No.

IN THE

Supreme Court of the United States

DEWBERRY GROUP, INC.,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

HELGI C. WALKER
Counsel of Record
THOMAS G. HUNGAR
JONATHAN C. BOND
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
HWalker@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

Whether an award of the "defendant's profits" under the Lanham Act, 15 U.S.C. § 1117(a), can include an order for the defendant to disgorge the distinct profits of legally separate non-party corporate affiliates.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. All parties to the proceeding are named in the caption.

2. Petitioner Dewberry Group, Inc., f/k/a Dewberry Capital Corporation, is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Dewberry Engineers Inc. v. *Dewberry Group, Inc.*, No. 20-cv-610 (May 6, 2022)

United States Court of Appeals (4th Cir.):

Dewberry Engineers Inc. v. *Dewberry Group, Inc.*, Nos. 22-1622, 22-1845 (Aug. 9, 2023)

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Petitioner Dewberry Group, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-61a) is reported at 77 F.4th 265. The order of the district court on the parties' cross-motions for summary judgment (App., *infra*, 96a-120a) is not published in the Federal Supplement but is available at 2021 WL 5217016. The order of the district court awarding a profits-disgorgement remedy (App., *infra*, 62a-95a) is not published in the Federal Supplement but is available at 2022 WL 1439826.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2023. A petition for rehearing was denied on September 19, 2023 (App., *infra*, 122a). On December 11, 2023, the Chief Justice granted petitioner's application to extend the time to file this petition to February 16, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Lanham Act, 15 U.S.C. § 1117(a), provides in pertinent part:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. * * * Such sum in either of the above circumstances shall constitute compensation and not a penalty.

Section 1117 is reproduced in full in the appendix to this petition. App., *infra*, 123a-125a.

INTRODUCTION

Congress legislates against the backdrop of a strong presumption that corporate affiliates are treated as separate entities, consistent with foundational principles of American corporate law. This Court has recognized the "bedrock principle" that a

corporation "is not liable for the acts" of its affiliates except when "the corporate veil may be pierced." *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998). And the Court has made clear that, if Congress wishes to depart from that principle in a particular context, it must say so "directly" in the statute. *Id.* at 63 (citation omitted). In the decision below, however, the Fourth Circuit held that the Lanham Act, 15 U.S.C. § 1051 *et seq.*, silently invites courts to ignore corporate separateness in trademark disputes without regard to veil-piercing principles. That erroneous ruling, which conflicts with decisions of the Ninth and Eleventh Circuits, the Lanham Act, and this Court's precedent, amply warrants review.

The case arises from an on-and-off trademark dispute between petitioner and respondent about the use of a shared surname—Dewberry—in marketing real-estate-development services. Following a prior settlement, petitioner rebranded its business and provided new marketing materials to its affiliates, which used those materials to market commercial properties to prospective tenants. Respondent brought this suit asserting Lanham Act claims based on that rebranding. But its suit named *only* petitioner, not the affiliates, as a defendant, and the parties litigated *only* the liability of petitioner itself. The district court nonetheless ordered petitioner to disgorge $43 million in profits earned by *the affiliates*—profits that never passed through petitioner's hands. Even though respondent never sought to pierce the corporate veil, much less met the demanding test for doing so, the court concluded that petitioner and its affiliates could be "treated as a single corporate entity when calculating

the revenues and profits" of the infringing activity. App., *infra*, 85a.

In a divided decision, the Fourth Circuit endorsed this expansive profits-disgorgement remedy. The majority forthrightly acknowledged that, "[r]ather than pierc[ing] the corporate veil," App., *infra*, 43a, the order for petitioner to disgorge profits of non-party affiliates rested solely on the district court's leeway to "weig[h] the equities of the dispute" and fashion remedies accordingly, *id.* at 45a (citation omitted). Dissenting, Judge Quattlebaum explained that plaintiffs can seek recovery from affiliates by either joining them as defendants or attempting to pierce the corporate veil. But he "kn[ew] of no law that allows courts, in assessing the profits of a defendant, to disregard those options and simply add the revenues from nonparties to a defendant's revenues for purposes of evaluating the defendant's profits." *Id.* at 59a.

Judge Quattlebaum had it right. And he is not alone in that conviction. The Ninth Circuit has held that "[t]he corporate veil will not be penetrated" by a Lanham Act plaintiff "unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them." *U-Haul International, Inc.* v. *Jartran, Inc.*, 793 F.2d 1034, 1043 (9th Cir. 1986) (citation omitted). The Eleventh Circuit, too, agrees that corporate affiliates must be treated "as distinct entities" unless a Lanham Act plaintiff proves "that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil." *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153, 1162 (11th Cir. 2022) (citation omitted).

In this case, the Fourth Circuit's decision to allow Lanham Act plaintiffs to disregard the corporate form without satisfying traditional veil-piercing principles cannot be squared with those decisions. Nor can it be squared with the statute and precedent. Far from "directly" displacing the "bedrock principle" that corporate affiliates are not liable for one another's acts unless the plaintiff successfully pierces the veil, *Bestfoods*, 524 U.S. at 62-63 (citation omitted), the Lanham Act reinforces that background rule in multiple ways. It expressly authorizes an award of only the "*defendant's* profits." 15 U.S.C. § 1117(a) (emphasis added). It further cabins profits-disgorgement remedies to "the principles of equity," *ibid.*, a proviso that under this Court's precedent is statutory shorthand importing all of the traditional limitations on equitable remedies. And the Act states that disgorgement must "constitute compensation and not a penalty." *Ibid.*

The decision below jumped all of those guardrails. The Fourth Circuit approved an award of the profits of *other corporations*—literally, non-parties to the case. It also disregarded the longstanding equitable principle that defendants can be "liable to account for such profits only as have accrued to themselves." *Liu* v. *SEC*, 140 S. Ct. 1936, 1945 (2020) (quoting *Belknap* v. *Schild*, 161 U.S. 10, 25-26 (1896)). And the award the court upheld is plainly a penalty: it ordered petitioner, which had zero net profits, to pay $43 million.

The Fourth Circuit's distortion of these principles, its departure from other circuits' and this Court's precedent, and its endorsement of a freewheeling view of the equities untethered to any traditional limits all pose serious real-world problems. The decision below provides a roadmap for Lanham Act plaintiffs to end-

run well-settled limitations on corporate liability and for lower courts to replace time-tested veil-piercing rules with unpredictable ad hoc balancing. It also scuttles corporations' ability to invest and conduct their operations confident that corporate separateness will be respected. It will introduce confusion by blurring the distinction between direct and secondary liability. The resulting circuit conflict will incentivize forum shopping. And these and other problems could spill over to other contexts if the Fourth Circuit's approach is exported to other statutes that authorize disgorgement remedies.

This Court should reject the Fourth Circuit's unmoored approach to equitable remedies and resolve the conflict it needlessly created. This case provides an ideal opportunity. The court of appeals' conclusion that the Lanham Act dispenses sub silentio with veil-piercing principles is the sole ground supporting the district court's disgorgement order. And the issue was squarely pressed and passed upon below. The petition should be granted.

STATEMENT

A. Factual Background

After playing quarterback for the Georgia Tech Yellow Jackets and the Calgary Stampeders in the 1980s, John Dewberry hung up his cleats and went into business. He founded petitioner, originally named Dewberry Capital Corporation, to assist in developing, leasing, and managing commercial properties.

Petitioner itself does not own or lease any commercial properties. App., *infra*, 43a-44a. Rather, petitioner is a corporate entity that supports other, affiliated leasing companies by providing accounting, hu-

man-resources, legal, and real-estate-development services. *Id.* at 4a, 45a. Those affiliates, in turn, lease commercial property to tenants in Florida, Georgia, South Carolina, and Virginia. *Id.* at 4a. Petitioner and its affiliates are under Mr. Dewberry's common ownership, but the affiliates are all separate corporate entities. *Id.* at 82a. For example, petitioner maintains separate bank accounts and accounting records for each affiliate and receives a fee for providing these services. *Id.* at 44a, 83a.

In 2006, petitioner and another real-estate entity, respondent Dewberry Engineers Inc., became embroiled in a trademark dispute. App., *infra*, 4a-5a. Respondent also provides real-estate-development services in Florida, Georgia, South Carolina, and Virginia. *Id.* at 3a-4a. Petitioner asserted senior common-law rights in the "Dewberry" mark, while respondent asserted a federal trademark in "Dewberry." *Id.* at 4a. The parties resolved those dueling claims in a 2007 settlement agreement that allowed respondent to use its registered "Dewberry" mark, allowed petitioner to use "Dewberry" subject to certain limits, and required petitioner to use a "DCC" mark rather than "Dewberry" for real-estate development and related services performed in Virginia. *Id.* at 5a-6a.

In 2017, petitioner rebranded itself as Dewberry Group, Inc., and created several sub-brands (Dewberry Living, Dewberry Office, and Studio Dewberry). App., *infra*, 7a. Petitioner also produced marketing materials that used the "Dewberry Group" and "Studio Dewberry" marks. *Id.* at 8a. Petitioner's affiliates then used these materials to market commercial properties to tenants. *Id.* at 39a.

B. Procedural History

1. In 2020, respondent brought this suit asserting (as relevant) trademark infringement under the Lanham Act on the theory that petitioner's rebranding infringed respondent's mark. App., *infra*, 9a. It named petitioner as the sole defendant. *Id.* at 1a, 86a; see also Compl. ¶ 11.

a. The district court granted summary judgment to respondent on liability. App., *infra*, 96a-120a. The court determined that petitioner's rebranded marks infringed respondent's mark. *Id.* at 108a-119a. Among other things, the court cited evidence that petitioner used the "Dewberry" mark on materials produced for its (non-party) affiliates, which the court acknowledged are "third parties, separated by the corporate veil." *Id.* at 103a.

b. The case proceeded to a bench trial limited to damages, and the district court issued an order on remedies. App., *infra*, 62a-95a. Addressing respondent's request for disgorgement of profits, the court first considered whether any award of disgorgement was appropriate. *Id.* at 77a. The district court acknowledged that respondent had "not provided direct evidence of lost sales." *Id.* at 79a. The court nevertheless held that the circumstances called for a profits-disgorgement award. See *id.* at 78a-82a.

The district court then turned to calculating the disgorgement award. Petitioner argued that any award should be limited to its own "revenues and profits" from infringing activities, which were zero. App., *infra*, 82a. As petitioner explained, the record showed that the infringement "generated zero profits" for petitioner, which did not engage in leasing, provided ser-

vices only to its affiliates, and did not receive any revenues from the affiliates' activities. *Id.* at 82a-83a. Respondent answered by urging the court to treat petitioner and its affiliates as "a single corporate entity" and to order petitioner to disgorge profits that the affiliates had purportedly earned from leasing. *Id.* at 82a, 85a.

The district court embraced respondent's approach and held that the Lanham Act authorized disgorgement from petitioner of the non-party affiliates' profits. The court acknowledged its own earlier description of the affiliates (in its summary-judgment ruling) as "third parties, separated by the corporate veil." App., *infra*, 82a (citation omitted). But the court stated that its language was "inaccurate" in light of what it described as "the economic reality" of petitioner's and its affiliates' businesses. *Id.* at 82a, 84a. The court reasoned "that, but-for the revenue generated by the [affiliates], [petitioner] as a single tax entity would not exist" because petitioner provides services only to its affiliates and has relied on Mr. Dewberry to cover significant losses "over the past 30 years." *Id.* at 84a. The court did not, however, apply any veil-piercing doctrine, which respondent had never invoked. *Id.* at 86a. Instead, the court's award of the affiliates' profits rested on its views of "the equitable purposes of the Lanham Act's disgorgement remedy." *Id.* at 85a-86a.

The district court accordingly ordered petitioner to disgorge close to $43 million of its affiliates' profits. App., *infra*, 94a. The court also awarded respondent attorney's fees and issued an injunction limiting petitioner's use of respondent's "Dewberry" mark for commercial real-estate-development services. *Id.* at 11a-12a.

3. As relevant here, the court of appeals affirmed the disgorgement order in a divided decision. App., *infra*, 3a-48a.

a. The panel majority agreed with the district court's determination that a profits-disgorgement remedy was appropriate under Fourth Circuit precedent and then turned to the question of "how much [petitioner] profited from its infringing activities." App., *infra*, 37a-39a. As the majority acknowledged, the answer was zero, in the sense that petitioner "does not actually provide infringing services to third parties for a profit" and instead produced branding found to be infringing "for its affiliates, who in turn generate profits using that branding on their lease, loan, and other promotional materials." *Id.* at 39a. The majority noted that petitioner in fact had "showed losses on its tax returns" and had made no profits on any of the marketed properties. *Ibid.* (citation omitted).

The panel majority held, however, that the district court properly "treated [petitioner] and its affiliates as a single corporate entity for the purpose of calculating revenues generated by [petitioner's] use of infringing marks." App., *infra*, 39a-40a. The majority deemed it sufficient that petitioner and its affiliates were under common ownership and had engaged in joint activity—namely, petitioner provided "branding for its affiliates, who in turn generate profits using that branding on their lease, loan, and other promotional materials." *Id.* at 39a.

The panel majority expressly rejected petitioner's argument that the district court could order petitioner to disgorge its affiliates' profits only if respondent succeeded in "piercing their corporate veils." App., *infra*,

43a. In the majority's view, the district court could "conside[r] the revenues of entities under common ownership with [petitioner]," wholly apart from veil-piercing. *Ibid.* The majority reasoned that, "while [petitioner] did not receive the revenues from its infringing behavior directly, it still *benefited* from its infringing relationship with its affiliates" who did receive them. *Id.* at 45a (citing *American Rice, Inc.* v. *Producers Rice Mill, Inc.*, 518 F.3d 321 (5th Cir. 2008)).

The panel majority acknowledged the Lanham Act's proviso stating that a "grant of profit disgorgement is 'subject to the principles of equity.'" App., *infra*, 45a (quoting 15 U.S.C. § 1117(a)). The majority interpreted that phrase not as limiting a district court's authority, but instead as conferring on courts broad "discretion" to "weig[h] the equities of the dispute." *Ibid.* (citation omitted). "Admonishing courts for using their discretion in this fashion," the majority posited, "risks handing potential trademark infringers the blueprint for using corporate formalities to insulate their infringement from financial consequences." *Ibid.* In the majority's view, giving effect to the corporate form would "ru[n] counter to Congress's fundamental desire" to maximize protection for trademark holders. *Ibid.*

b. Dissenting on the disgorgement issue, Judge Quattlebaum objected to the "use of revenues from separate companies," which are "affiliated with" petitioner but not parties to the case, to assess the profits attributable to petitioner itself. App., *infra*, 58a. He observed that "§ 1117(a) speaks to the *infringer's* profits." *Id.* at 59a (emphasis added). And Judge Quattlebaum noted that respondent had claimed only "that [petitioner], not third parties, was the infringer." *Ibid.* As

a result, the district court's order requiring petitioner to disgorge "revenues from the affiliated companies"—undisputedly "separate corporate entities"—that "were never realized by [petitioner]" itself was "incorrect as a matter of law." *Id.* at 60a.

Judge Quattlebaum also disagreed with the majority's prediction that respecting "'corporate formalities'" in this context would "insulate" infringement. App., *infra*, 58a-59a. He explained that "[t]here is no loophole that lets these entities infringe with impunity," because a Lanham Act plaintiff can either join affiliates as defendants or else seek to "pierce" the defendant's "corporate veil." *Id.* at 59a. But Judge Quattlebaum "kn[e]w of no law that allows courts * * * to disregard those options and simply add the revenues from non-parties to a defendant's revenues for purposes of evaluating the defendant's profits." *Ibid.*

3. The Fourth Circuit denied rehearing en banc. App., *infra*, 122a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted to resolve a circuit conflict on the question whether traditional principles of corporate separateness apply to remedies under the Lanham Act. For years, the circuits respected corporate separateness in this context, refusing to hold defendants liable for their affiliates' infringing conduct and their corresponding profits unless the corporate veil was properly pierced. See *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153, 1160 (11th Cir. 2022); *U-Haul International, Inc.* v. *Jartran, Inc.*, 793 F.2d 1034, 1043 (9th Cir. 1986). But the Fourth Circuit in its divided decision in this case rejected that

approach. The court affirmed an order requiring petitioner to disgorge profits obtained by its non-party affiliates—profits that petitioner undisputedly never received. And it expressly held that the Lanham Act allows courts to impose that remedy without applying veil-piercing principles, which respondent here never invoked.

That circuit-splitting disregard of corporate separateness also conflicts with this Court's precedents and the Lanham Act's plain text. Corporate form is not some trivial "formalit[y]," App., *infra*, 45a, to be dispensed with through free-form judicial balancing of the equities, but a foundational principle of American law. Consistent with that principle, this Court has long adhered to the "well-settled rule" that corporations are not liable for the acts of their affiliates unless "the corporate veil may be pierced." *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998). Congress is deemed to override that traditional common-law rule only if the statute "speak[s] directly to the question." *Id.* at 63 (citation omitted). Nothing in the Lanham Act purports to rewrite this fundamental principle of corporate law.

To the contrary, the Lanham Act confirms that the "bedrock" rule recognized by *Bestfoods*, 524 U.S. at 62, applies to disgorgement awards in federal trademark suits. The Act authorizes courts to award the "*defendant's* profits"—not profits of affiliates or anyone else. 15 U.S.C. § 1117(a) (emphasis added). It further constrains any such award according to "the principles of equity," *ibid.*, which have long limited disgorgement to the defendant's own profits, see, *e.g.*, *Liu* v. *SEC*, 140 S. Ct. 1936, 1945-1946 (2020); *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 140 (1878). And the Act eliminates any doubt by confining disgorge-

ment to "compensation" and forbidding its imposition as a "penalty." 15 U.S.C. § 1117(a). The disgorgement award upheld in this case flouts all of those statutory limitations. The Fourth Circuit approved an order requiring petitioner to disgorge $43 million in profits that petitioner never received, in contravention of the well-established principles of equity the statute expressly incorporates. Like any profits-disgorgement award that orders a defendant to "return" much more than it ever received, see *Liu*, 140 S. Ct. at 1949, that order is a prohibited penalty.

The Fourth Circuit expressed a concern that respecting corporate separateness would "ru[n] counter to Congress's fundamental desire" by permitting infringers to "insulate" their infringement from legal recourse. App., *infra*, 45a. If the Lanham Act did create such a loophole, that would be a problem for Congress to fix. This Court has reiterated, time and again, that "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar* v. *Allina Health Services*, 139 S. Ct. 1804, 1815 (2019). But the supposed "blueprint for using corporate formalities to insulate [defendants'] infringement from financial consequences" that the Fourth Circuit feared does not exist. App., *infra*, 45a. In cases that potentially involve multiple infringers, plaintiffs simply can sue *all* the defendants and recover from any or all for whom the plaintiffs can prove liability on direct or secondary theories of infringement. See *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982). What plaintiffs *cannot* do is extract all of the putative infringers' profits from a lone defendant—particularly one that made "zero profits"—without piercing the corporate veil. App., *infra*, 39a.

Allowing plaintiffs to bulldoze corporate distinctions in this manner threatens broad, harmful consequences. For the Lanham Act, the established framework for multiple-infringer cases (including secondary liability) is now optional in the Fourth Circuit. This new, expansive disgorgement remedy also will encourage plaintiffs to forum-shop claims of trademark infringement, for which the venue is often flexible. And the Fourth Circuit's willingness to bypass the corporate form could spread to other important federal statutes that authorize disgorgement of profits and other remedies subject to equitable principles.

This case is an ideal vehicle to resolve this important issue and clarify that the Lanham Act is fully consistent, not at war, with traditional principles of equity and corporate law. The issue was fully aired and addressed by the courts below. And it is dispositive of the disgorgement remedy at issue. Petitioner itself obtained zero profits, and respondent has never attempted to pierce the veil between petitioner and its affiliates, which the decision below deemed unnecessary. The Court should grant the petition and reverse the judgment below.

I. THE DECISION BELOW CREATES A CIRCUIT CONFLICT ON WHETHER THE PRESUMPTION OF CORPORATE SEPARATENESS APPLIES TO THE LANHAM ACT

The circuits are now divided on the scope of Lanham Act remedies against corporate affiliates. The Ninth and Eleventh Circuits respect the corporate form in this context. Both hold that corporations are distinct from their owners or affiliates (and vice versa) for purposes of the Lanham Act unless the plaintiff can satisfy a traditional veil-piercing doctrine. The

Fourth Circuit here did just the opposite, approving an unbounded disgorgement remedy that makes petitioner liable for the profits obtained exclusively by its affiliates—even though respondent never named those affiliates as parties (let alone established their liability), never argued contributory infringement, and never attempted to pierce the corporate veil. The result is that petitioner stands ordered to disgorge $43 million in profits it never received, on a theory that other courts of appeals have rejected. This divide amply warrants this Court's review.

A. Both the Ninth and Eleventh Circuits have rejected attempts under the Lanham Act to hold defendants liable for related entities' infringing conduct unless the plaintiff can properly pierce the corporate veil.

1. The Ninth Circuit has required veil-piercing before a court can order a Lanham Act defendant to disgorge a different person's profits. In *U-Haul International, Inc.* v. *Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), a nascent moving-truck company (Jartran) sought to boost its market share through "a nationwide newspaper advertising campaign comparing itself to U-Haul." *Id.* at 1036. The campaign enjoyed "tremendous success"; Jartran's revenues increased tenfold, while U-Haul's simultaneously declined. *Ibid.* In response, U-Haul filed false-advertising claims under the Lanham Act against both Jartran and its majority owner, James Ryder. *Id.* at 1036-1037.

The district court in *U-Haul* concluded that Jartran's advertising campaign violated the Lanham Act and awarded U-Haul $40 million in damages, including $6 million in profits that Jartran had earned as a

result of the advertising. 793 F.2d at 1037. The court also held Mr. Ryder jointly and severally liable for the award. *Id.* at 1043; see *U-Haul International, Inc.* v. *Jartran*, *Inc.*, 601 F. Supp. 1140, 1151 (D. Ariz. 1984).

The Ninth Circuit reversed in relevant part, holding that Mr. Ryder could not be held liable for Jartran's infringing conduct and resulting profits, absent a showing that Jartran was Mr. Ryder's alter ego. *U-Haul International*, 793 F.2d at 1043. As the court explained, "[t]he corporate veil will not be penetrated * * * unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them." *Ibid.* (citation omitted). U-Haul, the Ninth Circuit explained, had not made that showing. Although there was "ample evidence that Mr. Ryder controlled Jartran and that he subsidized it heavily," there was "no evidence" that he used Jartran's corporate separateness for fraudulent purposes. *Ibid.* Because there was no basis to pierce the corporate veil, the *U-Haul* court held that Mr. Ryder could not be held liable for Lanham Act remedies that should have run against only Jartran—including disgorgement of Jartran's profits. *Ibid.*

2. In *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153 (11th Cir. 2022), the Eleventh Circuit aligned itself with the Ninth Circuit in holding that the Lanham Act does not override corporate separateness absent veil-piercing. *Id.* at 1160. *Edmondson* involved a nightclub called Miami Velvet that created "marketing and promotional materials" that used unauthorized photographs of models. *Id.* at 1157. The models brought Lanham Act claims for false advertising and false endorsement. *Ibid.* They sued not only Miami Velvet's owner (Velvet Lifestyles), but also that

owner's corporate affiliate (My Three Yorkies, LLC) and an individual (Joy Dorfman) who served as president and manager of Velvet Lifestyles and as the managing member of My Three Yorkies. *Ibid.*

The parties in *Edmondson* disputed whether the plaintiffs could disregard corporate separateness under the Lanham Act. Mrs. Dorfman argued "that the plaintiffs had failed to pierce the corporate veil or show that she participated in the Lanham Act violations as required to hold her individually liable." 43 F.4th at 1158. Yorkies similarly defended its status as a "distinct" entity under the companies' "management structure." *Ibid.* In response, the plaintiffs argued that "there was 'no functional distinction'" among the defendants and pointed to several facts—"that Mrs. Dorfman had a management role in Velvet Lifestyles and Yorkies; that she was paid a salary; that she received the management fee from Yorkies; and that she was 'the beneficiary of funds' from the corporate entities." *Ibid.*

The district court granted the plaintiffs' motion for summary judgment, holding all of the defendants collectively liable for the infringing advertisements. In so doing, the court "never distinguish[ed] between the three defendants during its analysis of the plaintiffs' motion" and "simply treated Velvet Lifestyles, Yorkies, and Mrs. Dorfman as one and the same." *Edmondson*, 43 F.4th at 1161. A jury later awarded the plaintiffs damages from "all three defendants (Velvet Lifestyles, Yorkies, and Mrs. Dorfman)." *Id.* at 1159.

The Eleventh Circuit reversed. *Edmondson*, 43 F.4th at 1165. At the outset of its analysis, the court observed that the marketing materials were

both "created for and used by" only one of the defendants, Velvet Lifestyles, but that the plaintiffs had "also sued Yorkies and Mrs. Dorfman." *Id.* at 1160. That approach, the Eleventh Circuit explained, required the plaintiffs to prove one of two things. The plaintiffs could establish "direct liability" by proving that Velvet Lifestyles' affiliates had "participated in the prohibited conduct" themselves. *Ibid.* Alternatively, the plaintiffs could prove "that the corporate veil between Yorkies and Velvet Lifestyles should be pierced," a form of "indirect liability." *Ibid.* (citing *U-Haul International*, 793 F.2d at 1043).

The Eleventh Circuit concluded, however, that the plaintiffs and the district court had eschewed both paths. 43 F.4th at 1161-1162. Instead, the plaintiffs had simply "assumed that Velvet Lifestyles and Yorkies were not separate entities and could be treated the same" along with their manager and owner, Mrs. Dorfman. *Id.* at 1162. That assumption, the Eleventh Circuit held, was "mistaken" in light of the well-settled principles that separate corporations "are presumed to be distinct 'legal entit[ies]'" and that a manager generally is not liable for the corporation's actions. *Id.* at 1162-1164. Because the "plaintiffs did not argue or establish that the corporate veil should be pierced," the Eleventh Circuit held that the courts must treat the defendants as separate entities under the Lanham Act. *Id.* at 1162-1163.

B. The decision below is irreconcilable with the Ninth Circuit's decision in *U-Haul International* and the Eleventh Circuit's decision in *Edmondson*. The court of appeals here recognized that the district court ordered petitioner to disgorge the profits obtained by its *affiliates*—which are not parties to the lawsuit.

App., *infra*, 39a-40a. The Fourth Circuit also noted that petitioner itself never received any of those profits. *Id.* at 39a. It nevertheless held that, "[r]ather than pierce the corporate veil," *id*. at 43a, the district court could simply bypass such niceties to hold petitioner liable for its affiliates' infringing acts and corresponding profits. As the Fourth Circuit saw things, the statutory reference to "'the principles of equity'" made the choice to disregard corporate form in awarding relief "ultimately a matter of the court's discretion." *Id.* at 45a (quoting 15 U.S.C. § 1117(a)).

The Fourth Circuit alone interprets the Lanham Act to dispense with the need for veil-piercing before separate corporations can be treated as one and the same. In the Ninth Circuit, "[t]he corporate veil will not be penetrated" by a Lanham Act plaintiff "unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them." *U-Haul International*, 793 F.2d at 1043 (citation omitted). So too in the Eleventh Circuit, courts treat corporate affiliates "as distinct entities" unless a Lanham Act plaintiff proves "that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil." *Edmondson*, 43 F.4th at 1162 (citation omitted). But in the Fourth Circuit, corporate separateness can be ignored, and a Lanham Act plaintiff need not bother "pierc[ing] the corporate veil," so long as a district court concludes in the exercise of its "discretion" that the "equities" and "Congress's fundamental desire" to maximize relief for trademark registrants justify that result. App., *infra*, 43a; see *id.* at 43a-45a.

C. The Fourth Circuit purported to derive support for its approach from *American Rice, Inc.* v. *Producers Rice Mill, Inc.*, 518 F.3d 321 (5th Cir. 2008). See App., *infra*, 44a-45a. If anything, *American Rice* undermines the Fourth Circuit's conclusion. But even if that decision did embrace the same lax approach to Lanham Act remedies, it would only deepen the circuit divide.

In *American Rice*, a Lanham Act plaintiff sought disgorgement of profits that a farming collective called PRMI had earned on bags of rice that bore an infringing mark. 518 F.3d at 326. The district court reduced the collective's profits—from $1.2 million to $227—because virtually all of the profits received by the collective were subsequently passed on to its members. *Id.* at 326-327. On appeal, the Fifth Circuit instructed the district court to award the larger amount as disgorgement because "profits earned by PRMI are PRMI's profits for purposes of the Lanham Act, regardless of how such profits are passed on or how they are taxed." *Id.* at 340.

Contrary to the Fourth Circuit's characterization, *American Rice* stands only for the principle that an infringer's profits remain the infringer's profits even when the infringer passes those profits on to others. 518 F.3d at 339-340. As Judge Quattlebaum observed in his dissent below, *American Rice* "does not say anything about using the revenues of separate companies to calculate net profits." App., *infra*, 60a. To the contrary, the Fifth Circuit *respected* corporate formalities by refusing to disregard the farming collective's separate corporate existence as the recipient of profits before they flowed through to farmers. See *ibid.* But even taking the Fourth Circuit majority's understand-

ing at face value would only widen the circuit conflict and increase the need for this Court's intervention.

II. THE FOURTH CIRCUIT'S DISREGARD OF THE CORPORATE FORM FOR PROFITS DISGORGEMENT CONFLICTS WITH THIS COURT'S DECISIONS

The Fourth Circuit's freewheeling approach to Lanham Act remedies defies this Court's decisions and the plain statutory text. This Court has recognized the "bedrock principle" that a corporation "is not liable for the acts" of its affiliates except when "the corporate veil may be pierced." *Bestfoods*, 524 U.S. at 61-62. It has accordingly held that federal statutes will not be construed to "rewrite th[at] well-settled rule" unless Congress says so "directly." *Id.* at 63 (citation omitted).

Nothing in the Lanham Act purports to displace that rule. To the contrary, the pertinent statutory provision limits awards to the "*defendant's* profits," makes any such award "subject to the principles of equity," and cautions that no award can become a "penalty." 15 U.S.C. § 1117(a) (emphasis added). The decision below flouts all three limitations in one stroke. The Fourth Circuit's stated policy concerns about infringement by corporate groups are no license to rewrite the Lanham Act, and they are unfounded in any event.

A. This Court has established a presumption that corporate veil-piercing principles apply to federal-law remedies unless Congress displaces them in the statute. In *Bestfoods*, this Court considered whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, allowed a corporation to be held liable for its af-

filiates' pollution cleanup costs—a question that had divided the circuits. 524 U.S. at 55, 60 n.8. The Court held that CERCLA did not authorize liability for an affiliate's costs "unless the corporate veil may be pierced." *Id.* at 55. That result, *Bestfoods* explained, flowed directly from basic principles of corporate law.

The Court relied on the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 61. And under the canon against derogation of the common law, "the statute must speak directly to the question addressed by the common law" to displace that common-law rule. *Id.* at 63 (quoting *United States* v. *Texas*, 507 U.S. 529, 534 (1993)); see, *e.g.*, *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318-319 (2012). "[C]ongressional silence" means that "this venerable common-law backdrop" remains in full force, not that courts may fashion their own rules of derivative liability. *Bestfoods*, 524 U.S. at 62. *Bestfoods* thus recognized a presumption that, unless a federal statute provides otherwise, it will not be construed to deem a defendant "liable for the acts" of its affiliates except when "the corporate veil" is "pierced." *Id.* at 61-62.

Applying that presumption, *Bestfoods* held that "nothing in CERCLA purports to reject th[e] bedrock principle" that corporate affiliates are not liable for one another's acts unless the veil is pierced. 524 U.S. at 62. Although CERCLA did not preclude plaintiffs from piercing the veil to hold the parent company lia-

ble based on the actions of a subsidiary, nothing in the statute excused them from making the showing that veil-piercing principles require. See *ibid.* The Court thus concluded that CERCLA permits a corporation to be held derivatively liable for an affiliate's actions "when (but only when) the corporate veil may be pierced." *Id.* at 63-64.

Subsequent decisions of this Court have stressed that the "doctrine of piercing the corporate veil" remains "the rare exception" to the rule of corporate separateness and that its stringent requirements must be respected. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003). In *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 140 S. Ct. 2082 (2020), for example, the Court held that "foreign affiliates" of American corporations "possess no rights under the First Amendment" unless a plaintiff can "pierce the corporate veil" or else establish another "relevant exception to that fundamental corporate law principle." *Id.* at 2087. And in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), the Court expressed skepticism about the Ninth Circuit's "less rigorous test" for establishing personal jurisdiction over a corporation based on its affiliate's contacts with the forum, as compared with the traditional requirement of an "alter ego" finding. *Id.* at 134-135. All of these cases underscore the importance of enforcing traditional limitations of settled veil-piercing principles except where Congress (or the Constitution) has expressly displaced them.

B. The Fourth Circuit's interpretation of the Lanham Act as permitting liability for an affiliate's acts *without* veil-piercing directly conflicts with this Court's decisions. The Fourth Circuit explicitly stated

that the disgorgement award it affirmed was *not* based on "piercing th[e] [companies'] corporate veils." App., *infra*, 43a. But under *Bestfoods*, imposing such liability without piercing the veil is impermissible unless Congress so provides in the statute.

Congress did not so provide here. Like CERCLA, the Lanham Act nowhere suggests that Congress displaced the "bedrock principle" that veil-piercing is required to disregard corporate separateness. *Bestfoods*, 524 U.S. at 62. The Fourth Circuit certainly never identified any provision that overcomes "this venerable common-law backdrop." *Ibid.* In fact, the Lanham Act bolsters the background rule of corporate separateness on the specific issue of disgorgement. The remedial provision at issue here (1) authorizes recovery of only the "*defendant's* profits," (2) incorporates "principles of equity" that have long barred joint calculation of profits, and (3) prohibits remedies that serve as a "penalty" rather than a true measure of profits. 15 U.S.C. § 1117(a) (emphasis added). The decision below conflicts with all three limitations.

1. The Lanham Act authorizes recovery of the "defendant's profits," as well as "any damages sustained by the plaintiff" plus "the costs of the action." 15 U.S.C. § 1117(a). None of those categories covers profits of the defendant's affiliates. Far from overcoming the presumption that defendants are not liable for affiliates' acts absent veil-piercing, the Act embraces it. Section 1117(a), by its plain terms, forecloses the order in this case, which required petitioner to disgorge $43 million of its affiliates' profits, not its own profits.

This Court has previously treated Section 1117(a)'s text with care. In *Romag Fasteners, Inc.* v. *Fossil, Inc.*,

140 S. Ct. 1492 (2020), the Court considered the Second Circuit's rule that a plaintiff must prove a willful Lanham Act violation in order to seek the defendant's profits under Section 1117. *Id.* at 1494. The Court explained that the provision's "language spell[ed] trouble" for the Second Circuit's rule because Section 1117(a) nowhere makes "a showing of willfulness a precondition to a profits award." *Id.* at 1494-1495. Applying the principle that courts do not "usually read into statutes words that aren't there," this Court rejected an atextual willfulness requirement. *Id.* at 1495.

The same careful attention to Section 1117(a)'s text is warranted here. Nothing in that section authorizes recovery of "profits" of anyone other than a "defendan[t]." 15 U.S.C. § 1117(a). As Judge Quattlebaum observed, "§ 1117(a) speaks to the infringer's profits." App., *infra*, 59a (dissenting opinion). Unless common-law veil-piercing principles apply—and the Fourth Circuit disclaimed reliance on them, *id*. at 43a—such profits cannot be recovered on the theory that the affiliates' profits are effectively the defendant's own profits. The court had no warrant to "read into [the] statut[e] words that aren't there," *Romag*, 140 S. Ct. at 1495, by blue-penciling in language permitting recovery of affiliates' profits. Courts should respect Congress's policy choices expressed in the text, regardless of whether those choices expand or limit plaintiffs' remedies and defendants' liability.

2. The Fourth Circuit's approach also negates the Lanham Act's instruction that profits disgorgement may be imposed only "subject to the principles of equity." 15 U.S.C. § 1117(a). The court of appeals construed that language as a grant of "discretion" to

"weig[h] the equities of the dispute" without regard to traditional constraints. App., *infra*, 45a (citation omitted). That is backwards. As this Court has made clear, such statutory references to equitable relief *restrict* courts' discretion and confine a statutory remedy to "the limitations upon its availability that equity typically imposes." *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 211 n.1 (2002); accord, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).

The Lanham Act is no exception to that rule. As the Court explained in *Romag*, "the term 'principles of equity'" in Section 1117(a) denotes "transsubstantive guidance on broad and fundamental questions about matters like parties, modes of proof, defenses, and remedies." 140 S. Ct. at 1495-1496 (citation omitted). *Romag* clarified that Section 1117(a) does not embed special rules that are unique to trademark law. *Ibid.* Instead, Section 1117(a) incorporates "fundamental rules that apply more systematically across claims and practice areas." *Ibid.*; see also, *e.g.*, *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (courts must exercise discretion "consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards").

The well-established equitable rule here is that a defendant cannot be ordered to disgorge someone else's profits. That rule cuts across subject areas, and its roots run deep. The underlying theory of disgorgement is that the defendant holds its profits from the wrongful conduct "in trust for the benefit" of the plaintiff. *Ambler* v. *Whipple*, 87 U.S. (20 Wall.) 546, 559 (1874). This Court had confirmed the necessary implication of that theory—that disgorgement is limited

to the defendant's *own* profits—by the time Congress enacted the Lanham Act, ch. 540, § 35, 60 Stat. 439-440 (1946). In *Elizabeth* v. *Pavement Co.*, 97 U.S. 126 (1878), for example, this Court held that a city could not be ordered to disgorge its contractor's profits from infringing a patent because the city "made no profit at all" from its infringing collaboration with the contractor. *Id.* at 140. The limitation stretches back even further to this Court's earliest decisions, which recognized that restitution was unavailable when defendants "were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it." *Jennings* v. *Carson*, 8 U.S. (4 Cranch) 2, 21 (1807) (Marshall, C.J.); see Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *a*, p. 204 (2010) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.'").

This rule against joint liability for profits remains firmly established today. As this Court recently explained in *Liu* v. *SEC*, 140 S. Ct. 1936 (2020), defendants traditionally were "liable to account for such profits only as have accrued to themselves." *Id.* at 1945 (quoting *Belknap* v. *Schild*, 161 U.S. 10, 25-26 (1896)). As *Liu* observed, equity "generally awarded profits-based remedies against individuals." *Ibid.* Conversely, equity forbade disgorgement that swept across "multiple wrongdoers under a joint-and-several liability theory." *Ibid.* (citing *Ambler*, 87 U.S. (20 Wall.) at 559); cf. *Honeycutt* v. *United States*, 581 U.S. 443, 453-454 (2017) (rejecting joint and several liability for criminal forfeiture where defendant "never obtained tainted property as a result of the crime"). *Liu* identified only one exception to the "common-law rule requiring indi-

vidual liability for wrongful profits": joint "liability for partners engaged in concerted wrongdoing." 140 S. Ct. at 1949. That historical exception may have stemmed from the distinct contours of "the law of partnership," *id.* at 1955 (Thomas, J., dissenting), and is inapposite here.

Federal courts addressing the cognate contexts of copyright and patent have long applied this same rule that disgorgement can extend only to the defendant's *own* profits—not the profits of a purported co-infringer—outside the special contexts of veil-piercing or general partnerships. In *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), affirmed, 309 U.S. 390 (1940), the Second Circuit reversed the district court's order for the defendant corporation to disgorge its officers' profits. *Id.* at 51. Judge Learned Hand, speaking for the court of appeals, reasoned that the plaintiffs "can reach only the defendants' profits" and not non-parties' profits that "were never profits of the defendants at all." *Ibid.* In influential decisions in the years leading up the Lanham Act, other circuits agreed that profits-disgorgement remedies hold the defendant "accountable only for the profits he received, not for the profits which may have been received by a co-infringer." *Sammons* v. *Colonial Press*, 126 F.2d 341, 345 (1st Cir. 1942); see, *e.g.*, *Washingtonian Publishing Co.* v. *Pearson*, 140 F.2d 465, 467 & n.13 (D.C. Cir. 1944); *Amusement Corp. of America* v. *Mattson*, 138 F.2d 693, 697 (5th Cir. 1943).

In short, the Fourth Circuit's interpretation of "subject to the principles of equity" in 15 U.S.C. § 1117(a) as a grant of discretion to invent new remedies turns the text and this Court's precedent upside-down. That language instead directs courts to abide

by longstanding limitations on equitable remedies. *Romag*, 140 S. Ct. at 1496. *Liu* and similar decisions establish that an award of disgorgement generally violates principles of equity when a court orders the defendant to disgorge someone else's profits. And any adventurous innovation in disgorgement is "incompatible with [this Court's] traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). The decision below overstepped both well-established equitable principles and this Court's traditional hesitance to approve inventive remedies.

3. Finally, the Fourth Circuit's interpretation of the Lanham Act as allowing disgorgement of nonparty affiliates' profits contravened Congress's instruction that any profits-disgorgement award "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). This proviso reflects the foundational principle that equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873); accord *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 717 n.14 (1974).

The $43 million award against petitioner for profits obtained by others is plainly a penalty. An order for a defendant to disgorge something that he never received is indistinguishable from a civil penalty—"a kind of remedy available only in courts of law" rather than of equity. *Tull* v. *United States*, 481 U.S. 412, 422 n.7 (1987). For that very reason, the Court warned in *Liu* that permitting disgorgement of "benefits that accrue to [the defendant's] affiliates" can "transform

any equitable profits-focused remedy into a penalty." 140 S. Ct. at 1949 (citing *Marshall*, 82 U.S. (15 Wall.) at 149). The risk *Liu* warned against was realized here. Because disgorgement exists to "depriv[e] wrongdoers of their net profits from unlawful activity," *id.* at 1942, an order for petitioner to disgorge profits that it never received is a penalty.

C. The Fourth Circuit principally justified its contrary approach based on its view that "Congress's fundamental desire" was to maximize protection for trademark holders. App., *infra*, 45a. But "[n]o statute pursues a single policy at all costs, and [courts] are not free to rewrite this statute (or any other) as if it did." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023). The court of appeals' fear that "potential trademark infringers" will use "corporate formalities to insulate their infringement from financial consequences," App., *infra*, 45a, thus is a policy argument untethered from the statute Congress enacted. And policy arguments for or against "respect for corporate distinctions" provide no basis to skew the statute or this Court's precedent. *Bestfoods*, 524 U.S. at 62-63. For the Lanham Act, like any statute, "the place for reconciling competing and incommensurable policy goals like these is before policymakers," and the courts' "limited role is to read and apply the law those policymakers have ordained." *Romag*, 140 S. Ct. at 1497.

In any event, the Fourth Circuit's policy concern is unpersuasive even on its own terms. As Judge Quattlebaum observed, the Lanham Act hardly "insulate[s]" trademark infringement. App., *infra*, 59a (dissenting opinion). The Act authorizes actual damages to redress past harm (which respondent did not attempt to prove), injunctive relief to prevent future

harm (which respondent secured here), and recovery of profits of a defendant who is found liable. *Id.* at 79a; see 15 U.S.C. §§ 1116, 1117(a). But nothing in the Lanham Act says that a profits-disgorgement remedy *must* be awarded against a defendant, even when the defendant earned no profits from the infringement.

If respondent believed that petitioner's affiliates improperly profited from trademark infringement, "[a]ll [respondent] had to do was sue" the affiliates—and then plead and prove its claims against them. App., *infra*, 59a (Quattlebaum, J., dissenting). That course of action would have allowed the affiliates to put respondent to its proof on those claims and also to assert their own defenses, as due process entitles them, to both liability for infringement and the scope of disgorgement. Alternatively, respondent could have tried "to pierce [petitioner's] corporate veil to eliminate the corporate separateness between it and those entities." *Ibid.* But respondent chose to do neither. That strategic choice did not empower the Fourth Circuit to bypass corporate separateness and the Lanham Act's plain text in pursuing its own brand of rough justice.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT AND RECURRING QUESTION

The question presented has weighty legal and practical implications. The Fourth Circuit's decision undermines bedrock principles of corporate separateness and short-circuits the Lanham Act's design. It encourages forum shopping in cases involving multiple potential infringers. And the court of appeals' misguided approach could easily spill over to other often-invoked federal laws that likewise incorporate the

principles of equity or restrict awards to the defendant's profits. Those potential consequences amply warrant this Court's intervention. This case provides a perfect vehicle.

A. The implications of the Fourth Circuit's decision are significant. Its ruling runs roughshod over the principle of corporate separateness—"an almost indispensable aspect of the public corporation." *Dole Food*, 538 U.S. at 474 (citation omitted). After all, "[l]imited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944). That is why this Court has warned that "[f]reely ignoring th[at] separate status" injects "substantial uncertainty" into how businesses across the country are run. *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626 (1983). But the Fourth Circuit's approach permits courts to turn corporate separateness on or off like a light switch, based on their own post hoc view of what seems "fair." If that rule takes hold, businesses will be unable to assess their risks and liabilities accurately, purchase adequate insurance, and raise capital.

The Fourth Circuit's rule also undermines the Lanham Act's finely reticulated scheme for addressing alleged joint trademark infringement. As this Court has recognized, the proper method of seeking redress in cases like this one would have been for respondent to sue the affiliates for direct infringement and petitioner on a secondary-infringement theory for having "induce[d]" the affiliates' conduct. *Inwood Laboratories*, 456 U.S. at 854. But the decision below,

which allows respondent to bypass that framework at the remedial stage, encourages plaintiffs to cherry-pick whichever entity they perceive as having the weakest defenses. And it permits them to omit related entities from the lawsuit and obtain disgorgement of those non-parties' profits through a single defendant, without litigating those non-parties' possibly unique and meritorious defenses. That approach distorts the Lanham Act's design and promotes gamesmanship.

The Fourth Circuit's decision also incentivizes forum shopping. Many infringement claims, like the one here, will span activities in multiple States. App., *infra*, 3a-4a. And plaintiffs will be able to bring claims under the Lanham Act in any forum that has personal jurisdiction over a single corporate defendant. 28 U.S.C. § 1391(b)(1), (c)(2). As a consequence, plaintiffs can now opt into the Fourth Circuit's expansive profits-disgorgement remedy for any defendant incorporated in Maryland, North Carolina, South Carolina, Virginia, and West Virginia, as well as any corporation that allegedly engages in infringement there. That result runs contrary to the congressional purpose in enacting the Lanham Act: to establish "national uniformity" for trademark protections. *Matal* v. *Tam*, 582 U.S. 218, 224 (2017).

The consequences do not end with the Lanham Act. If left unchecked, the Fourth Circuit's approach would similarly distort other crucial statutory frameworks that mirror the Lanham Act. The securities laws, for instance, authorize the Securities and Exchange Commission to obtain "any equitable relief" from alleged violators, 15 U.S.C. § 78u(d)(5), including disgorgement of profits, *Liu*, 140 S. Ct. at 1944. The Employee Retirement Income Security Act similarly

permits an award of "any profits of [a] fiduciary" and "other equitable * * * relief" in response to plan fiduciaries' breach of their duties. 29 U.S.C. § 1109(a); see *Great-West*, 534 U.S. at 214 n.2. Echoing the Lanham Act, the Copyright Act also permits disgorgement of "the infringer's profits." 17 U.S.C. § 504(b). The decision below contains no logical limiting principle that would prevent courts from disregarding corporate separateness in those and other contexts.

B. This petition is an ideal vehicle to resolve the question presented. Indeed, few if any cases will likely present the issue so starkly or so cleanly. Petitioner "generated zero profits," which eliminates any need to calculate or apportion profits attributable to infringement. App., *infra*, 82a-83a. Respondent undisputedly did not name petitioner's affiliates as parties, much less prove any claims against them, or advance any theory of contributory liability. *Id.* at 86a. Nor did respondent even try to pierce the corporate veil. *Ibid.* And the Fourth Circuit expressly disclaimed reliance on those doctrines. *Id.* at 43a. Instead, respondent took the shortcut of suing petitioner alone and then sneaking its affiliates' profits through the backdoor at the remedial stage. A more flagrant disregard of corporate separateness is hard to imagine.

The question presented is also outcome determinative in this case. See App., *infra*, 58a-60a (Quattlebaum, J., dissenting). Because respondent did not name the affiliates as defendants or seek to pierce the corporate veil, there is no alternative ground on which the award could be affirmed. Respondent's failure to invoke *any* veil-piercing doctrine also means that this Court need not consider whether fed-

eral or state law governs that issue, which makes this petition a clean opportunity to resolve solely whether the Lanham Act abrogates traditional veil-piercing principles. See *Bestfoods*, 524 U.S. at 63 n.9. All this Court need decide is that the Lanham Act did not break with centuries-old equitable principles and clandestinely create an unprecedented profits-disgorgement remedy "that allows courts, in assessing the profits of a defendant, to * * * simply add the revenues from non-parties to a defendant's revenues for purposes of evaluating the defendant's profits." App., *infra*, 59a (Quattlebaum, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

HELGI C. WALKER
Counsel of Record
THOMAS G. HUNGAR
JONATHAN C. BOND
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
HWalker@gibsondunn.com

Counsel for Petitioner

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