No. 22-_____

IN THE
Supreme Court of the United States

CHARLES C. LIU AND XIN WANG A/K/A LISA WANG,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Ninth Circuit requiring petitioners to disgorge funds they raised and disbursed to unrelated third parties, but never personally received, complies with this Court's mandate in *Liu v. SEC*, 140 S. Ct. 1936 (2020).

2. Whether, as the Second, Third, Sixth, and Ninth Circuits hold, the mandate of a court of appeals limits the jurisdiction of a district court on remand; or whether, as the First, Fifth, Tenth, and Federal Circuits hold, compliance with the mandate is a procedural requirement but not a jurisdictional one.

PARTIES TO THE PROCEEDINGS

Petitioners Charles C. Liu and Xin Wang a/k/a Lisa Wang were defendants in the district court proceedings and appellants in the court of appeals proceedings.

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

Beverly Proton Center, LLC f/k/a Los Angeles County Proton Therapy, LLC; Pacific Proton EB 5 Fund, LLC; and Pacific Proton Therapy Regional Center, LLC were defendants in the district court proceedings but did not participate in the court of appeals proceedings.

RELATED CASES

This case was previously before the Court. On June 22, 2020, after merits briefing and argument, the Court vacated the Ninth Circuit's previous judgment and remanded for a redetermination of the disgorgement award consistent with this Court's decision. *See Liu v. SEC*, 140 S. Ct. 1936 (2020) (No. 18-1501). The prior, related Ninth Circuit case is:

SEC v. Liu, et al., No. 17-55849 (9th Cir.)

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Petitioners Charles C. Liu and Xin Wang a/k/a Lisa Wang petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App. 1a-8a) is unpublished but is available at 2021 WL 2374248. The order of the district court granting the motion for disgorgement against defendants (App. 20a-42a) is unreported. The order of the district court denying the motion to dismiss based on extraterritorial conduct (App. 9a-19a) is reported at 549 F. Supp. 3d 1087.

JURISDICTION

The court of appeals entered its judgment on August 24, 2022, and denied a petition for rehearing on November 9, 2022 (App. 43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY 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. 109a-118a.

INTRODUCTION

In *Liu v. SEC*, 140 S. Ct. 1936 (2020) ("*Liu I*"), this Court held that the SEC's statutory authority to seek "equitable relief . . . for the benefit of investors," 15 U.S.C. § 78u(d)(5), includes a judicially imposed "disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims." *Liu I*, 140 S. Ct. at 1940. The requirement that disgorgement may not exceed net profits stems from the "historical[] exclu[sion]" of "punitive sanctions" from equitable remedies. *Id.* The Court did not itself apply that standard to the facts of this case, but remanded to allow the Ninth Circuit and district court to do so.

Those courts did not follow this Court's directions. Instead, the district court imposed, and the Ninth Circuit endorsed, a disgorgement award requiring petitioners Charles Liu and Xin Wang to pay the SEC so-called profits they never personally received. Those courts rejected deductions for payments to unaffiliated third parties, required Liu and Wang to pay back their entire salaries, and declared Wang jointly and severally liable with Liu on a record devoid of evidence that she made or participated in the misrepresentations to investors that supported liability.

Review is warranted by this Court's institutional interest in ensuring that the Ninth Circuit and other circuit courts comply with this Court's directions. It is separately warranted to resolve a four-to-four circuit split on the question whether the mandate of a court of appeals limits the subject-matter jurisdiction of a separate court. The Ninth Circuit's incorrect answer to that question was its sole basis for declining to consider Wang's arguments that she should not be liable at all.

STATEMENT

1. This case arises from a failed attempt to develop a proton cancer therapy center in Los Angeles, California. Originally, the center was a joint project between Liu, the chairman and CEO of a Chinese company that acted as a sales agent for a manufacturer of proton therapy machines, and Dr. John Thropay, a Los Angeles physician and businessman. Liu and Thropay agreed that Liu would find investors for the center through the EB-5 Immigrant Investor Program, which offers visas to foreign nationals who invest to create jobs in the United States. Thropay owned the land on which the center would be built and would run the center. Ownership of Pacific Proton, the company that would manage the center, was divided between Liu (75%) and Thropay (25%).[1]

Potential investors received a private offering memorandum. Under the terms of the memorandum, each investor paid $500,000 to purchase a unit of investment in the PPEB5 Fund and $45,000 to Pacific Proton to cover administrative expenses. App. 2a, 32a. The capital contributions designated for the PPEB5 Fund were to pay for matters such as construction costs, equipment purchases, and the building and operation of the therapy center. App. 2a. The administrative expense charges were to pay for legal, accounting, and other administrative expenses, as well as offering commissions and fees. *Id.*

Liu and Thropay had hoped that the offering would attract 300 investors and raise $150 million to build the center, as well as $13.5 million in administrative

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[1] This petition, like the decisions below, refers to Pacific Proton Therapy Regional Center, LLC as "Pacific Proton," to Pacific Proton EB 5 Fund, LLC as "PPEB5 Fund," and to Beverly Proton Center, LLC as "Beverly Proton."

fees. C.A.E.R. 974, 986. Instead, "at least 50" investors purchased units of the fund, contributing "over $26 million" in total investments, of which $2.21 million were administrative fees under the memorandum's terms. App. 23a, 34a. In response to this shortfall, Liu used investors' capital contributions to pay for some expenses that, under the terms of the memorandum, should have been paid from administrative fees. Those payments went to marketing companies that attempted to attract additional investors, to Liu's own salary, and to Wang's own salary. App. 25a-27a.[2] Liu also paid some personal expenses from company funds. App. 38a n.15.

Thropay received rent payments on his property and investors' funds were used to make improvements to that property. App. 34a, 61a. In addition, Liu paid Optivus, a proton therapy unit manufacturer, a deposit for proton equipment and for consulting services to design the center on the assumption that the center would be built on Thropay's property and would use an Optivus machine. App. 29a. In the summer of 2015, Liu and Thropay had a dispute over the progress being made in building the cancer center. App. 28a-29a, 61a. After unsuccessful efforts to resolve that dispute, Liu found a new site for the project, hired a new architect, and put down a deposit on a proton therapy machine from Mevion, a different manufacturer to

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[2] The marketing companies that received payments were Overseas Chinese Immigration Consulting Ltd. ("Overseas Chinese"), Hong Kong Delsk Business Co., Ltd. ("Delsk"), and United Damei Group and its affiliates ("UDG"). The district court determined that Wang was a senior officer of UDG and that her mother, Yao Wenli, signed the contract between Pacific Proton and UDG. As the district court acknowledged in its remand opinion, "there is no evidence that Overseas Chinese or Delsk . . . had any connection to Liu or Wang." App. 39a.

which Thropay's sister and business partner had introduced Liu. App. 29a; *see* C.A.E.R. 819.

2. On May 26, 2016, the SEC brought an action against Liu, Wang, Pacific Proton, the PPEB5 Fund, and Beverly Proton to enforce several anti-fraud provisions of the federal securities laws. *Liu I* JA29-60 (No. 18-1501). Thropay, who cooperated with the government's investigation, was charged with no wrongdoing. The district court issued a preliminary injunction and appointed a monitor. On November 9 and 10, 2016, Liu and Wang appeared at their depositions, but each invoked the Fifth Amendment privilege against self-incrimination with regard to almost all the questions asked. App. 65a. Liu and Wang also reached a tentative settlement with the SEC under which they would have returned the funds received from investors, but were not able to provide the funds by the deadline set by the district court. App. 65a-67a.

On April 20, 2017, the district court granted summary judgment to the SEC on its claim that Liu and Wang had violated Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2). App. 52a-104a. The court found that Liu's agreements with the marketing companies violated the private offering memorandum and that the salaries paid to Liu and Wang were excessive and had not been disclosed to investors. App. 73a-74a. It concluded as a matter of law that the statements were material and that Liu and Wang had been "unequivocally negligent" in "recei[ving] . . . millions of dollars of investor funds." App. 75a-76a.[3]

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[3] Although the district court found Liu and Wang liable only for negligent misstatements, it found for purposes of its penalty determinations that they acted with "a high degree of scienter." App. 78a.

In granting summary judgment to the SEC, the district court did not address whether Wang, who does not speak English, had made any misrepresentation in the United States, or whether – in the absence of any domestic misrepresentation – Wang could be held personally liable under Section 17(a)(2). Wang had raised the SEC's failure to present evidence of any domestic conduct in her opposition to summary judgment, *see* C.A. Further E.R. 61 (citing *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016)), and her counsel at argument also cited to the district court *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which held that the federal securities laws do not reach extraterritorial conduct.[4]

As remedies, the district court enjoined Liu and Wang from further violations of Section 17(a)(2) and from further participation in the offer or sale of any security under the EB-5 program. App. 77a-83a. It also ordered both Liu and Wang to "disgorge" the "total investment" received from investors "minus funds remaining," which it found to be $26.7 million dollars, App. 83a-84a. It rejected Liu's and Wang's arguments that "disgorgement should . . . be offset by their 'legitimate' business expenses," App. 84a, as foreclosed by then-binding Ninth Circuit precedent. Finally, it also ordered Liu to pay a civil penalty of $6.7 million, which it found to be "the money [he] personally took from investors"; and Wang to pay a penalty of $1.5 million, which it found to be her "direct personal gain from investors." App. 85a.

On appeal, the Ninth Circuit affirmed the grant of summary judgment and order of disgorgement. App.

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[4] *See* Dist. Ct. ECF No. 266, at 22 (transcript of Feb. 6, 2017 hearing).

44a-51a. The court of appeals addressed most of Liu's and Wang's arguments on the merits, but declined to reach the question whether Wang's conduct had been extraterritorial, ruling that the issue had not adequately been raised before the district court. App. 49a. As to the disgorgement remedy, the court of appeals held that the SEC has power to seek disgorgement as a remedy and that "the proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors," App. 50a, without any deduction for legitimate business expenses.

3. This Court granted certiorari and vacated the Ninth Circuit's judgment. *Liu v. SEC*, 140 S. Ct. 1936 (2020) ("*Liu I*"). Relying on historical equity practice, it held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5)." *Id.* at 1940. The Court set out, however, several "principles" needed to prevent a "disgorgement award . . . [from] cross[ing] the bounds of traditional equity practice." *Id.* at 1947. Two of those three principles are relevant to the present petition.

First, the Court instructed that, to avoid "transform[ing] an[] equitable profits-focused remedy into a penalty," disgorgement must generally follow "the rule to not impose joint liability in favor of holding defendants 'liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation.'" *Id.* at 1949 (quoting *Belknap v. Schild*, 161 U.S. 10, 25-26 (1896)) (ellipsis in *Liu I*). It left, however, some "flexibility to impose collective liability" in cases where "partners [have] engaged in concerted wrongdoing." *Id.* (citing *Ambler v. Whipple*,

87 U.S. (20 Wall.) 546, 559 (1874)). Observing that "petitioners were married" and that "Wang held herself out as the president, and a member of the management team," of one of the marketing companies "to which Liu directed misappropriated funds," the Court directed the Ninth Circuit "to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required." *Id.*

Second, the Court reaffirmed the historical limitation that "[c]ourts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" *Id.* at 1949-50 (quoting *Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 804 (1870)). Consistent with that limit, the Court held that "courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)" and must "ascertain[] whether expenses are legitimate or whether they are merely wrongful gains 'under another name.'" *Id.* at 1950 (quoting *Goodyear*, 78 U.S. (9 Wall.) at 803). To illustrate, the Court pointed in particular to "lease payments and cancer-treatment equipment" as "items [that] arguably have value independent of fueling a fraudulent scheme," and directed "the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying § 78u(d)(5)."[5]

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[5] The Court also directed the courts below to determine whether disgorgement would be "for the benefit of investors," as required by the text of § 78u(d)(5). *See Liu I*, 140 S. Ct. at 1947-49. Based on the SEC's representation that distribution to harmed investors would be feasible, the district court found on

4. On remand, the district court stated that it would begin from the assumption that "the $26,423,168 raised from investors" constituted the "total profits" attributable to Liu and Wang. App. 29a. From that amount it deducted two categories of expenses that it recognized as legitimate.

First, the district court restricted deductions to "$45,000 in administrative fees" for each investor, as the amount that the private offering memorandum had indicated would be "spent on marketing and other administrative fees and commissions." App. 32a-33a. The court acknowledged that Pacific Proton spent "far more" than this amount on "broker fees . . . alone," without taking into account the services of accountants, attorneys, an economic consultant who assisted with the EB-5 application, and other marketing services. *Id.* It made no finding that Liu or Wang received any part of those payments; that the recipients of those payments failed to provide services to Pacific Proton; or that the fees the recipients charged were not reasonable for the services provided.[6]

Second, the district court deducted "$3,105,809 in expenses related to construction of the proton therapy center – including construction, rent, equipment, tax payments, insurance costs, travel, consulting fees, and permit and license fees." App. 34a. In the course of doing so, the court stated that it was "far from clear" that such expenses were "actually legitimate business expenses" because, the court suggested, "Defendants'

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remand, and petitioners have not since challenged, that this requirement is met in this case. App. 29a n.12.

[6] The district court expressed "serious concerns" about Proton Pacific's payments to UDG because of its relationship to Liu and Wang, App. 33a, but did not find that Liu or Wang received any part of the payments made to UDG.

scheme was fraudulent from the outset." App. 35a. The court nevertheless stated that it would make the deductions "in an abundance of caution, and in light of the Supreme Court's admonitions." *Id.*

The district court declined to deduct the $3 million deposit that Pacific Proton paid to Mevion for a proton therapy machine. The court stated that "Liu decided to order a Mevion unit in addition to the Optivus unit he had already ordered in order to cut Dr. Thropay out of the project and therefore divert more money to himself and his wife Wang." App. 36a. The court did not cite record evidence to support its conclusion about Liu's motive, App. 36a-37a, nor explain how paying $3 million to an equipment manufacturer increased any gain to Liu and Wang.

The district court also declined to deduct Liu's or Wang's salaries from the disgorgement amount. App. 38a. Liu and Wang had introduced expert testimony that $7.57 million ($3 million less than they received) would be reasonable market compensation for the services they provided to Pacific Proton, the PPEB5 Fund, and Beverly Proton. App. 37a; *see* C.A.E.R. 1651-54. The court acknowledged that evidence but made no finding concerning whether the compensation that Liu and Wang had received was reasonable or what reasonable compensation would have been. It declined to find "one penny" of compensation to be reasonable because the private offering memorandum for the PPEB5 Fund had not disclosed that salaries would be paid, because one compensation agreement had the wrong signatory, and because some salary was paid as back pay. App. 37a-38a.[7]

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[7] The district court also found in a footnote that Liu and Wang had improperly "withdr[awn] money from the companies for their

Finally, the district court acknowledged that Proton Pacific, the PPEB5 Fund, and Beverly Proton "incurred significant losses" rather than earning any net profits, but stated that the losses occurred because "Defendants looted [the companies] for their own personal gain." App. 38a-39a. It also refused to take into account petitioners' showing that "some of the funds were paid to companies that had no connection to Defendants," so that "Defendants did not receive the funds indirectly." App. 39a. The court still concluded that petitioners "must be held accountable" even for funds that they never actually received. *Id.*

The district court then ordered that Liu and Wang be jointly and severally liable for the disgorgement amount. App. 40a-41a. After summarizing the portion of this Court's opinion on joint-and-several liability, App. 40a, the court found that Wang "made investor presentations" and "helped raised investor capital"; that she was "paid and accepted without reservation" a salary taken from investor funds; and that she was "an officer of UDG." App. 41a. It found those facts justified labeling her "Liu's active partner and accomplice in the fraudulent investor scheme." *Id.*

Wang also sought leave to file a motion to dismiss, renewing her argument that her conduct had not violated Section 17(a)(2) of the Securities Act because it had not occurred within the United States. The SEC opposed her motion on the merits, but did not argue that the district court could not reach it. The court likewise resolved the issue on the merits, concluding that Wang's conduct was not extraterritorial because her "conversations promoting the project and making offers of investment occurred both in the United

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own expenses," including "various bills" such as "gardening" and "tuition" and a trip to "Las Vegas." App. 38a n.15.

States and in China." App. 16a. The court also relied on Wang's use of "United States bank accounts." App. 17a. It did not find that any investor received or accepted an offer from Wang or that she made any misrepresentation to any investor in the United States.[8]

5. The Ninth Circuit affirmed. App. 1a-8a. The court of appeals began by declaring that it would "decide the proper method of calculating disgorgement as an equitable remedy in an SEC enforcement action." App. 4a. In doing so, it acknowledged that this Court had "used the term 'net profits' to cabin the wrongful gains obtained by [petitioners]," but then rejected that "term [as] a misnomer in the context of this case." *Id.* It reasoned that "there were no revenues and no profit, because [petitioners] stole the investment capital necessary to build the cancer treatment facility." App. 5a. It quoted this Court's reasoning that deductions should not be permitted "'when the entire profit of a business or undertaking results from the wrongful activity,'" but acknowledged that the district court had declined to apply that principle here. *Id.* (quoting *Liu I*, 140 S. Ct. at 1945).

The court of appeals then stated that it "f[ou]nd no error with the district court's factual findings as to the illegitimate expenses or with the district court's disgorgement award." App. 5a. It endorsed the district court's reasoning that "payments to marketing companies and professional service providers" could not be deducted because "[t]hose payments far exceeded the

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[8] While the case was pending on remand in the district court, Congress amended 15 U.S.C. § 78u to add a separate statutory authorization for the SEC to seek "disgorgement." *See* 15 U.S.C. § 78u(d)(7). Neither the district court nor the Ninth Circuit determined that new § 78u(d)(7) changes the equitable principles set out by this Court in *Liu I* when applying § 78u(d)(5).

total amount of administrative fees collected and violated the terms of" the private offering memorandum. App. 5a-6a (footnote omitted). It also approved the district court's conclusion that Liu's and Wang's salaries and personal expenses all "represent . . . ill-gotten gains and are in no way legitimate business expenses," App. 6a, without addressing Liu's and Wang's expert evidence as to what compensation would have been reasonable. And the court of appeals approved the district court's finding that the $3 million payment to Mevion was "to cut out . . . Thropay, in order to prevent the exposure of Liu's fraudulent activities," *id.*, but, like the district court, cited no record support.

The court of appeals also upheld the district court's imposition of joint-and-several liability as to both Liu and Wang, stating that it "s[aw] no error" either in the district court's "factual findings" or in that court's "decision to hold Liu and Wang jointly and severally liable." App. 7a. In a footnote, it stated that Wang's "liability [was] already . . . established as law of the case." App. 7a n.8.

Finally, the court of appeals refused to consider the merits of Wang's motion to dismiss. It instead accepted the SEC's argument, raised for the first time on appeal, that the district court had erred in addressing the issue at all because it was outside the scope of the mandate. App. 7a-8a. The court of appeals disregarded the SEC's failure to raise that point in the district court because, "[i]n this Circuit, the rule of mandate 'limit[s] the district court's authority on remand,' and is therefore 'jurisdictional' in nature." App. 8a n.9 (quoting *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007)) (second alteration in *Liu*).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO ENFORCE THIS COURT'S MANDATE AND CLARIFY ITS HOLDING IN *LIU I*

This Court has "a special interest in ensuring that courts on remand follow the letter and spirit of [its] mandates." *Planned Parenthood of Se. Pennsylvania v. Casey*, 510 U.S. 1309, 1311 (1994) (Souter, J., in chambers) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)). Accordingly, once a case has been heard in and remanded by this Court, it has long exercised its discretionary power of review to consider whether a court of appeals "has misinterpreted th[e] decision" that followed from that hearing, *Creek Nation v. United States*, 302 U.S. 620, 622 (1938) (reversing after remand and subsequent grant of certiorari); whether a "court of appeals ha[s] misinterpreted or unduly limited this Court's earlier decision in [the same] case," *Schriber-Schroth Co. v. Cleveland Tr. Co.*, 311 U.S. 211, 217 (1940); or whether a "[c]ourt of [a]ppeals [has] improperly disregarded this Court's mandate," *Scheidler v. National Org. for Women, Inc.*, 547 U.S. 9, 16 (2006).

A second review of this case is warranted by that special interest. When this case was first before this Court in *Liu I*, it clarified that the equitable remedy of disgorgement cannot properly be used to "punish[]" wrongdoing – a purpose served instead by the civil monetary penalties that the SEC has sought and obtained in this case – but should be limited to its traditional function of ensuring that a "wrongdoer should not profit 'by his own wrong.'" *Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020) (quoting *Root v. Railway Co.*, 105

U.S. 189, 207 (1882)). The Ninth Circuit and the district court have disregarded that clarification. Rather than determine whether and to what extent Liu and Wang profited from the securities violation, they indiscriminately required disgorgement of funds that Liu and Wang never themselves received and refused even to consider evidence that any of the compensation Liu and Wang received was reasonable and legitimate. The Court should reaffirm that it meant what it said in *Liu I* and that disgorgement remains limited by the historical principle that "a court of equity" is not "an instrument for the punishment of simple torts." *Id.* at 1945 (quoting *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559-60 (1854)).

A. The Ninth Circuit and the District Court Disregarded This Court's Recognition of Disgorgement as a Profits-Based Remedy Grounded in Historical Equity Practice

1. The Ninth Circuit and the District Court Refused To Calculate Net Profits and Ordered Liu and Wang To Disgorge Funds That They Never Personally Received

The Ninth Circuit's ruling cannot be squared with *Liu I*. In that case, this Court held that the SEC could seek disgorgement under 15 U.S.C. § 78u(d)(5) based on the historical authority of "[e]quity courts . . . to deprive[] wrongdoers of their net profits from unlawful activity." 140 S. Ct. at 1942. The theme that disgorgement is a profits-based remedy sounds throughout the opinion in *Liu I*, from the Court's initial statement of its holding that a disgorgement award may "not exceed a wrongdoer's net profits," *id.* at 1940; through its canvass of equity precedents to determine that "courts consistently restricted awards to net profits

from wrongdoing after deducting legitimate expenses," *id.* at 1946; to its direction for "the lower court to examine whether including [certain] expenses in a profits-based remedy is consistent with the equitable principles underlying § 78u(d)(5)," *id.* at 1950.

Despite that guidance, the Ninth Circuit and the district court rejected the very concept of disgorgement as a profits-based remedy. The Ninth Circuit rejected "the term 'net profits'" as a "misnomer in the context of this case" because, "here, there were no revenues and no profit." App. 4a-5a. It nevertheless resolved to affirm the district court's disgorgement order so as to ensure what it called "an equitable remedy for [petitioners'] fraud." App. 5a. It made no attempt to reconcile that view of an "equitable remedy" with this Court's detailed discussion of historical equity practice and painstaking focus on profits as the key element of disgorgement. Similarly, the district court recognized that "the companies incurred significant losses" and that Liu and Wang "did not receive the funds" that "were paid to companies that had no connection to [them]." App. 38a-39a. It nevertheless ordered Liu and Wang to disgorge funds that they admittedly never received to ensure that they were "held accountable." App. 39a.

The reasons that the Ninth Circuit and the district court gave for ordering Liu and Wang to disgorge profits that did not exist and money that they never received were candidly punitive. The Ninth Circuit said there were no profits because petitioners "stole the investment capital necessary to build the cancer treatment facility," App. 5a, and the district court similarly accused Liu and Wang of "loot[ing]" the companies "for their own personal gain," App. 39a. Liu and Wang disagree vehemently with those characterizations. They

maintain that the projects failed because they did not attract enough investors between May 2013, when the private offering memorandum was prepared, and May 2016, when the SEC brought its action. But even taken as true, the lower courts' characterization of events would not justify the "transform[ation]" of disgorgement "into a penalty outside . . . equitable powers." 140 S. Ct. at 1944. Violations of law can be (and in this case were) punished by separate civil monetary penalties. App. 84a-85a.

The Ninth Circuit and the district court also departed from *Liu I* in refusing to allow any deductions for expenditures inconsistent with statements to investors in the offering memorandum – principally, the statement that only $45,000 per investor would be used for administrative expenses. That approach is grounded neither in *Liu I* nor in the equitable precedent on which *Liu I* relied. It resembles the approach this Court rejected in *Livingston*, 56 U.S. (15 How.) 546, *cited in Liu I*, 140 S. Ct. at 1945, which reversed an accounting for profits where the master had found that the defendants were "wrongdoers . . . and consequently in a position to be mulcted in damages greater than the profits they have actually received." *Id.* at 559. The investors here, like the patentee in *Livingston*, may have suffered damages or injury because of payments exceeding the administrative-expense limits in the materials they received. That does not mean that the payments can be ignored for disgorgement purposes where they actually reduced any "benefit . . . received," *id.*, by Liu and Wang.

Nor can the decisions below be justified under the "exception" that this "Court has carved out," authorizing a court to reject deductions "when the 'entire profit

of a business or undertaking' results from the wrongful activity." *Liu I*, 140 S. Ct. at 1945 (quoting *Root*, 105 U.S. at 203). In reaffirming that exception, this Court explained that it still "requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains 'under another name.'" *Id.* at 1950 (quoting *Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 803 (1870)). The Court did not authorize the Ninth Circuit or the district court to disregard otherwise deductible expenses for punitive purposes. Yet that is what those courts did.

The district court did not find that Liu's and Wang's businesses were wholly fraudulent. Although the court accused Liu of attempting "to keep up appearances" and of "plan[ning] from the beginning" to "funnel[] . . . money . . . to himself," App. 39a, it did not find that the marketing companies did not provide services to Pacific Proton and the PPEB5 Fund, and it did not find that the money paid to the marketing companies actually went to Liu or Wang. Instead, the court permitted deduction of such payments up to the amount of administrative fees actually collected. App. 33a. Accordingly, its ruling cannot be defended (as the Ninth Circuit suggested, App. 5a) on the ground that, if the district court had found the payments fraudulent, it could have refused to deduct them entirely.

This Court's reference to "wrongful gains 'under another name'" also did not authorize the district court on remand to refuse deductions for payments that were in no sense gains either to Liu or to Wang. The meaning of that reference is illustrated by this Court's decision in *Goodyear*, which this Court gave as an example in *Liu I*. *Goodyear* involved an accounting for profits derived from patent infringement, and the deductions that were rejected were for "extraordinary

salaries" that a special master had found were merely "dividends of profit under another name." *Goodyear*, 76 U.S. (9 Wall.) at 803. That analysis cannot coherently be applied to the marketing-company payments here. Even if those payments could be considered profits as to the marketing companies, they were as to Liu and Wang, profits that "accrued to another and in which [petitioners] ha[d] no participation." *Belknap v. Schild*, 161 U.S. 10, 25-26 (1896), *quoted in Liu I*, 140 S. Ct. at 1945.

Further, Liu and Wang put on expert evidence showing that $7.57 million would have been reasonable compensation for the services they performed. The district court should have considered that evidence and either permitted a deduction or else given a reasoned explanation for its refusal to do so. Instead, without citation to *Liu I* or any other authority, the court declared that it would "not deduct one penny" of either Liu's or Wang's salary from the disgorgement amount. App. 38a. That amounted to an implicit (and unjustified) finding that neither Liu nor Wang was entitled to any compensation whatsoever for six years of work on the legitimate business activities of their companies. The principle that "equity never 'lends its aid to enforce a forfeiture,'" *Liu I*, 140 S. Ct. at 1941 (quoting *Marshall v. Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873)), should have foreclosed that result.

In addition, *Liu I* called out and disapproved previous circuit precedent that had refused deductions of "legitimate expenses like payments to innocent third-party employees and vendors." *Id.* at 1950 (citing *SEC v. Brown*, 658 F.3d 858 (8th Cir. 2011)). Yet, in refusing to permit deductions, the district court cited and followed pre-*Liu-I* precedent that had declined to per-

mit expenses such as "taxes" and "legal and accounting fees," *SEC v. Shaoulian*, 2003 WL 26085847, at *6 (C.D. Cal. May 12, 2003), or "deductions for overhead, commissions and other expenses," *SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 214 (E.D. Mich. 1991), *aff'd*, 1993 WL 465161 (6th Cir. Nov. 10, 1993) (per curiam) (judgment noted at 12 F.3d 214 (table)). The court's quotation from those cases of formulaic labels such as "[e]xpenditures . . . for [a defendant's] own use" and "dissipation of investor funds," App. 39a & n.16, cannot conceal the reality that *Liu I* changed the law and required focus on a defendant's own personal profits, rather than on the total amount that investors paid out as a result of a securities violation.

2. The Ninth Circuit and the District Court Held Liu and Wang Jointly and Severally Liable Without Evidence That Wang Participated in Misrepresentations to Investors

In *Liu I*, this Court reaffirmed the historical "rule against joint-and-several liability for profits that have accrued to another," finding the SEC's practice of "s[eeking] to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates" to be "seemingly at odds with the common-law rule requiring individual liability for wrongful profits." 140 S. Ct. at 1945, 1949. It recognized an exception for "partners engaged in concerted wrongdoing" that created "some flexibility to impose collective liability." *Id.* at 1949. It discussed the facts already in the record on this issue, such as the fact that petitioners were married and that Wang had held herself out as the chairman of UDG. *See id.* It then remanded for the court of appeals "to determine whether the facts are such that petitioners can, consistent with equitable

principles, be found liable for profits as partners in wrongdoing." *Id.*

The district court engaged in no meaningful factual development on this issue. It first cited the facts already recognized by this Court. App. 40a. It then cited evidence that Wang "made investor presentations promoting the proton cancer therapy project, and helped raise investor capital through promotion." App. 41a. It also cited evidence that she received a salary personally and that, as this Court had recognized, she was an officer of UDG. *Id.* But the district court did not find that Wang's investor presentations contained falsehoods of which she knew or should have known, or that Wang presented the private offering memorandum to any investor. Nor did it make any finding that Wang (who does not speak English beyond simple courtesies and relies on her husband for translations, C.A.E.R. 146, 767) was aware of and understood the English statements to investors in the memorandum at the time she accepted her salary. Nor did it find that Wang personally received any part of the payments that went to UDG. It merely stated in general, conclusory terms that she "played an integral role" and was an "active partner and accomplice" in Liu's "scheme." App. 41a. The Ninth Circuit recited the same facts as the district court and found them enough for joint-and-several liability. App. 6a-7a.

That record does not support a finding that Liu and Wang were "partners engaged in concerted wrongdoing." *Liu I*, 140 S. Ct. at 1949. The wrongdoing for which disgorgement was ordered was the private offering memorandum's statement to investors about the source of money that would be spent on administrative expenses. The district court's summary-judgment opinion focused on Liu's conduct, including

his agreement with marketing companies, his promises to Overseas Chinese and UDG, and his award of salaries to himself and Wang. App. 73a-74a. There was no evidence and no finding that Wang herself was aware of the full extent of Liu's promises or received any of the money that went to the marketing companies.[9] The finding on which the district court placed most weight – that Wang "was paid and accepted without reservation well over a million dollars in investor funds," App. 41a – does not support holding her liable for funds that she never received. Even as to UDG, the only company with which Wang had any affiliation, the district court made no finding that any money went to her personally.

B. Review Offers the Opportunity To Clarify Confusion and Disagreement in the Circuit and District Courts

Since this Court decided *Liu I* three years ago, the courts of appeals and district courts have applied a variety of inconsistent approaches to its holding. Review in this case would therefore give this Court an opportunity not only to deal with the Ninth Circuit's and district court's disregard for the equitable limits set out in *Liu I*, but also to clarify standards that have led to conflicting results.

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[9] The district court quoted Thropay's testimony that Wang "seemed to be acutely aware of finances," App. 41a, but its quotation leaves out the context. Thropay testified that Wang did not "tell [him] anything" that led him to such a belief, but that he had overheard her speaking with her husband in Chinese – of which he "understood a few words" – and using the Chinese word for "money." C.A.E.R. 178-79. Not on the most generous reading does that testimony support a finding that Wang knew the details of Pacific Proton's finances.

First, courts have differed on whether and to what extent the SEC must show that the recipient personally received the funds subject to disgorgement. Some courts have properly recognized that *Liu I* imposes such a requirement. *See SEC v. Knox*, 2022 WL 1912877, at *4 (D. Mass. June 3, 2022) (ruling that certain defendants who "received lesser proceeds of [a] fraud . . . should only disgorge the amounts that passed through their accounts"); *SEC v. Yang*, 2021 WL 1234886, at *8 (C.D. Cal. Feb. 16, 2021) (refusing to order disgorgement of certain funds where "the admitted facts . . . d[id] not unequivocally establish that [a defendant] personally benefited from the illicit transfers" of those funds), *aff'd*, 2022 WL 3278995 (9th Cir. Aug. 11, 2022). Others, like the district court here, have treated personal receipt of funds as irrelevant. *See FTC v. Shkreli*, 2022 WL 1210834, at *4 (S.D.N.Y. Apr. 25, 2022) (citing as good law pre-*Liu-I* precedent under which an enforcement agency "did not need to show that the illegal gains personally accrued to" the defendant).

Second, courts take inconsistent approaches in the recurring situation where a defendant has received funds that arguably constitute profits from a violation, but then has passed them on in part to a third party that helped to generate the profits but is not alleged to have violated the securities laws – as is the case here with the payments to Overseas Chinese, Delsk, and UDG. Some courts have properly recognized that such payments should not be part of the amount to be disgorged. *See SEC v. Kon*, 2023 WL 195203, at *2 (S.D. Fla. Jan. 17, 2023) (deducting payments to a business "associate" and "third-party vendors" that were made "in furtherance of the [defendant's] penny stock promotion business"); *SEC v. Complete Bus.*

Sols. Grp., Inc., 2022 WL 17243360, at *12 (S.D. Fla. Nov. 22, 2022) (deducting payments to "consultants includ[ing] financial firms, marketers, promotional product companies, and more"), *appeal pending*, No. 23-10228 (11th Cir.). Others, like the district court here, have refused to deduct such payments on the grounds that they remained part of the "profits" from the violation even though the violator did not retain them. *See SEC v. McDermott*, 2022 WL 16533556, at *9 (E.D. Pa. Oct. 28, 2022) (declining to deduct commissions that the violator was "contractually obligated" to pay).

Third, as to joint-and-several liability, courts have adopted widely divergent standards as to when such orders are appropriate. Some have properly heeded *Liu I*'s "warning against the imposition of joint and several liability in lieu of determining the amount of tainted money each defendant received." *SEC v. Camarco*, 2021 WL 5985058, at *18 (10th Cir. Dec. 16, 2021); *see id.* at *17 (declining to require family trust to disgorge profits from a family member's fraudulent activities without proof of "the amount of ill-gotten funds [the trust] received"). Others, like the district court here, have imposed joint-and-several liability based merely on findings that defendants participated in and received part of the profits from a securities violation. *See SEC v. Jensen*, 2022 WL 1664258, at *7 (C.D. Cal. May 23, 2022) (ordering joint-and-several liability against certain defendants where "money gained through [the] fraudulent scheme was received by accounts in [their] names").

II. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER AN APPELLATE MANDATE LIMITS THE SUBJECT-MATTER JURISDICTION OF A DISTRICT COURT

A. The Circuits Are Split on Whether the Mandate Rule Is Jurisdictional

Independent of this Court's holding in *Liu I*, review is also warranted of the question whether the Ninth Circuit's mandate on remand to the district court deprived that court of jurisdiction to consider Wang's argument that the conduct with which she was charged did not violate the Securities Act because it was extraterritorial. The Ninth Circuit refused to consider the merits of the argument and rejected Wang's contention that the SEC had waived any objection to consideration of those merits. App. 7a-8a & n.9. The court of appeals' sole reason for overlooking the agency's waiver was the holding of *United States v. Thrasher*, 483 F.3d 977 (9th Cir. 2007), that "the rule of mandate 'limit[s] the district court's authority on remand,' and is therefore 'jurisdictional' in nature." App. 8a n.9 (quoting *Thrasher*, 483 F.3d at 982) (alteration in *Liu*). *Thrasher* itself acknowledged in 2007 that "[t]he circuits appear to be split four to four on the issue." 483 F.3d at 982. That acknowledgement was correct. The Second, Third, Sixth, and Ninth Circuits take the position that the mandate rule limits the jurisdiction of the district court, while the First, Fifth, Tenth, and Federal Circuits disagree.

As examples of decisions holding that the mandate rule is jurisdictional, *Thrasher* cited *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (per curiam); and *Tapco Products Co. v. Van Mark Products Corp.*, 466 F.2d 109, 110 (6th Cir.

1972). *See* 483 F.3d at 982. The Second Circuit is also on this side of the split, having followed *Tapco* in 1979. *See Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (per curiam) ("The court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to review or alter them."); *see also DeWeerth v. Baldinger*, 38 F.3d 1266, 1270 (2d Cir. 1994) (explaining that "*Eutectic* . . . decided . . . that a district court does not have jurisdiction to alter an appellate ruling where the appellate court has already considered and rejected the basis for the movant's Rule 60(b) motion"). In addition, one judge of the D.C. Circuit has noted the split and suggested that his Circuit's cases favor treating the rule as jurisdictional. *See Lee Mem'l Hosp. v. Becerra*, 10 F.4th 859, 867 n.1 (D.C. Cir. 2021) (Randolph, J., concurring) (quoting the statement in *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), that a "district court 'is *without power* to do anything which is contrary to either the letter or spirit of [an appellate court's] mandate'") (emphasis in *Lee Mem'l*).

As examples of decisions holding that the mandate rule is not jurisdictional, *Thrasher* cited *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993); *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002); *United States v. Gama-Bastidas*, 222 F.3d 779, 784 (10th Cir. 2000); and *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001). *See* 483 F.3d at 982. In addition, the Fourth Circuit has ruled similarly in several unpublished decisions. *See United States v. Williams*, 162 F. App'x 254, 256 (4th Cir. 2006) (per curiam); *Babb v. DEA*, 146 F. App'x 614, 621-22 (4th Cir. 2005) (per curiam); *see also Smith v. Bounds*, 813 F.2d 1299, 1304 (1987) (holding that the law-of-the-case doctrine,

which is related to the mandate rule, "is a rule of discretion and not a jurisdictional requirement"), *on reh'g en banc*, 841 F.2d 77 (4th Cir. 1988) (per curiam). More recent decisions from the Fifth and Tenth Circuits have also reaffirmed and reapplied the holdings of *Matthews* and *Gama-Bastidas*. *See*, *e.g.*, *Webb v. Davis*, 940 F.3d 892, 897 (5th Cir. 2019) (per curiam); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1102 (10th Cir. 2015) (Gorsuch, J.).

Those lists of cases show that the question whether the mandate rule limits a district court's jurisdiction arises often. The split has persisted for at least 30 years, since the First Circuit decided *Bell* in 1993. As this case illustrates, moreover, the difference between a jurisdictional (and therefore non-waivable) and a non-jurisdictional (and therefore waivable) understanding of the mandate rule can change the result in a case. In *Cook*, for example, the Tenth Circuit explained that it did not need to determine whether a particular aspect of the district court's ruling complied with its previous mandate because the relevant party had not "pursue[d] and thus ha[d] waived any complaint about" the alleged inconsistency. 790 F.3d at 1102.[10] Had the Ninth Circuit taken a similar approach here, it would have considered the merits of Wang's extraterritoriality arguments.

B. The Ninth Circuit Erred in Concluding That the Mandate Rule Is Jurisdictional

Although the deep and entrenched circuit split alone warrants review, certiorari should also be granted for

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[10] The Tenth Circuit also determined as an alternative basis for its ruling that the district court's ruling had been consistent with the mandate, *see* 790 F.3d at 1102, but its reasoning makes clear that it would have held the argument waived regardless.

the additional reason that the mandate rule is not jurisdictional and the Ninth Circuit's contrary position is wrong. As a general matter, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). Further, although "[j]urisdictional requirements mark the bounds of a 'court's adjudicatory authority,' . . . not all procedural requirements fit that bill." *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1497 (2022) (quoting *Kontrick*, 540 U.S. at 455). Because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system," including the requirement that "certain matters be raised at particular times," this Court has "tried in recent cases to bring some discipline to the use of" the "jurisdictional label." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011). The core of that discipline is that this Court will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler*, 142 S. Ct. at 1497 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

Applying those principles here leads to the straightforward conclusion that the mandate of a court of appeals does not limit the jurisdiction of a district court. The statutory authorization for such a court to remand a case comes from 28 U.S.C. § 2106, which permits a "court of appellate jurisdiction . . . [to] remand [a] cause and direct the entry of [an] appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." Nothing in § 2106 speaks to the subject-matter jurisdiction of the district courts or authorizes the courts of appeals to limit that jurisdiction. A fair reading of the statute certainly includes a rule that district

courts should comply with the directions that Congress has authorized courts of appeals to give. But there is no "'clear' indication that Congress wanted th[at] rule to be 'jurisdictional.'" *Henderson*, 562 U.S. at 435-36 (quoting *Arbaugh*, 546 U.S. at 515-16).

Nor do the origins of the mandate rule imply that it has any jurisdictional character. The rule that a lower court must follow the directions an appellate court gives on remand is of course old, well-settled, and important – indeed, Part I of this petition relies on it. The rule is often traced to *In re Sanford Fork & Tool Co.*, which stated:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

160 U.S. at 255. *Sanford Fork & Tool* in turn cited a similar pronouncement in *Sibbald v. United States*, 37 U.S. (12 Pet.) 488 (1838), which relied on earlier cases from state supreme courts. *See id.* at 492.[11] But neither *Sanford* nor *Sibbald* tied the rule to any limita-

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[11] *Sibbald* also cited Section 24 of the Judiciary Act of 1789, which provided that "the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon." Ch. 20, 1 Stat. 73, 85.

tion on the subject-matter jurisdiction of the lower federal courts or to any statute that limited the subject-matter jurisdiction of those courts.

The concerns that have led this Court to restrict the use of the "jurisdictional label" for procedural rules, *Henderson*, 562 U.S. at 435, further confirm that the mandate rule should not receive that label. In particular, the rule that a jurisdictional objection may be raised for the first time on appeal wastes resources where a party fails to raise an arguable conflict with the mandate in the district court – as the SEC did here. Further, although the scope of an appellate court's mandate is sometimes indisputable, it is also sometimes debatable. *See*, *e.g.*, *Standard Oil Co. of California v. United States*, 429 U.S. 17, 18 (1976) (per curiam) ("[T]he appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events."). "[T]he rule that '[j]urisdictional rules should be clear,'" *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring)) (second alteration in *Direct Mktg.*), thus also cuts in favor of treating the mandate rule as a non-jurisdictional procedural rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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