No. 23-900

In the Supreme Court of the United States

DEWBERRY GROUP, INC., FKA DEWBERRY CAPITAL CORPORATION, PETITIONER

v.

DEWBERRY ENGINEERS INC.

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

BRIEF FOR PROFESSORS SAMUEL L. BRAY AND PAUL B. MILLER AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are professors of law who teach and write about subjects that include the law of remedies and equity. They have expertise that bears directly on the question presented by the petition for a writ of certiorari: Whether an award of the "defendant's profits" under the Lanham Act, 15 U.S.C. § 1117(a), can in-

[1] Counsel for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to the deadline for filing the brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

clude an order for the defendant to disgorge the distinct profits of legally separate, nonparty corporate affiliates.

Amici are:

Samuel L. Bray, John N. Matthews Professor of Law at Notre Dame Law School.[2] Professor Bray has written extensively about the law of remedies, with a particular focus on equitable remedies.

Paul B. Miller, Robert and Marion Short Professor of Law at Notre Dame Law School, Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law. Professor Miller's work centers on general jurisprudence as well as philosophical questions in equity, fiduciary law, trust law, agency, and corporate law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Lanham Act's authorization to award "the defendant's profits," "subject to the principles of equity," 15 U.S.C. § 1117(a), does not empower district courts to disregard the "bedrock principle" of corporate separateness, *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998), based on nothing more than a weighing of the equities in an individual case. The decision below, in which the court of appeals endorsed that startling proposition, is flatly inconsistent with this Court's well-established case law. Under this Court's consistent approach, a statutory invocation of equity refers to *traditional* equitable principles—as reflected in the accumulated precedents developed by courts over centuries of equity practice and well-known reference works. Equity does not afford "discretion" to bypass

[2] Institutional affiliations are provided for identification purposes only.

the basic contours of traditional doctrine, and it has never authorized courts to run roughshod over foundational principles of corporate separateness based on a sense of what would be most fair in an individual case.

The court of appeals' error is also consequential. In addition to conflicting with the decisions of two other circuits, the decision below undermines important interests in stability and predictably under the Lanham Act, and the court's casual disregard of corporate separateness threatens a core premise of capital formation and business operations. The court of appeals' mistaken approach also threatens to sweep more broadly, causing mischief under many other federal statutes that employ materially identical language to authorize private litigants and administrative agencies to pursue equitable remedies. This Court's review is therefore warranted to address the court of appeals' stark departure from the proper understanding of equitable remedies available under federal statutes.

ARGUMENT

A. The Court Of Appeals Embraced An Unduly Broad Understanding Of Equitable Principles That Conflicts With This Court's Decisions

1. The Lanham Act's reference to "the principles of equity" incorporates traditional limitations on equitable remedies

a. The Lanham Act authorizes a successful plaintiff to recover an award of "the defendant's profits," with that recovery being "subject to the principles of equity." 15 U.S.C. § 1117(a). As a long line of this Court's cases confirm, this sort of statutory invocation of equity encompasses "the kinds of relief 'typically available in equity' in the days of 'the divided bench,' before law and equity merged." *US Airways, Inc.* v.

McCutchen, 569 U.S. 88, 94-95 (2013) (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993)); see also, *e.g.*, *Liu* v. *SEC*, 140 S. Ct. 1936, 1942 (2020) ("equitable relief" includes "those categories of relief that were *typically* available at equity") (quotation marks omitted). The Lanham Act's reference to "the principles of equity" is of a piece, incorporating "transsubstantive guidance on broad and fundamental questions about matters like parties, modes of proof, defenses, and remedies." *Romag Fasteners, Inc.* v. *Fossil Grp., Inc.*, 140 S. Ct. 1492, 1496 (2020). When interpreting this kind of statutory reference, the critical question a court must answer is thus whether the remedy at issue is one "traditionally viewed as 'equitable.'" *Mertens*, 508 U.S. at 255; see also *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 439 (2011) (asking whether a remedy was, "traditionally speaking," available at equity); *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999) (reading the Judiciary Act of 1789's reference to "all suits * * * in equity" as invoking "traditional principles of equity jurisdiction") (quotation marks omitted).

By consistently focusing on the "traditional" (*Amara*, 563 U.S. at 439) or "historic" (*McCutchen*, 569 U.S. at 98) equitable remedies, this Court's decisions have decisively rejected an alternative—and far broader and more malleable—understanding of statutory references to equitable relief. Indeed, this Court has frequently confronted general appeals to the breadth and flexibility of equity, and litigants have offered those appeals to justify novel forms of relief that lack any analogue in traditional equity practice. Although this Court has correctly recognized that "equity is flexible," and thus capable of development and

change, it has made clear that this "flexibility is confined within the broad boundaries of *traditional* equitable relief." *Grupo Mexicano*, 527 U.S. at 322 (emphasis added).

Equity developed a coherent set of doctrines and remedies over "several hundred years." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). Accordingly, "courts of equity" are "governed by rules and precedents no less than the courts of law," *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996) (quoting *Missouri* v. *Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring)), and equity's traditional set of doctrines and remedies remained intact after the merger of law and equity in the federal courts, see *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014). When Congress refers to equity, it invokes that body of law, the "basic contours" of which "are well known and can be discerned by consulting works on equity jurisprudence." *Liu*, 140 S. Ct. at 1942 (quotation marks omitted); see also, *e.g.*, *Romag*, 140 S. Ct. at 1496 (looking to "treatises and handbooks on the 'principles of equity'"); *Amara*, 563 U.S. at 439-440; *Grupo Mexicano*, 527 U.S. at 319-322. A statutory reference to the principles of equity thus does not authorize whatever remedies a court may deem to be appropriate or just in a particular case, and it does not authorize courts to improvise wholly new forms of relief in service of "the grand aims of equity." *Grupo Mexicano*, 527 U.S. at 321 (quotation marks omitted).

b. Sound reasons support this Court's consistent understanding that statutory references to equity incorporate traditional equitable principles. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763, 1765 (2022) (endorsing the Court's

practice of "look[ing] to the traditional practices of equity"). As an initial matter, that approach follows from the "settled principle of statutory construction" that, when Congress employs a term with a well-developed meaning in the law, it is generally presumed to adopt that meaning. *United States* v. *Shabani*, 513 U.S. 10, 13 (1994); see also, *e.g.*, *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019); *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962). Precisely because equity's "basic contours" are "well known," *Liu*, 140 S. Ct. at 1942, a departure from the traditional understanding would be warranted only if Congress had "made its desire plain." *Hecht*, 321 U.S. at 330; see also, *e.g.*, *Nken* v. *Holder*, 556 U.S. 418, 433 (2009); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982).

Adherence to equity's traditional contours also reflects a healthy respect for equity's coherence and systematic quality. As noted above, the equitable remedies were developed over "several hundred years." *Hecht*, 321 U.S. at 329-330. Equity's historical development reflects significant contingency and path-dependence; it would therefore be a mistake to treat the traditional equitable remedies as the product of planned consistency. But equitable remedies represent a response to recurring challenges, including the danger of opportunism and the need for remedies that compel or forbid action with continuing judicial oversight. See Samuel L. Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. Rev. 530, 553-558, 563-572 (2016); Bray & Miller, *Getting into Equity*, 97 Notre Dame L. Rev. at 1776-1785; Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1071-1081 (2021).

And these remedies can be understood as part of a rational system, accompanied by interlocking doctrines and limitations suited to the remedies particular role. See Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. Rev. at 533; cf. *The Federalist No. 83*, 558, 569 & n.* (Hamilton) (Jacob E. Cooke ed. 1961) (noting that "the principles by which [equitable] relief is governed are now reduced to a regular system"). Given the interlocking nature of these components, departures from the traditional conception of equity inevitably pose a risk of unanticipated effects. See, *e.g.*, *Grupo Mexicano*, 527 U.S. at 331 (expressing concern that authorizing creditors to pursue a preliminary injunction against dissipation of a debtor's assets "could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws").

Finally, this Court's "traditionally cautious approach to equitable power," *Grupo Mexicano*, 527 U.S. at 329, is consistent with the traditional role of courts in our system of government. To be sure, the limitations of that role do not demand that equity remain entirely static: "From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, *as they have been developed in the federal courts*." *Gordon* v. *Washington*, 295 U.S. 30, 36 (1935) (emphasis added). And the law of equitable remedies should take into account the availability of other adequate remedies, which may change over time as the law develops. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 509 (1959); cf. Bray & Miller, *Getting into Equity*, 97 Notre Dame L. Rev. at 1796 ("If law is not static, the equity that corrects and supplements it cannot be

static either."). But "any claim to the exercise of federal equity jurisdiction must find a basis in the equity tradition, reckoning both with the tradition's powers and with its limits." Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 Notre Dame L. Rev. 699, 707 (2022).

2. Traditional equitable principles do not authorize recovery of profits earned by a defendant's corporate affiliate based on a court's case-specific weighing of the equities

In the decision below, the court of appeals held that respondent could recover profits earned by petitioner's corporate affiliates, even though petitioner was the only named defendant in the case and the Lanham Act authorizes a court to award only "the *defendant's* profits." 15 U.S.C. § 1117(a) (emphasis added). The court of appeals reasoned that, because an award of profits under the Lanham Act is "subject to the principles of equity," *ibid.*, recovery is "ultimately a matter of the court's discretion," and it held that the district court had properly weighed the equities in awarding the profits of petitioner's non-party affiliates. Pet. App. 45a. In light of the foregoing principles, that result would be justified only if traditional equitable doctrine authorized courts to dispense with corporate formalities based on a case-specific weighing of the equities. But the court of appeals did not even undertake the required analysis, and the profits remedy here finds no support in the equity tradition. The court of appeals therefore unmistakably erred in upholding the district court's profits award—a decision that unsurprisingly conflicts with the precedent of two other circuits that have properly applied traditional veil-piercing doctrine to claims under the Lanham Act. See Pet. 15-20 (discussing conflict with *U-*

Haul Int'l, Inc. v. *Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), and *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153 (11th Cir. 2022)).

a. The profits award authorized by Section 1117(a) is the equitable remedy known as an "accounting" or "accounting for profits." Under the traditional doctrine, when a defendant has profited by using something that in good conscience belongs to the plaintiff, equity could require the defendant to account for those wrongfully obtained profits. See 1 D. Dobbs, *Law of Remedies* § 2.6(3), at 158 (2d ed. 1993). The classic case is an accounting awarded against a trustee or corporate director who has absconded with trust property or the profits of a business opportunity which he or she was obligated to pursue for the corporation. See Samuel L. Bray, Remedies, in *The Oxford Handbook of the New Private Law* 563, 569-570 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin, and Henry E. Smith eds., 2020) (describing such an accounting as the "paradigm remedy in trust law").

Consistent with that basic justification, traditional doctrine held that "in equity the profits which the complainant seeks to recover must be shown to have been actually received *by the defendant*." *Coupe* v. *Royer*, 155 U.S. 565, 583 (1895) (emphasis added); see also, *e.g.*, *Belknap* v. *Schild*, 161 U.S. 10, 25-26 (1896) ("In a suit in equity for the infringement of a patent, the ground upon which profits are recovered is that they are the benefits which have accrued *to the defendants* from their wrongful use of the plaintiff's invention * * * .") (emphasis added). Thus, the traditional understanding of the accounting remedy does not support the profits award at issue here, under

which respondent recovered not the profits of the defendant it actually sued, but rather profits of petitioner's affiliates that are not parties to this litigation.

b. No other established equitable doctrine could justify the court of appeals' departure from the "bedrock principle" that a corporation "is not liable for the acts of its affiliates," *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998)—which applies just as surely when equitable relief is sought as it does to claims for legal remedies. To be sure, that principle of corporate separateness is not absolute. But "[l]imited liability is the rule, not the exception," *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626 (1983), and it governs unless "the corporate veil may be pierced," *Bestfoods*, 524 U.S. at 63-64.

Veil piercing is a "rare exception," *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003), justified only when the corporate form is being misused as an instrument of fraud, deception, or dishonesty. Here, the court of appeals expressly disavowed any reliance on veil piercing. See Pet. App. 43a. That doctrine thus cannot justify overriding the corporate separateness between petitioner and its non-party affiliates.

The decision below likewise cannot be justified by established principles of accessory liability, which in rare cases may permit a court to deem a third-party liable as an accessory on the basis of established legal or equitable principles governing liability for conspiracy or complicity in a wrong done by the corporation. See, *e.g.*, *Allied Cap. Corp.* v. *GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006). Accessory liability is premised on the independent actionable wrong of the accessory—a theory that was neither pursued by respondent nor adopted by the courts below.

c. Lacking any support in established doctrines, the court of appeals' decision ultimately rests on an assertion of broad "discretion" to dispense with the "bedrock principle" of corporate separateness, *Bestfoods*, 524 U.S.at 62-63, based on the court's own understanding of what would be fair in this case. But as we have explained, see pp. 4-5, *supra*, this Court's decisions decisively reject that "expansive view of equity." *Grupo Mexicano*, 527 U.S. at 321. In the federal system, courts must respect "the broad boundaries of traditional equitable relief." *Ibid.* By elevating its own view of fairness over established doctrinal limitations, the court of appeals adopted precisely what this Court has disclaimed—a rule "not of flexibility but of omnipotence." *Ibid.*; see also *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.").

As a conceptual matter, moreover, the court of appeals badly misunderstood the role of discretion in equitable practice. Broadly stated, traditional equitable principles afford courts discretion to vary or to suspend the operation of legal rules where the usual operation of those rules would be inequitable. See generally Bray & Miller, *Getting into Equity*, *supra*. But equitable relief is the exception rather than the rule, and judicial discretion to provide equitable dispensation is subject to the foundational maxim that "equity follows the law." *Hedges* v. *Dixon Cnty.*, 150 U.S. 182, 192 (1893).

Equitable dispensation is thus meant to result in an "adjustment" of the enforcement of the law that is "nice," in the sense of very precise, *Romero-Barcelo*, 456 U.S. at 312 (quoting *Hecht*, 321 U.S. at 329); it is

not meant to permit end runs to be made around the law. For that reason, judicial discretion in equity is animated by traditional principles and cabined or constrained by equity's limiting doctrines. See, *e.g.*, Bamzai & Bray, *Debs and the Federal Equity Jurisdiction* 98 Notre Dame L. Rev. at 707-713 (describing limiting principles of equity).

Indeed, judicial discretion in equity most often takes the form of discretion to *withhold* relief, underscoring the principle that equitable remedies are never a matter of right. Thus, "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 32 (2008). That is why a patent holder, for instance, is not automatically entitled to a permanent injunction upon a showing of infringement. Rather, even a plaintiff that has established a violation of its legal rights must also demonstrate, among other things, that legal remedies are inadequate and that relief is warranted when "considering the balance of hardships between the plaintiff and defendant." *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). To state the obvious, this sort of relief-*limiting* discretion offers no support at all for the liability-*expanding* improvisation engaged in by the courts below.

B. The Question Presented Is Important And Warrants Review In This Case

The court of appeals' basic methodological error threatens to destabilize litigation not only under the Lanham Act, but also under a wide variety of other federal statutes that authorize equitable relief. And the starkness of the court of appeals' error makes this case a sound vehicle to reinforce the well-settled understanding that a statutory reference to equity does

not license courts to develop novel remedies without any grounding in equity's historical tradition. This Court's review is therefore warranted.

1. As the petition correctly explains (at 33-34), the decision below holds significant consequences for the Lanham Act itself. The court of appeals disregarded the principle of corporate separateness—which this Court has described as "[a] basic tenet of American corporate law," *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003)—based on nothing more than its own "weigh[ing] [of] the equities" of this case. Pet. App. 42a. In doing so, it seriously undermined the stability and predictably that Congress clearly sought to ensure when it selected a term of art with well-understood traditional contours to demarcate the scope of relief available under Section 1117(a). See pp. 5-7, *supra*. The natural inference is that "Congress felt comfortable" incorporating "equitable principles" in Section 1117(a) "precisely because the basic contours of the term are well known." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 217 (2002). But "rolling revision of its content" based on case-by-case weighing of the equities "introduces a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term 'equity.'" *Ibid.* That disruption of settled expectations is particularly pernicious when it comes to corporate separateness, given the foundational role that doctrine plays in capital formation and the operation of American businesses. See, *e.g.*, *First Nat'l City Bank*, 462 U.S. at 626.

Petitioner is also correct to observe (Pet. 34-35) that the consequences of the decision below are not limited to the accounting for profits remedy under the Lanham Act. A host of other federal statutes employ

broad references to equity—such as "the principles of equity," "equitable relief," or "equitable remedies"—to define the scope of relief available to redress statutory violations. The court of appeals' mistaken view that a statutory reference to "equity" authorizes case-by-case improvisation—rather than requiring adherence to traditional equitable principles—thus has the potential to undermine stability and predictability across a wide range of statutory contexts.

Another provision of the Lanham Act, for example, uses language virtually identical to Section 1117(a)'s in empowering courts to "grant injunctions, *according to the principles of equity* and upon such terms as the court may deem reasonable," to restrain violations of a trademark holder's rights. 15 U.S.C. § 1116(a) (emphasis added); see also 15 U.S.C. § 1125(c)(1) (authorizing injunctions, "[s]ubject to the principles of equity," to remedy "dilution by blurring or dilution by tarnishment of [a] famous mark"). The Patent Act likewise authorizes the district courts to protect a patentee's rights by "grant[ing] injunctions in accordance with the principles of equity." 35 U.S.C. § 283; see also *eBay Inc.*, 547 U.S. at 391 (holding that a request for injunctive relief under Section 283 is governed by "well-established principles of equity").

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, provides another prominent example. One of ERISA's remedial provisions authorizes a plaintiff to seek injunctions and "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Of course, claims under ERISA have long generated a significant volume of high-stakes litigation in the federal courts, and continue to do so. See, *e.g.*, *Hughes* v. *Northwestern Univ.*, 595 U.S. 170, 173-175 (2022).

Federal administrative agencies have also frequently been empowered to pursue equitable relief. The Securities and Exchange Commission is authorized to pursue "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). That authority includes recovery of the defendant's wrongfully obtained profits. See *Liu*, 140 S. Ct. at 1944. The Commodity Futures Trading Commission is likewise authorized to seek "equitable remedies" to redress violations of the commodities laws, including restitution and "disgorgement of gains received in connection with such violation." 7 U.S.C. § 13a-1(d)(3)(A)-(B). And the Consumer Financial Protection Bureau may obtain "all appropriate legal and equitable relief" to redress violations of consumer protections law, both in federal-court enforcement actions and in internal agency adjudications. 12 U.S.C. §§ 5564(a), 5565(a). Not only in these statutes, but also in "many others," *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 217, has Congress referred to equitable doctrines and remedies.[3]

In each of the instances just given, the statute employs language that is materially indistinguishable

[3] See, *e.g.*, 12 U.S.C. § 1817(j)(15)(C)(ii) (authorizing "equitable relief" to prevent violations of statutory and regulatory restrictions on change in control of federally insured depository institutions); 18 U.S.C. § 2724(b)(4) (authorizing "equitable relief" to redress violations of the Driver's Privacy Protection Act of 1994); 29 U.S.C. § 626(c)(1) (authorizing civil actions to pursue "legal or equitable relief" for violations of the Age Discrimination in Employment Act); 42 U.S.C. § 12188(b)(2) (authorizing "equitable relief" in actions by the Attorney General to enforce Title III of the Americans with Disabilities Act); 49 U.S.C. § 507(c) (authorizing the Attorney General to seek "equitable relief" to redress certain violations of the Motor Carrier Safety Act of 1984 and regulations promulgated thereunder).

from Section 1117(a)'s reference to "the principles of equity." Thus, if left uncorrected, the court of appeals' misguided approach risks expanding the already considerable power of these agencies far beyond what Congress contemplated. Indeed, although the decision below most directly threatens to destabilize the doctrine of corporate separateness, the improvisational approach endorsed by the court of appeals could sweep far more broadly. Litigants face a natural incentive to push the outer boundaries of the remedial authority that Congress has specified, and if the only practical limit is whatever happens to strike a reviewing court as fair in an individual case, then litigants can be expected to seek—and courts may well countenance—wholly new forms of purportedly "equitable" relief that have no connection to the equity tradition. That danger is heightened in the context of administrative agencies, given their "far-reaching influence * * * and the opportunities such power carries for abuse." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2423 (2019); see also *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 499 (2010) (noting that administrative agencies "wield[] vast power and touch[] almost every aspect of daily life"); cf. William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 159-160 (2023) (noting that "equitable remedies are often more intrusive to the parties, encroaching on liberty interests of private defendants and raising democratic concerns for public defendants") (footnote omitted).

The situation confronted in *Liu*, *supra*, illustrates the need for timely intervention by this Court. There, the Court construed the SEC's authority to obtain "equitable relief," 15 U.S.C. § 78u(d)(5), to "incorporate[e] * * * longstanding equitable principles" that "prohibit[] the SEC from seeking an equitable remedy in

excess of a defendant's net profits from wrongdoing." *Liu*, 140 S. Ct. at 1946. Over the prior decades, however, lower courts "had awarded disgorgement in * * * ways that test the bounds of equity practice," including "by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud." *Ibid.* (citing *SEC* v. *Clark*, 915 F. 2d 439, 441, 454 (9th Cir. 1990); *SEC* v. *Brown*, 658 F. 3d 858, 860-861 (8th Cir. 2011) (per curiam); *SEC* v. *Contorinis*, 743 F. 3d 296, 304-306 (2d Cir. 2014)). Thus, until this Court's decision in *Liu*, the lower courts had departed from Congress's design by awarding historically ungrounded forms of relief that "could transform any equitable profits-focused remedy into a penalty." *Id.* at 1949. That the lower courts had upheld the SEC's overreach in this manner *for decades* underscores the need for this Court's vigilance in safeguarding the proper boundaries of equitable relief.[4]

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[4] *AMG Capital Management, LLC* v. *FTC*, 593 U.S. 67 (2021), illustrates the same dynamic in a related context. There, the Court confronted the FTC's authority under 15 U.S.C. § 53 to seek preliminary and permanent injunctions from the district courts. See *AMG*, 593 U.S. at 72-73. Since at least the 1990s, lower courts had held that this statutory authorization to seek "injunctions" included an authority to seek monetary relief, and ultimately the FTC was able to "win equitable monetary relief directly in court with great frequency." *Id.* at 74. This Court, however, unanimously rejected that practice, holding that Section 53 did not authorize the FTC to obtain additional equitable relief beyond the "injunctions" that the statute expressly contemplates. See *id.* at 82. Again, the fact that lower courts had blessed the FTC's overreach for decades prior to this Court's intervention confirms the continuing need for this Court's oversight.

2. This case also provides a sound vehicle for this Court's review of the question presented. The question presented is cleanly presented because the courts below expressly "considered the revenues of entities under common ownership * * * in calculating [petitioner's] true financial gain" "rather than pierc[ing] the corporate veil." Pet. App. 43a. And they never suggested that their approach was consistent with historical equity practice, so granting review in this case would not require an extended inquiry into equity's traditional contours. This Court need only reaffirm the well-established principle that federal courts should give equitable remedies their traditional scope, rather than engaging in dramatic case-by-case improvisation.

Indeed, from *amici*'s perspective, the starkness of the court of appeals' error makes this Court's review particularly necessary. The decision below is not a debatable but incorrect application of this Court's established framework for determining the scope of equitable remedial provisions. Rather, the court of appeals simply bypassed that framework altogether. The court of appeals' stark and inexplicable departure from this Court's precedents amply justifies review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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