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 FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a district court, in a civil enforcement action brought by the Securities and Exchange Commission, may order disgorgement of money acquired through fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is reprinted at 754 Fed. Appx. 505. The order of the district court granting the Commission's motion for summary judgment (Pet. App. 9a-61a) is reported at 262 F. Supp. 3d 957.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2018. A petition for rehearing was denied on January 3, 2019 (Pet. App. 65a). On March 22, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 31, 2019, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 1, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-24a.

STATEMENT

1. In the wake of the stock market crash of 1929 and the ensuing Great Depression, Congress enacted the Securities Act of 1933 (Securities Act), ch. 38, Tit. I, 48 Stat. 74 (15 U.S.C. 77a *et seq.*) and Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*). Both the Securities Act and the Exchange Act vest the district courts with jurisdiction to hear "all suits in equity and actions at law brought to enforce any liability or duty created by" the relevant statute. 15 U.S.C. 77v(a), 78aa(a). Both laws also authorize the Securities and Exchange Commission (SEC or Commission) to bring civil enforcement actions seeking injunctive relief for violations. See 15 U.S.C. 77t(b), 78u(d)(1). Current Section 21(d)(5) of the Exchange Act, which was added to that law by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745, provides that "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, * * * any Federal court may grant[] any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5).

2. This case arises out of a "massive fraud" affecting "scores of victims." Pet. App. 40a. Petitioners operated a fraudulent scheme related to the EB-5 Immigrant Investor Program, which creates a pathway to obtaining a visa for foreign nationals who invest money in certain enterprises in the United States. See *id.* at 1a-2a. Through corporations that they controlled, petitioners

raised nearly $27 million from nearly 50 foreign investors. *Id.* at 12a-13a. Petitioners told investors that the money would fund the construction of a cancer-treatment center. *Id.* at 2a.

In violation of the terms of the offering documents, petitioners did not use the funds for that purpose, but instead transferred millions of dollars to their personal bank accounts in the United States and then to personal bank accounts overseas. Pet. App. 2a, 21a. They used that money to pay for personal expenses such as "credit card bills," "rent," "tuition" for their children, and "casino-related expenses." *Id.* at 16a n.9. Petitioners also diverted $12.9 million to overseas marketers, exceeding the caps set in the offering documents. *Id.* at 2a. The evidence showed that petitioners controlled at least one of those marketers, suggesting that those payments provided an additional way for petitioners to funnel money to themselves through foreign entities. *Id.* at 17a-18a, 33a. Petitioners exhausted all but $235,000 of the original $27 million investment, but they "never even obtained the required permits to break ground for the cancer center." *Id.* at 2a-3a; see *id.* at 21a.

3. In May 2016, the SEC brought this civil action, alleging that petitioners had violated (1) Section 10(b) of the Exchange Act (15 U.S.C. 78j(b)); (2) Sections 17(a)(1)-(3) of the Securities Act (15 U.S.C. 77q(a)(1)-(3)); and (3) Exchange Act Rule 10b-5 (17 C.F.R. 240.10b-5). J.A. 54-57. The Commission sought, among other relief, an order directing petitioners "to disgorge all funds received from their illegal conduct." J.A. 59.

The district court awarded the SEC summary judgment on the claim that petitioners had violated Section 17(a)(2) of the Securities Act (15 U.S.C. 77q(a)(2)), which prohibits obtaining money or property through

falsehoods or omissions in the offer or sale of securities. See Pet. App. 9a-61a, 62a-64a. The court observed that the Commission had produced "extensive evidence of a thorough, longstanding scheme to defraud investors," through which petitioners had "allow[ed] construction to languish while funneling millions of dollars to themselves." *Id.* at 33a, 41a. The court also concluded that petitioners had violated the terms of the offering documents by diverting large sums to overseas marketers. *Id.* at 30a.

Among other remedial measures, the district court ordered petitioners to disgorge approximately $26.7 million. Pet. App. 40a. The court described that figure as "a reasonable approximation of the profits causally connected to [petitioners'] violation." *Id.* at 41a. The court rejected petitioners' contention that the award should be "offset by their 'legitimate' business expenses." *Ibid.* In the court's view, petitioners' expenses were simply "half-hearted attempts to convey the illusion of progress" on the promised cancer-treatment center. *Id.* at 18a. The court concluded that "[i]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors." *Id.* at 41a (citation omitted). Because the violation of Section 17(a)(2) was "a sufficient basis for the remedies" the Commission sought, the court found it "unnecessary to reach" the SEC's remaining claims. *Id.* at 29a.

4. The court of appeals affirmed. Pet. App. 1a-8a. As relevant here, the court rejected petitioners' argument "that the district court lacked the power to order disgorgement in this amount." *Id.* at 6a. The court relied on "longstanding precedent" from the Ninth Circuit

upholding the power of a district court to award disgorgement in a civil action brought by the Commission. *Id.* at 7a.

The court of appeals also rejected petitioners' contention that the district court should have "give[n] them credit for amounts they characterize as legitimate business expenses." Pet. App. 7a. Like the district court, the court of appeals found it "unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

I. Section 21(d)(5) of the Exchange Act provides that, "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). The statute's expansive references to "*any* action or proceeding," "*any* provision of the securities laws," "*any* Federal court," and, most importantly, "*any* equitable relief" show that Congress meant it to have broad reach. Congress authorized all "equitable relief," and "disgorgement of improper profits" has "traditionally [been] considered an equitable remedy." *Tull* v. *United States*, 481 U.S. 412, 424 (1987).

The history of the overall statutory scheme confirms that Section 21(d)(5)'s current authorization of "any equitable relief that may be appropriate or necessary for the benefit of investors" encompasses disgorgement. As originally enacted in 1933 and 1934, the Securities Act and Exchange Act empowered courts to grant an

"injunction." In numerous cases over the years, the Commission argued, and the lower courts uniformly agreed, that courts in SEC enforcement suits could award disgorgement as an equitable remedy ancillary to an injunction. See, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d. Cir.), cert. denied, 404 U.S. 1005 (1971). Congress subsequently enacted a series of statutes that reflected awareness of, and were premised on, those judicial decisions. It was against that backdrop that Congress enacted current Section 21(d)(5) in 2002 to empower courts in SEC enforcement suits to award "any equitable relief that may be appropriate or necessary for the benefit of investors." Regardless of whether *Texas Gulf Sulphur* and similar cases were correctly decided, the sequence of events forecloses the argument that, in authorizing "any equitable relief," Congress intended to *withhold* the equitable remedy of disgorgement.

II. Petitioners' contrary arguments lack merit. Petitioners contend (Br. 15-19) that Congress implicitly precluded the SEC from obtaining disgorgement by authorizing the agency to obtain other remedies such as civil penalties. But the statute on which petitioners rely provides: "The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring." 15 U.S.C. 77t(d)(3)(C). Petitioners also argue (Br. 26-33) that disgorgement cannot qualify as equitable relief because it lacks a Founding-era analog. But because Congress enacted Section 21(d)(5) in 2002, its scope turns on what "equitable relief" meant at that time, not on what it meant in 1789. Finally, petitioners observe (Br. 20-26) that disgorgement has punitive fea-

tures. But those features do not preclude it from qualifying as equitable relief, since this Court has described disgorgement as both "an equitable remedy" and a "limited form of penalty." *Tull*, 481 U.S. at 424.

ARGUMENT

I. A COURT MAY AWARD DISGORGEMENT IN A CIVIL ACTION BROUGHT BY THE COMMISSION TO ENFORCE THE FEDERAL SECURITIES LAWS

Disgorgement is the remedy of ordering a "conscious wrongdoer" to yield up the "profit attributable to the underlying wrong." Restatement (Third) of Restitution § 51(4) (2011) (Third Restatement). The object of the remedy "is to eliminate profit from wrongdoing." *Ibid.*

Before 2002, Section 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act empowered the court in an SEC enforcement suit to issue an "injunction." Lower courts had held that disgorgement was a permissible element of relief in an SEC action.

The Court need not decide, however, whether those earlier decisions correctly construed the statutory language that was in effect at the time. In 2002, Congress enacted the Sarbanes-Oxley Act, which added Section 21(d)(5) to the Exchange Act (15 U.S.C. 78u(d)(5)). Section 21(d)(5), while leaving in effect the preexisting authorizations to issue "injunction[s]" in suits brought under the Securities Act and the Exchange Act, empowers a district court to award "any equitable relief that may be appropriate or necessary for the benefit of investors" in any suit brought by the Commission under any of the securities laws. 15 U.S.C. 78u(d)(5). The term "any equitable relief" plainly encompasses disgorgement. And regardless of whether the earlier decisions were correct, there is no basis for concluding that "any equitable relief" was intended to withhold an equitable remedy

that lower courts had uniformly concluded was already available.

A. The Courts' Power To Award The SEC "Any Equitable Relief That May Be Appropriate Or Necessary For The Benefit Of Investors" Includes The Power To Award Disgorgement

Section 21(d)(5) of the Exchange Act provides:

> In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, *any equitable relief* that may be appropriate or necessary for the benefit of investors."

15 U.S.C. 78u(d)(5) (emphasis added).

The phrase "any equitable relief" plainly includes disgorgement. For example, the Third Restatement explains: "Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.'" § 51 cmt. a. This Court, moreover, has repeatedly described disgorgement as an equitable remedy. Thus, in *Kansas* v. *Nebraska*, 574 U.S. 445 (2015), it referred to the "equitable power to disgorge profits." *Id.* at 463. In *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), it discussed "the equitable relief Petrella seeks—*e. g.*, disgorgement of unjust gains." *Id.* at 686. And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Court described "a decree compelling one to disgorge profits" to a federal agency as an "equitable" order, an "equitable remed[y]," "a remedy entered in the exercise of the District Court's equitable discretion," an exercise of "equitable jurisdiction," and a remedy that "lies within [the court's] equitable jurisdiction. *Id.* at 398-402. Other similar cases abound. See, *e.g.*, *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S.

340, 352 (1998) ("actions for monetary relief that we have characterized as equitable, such as actions for disgorgement of improper profits"); *Chauffeurs, Teamsters & Helpers* v. *Terry*, 494 U.S. 558, 570 (1990) ("we have characterized damages as equitable where they are restitutionary, such as in 'actions for disgorgement of improper profits'") (brackets and citation omitted); *Tull* v. *United States*, 481 U.S. 412, 424 (1987) ("an action for disgorgement of improper profits, traditionally considered an equitable remedy").

A separate statutory provision authorizing the Commodities Futures Trading Commission (CFTC) to obtain disgorgement also supports that interpretation. That provision, captioned "EQUITABLE REMEDIES," provides that the CFTC may seek "equitable remedies including * * * disgorgement of gains received in connection with [a] violation." 7 U.S.C. 13a-1(d)(3)(B). That provision shows that Congress considers disgorgement awarded to a federal agency to be an equitable remedy.

The history of equity practice confirms that disgorgement is an equitable remedy. For centuries, courts of equity have granted a remedy—known as accounting of profits, account of profits, accounting, or account—requiring wrongdoers to surrender profits from their wrongs. See *Root* v. *Railway Co.*, 105 U.S. 189, 207 (1882). "Disgorgement" is simply the modern name for "accounting." See Third Restatement § 51 cmt. a. As this Court has explained, "the remedy of an accounting * * * sought disgorgement of ill-gotten profits." *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954, 964 (2017).

Finally, traditional maxims of equity confirm that disgorgement is an equitable remedy. Courts have

"long recognized the 'fundamental equitable principle'" that "'no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.'" *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Board*, 502 U.S. 105, 119 (1991) (brackets and citations omitted). see, *e.g.*, *Riggs* v. *Palmer*, 22 N.E. 188, 190 (N.Y. 1889). Disgorgement serves that traditional equitable purpose by preventing a wrongdoer from retaining the gains he has obtained through his own fraud.

In short, the plain terms of Section 21(d)(5)—"any equitable relief"—authorize the equitable remedy of disgorgement.

B. The Statutory Context Confirms That Disgorgement Is "Equitable Relief" Within The Meaning Of Section 21(d)(5)

The historical context in which Congress enacted Section 21(d)(5) further confirms that "any equitable relief" includes the equitable remedy of disgorgement. In the decades preceding the enactment of Section 21(d)(5), the courts, the SEC, and Congress presumed that the SEC already had the authority to seek disgorgement. Indeed, in the years surrounding the enactment of Section 21(d)(5), Congress enacted five separate statutes that referred to or relied on the availability of disgorgement in civil suits brought by the SEC. Against that historical backdrop, it is implausible to suggest that the sweeping phrase "any equitable relief" was intended to *withhold* the equitable remedy of disgorgement.

1. Beginning in the 1960s, lower courts concluded that their injunctive powers under the Securities Act and Exchange Act included the power to order disgorgement

In response to the 1929 stock market crash and the ensuing Great Depression, Congress passed and President Franklin D. Roosevelt signed the Securities Act in 1933 and the Exchange Act in 1934. The Exchange Act created the SEC and authorized it to administer both statutes. §§ 4(a), 210, 48 Stat. 885, 908. The statutes authorized the Commission to "bring an action * * * to enjoin" a violation, and they empowered the district court in such a suit to enter "a permanent or temporary injunction or restraining order." Securities Act § 20(b), 48 Stat. 86; Exchange Act § 21(e), 48 Stat. 900. In the late 1960s, the SEC began to argue that the courts' statutory power to issue an injunction included the power to order defendants to disgorge their unjust gains. And in a series of decisions, the lower courts uniformly agreed.

For example, in *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, cert. denied, 404 U.S. 1005 (1971), the Second Circuit held that courts in SEC enforcement suits could direct violators to surrender "the gains of their wrongful conduct." *Id.* at 1308. The court held that such an order constituted an appropriate "ancillary remedy in the exercise of the courts' general equity powers to afford complete relief." *Id.* at 1307. The Second Circuit cited *Porter*, in which this Court had interpreted the language "permanent or temporary injunction, restraining order, or other order" in another statute to authorize disgorgement. *Porter*, 328 U.S. at 397 (citation omitted); see *Texas Gulf Sulphur*, 446 F.2d at 1307. The Second Circuit also cited *Mitchell* v. *Robert*

DeMario Jewelry, Inc., 361 U.S. 288 (1960), in which this Court had interpreted the power "to restrain violations" in another statute to authorize equitable reimbursement. *Mitchell*, 361 U.S. at 289 (citation omitted); see *Texas Gulf Sulphur*, 446 F.2d at 1307.

The Second Circuit subsequently explained that, when a court awards "[d]isgorgement of profits in an action brought by the SEC," it is "exercising the chancellor's discretion to prevent unjust enrichment." *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (1978) (Friendly, J.). The court understood that "the primary purpose of disgorgement" is to "forc[e] a defendant to give up" unjust gains, "not to compensate investors." *Id.* at 102. The court also understood that the disgorged funds may in some circumstances end up in the Treasury, rather than in investors' pockets. *SEC* v. *Fischbach Corp.*, 133 F.3d 170, 177 (2d Cir. 1997).

In the ensuing years, every other court of appeals to consider the matter followed *Texas Gulf Sulphur*. The courts of appeals thus reached a consensus that the Commission may seek disgorgement in civil actions, as an equitable adjunct to an injunction. See, *e.g.*, *United States SEC* v. *Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006), cert. denied, 550 U.S. 905 (2007); *SEC* v. *Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) (per curiam); *SEC* v. *Lipson*, 278 F.3d 656, 662-663 (7th Cir. 2002); *SEC* v. *Hughes Capital Corp.*, 124 F.3d 449, 455-456 (3d Cir. 1997); *SEC* v. *Gotchey*, 981 F.2d 1251 (Tbl.), 1992 WL 385284, at *2 (4th Cir. 1992) (per curiam), cert. denied, 509 U.S. 927 (1993); *SEC* v. *Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990); *SEC* v. *First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC* v. *Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *SEC* v. *MacDonald*, 699 F.2d 47, 52-55 (1st Cir. 1983) (en

banc); *SEC* v. *Washington County Utility District*, 676 F.2d 218, 227 (6th Cir. 1982); *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).

2. In five statutes enacted between 1988 and 2010, Congress ratified and built upon the prior judicial consensus that disgorgement is an available remedy in SEC enforcement actions

In more recent years, this Court has moved away from the understanding of courts' remedial authority that prevailed in the 1960s and early 1970s, emphasizing that policy judgments concerning the remedies that should be available for violations of federal laws are entrusted to Congress rather than to the courts. The Court has explained that the "remedies available are those 'that Congress enacted into law.'" *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). To discern the extent of those remedies, a court should "apply traditional principles of statutory interpretation." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). A court may not "apply its independent policy judgment," either to "recognize a [remedy] that Congress has denied" or to "limit a [remedy] that Congress has created." *Ibid.*

The question in this case, however, is not whether *Texas Gulf Sulphur* and similar lower-court cases were correctly decided. Regardless of whether those lower-court decisions correctly construed the securities laws' remedial provisions as they existed at that time, those decisions set the backdrop for the interpretation of the statutes that Congress subsequently enacted. And in five statutes enacted between 1988 and 2010, Congress substantially refined the remedial provisions that apply in SEC enforcement suits. The text and structure of those statutes show that Congress was aware of, relied

on, and ratified the preexisting view that disgorgement was a permissible remedy in civil actions brought by the Commission to enforce the federal securities laws.

a. The Insider Trading Act

In 1988, Congress passed and President Reagan signed the Insider Trading and Securities Fraud Enforcement Act of 1988 (Insider Trading Act), Pub. L. No. 100-704, 102 Stat. 4677. That statute contained a congressional finding that "the Commission has, within the limits of accepted administrative and judicial construction of [its] rules and regulations [regarding insider trading], enforced such rules and regulations vigorously, effectively, and fairly." § 2(2), 102 Stat. 4677. Congress further found that "nonetheless, additional methods are appropriate to deter and prosecute violations." § 2(3), 102 Stat. 4677.

In accordance with that purpose, the Insider Trading Act created a private right of action to sue persons who engage in insider trading. § 5, 102 Stat. 4680. The Act then provided:

> The total amount of damages imposed against any person [in such an action] shall be diminished by *the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission*, in a proceeding brought under section 21(d) of [the Exchange Act] relating to the same transaction or transactions."

§ 5, 102 Stat. 4681 (emphasis added). The italicized language demonstrates Congress's awareness of the prevailing judicial practice of awarding disgorgement in SEC enforcement actions. And when coupled with the express finding elsewhere in the same statute that the

SEC had been enforcing its rules "vigorously, effectively, and fairly," § 2(2), 102 Stat. 4677, the provision shows Congress's endorsement of that practice.

b. The Remedies Act

In addition to the provisions described above dealing with insider trading, the Insider Trading Act directed the Commission to study and submit recommendations for additional civil monetary penalties for other securities-law violations. § 3(c), 102 Stat. 4680. Two years later, after the SEC had submitted the required study, Congress passed and President George H.W. Bush signed the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act), Pub. L. No. 101-429, 104 Stat. 931.

The Remedies Act authorized the SEC to obtain civil monetary penalties in court for violations of the securities laws, with the penalties capped at a fixed sum or the amount of the gains from the violation, whichever is greater. See §§ 101, 201, 104 Stat. 932, 936. The Remedies Act also empowered the SEC to obtain, in administrative proceedings, both disgorgement and civil penalties. §§ 102, 202(a), 104 Stat. 935, 937-938. Those administrative civil penalties were subject to a lower cap, and were available for a narrower set of violations, than the penalties that a court could impose. *Ibid.* The long title explained that Congress was enacting the law "in order to provide *additional* enforcement remedies." 104 Stat. 931 (emphasis added). And the subsections on civil penalties provided: "REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring." §§ 101, 201, 104 Stat. 933, 936.

The design of the statute as a whole—granting courts broader power to award civil penalties, while granting the SEC narrower power to award civil penalties, plus power to order disgorgement—reflected Congress's apparent understanding that courts *already* had power to award disgorgement. The most natural order of operations is first to require the offender to return the money he swindled from his victims, and then to punish the offender by requiring him to pay a sum out of his own pocket. It would have made little sense for Congress to require judges to skip the first step of that remedial process and to jump straight to the second. And the structure of the civil-penalties provision—broader range and higher cap in judicial actions, narrower range and lower cap in administrative actions—shows that Congress meant to grant Article III judges *greater* remedial authority than it conferred on the Commission.

Petitioners view the Remedies Act's specific authorization for the SEC itself to order "disgorgement" as an indication that the more general term "equitable relief" in Section 21(d)(5) does not encompass that remedy. See Pet. Br. 17. But since the SEC lacks general equitable powers, and since the SEC had not previously been thought to have authority to order disgorgement in administrative actions, Congress understandably made that authorization specific. To the extent that statutory authority to seek retrospective monetary relief carries with it the potential for agency overreaching, that danger is presumably reduced if the final decision whether to award such relief is made by an Article III judge. It therefore would have been incongruous for Congress to authorize SEC personnel to order disgorgement while withholding that power from district

courts. Petitioners identify no policy rationale that might have led Congress to adopt that counterintuitive enforcement scheme.

The House and Senate Reports accompanying the Remedies Act confirmed the most natural understanding of the statute's text. The House Report observed that "courts have recognized that, in Commission actions, they have the inherent power to order disgorgement." H.R. Rep. No. 616, 101st Cong., 2d Sess. 31 (1990). It explained, however, that "[d]isgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engaging in securities fraud." *Id.* at 17. The Report stated that, for that reason, the "authority to seek or impose substantial money penalties, in addition to the disgorgement of profits, is necessary" to provide for "the deterrence of securities law violations." *Ibid.* It further observed that "[t]he Commission, of course, will continue to be able to seek disgorgement in its civil injunctive actions." *Id.* at 35. The Senate Report included similar language. See S. Rep. No. 337, 101st Cong., 2d Sess. 9-10 (1990). The House and Senate Reports thus confirmed that, in fashioning additional judicial and administrative remedies under the Remedies Act, Congress took as its baseline a remedial scheme in which courts *already* were authorized to award disgorgement in SEC civil actions.

c. The PSLRA

Congress next addressed disgorgement when it enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, over President Clinton's veto. That statute provided:

> Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, *funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action,* shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

§ 103(b)(1) and (2), 109 Stat. 756 (emphasis added). Consistent with the title, text, and structure of the Remedies Act that it had enacted five years earlier, Congress thus recognized that funds could be "disgorged" in either "an action brought by the Commission in Federal court" or a "Commission administrative action." *Ibid.*

d. The Sarbanes-Oxley Act

Seven years later, in response to a series of corporate and accounting scandals, Congress passed and President George W. Bush signed the Sarbanes-Oxley Act. Section 305(b) of that statute, 116 Stat. 779, amended the Exchange Act to add Section 21(d)(5), the provision authorizing courts to award "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). That provision expanded on the SEC's prior statutory authority to seek a judicial "injunction."

Section 308 of the Sarbanes-Oxley Act established a detailed collection scheme that assumed the availability of disgorgement in civil actions brought by the SEC. Congress has since amended Section 308, but at the time of enactment the provision read:

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any judicial or administrative action * * * the Commission obtains an order requiring disgorgement against any person * * * or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains * * * a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

(b) ACCEPTANCE OF ADDITIONAL DONATIONS.—The Commission is authorized to accept * * * gifts * * * for a disgorgement fund described in subsection (a). Such gifts * * * shall be deposited in the disgorgement fund and shall be available for allocation in accordance with subsection (a). * * *

(c) STUDY REQUIRED.— * * * The Commission shall review and analyze * * * proceedings to obtain civil penalties or disgorgements * * * [and] methods to improve the collection rates for civil penalties and disgorgement * * *

* * * * *

(e) DEFINITION.—As used in this section, the term "disgorgement fund" means a fund established in any administrative or judicial proceeding described in subsection (a).

Sarbanes-Oxley Act § 308, 116 Stat. 784-785.

In subsection (a) of that provision, Congress recognized that the SEC may obtain "an order requiring disgorgement" in a "judicial or administrative action," and that the SEC may "also" obtain a "civil penalty" in either type of proceeding. In subsection (e), Congress

again recognized that the SEC could obtain disgorgement in a "judicial" as well as an "administrative" proceeding. Subsections (a), (b), and (e) taken together created a detailed framework for depositing money in, accepting gifts for, and allocating money from a "disgorgement fund"—defined, again, to include a fund established in a "judicial" proceeding. And subsection (c) directed the SEC to find ways to "improve the collection rates for * * * disgorgements." Another Sarbanes-Oxley Act provision amended the Bankruptcy Code to state that a bankruptcy discharge does not relieve a debtor from any debt that is for the violation of federal or state securities laws and that results from "any *court* or administrative order for any damages, fine, penalty, citation, restitutionary payment, *disgorgement payment*, attorney fee, cost, or other payment owed by the debtor." § 803, 116 Stat. 801 (emphases added); see 11 U.S.C. 523(a)(19)(B)(iii).

e. The Dodd-Frank Act

Most recently, in 2010, Congress passed and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376. That statute modified the rules that govern the use of monetary awards entered by courts in SEC enforcement suits. As explained above, Section 308 of the Sarbanes-Oxley Act had authorized the addition of civil penalties to disgorgement funds, and the distribution of such penalties to investors, in proceedings where the SEC obtained both civil penalties and disgorgement in the same matter. § 308(a), 116 Stat. 784. The Dodd-Frank Act expanded that authority to encompass cases where the

SEC obtains civil penalties alone (*e.g.*, because the defendant has realized no gains and thus has nothing to disgorge). § 929B, 124 Stat. 1852.

The Dodd-Frank Act also authorized the SEC to pay monetary awards to whistleblowers whose information leads to a successful enforcement action. See § 922(a), 124 Stat. 1841. The permissible amount of such an award depends on a formula that takes into account "monies, including penalties, disgorgement, and interest, ordered to be paid" in the "judicial or administrative action." *Ibid.* Congress also established a fund "in the Treasury of the United States," to contain any disgorged moneys or civil penalties that are not deposited in "disgorgement funds" or that are "not distributed to victims." *Ibid.* Congress authorized the SEC to use that fund to pay for "awards to whistleblowers" and "the activities of the Inspector General." *Ibid.* In those provisions, Congress again recognized the availability of disgorgement in judicial actions; relied on that understanding in calibrating how much whistleblowers should be paid; recognized that money disgorged by the wrongdoer will not always go to victims; and authorized the use of undistributed funds to pay for whistleblower awards and the activities of the Inspector General.

Finally, the Dodd-Frank Act authorized the CFTC and Consumer Financial Protection Bureau (CFPB) to obtain disgorgement in civil actions. §§ 744, 1055(a)(2), 124 Stat. 1735, 2030. The CFTC provision bears the caption "EQUITABLE REMEDIES," and it states that the agency may obtain "equitable remedies including * * * disgorgement." § 744, 124 Stat. 1735.

3. The larger statutory context, and the history of the relevant provisions' development, confirm that disgorgement is a form of "equitable relief" authorized by Section 21(d)(5) of the Exchange Act

a. The series of statutes described above confirms Congress's intent that disgorgement be an available remedy in SEC enforcement suits. Congress has authorized courts in such suits to award "any equitable relief that may be appropriate or necessary for the benefit of investors," thus expanding the courts' prior authority to enter "injunction[s]" in such actions. Congress has also enacted numerous provisions that presuppose the availability of a disgorgement remedy and address the proper uses of funds disgorged in SEC suits.

As explained earlier, in Section 308 of the Sarbanes-Oxley Act, Congress recognized the availability of disgorgement in judicial actions, created rules for disgorgement funds, and ordered a study to find ways to improve the collection rates for disgorgements. See pp. 18-20, *supra*. And in Section 803, Congress created a new exception to the bankruptcy discharge that covers, among other things, court-ordered disgorgements. See p. 20, *supra*. The same Congress, in the same statute, could not have meant "any equitable relief" to exclude disgorgement, while simultaneously enacting numerous other provisions that presuppose the availability of disgorgement in judicial actions. To adopt that reading would violate the principle that "[t]he provisions of [the] text should be interpreted in a way that renders them compatible, not contradictory." *Maracich* v. *Spears*, 570 U.S. 48, 68 (2013) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 27, at 180 (2012)).

Other aspects of the larger statutory scheme reinforce the conclusion that disgorgement is a form of "equitable relief" under Section 21(d)(5). "[R]econciling many laws enacted over time, and getting them to 'make sense' in combination," is a "classic judicial task." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); see Scalia & Garner § 55, at 327. Over time, Congress has enacted multiple statutes that refer to disgorgement in SEC enforcement actions. The structure of the Remedies Act similarly makes sense only if disgorgement is available in such lawsuits. Interpreting the term "any equitable relief" in Section 21(d)(5) to encompass disgorgement harmonizes, gives effect to, and makes sense of the other statutory provisions that Congress has enacted in this field. The contrary reading nullifies Congress's express and persistent references to disgorgement in civil suits brought by the SEC.

b. That inference is particularly strong when the relevant statutes are viewed in sequence and against the backdrop of longstanding lower-court and SEC practice. A principle of interpretation known as the "prior-construction canon" states that, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, *or even uniform construction by inferior courts or a responsible administrative agency*, they are to be understood according to that construction." Scalia & Garner § 54, at 322 (emphasis altered); see, *e.g.*, *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U.S. 320, 336 (1934) (lower federal courts); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974) (agency). By the time Congress enacted Section 21(d)(5) in 2002, the lower federal courts had uniformly treated disgorgement as an appropriate equitable adjunct to an injunction in

SEC suits—as had the Commission, the responsible administrative agency. To the extent that the status of disgorgement as a form of "equitable relief" is otherwise uncertain, that background understanding should inform the Court's construction of the term as it appears in Section 21(d)(5).

Indeed, the rationale for applying the prior-construction principle is substantially more compelling here than in the typical case. In construing newly enacted statutes against the backdrop of prior judicial decisions, this Court ordinarily must "*assume* that Congress is aware of existing law when it passes legislation." *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (emphasis added). And a typical application of the prior-construction canon involves the "reenacting" of the relevant provision "without substantial change." *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920); see Scalia & Garner § 54, at 322.

Here, by contrast, the relevant text and history prove that Congress was *in fact* aware of the lower courts' and the agency's position when it enacted Section 21(d)(5). See pp. 13-21 *supra*. And rather than simply reenacting statutory language that had previously been construed to authorize disgorgement orders, Congress enacted new language that substantially strengthened that conclusion. For regardless of whether the prior statutory authorization for courts in SEC enforcement suits to enter "injunction[s]," standing alone, was correctly construed to authorize disgorgement, the current statutory language—"any equitable relief"—clearly does encompass that remedy. Moreover, in the Insider Trading Act, Congress both found that the SEC had been enforcing its rules on insider trading "vigorously, effectively, and fairly," § 2(2), 102 Stat. 4677, and

enacted language reflecting an awareness that the SEC had previously obtained "disgorge[ment]" in insider-trading cases "brought under section 21(d)," § 5, 102 Stat. 4681. And in the Sarbanes-Oxley Act, Congress established a framework for managing disgorgement funds, § 308(a)-(b), 116 Stat. 784; ordered the SEC to study methods to improve the collection rates for disgorgements, § 308(c), 116 Stat. 785; and exempted disgorgement payments in securities cases from the bankruptcy discharge, § 803, 116 Stat. 801. In short, there is no basis for concluding that, in adopting the sweeping phrase "any equitable relief," Congress meant to *withhold* a remedy that the SEC, lower courts, and Congress believed already existed.

c. Petitioners lack a convincing response to those contextual and historical arguments. Petitioners invoke the principle that congressional acquiescence in an interpretation cannot properly be inferred simply from "'the absence of corrective legislation,'" "congressional silence," "congressional * * * inaction," "a mere 'failure to overturn a statutory precedent,'" or "'failed legislative proposals.'" Pet. Br. 35-40 (citations omitted). The SEC, however, has relied not on mere congressional inaction or failed legislative proposals, but on the "statutory history"—that is, "the record of *enacted* changes Congress made to the relevant statutory text over time." *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting). Those enacted changes —embodied in bills "passed by a majority of both houses of Congress and signed by the President," Pet. Br. 14—provide compelling textual evidence about the meaning of the term "any equitable relief." See Scalia & Garner § 54, at 326 (distinguishing "presumed legis-

lative approval of prior judicial or administrative interpretations in statutes adopted after those interpretations" from "[t]he mere failure of a legislature to correct extant lower-court, intermediate court, or agency interpretations").

Petitioners also observe (Br. 35) that "agencies obtain authority from Congress's actions, not Congress's presuppositions." That observation is correct, but it is irrelevant here. Congress's enactment of a series of statutes that presuppose the availability of a disgorgement remedy in SEC enforcement suits cannot by itself make that remedy proper. But to the extent Section 21(d)(5)'s language ("any equitable relief that may be appropriate or necessary for the benefit of investors") were otherwise ambiguous—and it is not—the abundant contextual evidence that Congress viewed disgorgement as an available remedy is highly relevant to the resolution of any such ambiguity. "It is, of course, the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.).

Finally, petitioners identify (Br. 39) what they describe as "countervailing evidence suggesting a different legislative understanding"—namely, a currently pending legislative proposal to amend the securities laws to include a specific authorization for disgorgement in SEC civil actions. Unlike the evidence on which the SEC has relied, petitioners' "countervailing evidence" appears in a single unenacted bill rather than in enacted law. In any event, that bill was introduced after petitioners sought a writ of certiorari in this case, and it passed the House of Representatives after this Court

granted that writ. Compare H.R. 4344, 116th Cong. 1st Sess. (Sept. 17, 2019) (as introduced), and H.R. 4344, 116th Cong., 1st Sess. (Nov. 18, 2019) (as passed the House of Representatives), with 2019 WL 5659111 (granting petition) (Nov. 1, 2019). It thus shows at most that some lawmakers are uncertain about what decision the Court will reach in this case—not that "the current House of Representatives * * * thinks that existing law does not authorize disgorgement." Pet. Br. 40.

II. PETITIONERS' ARGUMENTS LACK MERIT

A. Petitioners' Legal Arguments Lack Merit

Petitioners argue that disgorgement, as obtained by the SEC, does not constitute Section 21(d)(5) "equitable relief" for five main reasons: (1) Congress has granted the SEC the power to obtain other remedies and has specifically authorized disgorgement in other circumstances, (2) disgorgement as obtained by the SEC lacks an exact Founding-era analog, (3) disgorgement as obtained by the SEC serves punitive purposes, (4) the disgorged funds may go to the Treasury rather than to the victims, and (5) the amount of the disgorgement may exceed the defendant's profit. Those arguments are unsound.

1. Statutory provisions that specifically authorize disgorgement orders in other circumstances do not preclude courts in SEC enforcement suits from ordering disgorgement under Section 21(d)(5)

Petitioners argue (Br. 15-19) that the Remedies Act implicitly precludes the SEC from obtaining disgorgement by creating a detailed system of civil penalties and by authorizing disgorgement in administrative proceedings, and that the Dodd-Frank Act implicitly precludes such relief by authorizing courts to order disgorgement

in suits brought by two other federal agencies. That is incorrect.

Section 21(d)(5) of the Exchange Act authorizes the court in an SEC enforcement suit to award "any equitable relief that may be appropriate or necessary for the benefit of investors." Congress placed no constraints on the forms of equitable relief that courts in such actions may award, other than the requirement that equitable remedies be "appropriate or necessary for the benefit of investors." Section 21(d)(5)'s broad catchall language would serve no useful purpose if courts could award only those forms of equitable relief that are specifically authorized by other statutory provisions.

As explained above, moreover, the long title of the Remedies Act states that the law creates *additional* remedies; the Act's text includes express disclaimers making clear that those remedies are not exclusive; the structure of the statute presupposes the continued availability of disgorgement in judicial proceedings; and the accompanying House and Senate Reports state that disgorgement will continue to be available in civil actions. See pp. 15-17, *supra*. Petitioners' arguments contradict all of those indicators of statutory meaning. Compare Pet. Br. 15 ("[T]he explicit authorization of certain remedies is 'strong evidence that Congress did *not* intend to authorize other remedies.'") (citation omitted), with Remedies Act § 101, 104 Stat. 933 ("REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring."). And petitioners identify no plausible reason that Congress would have authorized the Commission, but not an Article III court, to order violators

of the securities laws to disgorge their illicit gains. See pp. 16-17, *supra*.

The Dodd-Frank Act, which specifically authorizes the CFTC and CFPB to obtain disgorgement in judicial proceedings, likewise does not support petitioners' argument. By the time that statute was enacted, courts had been awarding the SEC disgorgement for four decades; Congress had enacted multiple statutes presupposing the availability of that remedy in SEC suits; and Congress had already granted courts broad power to award "any equitable relief." See pp. 13-20, *supra*. *Granting* disgorgement authority to other agencies would have been an oblique way of *withdrawing* that authority from the SEC. And because the pertinent CFTC provisions refer to disgorgement as an "equitable remed[y]," Dodd-Frank Act § 744, 124 Stat. 1735, it would be especially counterintuitive to infer from those provisions that disgorgement in an SEC suit is *not* a form of "equitable relief."

2. Historical practice does not support petitioners' cramped reading of Section 21(d)(5)

Petitioners contend (Br. 26-28) that a remedy is "equitable" within the meaning of Section 21(d)(5) only if it has a "close historical analogue" in a "Founding-era action" from "before the merger of law and equity." Nothing in the text or context of Section 21(d)(5) supports that reading.

Petitioners rely in part (Br. 26-27) on *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In that case, this Court held that a court's general equity powers under the Judiciary Act of 1789, ch. 20, 1 Stat. 73, depend on the scope of equity jurisdiction "at the time * * * of the original Judiciary Act, 1789." 527 U.S. at 318 (citation omitted). Because

Section 21(d)(5) was enacted in 2002, however, its meaning turns on the principles of equity that prevailed at that time.

Petitioners also invoke (Br. 26) this Court's decisions interpreting the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* But in those cases, this Court explained that whether Congress meant to recreate historical distinctions between legal and equitable remedies "remains a question of interpretation in each case." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 257 (1993). The Court acknowledged that, "[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past, [that] meaning becomes, perhaps, increasingly unlikely." *Id.* at 256-257. But reading the statutory language "[i]n the context of [ERISA]" and the context of the particular suit before it, the Court concluded that Congress had authorized only "those categories of relief that were typically available in equity" before the merger of law and equity, "such as injunction, mandamus, and restitution, but not compensatory damages." *Ibid.* (emphasis omitted). The Court emphasized that the contrary reading would "deprive of all meaning" distinctions that Congress had drawn elsewhere in the statute and would distort the structure of ERISA's "'comprehensive and reticulated'" remedial scheme. *Id.* at 251, 258 (citation omitted).

Nothing in Section 21(d)(5), or in the federal securities laws more generally, suggests that Congress intended to require courts in present-day SEC enforcement suits to adhere to the "technical refinements" of pre-merger equity. *Mertens*, 508 U.S. at 257. To the contrary, the provision's reference to "any equitable relief" evidences Congress's intent to grant courts the

power to award any form of equitable relief that had become accepted as of 2002, not to confine them to the particular forms of equitable relief deployed by 18th century chancellors. Petitioners' argument is also inconsistent with the abundant references to "disgorgement" in other securities-law provisions that govern SEC enforcement suits. And there is no sound reason to believe that Congress meant to require a claim for relief brought by the SEC (an administrative agency) to have a close analog from 1789 (a time before administrative agencies). In these circumstances, it is petitioners' reading that would undermine Congress's "comprehensive and reticulated" enforcement scheme. *Id.* at 251 (citation omitted).

In any event, the SEC has identified a close historical analog for the remedy of disgorgement: the traditional equitable remedy of accounting. "That the term 'disgorgement' has entered common legal parlance only recently cannot obscure that the ancient remed[y] of accounting * * * compelled wrongdoers to 'disgorge'—*i.e.*, account for and surrender—their ill-gotten gains for centuries." *SEC* v. *Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006) (citation omitted). Petitioners object (Br. 28) that accounting was unavailable in circumstances similar to those here, but courts of equity have long ordered those who commit fraud to account for their profits. See, *e.g.*, *Dickson* v. *Patterson*, 160 U.S. 584, 592 (1896). Petitioners also object (Br. 32) that the SEC does not trace monies to be disgorged to any particular asset or fund, but an accounting has always allowed a plaintiff to recover illicit gains "even if he cannot identify a particular res containing the profits sought to be recovered." *Great-West Life & Annuity Insurance Co.*

v. *Knudson*, 534 U.S. 204, 214 n.2 (2002). And while petitioners object (Br. 32) to joint and several liability for disgorgement, courts of equity have long held wrongdoers jointly and severally liable for profits in appropriate cases. See, *e.g.*, *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921).

3. The punitive features of disgorgement do not remove it from the scope of Section 21(d)(5)

Petitioners argue (Br. 19-26) that courts of equity traditionally refrained from imposing penalties; that this Court held in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017), that disgorgement is a penalty; and that disgorgement therefore cannot constitute "equitable relief" within the meaning of Section 21(d)(5). That line of reasoning is faulty.

a. In *Kokesh*, the Court held that a suit for disgorgement brought by the SEC is subject to the five-year federal statute of limitations applicable to an action for a "penalty," 28 U.S.C. 2462. The Court explained that disgorgement bears three "hallmarks of a penalty": it is "imposed as a consequence of violating a public law," it is "intended to deter," and it is "not compensatory." *Kokesh*, 137 S. Ct. at 1644. The Court "emphasized 'the fact that sanctions frequently serve more than one purpose,'" and it acknowledged that "disgorgement serves compensatory goals in some cases." *Id.* at 1645 (citation omitted). The Court cautioned that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Id.* at 1642 n.3.

Petitioners argue (Br. 25) that, because disgorgement constitutes a "penalty" under Section 2462, it must

also qualify as a "penalty" for purposes of the purported rule that "[p]enalties are not available at equity." Pet. Br. 20 (emphasis omitted). But "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them * * * has all the tenacity of original sin and must constantly be guarded against." *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (citation omitted). In particular, "the words 'penal' and 'penalty' have been used in various senses," and "there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language." *Huntington* v. *Attrill*, 146 U.S. 657, 666-667 (1892). In *Kokesh*, the consequence of the Court's decision was not to preclude or even to place special restrictions on SEC claims for disgorgement, but simply to ensure that such claims—like virtually all claims for retrospective monetary relief—must be brought within a period of time defined by statute. See 137 S. Ct. at 1641-1642 (noting centrality of limitations provisions to our legal system). The Court thus took care to refer to "a 'penalty' within the meaning of § 2462," *id.* at 1639; "a 'penalty' within the meaning of the statute of limitations," *id.* at 1643; "'[p]enalties' in the context of § 2462," *ibid.* (citation omitted); "penalty within the meaning of § 2462," *ibid.*; and "a penalty under § 2462," *id.* at 1645.

The three hallmarks of a penalty identified in *Kokesh*, individually and taken together, do not cast doubt on disgorgement's status as "equitable relief." The Court first observed that disgorgement in SEC suits is imposed for violation of "a public law." *Kokesh*, 137 S. Ct. at 1644. But equitable remedies (most obvi-

ously injunctions and declaratory judgments) are routinely premised on violations of federal statutes. Indeed, because "equitable powers assume an even broader and more flexible character" when "the public interest is involved," *Porter*, 328 U.S. at 398; accord *Kansas*, 574 U.S. at 456, it would be anomalous to view that factor as weighing *against* the treatment of disgorgement as an equitable remedy.

The second factor that the *Kokesh* Court identified is that a disgorgement remedy serves "to deter." 137 S. Ct. at 1644. But equitable remedies often have a deterrent effect: Most obviously, "[t]he historic injunctive process was designed to deter." *The Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). *Kokesh*'s third factor asks whether the remedy is compensatory. Yet equitable remedies are *usually* non-compensatory, since awarding compensatory damages is ordinarily the role of the jury rather than the chancellor. To give an example that combines all three factors: The constructive-trust remedy that prevents murderers from inheriting their victims' estates is imposed upon violation of the law against murder, serves in part to deter murder, and does not compensate—yet it has always been considered equitable. See Restatement (First) of Restitution § 187 (1937).

b. The relevant federal securities statutes treat "disgorgement" and "penalties" as distinct forms of monetary relief. The Remedies Act empowers the SEC to assess civil penalties in administrative proceedings in a subsection captioned "COMMISSION AUTHORITY TO ASSESS MONEY PENALTIES," while authorizing the agency to order disgorgement in administrative proceedings in a separate subsection captioned "AUTHORITY TO ENTER

AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT." § 202(a), 104 Stat. 937-938. The Sarbanes-Oxley Act refers to "any court or administrative order for any damages, fine, *penalty*, citation, restitutionary payment, *disgorgement payment*, attorney fee, cost, or other payment." § 803, 116 Stat. 801 (emphases added). And the Dodd-Frank Act refers to "monies, including *penalties*, *disgorgement*, and interest." § 922(a), 124 Stat. 1842, (emphasis added). With respect to the proper interpretation of the term "any equitable relief" in Section 21(d)(5), those provisions have far greater probative value than does this Court's construction of the term "penalty" in an unrelated catchall limitations provision that is not specific to securities law.

Courts of equity have long ordered accounting or disgorgement despite its punitive features. This Court held 150 years ago that, when a court of equity orders an accounting, "the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender." *Rubber Co.* v. *Goodyear*, 76 U.S. (9 Wall.) 788, 804 (1870). In *Porter*, the Court stated that "a decree compelling one to disgorge profits" constituted an "equitable" order, while acknowledging disgorgement's deterrent potential by observing that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 398-400. In *Tull*, the Court stated that "disgorgement of improper profits, traditionally considered an equitable remedy," is a "limited form of penalty." 481 U.S. at 424. And in *Kansas*, this Court awarded disgorgement against a State under the Court's "equitable power," while explaining that "[the] disgorgement award appropriately reminds [the wrongdoer] of its legal obligations" and "deters future violations." 574 U.S.

at 463. Those decisions make clear that disgorgement can constitute "equitable relief" notwithstanding the punitive elements identified in *Kokesh*.

4. The fact that disgorged funds are not always distributed to victims does not remove disgorgement from the scope of Section 21(d)(5)

Petitioners contend (Br. 34) that disgorgement cannot qualify as an equitable remedy because the disgorged funds may sometimes be deposited in the Treasury. That is mistaken.

a. The SEC aims to return disgorged funds to injured investors where possible. In Fiscal Year 2019, the SEC had a total of $1.9 billion in disgorgement and penalties assets and held $1.7 billion of that sum for distribution to harmed investors. SEC, *Fiscal Year 2019 Agency Financial Report* 90 (2019). In that year, the SEC collected $1.5 billion in new disgorgements and penalties, and paid out $1.2 billion to harmed investors. *Ibid.* In the same year, the SEC transferred $150 million to the Treasury. *Ibid.*

In asserting that distributions to investors represent the "exception," petitioners observe that, in Fiscal Year 2019, parties "were ordered" to pay $3.2 billion in disgorgement, but that harmed investors received $1.2 billion. Pet. Br. 7. That comparison is faulty, both because the amounts that courts *order* parties to disgorge often far exceed the amounts that the SEC *collects*, and because the complexity of frauds often leads to a time lag between the collection and the distribution of the money. In this case, for example, the SEC has been unable to collect the judgment because petitioners transferred the bulk of their misappropriated funds to China, defied the district court's order to repatriate those funds, and fled the United States. Pet. App. 21a-22a. In

other cases, parties have sometimes satisfied disgorgement orders through criminal forfeiture based on the same violations or through remittances to court-appointed receivers; the SEC does not include such sums in calculating amounts it has distributed to injured investors, even though the other entities that collect those sums may distribute them to the victims. See *Fiscal Year 2019 Agency Financial Report* 90.

b. To be sure, disgorged funds are not always distributed to investors. In some cases, it may be infeasible to identify (and hence to distribute funds to) injured investors. Funds likewise might not be distributed to harmed parties in cases where the cost of distribution would exceed the amount each investor would receive. And in some cases, such as those involving corporate bribes or insider trading, there may be no clear universe of injured investors. But disgorgement can constitute appropriate "equitable relief" under Section 21(d)(5) even when particular sums are not returned to the investors who were harmed by the defendant's wrongdoing.

In traditional practice, the "controlling" aim of accounting was to ensure that a wrongdoer "shall not profit by his wrong." *Rubber Co.*, 76 U.S. (9 Wall.) at 804. That is why, in the court of chancery, "[g]ains were to be disgorged even though they could not be shown to correspond with any disadvantage suffered by the other party." *Attorney General* v. *Blake*, [2001] 1 A.C. 268 (H.L.) 280 (appeal taken from Eng.). Courts have similarly understood that "the primary purpose of [SEC] disgorgement" is to "forc[e] a defendant to give up the amount by which he was unjustly enriched," "not to compensate investors." *Commonwealth Chemical Securities*, 574 F.2d at 102; see 6 Louis Loss, *Securities*

Regulation 3574 (2d ed. Supp. 1969) ("[I]t is more important to take the profit away from the [wrongdoer] than to worry about who gets it."). Disgorgement can serve that traditional purpose even where no victim receives the disgorged money. Courts have long held that the SEC may obtain disgorgement even where the funds go to the Treasury, see, *e.g.*, *Fischbach Corp.*, 133 F.3d at 177; *SEC* v. *Blavin*, 760 F.2d 706, 710 (6th Cir. 1985) (per curiam), and Congress was presumptively aware of that practice when it enacted Section 21(d)(5) in 2002.

c. The disgorgement remedy as implemented by the SEC achieves benefits traditionally associated with both disgorgement and restitution. To the (substantial) extent that the SEC's efforts to return money to victims are successful, disgorgement orders entered in Commission enforcement suits have the same practical effects as restitution orders. And with respect to disgorged funds that are not returned to victims, disgorgement ensures that securities-law violators do not profit from their own wrongs.

The securities-law provisions that govern available remedies in SEC enforcement actions reflect Congress's unambiguous approval of that hybrid scheme. The Sarbanes-Oxley Act provisions that govern each "disgorgement fund for the benefit of the victims of [a] violation," § 308(a), 116 Stat. 784, reflect Congress's intent that disgorged funds (and potentially civil penalties and additional donations as well) will be used when possible to compensate victims. See pp. 13-21, *supra*. The Dodd-Frank Act, however, reflects with equal clarity Congress's recognition that distribution of disgorged funds to victims will not always be feasible.

The Dodd-Frank Act includes a series of provisions governing the collection and use of money that is contained in a "disgorgement fund" but "is not distributed to the victims for whom the Fund was established." § 922(a), 124 Stat. 1844. Congress "established in the Treasury of the United States a fund" to which disgorged but undistributed sums may go, and it authorized the use of that fund to pay for "awards to whistleblowers" and "the activities of the Inspector General." *Ibid.* Those specific provisions make clear that, in the context of SEC enforcement actions, Congress did not view distribution of funds to injured investors as a prerequisite to a valid disgorgement order.

d. Petitioners observe (Br. 30 n.14) that Section 21(d)(5) authorizes "any equitable relief that may be appropriate or necessary for the benefit of investors," and they contend that disgorgement is not "for the benefit of investors" unless the disgorged funds are distributed to the victims who were injured by the defendant's wrongdoing. Petitioners do not meaningfully develop that argument, and it reflects an unnatural reading of the statutory language.

Section 21(d)(5) uses the broad phrase "for the benefit of investors," not the narrower phrase "for the benefit of victims." The SEC aims to return funds to the defendant's victims, but even where it cannot do so, disgorgement still benefits investors as a class by deterring future violations. And, as explained above, Congress has enacted detailed provisions that specify the appropriate treatment of disgorged funds that are *not* distributed to victims, and that provide in particular that such funds may be used for specified investor-protective purposes, such as paying whistleblowers who

help the government identify and bring successful enforcement suits against violators. Petitioners' cramped reading of the phrase "for the benefit of investors" in Section 21(d)(5) would effectively negate that aspect of the statutory scheme.

5. Disgorgement can be an appropriate equitable remedy even when it leaves the defendant worse off than he would have been if the violation had not occurred

Petitioners argue (Br. 32) that disgorgement cannot qualify as an equitable remedy because the size of the disgorgement award can sometimes exceed the wrongdoer's gains. That too is incorrect.

Traditionally, accounting or disgorgement has been limited to a defendant's profits, and courts have allowed appropriate deductions for costs incurred in the course of producing those gains. Third Restatement § 51(4). But courts of equity have long limited deductions to "actual and legitimate" expenses. *Callaghan* v. *Myers*, 128 U.S. 617, 665 (1888). A wrongdoer is not "allowed to diminish the show of profits by putting in unconscionable claims * * * or other inequitable deductions." *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 139 (1878). And in general, "every doubt and difficulty should be resolved against" the wrongdoer. *Rubber Co.*, 76 U.S. (9 Wall.) at 803-804. Courts have understood that those rules would sometimes leave the wrongdoer worse off than if he had followed the law, but they have reasoned that "[t]he conduct of the [wrongdoers] has not been such as to commend them to the favor of a court of equity," *id.* at 803; that "[a] more favorable rule would offer a premium to dishonesty," *id.* at 804; and that a wrongdoer who finds himself in a worse position "has only himself to blame," *Callaghan*, 128 U.S. at 666 (citation omitted).

The approach to disgorgement taken by the SEC and the lower courts in securities cases generally comports with those principles. Courts have held that disgorgement is limited to a "reasonable approximation of profits causally connected to the violation." *SEC* v. *JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-1114 (9th Cir. 2006) (citation omitted); see, *e.g.*, *SEC* v. *Patel*, 61 F.3d 137, 139-140 (2d Cir. 1995); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104-1105 (2d Cir. 1972). They have acknowledged that a defendant may be permitted to claim appropriate deductions. See, *e.g.*, *JT Wallenbrock*, 440 F.3d at 1114-1115; *SEC* v. *Smyth*, 420 F.3d 1225, 1230, 1233 (11th Cir. 2005); *SEC* v. *McCaskey*, No. 98-cv-6153, 2002 WL 850001, at *4 (S.D.N.Y. Mar. 26, 2002); *SEC* v. *Rosenfeld*, No. 97-cv-1467, 2001 WL 118612, at *2 (S.D.N.Y. Jan. 9, 2001); *SEC* v. *Thomas James Assocs., Inc.*, 738 F. Supp. 88, 94-95 (W.D.N.Y. 1990); *Litton Indus., Inc.* v. *Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990). But they have refused to allow inequitable deductions, for example where the cost was incurred for the very purpose of furthering the fraud. See *JT Wallenbrock*, 440 F.3d at 1114.

The district court's computation of the disgorgement award in this case accords with those principles. The court acknowledged that disgorgement is limited to a "reasonable approximation of profits causally connected to the violation." Pet. App. 40a (citations omitted). It disallowed petitioners' claimed "expenses," finding that many of them were disguised payments to petitioners themselves, designed to siphon money out of corporate accounts and into petitioners' personal accounts. *Id.* at 15a-18a, 21a, 33a. The court also judged that other claimed expenses were incurred in an effort

"to convey the illusion of progress" to investors—in other words, in furtherance of the fraud itself. *Id.* at 18a. The disallowance of those expenses is consistent with the principles that a wrongdoer may claim only "actual and legitimate" costs, *Callaghan*, 128 U.S. at 665, and that a wrongdoer may not put in "unconscionable claims" or "inequitable deductions," *Pavement Co.*, 97 U.S. at 139—even if that leaves him worse off than if he had not violated the law.

In any event, the question on which this Court granted certiorari is whether disgorgement in SEC enforcement actions is a permissible remedy *at all*. Even if petitioners could demonstrate that some courts have awarded excessive *amounts* of disgorgement, either in this case or in other SEC enforcement actions, that showing would suggest at most that courts should exercise greater care in the fact-intensive task of ensuring that particular disgorgement awards are "appropriate or necessary" under Section 21(d)(5). It would not cast doubt on the established understanding that disgorgement, if properly calculated, is an available form of "equitable relief" under that provision.

B. Petitioners' Practical Arguments Are Unsound

Petitioners assert (Br. 2) that "[n]ot much" would happen if the SEC were unable to obtain disgorgement in civil actions. Quite the contrary, such a holding would "revolutionize[] SEC enforcement proceedings." *SEC* v. *Team Resources Inc.*, 942 F.3d 272, 277 (5th Cir. 2019).

1. Most obviously, forbidding courts to order disgorgement in SEC suits would make it easier for wrongdoers to keep their ill-gotten gains, thereby reducing the deterrent effect of the current remedial scheme. That result would undermine the efforts of Congress

and the SEC to ensure that "the highest ethical standards prevail in every facet of the securities industry." *Kokesh*, 137 S. Ct. at 1640 (citation omitted). It would also contravene a principle "deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong." Benjamin N. Cardozo, *The Nature of the Judicial Process* 41 (1921).

Depriving courts of power to order disgorgement would also harm defrauded investors. "SEC enforcement actions have collected * * * billion[s] in disgorgement and penalties, much of it for distribution to injured investors." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008); see generally Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331 (2015). Victims left without recourse to the SEC's disgorgement funds would have to bring their own private lawsuits—a task complicated by the fact that this Court has previously invoked the availability of disgorgement in SEC suits as a reason to give a "narrow" scope to the investors' private right of action. *Stoneridge*, 552 U.S. at 167.

2. Petitioners suggest (Br. 42) that a disgorgement remedy is unnecessary because the Commission may still seek civil penalties in court. Petitioners misunderstand the relationship between civil penalties and disgorgement in the overall remedial scheme.

When it first authorized civil penalties in 1990, Congress was aware that courts had awarded disgorgement in SEC suits, but it viewed that remedy as insufficient standing alone, since an order that simply restores a defendant (if he is caught) to the position he would have occupied but for the violation may not adequately deter

wrongdoing. See pp. 15-17, *supra*. To ensure that the remedial scheme as a whole would have an adequate deterrent effect, the 1990 Congress authorized courts to award penalties *in addition to* disgorgement. And when it set the maximum civil penalty at the amount of the defendant's pecuniary gain, Congress anticipated that the civil penalty so calculated would still operate as a true penalty, since it would supplement the existing disgorgement remedy. Eliminating the disgorgement remedy would re-introduce the very inadequacy that Congress intended the civil-penalty mechanism to address, since the penalty standing alone would at most force the wrongdoer to surrender his illicit gains.

3. Petitioners also observe (Br. 40-41) that the SEC may order disgorgement in administrative proceedings. But the SEC's administrative law judges, unlike Article III judges, lack a general power to award equitable relief designed to ensure that disgorgement orders are paid. In this case, for example, the district court froze petitioners' assets, placed their corporate entities under a monitor, and ordered petitioners to repatriate their assets. See Pet. App. 19a-20a. The SEC could not have obtained such relief in an administrative action.

Finally, petitioners suggest (Br. 43) that the SEC could bring "both" a judicial action for civil penalties and a parallel administrative action for disgorgement. That option would not resolve the shortcomings of administrative actions just identified. It would also introduce a new shortcoming, by encouraging a multiplicity of suits. Section 21(d)(5)'s plain language—authorizing "any equitable relief"—helps avoid that unnecessary and inefficient result.

* * * * *

In the final analysis, the logical applicability of traditional disgorgement principles to suits brought by the SEC is open to reasonable dispute. One could view the award of disgorgement in this setting as a substantial departure from traditional norms (since disgorgement was historically awarded to private plaintiffs whose own legal rights had been violated), or instead as a natural means of achieving the traditional objective of disgorgement (ensuring that a wrongdoer does not profit from his wrong). The Court's task in this case is not to determine which of those views the Court finds most persuasive. The Constitution entrusts to Congress, not to the courts, the power to determine whether (and subject to what conditions) disgorgement should be available in SEC enforcement actions. And "as a matter of statutory construction," what governs is the meaning of the statute, not "the accuracy of the historical justifications on which [that meaning] was seemingly based." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700 (1992). The Court's task, instead, is simply to interpret the words "any equitable relief" in Section 21(d)(5) in light of all available indicia of congressional intent. The statutory text, the statutory context, and traditional principles of statutory interpretation all show that "any equitable relief" includes disgorgement as obtained by the SEC.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2020

APPENDIX

1. 15 U.S.C. 78u(d)(5) provides:

Investigations and actions

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

2. Securities Act of 1933, ch. 38, Tit. I, § 20(b), 48 Stat. 86 provides:

SEC. 20. (b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the

transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

3. Securities Exchange Act of 1934, ch. 404, § 21(a), 48 Stat. 899 provides:

SEC. 21. (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

4. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 provides in pertinent part:

* * * * *

SEC. 2. FINDINGS.

The Congress finds that—

(1) the rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934 governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors;

(2) the Commission has, within the limits of accepted administrative and judicial construction of such rules and regulations, enforced such rules and regulations vigorously, effectively, and fairly; and

(3) nonetheless, additional methods are appropriate to deter and prosecute violations of such rules and regulations.

* * * * *

SEC. 5. LIABILITY TO CONTEMPORANEOUS TRADERS FOR INSIDER TRADING.

The Securities Exchange Act of 1934 is amended by inserting after section 20 the following new section:

* * * * *

"SEC. 20A. (a) PRIVATE RIGHTS OF ACTION BASED ON CONTEMPORANEOUS TRADING.—Any person who violates any provision of this title or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

"(b) LIMITATIONS ON LIABILITY.—

* * * * *

(2) OFFSETTING DISGORGEMENTS AGAINST LIABILITY.—The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 21(d) of this title relating to the same transaction or transactions.

* * * * *

5. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 provides in pertinent part:

An Act To amend the Federal securities laws in order to provide additional enforcement remedies for violations of those laws and to eliminate abuses in transactions in penny stocks, and for other purposes.

* * * * *

TITLE I—AMENDMETNS TO THE SECURITIES ACT OF 1933

SEC. 101. AUTHORITY OF A COURT TO IMPOSE MONEY PENALTIES AND TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.

Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end thereof the following new subsections:

"(d) MONEY PENALTIES IN CIVIL ACTIONS.—

"(1) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 8A of this title, other than by committing a violation subject to a penalty pursuant to section 21A of the Securities Exchange Act of 1934, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

"(2) AMOUNT OF PENALTY.—

"(A) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

"(B) SECOND TIER.—Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

"(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the amount of penalty for each

such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

"(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

"(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

"(3) PROCEDURES FOR COLLECTION.—

"(A) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States.

"(B) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

"(C) REMEDY NOT EXCLUSIVE.—The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

* * * * *

SEC. 102. CEASE-AND-DESIST AUTHORITY.

The Securities Act of 1933 (15 U.S.C. 77 et seq.) is amended by inserting after section 8 the following:

"CEASE-AND-DESIST PROCEEDINGS

"SEC. 8A. (a) AUTHORITY OF THE COMMISSION.—If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this title, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

* * * * *

"(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and

disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.".

TITLE II—AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934

SEC. 201. ENFORCEMENT OF TITLE.

Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended—

* * * * *

by inserting after subsection (d)(1) the following new paragraphs:

* * * * *

"(3) MONEY PENALTIES IN CIVIL ACTIONS.—

"(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 21C of this title, other than by committing a violation subject to a penalty pursuant to section 21A, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

"(B) AMOUNT OF PENALTY.—

"(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

"(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

"(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

> "(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and
>
> "(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

* * * * *

"(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

* * * * *

SEC. 202. CIVIL REMEDIES IN ADMINISTRATIVE PROCEEDINGS.

(a) The Securities Exchange Act of 1934 is amended by inserting after section 21A (15 U.S.C. 78u-1) the following:

"CIVIL REMEDIES IN ADMINISTRATIVE PROCEEDINGS

"SEC. 21B. (a) COMMISSION AUTHORITY TO ASSESS MONEY PENALTIES.—In any proceeding instituted pursuant to sections 15(b)(4), 15(b)(6), 15B, 15C, or 17A of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such person—

"(1) has willfully violated any provision of the Securities Act of 1933, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or this title, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;

"(2) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

"(3) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this title, or in any

proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or

"(4) has failed reasonably to supervise, within the meaning of section 15(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;

and that such penalty is in the public interest.

"(b) MAXIMUM AMOUNT OF PENALTY.—

"(1) FIRST TIER.—The maximum amount of penalty for each act or omission described in subsection (a) shall be $5,000 for a natural person or $50,000 for any other person.

"(2) SECOND TIER.—Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

"(3) THIRD TIER.—Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

"(A) the act or omission described in subsection (a) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

"(B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

* * * * *

"(e) AUTHORITY TO ENTER AN ORDER REQUIRING AN ACCOUNTING AND DISGORGEMENT.—In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.".

* * * * *

6. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, Tit. I, § 103, 109 Stat. 756 provides in pertinent part:

SEC. 103. ELIMINATION OF CERTAIN ABUSIVE PRACTICES.

* * * * *

(b) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—

(1) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(f) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.".

* * * * *

7. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 provides in pertinent part:

* * * * *

TITLE III—CORPORATE RESPONSIBLITY

* * * * *

SEC. 305. OFFICER AND DIRECTOR BARS AND PENALTIES.

* * * * *

(b) EQUITABLE RELIEF.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended by adding at the end the following:

"(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."

* * * * *

SEC. 308. FAIR FUNDS FOR INVESTORS.

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant

to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

(b) ACCEPTANCE OF ADDITIONAL DONATIONS.—The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United States for a disgorgement fund described in subsection (a). Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the disgorgement fund and shall be available for allocation in accordance with subsection (a).

(c) STUDY REQUIRED.—

(1) SUBJECT OF STUDY.—The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding the date of the enactment of this Act that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs

of the Senate within 180 days after of the date of the enactment of this Act, and shall use such findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study.

* * * * *

(e) DEFINITION.—As used in this section, the term "disgorgement fund" means a fund established in any administrative or judicial proceeding described in subsection (a).

* * * * *

TITLE VIII—CORPORATE AND CRIMINAL FRAUD ACCOUNTABLITY

* * * * *

SEC. 803. DEBTS NONDISCHARGEABLE IF INCURRED IN VIOLATION OF SECURITIES FRAUD LAWS.

Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (17), by striking "or" after the semicolon;

(2) in paragraph (18), by striking the period at the end and inserting"; or"; and

(3) by adding at the end, the following:

"(19) that—

"(A) is for—

"(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

"(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

"(B) results from—

"(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

"(ii) any settlement agreement entered into by the debtor; or

"(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.".

* * * * *

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 provides in pertinent part:

* * * * *

SEC. 744. RESTITUTION REMEDIES.

Section 6c(d) of the Commodity Exchange Act (7 U.S.C. 13a-1(d)) is amended by adding at the end the following:

"(3) EQUITABLE REMEDIES.—In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including"—

"(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and

"(B) disgorgement of gains received in connection with such violation.".

* * * * *

SEC. 922. WHISTLEBLOWER PROTECTION.

(a) IN GENERAL.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 21E the following:

"SEC. 21F. SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

"(a) DEFINITIONS.—In this section the following definitions shall apply:

"(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION.—The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

"(2) FUND.—The term 'Fund' means the Securities and Exchange Commission Investor Protection Fund.

* * * * *

"(4) MONETARY SANCTIONS.—The term 'monetary sanctions', when used with respect to any judicial or administrative action, means—

"(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

"(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

* * * * *

"(b) AWARDS.—

"(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

"(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

"(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

"(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

“(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

“(1) DETERMINATION OF AMOUNT OF AWARD.—

“(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

“(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—

“(i) shall take into consideration—

“(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

“(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

“(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

“(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

“(ii) shall not take into consideration the balance of the Fund.

* * * * *

"(g) INVESTOR PROTECTION FUND.—

"(1) FUND ESTABLISHED.—There is established in the Treasury of the United States a fund to be known as the 'Securities and Exchange Commission Investor Protection Fund'.

"(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

"(A) paying awards to whistleblowers as provided in subsection (b); and

"(B) funding the activities of the Inspector General of the Commission under section 4(i).

"(3) DEPOSITS AND CREDITS.—

"(A) IN GENERAL.—There shall be deposited into or credited to the Fund an amount equal to—

"(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

"(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for

whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

"(iii) all income from investments made under paragraph (4).

"(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

* * * * *

SEC. 929B. FAIR FUND AMENDMENTS.

Section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(a)) is amended—

(1) by striking subsection (a) and inserting the following:

"(a) CIVIL PENALTIES TO BE USED FOR THE RELIEF OF VICTIMS.—If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction

of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.";

(2) in subsection (b)—

(A) by striking "for a disgorgement fund described in subsection (a)" and inserting "for a disgorgement fund or other fund described in subsection (a)"; and

(B) by striking "in the disgorgement fund" and inserting "in such fund"; and

(3) by striking subsection (e).

* * * * *

SEC. 1055. RELIEF AVAILABLE.

(a) ADMINISTRATIVE PROCEEDINGS OR COURT ACTIONS.—

(1) JURISDICTION.—The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) RELIEF.—Relief under this section may include, without limitation—

(A) rescission or reformation of contracts;

(B) refund of moneys or return of real property;

(C) restitution;

(D) disgorgement or compensation for unjust enrichment;

(E) payment of damages or other monetary relief;

(F) public notification regarding the violation, including the costs of notification;

(G) limits on the activities or functions of the person; and

(H) civil money penalties, as set forth more fully in subsection (c).

* * * * *