18-1501

IN THE
Supreme Court of the United States

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

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The New Civil Liberties Alliance (NCLA) is a nonprofit civil rights organization and public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be subject only to penalties that are both Constitutional and have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress and federal administrative agencies like the U.S. Securities and Exchange Commission (SEC) have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

In this instance, NCLA is particularly disturbed by the way the "disgorgement" remedy was craftily and surreptitiously grafted onto the SEC enforcement power without Congressional warrant or searching judicial supervision, and then mutated into a device completely unknown in equity. It is, in its present form, a legal remedy to which a right to jury trial attaches. U.S. CONST. amend. VII.

The current disgorgement remedy also violates Article I, § 1 of the United States Constitution, which states in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

SUMMARY OF ARGUMENT

It is undisputed that the "disgorgement" remedy appears nowhere in the SEC's enabling statutes. History reveals that the disgorgement remedy was created and expanded by a strategic enforcement and litigation process allowing SEC to arrogate to itself powers not granted by Congress. This process built on each victory with increasing overreach. What was once deemed "ancillary" relief has expanded, as extra-statutory powers are wont to do, to dwarf the actual relief provided by statute, and to make a mockery of what disgorgement means in equity even if such remedy was provided by statute. This plan was observed and followed by other agencies, particularly the Federal Trade Commission (FTC), and error has flowed from the SEC's overreach to other parts of the Government. This invasive weed was not nipped in the bud and so must be uprooted in its present exotic bloom.

The SEC's asserted power to disgorge, not explicitly exercised until the 1970s, derives from an expansive view of *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946), which related to war time price controls. *See SEC v. Texas Gulf Sulphur Co.,* 312 F. Supp. 77, 92-94 (S.D.N.Y. 1970) (allowing restitution) *aff'd in pertinent part, rev'd in part* 446 F.2d 1301, 1307-1308 (2d Cir. 1971) *cert. denied.,* 404 U.S. 1005 (1971).

This case demonstrates the extreme expansion of "disgorgement" as a remedy far beyond anything granted by Congress or even recognized in equity. The petitioners here, on evidence before the district court, received investor funds that were not used in accordance with the representations made to obtain them. After summary judgment, the petitioners

were barred from the EB-5 Immigrant Investment Program ("EB-5 Program") by injunction. The SEC obtained million dollar civil penalties against each of the petitioners in the amounts each received. Nonetheless, the Court also ordered "disgorgement" of nearly $27 million the petitioners did not have—there was no *res* above the approximately $250,000 repaid to investors—and even on funds they had spent on legitimate efforts to make the investment succeed. No deductions for expenses were allowed. That liability acts as a legal judgment and yet no jury right was afforded Petitioners.

This Court's jurisprudence fatally undermines any rationale for the SEC's exercise of extra-statutory power, even in a fact pattern redolent of knowing misrepresentations. First, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the Court held that the long recognized private civil liability for "aiding and abetting" under § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") was unsupported by the text of that Act. So, despite long use and findings of liability in private actions for aiding and abetting of securities fraud in every Circuit, this Court ended the right of private plaintiffs to maintain a suit under §10(b). *Id.* at 191.

Next, this Court recognized in *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002), that a grant of authority to obtain "appropriate equitable relief" did not authorize "money damages." *Id.* at 214, 218 (noting that the term "equitable relief" requires courts to "recognize the difference between legal and equitable forms of restitution"). Then, in the penultimate blow to this unconstitutional aggrandizement of agency power, this Court ruled in

Kokesh v. SEC, 137 S. Ct. 1635 (2017), that when the SEC seeks disgorgement, a five-year statute of limitations applies because disgorgement is a penalty rather than the equitable remedy the SEC had attempted to convert it to for over 40 years. Finally, the concerns this Court addressed in *Timbs v. Indiana,* 136 S. Ct. 682 (2019), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), counsel denying or cabining the disgorgement remedy SEC seeks.

I. THE SEC OBTAINED ITS PRESENT DISGORGEMENT POWERS BY A CAREFUL STRATAGEM OF AVOIDING TEXTUAL OR ORIGINALIST EXAMINATIONS OF ITS CLAIM TO THEM

A. How Did the SEC Obtain Its Current Disgorgement Power?

The aphorism "bad facts make bad law" is borne out by the steady march of the SEC's claim of disgorgement power and its transformation into its current uncabined form. The word "disgorgement" was infrequently used prior to the 1970s. One commentator found "only 11 cases in federal and state case law that were published between 1800 and 1960 that used the term 'disgorgement' in any context." Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (2013), https://www.hblr.org//?p=3528 (citing 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, 47 n.175 (2007)).[2]

Before it attempted to have the Courts confirm its power of disgorgement, the SEC often sought voluntary restitution and settlements that achieved remedies the statute did not provide for. John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 3, 641, 643 n. 11 (describing consensual restitution agreements). Then, a 1961 treatise by Louis Loss argued that in keeping with the cases of *Porter* and *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288 (1960), the SEC possessed the power of restitution and the SEC should seek it in appropriate cases. *See* Hugh L. Sowards, SECURITIES RECULATION. By Louis Loss. Boston, Massachusetts: Little, Brown & Company. 1961, 16 U. MIAMI L. REV. 496 (1962) *available at* http://repository.law.miami.edu/umlr/vol16/iss3/11; *see also* Ellsworth, *supra.,* 643-44.

Porter involved a wartime statute to prevent rent increases, the Emergency Price Control Act of 1942 (Emergency Price Control Act). *See* 328 U.S. 395. Critically, the Emergency Price Control Act provided the administrator with far broader remedies than does the Securities Act here. The Emergency Price Control Act provided under Section 205(a):

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[2] This observation is confirmed by comparing BLACK'S LAW DICTIONARY (5th Ed. 1979) which had no entry for "disgorgement", with BLACK'S LAW DICTIONARY (8th Ed. 1999) which defines "disgorgement" as: "The act of giving up something (such as profits illegally obtained) on demand or by legal compunction." The 8th Edition cites "[Cases Securities Regulation (key 150) C.J.S. *Securities Regulation* §§ 274-276, 279.]" for the source of this definition. The intervening years had seen an explosion of SEC cases seeking disgorgement.

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order*, or other order* shall be granted without bond.

Id. at 397 (quoting the Emergency Price Control Act) (emphasis added).

The Court found that when the Government sought to enforce the law, the court had retained all its equitable powers including restitution or disgorgement. *Id.* 398-399. Notably, there the agency was granted by statute the right to have a court issue "other orders"—language not present here. Later in *Mitchell,* 361 U.S. 288 (1960), an action by the Secretary of Labor to enjoin termination of employees for asserting their rights under the Fair Labor Standards Act (FLSA), the Court found that it had full equity powers to award lost wages from wrongful termination, even though FLSA stated the courts would not have such jurisdiction for underpayments of such wages. *Id.* at 296. In the Court's view, FLSA did not clearly take away this equitable power and so it remained. *Id.* at 294-95. The Court also disavowed any contention that *Porter* turned on being a

wartime measure asserting that Courts always had full equity powers to enforce a statutory provision unless denied this by statute. *Id.* at 291. The *Mitchell* court found that mere compensatory wages were not "punitive." *Id.* at 293.

It was not until the mid-1960s, thirty years after the Securities Act's promulgation, that the SEC, "first argued in federal court for the right to seek ill-gotten profits of securities law violators." Ellsworth, *supra* 641 n. 1. That case was *SEC v. Texas Gulf Sulphur Co.,* 312 F.Supp. 77, 92-94 (S.D.N.Y. 1970), *aff'd in pertinent part, rev'd in part,* 446 F.2d 1301, 1307-08 (2d Cir.), *cert. denied,* 404 U.S. 1005 (1971). There the district court was much more circumscribed in providing a remedy than the court here and its order allowed payments to the victims of insider trading regarding a mineral strike in Canada. All funds ordered to be disgorged there were to be "held in escrow in an interest-bearing account for five years" subject to the Court's further orders and applications by the SEC or other interested parties. *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d at 1307. At the end of that time any remaining funds would be returned to the company. The Court protected the respondents against double liability by making any private judgments draw from the fund. *Id.* There could therefore be no double counting of claims and so was not punitive but restitutional.

The Second Circuit's opinion upholding this creation is seeded with all the errors that would infect the law in this area for the next 50 years. First, it conflates the statutory grant of the remedy of an injunction with all remedies that could remotely be considered equitable. *Id.* at 1307-08. It rejected both legislative history and the plain meaning of the stat-

ute's "injunction" remedy to infer a wider grant of remedies under § 21(e) of the Securities Exchange Act. *Id.* and n. 8 (quoting 15 U.S.C. § 78u(e)). The court relied on cases where an injunction appointed a receiver to control enjoined assets and conflated it with completely separate monies being paid into a court-ordered fund. *Id.* at 1307. The Second Circuit noted that "*in other contexts*" the Courts have been able to use equitable powers to effectuate statutes. *Id.* (citing *inter alia Porter*)(emphasis added). In *Texas Gulf Sulphur*, the court confused the district court's equity powers with the remedies the Congress had provided to the SEC. *Id.* at 1307-08. Finally, in common with courts to follow, the Second Circuit confessed its own error by stating that to enforce the statute as its text, and even legislative history provided, would not fulfill the purpose of the statute and so it provided this new, extra-statutory relief. *Id.* at 1307 n. 7, 1308 ("we hold that the SEC may seek other than injunctive relief in order to effectuate the purposes of the Act").

And so it would go. Each disgorgement case taking the Court further and further from any semblance of equitable disgorgement and tending to resemble clear penalties or, at best, damages at law. Such decisions were almost always driven by the fact that the defendants were bad actors. Judicial outrage replaced judicial thought. *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (terming holding disgorgement only to funds wrongfully taken "a monstrous doctrine");[3]*SEC v. R.J. Allen & Associ-*

[3] *Banner Fund*, and cases of its ilk, boldly states that disgorgement orders create "personal liability" and are not directed at actual wrongfully obtained funds. *Id.* at 617 ("As the (continued…)

ates, Inc., 386 F. Supp. 866, 873 (S.D. Fla. 1974) (" In summary, the evidence in this case describes a horrible fraud, one that has been vicious and brutal. It is difficult to imagine how anyone could contrive and execute a more diabolical scheme."). Even the devil should get the benefit of law. *Fiero v. INS.*, 81 F. Supp. 2d 167 (D. Mass. 1999) (quoting Robert Bolt, *A Man for All Seasons* 66 (1962)).

The SEC during all of this time was also acquiring further powers by statute in its administrative hearings processes, including disgorgement. *See e.g.,* 15 U.S.C. § 78u-2(e), 78u-3(e).[4] Nonetheless unsatisfied, it continued to use ever expanding disgorgement as an equitable remedy in court as it has here.

This legal legerdemain was not limited to the SEC. Adopting the expansionist strategy of the SEC, the Federal Trade Commission (FTC) began stretching the injunctive relief provided by Section 13(b) of the FTC Act "in proper cases" to encompass new and routine claims for disgorgement and other so-called equitable remedies, by ignoring the statutory language and history of the FTC Act. David M. FitzGerald, a litigation attorney for the Federal Trade Commission's Office of General Counsel from 1976-1982 candidly laid out the FTC's aping of the

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Second Circuit decision makes clear, an order to disgorge establishes a personal liability, which the defendant must satisfy regardless whether he retains the selfsame proceeds of his wrongdoing.") (citing *SEC v. Shapiro,* 494 F.2d 1301, 1309 (2d Cir. 1974)).

[4] It may be wondered whether an executive branch agency can be given equitable powers that are part of the "judicial power" vested in the judiciary but the statute does purport to award such power to the SEC. *See* U.S. CONST. art. III, § 1.

SEC strategy. David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Paper, FTC 90th Anniversary Symposium (Sept. 23, 2004), *available at* https://bit.ly/2EFgaK8. Mr. FitzGerald noted that, like the SEC, the FTC first proceeded by consent orders before bringing its claims of broad equitable powers to the Courts. *Id.* at 10 ("Before the court ruled, the parties reached a settlement under which the payments were placed in escrow, and […respondents] agreed to a Commission consent order that required them to forgo future payments under the contracts and pay redress to consumers.") (citing *Australian Land Title, Ltd.,* 92 F.T.C. 362 (1978)).

The FTC advanced its agenda against weak defendants, asked for broad equitable relief, beyond injunction, and got it when the defendants defaulted. *Id.* at 14 (citing *FTC v. Kazdin*, No. C79-1857 (N.D. Ohio June 26, 1980). The FTC then used the *Porter* decision to provide cover as the SEC had. As Mr. FitzGerald explained,

> [t]he Supreme Court and the lower federal courts have applied this reasoning in many subsequent cases, upholding the district courts' authority to employ a broad range of equitable remedies in enforcement proceedings brought by an array of administrative agencies under statues that, like Section 13(b), expressly authorize only injunctive relief.

Id. at 16 (citing *inter alia* 15 U.S.C. § 78u(d)(1) ("giving the SEC authority to seek permanent or tempo-

rary injunctive relief against any person who is engaged in or is about to engage in acts or practices in violation of the Exchange Act")).

Mr. FitzGerald noted that all of this authority (including "disgorgement") was obtained even though

> [n]either the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there, however, research into case law interpreting statutes conferring similar injunctive authority on other agencies led to the *Porter* line of cases, providing critical support for a broad interpretation of Section 13(b).

Id. at 22. He concluded that "Being out of the spotlight can be an advantage" as it allowed the FTC to "pursue our efforts with little interference." *Id.* Thus, the SEC's inch-by-inch strategy to expand "injunction" to mean "all equitable remedies" and then to expand it further to "beyond any relief traditionally allowed in equity" has been followed by other agencies.

B. The Petitioners' Penalties Starkly Illuminate the Unbound Nature of the SEC's Assumed Powers

Disgorgement has metastasized incrementally over the last 50 years. The Petitioners were sued by the SEC for violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act, See Compl. ¶ 8, *SEC v. Liu*, No. SAVC 16-00974-CJC, ECF No. 1 (C.D. Cal. May 26,

2016). Neither of those statutes provide for a remedy of disgorgement. The gravamen of the charges was that the Petitioners misappropriated capital raised by misrepresentations to investors, in connection with the EB-5 Program which allows investors of $500,000 in certain projects to obtain visas to the United States. *See generally*, *Liu* Compl., ECF No. 1(C.D. Cal. May 26, 2016). The district court eventually granted the SEC summary judgment on the Petitioners' violation of Section 17(a)(2) of the Securities Act. App. 9a-61a. Having done so it did not reach the other causes of action.

The Court then granted a permanent injunction against either petitioner participating in an EB-5 Program again. It also entered a civil penalty of $6,714,580 against Petitioner Liu and $1,538,000 against petitioner Wang. These were authorized under 15 U.S.C. § 77t(d) and § 78u(d)(3)(B) for violations involving fraud and deceit and represented the "personal gain" the court found each had received from the violation. App. 42a. Having barred the petitioners from the EB-5 Program for life and issued among the highest civil penalties that could be exacted—the full amount of personal gain—the Court then granted the most draconian form of "disgorgement" imaginable. It awarded $26,733,018.81 to the SEC together with prejudgment interest. App. 62a. This represented a double counting of the amounts received by petitioners (already awarded as a civil penalty for the amounts received) as well as the exclusion of all legitimate expenditures made in the investment like construction costs and lease payments. *See SEC v. Liu*, 754 Fed. App'x 505, 509 (9th Cir. 2018). This was so even when the funds were used for leases, demolition and purchases of land

that in no way benefited petitioners and were costs truthfully disclosed to investors. *SEC v. Liu*, 262 F. Supp. 3d 957, 975-76 (C.D. Cal., 2017). The only offset permitted was $234,899.19 that was returned to investors. *Id.* at 975. The district court relied on Ninth Circuit precedent on disgorgement. *SEC v. Liu*, 262 F. Supp. 2d at 975; *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006); *see also SEC v. Colello,* 139 F.3d 674, 679 (9th Cir. 1998) ("To order disgorgement, the district court…need find only that [the defendant] has no right to retain the funds illegally taken from the victims."). The Appellate Court relied on this same precedent and stated that its precedential value was unaffected by *Kokesh*. *SEC v. Liu*, 754 Fed. App'x 505, 509 (9th Cir. 2018) Also of note, there is no hint that the SEC must return any disgorged funds to investors. App. 62a-64a.[5] Years of misapplication of statutory language and ignoring the true principles of equity have made the remedies the SEC seeks under the injunction banner unrecognizable and insupportable under the Constitution.

II. THIS COURT'S MODERN JURISPRUDENCE FORECLOSES THE REMEDY AWARDED HERE AND THE NINTH CIRCUIT MUST BE REVERSED

While the SEC was inflating the injunctive remedy beyond recognition as a matter of statutory inter-

[5] Should Petitioners have the funds to pay disgorgement and do so, the anomalous result is that actual injured investors may find an empty pocket in a civil suit of their own.

pretation or equitable principles, this Court was developing clear, crisp constitutional holdings that preclude the result the SEC seeks here. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (rejecting long-standing private action for aiding and abetting liability under the Exchange Act); *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (defining equitable remedy of restitution against legal remedy of same name); *Kokesh v. SEC,* 137 S. Ct. 1635 (2017) (finding disgorgement as asserted by the SEC to be punitive, not equitable, and applying a five-year statute of limitations). [6]

A. The SEC Cannot Inflict Penalties Not Delineated by Statute

The Supreme Court made clear that the statutory text governs strictly the scope of authority conferred by the federal securities laws and that claims cannot be authorized by implication when Congress failed to include them. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 180 (1994). In that case the Court had to answer a "question reserved in two earlier decisions: whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation." (citations omitted). After noting that the Exchange Act did not provide for aiding and abetting liability in private suits, the Court looked for other sources of interpretation that would provide that result. Piece by piece

[6] In addition, *Meghrig v. KFCW., Inc.,* 516 U.S. 479 (1996) denied that CERCLA allowed a restitution remedy despite the authority of *Porter* and *Mitchell.*

the Court rejected every source of such liability propounded by the respondents and the SEC:

- If Congress wanted to impose such liability it knew how to do it and that it did not explicitly so provide counted against that interpretation. *Id.* 511 U.S at 176. The same is true here as Congress has added disgorgement as an administrative remedy.
- Acquiescence by Congress to prior court rulings was surveyed and rejected. *Id.* at 187.
- The SEC next attempted to use the words of the statute that prohibited certain acts done either "directly or indirectly" to stand in for "aiding and abetting." The Court rejected this as putting more weight on those words than they can bear. *Id.* at 176. Like wise, here the SEC does the same with the words "ancillary" relief in certain cases and "equitable powers" in others.
- The Court also rejected a general knowledge by Congress of the law of torts and of "aiding and abetting" as leading to any view as to the inclusion of that cause of action in the statute. *Id.* at 181-182.
- Finally, the Court rejected the assertion, likely to be made here by the SEC, that Congress's failure to overturn precedent when it amends a statute is evidence that Congress adopted those cases and bound the Court to continue in error. *Id.* at 186.

That Congress in 1934 knew of all the equitable powers does not mean by choosing one, injunction, it granted all the others. Nor does it imply that Con-

gress included a definition of disgorgement that allowed general liability against all assets whether derived from fraud or not. Quite to the contrary.

This Court has already rejected as causes of action every argument the SEC is likely to make here as to its remedies. Notably it did so in the context of private securities litigation where a defendant has such protections as jury trial and exact proof of damages—all protections absent here. *See Danjaq LLC v. Sony Corp.,* 263 F.3d 942, 962 (9th Cir., 2001) (right to jury trial on all legal claims but not on equitable defenses). *Central Bank of Denver* addresses and insists upon statutory construction of the securities laws, unlike *Powell* or *Mitchell*, and is thus more in keeping with this Court's recent jurisprudence than those cases. By confining the SEC to the powers actually conferred on it by law, this approach also observes constitutional imperatives that "all" lawmaking power is vested in Congress, not agencies or courts that blindly accepted the made-up remedies of the SEC's expansionist agenda of the last five decades.

B. Equity Means Equity and Not What the SEC Wants It to Mean

Litigants may not simply use equity to get around contractual or statutory difficulties. For example, in *Great-West Life & Ann. Ins. Co.,* 534 U.S. 204, 221 (2002) the court rejected an attempt to use an equity theory nearly identical to the one the SEC advances here. The Court noted that the language, "to *obtain other appropriate equitable relief"* was insufficient to take ERISA beyond the powers conferred in its carefully crafted scheme. *Id* at 209; s*ee*

29 U.S.C. § 1132 (a)(3)(emphasis added). The insurance company, desirous of funds the injured insured had received by judgment in a suit against the tortfeasor, claimed it was just restitution of the more than $400,000 that the company had paid for her claim. Justice Scalia noted that there are two types of restitution, one at law, and one in equity. It is incontrovertible from the Court's description of the two types that what the SEC seeks here is not under equity but under law. As the Court noted:

> However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought.

Id. at 213-14. (citations omitted). The Court then explained restitution at law:

> In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. In such cases, the plaintiff's claim

> was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

Id. at 213. (emphasis in original)(internal citations omitted). This was much different from "restitution" in equity and the Court's description of such restitution bears no resemblance to what the SEC seeks here:

> In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular

> funds or property in the defendant's possession.

Id. at 213-214 (internal citations omitted). Here the entire disgorgement is a claim not on particular funds but as general liability against the petitioners; the exact type of restitution this Court has stated is a legal, not an equitable remedy. It is four square a legal remedy and not an equitable one and the judgment must be reversed. See also *Meghrig v. KFC Western, Inc.,* 516 U.S. 479 (1996) (rejecting implying a restitution remedy where statute provided for injunctive relief); *FTC v. Credit Bureau Center, LLC et al.,* 937 F.3d 764, 779-780 (7th Cir. 2019) (Section 13(b) of the FTC Act does not allow restitutionary relief contrasting *Porter* and *Micthell* to modern implied remedy jurisprudence); *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring) (rejecting "monetary judgments styled as 'restitution'" under FTC Act.).

C. This Disgorgement Is a Penalty and Cannot Be Countenanced in Equity

In its latest report, the SEC's Enforcement Division has complained that this court's decision in *Kokesh* is making seizing assets on stale claims difficult. SEC, DIVISION OF ENFORCEMENT 2019 ANNUAL REPORT 21 (Nov. 6, 2019) *available at* www.sec.gov/reports. It should be! This bureaucratic irritation with the rule of law continues with the SEC's position in this litigation. It argued below that this court's decision in *Kokesh* had no application beyond the statute of limitations. It invited, and indeed, led the Ninth Circuit into holding that its own precedent, based on the *Texas Gulf Sulphur*

Co.'s extension of disgorgement power, was unchanged after *Kokesh*. *SEC v. Liu*, 754 F.App'x at 509.[7] But *Kokesh* was inextricably linked to the reality of what the SEC's asserted disgorgement remedy is. The question in *Kokesh* was whether the disgorgement asserted by the SEC was an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." *Id*. S.Ct. 1638; *and see* 28 U. S. C. § 2462. If it was, a five-year statute of limitations applied.

In that unanimous opinion, the Court carefully compared the hallmarks of "penalty" with the actual nature of SEC's equitable disgorgement. Every factor which made the *Kokesh* disgorgement a "penalty" for statute of limitations purposes is present here. The judicial contortions needed to distinguish the statute of limitations from the underlying penalty would warp the law beyond recognition.

First, Justice Sotomayor held that one of the main defining aspects of penalty is money paid to satisfy a violation of the public laws and to deter both the wrongdoer *and others* from those violations. *Kokesh*. at 1642. Secondly, *Kokesh* distinguished cases where a private right of action was given to those injured by wrongdoing so that they might be compensated. *Id.* at 1643. Deterrence was a prime reason for disgorgement going all the way back to *Texas Gulf*. This was so even though there the disgorged funds were available to injured parties and any such awards were to be deducted from those

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[7] The Fifth Circuit recently made the same decision on similar arguments. *SEC v. Team Resources Inc.*, 942 F.3d 272, 274 (5th Cir. 2019) (acknowledging *cert. grant* in this case but adhering to circuit precedent on the issue.)

funds to *avoid double penalty*. No such protection is provided here. Next, the disgorged funds *might* go to the injured parties but typically go to the Treasury, which is also the case here. *Id.* at 1644. The Court remarked: "SEC disgorgement thus bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." *Id.*

In response to the SEC's argument that disgorgement simply put the wrongdoer back where he should have been and so was "remedial," the Court noted that by failing to deduct or offset benefits to third parties, or even the injured party, shows that this is punitive, not remedial, because the wrongdoer must "disgorge" more then he got. *Id.* at 1644-45. Not only does this make "disgorgement" a misnomer but also a penalty. *Kokesh* held that while it is "[t]rue [that] disgorgement serves compensatory goals in some cases…" this did not change the nature of disgorgement for purposes of the statute of limitations. *Id.* at 1645.[8] The *Kokesh* decision leaves the government nowhere to hide. Here and in the vast majority of cases disgorgement is punitive and therefore unavailable in equity.

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[8]One place the Court might find disgorgement to be equitable would be where the SEC obtains an injunction to seize funds, a company or stocks and then distributes such funds to injured parties. That is not the case here nor in the vast majority of SEC cases. *See e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-771, SEC ENFORCEMENT MORE ACTIONS NEEDED TO IMPROVE OVERSIGHT OF DISGORGEMENT COLLECTIONS 8 (2002) *available at* www.gao.gov/new.items/d02771.pdf (collection chart indicating that only 15% of disgorgement awards collected).

D. Ruling Against the SEC Here Comports with Other Precedents of the Court

In this case even funds used for breaking ground and on other expenses revealed to investors and to benefit the project were assessed as penalties against Petitioners as "disgorgement." Further, the civil fines granted in this case matched the amount the Petitioners personally received for their violations. But the Court also ordered "disgorged," nearly 27 million dollars from Petitioners. That number included within it the same amounts the Petitioners had received personally. The nearly 27 million dollar disgorgement awarded was, for Wang, 25 times more than she personally gained from the fraud, and nearly 4 times as much as Liu gained. All of this was imposed not criminally, but as civil damages.

Last term, in *Timbs v. Indiana*, this Court applied the Excessive Fines Clause of the U.S. Constitution to the States. In so doing it rejected Indiana's argument that traditional civil *in rem* proceedings could never fall under and be "excessive fines." *Id.*139 S.Ct. at 690. The broad interpretation of "disgorgement" pressed as civil penalty by the SEC raises "excessive fine" issues which would be completely avoided in the future if such actions were not part of the SEC's equitable, injunctive powers.

Similarly, in such cases as *BMW v. Gore*, 517 U.S. 559 (1996), this court noted that civil penalties that inflicted punitive sanctions many multiples in excess of any civil fine may violate the due process clause of the U.S. Constitution. *Id.* at 581-582. Here the disgorgement "punitive" award is as we have seen, many multiples of the statutory civil fine, even at

the highest tier. A ruling for the Petitioners would forestall any future constitutional issues along these lines. *Id.* at 581-82 (noting ratio of compensatory to punitive of 500 to 1). That case also noted that punitive damages more than four times the amount of compensatory damages" might be "close to the line" although it did not cross into "constitutional impropriety)." *BMW v. Gore*, 517 U.S. at 581 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991)). Once again, the Court would avoid future due process challenges by holding the SEC to its statutory remedies. For these reasons the SEC ought to be contained within its capacious statutory remedies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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