No. 16-529

In The

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION,

Respondent.

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

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] (AFR) is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property—a power that is "devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). For this reason, AFR champions the proper, limited interpretation of forfeiture laws. AFR advances this mission in many ways, including by filing amicus briefs.[2]

AFR is interested in *Kokesh* because of the important questions that this case raises about the dividing line that separates legal remedies from equitable ones. That line is of vital importance in forfeiture law. "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg*, 82 U.S. 146, 149 (1872). This principle requires courts to be vigilant against pecuniary exactions that blur the line between law and equity. Such exactions threaten vital protections against abusive forfeitures that both federal law and the Constitution provide.

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[1] The parties have consented to this brief. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than AFR and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015).

SUMMARY OF THE ARGUMENT

Nobel laureate Bob Dylan has observed that sometimes "[y]ou need something to open up a new door—to show you something you['ve] seen before—but overlooked a hundred times or more."[3] For decades, lower courts have granted 'disgorgement' to the Securities & Exchange Commission (SEC) in civil enforcement actions under federal securities laws. Disgorgement enables the SEC to force defendants to pay the government an amount of money out of their general assets equal to what they allegedly took through wrongdoing. The goal here is clear: "to deter violations of the securities laws by depriving violators of their ill-gotten gains." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

The authority of federal courts to effectuate this goal, however, is not clear. Many courts have simply presumed they are authorized to grant disgorgement to the SEC. As a result, disgorgement has become, in Dylan's words, something we've seen before. But the present case opens up a new door on whether that presumption of authority is correct—a door that stems from considering whether the 5-year limitations period that 28 U.S.C. § 2462 affixes to "any civil fine, penalty, or forfeiture" also applies to disgorgement. Answering that question requires an analysis of the genesis and limits of disgorgement. And that inquiry leads one to 15 U.S.C. § 78u(d)(5).

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[3] Bob Dylan, *Last Thoughts on Woody Guthrie*, BOB DYLAN (SONY ENTM'T), Apr. 12, 1963, http://bit.ly/1V0jYJ2.

As the Tenth Circuit noted below, under present federal securities law, any grant of disgorgement to the SEC by a federal district court is subject to 15 U.S.C. § 78u(d)(5), which "authoriz[es] [a] court to grant equitable relief sought by SEC." Pet. App. 10a. Section 78u(d)(5) actually says a bit more than that. It establishes 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).

Hence, "in so many words," § 78u(d)(5) serves to "restrict[ ] the court's jurisdiction in equity." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). This is true in two main respects. First, § 78u(d)(5) establishes through the use of the term "equitable relief" that a court may only grant remedies that were "typically available in equity during the days of the divided bench (meaning, the period before 1938 when courts of law and equity were separate)." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016). Second, § 78u(d)(5) requires grants of equitable relief to be "appropriate or necessary for the benefit of investors."

Once these restrictions are taken into account, something quite possibly overlooked a hundred times (or more) comes into focus: district courts do not have the power to grant the kind of disgorgement at issue in this case. To the extent such disgorgement generally aims to make defendants pay—even if they no longer possess any ill-gotten gains—this is not "equitable relief." "Equitable remedies . . . as a general rule . . . give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets." *Montanile*, 136 S. Ct. at 658–59. Also, to the extent the "purpose of [such] disgorgement is not to compensate investors," *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006), this is not relief "for the benefit of investors." Rather, this is relief for the government's benefit at the expense of investors—i.e., by draining funds available for restitution.[4]

Of course, the Court granted review here to decide the applicability of 28 U.S.C. § 2462 and its 5-year limitations period to disgorgement claims—not whether 15 U.S.C. § 78u(d)(5) authorizes district courts to grant the kind of disgorgement at issue. But "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(A). It is difficult to see how the Court can determine whether the disgorgement ordered by the district court is a fine, forfeiture, or penalty subject to 28 U.S.C. § 2462 without first identifying: (1) the authority that allows courts to grant disgorgement; and

[4] Disgorgement may also preclude the SEC from being able to seek restitution for investors as a matter of law. *See SEC v. Hughes Capital Corp*, 917 F. Supp. 1080, 1089 (D.N.J. 1996) ("The SEC has not identified any case in which a court has awarded restitution in addition to disgorgement pursuant to its equitable powers under the securities laws. . . . In the absence of any authority for making both awards, the court denies the SEC's motion for . . . restitution.").

(2) the extent to which the district court obeyed that authority here. The Court therefore should not hesitate to walk through the door that 28 U.S.C. § 2462 opens to the true meaning of 15 U.S.C. § 78u(d)(5).

ARGUMENT

I. In considering the Question Presented, the Court can and should address whether the district court was authorized to grant the kind of disgorgement at issue here.

The Question Presented asks: "Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for 'disgorgement'?" Any meaningful effort to answer this question, however, runs into a deeper question: "Was the district court authorized to grant the kind of disgorgement that the SEC requested in this case?" This is a question the Court *can* and *should* answer—especially since the answer is no, as explained in Parts III and IV below.

The Court *can* reach the legal-authority question because "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond [this Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Also, when a "claim is properly before [a] court"—as the SEC's claim for disgorgement is here—"the [C]ourt is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991).

The Court *should* reach the legal-authority question for three main reasons:

First, answering the legal-authority question is "essential to the analysis of the decisions below." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005). This case turns on the nature of the disgorgement that was granted here and whether this exaction fits the definition of "civil fine, penalty, or forfeiture" for purposes of 28 U.S.C. § 2462. In deciding whether the Tenth Circuit got this analysis right, the Court will inevitably encounter the law that the panel identified as "authorizing" disgorgement: 15 U.S.C. § 78u(d)(5). *See* Pet. App. 10a. Close review of § 78u(d)(5) in turn reveals a disconnect between the equitable, investor-focused relief that the law authorizes and the pecuniary, government-focused disgorgement that the district court ordered—a split that is fatal to the judgment below, no matter whether § 2462 applies to disgorgement claims or not.

Second, answering the legal-authority question avoids an advisory opinion on 28 U.S.C. § 2462. Indeed, if the district court's grant of disgorgement exceeded the terms set by 15 U.S.C. § 78u(d)(5), then the disgorgement was *ultra vires* and must be reversed. At that point, it is no longer necessary to decide whether

§ 2462 applies to disgorgement claims. In *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, the Court faced a similar situation. 508 U.S. 439 (1993). At issue was whether the D.C. Circuit had erred in deciding whether a federal law was still in force when neither side had raised this issue. *See id.* at 445–48. Both sides instead wanted a ruling on the merits that presumed the law was still valid. *See id.* This Court upheld the D.C. Circuit's decision to first address the law's enforceability because a "contrary conclusion would permit litigants . . . to extract . . . an opinion that would be difficult to characterize as anything but advisory." *Id.* at 446–47.

Third, answering the legal-authority question ensures this Court does not inadvertently rewrite 15 U.S.C. § 78u(d)(5). *Iselin v. United States* illuminates this point. 270 U.S. 245, 251 (1926) (Brandeis, J.). Tasked with interpreting a federal tax law, the Court found that "[t]he statute was evidently drawn with care. Its language is plain and unambiguous." *Id.* The Court then concluded that what the government really wanted in the case was "not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Id.* The Court refused to "transcend[ ] the judicial function." *Id.* But that same risk is posed here if the Court assumes that § 78u(d)(5) authorizes the type of disgorgement that the district court imposed when the plain text of the law supports the opposite conclusion.

In the end, the legal-authority question is one that bears upon whether "a court in equity [may] depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles." *Heine v. Levee Comm'rs*, 19 U.S. 655, 658 (1874). The legal-authority question also resides within the heartland of this Court's most important duty: "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Marshall, C.J.). Finally, the legal-authority question fits with this Court's observation in *Marbury* that where "an act of the legislature, repugnant to the constitution, is void," then such a law does not "bind the courts, and oblige them to give it effect." *Id.* Likewise, where a disgorgement, repugnant to 15 U.S.C. § 78u(d)(5), is void, then such disgorgement does not bind higher courts and oblige them to give it effect. *Id.*

At this point, AFR acknowledges that Petitioner does not advance the legal-authority question in his opening merits brief. *See* Pet'r Br. 62 ("[T]his does not suggest that Congress . . . has not authorized the SEC to seek disgorgement."). But as Justice Alito has observed, one way an amicus brief can "provide important assistance to the court" is by making points that may be "deemed too far-reaching for emphasis by a party." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). AFR thus offers the following argument about the proper scope of 15 U.S.C. § 78u(d)(5)—one that AFR believes will "help the [C]ourt toward [the] right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverage Control*, 197 F.3d 560, 567 (1st Cir. 1999).

II. The remedy of disgorgement in this case was subject to 15 U.S.C. § 78u(d)(5), which lets district courts grant "equitable relief" that is "for the benefit of investors."

The district court in this case ordered Petitioner to "disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37." Pet. App. 47a. The district court did not cite any source of authority for this disgorgement. *See id.* The Tenth Circuit in a parenthetical, however, correctly discerned that such disgorgement would have to be "authoriz[ed]" under 15 U.S.C. § 78u(d)(5). Pet. App. 10a. That provision, in full, declares:

> In any action or proceeding brought or instituted by the [U.S. Securities and Exchange] 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**.

Congress enacted this language as part of the Sarbanes-Oxley Act of 2002, § 305, Pub. L. No. 107-204, 116 Stat. 745, 778–79 (July 30, 2002). That fact matters for two reasons in terms of construing the above-bolded terms in § 78u(d)(5).

Great-West: Seven months before Congress enacted the Sarbanes-Oxley Act, this Court issued its now seminal decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) on the statutory meaning of "equitable relief." At issue was § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which enables federal courts to grant "appropriate equitable relief" to enforce the terms of ERISA plans. *Id.* at 209. The Court determined that § 502(a)(3) did not enable courts to grant "relief that was not typically available in equity." *Id*. at 210. This meant that courts had to consider "the conditions that equity attached" to a given form of equitable relief (e.g., a constructive trust) before concluding that a plaintiff's demand for such relief was indeed equitable. *Id.* at 216.

Hence, "[r]especting Congress's choice to limit the relief available under § 502(a)(3) to 'equitable relief'" compelled the Court to observe "the difference between legal and equitable forms of restitution." *Id.* at 218. "Congress felt comfortable referring to equitable relief in this statute—as it has in many others—precisely because the basic contours of the term are well known." *Id.* at 217. Adopting a more pragmatic "rolling" definition of "equitable relief," by contrast, would "introduce a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term 'equity.'" *Id*.

The Court's decision in *Great-West* sheds key light on Congress's decision to use the words "equitable relief" in 15 U.S.C. § 78u(d)(5) seven months later. Congress selected these words after being placed on notice by the Court about the inherent limits that would be read into these words whenever Congress used them. As such, the use of "equitable relief" in § 78u(d)(5) is not some mere affirmation that the SEC may seek disgorgement in court. Had Congress meant for § 78u(d)(5) to be read this way, Congress could have copied the language that it enacted 12 years earlier in § 202(a) of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 for purposes of refining disgorgement in SEC proceedings:

> In any proceeding in which the [SEC] . . . may impose a penalty under this section, the Commission . . . **may enter an order requiring accounting and disgorgement**, including reasonable interest.

Pub. L. No. 101-429, 104 Stat. 931, 938 (codified at 15 U.S.C. § 78u-2).

Effort to Compensate Victims: One of the most important goals of the Sarbanes-Oxley Act was to "expand the SEC's power to compensate defrauded investors."[5] To advance this goal, the Act enabled the SEC "to add civil fines paid in enforcement actions to disgorgement funds—called 'fair funds'—and distribute them to the victims of securities violations."[6] The relevant statutory text is telling:

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[5] Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 341 (2015)

[6] *Id.* (citing § 308(a) of the Sarbanes-Oxley Act).

> If in any judicial or administrative action brought by the [SEC] under the securities laws . . . the Commission obtains an order requiring disgorgement . . . and the Commission also obtains pursuant to such laws a 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 the disgorgement fund for the benefit of the victims** . . . .

Sarbanes-Oxley Act of 2002, § 308, Pub. L. No. 107-204, 116 Stat. 745, 784–85.

The bolded language reflects that: (1) for Congress, "disgorgement" was all about repaying injured investors—hence, Congress spoke of civil penalties becoming a part of the "disgorgement fund for the benefit of victims"; and (2) use of the words "for the benefit of" carried real meaning for Congress, establishing that an authorized remedy was meant to help someone other than the government.

Taken together, *Great-West* and the Sarbanes-Oxley Act establish why 15 U.S.C. § 78u(d)(5) is more than a shorthand way of saying that district courts are "authoriz[ed] . . . to grant equitable relief sought by [the] SEC," as the Tenth Circuit assumed here. Pet. App. 10a. The phrases "equitable relief" and "for the benefit of investors" carry specific meaning that must be considered in determining whether a court's grant of disgorgement in a SEC civil enforcement action is properly authorized under § 78u(d)(5).

This Court's precedents on how to read law counsel the same conclusion. The fundamental goal of statutory interpretation is to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). And "where Congress [has] borrow[ed] terms of art . . . [it] adopts the cluster of ideas . . . attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Finally, "[w]hen a statute limits a thing to be done in a particular mode, [the statute] includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929).

The last canon especially matters here. Both the SEC and courts have read 15 U.S.C. § 78u(d)(5) to simply recapitulate the inherent power of courts to grant equitable relief, rather than recognizing that § 78u(d)(5) statutorily displaces such inherent power and puts an investor-benefit condition on grants of "equitable relief."[7] Yet, as this Court has observed, "[c]ongressional curtailment of equity powers must be respected." *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945); *see also, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 342 (1999) (Ginsburg, J., dissenting) (noting that "courts

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[7] *See, e.g., Smith v. SEC*, 653 F.3d 121, 126 (2d Cir. 2011) (noting the SEC's argument to a magistrate judge that the judge had "inherent authority" under § 78u(d)(5) to grant certain relief sought by the SEC); *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367 (S.D. Fla. 2006) (omitting the investor-benefit clause in stating what § 78u(d)(5) authorizes).

must heed Congress' command" when Congress places express limits on equitable powers).

With that in mind, this Court should evaluate the district court's grant of disgorgement in this case against both of the meaningful conditions that 15 U.S.C. § 78u(d)(5) places on the grant of equitable remedies to the SEC. **First**, the disgorgement must fit the definition of "equitable relief" as set forth in *Great-West*. **Second**, the disgorgement must be "for the benefit of investors," as illuminated by the greater compensatory objectives and text of the Sarbanes-Oxley Act of 2002.

A final note: Disgorgement, like jurisdiction, is "a word of many, too many meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). This is a problem because many courts today have defined disgorgement in ways that wrench this term from its broader legal or historical context. For example, in attempting to establish the propriety of the district court's disgorgement order here, the Tenth Circuit explained that disgorgement constitutes "a process sometimes called 'accounting.'" Pet. App. 10a.

This definition, however, obscures an important reality: "[t]he presence of a fiduciary relationship between the claimant and the wrongdoer was essential to empower a court of equity to grant a money judgment in the form of an accounting."[8] *See, e.g.,*

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[8] Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Act: Why Federal Courts Are Powerless to Order*

United States v. Bitter Root Dev. Co., 200 U.S. 451, 478 (1906) ("We do not think that this is any . . . case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties."). In an SEC civil enforcement action, however, there generally is no fiduciary relationship (or even business relationship) between the defendant and the SEC.[9] Rather, the relevant fiduciary relationship is generally between the defendant and his alleged victims—a distinction that in the end establishes why disgorgement generally is not "equitable relief" when sought by the SEC.

Disgorgement in SEC Enforcement Proceedings, 33 REV. OF BANKING & FINANCIAL LAW 899, 915 (2013-14); *see also* BOGERT'S LAW OF TRUSTS AND TRUSTEES § 969 (2016) ("[F]or an accounting to be ordered, there must be a fiduciary or trust relationship between the petitioner and the party from whom the accounting is sought.").

[9] Nor can it be argued that a defendant's wrongdoing itself establishes a fiduciary relationship between the defendant and the SEC. *Cf. Root v. Ry. Co.*, 105 U.S. 189, 214 (1882) ("But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong.").

III. The disgorgement granted by the district court did not obey 15 U.S.C. § 78u(d)(5).

A. The disgorgement was not "equitable relief"—it was a legal claim to be paid out of Kokesh's general assets.

In *Montanile v. Board of Trustees*, 136 S. Ct. at 657–61, this Court set forth the following essential criterion that a given remedy must satisfy in order to constitute "equitable relief": "Equitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets." *Id.* at 658–59. In concrete terms, this means that where requested relief is directed at "specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (e.g., identifiable property like a car)," then the requested relief is properly deemed "equitable." *Id.*

The same is not true, however, where requested relief is directed at funds that the defendant has dissipated—e.g., a defendant who spends "the entire identifiable fund on nontraceable items (like food or travel)." *Id.* At this point, "a personal claim against the defendant's general assets" may exist, but any "recover[y] out of those assets is a legal remedy, not an equitable one." *Id.* And this remains so even though "equity courts sometimes awarded money decrees as a substitute for the value of [a] equitable lien." *Id.* at 660–61. This is because such money decrees "were still legal remedies," and the ability of equity courts to award them rested on their ancillary jurisdiction—not their power in equity. *Id.*

Applying these principles to the disgorgement here, this disgorgement sounds in law, not equity. The district court ordered Kokesh to "disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37." Pet App. 47a. The district court did not direct this disgorgement at any specific fund held by Kokesh. *Id.* Moreover, the district court expressly conceded that its disgorgement order was aimed at money that Kokesh no longer had, requiring Kokesh "to give up . . . even those [gains] he received many years ago and those he caused to be paid to third parties." Pet. App. 43a–44a. And the Tenth Circuit affirmed this objective on appeal insofar as it found that it was not punitive to require Kokesh "to pay for all the funds he caused to be improperly diverted to others as well as to himself." Pet. App. 12a.

It also bears mentioning that in granting this disgorgement, the district court gave the SEC exactly what it asked for. The SEC's complaint did not target any specific fund for disgorgement. The SEC instead asked the district court to "[o]rder the Defendant to disgorge an amount equal to the funds and benefits obtained illegally, or to which he is otherwise not entitled."[10] Then, in its motion for final judgment, the SEC asserted that all it had to do to be awarded disgorgement was "show a reasonable approximation of profits

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[10] Complaint at ¶55, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Oct. 27, 2009), ECF No. 1.

causally connected to the violation"—i.e., it did not have to point to any specific fund in Kokesh's possession.[11] In short, the SEC's consistent position in seeking disgorgement was that Kokesh was "liable for [all of] the funds he . . . dissipated."[12]

This phenomenon is not limited to Kokesh's case. To the contrary, as a former assistant director of the SEC's Division of Enforcement has noted, "any resemblance [of disgorgement] to a truly equitable remedy largely disappears in most [SEC] cases."[13] For example, "the SEC and the courts generally say that disgorgement can be ordered . . . against [any] defendants who no longer possess or have access to the tainted profits, or never possessed them at all."[14] The SEC and courts also "say that a defendant can be held jointly and severally liable for other people's gains as long as the participants were closely related or had collaborated in their scheme."[15] These views then "call into question whether the label of equity accurately describes disgorgement."[16]

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[11] Plaintiff's Motion for Entry of Final Judgment Against Defendant Charles R. Kokesh at 8, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Dec. 2, 2014), ECF No. 176.

[12] Plaintiff's Reply to Defendant's Opposition to Motion for Final Judgment at 11, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Jan. 21, 2015), ECF No. 181 (citation omitted).

[13] Russell Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 5 (2013).

[14] *Id.*

[15] *Id.*

[16] *Id.*

That question is not resolved by declaring that "chancery courts possessed the power to order equitable disgorgement in the eighteenth century." *SEC v. Cavanagh*, 445 F.3d 105, 120 (2d Cir. 2006).[17] Rather, the question is whether the disgorgements that courts are ordering in SEC enforcement actions satisfy "the conditions that equity attached" to equitable disgorgement before the merger of law and equity. *Great-West*, 534 U.S. at 216. And the answer to that question is 'no' to the extent that these disgorgements are directed at a defendant's general assets rather than any "specific property." *Montanile*, 136 S. Ct. at 659; *cf.* GEORGE PALMER, 1 LAW OF RESTITUTION § 1.1 (1978) ("If the defendant stole the plaintiff's goods and sold them, the plaintiff was given a money judgment in the amount of proceeds at law.").

B. The disgorgement was not "for the benefit of investors"—it was solely for the government's benefit.

In enacting 15 U.S.C. § 78u(d)(5), Congress could have simply declared that the SEC "may seek, and any Federal court may grant, any equitable relief." But it didn't. Congress instead declared that the SEC "may seek, and any Federal court may grant, any equitable

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17 *See* DeLuca, *supra* note 8, at 902 ("*Cavanagh* makes a diligent effort to show that the liability to surrender ill-gotten gains was a standard part of eighteenth-century English equity jurisprudence, but [*Cavanagh*] succeeds only in showing that such liability was the consequence of a breach of fiduciary duty or knowing participation in such a breach.").

relief that may be appropriate or necessary **for the benefit of investors**." These words cannot be ignored—at least not so long as the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The question then becomes: what facts did the district court find—and what showing did the government make—to prove that the disgorgement ordered against Kokesh in this case was "for the benefit of investors."

The answer is none. The district court's order contains no finding as a matter of fact or law that the disgorgement of $34,927,329 from Kokesh will benefit investors. *See* Pet. App. 41a–47a. The SEC's motion for final judgment also contains no argument or evidence to demonstrate disgorgement will benefit investors. The SEC instead makes the opposite argument to the extent that it distinguishes disgorgement from "damages, which are designed to compensate fraud victims."[18] Then, in its Tenth Circuit brief, the SEC omits the investor-benefit clause entirely in quoting

[18] Plaintiff's Motion for Entry of Final Judgment Against Defendant Charles R. Kokesh at 7, *supra* note 11.

15 U.S.C. § 78u(d)(5).[19] The SEC also notes the discretion of district courts "to direct disgorged funds to the U.S. Treasury rather than to victims."[20]

All of this is consistent, however, with how the SEC and courts have come to define disgorgement in the last few decades. As the Fifth Circuit explains: "Disgorgement . . . is meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does." *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). What this means in practical terms is that while the present case may have been cast by the SEC as being about a major fraud that caused millions of dollars in losses to investors,[21] those investors will likely never see a dime of the money that the SEC collects in disgorgement.

The SEC may attempt to argue that investors benefit in general from SEC enforcement actions. The relevant question, however, is whether this is the kind of

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19 Brief of the Securities & Exchange Commission, Plaintiff-Appellee, No. 15-2087, 2015 WL 8038637, at *20 (10th Cir. filed Dec. 2015) ("Disgorgement is an equitable remedy intended to deprive wrongdoers of their unjust enrichment, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989), imposed under the Exchange Act's authorization for district courts to grant 'any equitable relief that may be appropriate or necessary.' Section 21(d)(5), 15 U.S.C. § 78u(d)(5).").

20 *Id.* at *34 n.12.

21 Complaint at ¶1, *supra* note 10 ("From at least 1995 through July 2007, Kokesh systematically misappropriated approximately $45 million from four Commission-registered business development companies . . . . ").

benefit that Congress had in mind when Congress added the investor-benefit clause to the text of 15 U.S.C. § 78u(d)(5). *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."). In this regard, the investor benefit that lies at the heart of the Sarbanes-Oxley Act is enabling more injured investors to be made whole. *See supra* Part II. And that accords with Congress's limitation of § 78u(d)(5) to "equitable relief" because the goal of equity is "to prevent an unjust enrichment by allowing **injured complainants** to claim that which, *ex aequo et bono*, is theirs, and nothing beyond this." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); *see also, e.g.*, *Huntington v. Attrill*, 146 U.S. 657, 667 (1892) (observing that "a statute giving the right to recover back money lost at gaming and . . . authorizing a qui tam action to be brought" is "remedial as to the loser, though penal as regards the . . . [relator]").

CONCLUSION

By addressing whether the disgorgement in this case was properly authorized under 15 U.S.C. § 78u(d)(5), the Court stands to hold the line between law and equity true and clear. And by enforcing this line against the disgorgement, the Court does not render the SEC powerless. The SEC remains "free to eschew the involvement of the courts and employ its own arsenal of remedies instead." *SEC v. Citigroup Global Markets, Inc.,* 752 F.3d 285, 297 (2d Cir. 2014). The point is that so long as the SEC opts to "call upon the power of the courts," the SEC must also accept the limits of this power. *Id.*

Respectfully submitted,

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