No. 11-1161

In the Supreme Court of the United States

PETER S. CAHILL, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in ordering petitioner to disgorge the unlawfully-acquired gains from his securities-fraud scheme.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 659 F.3d 1. The opinions of the district court (Pet. App. 24-64) are reported at 691 F. Supp. 2d 198 and 744 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2011. A petition for rehearing was denied on December 22, 2011 (Pet. App. 71-72). The petition for a writ of certiorari was filed on March 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this civil enforcement action, alleging that petitioner and others had engaged in securities fraud. Pet. App. 2. After petitioner waived his right to contest the allegations, see *id.* at 25-27, the district court entered an order requiring, *inter alia*, that petitioner disgorge the proceeds of his fraudulent scheme. *Id.* at 2; see *id.* at 24-70. The court of appeals affirmed. *Id.* at 1-23.

1. The Securities Exchange Act of 1934 (Exchange Act) provides that, "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation" of the Exchange Act or the SEC's "rules or regulations thereunder," the SEC may bring a civil action "to enjoin such acts or practices." 15 U.S.C. 78u(d)(1). The Act further provides that, in such an action, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5).

2. Petitioner and his associates engaged in a nationwide "pump and dump" scheme that involved broadcasting hundreds of thousands of fraudulent voicemails touting a penny stock, then selling the stock at a profit.[1] Pet. App. 27. In May 2004, petitioner orchestrated the creation of Triton American Energy Corp (TRAE), a penny-stock company in which petitioner received 1.2 million shares. See *id.* at 6-7. Petitioner then hired

[1] Petitioner stipulated in the district court that, for purposes of determining his liability for disgorgement, "the allegations of the [SEC's] Complaint shall be accepted as and deemed true." Pet. App. 26; see *id.* at 5; see also Pet. 8 (acknowledging that "[t]he facts were largely uncontested").

Whittemore Management, Inc. (WMI) and its owner and sole employee, David Whittemore, to use auto-dialing equipment to place hundreds of thousands of calls nationwide leaving prerecorded messages promoting TRAE's stock. *Id.* at 4, 27-28. These "messages [were] intended to deceive [the] recipients by making them believe that the caller had dialed their number by mistake and that they were the unintended recipient of a hot stock tip." *Id.* at 27; see *id.* at 29 (transcript of broadcast message). The fictitious messages, which WMI broadcast in August and September 2004, were designed to "pump" the trading volume and share price of TRAE stock so that petitioner and others could "dump" their holdings at fraudulently inflated prices. *Id.* at 27.

Petitioner's scheme succeeded. See Pet. App. 29-30. The fraudulent voicemails quickly drove up the share price and trading volume of TRAE stock. See *ibid.* Petitioner then sold more than one million of his personal shares, generating $738,473 in ill-gotten gains. *Id.* at 30. Petitioner subsequently transferred $549,300 of that sum to a lawyer's trust account maintained in the name of WMI. *Ibid.*; see *id.* at 5-6. An attorney for petitioner wired an additional $78,500 to an account controlled by Whittemore's wife. *Id.* at 6.

3. In May 2005, the Commission brought this civil enforcement action against petitioner, Whittemore, and WMI, alleging that the defendants had committed securities fraud in violation of Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and the SEC's Rule 10b-5, 17 C.F.R. 240.10b-5. Pet. App. 24. Petitioner and his co-defendants waived their right to contest the allegations and consented to the entry of a permanent injunction. *Id.* at 5, 24. In addition, petitioner consented to the entry of a court order requiring "disgorgement of ill-got-

ten gains, prejudgment interest thereon, and a civil penalty," with the disgorgement amount to be determined by the district court based on evidence adduced by the parties. *Id.* at 26-27 (quoting petitioner's signed consent).

In the ensuing disgorgement proceedings, the Commission introduced evidence of petitioner's ill-gotten gains and contended that petitioner should be required to disgorge, *inter alia*, the entire $738,473 that he had received from his TRAE stock sales. See Pet. App. 5-7, 33. Petitioner invoked his Fifth Amendment privilege against self-incrimination and declined to offer any evidence of the amounts he had received or retained from the fraudulent scheme. See *id.* at 9, 20-21. Petitioner asserted, however, that he could not be required to disgorge the full proceeds of his stock sales because he had transferred much of the proceeds to WMI and Whittemore and, according to his counsel, no longer had those specific funds in his possession. *Id.* at 39. Petitioner also argued that the defendants should not be held jointly and severally liable for disgorging the proceeds of the fraud, but that each should be responsible for disgorging only the funds directly traceable to him. *Id.* at 40.

The district court rejected petitioner's arguments and ordered him to disgorge the full proceeds of his stock sales. Pet. App. 35-39. The court reasoned that, because petitioner had none of his own funds invested in his TRAE shares, the entire proceeds of the sale represented a reasonable estimate of petitioner's profit from his violations of the securities laws. *Id.* at 36-37. To the extent petitioner asserted otherwise, the court concluded, petitioner had failed to present evidence to refute the Commission's allegations. *Id.* at 37-38; see *id.*

at 38 (explaining that, in a civil case, a court may draw an adverse inference against a litigant who invokes his Fifth Amendment privilege and refuses to produce evidence that is under his control) (citing *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976)).

The district court further held that petitioner's subsequent transfer of some of the proceeds to other participants in the fraud did not foreclose a disgorgement order. The court explained that "[t]he 'manner in which [defendants] chose to spend [their] misappropriations is irrelevant as to [their] obligation to disgorge.'" Pet. App. 39 (quoting *SEC* v. *Levine*, 517 F. Supp. 2d 121, 139 (D.D.C. 2007)) (brackets in original). The court reasoned that petitioner "was a central part of a fraud that falsely and temporarily increased the stock value of TRAE and he sold hundreds of thousands of TRAE shares at inflated prices. He cannot now evade the consequences of those conceded actions." *Ibid.* (footnote omitted). The district court further explained that it was appropriate to impose joint and several liability for the disgorgement order on petitioner and his co-defendants because the evidence showed that they had collaborated to advance the fraud. *Id.* at 40.[2]

4. The court of appeals affirmed. Pet. App. 1-23. As relevant here, the court rejected petitioner's argument that "he should not be liable—jointly or otherwise—for funds he transferred to Whittemore and others after selling the [TRAE] shares." *Id.* at 13. An order of disgorgement, the court explained, imposes a requirement to repay "a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific

[2] At the request of the parties, the district court subsequently made various corrections to the disgorgement order. Pet. App. 9; see *id.* at 46-64, 65-70.

asset." *Id.* at 15 (quoting *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (*Banner Ford*)). Such an order "establishes a personal liability, which the defendant must satisfy regardless [of] whether he retains the selfsame proceeds of his wrongdoing." *Ibid.* (quoting *Banner Fund*, 211 F.3d at 617) (brackets in original). The court also observed that "neither evidence from [petitioner] nor any other source showed that any money transferred from the sale proceeds did not ultimately revert to [petitioner]." *Ibid.*

The court of appeals further held that the district court had not abused its discretion by imposing joint-and-several liability for disgorgement of the relevant amount. Pet. App. 15-20. Consistent with the views of the other circuits that have addressed the question, the court explained that joint-and-several liability for disgorgement is appropriate when two or more defendants collaborate or have a close relationship in engaging in the wrongful conduct. *Id.* at 16-19. The court concluded that "[b]ecause [petitioner] wrongfully obtained the proceeds of the [TRAE] stock sales and controlled the distribution, if any, of those proceeds, and because he collaborated with the Whittemore defendants in the fraudulent 'pump and dump' scheme," the district court "did not abuse its discretion in requiring a disgorgement of the gross proceeds of [petitioner's] sales of [TRAE] stock and in imposing joint and several liability." *Id.* at 20.[3]

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[3] The court of appeals also rejected petitioner's contention that the district court, by drawing adverse inferences from petitioner's failure to rebut the SEC's estimate of his unlawful gains, had impermissibly penalized petitioner for invoking his Fifth Amendment privilege. See Pet. App. 21 (concluding that petitioner's "invocation of the Fifth Amendment could not compensate for his failure to meet [his] burden"

ARGUMENT

The court of appeals held that the district court had not abused its discretion by requiring petitioner to disgorge his profits from violating the securities laws, including any profits that petitioner later transferred to other participants in his fraudulent scheme. That judgment is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's principal challenge to the disgorgement order, moreover, depends on factual premises not supported by the record. Further review is not warranted.

1. The court of appeals correctly rejected petitioner's contention that a person who commits securities fraud may avoid an order of disgorgement simply by transferring the specific proceeds of his fraud to others. Pet. App. 15. Petitioner does not dispute that, under the securities laws, district courts generally may require persons who defraud investors to disgorge the profits of their unlawful schemes. Pet. 6-7, 24; see, *e.g.*, *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978) (Friendly, J.). Congress has authorized the SEC to bring civil actions "to enjoin" violations of the securities laws. 15 U.S.C. 78u(d)(1). In such an action, "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). A legislative grant of equitable authority "to enjoin" statutory violations encompasses the power to enter a decree compelling a defendant "to disgorge profits * * * acquired in violation" of the rele-

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to rebut the Commission's reasonable approximation of his profits). Petitioner does not challenge that holding in this Court.

vant statutory prohibitions. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946); see *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Consistent with that principle, the courts of appeals have repeatedly held that district courts may order the disgorgement of profits obtained through violations of the securities laws.[4]

Petitioner argues (Pet. 20-22) that the permissible reach of a disgorgement order is limited to specific, traceable proceeds that remain in the possession of the defendant. As the court of appeals explained, however, that contention misapprehends the nature of the disgorgement remedy. Pet. App. 15. Disgorgement "consists of factfinding by a district court to determine the amount of money acquired through wrongdoing—a process sometimes called 'accounting'—and an order compelling the wrongdoer to pay that amount plus interest to the court." *SEC* v. *Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006). A disgorgement order therefore directs the defendant to pay "a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset." Pet. App. 15 (quoting *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)). That conclusion follows from the equitable nature of the remedy, which originated in the authority exercised by chancery courts

[4] See, *e.g.*, *SEC* v. *Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006), cert. denied, 550 U.S. 905 (2007); *SEC* v. *Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *SEC* v. *Lipson*, 278 F.3d 656, 662-663 (7th Cir. 2002); *SEC* v. *Rind*, 991 F.2d 1486, 1490 (9th Cir.), cert. denied, 510 U.S. 963 (1993); *SEC* v. *Ridenour*, 913 F.2d 515, 517-518 (8th Cir. 1990); *First City Fin. Corp.*, 890 F.2d at 1230; *SEC* v. *Blavin*, 760 F.2d 706, 712-713 (6th Cir. 1985) (per curiam); *SEC* v. *MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) (en banc); *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971).

"for centuries" to compel wrongdoers to "account for and surrender" their unlawful profits. *Cavanagh*, 445 F.3d at 119. And as the D.C. Circuit has explained, petitioner's contrary view "would lead to absurd results" because it would mean that "a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement." *Banner Fund*, 211 F.3d at 617.

Every court of appeals to address the question has rejected petitioner's contention that a disgorgement order cannot exceed the traceable proceeds of a defendant's wrongdoing that remain in the defendant's possession. See *SEC* v. *Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010) ("A person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained."); *SEC* v. *Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (per curiam) ("[N]othing in the securities laws expressly prohibits a court from imposing penalties or disgorgement liability in excess of a violator's ability to pay."); *Banner Fund*, 211 F.3d at 617; *SEC* v. *Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974). Further review is not warranted.

2. In arguing that the district court lacked equitable authority to order disgorgement of funds that had been transferred to others, petitioner relies heavily on this Court's decision in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002) (*Great-West Life*). Petitioner failed, however, to cite *Great-West Life* in the district court or in his briefs in the court of appeals. See C.A. Pet. for Reh'g 1-2 & n.2 (arguing that rehearing en banc was warranted because the panel's decision conflicted with *Great-West Life*, but conceding

that petitioner had not cited *Great-West Life* before the panel or the district court). Consequently, neither of the courts below addressed petitioner's argument that *Great-West Life* precluded the disgorgement order here. See Pet. App. 13-20, 35-42.

In any event, *Great-West Life* does not support petitioner's proposed limitation on the scope of a district court's equitable authority in securities-fraud suits initiated by the SEC. In *Great-West Life*, the Court held that an ERISA provision authorizing plan beneficiaries to bring suit for "equitable relief" did not encompass a private suit to compel performance of a reimbursement provision in an insurance contract. The Court explained that "specific performance of a past due monetary obligation" was "not typically available in equity." 534 U.S. at 210. In so holding, the Court rejected the contention that the relief sought was "equitable" merely because it could be characterized as restitutionary in nature. See *id.* at 212-214. The Court observed that restitutionary remedies may be legal or equitable and that, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. By analogy, petitioner contends (Pet. 17-22) that the disgorgement order here was beyond the district court's equitable authority because it did not target any specific, traceable funds in his possession.

This Court in *Great-West Life* specifically recognized, however, that some traditional forms of equitable monetary relief—in particular, remedies in the nature of an "accounting for profits"—do *not* involve the return of a specific res in the possession of the defendant. 534 U.S. at 214 n.2. The equity jurisdiction of the district

courts is the "authority to administer in equity suits the principles of 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." *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (*Grupo Mexicano*). As a remedy for fraud, breaches of fiduciary duty, or other wrongs cognizable in equity, the courts of equity regularly compelled defendants to disgorge ill-gotten profits by directing them to "account for and surrender" those gains. *Cavanagh*, 445 F.3d at 119. Thus, while the term "disgorgement" may be of recent vintage, the remedy itself—the power to compel a defendant to surrender his unjust enrichment—was well within the traditional power of equity courts.[5] *Id.* at 118-120; see also *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011) (observing that "the Federal Reporter is replete with instances in which judges of this Court deeply familiar with equity practice have permitted the SEC to obtain disgorgement without any mention of tracing").

Great-West Life, moreover, involved a private contractual dispute, not an action by the government to en-

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[5] Pomeroy, for example, explained that an accounting is among the traditional equitable actions "in which the final relief is wholly pecuniary, and is obtained in the form of a general pecuniary recovery." 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* 1070 (5th ed. 1941); see *id.* § 1416, at 1070 (listing "suits for an accounting in general" among such equitable actions). Such an action does not seek the return of any specific property or funds wrongfully acquired, but simply the payment of a sum representing the wrongdoer's unjust enrichment. See, *e.g.*, 1 Dan B. Dobbs, *Law of Remedies* § 4.3(5), at 614 (2d ed. 1993) (in an action for an accounting, "[t]he defendant is liable on the same unjust enrichment grounds as are involved in a constructive trust, but no particular fund is identified to which a trust or lien attaches").

force a statutory prohibition. As this Court has emphasized, "courts of equity will go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Grupo Mexicano*, 527 U.S. at 310 (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 383 (1965)); see *Porter*, 328 U.S. at 398 (holding that the government could obtain disgorgement of the defendant's profits from violations of the Emergency Price Control Act and observing that, in such a context, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake" (citing *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 552 (1937))). Even in circumstances in which equitable tracing principles might otherwise apply, those principles have been held inapposite to public enforcement actions that do not claim entitlement to any particular property, but instead seek to deter unlawful conduct by denying a wrongdoer the benefit of his misdeeds. See *Bronson Partners*, 654 F.3d at 374 (finding "no case in which a public agency seeking to obtain equitable monetary relief has been required to satisfy the tracing rules").

Thus, contrary to petitioner's belated contention, this Court's decision in *Great-West Life* does not cast doubt on the uniform body of precedent recognizing the authority of district courts, in civil enforcement actions brought by the Commission, to compel persons who have violated the securities laws to disgorge an amount equal to their unlawful gains. See pp. 7-9 & n.4, *supra*. Petitioner cites no contrary authority. This Court's review is not warranted.

3. Even if the question presented otherwise warranted review, this case would provide a poor vehicle for

the Court to address it. As framed by petitioner, the question presented assumes that the proceeds of petitioner's fraudulent scheme "long ago passed on to unrelated parties and are no longer available to [petitioner]." Pet. i. Petitioner contends that the disgorgement order was impermissibly punitive because "it was undisputed that the profits had long ago passed through petitioner's account into the possession of others, and thus were no longer traceable or available for petitioner to return to the SEC or to anyone else." Pet. 20; see, *e.g.*, Pet. i (describing this case as a "quintessential example" of a situation in which "the defendant does not possess or have access to the ill-gotten gains"); Pet. 10 (asserting that "the [Commission] sought disgorgement of gains that only briefly passed through petitioner's own account on their way to benefitting his co-defendant and the securities lawyer rather than himself").

That factual premise, however, is unsupported by the record. Because petitioner and his co-defendants "asserted their Fifth Amendment rights throughout the proceedings" (Pet. 8), the Commission was unable to establish where the proceeds of petitioner's fraud finally came to rest. Pet. App. 8. As the court of appeals noted, however, petitioner agreed for purposes of the disgorgement order that the SEC's allegations were true, and "neither evidence from [petitioner] nor any other source showed that any money transferred from the sale proceeds did not ultimately revert to [petitioner]." *Id.* at 15; cf. *id.* at 20-21 (concluding that the district court had permissibly drawn an adverse inference from petitioner's refusal to introduce evidence rebutting the Commission's reasonable approximation of his profits). The court of appeals explained that, in securities-fraud cases, "often defendants move funds through various accounts

to avoid detection, use several nominees to hold securities or improperly [derived] profits, or intentionally fail to keep accurate records." *Id.* at 19 (quoting *SEC* v. *Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997)). Petitioner neither introduced evidence to negate that concern nor pointed to anything in the record that would "preclude such a possibility here." *Id.* at 19-20. And as the district court reasoned, it "strains credulity to believe" that petitioner orchestrated the entire pump-and-dump scheme and "sold hundreds of thousands of TRAE shares at fraudulently-inflated prices without some profit to himself." *Id.* at 39-40 n.11.

In any event, the district court's disgorgement order imposed joint-and-several liability on petitioner and his co-defendants. See Pet. App. 42 ("Defendants shall be jointly and severally responsible for the disgorgement of this sum."). The court of appeals rejected petitioner's challenge to this aspect of the disgorgement order. See *id.* at 15-20. The court explained that the district court had reasonably concluded that the defendants had collaborated in carrying out the fraudulent scheme and that petitioner had failed to establish any factual basis for apportioning responsibility for the ill-gotten gains among the defendants. *Id.* at 19-20. In such circumstances, joint-and-several liability is consistent with the well-established practice of equity courts. See, *e.g.*, *Crites, Inc.* v. *Prudential Ins. Co.*, 322 U.S. 408, 414 (1944) (breach of receiver's duty to estate would warrant an order to "disgorge[]" profits, "including the profits of others who knowingly joined him in pursuing an illegal course of action"); *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921) ("[O]thers who knowingly join a fiduciary in [an illegal] enterprise likewise become jointly and severally liable with him for such profits.") (citing cases). Apart

from characterizing joint-and-several liability as "punitive" (Pet. 21), petitioner does not explain why it was inappropriate for the court to require the defendants collectively to disgorge the unlawful profits that they had collectively reaped, particularly given the defendants' refusal to produce evidence of the ultimate disposition of the funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2012