No. 23-987

In The
Supreme Court of the United States

MS. SHALINI AHMED,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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March 6, 2024

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QUESTIONS PRESENTED

As this Court has recognized, disgorgement in SEC proceedings must stay within "traditional equitable limitations" and remain "within the heartland of equity." *Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020).

This Court has also recognized that "where findings [of the district court] are infirm because of an erroneous view of the law, a remand is the proper course." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

The questions presented are:

1. Whether this Court's holding in *SEC v. Liu*, 140 S. Ct. 1936 (2020) that disgorgement must remain within equitable limits instructs that (i) the value of assets unilaterally seized by the alleged victim be offset against disgorgement, and (ii) the value of shares returned during two transactions be offset against disgorgement, especially as the alleged victims experienced no loss in those transactions.

2. Whether this Court's holdings across multiple cases and other circuit court holdings instruct a vacatur and remand on nominee theory on three discrete relief defendant assets as the district court's findings were based on an erroneous view of the law and were not legally sufficient to satisfy the requirements of the nominee doctrine such that these three assets can be disgorged as equitably belonging to the defendant and used for the satisfaction of defendant's judgment.

PARTIES TO THE PROCEEDING

Petitioner, Ms. Shalini A. Ahmed, as relief defendant, and as appellant in the Court of Appeals for the Second Circuit.

Respondent, the Securities and Exchange Commission (or the "SEC"), as the plaintiff in the District Court and the appellee in the Court of Appeals for the Second Circuit.

All parties do not appear in the caption of the case on the cover page. A list of all real parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Mr. Iftikar A. Ahmed, as defendant in the District Court and as appellant in the Court of Appeals for the Second Circuit.

Minor children relief defendants I.I.1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I.2, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, and I.I.3, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, in the District Court, and as appellants in the Court of Appeals for the Second Circuit.

Entity relief defendants I-Cubed Domains, LLC, Shalini Ahmed 2014 Grantor Retained Annuity Trust, DIYA Holdings, LLC, DIYA Real Holdings, LLC, in the District Court, and as appellants in the Court of Appeals for the Second Circuit.

PARTIES TO THE PROCEEDING—Continued

Receiver, Mr. Stephen Kindseth, as Court-appointed Receiver in the District Court, and as receiver-appellee in the Court of Appeals for the Second Circuit.

DIRECTLY RELATED PROCEEDINGS

– United States District Court for the District of Connecticut: *SEC v. Ahmed, et al.*, No. 3:15-cv-675. An order granting the SEC's motion for remedies, *inter alia*, deeming the relief defendants as nominees for Mr. Ahmed entered in the District Court on September 6, 2018.

– United States Court of Appeals for the Second Circuit: *SEC v. Ahmed, et al.*, No. 21-1686(L), 21-1712 (Con). An order denying the petition for rehearing and petition for rehearing *en banc* entered in the Second Circuit Court of Appeals on October 12, 2023, and Mandate issued on November 14, 2023.

– United States Supreme Court: *SEC v. Ahmed, et al.*, No. 23-741. Mr. Ahmed's petition for writ of certiorari, pending.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ms. Shalini Ahmed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 72 F.4th 379 and reproduced at Appendix ("App.") 1-52. The district court originally entered summary judgment on liability and damages in published decisions at, respectively, 308 F.Supp.3d 628 and 343 F.Supp.3d 16. The decision on damages is reproduced at App. 53-93. On partial remand, the district court entered an amended judgment in an unpublished order available at 2021 WL 2471526.

JURISDICTION

The Second Circuit filed its published decision on June 28, 2023. That court denied Petitioners' request for rehearing en banc on October 12, 2023. App. 94-95. On December 28, 2023, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to March 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V: No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This case concerns whether equitable principles as held by this Court in *Liu v. SEC*, 140 S. Ct. 1936 (2020) instruct that (i) assets unilaterally seized by the alleged victim offset disgorgement in a Securities and Exchange Commission (SEC) judgment and (ii) the value of shares returned in two transactions offset disgorgement, especially as the alleged victims did not experience any loss.

This case further concerns (iii) if the district court's nominee analysis on three discrete relief defendant assets was legally sufficient to satisfy the requirements of the nominee doctrine such that these assets can be disgorged as equitably belonging to the defendant and used for the satisfaction of his judgment, instead of being vacated and remanded for further factfinding on relief defendant ownership as the district court's ruling was on an erroneous view of the law and infirm findings, and is against other circuit rulings.

I. District Court Proceedings

Between 2004 and 2015, Iftikar Ahmed was employed by venture-capital firm Oak Management Corporation ("Oak") and served as a managing member for certain of Oak's investment funds. Mr. Ahmed's investment recommendations were often highly successful, and as compensation for his work, he received tens of millions of dollars that neither Oak nor the SEC claimed to be unlawful. Mr. Ahmed and petitioner Ms. Ahmed were married in 2003 and this compensation, along with Ms. Ahmed's compensation, came into the marriage.

On May 6, 2015, the SEC filed this action against Mr. Ahmed, alleging he misappropriated assets and defrauded his employer over a roughly 10-year period. The complaint sought disgorgement of roughly $65 million. After the SEC brought the action, Oak unilaterally seized earned and vested assets belonging to Mr. Ahmed in the amount of over $35 million for the same alleged conduct at issue in this case. In addition, Ms. Ahmed, Ms. Ahmed's minor children, and certain of their entities were joined as Relief Defendants in June 2015, and a preliminary injunction was entered on August 12, 2015, freezing all of Ms. Ahmed's, and others' assets.

On March 29, 2018, the district court granted summary judgment in favor of the SEC on liability. On September 6, 2018, the district court entered an order on remedies, awarding the SEC relief, specifically ordering Mr. Ahmed to disgorge $41,920,639, which was

later increased to $64,171,646.14. However, the district court refused to credit $35 million against disgorgement for assets unilaterally declared forfeited and seized by the alleged victim Oak ("Seized Assets"), reasoning that these Seized Assets were not "ill-gotten gains" but rather assets sacrificed pursuant to contract, even though for the same underlying conduct at issue in this case. App. 87-90.

The district court also ruled that the value of shares returned to the alleged victims in two transactions at issue, the Company C1 transaction ("C1") in October 2013 and the Company C2 transaction ("C2") in October 2014, could not be offset against the calculation of disgorgement for those two transactions, as Mr. Ahmed's "conflict of interest" in C1 and his position "on both sides of the deal" in C2 precluded the credit of the value of shares against disgorgement in both of those transactions, despite the fact that there is no evidence that the value of the shares was improperly inflated, there is evidence that Mr. Ahmed returned shares of value, and the fact that the alleged victims did not suffer any loss. App. 66-67.

In that same ruling on remedies, the district court ruled that Relief Defendants were "nominees"—nominal owners—of all of their frozen assets. Thus, even though Relief Defendants indisputably held legal title to the assets, the district court declared Mr. Ahmed to be their actual owner and allowed the SEC to collect the judgment from those assets. Specifically, the district court held that the Relief Defendants were

nominees for Mr. Ahmed simply because they received funds from him. App. 78.

Mr. Ahmed, Ms. Ahmed, and other Relief Defendants appealed the district court's rulings.

II. The Second Circuit's Decision

In their opening briefs, Mr. Ahmed and Relief Defendants argued, *inter alia*, that: (i) the unilateral seizure of $35 million by Oak should be credited against disgorgement, as it gave Oak a "double-recovery" which is prohibited by equitable principles limiting disgorgement and not permitting "more than a fair compensation to the person wronged." *Liu*, 140 S. Ct. at 1943; (ii) that shares returned by Mr. Ahmed should offset disgorgement in the C1 and C2 transactions and disgorgement cannot be ordered when the alleged victim does not suffer a loss as that would allow a prohibited "windfall" to the alleged victim; and that (iii) the district court improperly flipped the burden of proof to the Relief Defendants to prove that they were the true owners of their assets and improperly determined the Relief Defendants were nominees simply because Mr. Ahmed originally provided the funds for the assets in question, even though the SEC introduced no evidence that Mr. Ahmed dominated, benefitted from and controlled those assets. The SEC disagreed.

On June 28, 2023, the Second Circuit issued a Decision affirming the district court's denial of an offset of the Seized Assets against disgorgement, stating that the Seized Assets "[are] not an ill-gotten gain from [Mr.

Ahmed's] fraud but rather [were] his *expectancy* to a portion of Oak's profits conferred by [contract]." App. 24. The court of appeals also affirmed the denial of a recalculation of disgorgement for the value of returned shares in both C1 and C2 transactions, stating that Mr. Ahmed "fail[ed] to disclose his conflicts of interest" and that it was irrelevant that the alleged victim "might have gotten a 'bargain' on the share purchase." App. 23-24.

The Second Circuit also concluded that the district court "erroneously shifted the burden to the Relief Defendants to present evidence that they were the true owners of these assets" as "the burden remained with the SEC to prove that [Mr. Ahmed] was the true owner of each asset (or group of similar assets), and the district court should have made specific findings accordingly." App. 50. The Second Circuit vacated and remanded the district court's ruling that the entirety of the Relief Defendants' assets were nominees, with the exception of three assets, specifically "the Iftikar A. Ahmed Family Trust, MetLife Policy, and Fidelity x7540 account." App. 50.

The court of appeals affirmed Mr. Ahmed as equitable owner of: (i) the Iftikar A. Ahmed Family Trust, a spendthrift, irrevocable Trust established for the sole benefit of three minor children with an independent Trustee, based on the district court's "finding[] on the record" that the "Trust was funded and created using [Mr. Ahmed's] money and therefore can be used to satisfy a judgment against him." App. 83 n.21; (ii) the MetLife policy as it is "owned by the Family Trust" *Id.*; and

(iii) Petitioner's x7540 Fidelity Account based on two findings made at the preliminary injunction stage. App. 82 n.19

Petitioner Ms. Ahmed and Mr. Ahmed sought rehearing and rehearing *en banc*, which was denied on October 12, 2023.

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with This Court's Authority on Equitable Limitations Inherent in Disgorgement.

This Court has recently addressed—and invalidated—punitive measures in disgorgement remedies, holding that "a remedy grounded in equity must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Liu v. SEC*, 140 S. Ct. 1936, 1947 (2020).

The issue of limitations on disgorgement in SEC enforcement actions has undergone attention in the last seven years, from this Court's ruling in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) that SEC's disgorgement actions are time-barred as a penalty under 28 U.S.C. § 2462, to this Court's more recent ruling in *Liu v. SEC*, 140 S. Ct. 1936 (2020) that disgorgement must remain within traditional equitable limitations and sit "squarely within the heartland of equity." *Liu* at 1943.

In *Liu*, this Court held that disgorgement must "be deemed to contain the limitations upon its availability that equity typically imposes." *Liu* at 1947. Those limitations are necessary to ensure that disgorgement remains equitable and is not transformed into a penalty.

A. The Decision Below Affirming the Denial of an Offset for Value Returned to the Victim, Conflicts with this Court's Authority that Disgorgement Must Remain Equitable.

The court of appeals' decision affirming the denial of a credit for the Seized Assets cannot be reconciled with this Court's precedent on equitable limitations, which holds that "the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'" *Liu* at 1943 (internal citation omitted). Importantly, this Court explained that a remedy resides in the "heartland of equity" when it "restores the status quo." *Id.*

Here, Oak unilaterally seized $35 million worth of assets for the same underlying conduct at issue in this SEC proceeding. The Second Circuit's reasoning that the "forfeited 'carried interest' is not an ill-gotten gain from [Mr. Ahmed's] fraud but rather was his *expectancy* to a portion of Oak's profits conferred by [contract]" and that "[e]quity does not require an offset for the carried interest, which was contingent on [Mr. Ahmed's] relationship with Oak and was not derived directly from his fraud" runs squarely against this Court's holdings. App. 24.

There should have been an offset for the amounts Oak recovered from Mr. Ahmed as a "forfeiture." As *Liu* explains, "equity never 'lends its aid to enforce a forfeiture or penalty,'" 140 S. Ct at 1941 (quoting *Marshall v. Vicksburg*, 15 Wall. 146, 149 (1873)). Thus, it is improper under this Court's precedents to charge the wrongdoer twice for disgorgement or to provide the victim a double-recovery. But that is precisely what the Second Circuit affirmed.

These carried interests had value—indeed, Oak itself valued them at $35 million and Oak was quick to declare forfeiture and seize these valuable assets. Thus, whether the expectation that the carried interests would later materialize to distributions (they did), is irrelevant in that at the time of forfeiture, these carried interests were valued *by Oak itself* at $35 million. Thus, the appellate court's affirmance plainly contravenes the well-settled "equitable principle," as held by this Court, "that the wrongdoer should not be punished by pay[ing] more than a fair compensation to the person wronged." *Liu*, 140 S. Ct. at 1943. If a defendant returns the value of his unlawful gains to the victim, he has not been "unjustly enriched" by his violations, and an order to return anything more takes disgorgement out of the "heartland of equity" rendering it punitive, and does not "restore[] the status quo." *Liu* at 1943.

This prohibition of a double-recovery is recognized. In *Disraeli v. SEC*, the D.C. Circuit held that, if the wrongdoer already repaid his victim, "such payments will offset his disgorgement obligation." 334

F. App'x 334, 335 (D.C. Cir. 2009). In *In re Sherman*, the Ninth Circuit ruled that the defendant was entitled to an offset equal to the amount paid to the receiver of the estate impacted by his fraud because "the SEC is entitled to seek the disgorgement of ill-gotten gains only for the purpose of preventing unjust enrichment, not as a penalty." 491 F.3d 948, 965 n.19 (9th Cir. 2007). And in *SEC v. Levin*, the Eleventh Circuit determined that if any defrauded investor "does ultimately recover" from the defendant directly—i.e., through a civil claim for damages—the defendant "could petition the court for a reduction in the disgorgement award because the recovery would constitute a partial return of [defendant's] ill-gotten gains." 849 F.3d 995, 1007 (11th Cir. 2017).

Here, Oak unilaterally forfeited and seized assets for the same alleged conduct at issue in this case. The forfeiture of these Seized Assets—themselves worth over $35 million—by the alleged victim should be offset against disgorgement as "returning value to a wronged party satisfies disgorgement dollar-for-dollar" and "a wrongdoer returns 'value' for the purpose of disgorgement whenever he returns property that holds value in his own hands." *SEC v. Govil*, No. 22-1658, at *31 (2d Cir. Oct. 31, 2023). This property—these Seized Assets—worth over $35 million, and earned during the marriage, indisputably held value for both Mr. Ahmed and petitioner Ms. Ahmed.

That these assets were seized pursuant to contract is irrelevant. Specifically, that Oak deemed assets "forfeited" and seized assets is no different than if Oak had

filed a case and obtained a judgment finding Mr. Ahmed had engaged in "Disabling Conduct" and requiring turn-over of the Seized Assets. Clearly, that would require an offset against disgorgement. There is no difference between that situation and Oak's seizure here, and it makes no sense to create such a distinction, which would eviscerate, and allow the government to bypass, this Court's requirement that disgorgement remain equitable and "contain the limitations upon its availability that equity typically imposes." *Liu* at 1947.

This issue is outcome-determinative by over $35 million and the denial of an offset for the Seized Assets renders disgorgement impermissibly punitive and cannot be reconciled with this Court's mandate in *Liu* of equitable limitations on disgorgement in SEC proceedings, which explicitly seeks to prevent actions that transform disgorgement into a penalty.

B. The Decision Below Affirming the Denial of an Offset for Two Transactions, Even with Value Returned to the Victims and No Losses, Conflicts with this Court's Authority that Disgorgement Must Remain Equitable and Be Awarded to Victims.

This Court also emphasized that such an equitable remedy is about "*return[ing]* the funds to victims." *Liu* at 1948 (emphasis added). That presupposes a loss to the victims. Yet, here there was no loss to the alleged victims in two underlying transactions, transactions C1 and C2. However, the appellate court's decision

affirmed the denial of recalculation of disgorgement to account for (i) the return of shares in the two C1 and C2 transactions and (ii) the fact that there was no evidence that the alleged victim paid inflated prices as opposed to fair market value in these transactions.

In both the C1 and C2 transactions, Mr. Ahmed returned shares at or below market value at the time of the transactions and the value of these shares should have been offset against the disgorgement calculation, as instructed by this Court in *Liu* 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.'" *Liu* at 1949-50 (internal citation omitted). However, the appellate court did not even address the return of the shares in its decision, resulting in a conflict with this Court's holdings, and transforming disgorgement into a penalty.

Specifically, in the C1 transaction, Mr. Ahmed exchanged shares valued at $10.9 million for $10.9 million in cash; thus, there is no "gain" to be disgorged in that transaction. In the C2 transaction, Mr. Ahmed received $7.5 million in cash for shares valued by the alleged victim itself at $10.1 million; thus, there is no "gain" to be disgorged and the alleged victim received a windfall of $2.6 million in that transaction.

There is no evidence in the record that the alleged victim paid inflated prices as opposed to market value, and instead the record shows that the alleged victim paid *less* than market value for its shares, already

reaping a bargain at the time of purchase. The appellate court's decision does not restore the status quo, results in a prohibited windfall to the alleged victim, and conflicts with this Court's decision that "the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'" *Liu* at 1943 (internal citation omitted).

This issue is outcome-determinative by millions of dollars and the denial of offsets for the value of the returned shares at the time of the C1 and C2 transactions and the receipt by investors of disgorgement even with no loss at the transactions, does not restore the "status quo," but rather, confers a windfall on those who received the benefit of the bargain. This cannot be reconciled with this Court's precedent of equitable limitations on disgorgement in SEC proceedings, which seeks to prevent actions that transform disgorgement into a penalty.

II. The Decision Below Conflicts with This Court's Authority that Mandates Vacating and Remanding Decisions Made on An Erroneous Basis of Law.

The second question addresses the legal requirements necessary to declare a relief defendant a nominee of a primary defendant such that her assets are deemed equitably owned by the defendant and can be used towards satisfaction of the defendant's SEC judgment.

The SEC aggressively names and goes after relief defendants—innocent litigants who are accused of no wrongdoing, but for the allegation that they may be in possession of alleged ill-gotten gains. But the SEC does not stop there. Rather, the SEC uses its immense powers to try and name the relief defendants and their assets as "nominees" for the primary defendant, such that even legitimately acquired assets owned by, controlled by, and for the benefit of relief defendants only, can be taken by the SEC for satisfaction of the primary defendant's judgment.

The district court deemed Mr. Ahmed the equitable owner of all of the Relief Defendant assets, simply because he brought the bulk of the assets to the family. It did not matter to the district court that these assets were titled to, controlled by, and only for the benefit of the Relief Defendants.

The appellate court vacated and remanded on the nominee finding on almost all of the Relief Defendant assets, finding that "the district court's analysis in support of its conclusion that the Relief Defendants are merely nominal owners of all the frozen assets held in their names was inadequate." App. 44. It recognized that "[t]he district court invoked a six-factor nominee test but did not apply it on an asset-by-asset basis." App. 49

However, the appellate court affirmed nominee status on three discrete Relief Defendant assets: (i) the Iftikar A. Ahmed Family Trust for the sole benefit of three minor children; (ii) the MetLife whole-life

insurance policy owned by the Iftikar A. Ahmed Family Trust; and (iii) Petitioner's brokerage account established for her by her ex-employer.

The appellate court's affirmance of nominee status as to these three Relief Defendant assets conflicts with this Court's precedents that mandate reversal when decisions are made on an erroneous basis of law, and also creates a circuit split on the legal sufficiency needed to satisfy the requirements of the nominee doctrine to conclude certain assets as nominees.

This Court has also long addressed the court of appeals' responsibility when faced with a situation where a district court renders a decision on an erroneous view of the law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (holding that "where findings [of the district court] are infirm because of an erroneous view of the law, a remand is the proper course . . . " and further stating that "[in this situation] the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance"). Here, the appellate court's decision affirming the three Relief Defendant assets as nominees conflicts with this Court's holdings.

The appellate court affirmed the finding of nominee on an irrevocable, spendthrift Trust established for the sole benefit of three minor children with an independent Trustee simply because the district court concluded that Mr. Ahmed "funded and created" the Trust. App. 83 n.21. This sole finding is legally insufficient to

satisfy the requirements of the nominee doctrine to conclude the Trust (and MetLife whole-life insurance Policy owned by the Trust) as nominee, and conflicts with this Court's precedents that warrant a vacatur and remand, or remand, for further factfinding.

This is particularly relevant as a beneficiary has an unquestioned interest in the Trust property and here, the minor children's interests vested in 2009 upon the creation of the Trust. *See* Restatement (Second) of Trusts § 74, Comment a (1959) ("The beneficiary of a trust has an equitable interest in the subject matter of the trust, and in its proceeds if it is disposed of, which gives him priority over the claims of the general creditors of the trustee and over transferees who are not bona fide purchasers."); *see Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 13, 57 S. Ct. 330, 333, 81 L. Ed. 465 (1937) (the beneficiary of a trust is the "owner of an equitable interest in the corpus of the property"); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1625 (2020) (Sotomayor, J., dissenting) (beneficiaries of a trust have an equitable interest in the subject matter of the trust, stating that "the beneficiary "always" has an "equitable" stake").

This Court has similarly held that findings at the preliminary injunction stage are not dispositive at the later merits stage, yet the appellate court affirmed Petitioner's brokerage account as nominee solely based on two preliminary injunction findings. This has provided the SEC a means to bypass the litigation process and conflicts with this Court's holding that "[t]he purpose of a preliminary injunction is merely to preserve

the relative positions of the parties until a trial on the merits can be held. Given this limited purpose . . . it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Here, the court of appeals' decision conflicts with this Court's holding that "[w]e consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948) (vacating and remanding to the district court for "reconsideration and amplification of the record"). Also, as "[t]his factual issue was dispositive of the case . . . it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing . . . factfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *Demarco v. U.S.*, 415 U.S. 449, 450 (1974). Conclusions made on an erroneous view of the law with incomplete facts have been rejected by this Court.

Other circuit courts also determine nominee status on a well-developed record with multiple factors and not just one factor. *Dalton v. Comm'r of Internal Revenue*, 682 F.3d 149, 158 (1st Cir. 2012) (stating

"[v]irtually without exception, courts focus on the totality of the circumstances," and no single factor is dispositive) (discussing multiple factors for determining nominee status); *Berkshire Bank v. Town of Ludlow*, 708 F.3d 249 (1st Cir. 2013) (finding facts on all eight factors of eight-factor nominee test on well-developed factual record); *Fourth Investment LP v. U.S.*, 720 F.3d 1058 (9th Cir. 2013) (reviewing facts on all six factors of six-factor nominee test); *Spotts v. U.S.*, 429 F.3d 248, 253 n.2 (6th Cir. 2005) (acknowledging six-factor test and reversing for application of state law in determining nominee status); *U.S. v. Bogart*, No.15-2363 (3d Cir. Oct. 27, 2017) (discussion of application of all seven factors to determine nominee status).

Here, the court of appeals' decision affirming nominee status on findings not legally sufficient to satisfy the requirements of the nominee doctrine—specifically, on the one finding that Mr. Ahmed "funded and created" the minor children's Trust and on the two preliminary injunction findings on Petitioner's brokerage account—raises a circuit split, interferes with Relief Defendants' constitutional ownership rights in their assets and was made on an erroneous view of the law, all which are against this Court's precedents.

This issue impacts all relief defendants in SEC enforcement proceedings and is outcome-determinative, as the SEC has already deemed the minor children's irrevocable, spendthrift Trust and MetLife life insurance Policy, as well as Petitioner's brokerage account, as assets equitably owned by Mr. Ahmed that can be used to satisfy his judgment, and has precluded the

minor children and Petitioner from any use of or benefit from these assets. This cannot be reconciled with this Court's precedents on constitutional ownership rights, due process requirements, and decisions made on infirm findings on an erroneous basis of law.

III. The Decision Below Raises Issues of Exceptional Importance as To The Government's Ability to Avoid Judicial Scrutiny of Its Disgorgement Calculations and Application of the Nominee Doctrine.

This case presents questions of exceptional importance—whether the government can insulate (i) its disgorgement calculations that transform disgorgement into a penalty and (ii) its application of the nominee doctrine stripping relief defendants from their constitutional ownership rights, from judicial scrutiny.

The SEC routinely brings enforcement actions seeking disgorgement as a form of equitable relief. *See SEC v. Pardue*, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005) ("Disgorgement has become the routine remedy for a securities enforcement action."). The SEC aggressively calculates disgorgement, and the defendant shoulders the burden of showing that the SEC's estimate is unreasonable. That gives the SEC significant leverage to dictate what it alone deems can and cannot be offset against disgorgement and allows the SEC to circumvent this Court's explicit holding in *Liu* that "a remedy grounded in equity must, absent other indication, be

deemed to contain the limitations upon its availability that equity typically imposes." *Liu* at 1947.

The SEC also routinely names relief defendants in enforcement actions, in an effort to collect those billions of dollars of disgorgement, even though relief defendants are innocent litigants who have been accused of no wrongdoing. The SEC aggressively goes after relief defendant assets, seeking to name relief defendants as nominees of the defendant on a paucity of evidence, even though it is well-established that a nominee finding stripping a relief defendant of her constitutional ownership rights in her assets cannot be made on just one or two facts.

The implications of the SEC's position are particularly severe because the disgorgement calculations and application of nominee determination extend to current and future enforcement cases.

Notwithstanding this Court's view that disgorgement must remain within traditional equitable limitations and sit "squarely within the heartland of equity," *Liu* at 1943, the SEC has refused to consider payments that should be offset against this disgorgement calculation, rendering disgorgement impermissibly punitive.

Under the SEC's approach, there is a limit to what can be offset against disgorgement, and it alone can determine that limit. It is of no matter if that limit transforms disgorgement into a penalty. The government has employed this approach even though it is

clearly against the mandated limitations in equitable remedies.

Nor does it matter if a relief defendant asset is titled to, controlled by, or for the benefit of that relief defendant, because if the primary defendant contributed funds—even legitimate funds—to that asset, it would be equitably owned by him and used to satisfy the SEC's judgment. This is impermissible and against relief defendants' constitutional rights in their assets, as well as their due process rights to a full and fair determination on the merits.

Under the SEC's approach, any relief defendant asset, even if established legitimately, and titled to, for the benefit of and controlled by the relief defendant, could be seized simply on one aspect of the six-factor nominee doctrine, with no ability for the relief defendant to contest that determination.

Indeed, the SEC has raised this very narrow and unconstitutional application to urge the district court to deem every single one of the remaining relief defendant assets as nominees, though they are indisputably titled to, controlled by, and benefit the relief defendants. Such extends to future enforcement cases wherever there is a relief defendant joined in the enforcement proceeding.

The SEC advocates for an abdication of the Court's duty to safeguard the constitutional ownership rights of litigants, even though these litigants may be innocent relief defendants. This Court should not turn a blind eye to the indiscriminate and unconstitutional

use of the nominee doctrine by the SEC to strip innocent relief defendants of their constitutional ownership rights in their assets.

IV. The Court Should Take This Opportunity to Clarify Disgorgement Calculations and Whether the Government May Deem a Relief Defendant a Nominee on Findings Not Legally Sufficient to Satisfy the Nominee Doctrine.

This petition presents an apt opportunity for the Court to clarify that governments are not immune from judicial scrutiny on the calculation of disgorgement and from constitutional scrutiny regarding the legal sufficiency required to deem a relief defendant a nominee, to the immediate benefit of the thousands of defendants and relief defendants who are in cases with the SEC each year.

First, the judgment here transforms disgorgement into a penalty and value returned to an alleged victim must be offset against disgorgement to remain within traditional equitable limitations, especially as "[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.'" *Liu* at 1949-50 (internal citation omitted). Here, the Seized Assets and return of shares in two transactions—worth tens of millions of dollars in aggregate—were not taken into account, presenting a prime case of the exact harm that results when the

SEC unilaterally determines what can or cannot be offset against disgorgement.

Furthermore, victims who have suffered no pecuniary harm are not entitled to disgorgement, as that would "not be restoring the status quo for those investors [but rather] . . . would be conferring a windfall on those who received the benefit of the bargain." *SEC v. Govil*, No. 22-1658, at *22 (2d Cir. Oct. 31, 2023). This takes the disgorgement remedy outside the "heartland of equity." *Liu* at 1943. Here, there was no loss in either the C1 or the C2 transactions, yet disgorgement was affirmed for these two transactions, further transforming disgorgement into a penalty.

Second, the judgment here renders the relief defendant assets as nominees for the primary defendant on an erroneous view of the law with findings not legally sufficient to satisfy the requirements of the nominee doctrine and creates a circuit split on the legal sufficiency of findings required. The relief defendants have a constitutional ownership right in their assets and the legal insufficiency of determining nominee status does not satisfy the requirements of due process, especially as this Court has consistently held that depriving litigants of their ownership and constitutional rights in their property without due process of law violates the Due Process Clause, as "[t]he Due Process Clause of the Fifth Amendment prohibits the United States . . . from depriving any person of property without 'due process of law.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (internal citation omitted). The "[Due Process] Clause centrally concerns the

fundamental fairness of governmental activity." *North Carolina Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219 (2019) (citation and quotation marks omitted).

Most relief defendants are spouses and/or minor children who do not pursue higher judicial review simply because they do not have the funds to retain counsel to do so, simply want to end the case, or have no ability to continue to seek higher review.

Third, the instant case presents a rare opportunity to ensure that government calculations of disgorgement do not evade judicial review and are consistent with this Court's holdings mandating that disgorgement must remain within traditional equitable limits. This instant case is also applicable to relief defendants, who are divested of their constitutional ownership rights in their assets simply because they are related to the primary defendant. Relief Defendants, who are accused of no wrongdoing, usually want to move on with their lives and do not bring cases for higher judicial review because they cannot afford to litigate. Under such circumstances, such judgments are rarely subject to review on appeal or by this court. That means the Court will be presented with few opportunities to weigh in on the questions that this petition presents of proper calculation of disgorgement to remain within equitable limits and whether the government may seize relief defendant assets under a legally insufficient analysis of the nominee doctrine.

Fourth, granting review will provide meaningful guidance to not only the SEC—which currently maintains that only the return of ill-gotten gains can be offset against disgorgement as opposed to the return of any asset of value, that it does not matter if the alleged victim does not suffer pecuniary harm, and that a proper analysis under the nominee doctrine is not required to deem a relief defendant asset a nominee—but also to the hundreds of defendants and thousands of relief defendants who deal with SEC proceedings and who may lack the resources to fight the SEC's charge or challenge the SEC's aggressive practices in calculating disgorgement and deeming assets as nominees. Such guidance will extend beyond this instant case to all SEC proceedings.

Lastly, there are no vehicle problems that would prevent this Court from resolving the questions presented. If the Second Circuit had adhered to the equitable limitations in the calculation of disgorgement and vacated and remanded on the three Relief Defendant assets at issue here, it would not have allowed an order increasing disgorgement by tens of millions and deeming these three Relief Defendant assets—themselves worth over $25 million—as nominees. These issues are therefore outcome-determinative and applicable across multiple SEC enforcement actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX