No. 23-1338

In The
Supreme Court of the United States

MARTIN SHKRELI, individually,
as an owner and former director of Phoenixus AG and
as a former executive of Vyera Pharmaceuticals LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION, STATE OF NEW YORK,
STATE OF CALIFORNIA, STATE OF OHIO, COMMONWEALTH
OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF
NORTH CAROLINA, COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Rule 15.8, Petitioner submits this supplemental brief to address three intervening developments directly relevant to his pending petition for a writ of certiorari.

A. This Court's recent grant of certiorari in *Dewberry* confirms the need to resolve the complementary circuit conflict here.

On June 24, 2024, this Court granted certiorari in *Dewberry Group, Inc.* v. *Dewberry Engineers Inc.*, No. 23-900.[1] *Dewberry* will consider whether a corporate defendant can be ordered to disgorge profits that were realized exclusively by its non-party corporate affiliates in the context of a trademark infringement action for "defendant's profits" under 15 U.S.C. § 1117(a) of the Lanham Act. Petition for Writ of Certiorari, *Dewberry*, No. 23-900 ("Dewberry Pet.") at i; see also *id*. at 16. Shkreli's petition presents the complementary question of whether a federal court may order an individual defendant to disgorge wrongful profits that accrued exclusively to his or her corporate codefendants in the context of a federal antitrust case that involves a pendant claim for equitable restitution under state law. Pet. ("Shkreli Pet.") at i. Both questions hinge directly on the scope of a federal district court's equity powers, as defined and limited by traditional equity practice.

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[1] As previously noted, *Dewberry* was pending at the time this petition was filed. See Pet. at 25, n.1.

All of the conventional factors that supported certiorari in *Dewberry* are equally present here. Both petitions ask this Court to resolve intercircuit conflicts over questions of whether and under what circumstances a federal court of equity may order a defendant to "disgorge" unlawful profits that were realized exclusively by other parties. Compare Dewberry Pet. at 15-22 (circuit conflict between the Fourth Circuit and the Ninth and Eleventh Circuits) with Shkreli Pet. at 19-24 (circuit conflict between the Second Circuit and the Fifth and Eleventh Circuits). Both petitions seek review of lower-court decisions that clash with well-established precedents of this Court that limit disgorgement to a defendant's own profits, *Liu* v. *SEC*, 140 S. Ct. 1936, 1945-1946 (2020), and prohibit disgorgement against a defendant who has "made no profit at all" from unlawful conduct. *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 140 (1878). Compare Dewberry Pet. at 26-29 with Shkreli Pet. at 2-3, 7-8, 18. And both petitions raise recurring and important questions of federal equity practice: Equitable disgorgement is a frequently litigated remedy that is implicated by numerous statutes and regulatory schemes authorizing actions for profits, equitable restitution, or "equitable relief" generally. Compare Dewberry Pet. at 32-35 with Shkreli Pet. at 25-28. Indeed, an amici brief of equity scholars in support of certiorari in *Dewberry* details how formulations of equitable remedies unmoored from traditional equity practice "threaten[] to destabilize litigation not only under the Lanham Act, but also under a wide variety of other federal statutes." Brief for Professors Samuel L. Bray and Henry E. Smith as

Amici Curiae in Support of Petitioner, *Dewberry*, Case No. 23-900, p. 12; see also *id*. at pp. 12-17.

To be sure, the federal courts in *Dewberry* and *Shkreli* entered their respective equitable monetary judgments in different contexts and under different statutes: The court in *Dewberry* ordered the disgorgement of trademark infringement profits in an action brought under the Lanham Act, while the court in *Shkreli* ordered disgorgement in an antitrust case after exercising supplemental jurisdiction over a New York statute authorizing equitable restitution. But both judgments were grounded in the equity jurisdiction of the federal courts, which operates across practice areas and is defined and cabined by traditional principles of equity. Compare Dewberry Petition at 27 (explaining that the Lanham Act's authorization of an equitable profits remedy incorporates "fundamental rules that apply more systematically across claims and practice areas" and imports "transsubstantive guidance on broad and fundamental questions about matters like parties, modes of proof, defenses, and remedies") (quoting *Romag Fasteners, Inc*. v. *Fossil, Inc*., 140 S. Ct. 1492, 1495-96 (2020)) with Shkreli Petition at 4-5 (noting that the traditional limitations on a federal court's equity powers continue to apply when the court is hearing a claim of state law through an exercise of supplemental or diversity jurisdiction) (citing *Guaranty Trust Co*. v. *York*, 326 U.S. 99, 105-06 (1945); *Grupo Mexicano De Desarrollo* v. *All. Bond Fund*, 527 U.S. 308, 318 (1999)).

Because the *Dewberry* and *Shkreli* petitions present closely related questions of federal equity practice

that divide the courts of appeals, resolving both in the same term would promote judicial economy while also unifying federal law and providing the lower courts with needed guidance.

B. This Court's resolution of *Jarkesy* further undermines the Second Circuit's *Contorinis* decision at the center of the circuit conflict here.

On June 27, 2024, this Court issued its decision in *SEC* v. *Jarkesy*, No. 22-859, which held that the Seventh Amendment entitles a defendant to a jury trial in an SEC proceeding that seeks civil penalties. In so holding, this Court emphasized that a court of equity's power to issue equitable monetary relief is limited "solely" to the purpose of restoring the status quo:

> What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, *solely* to restore the status quo. * * * And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to punish culpable individuals. Applying these principles, we have recognized that civil penalties are a type of remedy at common law that could only be enforced in courts of law.

Slip Op. at *9 (emphasis added) (citations and quotations omitted).

Jarkesy's reasoning thus all but forecloses the continued viability of the Second Circuit's decision in *SEC* v. *Contorinis*, 743 F.3d 296 (2d Cir. 2014), which

generated the circuit split at issue in this petition by holding that a court of equity could order a defendant to disgorge profits that accrued exclusively to other parties. See Pet. at 22-24. Indeed, this Court's unanimous decision in *Kokesh* v. *SEC*, explicitly cited *Contorinis* as an example of a disgorgement remedy that "does not simply restore the status quo; it leaves the defendant worse off." 581 U.S. 455, 466 (2017) (citing *Contorinis*, 743 F. 3d at 302) (additional citations omitted); see also Daniel B. Listwa and Charles Seidell, *Penalties in Equity: Disgorgement After Kokesh v. SEC*, 35 YALE J. ON REG. 698-99 (2018) (describing *Kokesh* as a "warning shot" against *Contorinis*). Thus, because equitable monetary relief exists "solely to restore the status quo," and because the *Contorinis* formulation of disgorgement "does not simply restore the status quo" but instead "leaves the defendant worse off," the Second Circuit's departure from its sister circuits no longer finds any support whatsoever in this Court's precedent.

Despite *Contorinis*' untenable basis in traditional equity practice, however, it remains the law of the Second Circuit—and the circuit conflict it created has now persisted for ten years. This Court's intervention is thus urgently needed to resolve that conflict and restore uniformity to the courts of appeals.

C. The Federal respondent is an interested party.

On July 16, this Court granted the State respondents' consent motion to extend the deadline to respond to the petition to and including August 8, 2024. The

Federal Trade Commission waived its response in a filing entered by the Solicitor General. Although the district court's entry of equitable disgorgement was grounded in N.Y. Exec. Law § 63(12) (rather than the FTC Act), this Court may wish to request a response from the Federal respondent because it remains an interested party for several reasons.

First, the FTC is actively enforcing the judgment. The disgorgement order vests the Federal and State respondents with the authority to compel Petitioner to produce financial documents and sit for interviews "for purposes of determining or securing compliance." Pet.App. at 23a; see also *id*. at 21a-23a. During the pendency of Petitioner's appeal, for example, the FTC and State respondents exercised that power by jointly moving the district court to hold Petitioner in contempt for reasons that included his failure to satisfy the disgorgement judgment—pointing in part to Petitioner's release from prison and retention of appellate counsel as evidence that his financial condition may have improved.[2] The motion was supported by the declaration of an FTC attorney from the Commission's Compliance Division, who explained that she had been tasked with "monitor[ing] Defendant Martin Shkreli's compliance" with the order and detailed her subsequent

[2] Plaintiffs' Memorandum of Law in Support of Motion to Hold Defendant Martin Shkreli in Contempt and Sanction Shkreli for Violating the Court's February 4, 2022 Order [Dkt. No. 922] at 4, *FTC* v. *Vyera*, No. 20-cv-706 (S.D.N.Y., Jan. 20, 2023)

investigation.[3] Thus, the FTC is actively employing its resources to enforce the judgment at issue.

Second, the FTC has publicly touted the judgment below as "precedent-setting relief" and "a warning to corporate executives everywhere that they may be held individually responsible for the anticompetitive conduct they direct or control." Pet. at 28 (citation omitted). And although this Court has held that the Commission does not have congressional authorization to pursue disgorgement on its own, *AMG Capital* v. *FTC*, 593 U.S. 67 (2021); see also Pet. at 12-13, the FTC and State of New York continue to pursue equitable monetary relief jointly by bringing antitrust cases in federal court that raise pendant claims for equitable restitution under N.Y. Exec. Law § 63(12). See Pet. at 27, n.9 (citing *FTC, et al.* v. *Amazon*, No. 23-cv-1495 (W.D. Wash.)). Thus, the Commission's public endorsement of the judgment below and its ongoing involvement in other litigation that seeks equitable monetary relief further highlight its interest in the controversy.

Finally, the federal government has a broader stake in the question presented because of its interest in the numerous federal statutes and regulatory schemes that incorporate the equitable disgorgement remedy. See pp. 2-3, *supra*; see also Pet. at 25-27. Because the Office of the Solicitor General has entered an appearance on behalf of the FTC, this Court may wish to request its response to learn the United States'

[3] Declaration of Christine Tasso in Support of Plaintiffs' Motion to Hold Defendant Martin Shkreli in Contempt and Sanction Shkreli for Violating the Court's February 4, 2022 Order [Dkt. No. 922-3] at 1, *FTC* v. *Vyera*, No. 20-cv-706 (S.D.N.Y., Jan. 20, 2023).

position on the continued viability of the *Contorinis* rule that this Court has twice explicitly called into question. See Pet. at 2; see also *Liu* v. *SEC*, 140 S. Ct. 1936, 1946 & n.3 (2020) (citing *Contorinis*, 743 F. 3d at 304-306); see also *Kokesh*, 581 U.S. at 466 (2017) (citing *Contorinis*, 743 F. 3d at 302).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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