No. 18-1501

In the Supreme Court of the United States

CHARLES C. LIU, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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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.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

SEC v. *Liu*, No. 16-cv-974 (Apr. 20, 2017)

United States Court of Appeals (9th Cir.):

SEC v. *Liu*, No. 17-55849 (Oct. 25, 2018)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Chauffeurs, Teamsters & Helpers v. *Terry*, 494 U.S. 558 (1990) 6
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 12
FTC v. *AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018) 10
FTC v. *Credit Bureau Ctr., LLC*, No. 18-2847, 2019 WL 3940917 (7th Cir. Aug. 21, 2019) 11
Huntington v. *Attrill*, 146 U.S. 657 (1892) 8
Kansas v. *Nebraska*, 135 S. Ct. 1042 (2015) 5, 8
Kokesh v. *SEC*, 137 S. Ct. 1635 (2017) 7
Maslenjak v. *United States*, 137 S. Ct. 1918 (2017) 7
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 5
Osborn v. *Griffin*, 865 F.3d 417 (6th Cir. 2017) 11
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 5
Saad v. *SEC*, 873 F.3d 297 (D.C. Cir. 2017) 10
SEC v. *Arcturus Corp.*, No. 13-cv-4861, 2018 WL 1701998 (N.D. Tex. Jan. 10, 2018) 9
SEC v. *Blavin*, 760 F.2d 706 (6th Cir. 1985) 9
SEC v. *Brooks*, No. 07-cv-61526, 2017 WL 3315137 (S.D. Fla. Aug. 3, 2017) 9
SEC v. *Calvo*, 378 F.3d 1211 (11th Cir. 2004) 9

Cases—Continued: Page

SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 8
SEC v. *First City Fin. Corp.*, 890 F.2d 1215 (D.C. Cir. 1989) 6, 9
SEC v. *Flowers*, No. 17-cv-1456, 2018 WL 6062433 (S.D. Cal. Nov. 19, 2018) 9
SEC v. *Gotchey*, 981 F.2d 1251, 1992 WL 385284 (4th Cir. 1992) (Tbl.), cert. denied, 509 U.S. 927 (1993) 8
SEC v. *Happ*, 392 F.3d 12 (1st Cir. 2004) 8
SEC v. *Huffman*, 996 F.2d 800 (5th Cir. 1993) 9
SEC v. *Hughes Capital Corp.*, 124 F.3d 449 (3d Cir. 1997) 8
SEC v. *Jammin Java Corp.*, No. 15-cv-8921, 2017 WL 4286180 (C.D. Cal. Sept. 14, 2017) 9
SEC v. *Lipson*, 278 F.3d 656 (7th Cir. 2002) 9
SEC v. *Maxxon, Inc.*, 465 F.3d 1174 (10th Cir. 2006), cert. denied, 550 U.S. 905 (2007) 9
SEC v. *Metter*, 706 Fed. Appx. 699 (2d Cir. 2017) 9
SEC v. *Present*, No. 14-cv-14692, 2018 WL 1701972 (D. Mass. Mar. 20, 2018) 9
SEC v. *Revolutions Med. Corp.*, No. 12-cv-3298, 2018 WL 2057357 (N.D. Ga. Mar. 16, 2018) 9
SEC v. *Ridenour*, 913 F.2d 515 (8th Cir. 1990) 9
SEC v. *Rind*, 991 F.2d 1486 (9th Cir.), cert. denied, 510 U.S. 963 (1993) 9
SEC v. *Sample*, No. 14-cv-1218, 2017 WL 5569873 (N.D. Tex. Nov. 20, 2017) 9
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d. Cir.), cert. denied, 404 U.S. 1005 (1971) 6, 8
SEC v. *Weaver*, 773 Fed. Appx. 354 (9th Cir. 2019) 9
Tull v. *United States*, 481 U.S. 412 (1987) 6, 8
United States v. *Johnston*, 268 U.S. 220 (1925) 13

Cases—Continued: Page

United States v. *Williams*, 504 U.S. 36 (1992) 13
United States SEC v. *Ahmed*, 343 F. Supp. 3d 16 (D. Conn. 2018) 9
Zacharias v. *SEC*, 569 F.3d 458 (D.C. Cir. 2009) 10

Statutes and regulations:

Act of Mar. 21, 1938, ch. 49, sec. 4, § 13(b), 52 Stat. 115 (15 U.S.C. 53(b)) 10
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* 10
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 5
§ 305(b), 116 Stat. 779 5
§ 308(a), 116 Stat. 784 (15 U.S.C. 7246) 6
§ 308(b), 116 Stat. 784-785 6
§ 308(c)(1)(A), 116 Stat. 785 7
§ 308(c)(1)(B), 116 Stat. 785 7
§ 803, 116 Stat. 801 (11 U.S.C. 523(a)(19)) 7
Securities Act of 1933, ch. 38, Tit. I, § 17(a)(2), 48 Stat. 85 (15 U.S.C. 77q(a)(2) 2
§ 17(a)(2) (15 U.S.C. 77q(a)(2)) 3
§ 17(a)(1)-(3) (15 U.S.C. 77q(a)(1)-(3)) 3
15 U.S.C. 77t(b) 5
Securities Exchange Act of 1934, ch. 404, Tit. I, § 10(b), 48 Stat. 891 (15 U.S.C. 78j(b)) 3
15 U.S.C. 78u(d)(1) 5
15 U.S.C. 78u(d)(4) 7
15 U.S.C. 78u(d)(5) (§ 21(d)(5)) 5
15 U.S.C. 78u-6 7
15 U.S.C. 78t-1(b)(2) 7
8 U.S.C. 1153(b)(5)(A) 2
8 U.S.C. 1153(b)(5)(C)(ii) 2

Statutes and regulations—Continued: Page

28 U.S.C. 2462 ..... 7, 8
8 C.F.R. 204.6(f)(2) 2
17 C.F.R. 240.10b-5 3

Miscellaneous:

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 6

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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 the petition for a writ of certiorari to and including May 31, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners obtained approximately $27 million from investors. Pet. App. 1a-2a. The Securities and Exchange

Commission (SEC or Commission) brought this civil enforcement action, alleging that petitioners had acquired the money through fraud and had misappropriated most of the funds. *Id.* at 29a. The district court found petitioners liable under Section 17(a)(2) of the Securities Act of 1933 (Securities Act), ch. 38, Tit. I, § 17(a)(2), 48 Stat. 85 (15 U.S.C. 77q(a)(2)), which prohibits "obtain[ing] money or property by means of any untrue statement of a material fact" in the offer or sale of any securities. The court awarded injunctive relief, ordered petitioners to disgorge their ill-gotten gains, and imposed civil penalties. Pet. App. 62a-64a. The court of appeals affirmed. *Id.* at 8a.

1. This case concerns the offer and sale of securities in connection with the EB-5 Immigrant Investor Program, which provides a pathway to obtaining a visa for foreign nationals who invest money in certain enterprises in the United States. 8 U.S.C. 1153(b)(5)(A) and (C)(ii); see Pet. App. 1a-2a; 8 C.F.R. 204.6(f)(2). Petitioners, through corporate entities that they controlled, obtained nearly $27 million from 50 foreign investors who sought to take advantage of that program. Pet. App. 12a-13a. Petitioners claimed that the money would fund the construction of a cancer-treatment center, but petitioners did not use the funds for that purpose. *Id.* at 2a. Petitioners instead transferred millions of dollars to their personal bank accounts in the United States, in violation of the terms of the offering documents, and then transferred the bulk of that money to their accounts overseas. *Id.* at 2a, 21a. Petitioners also diverted $12.9 million to overseas marketers, exceeding the caps set out in the offering documents for the payment of such expenses. *Id.* at 2a, 14a-15a. Although petitioners nearly exhausted the investors' funds, they "never even obtained the required permits to break ground for the cancer center." *Id.* at 2a-3a.

2. In May 2016, the Commission commenced this civil action, alleging that petitioners had violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), ch. 404, Tit. I, § 10(b), 48 Stat. 891 (15 U.S.C. 78j(b)); Section 17(a)(1)-(3) of the Securities Act (15 U.S.C. 77q(a)(1)-(3)); and 17 C.F.R. 240.10b-5 (Rule 10b-5). Pet. App. 19a; Compl.

The district court awarded the Commission 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 untrue statements 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," under which petitioners had "allow[ed] construction to languish while funneling millions of dollars to themselves, to foreign entities they controlled, and to foreign entities tasked with enticing more investors." *Id.* at 33a, 41a (footnote omitted). Specifically, the court determined that petitioners had "failed to inform investors" in the offering documents that petitioners would "award" themselves "exorbitant remuneration." *Id.* at 30a. The court also determined that petitioners had violated the terms of the offering documents regarding "appropriate uses" of the investors' money by diverting large sums to overseas marketers. *Ibid.*

As a remedy, the district court ordered petitioners to disgorge approximately $26.7 million—"a reasonable approximation of the profits causally connected to [petitioners'] violation." Pet. App. 41a. The court also imposed civil monetary penalties and enjoined petitioners from further violations of Section 17(a)(2) and from participat-

ing in any offer or sale of securities under the EB-5 program. *Id.* at 42a, 62a-64a. Because the violation of Section 17(a)(2) was "a sufficient basis for the remedies the SEC seeks," the court found it "unnecessary to reach the SEC's other claims." *Id.* at 29a.

3. The court of appeals affirmed. Pet. App. 1a-8a. As relevant here, the court rejected petitioners' challenge to the district court's order of disgorgement. *Id.* at 6a-8a. Petitioners conceded that a court may award disgorgement as an equitable remedy in an appropriate case. See Pet. C.A. Br. 49-50. Petitioners argued, however, that the district court "lacked the power to order disgorgement in this amount" under the facts of this case, and that the district court had erred in "setting the amount to be disgorged," Pet. App. 6a-7a. The court of appeals rejected those arguments, stating that "the proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors." *Id.* at 7a.

ARGUMENT

Petitioners contend (Pet. 8-22) that the district court lacked the authority to order the disgorgement of their profits. The court of appeals' decision affirming the award of disgorgement was correct and does not conflict with any decision of this Court or any other court of appeals. And this case would be an unsuitable vehicle for reviewing the question presented, because petitioners failed to preserve in the courts below the argument that federal law categorically precludes district courts from awarding disgorgement in SEC enforcement actions.

1. Petitioners principally contend (Pet. 10), as a categorical matter, that Congress "has not authorized disgorgement as a form of relief" in civil enforcement actions

brought by the Commission. That broad contention does not warrant this Court's review.

a. The court of appeals correctly affirmed the district court's order of disgorgement. Judicial authority to order violators of the securities laws to disgorge their ill-gotten gains derives from two sources. First, the Securities Act and Exchange Act both authorize a federal court to "enjoin" violations. 15 U.S.C. 77t(b), 78u(d)(1). This Court has explained that a legislative grant of authority to "enjoin" statutory violations encompasses the power to order a violator "to disgorge profits * * * acquired in violation" of the relevant statutory provisions. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946). That is so because, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). "Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter*, 328 U.S. at 399.

Second, as part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745, Congress amended Section 21(d) of the Exchange Act to authorize courts hearing SEC enforcement actions to order "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5); see § 305(b), 116 Stat. 779. This Court has repeatedly characterized disgorgement as an equitable remedy. See, *e.g.*, *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1057 (2015) ("[A] disgorgement order constitutes a 'fair and equitable' rem-

edy.") (citation omitted); *Chauffeurs, Teamsters & Helpers* v. *Terry*, 494 U.S. 558, 570 (1990) ("[W]e 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) ("[D]isgorgement of improper profits [is] traditionally considered an equitable remedy."). Congress enacted the provision authorizing "equitable relief" against the backdrop of a settled understanding in the courts of appeals that courts had equitable authority to order disgorgement in actions brought by the Commission. See, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Because Congress used the term "equitable relief" after that term had "already received authoritative construction by * * * inferior courts," that term must be "understood according to that construction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 54, at 322 (2012); see *Manhattan Props., Inc.* v. *Irving Trust Co.*, 291 U.S. 320, 336 (1934).

Confirming that interpretation, Congress has enacted numerous statutes that presuppose the availability of disgorgement as an equitable remedy in SEC enforcement actions. For example, the Sarbanes-Oxley Act authorizes civil penalties to be "added to and become part of the disgorgement fund" established for the benefit of injured investors, § 308(a), 116 Stat. 784 (15 U.S.C. 7246); authorizes the Commission to incorporate certain additional funds into a "disgorgement fund" ordered by a court, § 308(b), 116 Stat. 784-785; requires the Commission to review previous enforcement actions that sought "disgorgements" and to study methods to

"improve the collection rates for * * * disgorgements," § 308(c)(1)(A) and (B), 116 Stat. 785; and amends the bankruptcy laws to exempt from discharge "disgorgement payment[s]" resulting from any "court * * * order" in SEC enforcement actions, § 803, 116 Stat. 801 (11 U.S.C. 523(a)(19)). Another statute reduces damages in certain private actions for insider trading by the "amounts, if any, that [the defendant] may be required to disgorge, pursuant to a court order." 15 U.S.C. 78t-1(b)(2). Still another provides that, as a general rule, funds "disgorged as a result of an action brought by the Commission in Federal court" cannot be used to pay attorneys' fees. 15 U.S.C. 78u(d)(4). And under a final statute, the size of certain payments to whistleblowers depends on the amount of any "disgorgement" ordered to be paid in civil enforcement actions brought by the Commission. 15 U.S.C. 78u-6. Petitioners' argument that federal courts in SEC enforcement actions lack the power to order disgorgement in the first place contradicts the evident premise of those provisions, in violation of a court's obligation "to make sense rather than nonsense out of the *corpus juris*." *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1926 (2017) (citation omitted).

Petitioners principally argue (Pet. 8-13) that treating disgorgement as a form of equitable relief is incompatible with *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017). In *Kokesh*, however, this Court determined only that disgorgement constitutes a penalty "within the meaning of [28 U.S.C.] 2462," a five-year statute of limitations for actions to enforce civil penalties. *Id.* at 1639. The Court cautioned that "[n]othing in [its] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement." *Id.* at 1642 n.3.

Petitioners nonetheless maintain (Pet. 11) that, because disgorgement constitutes a "penalty" for purposes of Section 2462's statute of limitations, it cannot qualify as an equitable remedy. That contention is wrong. "[T]he words 'penal' and 'penalty' have been used in various senses" and are "elastic in meaning." *Huntington* v. *Attrill*, 146 U.S. 657, 666-667 (1892). A remedy thus can qualify as a form of equitable relief even though it might also be considered "penal" for some purposes. In *Tull*, this Court characterized "disgorgement of improper profits" as both "an equitable remedy" and a "limited form of penalty." 481 U.S. at 424. Similarly in *Kansas*, the Court explained both that disgorgement constitutes an "'equitable'" remedy and that "a disgorgement award * * * deters future violations." 135 S. Ct. at 1057 (citation omitted). The understanding that disgorgement constitutes an equitable remedy therefore is not inconsistent with the *Kokesh* Court's holding that disgorgement constitutes a "penalty" within the meaning of Section 2462.

b. Petitioners do not identify any disagreement among the courts of appeals regarding the availability of disgorgement in SEC enforcement actions. Five decades ago, the Second Circuit recognized that district courts may require defendants in Commission actions to disgorge their illicit gains "as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief." *Texas Gulf Sulphur Co.*, 446 F.2d at 1307. Since then, the circuits have uniformly held that disgorgement is an available remedy in the Commission's enforcement actions. See *SEC* v. *Happ*, 392 F.3d 12, 31 (1st Cir. 2004); *SEC* v. *Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006); *SEC* v. *Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997); *SEC* v. *Gotchey*, 981 F.2d 1251, 1992 WL 385284, at *2 (4th Cir. 1992) (Tbl.), cert. denied, 509 U.S. 927 (1993);

SEC v. *Huffman*, 996 F.2d 800, 803 (5th Cir. 1993); *SEC* v. *Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (per curiam); *SEC* v. *Lipson*, 278 F.3d 656, 662-663 (7th Cir. 2002); *SEC* v. *Ridenour*, 913 F.2d 515, 517-518 (8th Cir. 1990); *SEC* v. *Rind*, 991 F.2d 1486, 1493 (9th Cir.), cert. denied, 510 U.S. 963 (1993); *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); *First City Fin. Corp.*, 890 F.2d at 1230 (D.C. Cir.).

That uniform understanding has remained in effect since this Court decided *Kokesh*. Every court of appeals and every district court that has considered the issue after *Kokesh* has determined that nothing in that decision calls into question the availability of disgorgement in SEC enforcement actions. See *SEC* v. *Weaver*, 773 Fed. Appx. 354, 356-357 (9th Cir. 2019); *SEC* v. *Metter*, 706 Fed. Appx. 699, 702 (2d Cir. 2017); *United States SEC* v. *Ahmed*, 343 F. Supp. 3d 16, 26-27 (D. Conn. 2018); *SEC* v. *Flowers*, No. 17-cv-1456, 2018 WL 6062433, at *2 (S.D. Cal. Nov. 19, 2018); *SEC* v. *Present*, No. 14-cv-14692, 2018 WL 1701972, at *2 (D. Mass. Mar. 20, 2018); *SEC* v. *Revolutions Med. Corp.*, No. 12-cv-3298, 2018 WL 2057357, at *2-*3 (N.D. Ga. Mar. 16, 2018); *SEC* v. *Arcturus Corp.*, No. 13-cv-4861, 2018 WL 1701998, at *1-*3 (N.D. Tex. Jan. 10, 2018); *SEC* v. *Sample*, No. 14-cv-1218, 2017 WL 5569873, at *1-*2 (N.D. Tex. Nov. 20, 2017); *SEC* v. *Jammin Java Corp.*, No. 15-cv-8921, 2017 WL 4286180, at *2-*3 (C.D. Cal. Sept. 14, 2017); *SEC* v. *Brooks*, No. 07-cv-61526, 2017 WL 3315137, at *6-8 (S.D. Fla. Aug. 3, 2017).

2. Petitioners rely (Pet. 18-19) on remarks in three concurring and dissenting opinions. None of those remarks supports petitioners' suggestion that the lower courts have "struggled" to reconcile the power to order

disgorgement with *Kokesh*. Pet. 16 (capitalization and emphasis omitted).

a. Petitioners rely on then-Judge Kavanaugh's concurrence in *Saad* v. *SEC*, 873 F.3d 297 (D.C. Cir. 2017), which noted that *Kokesh* had "overturned a line of cases from the D.C. Circuit that had concluded that disgorgement was remedial and not punitive." See Pet. 18 (quoting *Saad*, 873 F.3d at 305) (brackets omitted). That observation, however, referred to a line of decisions in which the D.C. Circuit had treated disgorgement as remedial rather than punitive for purposes of the statute of limitations. See *Saad*, 873 F.3d at 305 (citing *Zacharias* v. *SEC*, 569 F.3d 458 (D.C. Cir. 2009) (per curiam)). Judge Kavanaugh did not suggest that *Kokesh* casts doubt on courts' general equitable authority to order disgorgement in Commission actions.

b. Petitioners rely (Pet. 19) on Judge O'Scannlain's special concurrence in *FTC* v. *AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018). But that opinion did not address the statutes at issue in this case. Rather, it questioned whether a court may order disgorgement under Section 13(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq*. Act of Mar. 21, 1938, ch. 49, sec. 4, § 13(b), 52 Stat. 115 (15 U.S.C. 53(b)); see *AMG Capital*, 910 F.3d at 429. Judge O'Scannlain relied in part on the language of that provision, *id*. at 430, and in part on inferences he believed could appropriately be drawn from another FTC Act provision, *id*. at 431-432. And because the case involved the FTC Act, Judge O'Scannlain had no occasion to consider the significance of the securities laws' many references to disgorgement. See pp. 6-7, *supra*.

For substantially the same reasons, the decision below does not conflict with the Seventh Circuit's recent deci-

sion in *Federal Trade Commission* v. *Credit Bureau Center, LLC*, No. 18-2847, 2019 WL 3940917 (Aug. 21, 2019), which was issued after the petition in this case was filed. Like Judge O'Scannlain in *AMG Capital*, the Seventh Circuit relied on the specific text of Section 13(b) of the FTC Act, see *id.* at *6-*7, and on what it viewed as the logical implications of other FTC Act provisions, see *id.* at *7-*9. The court did not discuss the securities laws or purport to announce a categorical rule governing the availability of disgorgement or restitution under federal statutes generally. The government has not yet decided whether it will seek this Court's review of the Seventh Circuit's decision. But whatever the merits of that court's ruling, it does not conflict with the decision below.

c. Petitioners rely on a dissenting opinion in which Judge Merritt stated that, after *Kokesh*, equitable disgorgement "may not" be available in SEC cases "for much longer." Pet. 19 (quoting *Osborn* v. *Griffin*, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting)). That comment—which appeared in a footnote, in a dissent, in a case that did not raise the issue—reflects a single judge's speculation that *Kokesh* "may" render disgorgement unavailable in SEC enforcement suits. *Osborn*, 865 F.3d at 470 n.1. It does not establish a conflict even among individual judges, let alone a conflict among the courts of appeals.

3. In all events, this case would be an unsuitable vehicle for resolving any uncertainty about the effect of *Kokesh* on courts' authority to grant disgorgement in SEC enforcement actions. Petitioners have waived—or, at the very least, forfeited—the broad contention that the Commission categorically lacks authority to seek disgorgement in enforcement actions. In the district court, petitioners "d[id] not directly argue that disgorgement is

inappropriate here; rather they challenge[d] the amount the SEC request[ed]." Pet. App. 40a. In the court of appeals, petitioners conceded in their opening brief that "[d]isgorgement, depending on funds or assets ordered disrgorged, how calculated, and its purpose, can be either an equitable remedy or a penalty." Pet. C.A. Br. 49. They stated in their reply brief that "[w]hether the SEC could rely on judicial precedents authorizing disgorgement as an equitable remedy is not the issue this Court confronts." Pet. C.A. Reply Br. 27. At oral argument, they explained that they were "not arguing that [a court] has no authority to award disgorgement," and they conceded that a court "may award disgorgement as an equitable remedy." Oral Arg. at 29:00 (No. 17-55849), https://go.usa.gov/xVYgU.

In addition, the court of appeals failed to pass on the question as to which petitioners now seek this Court's review. The court rejected petitioners' "argu[ment] that the district court lacked the power to order disgorgement in this amount" and petitioners' objection to the district court's analysis "in setting the amount to be disgorged." Pet. App. 6a-7a. But the court did not consider (presumably because petitioners did not raise the issue) whether disgorgement is a permissible equitable remedy in the first place. There is no sound basis for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to consider that issue in the first instance.

4. Petitioners more narrowly contend (Pet. 2, 11) that the disgorgement order, "in this case" and in "the circumstance[s] here," exceeded the district court's equitable authority. That contention likewise does not warrant this Court's review.

Petitioners contend (Pet. 2, 6) that the disgorgement order in this case operates as an impermissible penalty because the "disgorgement award exceeds what the defendant unlawfully gained," and because the district court failed to offset the disgorgement award for petitioners' business "expenses." The court concluded, however, that the disgorgement award represented "a reasonable approximation of the profits causally connected to [petitioners'] violation." Pet. App. 41a. And the court of appeals explained that it would be "unjust to permit [petitioners] to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving [petitioners] the money in the first place." *Id.* at 7a (citation omitted). Those fact-bound determinations do not warrant further review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

Petitioners also argue (Pet. 12) that the disgorgement order in this case does not constitute equitable relief because the disgorged funds will flow to the U.S. Treasury rather than to injured investors. Petitioners did not raise that contention below, and the court of appeals did not address it. This Court's traditional practice is to deny review when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

In any event, petitioner's assertion is premature. The Commission seeks to distribute, and generally has distributed, disgorged funds to injured investors through court-approved distribution plans. In this case, the Commission has not yet collected on the judgment, moved for entry of a distribution plan, or obtained the

district court's approval to execute such a plan to compensate the injured investors. Further review of petitioners' factbound contention is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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