.

Equity encompasses a set of principles and doctrines developed over "several hundred years." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944). Accordingly, "courts of equity" are "governed by rules and precedents no less than the courts of law." *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996) (quoting *Missouri* v. *Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring)). When Congress refers to "equitable relief," then, it invokes this body of law, as embodied

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McCutchen, 569 U.S. at 104 (considering "traditional practice in courts of equity") (quotation marks omitted); *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (adopting "traditional," "long-established and familiar" principles governing a stay) (quotation marks omitted); *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (reaffirming traditional rule that a preliminary injunction can issue only on a showing of likely irreparable injury); *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (invoking "well-established principles of equity" with respect to permanent injunctions).

in accumulated precedent and exposited in well-known reference works. See, *e.g.*, *Amara*, 563 U.S. at 439-40; *Grupo Mexicano*, 527 U.S. at 319-22; *Sereboff*, 547 U.S. at 363-68. A statutory reference to equitable relief therefore does not authorize whatever remedies a court may deem to be appropriate or just in a particular case, and it does not authorize courts to improvise wholly new forms of relief in service of "the grand aims of equity." *Grupo Mexicano*, 527 U.S. at 321 (quotation marks omitted).

2. Sound reasons support this Court's refusal to reduce equity's tradition to a single value, such as flexibility. As an initial matter, that approach follows from the "settled principle of statutory construction" that, when Congress employs a term with a well-developed meaning in the law, it is generally presumed to adopt that meaning. *United States* v. *Shabani*, 513 U.S. 10, 13 (1994); see also, *e.g.*, *Taggart*, 139 S. Ct. at 1801; *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962). When Congress refers to "equitable relief," it is using a term with "basic contours" that are "well known." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 217 (2002); see also Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1014 (2015) (explaining that Congress generally uses the phrases "equitable remedies" and "equitable relief" as "unmistakably technical terms"). It therefore makes good sense to presume that Congress intended to adopt the term's settled meaning.

Adherence to the traditional contours of equitable relief also reflects a healthy respect for equity's coherence and systematic quality. As noted above, the equitable remedies were developed over "several

hundred years." *Hecht*, 321 U.S. at 329-30. While there are surely significant elements of contingency and path-dependence in the development of equity, equitable remedies represent a response to recurring challenges, including the danger of opportunism and the need for remedies that compel or forbid action with continuing judicial oversight. See Henry E. Smith, *Property, Equity, and the Rule of Law*, in *Private Law and the Rule of Law* 224, 232-39 (Lisa M. Austin & Dennis Klimchuk eds., 2014); Samuel L. Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. Rev. 530, 553-58, 563-72 (2016) (Bray, *Equitable Remedies*). And these remedies can be understood as part of a rational system, accompanied by interlocking doctrines and limitations suited to the remedies' particular role. See Bray, *Equitable Remedies*, 63 U.C.L.A. L. Rev. at 533. Given the interlocking nature of these components, departures from the traditional conception of equitable relief inevitably pose some risk of unanticipated effects. See, *e.g.*, *Grupo Mexicano*, 527 U.S. at 331 (expressing concern that authorizing creditors to pursue a preliminary injunction against dissipation of a debtor's assets "could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws").

Finally, this Court's approach is consistent with the traditional role of courts in our system of government. To be sure, the limitations of that role do not demand that equity remain entirely static. It is proper for courts to continue to develop equitable doctrines, and the law of equitable remedies should take into account the availability of other adequate remedies. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 509 (1959). But that practice cannot justify

the "wrenching departure from past practice" associated with the creation of "remedies previously unknown to equity jurisprudence." *Grupo Mexicano*, 527 U.S. at 322, 332.[5]

B. SEC "Disgorgement" Is Not A Traditional Equitable Remedy

The form of punitive "disgorgement" sought by the SEC cannot be squared with the traditional understanding of equitable remedies. A core component of that understanding is the maxim that equity does not punish—a principle with strong functional justifications. Because SEC disgorgement "bears all the hallmarks of a penalty," *Kokesh*, 137 S. Ct. at 1644, and has no analogue in traditional equity practice, it is not among the forms of "equitable relief" that the SEC may obtain in court actions.

1. Equity does not punish

The maxim that equity does not punish is deeply rooted in the historical understanding of equity. Unlike courts of law, "[i]t is not the function of courts of equity to administer punishment." *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 717 n.14 (1974) (quoting *Home Fire Ins. Co.* v. *Barber*, 93 N.W. 1024, 1035 (Neb. 1903) (Pound, C.)); see also *Tull* v. *United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals, as

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[5] See also *Taggart*, 139 S. Ct. at 1801 (holding that bankruptcy court's broad contempt power is not "unlimited" and is constrained by "traditional standards in equity practice"); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.").

opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). Instead, equity "permits only what is just and right with no element of vengeance or punishment." *Williamson* v. *Chicago Mill & Lumber Corp.*, 59 F.2d 918, 922 (8th Cir. 1932) (citing *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 549 (1854)); see also *SEC* v. *Gentile*, 939 F.3d 549, 556 (3d Cir. 2019) ("[I]njunctions may properly issue only to prevent harm—not to punish the defendant.").

Indeed, it is antithetical to equity to punish. It has long been understood that "[a] court of equity has no punitive jurisdiction." Walter Ashburner, *Principles of Equity* 53 (1902). At a minimum, "a Court of Chancery has never had jurisdiction to impose punitive or exemplary damages in the absence of specific statutory authority." *Beals* v. *Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (citing *Superior Const. Co.* v. *Elmo*, 102 A.2d 739 (Md. 1954)); see also, *e.g.*, *United States* v. *Bernard*, 202 F. 728, 732 (9th Cir. 1913) ("no authority to assess exemplary damages"); *Coca-Cola Co.* v. *Dixi-Cola Labs Inc.*, 155 F.2d 59, 63 (4th Cir. 1946); *Decorative Stone Co.* v. *Bldg. Trades Council of Westchester Cty.*, 23 F.2d 426, 427-28 (2d Cir. 1928) ("The right to recover penal damages still remains a right enforceable only in a common-law action.").

As petitioners correctly explain, that limit on equitable authority has been "well-established" for more than 160 years. Pet. Br. 20 (quoting *Livingston*, 56 U.S. (15 How.) at 559). And it has been repeated countless times by "[t]his Court, other federal courts, state courts, and scholars." *Id.* at 21 & n.10 (collecting authorities); see also *Harris* v. *Digital Pulse Pty. Ltd.*, [2003] 56 N.S.W.L.R. 298 (Austl.) (opinion of Heydon, J.) (analyzing the principle that equity does not punish

across common law jurisdictions); Samuel L. Bray, *Punitive Damages Against Trustees?*, in *Research Handbook on Fiduciary Law* 201, 211-13 (D. Gordon Smith & Andrew S. Gold eds., 2018) (Bray, *Punitive Damages*).

2. The "no-punishment" principle is a core feature of equity

Equity's traditional aversion to punishment is not arbitrary. Rather, it is based on sound reasons that are internal to the system of equity. First, equity focuses on correcting and inculcating, goals that are inconsistent with punishment. Second, equity is concerned with the justice of the remedy not only for the plaintiff but also for the defendant. Third, equity lacks a critical procedural safeguard for punishment: the civil jury.

These reasons for equity's "no punishment" principle are not merely historical. The first two reasons are rooted in English equity, while the third is unique to the constitutional system of the United States. All three have enduring relevance in the legal system of the United States.

First, equity's traditional concern with the defendant's conscience is inconsistent with punishment. Equity is willing to "correct" or "adjust" the conscience of the defendant. Bray, *Punitive Damages*, at 211-13. This concern has deep roots in equity's past, including the centuries in which the Chancellor was a bishop. See J.H. Baker, *An Introduction to English Legal History* 105-107 (4th ed. 2007). But even today it remains characteristic of equity that it is not so much concerned with saying what the parties' rights are, but rather with guarding against abuse of those rights. Henry E. Smith, *Fusing*

the Equitable Function in Private Law, in *Private Law in the 21st Century* 173, 176-85 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017).

Contempt proceedings illustrate the continuing relevance of equity's traditional focus on adjusting the defendant's behavior, as distinguished from punishment for misbehavior. Most immediately, courts will go to great lengths to enforce equitable decrees with civil contempt. *E.g.*, *Chadwick* v. *Janecka*, 312 F.3d 597, 608-609, 613 (3d Cir. 2002) (Alito, J.). In some cases, this treatment may seem harsh—particularly when the stakes of the dispute are relatively modest. But the logic behind courts' willingness to enforce their equitable decrees is critical: it is not a punishment that is meant to fit the crime; it is not supposed to put the scales of justice back in balance. Bray, *Punitive Damages*, at 211-13. Thus, as soon as the civil contemnor does the required act, the contemnor may go free, for he "carries the keys of his prison in his own pocket." *Int'l Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 828 (1994) (quoting *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)). In other words, equity goes only so far as is necessary to enforce compliance with its decrees. It does not go further, by punishing for the violation. See, *e.g.*, *Bush* v. *Gaffney*, 84 S.W.2d 759, 764 (Tex. Civ. App. 1935) ("A court of equity is a court of conscience, but not a forum of vengeance. It will make restitution, but not reprisals. It will fill full the measure of compensation, but will not overflow it with vindictive damages."); J.D. Heydon, M.J. Leeming, & P.G. Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* § 23-595, at 865 (5th ed. 2015).

Equity's aversion to punishment does not mean that equitable remedies are weak. Indeed, they are

often stronger than legal remedies (unsurprisingly, since their availability can depend on the absence of an adequate remedy at law). But the point is that deterrence is a by-product; the equitable remedies do not aim for punishment and are not structured for punishment. See *Harris*, 56 N.S.W.L.R. ¶ 407 (opinion of Heydon, J.) (recognizing that an "account of profits [can] certainly have a deterrent effect," but denying that it is penal or punitive in the sense of exacting more than the defendant's gain). In short, equity's treatment may seem harsh, but it has the logic of correction and adjustment, not of punishment.

Second, equity is concerned with the justice of the remedy for both the plaintiff *and* the defendant. See, *e.g.*, Henry L. McClintock, *Handbook of the Principles of Equity* 78 (2d ed. 1948) ("A court of equity may frame its decree so as to protect to the greatest extent possible the conflicting interests of the parties * * * ."). This concern is rooted in equity's history. See Richard Hedlund, *The Theological Foundations of Equity's Conscience*, 4 Oxford J. L. & Rel. 119, 124-26 (2015). It also continues into equity's present. For example, an award of legal damages is not reduced because of a defendant's inability to pay. See, *e.g.*, *United States* v. *Charles George Trucking, Inc.*, 34 F.3d 1081, 1087 (1st Cir. 1994).[6] By contrast, a court *will* consider the defendant's ability to perform when deciding whether to grant equitable relief. See, *e.g.*, *Maggio* v. *Zeitz*, 333 U.S. 56, 72 (1948); see also *SEC* v. *Ormont Drug & Chem. Co.*, 739 F.2d 654, 656 (D.C. Cir. 1984) ("An equity court can never exclude claims of inability to render absolute performance.") (quotation marks

[6] Ability to pay is, moreover, frequently considered in assessing an award of punitive damages. See *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 504 (2008).

omitted). This consideration can be found in many equitable doctrines—including the undue hardship defense, judicial concern about the burdens of supervision, the requirement of specificity for injunctions, and equity's unwillingness to require impossibilities. See, *e.g.*, *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 374-75 (1977) (Title VII's equitable remedies are "limited by basic principles of equity" and account for equity's "special blend of what is necessary, what is fair, and what is workable.") (quotation marks omitted).

Moreover, for both historical and enduringly functional reasons (including the absence of juries), equity has always been able to handle more complex and multi-polar disputes. See, *e.g.*, The Federalist No. 83, at 568-69 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (offering functional reasons to distinguish "the circumstances that constitute cases proper for courts of equity"); Henry E. Smith, *Equitable Defences as Meta-Law*, in *Defences in Equity* 17, 19-20, 26-27 (Paul S. Davies, Simon Douglas & James Goudkamp eds., 2018). This ability helps to explain the development in equity of interpleader, joinder, class actions, and other procedures for the adjudication of highly complex disputes.[7]

In figurative language, one could say that equity has a "wide-angle lens," considering not only the harm

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[7] John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 556 (2012) ("The nonjury equity courts, freed from the need to package cases for decision by lay triers, had been able to entertain multiparty and multi-issue cases, which is why substantive fields characterized by multiparty relations such as account, business associations, and estate administration developed in equity rather than at common law." (footnotes omitted)).

to the plaintiff, but also the interests of the defendant and even the interests of the public. See, *e.g.*, Henry E. Smith, *An Economic Analysis of Law Versus Equity* 37-38 (Oct. 22, 2010), https://bit.ly/2EHjXX9. This wider lens is pervasive in equitable doctrine, including courts' consideration of the public interest when deciding whether to grant an injunction. See, *e.g.*, *Winter*, 555 U.S. at 24.

Third, equity does not—and should not—punish because equity lacks the central safeguard for punishment in the U.S. constitutional tradition: the jury. The lack of juries is one of the most pronounced and famous characteristics of equity. It is not merely historical. The right to a civil jury in "suits at common law," is guaranteed by the United States Constitution. U.S. Const. amend. VII. The inverse might even be true: this Court has suggested that the absence of juries in equity might be of constitutional stature. See *Michaelson* v. *United States* ex rel. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 63-65 (1924). In all events, one of the fundamental and enduring distinctions between an action for damages and a suit for an equitable remedy in federal court is the presence or absence of the jury.

The right to a civil jury trial in an action for damages is what makes it constitutionally permissible for those damages to be "exemplary," in the sense of punishing the defendant. See *Tull*, 481 U.S. at 422. The civil jury was of great importance to the Founders not only because it would promote republican values by including the People in the process of government under law, see, *e.g.*, Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 Ala. L. Rev. 189, 243-45 (2015), but also because it was a critical safeguard of individual liberty, see, *e.g.*, *Parklane Hosiery Co.* v.

Shore, 439 U.S. 322, 340-44 (1979) (Rehnquist, J., dissenting).[8]

Over time, the concerns about the exercise of equitable powers have changed. Nevertheless, there remains a relationship between equity's powers and its limits. Equity's broad powers are tolerable—as a matter of political morality and as a matter of constitutional principle—only because there are limits. There is much that equity can do, but only because there are things it cannot do. Because there is no right to a civil jury trial for an equitable claim, one of those things that equity cannot do is inflict punishment.

* * *

This confluence of traditional equitable principles and constitutional values is familiar terrain. As this Court observed with respect to "the basic doctrine of equity jurisprudence" that the plaintiff must have no adequate remedy at law:

> The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury * * *.

Younger v. *Harris*, 401 U.S. 37, 44 (1971). The same is true of equity's unwillingness to punish, which

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[8] Moreover, equity was once associated with the royal prerogative, another fact that made the courts of equity particularly ill-suited to mete out punishment. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 *Perspectives in American History: Law in American History* 257, 260 (Donald Fleming & Bernard Bailyn eds., 1971).

follows from and promotes both traditional equitable values and core constitutional constraints on governmental power.

3. The equitable restitutionary remedies are consistent with equity's no-punishment principle

Equity's no-punishment principle is visible in the traditional equitable remedies. For starters, injunctions cannot issue "for purposes of punishment." *Gentile*, 939 F.3d at 556 (quoting 1 James L. High, *A Treatise on the Law of Injunctions* § 1, at 3 (4th ed. 1905)). And the same is true for each of the restitutionary remedies traditionally available in equity—namely, accounting for profits, constructive trust, and equitable lien. See generally Samuel L. Bray, *Fiduciary Remedies* in *The Oxford Handbook of Fiduciary Law* 449, 452-56 (Evan J. Criddle, Paul B. Miller & Robert Sitkoff eds., 2018) (Bray, *Fiduciary Remedies*). Unlike legal restitution, each of those remedies is carefully calibrated to *avoid* punishing the defendant—even when the defendant is an admitted wrongdoer.[9]

Accounting for Profits. Where a defendant has profited by using something that in good conscience belongs to the plaintiff, equity could require an accounting for profits. See 1 D. Dobbs, *Law of*

[9] The restitutionary remedies available in the United States stem from two historic sources. One is equity. The other is law, particularly the common counts and what was once called "quasi-contract." See *Great-West*, 534 U.S. at 212-13 (noting that "restitution was available in certain cases at law, and in certain others in equity"). Because the SEC seeks to ground a "disgorgement" remedy in its authority to pursue "equitable relief," *amici* do not further discuss the legal restitutionary remedies.

Remedies § 2.6(3), at 158 (2d ed. 1993). Originating in trust law,[10] the equitable accounting for profits was not, strictly speaking, merely a remedy; it is also an investigative process (which may involve a master), and it tracks a core substantive duty of a trustee: the duty to account for his or her management of the trust. Bray, *Fiduciary Remedies*, at 452.

An accounting requires the disloyal trustee to turn over actual net profits to his beneficiary. As has been established for nearly three centuries, there is a strict "no profit" rule for trustees, as an aspect of the duty of loyalty. See *Keech* v. *Sandford*, (1726) 25 Eng. Rep. 223 (Ch.). In requiring the trustee to turn over profits, the "remedy" of accounting can be seen as requiring the trustee to act as a good trustee, that is, to do what the trustee is already required to do. Bray, *Fiduciary Remedies*, at 452 & n.20 (quoting Joshua Getzler, *"As If," Accountability and Counterfactual Trust*, 91 B.U. L. Rev. 973, 978 (2011)).

But an accounting does not punish the wrongdoer. A plaintiff can recover only the defendant's actual profits—not whatever gross revenues were derived from the wrongdoing, and not any punitive enhancement. See, *e.g.*, *Livingston*, 56 U.S. (15 How.) at 559-60; *Mowry* v. *Whitney*, 81 U.S. 620, 649 (1871) (holding that plaintiff was "not entitled to receive more than the profits actually made"). Thus, the defendant is generally entitled to an offset compensating him for the costs he incurred. See *Root* v. *Lake Shore & Michigan S. Ry. Co.*, 105 U.S. 189, 215 (1881)

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[10] Although the equitable accounting originated in trust law, it has long been available outside of trusts. Although some tie to equity is still required—*e.g.*, an equitable wrong, a statute authorizing an equitable accounting, accounts too complex for a jury—there is no requirement that the defendant be a fiduciary.

("allowances * * * for the cost and expense of the business"); *Callaghan* v. *Myers*, 128 U.S. 617, 665 (1888) (permitting deductions for unsold copies of infringing work and "actual and legitimate manufacturing cost"); *Neal* v. *Cox*, 7 Tenn. 443, 461 (1824) (credit for value of certain improvements made by disloyal trustee); see also Bray, *Fiduciary Remedies*, at 453-54 (discussing trustee's right to offset his own costs). Thus, the traditional remedy of accounting for profits does not punish.

Constructive Trust and Equitable Lien. The two other traditional equitable restitutionary remedies—constructive trust and equitable lien—are likewise consistent with equity's no-punishment limitation. These remedies apply when "money or property identified as belonging in good conscience to the plaintiff" can be "traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213.

This tracing principle is powerful: It allows the plaintiff to follow an asset through changes in form or changes in putative ownership. See, *e.g.*, Bray, *Fiduciary Remedies*, at 454-56; Lionel D. Smith, *The Law of Tracing* (1997). But it is also consistent with equity's traditional no-punishment maxim. The effect of these proprietary remedies is to grant the plaintiff an interest in particular property that has been wrongfully diverted (or the traceable proceeds of such property). See Bray, *Equitable Remedies*, 63 U.C.L.A. L. Rev. at 554-55. In other words, the specific asset or fund, and whatever is traceable to it, must be given over to the defendant. But nothing more must be given over. See Bray, *Fiduciary Remedies*, at 455. While equity may resolve uncertainties against a wrongdoer, it will not give a punitive award.

By the same token, the court may impose offsets when it determines that the defendant should be compensated for expenses or effort in connection with the property in question. See, *e.g.*, *Restatement (Third) of Restitution and Unjust Enrichment* § 55 cmt. *l* (2011). Again, this feature of the proprietary remedies confirms that equitable remedies do not inflict punishment by placing the defendant in a worse position than he or she would otherwise have occupied.

* * *

At bottom, "no punishment" is not only a basic principle of equity, but it is also a recurring theme in the law of equitable restitutionary remedies. These remedies are meant to give something to the plaintiff that is rightfully the plaintiff's—whether it be profits or a specific asset with its proceeds. These remedies are not oriented toward punishing the defendant's conduct; punishment is alien to their logic.

4. SEC "disgorgement" is inconsistent with traditional equitable remedies

"Disgorgement," in the form sought and obtained by the SEC in this case, cannot be squared with the traditional understanding of equitable remedies.

Far from having a storied history in traditional equity practice, "disgorgement is a modern term. Notwithstanding confusion introduced by recent, imprecise usage of the term, see pp. 22-25, *infra*, there was no traditional remedy known as "disgorgement."

Not only is the term relatively novel, but SEC "disgorgement" differs markedly from the traditional equitable restitutionary remedies. As previously explained, see pp. 16-19, *supra*, accounting for profits, constructive trust, and equitable lien are remedies with longstanding histories and well-understood

contours. And "disgorgement"—in the sense of the remedy sought and obtained by the SEC—lacks any similar pedigree in history or tradition.

SEC "disgorgement" is also incompatible with the traditional understanding of equity because it violates equity's no-punishment principle. As sought and obtained by the SEC, disgorgement "bears all the hallmarks of a penalty" and is imposed for expressly "punitive purposes." *Kokesh*, 137 S. Ct. at 1644. There is no tracing requirement (as there would be for constructive trust or equitable lien), and there is no requirement that an award be reduced to account for the "defendant's expenses that reduced the amount of illegal profit" (as would be the case with accounting for profits). *Id*. at 1644. Indeed, leaving the "defendant worse off" is entirely consistent with the SEC's goal of "deterring" others by making an example of those who violate the securities laws. *Id*. at 1643-45. And the disgorged funds are not necessarily paid to victims; the funds are paid to the SEC and ultimately many funds are simply deposited to the U.S. Treasury. See *id*. at 1644; see also SEC, *Division of Enforcement 2019 Annual Report* 9 (Nov. 6, 2019), https://bit.ly/372wYa6 (reporting that the SEC obtained "$4.3 billion in disgorgement and penalties" but returned only $1.2 billion "to harmed investors").

Because it is at odds with traditional equitable principles and exceeds the traditional limits on equity, the "disgorgement" remedy sought and obtained by the SEC in this case is not a traditional equitable remedy. Therefore, the SEC's statutory authorization to seek "equitable relief" cannot justify the disgorgement order here.

C. The Puzzle Of "Disgorgement" As A Remedy

Given the incompatibility between SEC "disgorgement" and traditional equitable principles, it may appear difficult to explain the ample authority treating disgorgement as an equitable remedy. Indeed, there is some authority that might seem to equate disgorgement with accounting for profits. See, *e.g.*, *Restatement (Third) of Restitution and Unjust Enrichment* § 51(4) (2011).[11] And dicta in opinions of this Court have occasionally classified disgorgement as equitable. See, *e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 686 (2014) (including "disgorgement of unjust gains" as an example of equitable relief); *SCA Hygiene*, 137 S. Ct. 954, 964 (2017) (similar); *Feltner* v. *Columbia Pictures Television*, 523 U.S. 340, 352 (1998) (similar); *Tull*, 481 U.S. at 424 (rejecting argument that civil penalties are akin to "action for disgorgement of improper profits" without analyzing whether "disgorgement" itself is an

[11] A careful inspection of the Restatement (Third) shows an apparent reluctance to fully identify "disgorgement" with "accounting." Rather they are presented as two terms that are each "often" used to describe remedies that "eliminate profit from wrongdoing." *Restatement (Third) of Restitution and Unjust Enrichment* § 51(4) (2011). Yet legal restitution also works to eliminate the profit from wrongdoing. What the Restatement is doing in Section 51 is blending together large swathes of legal restitution and equity's accounting, or at least stating certain principles at a high enough level of generality that they are applicable both to legal restitution and an equitable accounting. As the Restatement itself acknowledges, it is simply not answering questions about the precise relationship of "disgorgement" to equity or accounting. See *id.* § 4 cmt. a ("[T]here is no systematic attempt in Chapter 7 to distinguish with precision the legal and equitable aspects of the various remedies described.").

equitable remedy). For several reasons, however, this authority is not incompatible with the conclusion that that "disgorgement" as obtained by the SEC is not an equitable remedy.

A major source of confusion is terminological. "Disgorgement" was never the name of any particular equitable remedy, and it was unknown to American law until the second half of the twentieth century. See 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, 49 (2007). Before then, uses of *disgorge* and its cognates in legal texts were non-technical. See *id.* at 49. For example, one could speak of a defendant disgorging a gain (though that locution was still rare). But that usage does not establish that there was a distinct remedy of "disgorgement"—just as one can speak now of a defendant giving up ill-gotten gains without suggesting that that there is a remedy of "giving up." And while use of the term spread in the latter half of the twentieth century, "the first proposed definitions only began to appear around 2000"—tellingly, it "was not used or defined in the Restatement First and was only defined in a draft of the Restatement Third as of 2000 [and] Black's Law Dictionary only offered a definition after 2000." *Ibid.*

Several reasons seem to explain why the term "disgorgement" has come into widespread use more recently. None of these reasons, however, establishes that "disgorgement" is a distinct remedy within the tradition of equity.

First, the term "disgorgement" is useful for the SEC. That is true because the very novelty of the term introduces conceptual space between the SEC's remedy and the body of doctrine that was already

developed for accounting for profits. By freeing itself from traditional terminology, the SEC has been able to obtain a remedy that differs in key respects from any traditional equitable remedy.

To take one important example, the terminological shift appears to have made it easier for courts to conceptualize recovery going not to victims but to the SEC. As one of the *amici* has written, the shift from "accounting for profits" to "disgorgement" has resulted in "the loss of a profound set of associations." Bray, *Fiduciary Remedies*, at 454. In particular:

> "Accounting for profits" has transitive associations with duty and relationship: it is an accounting by A to B. "Disgorgement" lacks those associations and is conceptually intransitive: it is A disgorging.

Ibid.

Second, the rise of the idea of a remedy of "disgorgement" coincides with a period of diminished interest in and knowledge of equity and restitution in the American legal academy. At present, equity and restitution are subjects that are enjoying a renaissance in American legal scholarship. But the notion of "disgorgement" as a remedy arose in a period in which scholars were generally expecting the law/equity line to disappear. Instead of using old language that smacked of either law or equity—as "accounting for profits" undeniably does[12]—it was useful to have a term that elided the law/equity distinction. Precisely because it was not the name of a

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[12] To be sure, the courts of law developed an accounting before equity did. See generally Joshua Getzler, *Fiduciary Principles in English Common Law*, in *The Oxford Handbook of Fiduciary Law* 471 (Evan P. Criddle, Paul B. Miller & Robert Sitkoff eds., 2018). But the legal version of the remedy died out centuries ago, and so "accounting" has long been understood as an equitable remedy.

traditional remedy—legal or equitable—the term "disgorgement" could serve this function.

Third, the shift from more particular remedies like "accounting for profits" to a more generic remedy of "disgorgement" can be useful for scholarly economic models. This was once recognized in law and economic scholarship. For example, in 1991, Robert Cooter and Bradley Freedman could refer to "disgorgement" as being "[t]he usual remedy when the fiduciary appropriates part of the value of the principal's asset." Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1051 (1991). But they recognized that what they were referring to was not really a remedy at all, but rather an umbrella term for a number of remedies. Thus, Cooter and Freedman continued in a footnote:

> The disgorgement remedy is effected through the equitable remedies of constructive trust, tracing, and accounting; requiring the fiduciary to indemnify the agent for losses; setting aside an improper transaction or objectionable act; granting injunctive and declatory relief; and awarding prejudgment interest. Each of these remedies is designed to deprive the fiduciary of all gains resulting from her wrongful conduct.

Id. at 1051 n.14; see also Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 Oxford J. Leg. Stud. 71, 87-89 (2018). Over time, however, this understanding that "disgorgement" was simply an umbrella term has faded away.

With this background in view, one understands how use of the term "disgorgement" leads to "a marked loss of clarity." Bray, *Fiduciary Remedies*, at 454. The term is sometimes used as a synonym for an

accounting. It is sometimes "used not just for accounting for profits but for any gain-based equitable remedy, obscuring the difference between personal and proprietary remedies." *Ibid.* And "[a]t other times the term is used indiscriminately for any gain-based remedy, including legal relief, such as recovery in quasi-contract." *Ibid.* In its broadest formulation, disgorgement has even been used to recover funds the defendant never had and profits he never received. See *SEC* v. *Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014) (requiring defendant to "disgorge" both his gains and "*also the benefit that accrue[d] to third parties*") (emphasis added); see also *id.* at 310 (Chin, J., dissenting) (noting that the SEC's civil disgorgement order imposed *more* liability than the criminal forfeiture order imposed for the same misconduct).

* * *

At bottom, the error that has led the lower courts to uphold punitive awards of "disgorgement" as supposed "equitable relief" is a result of pressing a fuzzy and non-technical term into service at the expense of a number of more precise and technical terms with well-understood legal meanings. The better approach is to focus on precise terms, such as "accounting for profits," rather than ones without any clearly demarcated significance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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