No. _____

In the
Supreme Court of the United States

TEAM RESOURCES INCORPORATED, FOSSIL ENERGY CORPORATION, AND KEVIN A. BOYLES,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Securities and Exchange Commission may obtain disgorgement from a federal court as an equitable remedy for securities violations despite this Court's determination that disgorgement is a penalty.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners Team Resources Incorporated, Fossil Energy Corporation and Kevin A. Boyles were defendants in the district court proceedings and appellants in the court of appeals proceedings.

Pursuant to Rule 29.6, Petitioners state that there is no parent corporation or publicly held company owning ten percent (10%) or more of the stock in Team Resources Incorporated or Fossil Energy Corporation.

Respondent Securities and Exchange Commission was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

STATEMENT OF RELATED PROCEEDINGS

- *SEC v. Team Resources Inc., et al.*, No. 18-10931 (5th Cir.) (opinion issued and judgment entered Nov. 5, 2019; mandate issued Dec. 30, 2019).
- *SEC v. Team Resources Inc., et al.*, No. 3:15-cv-01045-N (N.D. Tex.) (order issued June 4, 2018; final judgment entered June 4, 2018).

There are no additional proceedings in any court that are directly related to this case.

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Petitioners Team Resources Incorporated, Fossil Energy Corporation and Kevin A. Boyles respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 942 F.3d 272 and reproduced at App.1-14. The district court's opinion is unreported but appears at 2018 WL 6737675 and reproduced at App.15-22.

JURISDICTION

The Fifth Circuit issued its opinion and entered its judgment on November 5, 2019. App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, are reproduced at App.25-54.

INTRODUCTION

This petition involves the same open and recurring question already pending before this Court in *Liu v. SEC* (No. 18-1501)—whether the Securities and Exchange Commission ("SEC") may seek and obtain disgorgement in federal court for violation of securities laws, despite this Court's determination that

disgorgement is a penalty. *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017).

In Petitioners' case, when the SEC sued for alleged violations of federal securities laws, Petitioners settled the civil allegations and agreed to entry of civil injunctive relief but reserved the right to contest the amounts of any disgorgement or civil penalties that may be imposed. Granting the SEC's request for remedies, the district court ordered disgorgement in an amount equal to statutory penalties, doubling Petitioners' liability from approximately $15 million to $30 million.

Nothing in the federal securities laws or other federal statutes explicitly authorized the SEC to disgorge profits in federal court civil injunctive proceedings. But, for nearly 50 years, the SEC has made a regular practice of seeking disgorgement unlawfully. Certain courts, including the Fifth Circuit, continue to order and affirm disgorgement notwithstanding the lack of statutory authority for a remedy that, as this Court has held, is a penalty. *Kokesh*, 137 S. Ct. at 1645.

Although this Court in *Kokesh* expressly declined to consider whether the courts had authority to order SEC disgorgement as an equitable remedy, *see id.* at 1642 n.3, its reasoning in *Kokesh* dictates that they cannot. Simply, "*Kokesh* overturned a line of cases . . . that had concluded that disgorgement was remedial and not punitive." *Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring). Lower courts no longer are free to "rubber-stamp" SEC requests for disgorgement "simply because [they] ha[ve] historically

been permitted to do so." *SEC v. Gentile*, 939 F.3d 549, 565 (3d Cir. 2019) (applying *Kokesh* in the context of an SEC injunction).

Accordingly, Petitioners respectfully request that the Court hold this petition pending its decision in *Liu*, and dispose of this case in a manner consistent with *Liu*.

STATEMENT OF THE CASE

A. Factual Background and District Court Proceedings

On April 6, 2015, the SEC brought a civil enforcement action against Petitioners alleging violations of the federal securities laws. *See* Compl. ¶¶ 8, 95-106, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 1 (N.D. Tex. April 6, 2015). As the district court summarized, the SEC's complaint alleged that Petitioners participated in a "fraudulent oil and gas investing scheme" in which they allegedly "lured investors by touting unreasonable oil and gas production figures and investment returns." App.15-16. According to the SEC, Petitioners "then distributed misleading status updates that led investors to believe that the oil and gas companies were performing well, when in fact the companies' performance was dismal." App.16. The SEC also alleged that Petitioners "received large sales commissions ranging from 25% to 35% that they did not disclose to investors," and that they "failed to register as securities brokers as required by law." App.16.

The parties immediately reached a settlement, with Petitioners consenting to entry of separate April 10, 2015 judgments of "permanent injunction," without admitting or denying liability.[1] *See* Judgments as to Team Resources Inc., Fossil Energy Corp., and Kevin Boyles, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 11, 13, 14 (N.D. Tex. April 10, 2015). However, pursuant to the terms of the settlement, Petitioners negotiated and reserved the right to contest the amounts of disgorgement and civil penalties they would be required to pay. *See id.* at ¶ IV. In addition, the parties agreed that "[i]n connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties." *Id.*

On February 28, 2017, the SEC filed a motion for remedies and entry of a final judgment, seeking $30,494,037.26 in disgorgement. *See* SEC's Mtn. for Remedies and Entry of Judgment and Br. at 4, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 42 (N.D. Tex. Feb. 28, 2017). Beyond that, it also sought civil penalties under 15 U.S.C. §§ 77t(d) and 78u(d), because, as the SEC believed, "disgorgement . . . does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud." *Id.* at 6 (citation to case law omitted). The SEC argued for civil penalties "up to the amount" of Petitioners alleged "gross pecuniary gain," of more than $30 million. *Id.* at 7.

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[1] *See* Consents as to Team Resources Inc., Fossil Energy Corp., and Kevin Boyles, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 3, 5, 6 (N.D. Tex. April 6, 2015).

Petitioners countered that the five-year limitations period in 28 U.S.C. § 2462 prohibited the SEC from seeking to disgorge an amount in excess of $30 million—a figure that failed to account for legitimate business expenses or distinguish between purportedly ill-gotten and lawfully obtained funds in any event. *See* Defs.' Resp. in Opp. to SEC's Mtn. for Remedies and Entry of Judgment and Br. at 3-13, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 45 (N.D. Tex. March 16, 2017). Petitioners argued they should "have an opportunity in discovery . . . to test and establish the reasonableness" of the SEC's disgorgement calculation and the "asserted connection" between the amount sought and the alleged violations. *Id.* at 9.

While the SEC's motion was pending, this Court issued its decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), proving correct Petitioners' statute of limitations argument. Under *Kokesh*, "SEC disgorgement constitutes a penalty within the meaning of § 2462" to which the five-year limitations period indeed applies. *Id.* at 1643. This is so because disgorgement "is imposed as a consequence of violating public law" for "punitive purposes" and to deter future violations rather than compensate the victim. *Id.* at 1643–44. "SEC disgorgement thus bears all the hallmarks of a penalty." *Id.* at 1644. The Court left open, however, whether the SEC had authority to seek disgorgement in the first instance: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have

properly applied disgorgement principles in this context." *Id.* at 1642 n.3.

Following *Kokesh*, the SEC filed an amended motion for remedies on October 5, 2017, this time seeking $15,508,280.13 in disgorgement. *See* SEC's Amend. Mtn. for Remedies and Entry of Judgment and Br. at 4, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 61 (N.D. Tex. Oct. 5, 2017). Again, though, in addition to the disgorgement penalty, the SEC also sought civil penalties up to the amount of the disgorgement. *Id.* at 7-8.

In response to the SEC's amended motion, Petitioners argued that the Supreme Court's determination in *Kokesh* that disgorgement is a "penalty," *i.e.*, a legal remedy, meant that the district court lacked statutory authority to order disgorgement because the securities laws only gave district courts power to award equitable relief and monetary civil penalties *not* including disgorgement. *See* Defs.' Resp. in Opp. to SEC's Amend. Mtn. for Remedies and Entry of Judgment and Br. at 1-6, *SEC v. Team Resources Inc.*, No. 3:15-cv-01045-N, ECF # 64 (N.D. Tex. Oct. 18, 2017). Petitioners further asserted that the SEC's disgorgement calculation was flawed because it was nothing more than a "conclusory approximation" and it failed to account for direct, investment-related expenses, such as the costs associated with "oil field operations (including drilling)." *Id.* at 7-11. Petitioners therefore requested "an opportunity in discovery, in advance of a hearing, to test and establish the unreasonableness of the approximation and asserted

connection of the funds the SEC claims are subject to disgorgement." *Id.* at 10-11.

The district court, however, granted the SEC's amended motion without permitting discovery or holding any hearing. App.15-22.

Regarding Petitioners' *Kokesh* argument, the district court was not persuaded. Citing to footnote three, the court insisted that *Kokesh* "merely" held that disgorgement is subject to the five-year limitations period in § 2462, and nothing more. App.18. Relying on an unsubstantiated chart prepared by an SEC investigator, the district court ordered Petitioners to pay disgorgement in the amount of $15,508,280.13, App.18-19, 23, which the SEC claimed to represent "the proceeds received by each Defendant from the fraud scheme, net of monies returned to investors." *See* SEC's Amend. Mtn. for Remedies and Entry of Judgment and Br. at 5. The court also awarded $2,998,870.17 in prejudgment interest, as well as civil penalties "equal to the disgorgement amounts." App. 21, 23.

Petitioners appealed.

B. Court of Appeals Proceedings

On appeal before the Fifth Circuit, Petitioners reiterated that the district court lacked authority to order disgorgement under *Kokesh*. Petitioners' C.A. Br. at 13-28. "[A]s a penalty subject to the five-year limitations period of § 2462," Petitioners argued "SEC disgorgement is necessarily a civil penalty," meaning it is one that could have traditionally been enforced only in a court of law, not equity. *Id.* at 18-19. "It follows

then that SEC disgorgement . . . must be subject to the same rules as other civil remedies," including the requirement that such remedies be authorized by statute. *Id.* at 19. And SEC disgorgement is not. *Id.* at 24-28.

Like the district court, however, the Court of Appeals pointed to footnote three and concluded that *Kokesh* "decided only the issue before it." App.8. "True," it conceded, "during the *Kokesh* oral argument some members of the Supreme Court questioned the source of courts' authority to order disgorgement in civil enforcement proceedings."[2] App.10 n.4. And the Fifth Circuit was aware of at least "one" scholar who argued that SEC disgorgement did not survive *Kokesh*. App.10 n.4. What is more, only a few days before the Fifth Circuit issued its decision, this Court granted certiorari in *Liu*, "a Ninth Circuit decision addressing whether district courts have disgorgement authority after *Kokesh*." App.2 (citing *SEC v. Liu*, 754 F. App'x 505 (9th Cir. 2018) (unpublished), cert. granted sub nom. *Liu v. SEC*, —— U.S. ——, —— 2019 WL 5659111 (U.S. Nov. 1 2019) (No. 18-1501)). Still, none of this convinced the Court of Appeals to reexamine its previous case law characterizing disgorgement as a remedy within the courts' general equitable powers.

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[2] "[Q]uestioned" may be an understatement. Five Justices inquired into the statutory grounds for disgorgement at the *Kokesh* oral argument. Oral Arg. Tr. 7-9, 13, 31, 52, *Kokesh v. SEC*, No. 16-529 (Apr. 18, 2017). Chief Justice Roberts, in particular, remarked that the SEC "devised this remedy or relied on this remedy without any support from Congress." *Id.* at 31. Justice Gorsuch noted that with "no statute governing" disgorgement, "[w]e're just making it up." *Id.* at 52.

App.6-10. The Fifth Circuit therefore affirmed. App.10, 14.

This petition followed.

REASONS FOR GRANTING THE PETITION

Having granted the *Liu* Petition,[3] this Court has already acknowledged, however implicitly, that the conflict between *Kokesh* and lower court decisions still applying SEC disgorgement as a viable, extra-statutory remedy in equity warrants review. This petition involves and brings before this Court that same conflict.

SEC disgorgement punishes defendants for violating public laws with the purpose of deterring future violations. That punitive mindset and approach permeates the lower court record. However, disgorgement lacks a basis in statute and, under *Kokesh*, does not qualify as an equitable remedy. Accordingly, just like the Ninth Circuit, the Fifth Circuit upheld the imposition of a penalty against Petitioners that Congress never authorized. This Court therefore should hold the petition pending its decision in *Liu*, and dispose of this case in a manner consistent with *Liu*.

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[3] Petition for Certiorari, *Liu v. SEC*, No. 18-1501, 2019 WL 2354737 (filed, May 31, 2019) (hereinafter the "*Liu* Petition").

I. CONGRESS HAS NOT AUTHORIZED SEC DISGORGEMENT

As the *Liu* Petition notes, "Congress has expressly identified the forms of relief available to the SEC in civil cases such as this one." 2019 WL 2354737, at *8. Disgorgement is not among them. When the SEC enforces securities law violations in federal court, the SEC is limited to seeking injunctive relief, 15 U.S.C. §§ 77t(b), 78u(d)(1), "civil [monetary] penalt[ies]," 15 U.S.C. § 77t(d)(1), and "equitable relief that may be appropriate or necessary for the benefit of investors," 15 U.S.C. § 78u(d)(5).

"Initially," under the Securities Act of 1933 and Securities and Exchange Act of 1934, "the only remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws." *Kokesh*, 137 S. Ct. at 1640. Congress since has expanded the SEC's authority, affording it a comprehensive "panoply of enforcement tools." *Id.* The SEC may, for example, "promulgate rules and investigate violations of those rules." *Id.* The agency may pursue enforcement actions against those who buy or sell securities based on material nonpublic information and seek a penalty of up to "three times the profit gained or loss avoided." 15 U.S.C. § 78u-1(a)(2). The SEC may seek civil monetary penalties for virtually all federal securities law violations. 15 U.S.C. §§ 77t(d), 78u(d)(3). And, in the context of *administrative* enforcement proceedings, the SEC may claim disgorgement of a defendant's ill-gotten gains

arising from securities law violations. 15 U.S.C. §§ 77h-1(e), 78u-2(e).[4]

Yet "[n]othing in the securities acts authorizes the SEC to seek legal disgorgement." Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 Rev. Banking & Fin. L. 899, 907 (2014). Court-ordered disgorgement "is a relatively new penalty . . . created by judicial fiat at the SEC's behest" when the agency began urging courts to order surrender of profits in the exercise of their inherent equity power. Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17, 19 (2018). "Beginning in the 1970's, courts ordered disgorgement . . . to 'deprive defendants of their profits in order to remove any monetary award for violating' securities laws and to 'protect the investing public by providing an effective deterrent to future violations.'" *Kokesh*, 137 S. Ct. at 1640 (quoting *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp.77, 92 (S.D. N.Y. 1970) aff'd in part and rev'd in part, 446 F.2d 1201 (2d Cir. 1971) (ellipsis omitted)).

The problem here (and in *Kokesh* for that matter) arose because, even after Congress empowered the SEC to seek civil monetary penalties, "the Commission has continued its practice of seeking [extra-statutory] disgorgement in enforcement proceedings." *Id.*

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[4] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub.L. 101–429, 104 Stat. 931.

The absence of a statutory provision expressly authorizing disgorgement is "strong evidence that Congress did *not* intend" to permit the remedy. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). In fact, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest" here, given the Court's reluctance to "tamper with an enforcement scheme crafted with such evident care" as the one regulating the securities industry. *Id.* (quoting in part *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981)). *See e.g.*, *Kokesh*, 137 S. Ct. at 1640 & n.1 (detailing the SEC's "panoply" of enforcement options). When a statute "expressly provides a remedy, courts must be especially reluctant to provide additional remedies," even those traditionally considered equitable. *See Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (holding injunctive relief is not available to enforce disclosure requirement under the Biologics Price Competition and Innovation Act (citation omitted)).

This leaves the SEC to argue that courts may order disgorgement under one of the three enumerated categories, or "as an ancillary remedy" in the exercise of their more amorphous "general equity powers to afford complete relief." *Texas Gulf Sulphur*, 446 F.2d at 1307. However, because disgorgement as "applied . . . in the SEC enforcement context" functions as a penalty, it does not fit neatly within any one of them. *Kokesh*, 137 S. Ct. at 1644.

A. Disgorgement Is Not An "Injunction"

Disgorgement cannot reasonably be characterized as an injunction.[5] *See Kokesh*, 137 S. Ct. at 1640 (distinguishing "the Commission's [initial] statutory authority . . . to seek[] an injunction barring future violations," from its later requests for disgorgement orders). A judgment ordering disgorgement does not "enjoin" anything; it requires an affirmative payment of money damages. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (statute permitting an injunction that orders a party to "take action" or "restrain[]" further legal violations does not "contemplate[] the award of" compensation, "whether . . . denominated as 'damages' or 'equitable restitution'"). Whereas injunctions are "traditionally viewed as 'equitable,'" "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (citing *Curtis v. Loether*, 415 U.S. 189, 196 (1974) and *Teamsters v. Terry*, 494 U.S. 558, 570–71 (1990)).

The SEC's related argument—that authority to enjoin statutory violations encompasses the power to disgorge profits under *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)—is misplaced for the same reason.[6] Under *Porter*, "[u]nless a statute . . . restricts the court's jurisdiction in equity, the full scope of that

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[5] In response to the *Liu* Petition, the SEC argued it may seek disgorgement as part of its authority to "enjoin" future securities violations under 15 U.S.C. §§ 77t(b) and 78u(d)(1). Br. in Opp. at 5. It may not.

[6] *See* Br. in Opp. at 5.

jurisdiction" is generally deemed available to it. *Id.* at 398. But *Porter* permits money damages in instances where such damages are "considered as an *equitable* adjunct to an injunction decree." *Id.* at 399 (emphasis added).[7] And it distinguishes disgorgement that "restor[es] the status quo" by requiring "the return of that which rightfully belongs" to the injured party from statutory damages, which "differ[] greatly" and "go to the United States Treasury." *Id.* at 402. In that sense, *Porter* merely provokes the same question at issue here—whether the SEC may seek disgorgement as an equitable remedy, even though it "bears all the hallmarks of a penalty," including payment to the government. *Kokesh*, 137 S. Ct. at 1644. It is not a ticket for the SEC to bypass the plain language of carefully crafted statutory remedies. *See e.g.*, *Meghrig*, 516 U.S. at 484 (declining to follow "a line of cases holding that district courts retain inherent authority to award any equitable remedy" even when not provided for under statute, including *Porter*, *supra*, 328 U.S. 395).

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[7] *Porter* also involved a different statutory scheme (the Emergency Price Control Act of 1942) which permitted the enforcing body to seek an injunction, restraining order, "or other order" for relief as a consequence of violations. *See* 328 U.S. at 397, 399 ("the term 'other order' contemplates a remedy other than that of an injunction or a restraining order"). No similar "other order" language appears in the securities laws applicable to federal court injunctions.

B. Disgorgement Is Not "Equitable Relief" For "The Benefit Of Investors"

Given that the SEC did not seek disgorgement from Petitioners by virtue of its authority to claim civil penalties,[8] that leaves only the third option—whether disgorgement may be ordered as "equitable relief . . . appropriate or necessary for the benefit of investors," 15 U.S.C. § 78u(d)(5), or "as an ancillary remedy" by way of "the courts' general equity powers." *Texas Gulf Sulphur*, 446 F.2d at 1307. The same framework governs in determining whether a particular remedy is available from either source.[9]

The "relief" available under § 78u(d)(5) is subject to two limitations: it must be "equitable," and it must be

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[8] In both its original and amended motions for remedies (the latter of which it filed after *Kokesh*) the SEC labeled its request for disgorgement as a distinct remedy, available independent of civil penalties. *See* SEC's Mtn. for Remedies and Entry of Judgment. and Br. at 4-7; *see also* SEC's Amend. Mtn. for Remedies and Entry of Judgment and Br. at 4-7. The district court's judgments against Petitioners also identify the disgorgement orders as separate from the orders to pay civil penalties. App.23-24. Civil penalties, furthermore, are subject to specific statutory limits that the district court did not apply with respect to its disgorgement order here. 15 U.S.C. § 78u(d)(3)(B).

[9] *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999) (considering the equitable jurisdiction conferred by the Judiciary Act of 1789); *see also Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) and *Mertens*, 508 U.S. at 256 (both considering equitable remedies available under the Employee Retirement Income Security Act).

"appropriate or necessary for the benefit of investors." SEC disgorgement is neither.

1. Disgorgement is Not "Equitable"

By 2002, the year Congress adopted legislation empowering the SEC to seek "equitable relief . . . appropriate or necessary for the benefit of investors," 15 U.S.C. § 78u(d)(5), this Court had already settled the meaning of "equitable relief" as a statutory term of art. *See Mertens*, 508 U.S. at 256.

Specifically, "'[e]quitable' relief must mean *something* less than *all* relief." *Id.* at 258 n.8. "Instead," in construing statutory remedies, "the term 'equitable relief' . . . must refer to 'those categories of relief that were *typically* available in equity.'" *Great-West Life & Annuity Ins. Co v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Mertens*, 508 U.S. at 256). "The substantive prerequisites for obtaining an equitable remedy . . . depend on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318–19 (quoting 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2941, p. 31 (2d ed. 1995) (brackets omitted)). Accordingly, the question becomes whether the SEC's claimed relief "was traditionally accorded by courts of equity." *Id.* at 319.

Civil penalties, like SEC disgorgement, were not. "Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore status quo, were issued by courts of law, not courts of equity." *Tull v. United States*, 481 U.S. 412, 422 (1987); *see also Loether*, 415

U.S. at 196 ("the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law" (footnote omitted)). "Although the equity courts could award monetary relief to make the victim of a breach of trust whole, extracompensatory forms of relief, such as punitive damages, were not available." *Mertens*, 508 U.S. at 270 (White, J., dissenting); *see also Porter*, 328 U.S. at 402 (distinguishing statutory damages awarded by courts "act[ing] as a court of law rather than a court of equity," from equitable restitution, which "differs greatly from the damages and penalties" available by statute).

Even the Court in *Texas Gulf Sulphur*—one of the first to credit the SEC's assertion that courts could order disgorgement as a matter of equity[10]—held that the SEC "may seek other than injunctive relief . . . to effectuate the purposes of the [Securities Exchange] Act [of 1934], so long as such relief is remedial relief and is *not a penalty assessment*." 446 F.2d at 1308 (emphasis added). After *Kokesh*, SEC disgorgement can hardly be regarded as *anything other* than a "penalty" assessment.

First, disgorgement "is imposed for punitive purposes," "as a consequence for violating . . . public laws." *Kokesh*, 137 S. Ct. at 1643; *see also SEC v. Teo*, 746 F.3d 90, 101 (3d Cir. 2014) ("All civil enforcement actions . . . share the same general goal: 'to maintain public confidence in the marketplace'" (citation

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[10] *See Kokesh*, 137 S. Ct. at 1643 (citing *Texas Gulf Sulphur* as "one of the first cases requiring disgorgement in SEC enforcement proceedings").

omitted)). When the SEC sought disgorgement against Petitioners here, for example, it did not "stand[] in the shoes of particular injured parties," but claimed to vindicate the rights of the "public at large." *Kokesh*, 137 S. Ct. at 1643 (quoting Brief for United States at 22). *See SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) ("civil enforcement actions promote economic and social policies [wholly] independent of the claims of individual investors").

This undermines the lower courts' attempt to analogize SEC disgorgement to the "ancient remedies" of accounting or constructive trust—equitable suits that required the existence of a fiduciary relationship between the parties as a condition of recovery. *Compare SEC v. Cavanagh*, 445 F.3d 105, 119–120 (2d Cir. 2006) (describing disgorgement as akin to "the ancient remedies of accounting, constructive trust, and restitution"); *with* DeLuca, 33 Rev. Banking & Fin. Law at 914-17 (an "institutional constructive trust, like the accounting, requires a fiduciary relationship for liability").

Second, the primary purpose of disgorging a defendant's "ill-gotten gains" is to deter future federal securities law violations. *Kokesh*, 137 S. Ct. at 1643; *see also Rind*, 991 F.2d at 1490 ("The Commission seeks disgorgement in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws."). "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (citation omitted).

To advance this goal, "SEC disgorgement sometimes exceeds the profits gained as a result of the violation." *Kokesh*, 137 S. Ct. at 1644. For example, "[i]ndividuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits." *Id.* (citing *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014) and *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998)). *See also Contorinis*, 743 F.3d at 303 (a tipper in an insider trading case who gives away information to curry favor with another "would unquestionably be liable to disgorge the profit; disgorgement is required whether the insider trader has put his profits into a bank account, dissipated them on transient pleasures, or given them away to others" (footnote omitted)).

In the same vein, while equity might require that the defendant be permitted to offset any disgorged profits by the amount of its legitimate business expenses,[11] SEC disgorgement does not. *Kokesh*, 137 S. Ct. at 1644–45; *see also e.g.*, *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1115 (9th Cir. 2006) ("Neither the deterrent purpose of disgorgement nor the goal of depriving a wrongdoer of unjust enrichment

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[11] *See* 1 Dan B. Dobbs, *Law of Remedies*, § 4.3(5), at 610 (2d ed. 1993) (defendant may make "appropriate deductions for expenses . . . incurred in reaping the profits" if he can prove them); *see also Kokesh*, 137 S. Ct. at 1644–45 ("As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement." (quoting the Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. *h* at 216)).

would be served were we to allow these defendants . . . to 'escape disgorgement by asserting that expenses associated with this fraud were legitimate'"(citation omitted)). "In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off." *Kokesh*, 137 S. Ct. at 1645.

Petitioners' case illustrates these principles. Here the district court ordered Petitioners jointly and severally liable for $15,508,208 in disgorgement, "representing proceeds gained as a result of the conduct alleged in the SEC's complaint." App.23. The Court of Appeals affirmed the district court's decision, citing the "overwhelming" case law prohibiting defendants from offsetting disgorgement liability with business expenses—even though leaving the defendant worse off denotes a penalty, not an equitable remedy. App.5. Coupled with the cost of civil penalties in the same amount (which already punish), the district court plainly ordered disgorgement of alleged profits as a further punitive measure to deter Petitioners and the public from violating securities laws.

2. Disgorgement is Not "For the Benefit of Investors"

Another marker of the SEC's use of disgorgement punitively is that, "in many cases," it is "not compensatory." *Kokesh*, 137 S. Ct. at 1644. As a result, it cannot be characterized as an equitable remedy "for the benefit of investors." 15 U.S.C. § 78u(d)(5); *see also Contorinis*, 743 F.3d at 301(disgorgement "operates to make the illicit action unprofitable for the wrongdoer," and "need not serve to compensate the victims of the wrongdoing").

Indeed, this is one of the reasons this Court rejected the SEC's attempt to label disgorgement as a "remedial" fix that merely restores the status quo. *Kokesh*, 137 S. Ct. at 1644–45. Restitution at equity "is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the [victim].'" *Tull*, 481 U.S. at 424 (quoting *Porter*, 328 U.S. at 402). But "[d]isgorgement does not aim to compensate the victims of the wrongful acts, as restitution does." *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). "Courts have required disgorgement 'regardless of whether the disgorged funds will be paid to investors as restitution.'" *Kokesh*, 137 S. Ct. at 1644 (quoting *Fishbach*, 133 F.3d at 176). When funds are ordered to be paid to the government for a legal violation, as opposed to being used to compensate the victim, "the payment operates as a penalty." *Kokesh*, 137 S. Ct. at 1644 (citing *Porter*, *supra*, 328 U.S. at 402).

Relatedly, when restitution was ordered in equity, it typically required a claim relating to specific, identifiable property held by the defendant. A plaintiff could claim restitution "*in equity* . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 213. "A court of equity could then order a defendant to transfer title . . . or to give a security interest . . . to a plaintiff who was, in the eyes of equity, the true owner." *Id.* "Equitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets.'" *Montanile*, 136 S. Ct. at

658–59 (quoting 4 S. Symons, Pomeroy's Equity Jurisprudence § 1234, p. 694 (5th ed. 1941) (ellipsis omitted)).

By contrast, "where 'the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the defendant.'" *Knudson*, 534 U.S. at 213–14 (quoting Restatement of Restitution § 215, cmt. *a*, p. 867 (1936)). Under that circumstance, the plaintiff had "merely a personal claim against the wrongdoer" recoverable from the wrongdoer's general assets—"a quintessential action at law." *Montanile*, 136 S. Ct. at 659 (citation omitted).

Unlike traditional equitable remedies, SEC disgorgement requires no tracing or identification of particular funds as "ill-gotten" profits. Rather, "[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation," with the "risk of uncertainty . . . fall[ing] upon the wrongdoer." *Contorinis*, 743 F.3d at 305; *see also SEC v. Seghers*, 298 F. App'x 319, 336 (5th Cir. 2008) ("If the Commission shows a causal relationship between the defendant's wrongdoing and the amount by which he was unjustly enriched, that amount of money may be disgorged even if the defendant has otherwise disposed of, reinvested, or spent the particular assets that he wrongfully obtained."). SEC disgorgement, therefore, does not involve a "requirement to replevy a specific asset," *SEC v. Banner Fund Int'l,* 211 F.3d 602, 617 (D.C. Cir.

2000), making the comparison to equitable restitution inapposite.

Again, both non-equitable traits of SEC disgorgement are evident in Petitioners' case. The district court ordered petitioners to pay $15,508,208 in disgorgement with no mention of whether any of the funds may ever be available to alleged victims. App.16-18, 23-24. Nor did the courts below require the SEC to identify any specific "ill-gotten" profits derived from particular victims. Instead, the district court accepted the SEC's argument that it was simply enough to "approximate reasonably the amount of proceeds" causally connected to the alleged violations, even if such funds were now mixed among Petitioners' general assets and could not be claimed for the benefit of investors. App.19.

II. THE COURTS HAVE FAILED TO APPLY *KOKESH* CONSISTENTLY

The *Liu* Petition makes the case that the lower courts have struggled in applying *Kokesh* and require further guidance. They do. And the Fifth Circuit's decision—which the Court of Appeals issued *after* this Court granted the *Liu* Petition—demonstrates that fact. Further, because the scope of authority to order equitable remedies has implications beyond disgorgement alone, and beyond the SEC alone, these considerations also favor holding the petition here pending the outcome in *Liu*.

A. The Circuit Courts Continue to Treat Disgorgement as an Equitable Remedy

In the years since *Texas Gulf Sulphur*, the lower courts have largely regarded SEC disgorgement as an equitable remedy. *See e.g., Huffman*, 996 F.2d at 802 (disgorgement "is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs"); *Teo*, 746 F.3d at 103 ("Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property that is causally related to the wrongdoing." (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)); *Cavanagh*, 445 F.3d at 120 ("Because chancery courts possessed the power to order equitable disgorgement in the eighteenth century, we hold that contemporary federal courts are vested with the same authority"); *Wallenbrock & Assocs.*, 440 F.3d at 1113 ("the district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of federal securities laws"); *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) ("Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." (citation omitted)).

Of course, *Kokesh* undercut this precedent. Analyzing "how SEC disgorgement operates in practice,"[12] this Court concluded that SEC disgorgement seeks to redress a wrong against the

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[12] *SEC v. Gentile*, 939 F.3d 549, 557 (3d Cir. 2019).

public, is imposed "for the purpose of punishment," and meant "to deter others from offending in a like manner." *Kokesh*, 137 S. Ct. at 1642. Because disgorgement "go[es] beyond compensation" and is "intended to punish and label defendants wrongdoers," it is a civil penalty—not an equitable, remedial one. *Id.* at 1645 (citations omitted).

Some judges have recognized that *Kokesh* changed the lens through which courts view the SEC's remedial powers. The Third Circuit, for instance, recently applied *Kokesh* in considering whether an SEC "obey-the-law" injunction was also subject to the 5-year limitations period in § 2462. *SEC v. Gentile*, 939 F.3d 549, 563 (3d Cir. 2019). Though the court concluded it did not, it warned the district court not to "rubber-stamp" the SEC's request for such an injunction "simply because it has been historically permitted to do so by various courts." *Id.* at 565. "After all . . . the landscape for SEC enforcement actions [is] significantly different . . . today" than it was 40 years ago. *Id.* (citing *Kokesh*, 137 S. Ct. at 1640).

Justice Kavanaugh's concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), is another example. *Saad* involved a dispute over the SEC's decision to permanently ban the defendant from registering with the Financial Industry Regulatory Authority (FINRA). But as then-Judge Kavanaugh noted, "*Kokesh* was not limited to the specific statute at issue there." *Id.* at 305 (Kavanaugh, J., concurring). To the contrary, "the Supreme Court's decision in *Kokesh* overturned a line of cases from [the D.C. Circuit] that had concluded that disgorgement was

remedial and not punitive." *Id.* When the SEC requests a punitive sanction, it is "no longer able to simply waive the 'remedial card' and . . . evade judicial review of the harsh sanctions they impose on specific defendants." *Id.* at 306.

Likewise, in the Ninth Circuit, Judge O'Scannlain has cited *Kokesh* in questioning that court's "unfortunate interpretation" of the Federal Trade Commission Act—which currently permits district courts to issue orders for money judgments "styled as 'restitution'" under a statutory grant that, on its face, authorizes only "injunction[s]." *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., specially concurring).[13] As he sees it, *Kokesh* "undermines a premise in our reasoning: that restitution . . . is an 'equitable' remedy at all." *Id.* And in the Sixth Circuit, Judge Merritt has observed that "the theory [of equitable disgorgement] may not even be applicable in SEC contexts for much longer in light of" *Kokesh*. *See Osborn v. Griffin*, 865 F.3d 417, 471 n.1 (6th Cir. 2017) (Merritt, J., dissenting) ("Lord Coke, Blackstone, Justice Story, and other distinguished lawyers . . . would never have heard of 'equitable disgorgement.'" (citing Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1598-1600 (2002)).

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[13] Judge Bea joined Judge O'Scannlain's special concurrence. *See id.*

Kokesh notwithstanding, lower courts have adhered to pre-*Kokesh* precedent in still issuing and affirming SEC disgorgement orders. *See e.g.*, *AMG Capital Mgmt*, *supra*, 910 F.3d at 427; *SEC v. Hall*, 759 F. App'x 877, 882 (11th Cir. 2019) (per curiam); *SEC v. de Maison*, 785 F. App'x 3, 6 (2d Cir. 2019); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 27 (D. Conn. 2018); *SEC v. Brooks*, 2017 WL 3315137, at *6–8 (S.D. Fla. Aug. 3, 2017). As the Fifth Circuit did here, App.6-10, some of these courts point to footnote three as proof that *Kokesh* has no application outside the statute-of-limitations context.[14] *E.g.*, *AMG Capital Mgmt*, 910 F.3d at 427; *see also de Maison*, 785 F. App'x at 6; *Liu*, 754 F. App'x at 509 ("*Kokesh* expressly refused to reach this issue"); *Ahmed*, 343 F. Supp. 3d at 27 ("nothing in *Kokesh* disturbed Second Circuit precedent that disgorgement is a proper equitable remedy"); *Brooks*, 2017 WL 3315137, at *8 ("*Kokesh*'s holding cannot be plucked from the statutory context that gives it force").

Unlike *Kokesh* itself, however, this narrow reasoning ignores the manner in which SEC disgorgement "operates in practice." *Gentile*, 939 F.3d at 557. In reality, "nothing about shifting the frame of analysis from the limitations period to the authority and power perspective changes the basic fact that disgorgement as used in SEC cases is intended to remedy a harm to the public rather than to compensate specific victims." Bainbridge, 56 Wash. U. J.L. & Pol'y at 26. SEC disgorgement does not become any less a

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[14] With that said, the Fifth Circuit appears to be the only circuit thus far to further insist on the limits of footnote three after this Court's grant of certiorari in *Liu*.

punishment or a deterrent when considering whether district courts have the power to issue it. *Id.*; *see also Saad*, 873 F.3d at 305 ("*Kokesh* was not limited to the statute at issue there") (Kavanaugh, J., concurring).

Beyond that, continued adherence to *Texas Gulf Sulphur* risks overlooking intervening legislation and precedent that may have changed the calculus of that 1970 decision. For example, when Congress enacted the Securities Enforcement Remedies and Penny Stock Reform Act in 1990, it authorized the SEC to recover civil penalties for securities violations that "are the functional equivalent of disgorgement." Bainbridge, 56 Wash. U. J.L. & Pol'y at 26; *see also* 15 U.S.C. § 78u(d)(3)(B) (listing tiers of civil penalties for most securities violations and permitting penalties up to the "gross amount" of the defendant's "pecuniary gain"). One can question why the SEC should be free to pursue the unauthorized remedy of disgorgement when Congress has explicitly authorized a largely equivalent one. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere."). Even more to the point, that Act also expressly authorized the SEC to request disgorgement in agency administrative proceedings, *but not* in federal court enforcement proceedings. 15 U.S.C. §§ 77h-1(e), 78u-2(e). "Had Congress intended to" permit court-ordered disgorgement in the civil

setting, "it presumably would have done so expressly." *Sandoz*, 137 S. Ct. at 1677 (citation omitted).[15]

Texas Gulf Sulphur also stands on the shoulders of earlier Supreme Court precedent creating implied rights of action under the federal securities or other federal laws. Bainbridge, 56 Wash. U. J.L. & Pol'y at 27; *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391 (1970) ("we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 295 (1960); *accord Porter*, 328 U.S. at 402.[16] But this Court's more recent decisions trend in the opposite direction. *See e.g.*, *Cent. Bank of Denver*, 511 U.S. at 184; *see also FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 779 (7th Cir. 2019) ("The Supreme Court's understanding of implied remedies evolved after *Porter* and *Mitchell*. . . In particular, the Court now recognizes the importance of Congress's choice to specify forms of relief." (citations omitted)). Modern cases reflect a greater hesitance to "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451

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[15] In apparent recognition of this omission, the Unites States Senate is considering a bill (already passed by the House) that would explicitly grant to the Commission the authority to seek disgorgement in addition to civil monetary penalties in enforcement actions. *See* Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019), available at https://congress.gov/bill/116th-congress/house-bill/4344/text.

[16] *See Texas Gulf Sulphur*, *supra*, 446 F.2d at 1308 (citing these cases).

U.S. 287, 297 (1981); *see also Knudson*, 534 U.S. at 220 ("vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of the text regarding the *specific* issue under consideration" (citation omitted)); *see also Sandoz*, 137 S. Ct. at 1675 ("The remedy provided by [statute] excludes all other federal remedies, including injunctive relief.").

In short, this Court was right to intervene in *Liu* to dispel the lower courts' confusion and determine whether the district courts may, in fact, issue a remedy grounded in now-dubious authority. Petitioners here seek to benefit from the Court's resolution of this frequently litigated question.

B. The SEC and Numerous Other Agencies Collect Billions in Unauthorized Disgorgement Penalties

Finally, the *Liu* Petition correctly observes that the SEC routinely collects "billions" in unauthorized disgorgement penalties, and that numerous other agencies are in the habit of seeking "equitable disgorgement." 2019 WL 2354737, at *13, *20. Both points likewise favor holding the Petitioners' case pending the outcome in *Liu*.

Between 2009 to 2012 for example, courts awarded the SEC $3.273 billion in civil penalties, but more than double that amount—$7.9 billion—in disgorgement. DeLuca, 33 Rev. Banking & Fin. L. at 931. This substantial financial impact is also reflected in Petitioners' case, where the district court's disgorgement order effectively doubled their liability from roughly $15 million to $30 million. That the SEC

may prefer this more lucrative penalty makes sense; disgorgement is not subject to the same limitations as statutory civil penalties, *see* 15 U.S.C. § 78u(d)(3)(B). Further, the showing required to disgorge a certain amount of profits is relatively minimal; the amount disgorged "need only be a reasonable approximation of profits causally connected to the violation." *Contorinis*, 743 F.3d at 305. And it was not until this Court's pronouncement in *Kokesh* that disgorgement became subject to the five-year limitations period. 137 S. Ct. at 1645.

Clarifying *Kokesh*, moreover, will have an impact beyond disgorgement as an enforcement mechanism, and beyond the SEC as an agency. Then-Judge Kavanaugh has already found that "*Kokesh* was not limited to" § 2462, and may require the SEC to justify other particularly harsh punitive sanctions, instead of "waiv[ing] the 'remedial card'" to "evade judicial review." *Saad*, 873 F.3d at 306 (Kavanaugh, J., concurring). The Third Circuit has considered whether *Kokesh* applies to SEC injunctions. *Gentile*, 939 F.3d at 563. And judges on the Ninth Circuit have suggested *Kokesh* requires a reconsideration of that circuit's precedent on remedies available under the FTCA. *AMG Capital Mgmt.*, 910 F.3d at 429 (O'Scannlain, J., specially concurring). With "[n]early 100 statutes" empowering the courts to fashion some form of equitable relief, the *Liu* Petition notes that defining the scope of that authority—to check not only the lower courts, but the SEC and other agencies—is critical. 2019 WL 2354737, at *20–22. Petitioners agree.

CONCLUSION

For the foregoing reasons, this Court should hold the petition pending its decision in *Liu* and dispose of the petition in a manner consistent with *Liu*'s resolution.

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