No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Liu* v. *SEC*, 140 S. Ct. 1936 (2020), this Court held that a federal court's congressionally granted power to issue "equitable relief" in an SEC action includes the power to order the "disgorgement" of a wrongdoer's unlawful profits—subject to the condition that the relief conforms with the established limitations of traditional equity practice. Among various "incarnations" of disgorgement that this Court described as being "in considerable tension with equity practices," *id*. at 1946, was the practice of seeking "disgorgement liability on a wrongdoer for benefits that accrue to his affiliates." *Id*. at 1949 (citing *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (2d Cir. 2014)); see also *id*. at 1946, n.3.

The Fifth and Eleventh Circuits limit a defendant's disgorgement liability in equity to his or her personal gain from unlawful activity. Conversely, the Second Circuit continues to permit district courts to impose disgorgement liability on a defendant for profits that accrued solely to his or her affiliates. The question presented is:

Does a district court's exercise of its federal equity jurisdiction, as defined and cabined by traditional equity practice, include the power to order a defendant to disgorge unlawful gains that he or she did not personally receive, possess, or control, but that instead accrued exclusively to his or her codefendants?

PARTIES TO THE PROCEEDING

Petitioner Martin Shkreli was the only appellant in the Second Circuit proceedings and was a codefendant in the district court proceedings.

Respondents are the Federal Trade Commission, State of New York, State of California, State of Ohio, Commonwealth of Pennsylvania, State of Illinois, State of North Carolina, and Commonwealth of Virginia. Respondents were plaintiffs in the district court proceedings and appellees in the Second Circuit proceedings.

Additional codefendants in the district court proceedings were Phoenixus AG, Vyera Pharmaceuticals LLC, and Kevin Mulleady, but all settled before trial and did not participate in the Second Circuit proceedings. They are not parties before this Court.

RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in this Court, the U.S. Court of Appeals for the Second Circuit, and the U.S. District Court for the Southern District of New York.

Shkreli v. *Federal Trade Commission, et al.*, No. 23A930 (U.S.) (applications granted on April 17, 2024, and May 14, 2024).

Federal Trade Commission, et al. v. *Shkreli*, No. 22-728 (2d Cir.) (opinion issued on January 23, 2024).

Federal Trade Commission, et al. v. *Vyera, et al.*, No. 20-cv-706 (S.D.N.Y.) (trial opinion and order finding defendant liable entered on January 14, 2022; opinion and order for permanent injunction and equitable monetary relief entered on February 4, 2022; opinion and order denying motion to stay pending appeal entered April 25, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Martin Shkreli petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The unreported summary opinion of the court of appeals (App., *infra*, 1a-10a) is available at 2023 WL 9346525. The district court's opinion finding Petitioner liable for violations of federal and state antitrust law (App., *infra*, 25a-150a) is reported at 581 F. Supp. 3d 579. The district court's opinion addressing Petitioner's objections to the order for permanent injunction and equitable monetary relief (App., *infra*, 151a-158a) is available at 2022 WL 1081563. The district court's opinion denying Petitioner's motion to stay the equitable relief pending appeal (App., *infra*, 159a-173a) is available at 2022 WL 1210834.

JURISDICTION

The Second Circuit entered its judgment on January 23, 2024. On April 17, 2024, Justice Sotomayor granted an application to extend the time to file a petition for certiorari to and including May 22, 2024. On May 14, 2024, Justice Sotomayor further extended the time to and including June 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Section 13(b) of the FTC Act and New York Executive Law § 63(12) are reproduced in the Appendix at 174a-176a.

INTRODUCTION

The court of appeals' judgment in this case continues a square and acknowledged circuit conflict over a frequently recurring question of federal remedies law: whether a federal court of equity may compel a defendant under penalty of contempt to "disgorge" unlawful profits that were realized solely by his or her codefendants.

The Fifth and Eleventh Circuits limit a defendant's liability in disgorgement to his or her personal gain from wrongdoing based on the foundational principle that equity cannot punish the defendant by compelling the forfeiture of unlawful profits never received. Conversely, the Second Circuit has concluded that a defendant can be ordered to "disgorge" profits that he or she never received, possessed, or controlled, but that instead accrued solely to other parties. That conclusion—first reached by a divided panel of the court of appeals in *SEC* v. *Contorinis*, 743 F.3d 296, 304-06 (2d. Cir. 2014)—has generated a circuit conflict that has now persisted for ten years.

Although *Contorinis* remains the law of the Second Circuit, this Court has now twice explicitly questioned it as presenting an "incarnation" of the disgorgement remedy that "is in considerable tension with equity practices." *Liu* v. *SEC*, 140 S. Ct. 1936, 1946 & n.3 (2020) (citing *Contorinis*, 743 F. 3d at 304-306); *see also Kokesh* v. *SEC*, 581 U.S. 455, 466 (2017) (citing *Contorinis*, 743 F. 3d at 302). *Contorinis* also effectively nullifies this Court's longstanding holding in *Elizabeth* v. *Pavement Co.*, 97 U.S. 126 (1877) that a

party cannot be liable in accounting for profits that the party did not share in. See *id*. at 140.

In this case, a federal district court, sitting in equity over a rule-of-reason antitrust case, applied *Contorinis* to order a corporation's former CEO to disgorge $64.6 million in profits that were realized exclusively by his corporate codefendants. Corporate entities Vyera and Phoenixus, along with Petitioner Martin Shkreli (Vyera's former CEO and largest minority shareholder), were all found liable for violations of antitrust law—Shkreli after trial and his corporate codefendants by settlement. It was undisputed that Shkreli did not personally realize any profits from the conduct found to be anticompetitive: his averments that he took no salary and received no profits from Vyera were uncontested at trial. See pp. 15-16, *infra*. But relying on *Contorinis*, the district court concluded that "the plaintiffs did not need to show that the illegal gains personally accrued to Shkreli." App., *infra*, at 168a (citing *Contorinis*, 743 F.3d 296, 305-06 (2d Cir. 2014)). The court thus ordered Shkreli jointly and severally liable for the disgorgement of $64.6 million in profits that Vyera alone realized. *Id*. at 146a-147a. Moreover, the corporate codefendants' total liability was capped by settlement at a maximum of $40 million, with only 10 million guaranteed—*id*. at 208a, effectively leaving Shkreli individually liable for the remainder.

As a result of this ongoing circuit conflict, the scope of a routinely litigated federal remedy depends entirely on the jurisdiction in which it is sought. The question is important and recurring. This Court's review is warranted.

STATEMENT OF THE CASE

A. Legal Background

Equity Jurisdiction of the Federal Courts

1. Absent modification by Congress, the scope of a federal court's equity jurisdiction is defined and cabined by the principles of traditional equity practice. Beginning with the Judiciary Act of 1789—through which the First Congress "conferred the federal courts with jurisdiction over 'all suits . . . in equity,' " *Grupo Mexicano De Desarrollo* v. *All. Bond Fund*, 527 U.S. 308, 318 (1999) (citing 1 Stat. 78)—congressional authorizations of equity powers have been construed by this Court in accordance with " 'the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.' " *Id*. at 308 (quoting *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)) (additional citations omitted).

Consequently, "[e]quitable relief in a federal court is . . . subject to [the] restrictions [that] the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery[.]" *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 105 (1945) (citations omitted). This Court has explained that these traditional restrictions continue to operate when—as here—a court may be acting in part to enforce a state's law through an exercise of its supplemental or diversity jurisdiction: "That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts." *Id*. at 105-06 (citations omitted).

Among the well-established limitations of traditional equity practice was the rule that equitable remedies cannot be employed to punish a defendant, as equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873). "Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull* v. *United States*, 481 U.S. 412, 422 (1987) (citation omitted). Unlike proceedings at equity, a proceeding at law triggers a defendant's right under the Seventh Amendment to test the plaintiff's case before a jury. See *id*. at 417-19.

The Equitable Disgorgement Remedy

2. Equitable disgorgement is a "profit-based measure of unjust enrichment," *Liu* v. *SEC*, 591 U.S. 71, 79-80 (2020) (citing Restatement (Third) of Restitution and Unjust Enrichment §51, Comment a, at 204 (2011)) ["Restatement (Third)"], that compels a defendant to relinquish their profits derived from unlawful conduct. See *id*. at 79. Though a form of restitution, disgorgement is measured not by the victim's loss, but by the wrongdoer's gain; it thus "restor[es] the status quo" of the wrongdoer by returning them to their position prior to their misconduct. *Tull*, 481 U.S. at 424 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946)); cf *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 212-14 (2002) (distinguishing equitable and legal restitution); see also Restatement (Third) §51(4) at 203 ("Restitution remedies that pursue the object of

eliminating profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty are often called 'disgorgement' or 'accounting.' ") (cleaned up).

3. Although restitutionary remedies such as accounting are firmly established in traditional equity practice, courts have observed that the term "disgorgement" is a more recent coinage of sometimes inconsistent usage. See *SEC* v. *Cavanagh*, 445 F.3d 105, 116, n. 24 (2d Cir. 2006).[1] In *Kokesh* v. *SEC*, 581 U.S. 455 (2017), for example, this Court observed that the SEC had at times sought disgorgement "exceed[ing] the profits gained" from wrongdoing, *id*. at 466 (citing *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (2d Cir. 2014) (additional citations omitted), thereby going beyond merely "restor[ing] the status quo" and instead leaving the defendant in a worse position. *Id*. at 466. For these and other reasons, the Court held that SEC disgorgement functioned as a "penalty" for purposes of the five-year statute of limitations imposed by 28 U.S.C. § 2462, *id*. at 457, thereby raising questions about the remedy's basis in equity.

4. In *Liu* v. *SEC*, this Court addressed those questions by holding that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims" is a permissible exercise of a federal court's power to issue "equitable relief" under the federal Securities Act. *Liu*, 591 U.S. at 74 (citing 15

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[1] See also George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 49 (2007) (noting that "the first proposed definitions [of disgorgement] only began to appear around 2000.").

U.S.C. § 78u(d)(5)). While acknowledging the "relatively recent vintage of the term 'disgorgement,' " *id*. at 591 76, n.1, the Court explained that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy," *Liu*, 140 S. Ct. at 79—including the equitable remedy traditionally known as accounting for "profits." *Id*. at 79-80.

5. Although this historic profits remedy was "not limit[ed] . . . to particular types of cases," *id*. at 82, the Court explained that it incorporated three longstanding principles that equity courts applied to "circumscribe the award . . . to avoid transforming it into a penalty outside their equitable powers." *Id*. (citing *Marshall*, 15 Wall., at 149, 82 U.S. 146).

a. First, the profits remedy required the surrendered gains to be awarded to or held in constructive trust for wronged victims. *Id*. Thus, equity forbids the SEC from retaining for itself the profits of equitable disgorgement, but instead requires the agency to make reasonable efforts to return them to victims. See *id*. at 87-90.

b. Second, the historic profits remedy was generally awarded against "individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory." *Id*. at 82-83. In *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 24 L. Ed. 1000 (1878), for example, a plaintiff brought a patent infringement suit in equity against a city, a corporate contractor, and one of the contractor's officers, seeking that they be held jointly liable for the profits of infringement. *Id*. But because only the contractor

had realized the profits, the other two parties could not be held jointly responsible for gains that they did not receive. *Id.*; *see also Liu*, 591 U.S. at 83.

Applying these same principles to disgorgement, the *Liu* Court noted that the SEC had in some cases "sought to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability, in a manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits." *Id.* at 90. The Court warned that this practice could "transform any equitable profits-focused remedy into a penalty," *id.*, and that it "r[an] against the general rule" prohibiting joint liability described in cases such as *Elizabeth*, 97 U.S. 126. But the Court also noted a common law principle of partnership that had permitted collective liability "for partners engaged in concerted wrongdoing." *Id.* at 90-91. Thus, the Court explained that equity provided some "flexibility to impose collective liability" in certain cases. *Id.* And though reserving the question of when collective disgorgement might be punitive or permissible, the Court suggested without deciding that it might be appropriate against the two married petitioners before the Court who had run a fraudulent company together and presented no evidence to suggest that they had not commingled their finances or jointly "enjoy[ed] the fruits" of their wrongdoing. *Id.* at 91. The Court thus remanded to the court of appeals for further proceedings consistent with that guidance. *Id.*

c. Finally, the profits remedy was generally limited to net profits rather than gross receipts. *Id.* at

83-85. Thus, the equitable disgorgement remedy too must, with limited exceptions, allow for the deduction of legitimate expenses. See *id*. at 91-92.

At bottom, the Court concluded that an award of "disgorgement" that conforms with these "longstanding equitable principles" of the profits remedy, id. at 85, is permissible in equity. *Id*. at 74.

B. Facts and Procedural History

Factual Background

1. In 2014, Petitioner Martin Shkreli, a pharmaceutical executive and former hedge fund manager, founded Turing Pharmaceuticals AG (now Phoenixus AG) and its parent corporation Turing Pharmaceuticals LLC (now Vyera Pharmaceuticals LLC) with a group of coworkers from a prior pharmaceutical venture called Retrophin, which he had launched in 2011 and recently departed. App., *infra*, 42a-44a; see also *id*. at 187a. Per his uncontested testimony at trial, Shkreli invested approximately $18 million into Turing at its founding, *id*. at 187a, and "never received a salary or any form of compensation" from the company. *Id*. at 188a.

a. In August 2015, Turing purchased from Impax Laboratories the rights to Daraprim, App., *infra*, 49a—a tablet formulation of the antiparasitic drug pyrimethamine used to treat toxoplasmosis. See *id*. at 46a, 47a, 49a. Daraprim was off patent but had no generic competition and sold at a wholesale acquisition price of $17.60 per tablet. *Id*. at 50a. Upon acquisition, Turing raised the drug's price to $750 per tablet, *id*.,

and implemented various distribution restrictions that prohibited Daraprim's sale to generic drug competitors and established exclusive supply agreements with two primary manufacturers of its active pharmaceutical ingredient. See generally *id*. at 52a-70a.

b. Approximately four months after Turing acquired Daraprim, Shkreli was arrested in December 2015 on federal criminal charges involving his operation of a former hedge fund.[2] App., *infra*, 45a. Shkreli subsequently resigned as Turing's CEO and stepped down from its Board, but remained its largest minority shareholder, *id*., holding an approximate ownership interest of 32%, see *id*. at 201a-202a, and a voting interest ranging from 43.07% to 49.44%. *Id*. at 98a; see also *id*. at 201a-202a. Following Shkreli's arrest and departure, Turing Pharmaceuticals AG and its parent entity Turing Pharmaceuticals LLC changed their names to Vyera and Phoenixus, respectively, but continued to prohibit Daraprim's sale to generic drug companies. *Id*. at 45a.

c. Although the conduct surrounding Daraprim's distribution and pricing generated substantial public controversy, it had not previously been declared unlawful. A 2016 Senate investigation[3] into Turing and other

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[2] In 2017, Shkreli was convicted of three of eight counts of securities fraud and sentenced to 84 months in prison, see App., *infra*, 32a, n.9; the record reflects that he was incarcerated throughout the entirety of the district court litigation in this case. See *id*.

[3] U.S. SENATE SPECIAL COMM. ON AGING, 114TH CONG., Sudden Price Spikes in Off- Patent Prescription Drugs: The Monopoly Business Model that Harms Patients, Taxpayers, and the U.S.

pharmaceutical companies—referenced by Respondents in their complaint, App., *infra*, 179a—had concluded that "[t]he law [was] far from clear on whether it is an antitrust violation to refuse to deal with potential generic entrants seeking reference listed drugs" and that "Mr. Shkreli and other[s] . . . know this and may have pursued this aspect of the business model precisely because they have precedent supporting [its] legality."[4] In response, Congress on December 20, 2019 enacted the CREATES Act, which now obligates branded pharmaceutical companies to sell product samples to generic competitors under "commercially reasonable, market-based terms" within "31 days" upon written request. 21 U.S.C. § 355-2. The first generic formulation of Daraprim launched in March 2020. See App., *infra*, 54a, 73a.

District Court Proceedings

2. Approximately one month after the CREATES Act was signed into law, the Federal Trade Commission and seven states filed this suit on January 27, 2020, in the U.S. District Court for the Southern District of New York, alleging violations of antitrust law under Sections 1 and 2 of the Sherman Act and various state-law analogs that incorporate federal precedent. See App., *infra*, 161a. In addition to corporate defendants Vyera and Phoenixus, the suit also named Petitioner Shkreli

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Health Care System (Dec. 2016), https://www.aging.senate.gov/imo/media/doc/Drug%20Pricing%20Report.pdf ["Senate Report"]

[4] *See* Senate Report at 116-17; *see also id*. at 17, n.732 (concluding Second Circuit caselaw "makes it difficult to bring a successful case against Turing or Mr. Shkreli for failing to deal.").

and former-CEO Kevin Mulleady individually as defendants in their capacities as owners and former executives of the corporate defendants. See *id*. at 26a-27a, 178a.

a. Respondents' suit alleged that Vyera's distribution restrictions and refusal to sell Daraprim to generic drug competitors impeded generic drug firms from obtaining the product samples needed to perform bioequivalence studies and enter the market—conduct that Respondents alleged violated Sections 1 and 2 of the Sherman Act. See generally *FTC* v. *Vyera*, 479 F. Supp. 3d 31, 39-41 (S.D.N.Y. 2020). Among other arguments, Petitioner and his codefendants countered that under this Court's decision in *Verizon Communs.* v. *Trinko*, 540 U.S. 398 (2004), the Sherman Act generally imposes no duty on a firm to transact business with competitors unless there has been a prior course of dealing between the parties, *id*. at 408; see also *Vyera*, 479 F. Supp. 3d at 49-50 (discussing pretrial arguments), and that Vyera's exclusive supply agreements and closed distribution system were not unlawful. See *Vyera*, 479 F. Supp. 3d. at 47-49.

b. The FTC brought suit under Section 13(b) of the FTC Act, which empowers the Commission to seek a "permanent injunction" against a party it believes is "is violating, or is about to violate," a law falling under its enforcement jurisdiction. 15 U.S.C. § 53(b). The FTC initially sought both injunctive relief and disgorgement, but later withdrew the latter request, see App., *infra*, 27a, following this Court's decision in *AMG Capital Mgmt., LLC* v. *FTC*, 593 U.S. 67 (2021), which held that Section 13(b)'s reference to a "permanent

injunction" did not include a broader ancillary power to award equitable monetary relief such as disgorgement. *Id*. at 70.

c. The state plaintiffs invoked the district court's original jurisdiction under Section 16 of the Clayton Act, which authorizes "any person . . . to sue for and have injunctive relief" in federal court for a violation of antitrust law. 15 U.S.C. § 26. Similar to the FTC, the state plaintiffs initially sought to utilize this statutory reference to "injunctive relief" to pursue a broader remedy of equitable disgorgement, but the district court concluded that this Court's reasoning in *AMG* "appear[ed] to preclude" this prayer for relief. *FTC v. Vyera*, No. 20-cv-706, 2021 WL 4392481; 2021 U.S. Dist. LEXIS 183303, at *7 n.6 (S.D.N.Y. Sep. 24, 2021).

d. The state plaintiffs further invoked the court's supplemental jurisdiction under 28 U.S.C. § 1367 to add various related claims of state antitrust law—claims that the district court observed "all . . . follow federal precedent." See App., *infra*, 103a. Among the state statutes at issue was New York Executive Law § 63(12), which authorizes the New York Attorney General to seek injunctive relief and "restitution" against "any person" who has "engaged in repeated . . . illegal acts" in the "transaction of business" in the state. N.Y. Exec. Law § 63(12). Citing New York precedent concerning the statute's authorization of "restitution," the district court concluded in a pretrial summary judgment ruling that § 63(12) authorized New York to seek nationwide equitable disgorgement against the defendants for violations of federal or state antitrust law. *FTC v. Vyera*, No. 20-cv-706, 2021 WL 4392481; 2021

U.S. Dist. LEXIS 183303, at *8-11 (S.D.N.Y. Sep. 24, 2021); see also App., *infra*, 112a-113a, 144a-145a.

3. After two years of pretrial litigation, a bench trial was set for December 14, 2021.

a. Two weeks before trial, Petitioner's codefendants—the Vyera corporate entities and Vyera's former CEO Kevin Mulleady (both represented by separate counsel, see App, *infra*, at 212a)—settled with Respondents and agreed to a stipulated order for monetary and injunctive relief on Dec. 7, 2021. *Id*. at 205a-209a; see also *id*. at 28a. Among other terms, the order capped the corporate defendants' liability for equitable monetary relief at $40 million, with the entities agreeing to "pay a guaranteed amount of $10 million upfront and up to $30 million more in contingent payments over 10 years." *Id*. at 208a; see also *id*. at 234a-238a. Mulleady agreed to a suspended judgment of $250,000, enterable upon any future finding of contempt. *Id*. at 239a. The order permitted all of the settling codefendants to explicitly deny any wrongdoing or liability. *Id*. at 215a; see also *id*. at 206a-207a.

b. Shkreli similarly denied any wrongdoing or liability, but proceeded to trial as the sole remaining defendant, App., *infra*, 28a, explaining through counsel that he wished to exercise his right to hold the government to its burden of proof under the rule of reason. See *id*. at 265a-266a. Sitting in equity without a jury, *id*. at 27a, n.4, the district court conducted a seven-day bench trial and subsequently issued an opinion and order finding Shkreli individually liable for "violations of §§ 1 and 2 of the Sherman Act and . . . parallel violations of state law." App., *infra*, 136a. All conduct at

issue was evaluated under the rule of reason, see *id*. at 105a-106a, and the court found that Shkreli had devised Vyera's business plan concerning its pricing and distribution of Daraprim and continued to use his power as the company's largest minority shareholder to maintain the business plan after his departure. *Id*. at 136a-137a.

c. Following its finding of liability, the district court entered an equitable disgorgement order against Shkreli of $64.6 million, App., *infra*, 150a—the court's estimation of the nationwide profits that Vyera accrued from its sales of Daraprim. *Id*. at 146a-147a. The court ordered Shkreli jointly and severally liable for the full $64.6 million, to be offset by any settlement payments made by the settling corporate codefendants. *Id*. at 148a-150a. As described above, see p. 14, *supra*, the corporate codefendants' liability was capped at $40 million per the terms of the settlement order, with only $10 million guaranteed. *Id*. at 208a, 234a-235a.

d. The district court did make any findings that Shkreli personally realized any gains from Vyera or Phoenixus. Shkreli's averments that he "never received a salary or any form of compensation from either company," App., *infra*, 188a; see also *id*. at 193a, were uncontested at trial. Moreover, Respondents' complaint did not allege that Shkreli realized any of the monopoly profits at issue, see *id*. at 180a (alleging monopoly profits and revenues of Vyera), or that Shkreli had access to Vyera's funds or financial accounts. Cf. *id*. at 202a (uncontested testimony that Vyera's management denied Shkreli's request for a consulting contract after his departure). Responding to

Shkreli's objections that ordering him to disgorge profits he had not realized constituted a penalty assessment, the district court cited the Second Circuit's decision in *SEC v. Contorinis*, to conclude that "the plaintiffs did not need to show that the illegal gains personally accrued to Shkreli." *Id*. at 168a (citing *Contorinis*, 743 F.3d 296, 305-06 (2d Cir. 2014)); see also *id*. at 263a (Respondents' summation, citing *Contorinis* to argue that equitable disgorgement "does not entail that the gain must personally accrue to the wrongdoer").

e. The court further issued a permanent injunction ordering that Shkreli be "banned . . . for life from directly or indirectly participating in any manner in the pharmaceutical industry," App., *infra*, 17a, to include the making of any "public statements" that are "intended" to "directly or indirectly influence or control the management or business of any Pharmaceutical Company." *Id*. at 18a. The court justified the scope of the injunction in part on its finding that Shkreli had "not expressed remorse or any awareness that his actions violated the law," *id*. at 142a, but opted instead to mount various defenses at trial. See *id*. The court additionally found the conduct at issue to be "deliberate, repetitive, and long-running," *id*. at 140a, based on the court's findings that Shkreli had employed a similar business model at his prior firm Retrophin. *Id*. at 141a. Although the district court did not find that this prior conduct by Retrophin had previously been challenged or declared illegal, cf. pp. 10-11, *supra*, the court concluded that it constituted "repetitive" conduct. See App., *infra*, 140a, 141a, 72a.

Second Circuit Proceedings

4. Following trial, Shkreli appealed from the district court's entry of the equitable disgorgement order and the permanent injunction.

a. The court of appeals affirmed the disgorgement order. Among Shkreli's arguments pressed on appeal,[5] he renewed his argument that the district court's order requiring him to disgorge the profits of Vyera exceeded the bounds of its federal equitable jurisdiction as informed by this Court's guidance in *Liu*, 140 S. Ct. 1936. Pointing out that *Liu* had cited disapprovingly the Second Circuit's decision in *Contorinis*, Def. Br. [Dkt. No. 102] at 33, Shkreli argued that requiring him to disgorge profits realized exclusively by his codefendants contravened the equitable principles of disgorgement described in *Liu*, Def. Br. at 33-34 (citing 140 S. Ct. at 1949-50); *see also* Reply Br. [Dkt. No. 157] at 16, as it was uncontested that Shkreli earned no profits or salary from Vyera. *Id*. The state plaintiffs-appellees responded that *Liu* should be read broadly to authorize joint-and-several disgorgement upon any finding of "concerted wrongdoing" among codefendants—regardless of whether any individual codefendant actually

[5] Constrained by *Contorinis* below, Shkreli's first argument to the court of appeals was that the district court's entry of joint-and-several disgorgement liability for antitrust violations that implicated both federal and state law should have been subject to additional equitable limitations under New York state law. Def. Br. [Dkt. No. 102] at 27-31. The court of appeals denied this argument as waived. App., *infra*, 3a-4a. Shkreli does not seek further review of this holding.

realized any personal gains from the conduct judged unlawful. *See* States Br. [Dkt. No. 134] at 24-29.

The court of appeal summarily denied the argument without further analysis, see App., *infra*, 10a ("We have carefully considered Shkreli's remaining arguments and find them to be without merit."), and affirmed the district court's judgment. *Id*.

b. The court of appeals additionally affirmed the district court's entry of the permanent injunction. App., *infra*, 4a-10a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are squarely divided over the question of whether, and if so to what extent, a defendant can be ordered to disgorge the profits of other parties.

The issue is an important and recurring one, and this case presents a highly suitable vehicle for resolving it. The Second Circuit, moreover, has answered it incorrectly: It has concluded that a defendant can be ordered to "disgorge" profits that he or she never received, possessed, or controlled, but that instead accrued solely to other parties. That conclusion has now twice been questioned by this Court as being "in considerable tension with equity practices." *Liu*, 591 U.S. at 85 (citing *Contorinis*, 743 F. 3d at 304-306); see also *Kokesh*, 581 U.S. at 466 (citing *Contorinis*, 743 F. 3d at 302). It also effectively nullifies this Court's longstanding holding in *Elizabeth* v. *Pavement Co.*, 97 U.S. 126 (1877) that a party cannot be liable in accounting for profits that the party did not share in. See *id*. at 140. This Court should grant certiorari to resolve the courts

of appeals' disagreement, and should reverse the judgment below.

A. The decision below implicates a longstanding conflict among the courts of appeals.

1. By affirming that a federal court of equity may order a defendant to disgorge profits that accrued solely to his or her codefendants, the Second Circuit's decision continues a conflict with the decisions of the Fifth and Eleventh Circuits that has persisted for ten years.

a. In *SEC* v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978), the Fifth Circuit held that a federal "court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *Id*. at 1335. Applying the equitable maxim that "[d]isgorgement is remedial and not punitive," the court concluded that "[a]ny further sum would constitute a penalty assessment" beyond the scope of accepted equity practice. *Id*.

Blatt involved two attorneys—Gerson Blatt and Barton Udell—who exploited their insider knowledge of material nonpublic information about a corporate acquisition to generate unlawful profits for a trust controlled by a longtime client named John Pullman, also a codefendant. *Id*. at 1327-29. While Pullman netted a windfall profit of approximately $315,000 from the unlawful scheme, *id*. at 1328, attorney Blatt "did not receive any profits directly," *id*. at 1335, and instead gained only his legal fees of $3,500. *Id*. The district court, after finding all three codefendants liable for securities fraud, ordered Pullman to disgorge the full

sum of his unlawful profits, while also ordering Blatt and another settling codefendant to "share in paying the trustee's expenses in collecting and disbursing the disgorged funds." *Id*.

The Fifth Circuit reversed and vacated the disgorgement order as to Blatt, holding that accepted equity practice prohibited him from being required to disgorge an amount more than the legal fees he personally gained from the unlawful conduct. *Id*. at 1335. The case was remanded with instructions that Blatt and his settling codefendant be ordered "to pay an amount not exceeding the fees they received for their role in the fraud." *Id*. at 1336.

Consequently, the Fifth Circuit flatly prohibits a court from ordering one defendant to disgorge the profits of another. Moreover, consistent with this Court's subsequent guidance in *Liu*, the Fifth Circuit's approval of collective disgorgement orders has been limited to cases involving codefendants whose finances were effectively commingled, cf. *Liu*, 140 S. Ct. at 1949, thus rendering the individual apportionment of unlawful gains infeasible or functionally meaningless. See, e.g., *SEC* v. *Halek*, 537 F. App'x 576, 581 (5th Cir. 2013) (affirming joint-and-several disgorgement against two companies and their individual owner and operator who had "authority to receive and disburse funds from all the relevant accounts"); *SEC* v. *United Energy Partners, Inc.*, 88 F. App'x 744 (5th Cir. 2004) (affirming joint and several disgorgement against company and two executives who together owned 100% of its shares).

b. The Eleventh Circuit treats *Blatt* and other decisions of the former Fifth Circuit as binding authority. See *Bonner* v. *City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).[6] Consequently, the Eleventh Circuit follows the Fifth Circuit's lead in limiting disgorgement liability to "only to the amount with interest by which the defendant profited from his wrongdoing," *SEC* v. *ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (quoting *Blatt*, 583 F.2d at 1335) (internal quotations omitted), on the grounds that "[a]ny further sum would constitute a penalty assessment." *Ibid*.

The Eleventh Circuit's ongoing conflict with the Second Circuit, pp. 22-24, *infra*, is starkly illustrated by a district court decision that the government did not appeal. In *SEC* v. *Megalli*, 157 F. Supp. 3d 1240 (N.D. Ga. 2015), an investment fund manager named Mark Megalli was found liable for securities fraud after using insider information to execute stock trades for his employer's fund. *Id*. at 1253-54. Seeking disgorgement, the SEC asked the court to adopt the Second Circuit's then-recent decision in *Contorinis* (discussed below) to require defendant Megalli to disgorge not just his personal gains from the unlawful trade, but the entirety of the fund's gains as well—a sum of over $3 million. *Id*. at 1253. But explaining that courts within the Eleventh Circuit "remain[] bound by *Blatt*," *id*. at 1254, Judge Totenberg rejected the SEC's invitation to apply

[6] The Eleventh Circuit was created on October 1, 1981, by Congress' division and reorganization of the former Fifth Circuit under the Fifth Circuit Court of Appeals Reorganization Act. See *Bonner*, 661 F.2d at 1207.

another circuit's contravening precedent. After conducting an evidentiary hearing, the court subsequently ordered Megalli to disgorge a sum of $19,790.00, based on the court's findings of the salary and bonus compensation he personally gained from the illegal trade. *SEC* v. *Megalli*, No. 1:13-cv-3783-AT, 2015 WL 13021472; 2015 U.S. Dist. LEXIS 197881, at *4-5 (N.D. Ga. Dec. 15, 2015).

2. The Second Circuit has reached the opposite conclusion: that a defendant can be ordered to disgorge profits beyond the amount of his or her personal gain to include the profits of other parties as well. Consequently, a defendant within the Second Circuit can be required to disgorge funds that he never received, possessed, or controlled.

a. In *SEC* v. *Contorinis*, 743 F.3d 296 (2d. Cir. 2014) a divided panel of the Second Circuit held that a district court's equitable jurisdiction includes the power to order a defendant to disgorge not only his or her own profits from wrongdoing, but also any additional profits that may have accrued to other parties—up to "the maximum of the total gain from the illicit action." *Id*. at 306; see also *id*. at 304-06. In so holding, the majority 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).

Like *Magelli*, p. 21, *supra*, *Contorinis* involved a portfolio manager who unlawfully used insider information to execute stock trades for a fund that he managed. *Contorinis*, 743 F.3d at 299-300. Defendant Contorinis personally gained $427,875 in salary and

compensation from his wrongdoing, see *id*. at 300, while his employer's fund generated profits of over $7 million. See *id*. Following a finding of liability for securities fraud, *id*., a district court ordered Contorinis to disgorge not only his only profits, but the entirety of the fund's profits as well. *Id*. at 300-301.

The court of appeals affirmed in a divided decision. Though noting that the question presented "an ambiguity in the concept of disgorgement," *id*. 302, the majority rejected the contention that "the wrongdoer need disgorge only the financial benefit that accrues to him personally." *Id*. at 305. Instead, the majority reasoned that limiting disgorgement to a defendant's pecuniary gains would fail to capture "indirect or intangible" benefits—such as an "enhanced reputation" or the "psychic pleasures" gained from enriching other parties. *Id*. at 306. Because these intangible gains would be "difficult to quantify," *id*., the court concluded that "ordering a violator to disgorge gain the violator never possessed does not operate to magnify penalties or offer an alternative to fines, but serves disgorgement's core remedial function of preventing unjust enrichment." *Id*. at 307.

In dissent, Judge Chin concluded that ordering a wrongdoer to disgorge the profits of other parties was "inconsistent with both the nature and purpose of disgorgement," *id*. at 309, which he explained "should have the effect of returning a defendant to his status quo prior to the wrongdoing." *Id*. Judge Chin concluded that requiring Contorinis "to 'disgorge' $7.2 million in 'profits.' . . . [that were] never in his possession or control," *id*., contravened that equitable purpose and

instead "had the effect of punishing Contorinis for his wrongdoing." *Id*. at 310. And while agreeing that "Contorinis undeniably deserved to be punished," *id*. at 310, Judge Chin observed that "disgorgement was not the proper mechanism to be used to impose that punishment." *Ibid*.

b. In the proceedings below, Petitioner Shkreli pressed the same argument to the Second Circuit—that the district court exceeded its powers in equity when it relied on *Contorinis* to order Shkreli to disgorge $64.6 million in profits that accrued exclusively to his codefendants. See pp. 17-18, *supra*. The court of appeals summarily dispensed with his argument, App., *infra*, 10a ("We have carefully considered Shkreli's remaining arguments and find them to be without merit."), thus affirming the district court's disgorgement order and continuing the split of authority.

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As a result of this conflict of authority, both government and private plaintiffs within the Second Circuit can pursue a much broader incarnation of equitable disgorgement than is available to plaintiffs within the Fifth and Eleventh Circuits, giving such plaintiffs a remedial power under federal law that other plaintiffs do not possess. Had Respondents' suit been adjudicated under the law of the Fifth or Eleventh Circuits, Shkreli would not have been liable for any disgorgement at all—because it was uncontested that Shkreli did not personally receive or otherwise realize any of the profits that Vyera accrued from Daraprim.

B. The question presented implicates an important and recurring issue of federal equity law, and this case presents an ideal vehicle for resolving it.

1. The controversy over the permissible scope of the disgorgement remedy in equity is a recurring issue of national importance. As described above, the Second Circuit's conception of equitable disgorgement directly contradicts that of two other circuits. In consequence, a defendant's liability in disgorgement depends entirely on the jurisdiction in which it is pursued.

2. Because the disgorgement remedy is implicated by numerous federal statutes authorizing actions for profits or equitable relief, it has widespread application in federal equity practice.

a. In actions for trademark or copyright infringement, a plaintiff may seek disgorgement of a "defendant's profits" under 15 U.S.C. § 1117(a) of the Lanham Act, or of "the infringer's profits" under the Copyright Act. 17 U.S.C. § 504(b). In *Dewberry Eng'rs Inc.* v. *Dewberry Grp., Inc.*, 77 F.4th 265 (4th Cir. 2023), Pet. for Cert. pending (No. 23-900), for example, a divided panel of the Fourth Circuit recently held that a corporation could be ordered to disgorge the trademark infringement profits of its non-party affiliates.[7]

b. Likewise, under the Employee Retirement Income Security Act (ERISA), participants in retirement plans may seek disgorgement of transferred

[7] This Court recently relisted the pending petition for certiorari for this Court's Conference of June 20, 2024. See Case No. 23-900 (U.S.).

assets under Section 502(a)(3)'s authorization to pursue "other appropriate equitable relief," 29 U.S.C. § 1132(a)(3); see *Great-West*, 534 U.S. at 214; see also *Patterson* v. *United Healthcare Ins.*, 76 F.4th 487, 497 (6th Cir. 2023), or in actions for breach of fiduciary duty under the statute's authorization to seek disgorgement of the "profits of [a] fiduciary." 29 U.S.C. § 1109(a).

c. The disgorgement remedy is also a mainstay of the SEC's equitable remedial toolkit; the SEC's pursuit of disgorgement through its power under § 78u of the Securities Act to seek "equitable relief" was the subject of this Court's decision in *Liu*. See 591 U.S. at 74-75. Notably, Congress in 2021 amended § 78u to explicitly authorize "disgorgement," which is defined as "any unjust enrichment *by the person who received such unjust enrichment* as a result of such violation," 15 U.S.C. § 78u(d)(3)(A)(ii) (emphasis added)—language appearing to limit disgorgement in SEC actions to the unlawful profits personally "received." A recent article explores whether this new disgorgement provision incorporates or modifies this Court's equitable guidance in *Liu*. Andrew N. Vollmer, *Liu and the New SEC Disgorgement Statute*, 15 Wm. & Mary Bus. L. Rev. 307, 354-59 (2024).[8]

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[8] In contrast, Congress did not amend the Securities Act's separate "controlling person" provision of Section 78(t), which statutorily imposes joint-and-several liability on "every person who, directly or indirectly, controls any person liable" under the securities laws. 15 U.S.C. § 78(t). The Securities Act thus appears to incorporate by statute certain forms of joint-and-several liability that other regulatory schemes do not.

Courts may also use disgorgement calculations to inform the pretrial freezing of a defendant's assets. See, e.g., *ETS Payphones*, 408 F.3d at 734-36. Thus, a rule that exposes a defendant to liability in disgorgement for the profits of other parties can greatly enlarge the scope of his or her assets to be frozen before trial, thereby compromising the defendant's ability to fund a meaningful defense. Cf. *Kaley* v. *United States*, 571 U.S. 320, 326-27 (2014) (Fifth and Sixth Amendments do not prohibit the pretrial seizure of assets a defendant needs to hire and pay a defense attorney); see also *id*. at 341 (ROBERTS, C.J., dissenting).

d. Finally, disgorgement is also sought in federal court in public or private civil actions in claims of state law brought under supplemental or diversity jurisdiction. In this case, for example, the remedy of equitable disgorgement was not authorized by either the FTC Act or the Clayton Act—both of which provide only for injunctive relief in equity. See pp. 12-13, *supra*. Instead, the district court's equity jurisdiction to order disgorgement was invoked through an exercise of its supplemental jurisdiction over a claim under New York law. See *id*. Because this Court has made clear that the equity jurisdiction of the federal courts in such cases remains cabined by traditional equity practice, *id*. at 4 (citing *York*, 326 U.S. at 105-06), the federal disgorgement remedy has important and recurring implications for pendent and diversity actions as well.[9]

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[9] In *FTC, et al*. v. *Amazon*, No. 23-cv-1495 (W.D. Wash.), for example, co-plaintiff New York has—just as in this case—invoked the district court's supplemental jurisdiction in another antitrust action to pursue equitable monetary relief under New York

3. The question is also likely to recur because the FTC has publicly touted the judgment below as "precedent-setting relief" that should serve as "a warning to corporate executives everywhere that they may be held individually responsible for the anticompetitive conduct they direct or control."[10] The FTC has thus signaled its endorsement of the Second Circuit's incarnation of disgorgement—and its intention to pursue it again.

4. This case presents an ideal vehicle for resolving the question presented. It is cleanly presented with no underlying disputes of fact. Respondents did not allege, nor did the district court find, that Shkreli personally realized any of the profits he was ordered to disgorge. Rather, under Contorinis, his personal gains (or lack thereof) were regarded as immaterial. Pp. 15-16, *supra*. The question of the disgorgement order's compliance with federal equity jurisdiction was pressed to both the district court and the court of appeals. Moreover, the court of appeals' summary disposition of Petitioner's argument, see pp. 17-18, *supra*, further reflects *Contorinis*' status as the established law of the Second Circuit.

#. Nor can *Contorinis* or the decision below be justified as an exercise of restitution among "partners

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Executive Law § 63(12). See Amended Complaint [Dkt. No. 171] at 12, ¶ 41; 13, ¶ 47; 154, ¶ 19.

[10] Press Release, Federal Trade Commission, *Statement of Chair Lina M. Khan on the Ruling by Judge Denise L. Cote Federal Trade Commission et al v. Vyera Pharmaceuticals, LLC et al.* (Jan. 14, 2022). https://www.ftc.gov/news-events/news/press-releases/2022/01/statement-chair-lina-m-khan-ruling-judge-denise-l-cote-federal-trade-commission-et-al-v-vyera

engaged in concerted wrongdoing." *Liu*, 591 U.S. at 90-91. Petitioner does not dispute equity's flexibility to impose joint disgorgement among partners in cases where it would be infeasible or impossible to disentangle the relative gains of each party. Indeed, this Court has long recognized that "[f]lexibility rather than rigidity has distinguished" the "power of the Chancellor." *Hecht Co*. v. *Bowles*, 321 U.S. 321, 329-30 (1944).

It thus makes sense that equity might demand collective disgorgement among codefendants whose actions have made it difficult to apportion their relative gains because of, for example, their use commingled finances, or where one partner has financed the lifestyle of the other. See *Liu*, 591 U.S. at 91. By contrast, an order imposing disgorgement liability against a defendant for profits that accrued exclusively to other parties frustrates the purpose of equity by necessarily leaving that defendant worse off.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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