No. 23-1338

IN THE

Supreme Court of the United States

MARTIN SHKRELI,
Petitioner,

v.

FEDERAL TRADE COMMISSION, States of NEW YORK, CALIFORNIA, ILLINOIS, NORTH CAROLINA, and OHIO, and Commonwealths of PENNSYLVANIA and VIRGINIA,
Respondents.

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

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The U.S. District Court for the Southern District of New York issued a disgorgement order against petitioner Martin Shkreli based on the court's findings, after a bench trial, that Shkreli and others had violated New York state antitrust and related laws. The order required Shkreli to disgorge the ill-gotten profits from his anticompetitive scheme on a joint-and-several basis with his codefendants.

On appeal, Shkreli argued that New York law did not authorize this remedy; the Second Circuit held that Shkreli waived this argument by failing to raise it below, and summarily affirmed the district court.

Shkreli now seeks certiorari on a question that the court of appeals never addressed:

Whether federal law precluded the district court from ordering Shkreli to disgorge the profits of his unlawful scheme on a joint-and-several basis, subject to setoffs for his codefendants' disgorgement payment, as a remedy for state law claims over which the court was exercising supplemental jurisdiction.

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INTRODUCTION

Petitioner Martin Shkreli executed an anticompetitive scheme to raise the price of a life-saving drug by 4,000 percent and then extract monopoly profits for himself by eliminating any potential generic drug competition that would reduce the drug's price. The Federal Trade Commission and several States[1] sued for antitrust violations. The U.S. District Court for the Southern District of New York (Cote, J.) found Shkreli liable for the scheme that he had masterminded and directed at every stage. The court ordered him to disgorge the ill-gotten profits of his unlawful scheme on a joint-and-several basis with codefendants who had engaged with him in the scheme. The joint-and-several disgorgement order against Shkreli was subject to setoffs for amounts the codefendants paid.

On appeal, Shkreli primarily argued that the district court erred in applying federal remedies jurisprudence to its disgorgement order. He argued that the district court should have applied state rather than federal remedies jurisprudence because the district court had ordered disgorgement based solely on the plaintiff States' state law claims. And he argued that the disgorgement order was improper under state law. The U.S. Court of Appeals for the Second Circuit found this claim had been waived and unanimously affirmed by summary order.

Shkreli's petition for certiorari should be denied both because this case is a poor vehicle for deciding the question he presents, and because there is in any event

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[1] The plaintiff States are New York, California, Illinois, North Carolina, Ohio, Pennsylvania, and Virginia. This brief is filed solely on their behalf.

no split of authority or other reason warranting this Court's review. Shkreli seeks to present the question of whether federal remedies jurisprudence permits the disgorgement order here. But because Shkreli argued in the court of appeals that only New York remedies jurisprudence applied, the court of appeals did not address the federal remedies question that Shkreli now seeks to present. Instead, it addressed only the state law question, which it found that Shkreli waived in the trial court. In short, the federal law issue Shkreli now seeks to present was not squarely presented or decided below, and the state law issue that was presented and decided below is not the subject of this petition.

Moreover, even putting aside these vehicle problems, this case still would not merit this Court's review. There is no circuit split on the federal remedies question that Shkreli seeks to present. To the contrary, courts are in accord that federal remedies jurisprudence permits joint-and-several disgorgement where, as here, codefendants "engaged in concerted wrongdoing" and benefited together from that wrongdoing. *See Liu v. SEC*, 591 U.S. 71, 90-91 (2020). Shkreli errs in relying on cases that sought disgorgement not from concerted wrongdoers but rather from defendants who bore little or no responsibility for the ill-gotten profits to be disgorged. These cases have no application here and are not in conflict with the wholly proper disgorgement order in this case.

STATEMENT

A. Factual Background[2]

1. Shkreli's anticompetitive scheme

In 2011, Shkreli cofounded a pharmaceutical company called Retrophin. To prevent competition from emerging, Shkreli closed off distribution of certain brand-name drugs that Retrophin acquired. By closing distribution, Shkreli prevented potential generic competitors from obtaining the brand-name drug samples they would need to conduct the testing that the U.S. Food and Drug Administration requires to approve generic versions of those drugs. (Pet. App. 42a-44a; *see also* Pet. App. 35a-40a.) Shkreli raised the price of one of the brand-name drugs he acquired while at Retrophin by a factor of twenty, from $4,000 to $80,000. (Pet. App. 44a.)

In 2014, Shkreli left Retrophin to establish a new pharmaceutical company called Vyera, where he pursued an anticompetitive scheme similar to the one he perpetrated at Retrophin. (Vyera was originally called Turing Pharmaceuticals, before later changing its name to avoid being associated with Shkreli.) At Vyera, Shkreli sought to acquire brand-name drugs that provided the only effective treatment for life-threatening diseases and that had small patient populations, which made it easier for him to control access to the drugs and thus block competitors from developing generic versions of those drugs. (Pet. App. 44a-45a.)

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[2] The abbreviated factual background presented here is based on the district court's findings of fact, which Shkreli did not dispute on appeal to the Second Circuit and does not dispute in his petition for a writ of certiorari. The full factual background of this case is set forth in detail in the district court's findings of fact. (*See* Pet. App. 35a-103a.)

By 2015, at Shkreli's direction, Vyera identified Daraprim as a prime brand-name drug candidate for acquisition. (Pet. App. 46a.) Daraprim is the unique "gold standard" treatment for toxoplasmosis (Pet. App. 49a), a parasitic infection that can cause severe disease and death (Pet. App. 46a). Patients who suffer from toxoplasmosis may need to take Daraprim very quickly, within twelve to twenty-four hours, to prevent serious illness or death. These patients are often immunocompromised and thus particularly vulnerable to infection and severe consequences from infection, or are pregnant and likely to pass on to their child serious consequences, such as blindness or mental disabilities. (Pet. App. 46a-47a; CA2 ECF No. 94, Appendix (A.) 611 (Dec. 22, 2022).) Daraprim had no generic competition when Vyera acquired it.

Within days of purchasing Daraprim, Shkreli and Vyera raised the price of the drug from $17.60 to $750 per tablet—an increase of more than 4,000 percent from the base price. One of Vyera's own top executives testified at trial that the price hike was the "poster child of everything that is considered wrong about the pharmaceutical industry." (Pet. App. 50 (quotation marks omitted).) Following the price hike, Daraprim's sales dropped to between a fifth and a quarter of prior levels. But Vyera nevertheless reaped enormous profits of $55 million to $74 million per year—at least a five-to-seven-fold increase from before the price hike. (*See* Pet. App. 57a.)

At the same time, Shkreli and Vyera made herculean efforts to prevent competitors from entering the market with generic versions of Daraprim—which would bring down Daraprim's price. These efforts prevented generic drug manufacturers from accessing the quantities of Daraprim they needed to complete the

required testing for FDA approval of a generic version of Daraprim. For example, as he had done at Retrophin, Shkreli built a closed distribution system that strictly limited sales of Daraprim to authorized customers and strictly limited the number of pills sold at a given time. (Pet. App. 52a-60a.) Shkreli and Vyera also closely monitored sales and took prompt action to prevent any generic manufacturers from getting access to Daraprim. (Pet. App. 58a-60a.) For instance, Vyera's surveillance system flagged a Daraprim sale to a company that supplies brand-name drugs for the testing required for FDA approval of generic alternatives. In response, a Vyera executive met the company's owner in a parking lot the next day to repurchase the Daraprim for $750,000—twice the amount the company had paid for the drug—and thus prevent the company from selling the Daraprim to potential generic competitors. (Pet. App. 59a.) And Vyera took similarly aggressive steps to prevent generic manufacturers from accessing Daraprim's active ingredient, pyrimethamine, by entering exclusive supply agreements with FDA-approved pyrimethamine suppliers. (Pet. App. 60a-70a.)

Through these combined efforts, Shkreli's scheme successfully delayed the entry of generic competition to the Daraprim market for at least eighteen months. This extensive delay earned Vyera at least $64.6 million in excess profits—which the district court found was a conservative estimate. (Pet. App. 70a-93a, 145a-146a.)

2. Shkreli's control and principal ownership of Vyera

Shkreli founded Vyera and served as its first CEO until late 2015, when he was arrested for securities fraud related to his prior business ventures, including at Retrophin. (Pet. App. 44a-45a, 97a.) Shkreli was also

Vyera's largest shareholder, owning nearly half of its voting shares. (Pet. App. 98a.) Shkreli stated that he undertook his anticompetitive actions at Vyera because preventing competition "would have a significant effect on my investment in the company." (Pet. App. 148a (quotation marks omitted).)

The anticompetitive scheme to prevent generic competition to Daraprim (Pet. App. 150a) was Shkreli's "brainchild," and he drove the scheme at each step (Pet. App. 148a). For example, Shkreli made the decision for Vyera to acquire Daraprim and to implement the anticompetitive scheme with that brand-name drug, including the massive hike to the price of Daraprim and the extreme efforts to prevent competition that could bring down the price. When Shkreli's general counsel objected to the price increase, Shkreli fired him. (Pet. App. 97a-98a.)

Even after Shkreli's arrest and subsequent conviction and sentencing to several years in prison, Shkreli continued to control Vyera and to direct the anticompetitive scheme to extract profits from the company. (Pet. App. 32a n.9, 98a.) When he faced any resistance, he threatened to use—and in both 2017 and 2020 did use—his authority as Vyera's largest shareholder to install loyalist directors and officers who lacked relevant experience. For example, he installed Kevin Mulleady, Shkreli's business partner from his Retrophin days, as a board member and CEO of Vyera. Shkreli also appointed another individual to the board and its executive committee, even though that individual was just three years out of college and had no pharmaceutical experience. (Pet. App. 98a-100a; *see also* Pet. App. 45a-46a.) As Shkreli explained from prison, "being on the board . . . means, you know, you're on the Martin and Kevin board," and, if directors and officers do not listen to him,

"I have no problem firing everybody to be frank." (Pet. App. 102a.) Shkreli compared himself to Mark Zuckerberg and Vyera to Facebook, explaining that Zuckerberg "just happens to own the thing and that's the way it is," and "[y]ou can't go in there and tell Zuckerberg what to do." (Pet. App. 102a-103a.)

B. Procedural Background

1. This litigation

The FTC and the plaintiff States filed this action against Shkreli, Mulleady, and Vyera in the U.S. District Court for the Southern District of New York. The FTC brought claims against each defendant for engaging in unfair methods of competition, in violation of § 5(a) of the Federal Trade Commission Act. (A. 136-138, 200-201.) The plaintiff States brought federal and state law claims against each defendant for anticompetitive conduct. The federal law claims alleged that defendants had violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. The state law claims, which the plaintiff States brought in federal court pursuant to the district court's supplemental jurisdiction, alleged that defendants had violated various state antitrust or similar laws, including New York laws. (A. 136-138, 200-209.)

Initially, both the FTC and the plaintiff States sought equitable and declaratory relief, including equitable monetary relief such as disgorgement and a permanent injunction to remedy and prevent recurrence of the defendants' anticompetitive conduct. (A. 209-213.) The FTC later withdrew its claim for equitable monetary relief following this Court's decision in *AMG Capital Management, LLC v. FTC*, which held that the FTC Act does not permit the FTC to seek equitable monetary relief. *See* 593 U.S. 67, 82 (2021).

The plaintiff States continued to seek equitable monetary relief based on both their federal law and state law claims. On summary judgment, the district court (Cote, J.) ruled that the plaintiff States could pursue disgorgement of defendants' unlawful profits based on their state law claims, including specifically their claims under New York state law. (SDNY ECF No. 482, Op. & Order ("SJ Order") at 10-16 (Sept. 24, 2021).) As the court explained, both the Donnelly Act (New York's anti-trust statute), *see* General Business Law § 340 et seq., and Executive Law § 63(12) clearly authorized New York to pursue disgorgement of the profits that the New York–based defendants had obtained nationwide.[3] (SJ Order at 11-14.)

But the district court concluded that disgorgement was not available as a remedy for the plaintiff States' federal law claims. According to the district court, this Court's reasoning in *AMG Capital Management* also applied to the plaintiff States' federal law claims. (*Id.* at 10 n.6.) Without conceding the correctness of this ruling, the States did not contest it. The district court's holding that disgorgement is available for the state law claims made it unnecessary to do so. Accordingly, the plaintiff States continued to pursue disgorgement as a remedy solely for their state law claims. (*See, e.g.*, SDNY ECF No. 665, Pls. States Supp. Pretrial Mem. at 14 (Nov. 29, 2021).)

Shortly before the scheduled trial, defendants Mulleady and Vyera settled all claims against them, agreeing to pay up to $40.25 million. (*See* CA2 ECF No.

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[3] Because the court found that New York law permits disgorgement of all of the profits of Shkreli's unlawful scheme, the court found it unnecessary to address other States' laws. (S.A. 11.)

95, A. 492-580 (Dec. 22, 2022); Pet. App. 20a.) Shkreli proceeded to trial.

2. The district court's posttrial opinion and remedial orders

Following a seven-day bench trial with testimony from dozens of fact and expert witnesses, the district court issued a comprehensive 135-page opinion finding Shkreli liable on all claims. (Pet. App. 25a-150a.) As the district court found, Shkreli devised and implemented an anticompetitive scheme through which he acquired Daraprim, raised its price by 4,000 percent, and then orchestrated elaborate steps to prevent generic drug manufacturers from competing with Daraprim. (Pet. App. 44a-103a.)

The court ordered that Shkreli pay the plaintiff States up to $64.6 million in disgorgement of the excess profits obtained from his unlawful scheme on a joint-and-several basis, "subject to a set-off of any amount paid by the settling defendants." (Pet. App. 145a.) The court explained that joint-and-several disgorgement is proper where multiple defendants—like Shkreli and his codefendants—engage in concerted wrongdoing and each benefit from that wrongdoing, which generated the illicit profits to be disgorged. Here, the court found, Shkreli not only engaged in concerted wrongdoing with Vyera but was also "the mastermind" and "prime mover" of the anticompetitive scheme, who drove it "each step of the way." (Pet. App. 148a-150a.) Moreover, the court found that "[a]s Vyera's founder and its largest shareholder, any excess profit gained from Shkreli's scheme directly benefited him." (Pet. App. 148a.)

The court also issued a permanent injunction enjoining Shkreli from participating in the pharmaceu-

tical industry, in light of his "egregious, deliberate, repetitive, long-running, and ultimately dangerous illegal conduct." (Pet. App. 140a; *see* Pet. App. 140a-143a.)

3. The court of appeals' summary affirmance

Shkreli appealed to the Second Circuit. On appeal, Shkreli did not challenge the district court's liability determinations or any of the factual findings underlying those liability determinations. Instead, he challenged only the remedies that the district court had imposed.

As to the disgorgement order, Shkreli principally argued that the district court erred by relying on federal remedies jurisprudence at all. He argued that *only* New York remedies jurisprudence should have applied because the plaintiff States had been pursuing, and the district court had ordered, disgorgement based solely on the New York statutory claims. (*See* CA2 ECF No. 102, Br. for Appellant at 19-26 (Dec. 22, 2022).) Shkreli further argued that New York law does not permit joint-and-several disgorgement. (*See id.* at 27-32.) Purely as an alternative argument, Shkreli contended that even if federal law applied, joint-and-several disgorgement was improper under the particular facts presented here. (*See id.* at 32-34.) The plaintiff States argued in response that Shkreli had waived the New York law argument by relying entirely on federal law in the district court; that federal law could inform the scope of relief available; and that, in any event, New York law authorizes joint-and-several disgorgement in cases of concerted wrongdoing to obtain illicit profits. (*See* CA2 ECF No. 134, Br. for State Appellees at 20-40 (Mar. 23, 2023).)

The Second Circuit unanimously affirmed in a brief nonprecedential summary order. (Pet. App. 1a-2a.) The

court concluded that Shkreli had waived his arguments about New York remedies jurisprudence. (Pet. App. 3a-4a.) The court then added that even if those arguments had not been waived, they would still fail because New York law authorizes joint-and-several disgorgement where, as here, codefendants engaged in concerted wrongdoing to obtain illicit profits. (Pet. App. 4a n.1.) The court did not address Shkreli's alternative argument that *if* federal remedies jurisprudence were applicable, it would not authorize the joint-and-several disgorgement award under the facts here. (*See* Pet. App. 3a-4a.)

The court of appeals also affirmed the district court's injunction order. Shkreli does not challenge the injunction here.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN EXCEEDINGLY POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Shkreli frames the question presented in this case as whether federal remedies jurisprudence bars a defendant from being required to disgorge on a joint-and-several basis ill-gotten profits purportedly received by another defendant (Pet. 2-3), where, as here, the undisputed facts establish that the codefendants engaged in concerted wrongdoing to generate the ill-gotten profits for their collective gain. But that question of *federal* remedies jurisprudence is not squarely presented here because Shkreli chose to focus the court of appeals on *state* remedies jurisprudence. Shkreli's focus on state law below created multiple vehicle problems with this case, each of which independently warrants denial of certiorari.

1. Certiorari should be denied because Shkreli urged the court of appeals not to consider the issue of federal remedies jurisprudence that he now seeks to present here. In the court of appeals, Shkreli primarily argued that the district court had erred in applying federal remedies jurisprudence. (*See* Br. for Appellant at 19-26; *see, e.g.*, *id.* at 19 ("The District Court Erred by Relying on the Federal Law of Remedies….").) Shkreli argued that the district court was instead required to apply solely state remedies jurisprudence (specifically, New York remedies jurisprudence) because the court had ordered disgorgement based solely on Shkreli's violations of state antitrust statutes and other state laws (SJ Order at 10 n.6, 11-14). (*See, e.g.*, Br. for Appellant at 20 (court should "look[] to state law alone to assess the final remedies available"); *id.* at 24 ("the only monetary relief available was disgorgement under New York law"); *id.* ("the district court could not order disgorgement beyond New York law's limits").) And Shkreli contended that New York state remedies jurisprudence did not permit joint-and-several disgorgement under the facts presented here. (*See id.* at 27-32.)

After the court of appeals rejected his state law arguments as having been waived in the trial court, Shkreli has now done an about-face and seeks certiorari on the theory that federal law applies and purportedly does not authorize joint-and-several disgorgement under the facts presented here. But certiorari is not warranted to review a question that Shkreli urged the court of appeals not to consider. Indeed, this case would be a particularly poor vehicle for reviewing that question because Shkreli argued in the court of appeals that no question about disgorgement under federal law is presented here at all, let alone squarely presented.

2. Because Shkreli failed to squarely present the federal remedies question to the court of appeals, not surprisingly, the court of appeals did not rule on it. Although Shkreli noted the possibility of applying federal remedies jurisprudence here, he raised it only to say that in case the court of appeals did not agree with him that New York remedies jurisprudence governed (*see id.* at 32-34), it should find that he would prevail under federal law. The court of appeals did not address federal remedies jurisprudence because Shkreli's primary argument had urged the court not to do so. Instead, the court of appeals addressed only Shkreli's arguments about New York remedies jurisprudence. (*See* Pet. App. 1a-4a.)

This Court ordinarily "does not decide issues unaddressed on first appeal." *Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.16 (2016). That is because this Court "is a court of review, not of first view." *McWilliams v. Dunn*, 582 U.S. 183, 200 (2017) (quotation marks omitted). And deciding issues undecided on a first appeal would deprive this Court of the substantial benefit of the court of appeals' informed views on those issues, which "could yield insights (or reveal pitfalls) [this Court] cannot muster guided only by [its] own lights." *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

Moreover, the court of appeals likely would have declined to rule on the argument about federal remedies jurisprudence that Shkreli now seeks to present because he never squarely raised that argument in the district court. In the district court, Shkreli made various (erroneous) arguments, challenging, for instance, the plaintiff States' authority to seek disgorgement (*see* SDNY ECF No. 462, Defs.' Mem of Law at 4-12 (Aug. 13, 2021)), and the fact-bound application to him of the factors this

Court laid out in *Liu v. SEC*, 591 U.S. 71 (2020), for determining when a joint-and-several disgorgement order is appropriate under federal law (*see* SDNY ECF No. 653, Shkreli Pretrial Mem. at 23-25 (Nov. 29, 2021); Br. for Appellant at 32-34). But Shkreli did not argue in the district court, as he does now in his petition, that federal remedies jurisprudence categorically prohibits any joint-and-several disgorgement order that holds individual defendants liable for disgorgement amounts that they have not been shown to have personally received, even where, as here, the codefendants indisputably engaged together in the concerted wrongdoing that generated the ill-gotten gains. Certiorari is not warranted to review a question that Shkreli failed to fully preserve in the district court and barely mentioned in the court of appeals, and that the court of appeals did not address.

3. Not only did the ruling below fail to address the question Shkreli seeks to present, but also it expressly addressed a different issue, which does not warrant this Court's review. The court of appeals concluded that the issue presented to that court on appeal by Shkreli was the claim that state remedies jurisprudence rather than federal remedies jurisprudence applied, and that state remedies jurisprudence prevented the disgorgement order here. (Pet. App. 3a-4a.) And the court of appeals determined that this state law claim, though presented on appeal, was not preserved for its review, because it had not been properly raised in the district court. Shkreli does not seek review of that ruling (*see* Pet. 17 n.5), and certiorari would not be warranted on that issue even if he did, because waiver is a fact-bound issue within the court of appeals' discretion to decide. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

The court of appeals further observed that, even if Shkreli's arguments about New York remedies jurisprudence had not been waived, they would still fail because New York remedies jurisprudence authorizes joint-and-several disgorgement in circumstances like those here, where codefendants together engaged in concerted wrongdoing to generate ill-gotten gains. (Pet. App. 4a n.1.) Shkreli does not seek review of that state law determination either. Nor is there any reason for this Court to grant review to address that pure question of state law. Indeed, it is a longstanding principle of this Court that it ordinarily "accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

4. Finally, certiorari should be denied because the court of appeals' decision below, which decided that a New York remedies claim had been waived in the trial court, is not binding precedent even on that issue because it is an unpublished summary order. Indeed, the Second Circuit specifically prohibits reliance on such summary orders as precedent in future cases. *See* CA2 Local R. 32.1.1(a). The nonprecedential nature of the decision below makes this case an even weaker candidate for certiorari.

II. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

Apart from the serious vehicle problems presented by this petition, the question it seeks to present does not warrant this Court's review because there is no split of authority or other compelling reason to consider the issue at this time. The disgorgement order is not in conflict with any precedent of another court of appeals or of this Court and was a proper exercise of the district court's broad equitable discretion.

1. Federal courts are in accord that joint-and-several disgorgement is permissible where, as here, codefendants "engaged in concerted wrongdoing" for the purpose of their collective economic gain, which results in the illicit profits to be disgorged. *Liu*, 591 U.S. at 90-91. This Court held as much in *Liu*. *See id.* And here, the Second Circuit correctly affirmed the district court order properly applying *Liu* to the facts presented. As the district court explained, Shkreli and his codefendants had engaged in precisely the type of concerted wrongdoing for which joint-and-several disgorgement is appropriate. Indeed, the undisputed factual findings establish that Shkreli not only engaged in concerted wrongdoing with his codefendants, but also was the "mastermind" of the unlawful scheme who drove it "each step of the way" to enrich himself along with his codefendants. (Pet. App. 148a-150a.)

Other circuits have similarly and consistently applied *Liu* to the particular facts presented in those cases. *See, e.g.*, *SEC v. Navellier & Assocs.*, No. 20-1581, -- F.4th ----, 2024 WL 3423045, at *14 (1st Cir. July 16, 2024) (affirming joint-and-several disgorgement order where codefendants "engaged in concerted wrongdoing"); *SEC v. Johnson*, 43 F.4th 382, 390-91 (4th Cir. 2022)

(same); *SEC v. World Tree Fin., L.L.C.*, 43 F.4th 448, 467 n.15 (5th Cir. 2022) (same); *SEC v. Liu*, No. 21-56090, 2022 WL 3645063, at *3 (9th Cir. Aug. 24, 2022) (affirming joint-and-several disgorgement order for concerted wrongdoers, on remand from this Court), *cert. denied*, 143 S. Ct. 2495 (2023).

Even before *Liu*, many circuit decisions, including some from courts that have not reached the issue post-*Liu*, upheld joint-and-several disgorgement orders where concerted wrongdoing had been established. *See, e.g.*, *SEC v. Monterosso*, 756 F.3d 1326, 1337-38 (11th Cir. 2014) (per curiam) (citing *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (per curiam)); *SEC v. Hughes Cap. Corp.*, 124 F.3d 449, 455 (3d Cir. 1997). Indeed, Shkreli relies (Pet. 20) on two such Fifth Circuit decisions. *See SEC v. Halek*, 537 F. App'x 576 (5th Cir. 2013); *SEC v. United Energy Partners, Inc.*, 88 F. App'x 744 (5th Cir. 2004). Both decisions affirmed joint-and-several disgorgement orders because the defendants had acted in concert in the wrongdoing that resulted in the ill-gotten profits, from which they and their codefendants collectively benefited. And both decisions rejected the argument, which Shkreli makes here, that a defendant must have been shown to have personally received all the ill-gotten profits that they were ordered to disgorge. *See Halek*, 537 F. App'x at 581; *United Energy*, 88 F. App'x at 746. Contrary to Shkreli's unsupported suggestion (Pet. 20), the Fifth Circuit did not condition its holdings on a showing that the codefendants' finances were effectively commingled.

The district court here conducted "the fact-intensive inquiry *Liu* demands" and rightly concluded that defendants should be jointly and severally liable "'as partners in wrongdoing.'" *See Johnson*, 42 F.3d at 393 (quoting *Liu*, 591 U.S. at 91). The Second Circuit's affirmance of

this fact-specific disgorgement order provides no basis for further review in this Court.

2. None of the cases on which Shkreli relies conflicts with the decision below. These cases instead reached different results based on fact patterns unlike the facts presented here.

For example, Shkreli relies on cases in which joint-and-several disgorgement was sought from individuals who, far from being concerted wrongdoers in a scheme from which they collectively benefited, bore little or no responsibility for the wrongful profits to be disgorged. In *Liu*, the Court questioned whether federal jurisprudence allowed joint-and-several disgorgement under such circumstances. *See* 591 U.S. at 90. But the Court distinguished such cases from those where, as here, joint-and-several disgorgement is properly sought against concerted wrongdoers who collectively profited—which the Court found fully consistent with the common law. *See id.*

Shkreli suggests that this case presents an occasion to revisit the Second Circuit's decision in *SEC v. Contorinis*, 743 F.3d 296 (2014), but the facts in that case are utterly different from those here. The court in *Contorinis* ordered the defendant to disgorge amounts ostensibly obtained exclusively by innocent third parties (i.e., through trades the defendant executed on the third parties' behalf). *See id.* at 302. Here, Shkreli was not ordered to disgorge amounts obtained exclusively by innocent third parties but rather amounts that he and his codefendants obtained together.

Shkreli errs in relying on cases rejecting joint-and-several disgorgement from defendants who had little or no connection to the scheme and the ill-gotten benefits it generated. For instance, Shkreli points (Pet. 7-8, 18)

to *City of Elizabeth v. Pavement Co.*, 97 U.S. 126, 140 (1877), in which disgorgement was inappropriate from codefendants who merely answered jointly with the wrongdoers who made an illicit profit. And in *SEC v. Megalli*, 157 F. Supp. 3d 1240 (N.D. Ga. 2015), on which Shkreli also relies (Pet. 21-22), a district court concluded that a defendant should not be required to disgorge the full profits obtained by the company where he worked, when the defendant employee claimed to have personally benefited from less than 1/1000th of those profits. *See* 157 F. Supp. 3d at 1253-54. Shkreli's case is entirely different because the district court's undisputed factual findings make clear that Shkreli was not only the "mastermind" of his unlawful scheme (Pet. App. 150a); as his codefendant company's "founder and its largest shareholder, any excess profit gained from Shkreli's scheme directly benefited him."[4] (Pet. App. 148a.)

Shkreli also misplaces his reliance (Pet. 19-20) on the Fifth Circuit's decision in *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978). *Blatt* held that a disgorgement order could not require payment of more than the aggregate profits of the unlawful scheme—e.g., the order could not require further disgorgement of the expenses a trustee incurred in collecting and disbursing the ill-

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[4] Accordingly, Shkreli is incorrect to suggest that he did not profit from his unlawful scheme. (*See, e.g.*, Pet. 28-29.) To the extent that the record here is not clear as to exactly how much Shkreli personally profited and how his finances were entangled with his company's, any such issues of fact only further underscore that this case is a poor vehicle for deciding questions of federal remedies jurisprudence that may depend on those facts. In any event, insofar as concerted wrongdoers like Shkreli believe joint-and-several disgorgement orders require them to pay back more profits than they rightfully owe, they may seek contribution or indemnification from their codefendants.

gotten profits. *See id.* at 1335-36. The disgorgement order here did nothing of the sort. Instead, the disgorgement order held Shkreli jointly and severally responsible for only the ill-gotten profits of his scheme, which were conservatively estimated (Pet. App. 147a) and reduced by setoffs for any amounts paid by his codefendants.

The disgorgement order here is also consistent with Eleventh Circuit precedent. The only case from that court on which Shkreli relies (Pet. 21) *affirms* a disgorgement-related order, citing *Blatt*, which is binding precedent in the Eleventh Circuit because it predates the split of that circuit from the Fifth Circuit. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (per curiam).

This Court's recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), on which Shkreli relies in his supplemental brief (at 4-5), is further afield. *Jarkesy* does not address disgorgement at all. And while *Jarkesy* notes that equitable monetary remedies are intended to restore the status quo, *see* 144 S. Ct. at 2129, the disgorgement order here has precisely that purpose, specifically, to remove from Shkreli and his codefendants the wrongful profits of their unlawful scheme.

4. Finally, Shkreli's petition draws no support from the fact that disgorgement is available under several federal and state laws. (*See* Pet. 25-27.) These laws have their own language, context, and purpose concerning the available scope of relief, which have little or no bearing on the district court's disgorgement order here for violations of particular New York state laws. For similar reasons, this Court's grant of certiorari in *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, No. 23-900 (June 24, 2024), to address a question regarding the

availability of disgorgement under the Lanham Act, is largely irrelevant here.[5]

In any event, because the order here is proper and fully consistent with other courts' disgorgement rules, this case would not warrant further review even if it otherwise could have implications for disgorgement under other laws.

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[5] Shkreli incorrectly suggests (Pet. 28) that the FTC may seek disgorgement like the disgorgement ordered here. This Court held that the FTC Act does not give the FTC such authority. *See AMG Cap. Mgmt.*, 593 U.S. at 82. The press release on which Shkreli relies endorsed the FTC seeking to hold corporate executives individually liable *through injunctions*—not through disgorgement. *See* FTC, Statement of Chair Lina M. Khan on the Ruling by Judge Denise L. Cote Federal Trade Commission et al v. Vyera Pharma ceuticals, LLC et al. (Jan. 14, 2022), https://tinyurl.com/7c32tyxf. And, contrary to Shkreli's suggestion in his supplemental brief (at 6-7), the FTC has pursued enforcement only of the injunction order, not the disgorgement order, in this case. The FTC simply filed a single joint contempt motion with the plaintiff States, who also sought to enforce the disgorgement order. (*See* SDNY ECF No. 922-1, Pls. Mem. of Law (Jan. 20, 2023).)

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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