No. 23-1338

IN THE

Supreme Court of the United States

MARTIN SHKRELI,

Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF

This case calls out for this Court's review. The Second Circuit's outlier practice—first announced in *SEC* v. *Contorinis*, 743 F.3d 296, 304-06 (2d. Cir. 2014)—of authorizing equitable disgorgement judgments against defendants for profits that accrued exclusively to other parties has divided the courts of appeals for a decade and twice been called into question by this Court.

Although Respondents attempt to manufacture several purported vehicle defects, all prove illusory on examination. The question presented was pressed to both courts below and demands no threshold determinations of state law or fact whatsoever. And although the court of appeals resolved the question summarily (unsurprising, given *Contorinis*' status as the controlling law of the Second Circuit), this Court regularly grants certiorari to review unpublished summary decisions that implicate preexisting circuit conflicts. Here, that conflict has percolated for ten years. *Contorinis* generated a circuit split and dissenting opinion when it was decided in 2014, and has elicited only further skepticism in the years since—including twice from this very Court.

This Court should grant certiorari to resolve the circuit conflict. It should then reverse the court of appeals and reaffirm the foundational principle that a federal court of equity's power to order the disgorgement of profits cannot extend to a party who has "made no profit at all." *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 140 (1877). Monetary remedies in equity exist "solely to restore the status quo." *SEC* v. *Jarkesy*, 144 S. Ct. 2117, 2129 (2024) (citing *Tull* v. *United States*, 481 U.S. 412, 422 (1987)). Conversely, the *Contorinis* incarnation of disgorgement "does not simply restore the status quo" but instead

"leaves the defendant worse off," *Kokesh* v. *SEC*, 581 U.S. 455, 466 (2017) (citing *Contorinis*, 743 F. 3d at 302) (additional citations omitted). Even still, it persists as the controlling law of the Second Circuit and urgently warrants this Court's intervention.

I. The purported vehicle issues are illusory.

Although Respondents acknowledge that Petitioner pressed the question presented to the court of appeals (Opp.13), they insist that this is "an exceedingly poor vehicle" (Opp.11) for reviewing the Second Circuit's *Contorinis* theory of disgorgement because Petitioner raised it in his second—rather than leading—argument in his appellate brief below, and because the court of appeals resolved it summarily. Respondents are mistaken on all counts.

1. Respondents' suggestion (Opp.12-14) that the question presented was inadequately pressed to the courts below is thoroughly unavailing. Petitioner repeatedly and forcefully pressing to both courts below his argument that principles of federal equity law prohibited a federal court from ordering him to disgorge profits realized exclusively by his corporate codefendants. See Pet.15-16 (district court); Pet.17-18 (court of appeals). Before both courts, he was rebuffed.

Ordering the judgment below, the district court directly invoked *Contorinis* to conclude that it was immaterial whether Shkreli had personally realized any of the profits that he was ordered to disgorge because, under *Contorinis*, "the plaintiffs did not need to show that the illegal gains personally accrued to Shkreli." App.168a (citing *Contorinis*, 743 F.3d at 305-06). And it did so at Respondents' urging, who likewise relied on *Contorinis* to argue that equitable disgorgement "does not entail that

the gain must personally accrue to the wrongdoer." See, e.g., App.263a.

Petitioner advanced the same question before the court of appeals, pressing it as his second of two appellate arguments. See Pet.17-18. Noting that this Court's intervening decision in *Liu* v. *SEC*, 140 S. Ct. 1936, 1946 & n.3 (2020) had cited *Contorinis* disapprovingly, Petitioner renewed his argument that requiring him to disgorge $64.6 million in profits that accrued exclusively to Vyera and never touched his possession or control was irreconcilable with *Liu*'s tethering of equitable disgorgement to the traditional principles of federal equity practice. Def. Br. at 33-34 (citing 140 S. Ct. at 1949-50); see also Reply Br. at 16. *Id.* Respondents countered with a maximalist reading of *Liu* that would authorize joint-and-several disgorgement against *any* codefendant who engaged in "concerted wrongdoing"—irrespective of whether that codefendant received any of the unlawful profits to be disgorged. See States Br. at 24-29. The court of appeals summarily rebuffed Petitioner without elaboration, App.10a ("We have carefully considered Shkreli's remaining arguments and find them to be without merit"), and affirmed the district court's judgment in an unpublished summary opinion. *Id.*

2. Respondents' contention (Opp.12) that Petitioner's leading argument to the court of appeals (seeking review under an additional principle of state equity law not at issue in this petition) contradicted or otherwise prevented the court from reaching his secondary argument (which pressed the question presented here under principles of federal equity law) is similarly without merit. Indeed, it is routine appellate practice for litigants to pursue primary and secondary arguments.

Regardless, Petitioner's separate arguments under state and federal equity law were not contradictory, but

complementary. Although this Court has repeatedly explained that state law cannot *expand* the equity powers of a federal court (even where an underlying claim arises under state law), see Pet.4-5 (citing *Guaranty Trust* v. *York*, 326 U.S. 99, 105-06 (1945); *Grupo Mexicano De Desarrollo* v. *All. Bond Fund*, 527 U.S. 308, 318 (1999)), it has reserved judgment on the converse question of whether state equity law can impose additional *limitations* on those powers. In *Stern* v. *S. Chester Tube Co.*, 390 U.S. 606 (1968), for example, this Court withheld judgment on whether a federal court in a diversity case could issue a remedy available in federal equity law "even in the absence of a similar state remedy." *Id.* at 609. Thus, Petitioner's use of his leading argument to attempt maneuver around *Contorinis* by invoking any additional limitations that state equity law might impose on disgorgement was eminently reasonable and in no way abandoned or contradicted his secondary arguments under federal equity law. The extra limitations of state law would merely supplement—rather than supplant—the threshold limitations of traditional equity practice that apply to all federal courts of equity. See *Guaranty Trust*, 326 U.S. 105-06.

3. Respondents' more general objections that the judgment below is nonprecedential (Opp.15) or that the question presented is somehow underdeveloped (Opp.13) are similarly unavailing. This Court regularly grants certiorari to review summary orders or unpublished decisions that implicate preexisting circuit conflicts.[1] Moreover, given *Contorinis*' entrenched status as the

1. See, e.g., *Ricci* v. *DeStefano*, 557 U.S. 557, 576 (2009) (granting certiorari to review a "one-paragraph *per curiam* opinion adopting the District Court's reasoning"); *Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993).

controlling law of the Second Circuit, it is unremarkable that an appellate panel would give summary treatment to arguments that clash with it. Regardless, Petitioner preserved the question (explicitly noting this Court's expressed skepticism for *Contorinis*), see Pet.17-18, and had no control over its disposition.

Nor can Respondents reasonably claim that the question suffers from a lack of percolation. *Contorinis* generated a dissenting opinion when decided, see Pet.23-24, and produced a circuit conflict that has persisted for a decade. See Pet.19-24. It has been the subject of scholarly commentary, and this Court has twice questioned it as an incarnation of the disgorgement remedy that "is in considerable tension with equity practices," *Liu*, 140 S. Ct. at 1946 (citing *Contorinis*, 743 F. 3d at 304-306), and "does not simply restore the status quo" but "leaves the defendant worse off." *Kokesh*, 581 U.S. at 466 (citing *Contorinis*, 743 F. 3d at 302). Far from being underdeveloped, the question all but cries out for this Court's review.

4. Respondents' observation (Opp.14-15) that certiorari would not be warranted to review the court of appeals' disposition of Petitioner's arguments under state equity law is a red herring. As Respondents acknowledge, *id.*, Petitioner does not seek review of that determination. See Pet.17,n.5.

To wit, this petition seeks no threshold determinations of state law whatsoever, nor does it contest Respondents' reading of N.Y. Exec. Law § 63(12) to authorize equitable disgorgement. Instead, the question presented hinges solely on the scope of the equity powers of the federal courts. As this Court has repeatedly explained, those equity powers are defined by a transsubstantive body of federal law rooted in traditional equity practice—regardless of whether the underlying claim arises in

federal or state law. See Pet.4-5.

5. Nor did the judgment below turn on any factual dispute about whether or to what amount Shkreli profited from the scheme. The district court's $64.6 disgorgement judgment was based exclusively on the court's estimation of the nationwide profits that his codefendant Vyera accrued from its sales of the drug at issue. Pet.15. It made no findings of Petitioner personally realizing any of those gains. *Id.* Nor could it have, as his averments that he took no salary and earned no profits from Vyera were uncontested at trial. *Id.*

Although Respondents claim (Opp.19) that Vyera's profits "benefited" Petitioner because he was its largest minority shareholder, this is merely a legal argument toward the question presented—and one that could make any shareholder codefendant subject to joint disgorgement, irrespective of whether (as here) that shareholder earned no profits from his or her shares. The district court did not find—nor did Respondents plead or argue—that Petitioner earned *any* dividends, capital gains, salary income, or other gains from Vyera. Instead, it relied on *Contorinis* to argue that his lack of personal gain was immaterial.

Respondents suggest in a footnote (Opp.19,n.4) that certiorari be denied precisely because Respondents made no effort to establish any personal gains of Petitioner on the record below. To the contrary, if disgorgement of profits cannot be imposed against a party who "made no profit at all" from wrongdoing, then it was Respondents' burden to show that Petitioner made a profit and Petitioner is entitled to, at minimum, a vacatur and remand.

II. The question presented has divided the courts of appeals for ten years and the Second Circuit decided it incorrectly.

The Fifth and Eleventh Circuits limit disgorgement liability "only to the amount with interest by which the defendant profited from his wrongdoing," *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978), on the grounds that "[a]ny further sum would constitute a penalty assessment." *Ibid.*; see also *SEC* v. *ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (quoting *Blatt*, 583 F.2d at 1335). The Second Circuit's conflicting decision in *Contorinis*, 743 F.3d 296 acknowledged its departure from the Fifth Circuit's limitation of disgorgement to an "individual, knowing participant['s] . . . personal gain." *Id.* at 305, n.5 (citing *Blatt*, 583 F.2d at 1336). Courts and commentators likewise acknowledge the conflict. See *SEC* v. *Megalli*, 157 F. Supp. 3d 1240, 1254 (N.D. Ga. 2015) (explaining that courts within the Eleventh Circuit "remain[ ] bound by *Blatt*" over *Contorinis*).

Respondents (Opp.16-21) nonetheless deny the existence of the split and its application to the question presented, but their arguments are wholly without merit.

A. The circuit conflict is acknowledged and cleanly presented.

Respondents' treatment (Opp.18-20) of the conflicting decisions of the Fifth, Eleventh, and Second Circuits mischaracterizes their holdings and indeed finds Respondents retreating without explanation from the opposite arguments they made below.

1. Respondents argue (Opp.18) that *Contorinis* is inapplicable to the judgment below, offering the puzzling contention that "the facts of that case are utterly different

from those here." *Id.* That contention is hopelessly undermined by the fact that it was Respondents who directly invoked *Contorinis* before the district court to justify their purported ability to pursue disgorgement from Petitioner, see pp.2-3, *supra*, and successfully persuaded the court to agree. *Id.* Consequently, the judgment now before this Court—ordering Petitioner to disgorge $64.6 million in anticompetitive profits that never touched his possession or control but instead accrued exclusively to his corporate codefendants—is the direct product of that *Contorinis* rule. Respondents' argument that *Contorinis* can somehow narrowly be limited to its particular facts is thus wholly without merit.

Indeed, *Contorinis*—and likewise the judgment below—conflicts with the decisions of the Fifth and Eleventh Circuits because it authorizes disgorgement beyond a defendant's *personal* gain to include the additional profits of other parties—up to "the maximum of the total gain from the illicit action." *Contorinis*, 743 F.3d at 306; see also *id.* at 304-06. Consequently, it can require a defendant to "disgorge funds he never had and to pay back profits he never received," *id.* at 309 (CHIN, J., dissenting), even when those funds "were never in his possession or control." *Id.* That was exactly the result here.

2. Respondents (Opp.19-20) equally mischaracterize the Fifth Circuit's conflicting decision in *Blatt*, which they wrongly describe as having held "that a disgorgement order could not require payment of more than the *aggregate profits* of the unlawful scheme." Opp.19 (emphasis added). To the contrary, *Blatt* did not authorize disgorgement of the "aggregate" profits of wrongdoing (the holding of *Contorinis*), but instead limited the remedy to a defendant's personal gain—*i.e.*, "only to the amount with interest by which the defendant profited from his

wrongdoing." *Blatt*, 583 F.2d at 1335; see also Pet.19-20. Indeed, *Contorinis* openly acknowledged its departure from *Blatt*'s limitation of disgorgement to an "individual, knowing participant['s] . . . personal gain." *Contorinis*, *Id.* at 305, n.5 (citing *Blatt*, 583 F.2d at 1336).

3. Finally, Respondents (Opp.20) address the Eleventh Circuit's decision in *ETS Payphones*, 408 F.3d 727 only to note that it affirmed the disgorgement judgment before it. True, but it did so only after applying *Blatt* to confirm that the disgorgement calculation was limited to the gains that came into the individual defendant's possession. *Id.* at 735-36. See also *Megalli*, 157 F. Supp. 3d at 1254 (explaining that courts within the Eleventh Circuit "remain[ ] bound by *Blatt*" over *Contorinis*).

B. The *Contorinis* formulation of disgorgement is irreconcilable with this Court's precedents.

Respondents' remaining arguments (Opp.16-18) primarily defend the judgment on the merits rather than address the circuit conflict. Although these merits arguments provide no reason for this Court to deny review, they are unavailing.

1. Respondents' principally contend (Opp.16-18) that this Court's intervening decision in *Liu*, 591 U.S. 71 can be read as authorizing the practice below of ordering a defendant to disgorge unlawful gains that accrued exclusively to others. Respondents neglect to disclose that *Liu* directly named *Contorinis* as an example of disgorgement "in considerable tension with equity practices," *id.* at 85 & n.3, and "seemingly at odds with the common-law rule requiring individual liability for wrongful profits." *Id.* at 90. And following this Court's longstanding practice of tethering equitable remedies to their historical understanding in traditional

equity practice, *Liu* meticulously detailed several limiting principles that courts of equity must follow to "circumscribe" an award for disgorgement and "avoid transforming it into a penalty outside their equitable powers." *Id.* at 82 (citations omitted). Among these was the principle of *Elizabeth*, 97 U.S. 126, which limited an equitable profits remedy to a defendant's personal gain, *Liu*, 591 U.S. at 83, and prohibited its application against a city codefendant that "made no profit at all." *Elizabeth*, 97 U.S. at 140.

2. Respondents' suggestion that *Elizabeth* could instead have turned on the city codefendant having "little or no connection" (Opp.18) to the conduct at issue is flatly mistaken. To the contrary, the Court explained that the city had jointly admitted infringement and thus would have "made itself liable to damages" had legal remedies been sought. *Elizabeth*, 97 U.S. at 140. But because the action was in equity, the city's joint culpability was irrelevant to the sole inquiry of "which party received profits from the transaction." *Id.*

Indeed, *Liu*'s authorization of "a disgorgement award that does not exceed a wrongdoer's net profits," 591 U.S. at 75, reflects the broader foundational principle that equitable monetary relief exists "solely to restore the status quo," *Jarkesy*, 144 S. Ct. 2129 (citations omitted), and cannot be employed to "punish culpab[ility]." *Id.* Consequently, Respondents' effort (Opp.19) to ground the judgment below in Petitioner's culpability as the "mastermind" of conduct that earned him no actual profits finds no basis in equity whatsoever. And Respondents' attempt to dismiss *Jarkesy* as case that "does not address disgorgement at all" (Opp.20) misses the point that principles of equity are "transsubstantive" and provide "guidance on broad and fundamental questions" across

remedies and practice areas. *Romag Fasteners, Inc.* v. F*ossil Grp., Inc.*, 590 U.S. 212, 217 (2020).

3. At bottom, the judgment below depends on an indefensible reading of *Liu* that authorizes joint-and-several disgorgement against a defendant based on a finding of "concerted wrongdoing" alone, while dismissing as immaterial the definitional question of whether he or she actually profited from that wrongdoing. Such a reading would subject virtually all codefendants to joint disgorgement, and effectively nullify *Elizabeth*'s prohibition on disgorgement against codefendants who have "made no profit at all" from their wrongdoing. Conversely, *Liu* directly reaffirmed *Elizabeth*. Liu, 591 U.S. at 83. And *Liu* authorized joint disgorgement only after identifying it in the history of equity practice (tethered to the common law of partnership) where it never functions as a penalty. Id. at 90-91. Although the Court found it unnecessary to "wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals," *id.* at 91, it offered specific examples of equity's "flexibility" to impose it in manners that are not punitive—for example, where partners use commingled finances, are married, or where one funds the lifestyle of the other. *Id.*

This petition in no way contests equity's flexibility to impose joint disgorgement in these or other circumstances where codefendants' actions have made it impractical to disentangle their relative gains. Instead, it merely asks this Court to reaffirm the bedrock principle that ordering a defendant to disgorge profits that accrued exclusively to other parties does "not restore the status quo" but leaves him worse off.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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