

No. 22-687

In The
Supreme Court of the United States

—◆—
RANDALL S. GOULDING,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—◆—
REPLY BRIEF FOR PETITIONER

—◆—
BRADLEY J. BONDI
Counsel of Record
MICHAEL D. WHEATLEY
VITALIY KATS
PAUL HASTINGS LLP
2050 M Street NW
Washington, DC 20036
(202) 551-1700
bradbondi@paulhastings.com
Counsel for Petitioner

May 12, 2023

TABLE OF CONTENTS

| | Page |
|---|------|
| ARGUMENT | 1 |
| I. THE SEC'S OPPOSITION BRIEF CONFIRMS THAT THE SEVENTH CIRCUIT'S DECISION SHOULD BE SUMMARILY REVERSED AND REMANDED TO THE DISTRICT COURT..... | 1 |
| II. THIS COURT EITHER MAY SUMMARILY REVERSE ON MR. GOULDING'S FIRST ISSUE OR MAY ADDRESS ALL THREE ISSUES RAISED IN THE PETITION | 3 |
| CONCLUSION..... | 5 |

TABLE OF AUTHORITIES

| | Page |
|--|------|
| CASES | |
| <i>Bigelow v. RKO Radio Pictures</i> , 327 U.S. 251 (1946) | 2 |
| <i>Liu v. SEC</i> , 140 S. Ct. 1936 (2020) | 1-4 |
| <i>SEC v. Goulding</i> , 40 F.4th 558 (7th Cir. 2022)..... | 3, 4 |
| <i>Singleton v. Wulff</i> , 428 U.S. 106 (1976) | 4 |
| <i>Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012)..... | 4 |

ARGUMENT**I. THE SEC’S OPPOSITION BRIEF CONFIRMS THAT THE SEVENTH CIRCUIT’S DECISION SHOULD BE SUMMARILY REVERSED AND REMANDED TO THE DISTRICT COURT.**

As Mr. Goulding explained in his Petition, the Seventh Circuit and District Court departed from this Court’s binding precedent in *Liu v. SEC*, 140 S. Ct. 1936 (2020) by ordering him to disgorge a sum totally untethered to the net profit from his alleged wrongdoing. (Petition at 9–11.) The District Court did not have the benefit of this Court’s holding in *Liu* at the time of its decision. Instead of complying with the principles later espoused in *Liu*, the District Court disgorged all the cash flows from Nutmeg’s bank account to Mr. Goulding without considering whether these cash flows were for legitimate business purposes. (Petition at 6–8.) The Seventh Circuit affirmed the District Court’s award, even though both lower courts acknowledged that Nutmeg was not an entirely fraudulent enterprise, and therefore disgorging all of Nutmeg’s cash flows to Mr. Goulding was improper under *Liu*. (Petition at 8.) Because the District Court did not follow *Liu*, the Seventh Circuit’s opinion should be summarily reversed and the case remanded to the District Court with instructions to apply *Liu* in the first instance.

The SEC’s opposition brief failed to address any of Mr. Goulding’s substantive arguments in favor of summary reversal. Much of the SEC’s brief simply restates

the findings of the Seventh Circuit and District Court and argues, as a matter of *ipse dixit*, that Mr. Goulding’s “factbound” arguments are incorrect based on these findings. (Opposition at 2–9.) The SEC’s argument is both unresponsive and misleading. Mr. Goulding’s position is that the lower courts erred by applying a disgorgement calculation that is categorically prohibited by *Liu*. (Petition at 9–11.) This is a *legal* error, not a *factual* one.

The SEC attempts to distract from Mr. Goulding’s argument by cherry-picking a statement from the Magistrate Judge’s findings that Nutmeg “owed the funds more than \$1 million at the time petitioner’s fraud was discovered.” (Opposition at 10.) The quoted language comes from a plaintiff’s exhibit that the District Court did not rely on to calculate disgorgement. (App. 60.) And even if the District Court were to have relied on that exhibit, Nutmeg “owing” the funds \$1 million says nothing about whether the money “owed” was related to Mr. Goulding’s alleged wrongdoing or not.

Even though the District Court’s disgorgement calculation was legally unsound, the SEC also claims that the District Court was correct to shift the burden of proof onto Mr. Goulding. (Opposition at 10.) For support, the SEC cites a case from 1946 for the proposition that a “wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). The *Bigelow* case predates *Liu* by 74 years and has nothing to do with either securities law or equity jurisprudence.

Finally, the SEC states that its failure to distribute funds to victims is excusable because it only plans to do so “[i]f petitioner ever disgorges any funds.” (Petition at 11.) But the SEC neglects to acknowledge that the District Court already has ordered Mr. Goulding to send all disgorged funds to the Treasury in direct contravention to *Liu*. (App. 100); *see also Liu*, 140 S. Ct. at 1949 (directing the lower court to evaluate “in the first instance” whether an order direct funds to be deposited with the Treasury “would indeed be for the benefit of investors . . . and consistent with equitable principles”).

Because the lower courts did not apply *Liu*’s net profits analysis, and because the SEC’s opposition brief has not provided any reason to ignore this patent legal error, this Court should grant the Petition, summarily reverse the Seventh Circuit’s opinion, and remand to the District Court for an opportunity to apply *Liu*.

II. THIS COURT EITHER MAY SUMMARILY REVERSE ON MR. GOULDING’S FIRST ISSUE OR MAY ADDRESS ALL THREE ISSUES RAISED IN THE PETITION.

Unable to address the substance of Mr. Goulding’s Petition, the SEC shifts gears and argues that Mr. Goulding failed to raise certain arguments below. The SEC’s argument is unavailing.

Mr. Goulding squarely raised the threshold question of whether disgorgement was correctly calculated under *Liu* at first opportunity. *See SEC v. Goulding*, 40

F.4th 558, 561 (7th Cir. 2022). If the Court summarily reverses on this first question, it can remand for resolution of any other issues the District Court’s error may have prevented it from addressing. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (“[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts’ error prevented them from addressing.”).

If the Court elects not to summarily reverse on the first question, it should address all three question because they are so deeply interrelated that failing to address each of them would create manifest injustice. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (explaining that courts may address an issue raised for the first time where “injustice might otherwise result”). Indeed, the SEC’s opposition brief perfectly illustrates the injustice that may result. The SEC claims that it will make a plan to disburse disgorged funds to victims only if Mr. Goulding first pays the money. (Opposition at 11.) If the amount that Mr. Goulding must disgorge was not correctly calculated in the first instance, forcing him to pay before addressing any other issues would serve only to compound the legal error and the ensuing harm to Mr. Goulding. And, as the SEC admits, the question of whether the District Court should have shifted the burden of proof onto Mr. Goulding depends on whether the District Court’s *prima facie* calculation was consistent with *Liu*. (Opposition at 10.)

In sum, the Court should either summarily reverse on Mr. Goulding’s first question and remand for consideration of all attendant issues, or address all

three of Mr. Goulding's questions to prevent the manifest injustice that will arise from a piecemeal resolution.



CONCLUSION

The Petition for a writ of certiorari should be granted, the opinion of the Seventh Circuit should be summarily reversed, and the case should be remanded to the District Court for proceedings consistent with this Court's decision.

Respectfully submitted,

BRADLEY J. BONDI

Counsel of Record

MICHAEL D. WHEATLEY

VITALIY KATS

PAUL HASTINGS LLP

2050 M Street NW

Washington, DC 20036

(202) 551-1700

bradbondi@paulhastings.com

Counsel for Petitioner

May 12, 2023