No. 18-378

IN THE

Supreme Court of the United States

MERCK & CO., INC. MERCK SHARP & DOHME CORP., AND IONIS PHARMACEUTICALS, INC.,

Petitioners,

v.

GILEAD SCIENCES, INC.,

Respondent.

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

BRIEF FOR SAMUEL L. BRAY AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the equitable defense of unclean hands precludes legal relief in the form of damages.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is a scholar with expertise in the law of equity, and he submits this brief to show that unclean hands is, and should be, an equitable defense applicable only against equitable claims.

SUMMARY OF ARGUMENT

One of the long-standing maxims of equity is that "he who comes into equity must come with clean hands." It is closely related to the maxim that "he who seeks equity must do equity." These equitable principles are "an historical reflection of the fact that courts of equity began as courts of conscience." J. D. Heydon, M. J. Leeming, & P. G. Turner, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 3-085, at 80 (5th ed., 2015). In this country and throughout the common law world, unclean hands has traditionally been a defense to equitable claims, but not to legal claims.[2]

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[1] No counsel for a party authored any portion of this brief, and no person other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief. Counsel of record for all parties received timely notice of *amicus*'s intent to file this brief and provided written consent to the filing of the brief.

[2] A claim might be considered "equitable" because it (1) seeks an equitable remedy (e.g., injunction); (2) arises in an area of law exclusively developed by equity (e.g., trust law); or (3) is based on a device that was exclusively developed by equity (e.g., interpleader). Each of these kinds of equitable claims is subject to equitable defenses. *E.g.*, *Great Am. Ins. Co.* v. *Bank of Bellevue*, 366 F.2d 289, 293 (8th Cir. 1966) ("Interpleader is an equitable action controlled by equitable principles, and the equitable doctrine that one seeking equitable relief must do equity and come into court with clean hands is applicable." (citations omitted)). In

Yet in the case below the Federal Circuit applied the equitable defense of unclean hands to a legal claim for damages for patent infringement. The Federal Circuit repeatedly relied on precedents of this Court that characterize unclean hands as an equitable defense that constrains a court of equity. *Gilead Sciences, Inc.* v. *Merck & Co., Inc.*, 888 F.3d 1231, 1239 (Fed. Cir. 2018) (quoting decisions of this Court defining the unclean hands defense in terms of "the equity" a plaintiff seeks, "the equitable relations between the parties," relief from "a court of equity," and an "equity court's use of discretion" (internal quotation marks and citations omitted)). The Federal Circuit provided no support whatsoever for applying the equitable defense of unclean hands to a legal claim for damages, especially when that equitable defense would displace the verdict of a jury.[3]

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this brief the term "equitable claim" is used for precision, even though the distinction that is specifically relevant is between claims for equitable remedies and claims for legal remedies.

[3] Petitioners' arguments below focused more clearly on the tension between an equitable defense and a jury verdict, rather than on the tension between an equitable defense and a legal claim. Nevertheless, the arguments were sufficient to preserve the issue. *See, e.g.*, Defendants-Appellants' Reply and Cross-Appeal Response Brief at 10, Gilead Sciences, Inc., v. Merck & Co., Inc., 2017 WL 2861324 (Fed. Cir. July 3, 2017), at *10 ("Under the Seventh Amendment, Gilead cannot ask this Court to impose unclean hands based on credibility determinations that contradict the jury's."); Defendants' Trial Brief on Bench Trial Issues at 2, Gilead Sciences, Inc., v. Merck & Co., Inc., 2016 WL 1532157 (N.D. Cal. Mar. 22, 2016) ("Under the Seventh Amendment, a jury verdict rejecting Gilead's enablement and written description defenses for any asserted claims of the Patents-in-Suit will constrain the Court's equitable determination of any fact that is common to those legal defenses and the equitable defenses adjudicated in the bench trial. Consistent with the requirements of *Dairy Queen,*

By doing so, the Federal Circuit contradicted this Court's decisions directly addressing the scope of equitable defenses. Recently, this Court has twice held that the equitable defense of laches may be applied only against equitable claims, not against legal ones. *See Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014); *SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017). Nothing about the equitable defense of unclean hands suggests any different treatment.

Moreover, a long line of decisions from this Court affirm certain aspects of the historic distinction between law and equity, including equitable constraints on equitable powers. *E.g.*, *Grupo Mexicano de Desarrollo S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308 (1999). The Federal Circuit's holding in this case, with its mix-and-match quality about legal claims and equitable defenses, is at odds with this line of authority and is an unwarranted expansion of a federal judge's equitable authority.

In addition, the Federal Circuit misconceived the role of equitable defenses. Equitable defenses such as unclean hands, laches, and undue hardship are not free-ranging judicial tools against all that is bad, but rather they are internal constraints on the exercise of broad equitable powers. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 572-586 (2016). Within equity, equitable defenses serve important allocative and legitimating functions. But the equitable defenses do not serve these functions outside of equity. To the contrary, outside of equity

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Inc. v. Wood, 369 U.S. 469, 472-73 (1962), the Court properly held the jury trial on Gilead's legal defenses prior to the bench trial on Gilead's equitable defenses.").

these equitable principles are both unnecessary and, at times, unconstitutional—because applying equitable defenses to legal claims can abridge the Seventh Amendment jury trial right in "Suits at common law."

Some cases about the line between law and equity present a difficult question. This one, however, does not. In *Petrella*, this Court decided the key question—whether equitable defenses apply only to equitable claims, or also to legal ones. Then, in *SCA Hygiene*, this Court was required to return to that question, again with reference to the laches defense, because the Federal Circuit appeared unwilling to follow the clear import of *Petrella* in patent law. Now, with respect to another equitable defense, the Federal Circuit again appears to be taking a path that can only be termed patent exceptionalism.

This Court has often had to reverse the Federal Circuit for its apparent resistance to applying basic principles of equity in patent law. *See, e.g.*, *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) (injunction standard). In this case, the Federal Circuit applied an equitable defense to a legal claim, with no recognition of this Court's recent reversal *of that very court on the very issue of the scope of equitable defenses in patent law*. *SCA Hygiene*, 137 S. Ct. 954.

If the Federal Circuit's decision is allowed to stand, first, the Seventh Amendment right to trial by jury in patent cases will be severely undermined by the reconsideration of damage awards via equitable defenses. This Court has previously protected the jury trial right in patent cases, and it now needs to do so again. Given the Federal Circuit's exclusive appellate jurisdiction over patent appeals, there will be no circuit split on this question in patent law: there is no reason to wait.

Second, and more generally, if the decision below stands, it will cause confusion throughout the lower courts about whether equitable defenses apply to claims for legal remedies. In the context of laches, *Petrella* and *SCA Hygiene* made clear that equitable defenses should not be applied to legal claims, but that clarity would now be called into question.

Third, this case presents an excellent opportunity for the Court to further explain the rationale behind its emerging, yet already extensive, line of precedent about the continuing distinction between law and equity. Regardless of whether this Court offers such a rationale, however, review is warranted. It is impossible to square the Federal Circuit's decision with this Court's precedents.

ARGUMENT

I. HISTORY AND PRECEDENT MAKE CLEAR THAT UNCLEAN HANDS IS AN EQUITABLE DEFENSE

Even though the Federal Rules of Civil Procedure merged the procedures of law and equity in 1938, this Court has repeatedly held that the adoption of the Rules did not change other distinctions between law and equity. *E.g.*, *Petrella*, 134 S. Ct. at 1974. The equitable powers of the federal courts remain the ones that can be traced to the equitable practice of Chancery. *Grupo Mexicano*, 527 U.S. at 318-319 (interpreting the Federal Judiciary Act of 1789). And the equitable remedies authorized by federal statutes remain those that were traditionally equitable. *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 439-445 (2011) (interpreting ERISA). In these and other cases, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002),

this Court has treated equity in the federal courts not as an abstract value like "fairness," but rather as an established legal concept that is informed and shaped by its history.

In two recent cases this Court considered how this principle of continuity should be applied to equitable defenses when presented with the question whether a federal court may apply an equitable defense against a legal claim for damages. In both cases, this Court held that the answer is *no*. First, in *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), this Court decided that the equitable defense of laches could be applied only to equitable claims. After all, an equitable defense before 1938 remained an equitable defense after 1938: the adoption of the Federal Rules of Civil Procedure did not alter "the substantive and remedial principles" of the federal courts. *Id.* at 1974 (internal quotation marks omitted). Second, in *SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017), this Court was called upon to decide whether there was anything about patent law that justified a result different from that of *Petrella*. The Court decided that there was not. *Id.* at 959.

As such, the *Petrella* and *SCA Hygiene* decisions fully dispose of this case. Although the equitable defense involved here is a different one—unclean hands—there is no reason to distinguish it and give it a different treatment from laches. The logic of *Petrella* and *SCA Hygiene* is compelling in this context. The only question is whether unclean hands is an equitable defense. And the answer to that question is not reasonably in doubt.

Unclean hands is a traditionally equitable defense. Its equitable provenance is clear in Richard Francis's eighteenth century work on the maxims of equity. It is

second in his list of the maxims, where it takes the form: "He that hath committed Iniquity, shall not have Equity." Richard Francis, MAXIMS OF EQUITY, COLLECTED FROM, AND PROVED BY CASES OUT OF THE BOOKS OF THE BEST AUTHORITY IN THE HIGH COURT OF CHANCERY 5 (3d ed. 1791) (marginal note omitted). Francis also recognizes that the maxim has application *only* within the courts of equity. *Id.* at 7 (noting a case in which the chancellor would not grant an injunction, because of the conduct of the plaintiff in equity, and contrasting the law courts, where "no Consideration can be had of this Maxim").[4]

Moreover, this Court has repeatedly held that unclean hands is an equitable defense not applicable to legal claims. The doctrine is "one of the fundamental principles upon which equity jurisprudence is founded." *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 244 (1933) (quoting STORY'S EQUITY JURISPRUDENCE (14th ed.) § 98). It is a fundamental equitable doctrine with no application in law. If a person has unclean hands with respect to the matter in litigation, "'whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.'" *Id.* (quoting *Deweese*

[4] To be sure, Zechariah Chafee once called unclean hands "a rather recent growth" and said that it was "by no means confined to equity." SOME PROBLEMS OF EQUITY 2 (Thomas M. Cooley Lectures) (1950). But Chafee is not reliable on this point, and showed the typical Legal Realist disdain for the distinction between law and equity. On his desire to replace unclean hands with multiple other doctrines, see Samuel L. Bray, *On Doctrines That Do Many Things*, 18 Green Bag 2d 141, 142 (2015); and on his prediction that it would be "absurd" to make any distinction between law and equity in the twenty-first century, repeatedly falsified by this Court, see Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 998-99 (2015).

v. *Reinhard*, 165 U.S. 386, 390 (1897)). Unclean hands is an "equitable principle[] applicable *only* against one who affirmatively has sought equitable relief." *Manufacturers' Finance Co.* v. *McKey*, 294 U.S. 442, 453 (1935) (emphasis added).

The treatises are similarly clear that unclean hands is traditionally an equitable defense that can be used to defend only against equitable claims. The application of the unclean hands "maxim has *only* the effect of defeating the equitable relief sought by the patentee." Henry L. McClintock, HANDBOOK OF THE PRINCIPLES OF EQUITY § 149, at 398-399 (2d ed., 1948) (emphasis added). The defense "*only* applies where a party is appealing as actor to a court of equity in order to obtain some equitable relief." 2 Spencer W. Symons, POMEROY'S TREATISE ON EQUITY JURISPRUDENCE § 386, at 55 (5th ed. 1941) (emphasis added and omitted); *see also id.* § 386, at 55–56 n.5 (noting that some authority even suggests that a court of equity would not apply unclean hands when it was enforcing a purely legal right). Even the new edition of the Dobbs treatise on remedies, which makes more concessions than necessary regarding the fusion of law and equity, says "[t]he most orthodox view of the unclean hands doctrine makes it an equitable defense, that is, one that can be raised to defeat an equitable remedy only, but one that is unavailable to those seeking only legal relief." Dan B. Dobbs & Caprice L. Roberts, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.4(2), at 67 (3d ed. 2018); *see also id.* § 2.4(2), at 71 (suggesting that unclean hands "should apply to bar only equitable remedies"); *id.* § 2.6(1), at 106 (including among the continuing aspects of the law/equity distinction "the equitable defenses of unclean hands and laches").

The traditional rule that the unclean hands defense applies only to equitable claims, not to legal claims, is nicely illustrated by the leading case of *Carmen* v. *Fox Film Corp.*, 269 F. 928 (2d Cir. 1920). Ms. Carmen, a celebrated film star, entered into contracts with Fox when she was a minor and then sought equitable relief to escape the contracts, including an injunction to prohibit Fox from asserting that the contracts were valid. The Second Circuit refused to grant equitable relief, relying on "[t]he maxim that one who comes into equity must come with clean hands." *Id.* at 932. But Ms. Carmen was denied only equitable relief. She was subsequently able to recover damages in a tort suit. *Carmen* v. *Fox Film Corp.*, 204 App. Div. 776 (N.Y. App. Div. 1923).

Admittedly, some states have gone further in fusing law and equity, and allow equitable defenses such as unclean hands to be raised across the board. *See* Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. at 546 n.76. But these states are exceptional. "[I]n the vast majority of jurisdictions [unclean hands] is an equitable defense good only against equitable claims." *Id.* at 549.

Some scholars, likewise, support the extension of the unclean hands defense to all claims, arguing that distinctions between law and equity should be erased wherever possible. *See, e.g.*, T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 Am. Bus. L. J. 455, 509 (2008) ("Distinctions between legal and equitable defenses are dead. They were buried with the merger. It is time for courts to begin writing their obituary."). Nevertheless, these are precisely the sort of misreadings of the adoption of the Federal Rules in 1938 that this Court has rejected in

cases such as *Grupo Mexicano*, *Petrella*, and *SCA Hygiene*.

In sum, it is beyond dispute that unclean hands is a traditionally equitable defense, and this Court's holdings demonstrate that such defenses do not apply to legal claims. The argument in favor of reversal cannot reasonably be challenged.

II. FUNCTIONAL CONSIDERATIONS SUPPORT RECOGNITION THAT UNCLEAN HANDS IS AN EQUITABLE DEFENSE

Functional considerations further support the historical and doctrinal position set forth above. While the page of history already given suffices, logic also dictates *why* unclean hands is and should continue to be an equitable defense.

The common law developed as the primary system for adjudicating disputes in England. Equity offered an alternative system, an exceptional system with exceptional remedies for exceptional cases. This division of labor, with law as primary and equity as supplemental and secondary, was clearly understood by the Founders. As Alexander Hamilton wrote, "The great and primary use of a court of equity is to give relief *in extraordinary cases,* which are *exceptions* to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction must have a tendency to unsettle the general rules and to subject every case that arises to a *special* determination." The Federalist No. 83, at 569 (Alexander Hamilton) (J. Cooke ed. 1961) (footnote omitted)).

Equity offered, and offers, a distinctive approach to decisionmaking. It is defined by an adjectival relationship to legal entitlements, a concern not so much with the definition of rights as with the abuse of rights, a morally inflected language, a consideration of the

relative moral position of the parties, a single expert decisionmaker who takes in the whole, the greater complexity that a body of law can have when it does not need to be explained to juries, *in personam* remedies, conditional relief, and a set of flexible devices for supervising performance. *See* Samuel L. Bray, *Equity and the Seventh Amendment* (Sept. 3, 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237907); Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY (Kit Barker, Karen Fairweather & Ross Grantham, eds., 2017).

This understanding of equity is critical for appreciating equity's internal constraints. These constraints consist of equitable defenses, such as laches and unclean hands, as well as the requirement of "no adequate remedy at law" and various other limitations on what equity will do. *See generally* Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. at 572-586. These internal constraints do not give any particular party rights or interests, but instead they operate to limit equity's powers by "guiding and regulating the action of equity courts in their interposition on behalf of suitors." Symons, POMEROY'S TREATISE ON EQUITY JURISPRUDENCE § 397, at 91.

Although some of the equitable limitations have fallen into desuetude, many of them are still going strong. *See, e.g.*, *SCA Hygiene*, 137 S. Ct. 954 (laches), *eBay*, 547 U.S. 388 (no adequate remedy at law requirement); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312-313 (1982) (equitable discretion not to award equitable remedy); *Younger* v. *Harris*, 401 U.S. 37, 43-49, 54 (1971) (equitable reluctance to interfere with criminal law); *O'Shea* v. *Littleton*, 414 U.S. 488, 494-

504 (1974) (equitable concern with managerial burdens).

Within equity, these internal constraints serve two major purposes: allocation and legitimation.

The allocation function responds to a fundamental concern about equitable powers: they impose unusually intense burdens on the court, not to mention the parties. Equity's resources are limited—in equity's formative centuries, there was only one Chancellor—and so equity developed these internal constraints in part as a way to ration the use of equitable powers. As Justice Holmes noted, the judicial inquiry is into whether the requested exercise of equitable powers "would not call on the court to do more than it is in the habit of undertaking." *Jones* v. *Parker*, 163 Mass. 564, 566, 40 N.E. 1044, 1045 (1895).

Equity's internal constraints serve the allocation function because they shift equity's focus (that is, they shift the focus of the court granting equitable remedies) toward certain cases and away from others. The court's attention is directed toward cases where legal remedies are truly inadequate, toward cases where the supervisory task is really appropriate for equity and not constitutionally fraught, toward cases in which the plaintiff has indeed acted with the promptness (laches) and propriety (unclean hands) that a court of equity demands.

Equity's internal constraints also serve a legitimation function. This function responds to a valid concern that has accompanied the exercise of equitable powers for at least three and a half centuries. *See* Robert Waters, JOHN SELDEN AND HIS TABLE-TALK 102-103 (1899) [1689]. Equity has contributed some rather awesome powers to the American courts—including a

judge's ability to prescribe exactly what the defendant must do or not do, on pain of contempt, and subject to continuing supervision and modification. *See* Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW: FUSION AND FISSION (John Goldberg, Henry Smith, & Peter Turner eds., forthcoming 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144436). Under what conditions is it legitimate for a court to exercise such mighty powers? Especially in our system of constitutionally separated powers in which federal judges are insulated from political pressure (and thus political accountability)? The germ of these questions can be traced at least as far back as John Selden's famous gibe about the Chancellor's foot, Waters, JOHN SELDEN AND HIS TABLE-TALK at 102-103, and they remain with us in debates about structural injunctions and now national injunctions.

Equity's internal constraints serve the legitimation function because they establish the conditions under which it is proper, in our constitutional system, for a federal court to wield equitable powers. This is why in case after case—including *Younger*, *O'Shea*, and *Grupo Mexicano*—this Court has invoked both traditional equity and the Constitution of the United States as joint reasons for a limitation on the exercise of equitable powers. Without these equitable constraints (as well as habits of judicial self-restraint), the Founders would likely never have entrusted equitable powers to the federal judiciary. *Cf. Trump* v. *Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring).

Accordingly, this Court has continued to emphasize the distinctive and exceptional nature of equitable remedies and equitable principles. *E.g.*, *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (*per curiam*);

SCA Hygiene, 137 S. Ct. 954; *Petrella*, 572 U.S. 663; *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011); *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-24 (2008); *eBay*, 547 U.S. at 391-394; *Grupo Mexicano*, 527 U.S. 308; *Romero-Barcelo*, 456 U.S. at 312-313, 320. Injunctions and other equitable remedies may not be statistically exceptional, but they remain conceptually exceptional. *See* Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. at 1037-1039.

The unclean hands defense in particular serves these allocative and legitimating functions. Out of the many cases that could receive an equitable remedy, it filters out ones in which the plaintiff lacks what might be called "equitable standing." In serving this allocative function, directing the court's equitable attention to deserving cases, it resembles the maxim that "he who seeks equity must do equity."[5] It is also legitimating, because it grounds the authority of equity in conscience—not the arbitrary moral views of a single judge, but a legally refined and precedentially shaped kind of conscience (as Chancellors have affirmed for centuries). Indeed, with respect to both the allocative and legitimating functions, the unclean hands defense sounds very strongly in the idea that a court of equity is distinctively a court of conscience: "the purpose of the [unclean hands] maxim is to protect the court of conscience from intervening to award a party the fruits of his inequitable conduct." McClintock,

[5] Unclean hands may serve the allocative function more decisively than laches, for it is easier to see unclean hands as a distinctive equitable standing requirement, a maxim that leads a court not to give partial relief (as can happen with laches) but rather to "refuse . . . any relief whatsoever." *Manufacturers' Finance Co.*, 294 U.S. at 448.

HANDBOOK OF THE PRINCIPLES OF EQUITY § 26, at 61 n.64. This defense is not ultimately meant to protect the defendant; it "is for the protection of the court." *Id.* at § 26, at 60.

The unclean hands defense can only serve these functions when applied to equitable claims. To apply the unclean hands defense to a legal claim for damages for patent infringement, as in this case, would serve neither the allocative nor the legitimating function of the defense.

As for the allocative function, there are no burdens on the courts once damages have been awarded. The damages will be paid; if not, attachment is straightforward. There is no need for the court to supervise compliance, appoint a master, modify or dissolve the decree, or any of the others duties and burdens that are involved with equitable remedies.

As for the legitimating function, there is no need for equity's internal constraints in order to legitimate the common law. These equitable constraints were not part of "the judicial Power" in common law cases at the founding. And to apply them misses a crucial legitimating condition outside of equity: the civil jury. Our legal system ultimately belongs to the People of the United States, and we give recognition to that fact with the Seventh Amendment. But that right obtains only in "Suits at common law." Law has the legitimation of the jury, not that of equity's internal constraints. Equity has the legitimation of its internal constraints, its own guardrails, not that of the jury.

Indeed, one could go further. To apply the equitable defense of unclean hands to a legal claim for damages, as the Federal Circuit did in this case, results in a serious interference with the civil jury trial right. The

jury awarded damages. There is a way in our constitutional tradition for a court to reduce a jury award that is excessive: remittitur. But remittitur is hemmed in with various requirements, including the ultimate choice the plaintiff has about whether to try again. Here those requirements were circumvented. To instead reduce or wipe out an award on equitable grounds is to replace the decision of the jury with a decision of the judge, without any warrant in our constitutional tradition.

In short, to apply the equitable defense of unclean hands only to equitable claims is consistent with a proper understanding of how equity works. *Accord SCA Hygiene*, 137 S. Ct. at 961 (noting with respect to the laches defense that broadening its application would "clash with the purpose for which the defense developed in the equity courts"). Equity is exceptional, and it has internal constraints that serve to allocate its attention and justify its power. But outside of equitable claims, the unclean hands defense does not serve these functions. Rather it becomes a kind of free-ranging commission to beat down perceived bad conduct by litigants. Such a new and broad power for federal judges would allow them to displace the verdict of a jury, exercising an equitable authority that has no basis in traditional equity and the historic practices of the federal courts.

Today it is an equitable defense that is overrunning its bounds. Tomorrow it might be an equitable remedy. For defenses and remedies alike, if equity is to keep its valuable place in our constitutional system, it needs to stay within its proper limits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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