No. 24-949

In the Supreme Court of the United States

NAVELLIER & ASSOCIATES, INC., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in seeking an order requiring registered investment advisers to disgorge profits obtained through fraud, the Securities and Exchange Commission (SEC) must show that the adviser's clients suffered pecuniary harm.

2. Whether the court of appeals applied the correct materiality standard in affirming the district court's award of summary judgment to the SEC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 108 F.4th 19. The district court's memorandum and order (Pet. App. 46a-74a) and amended disgorgement findings of fact and conclusions of law (Pet. App. 94a-116a) are available at 2020 WL 731611 and 2021 WL 5072975.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2024. A petition for rehearing was denied on October 2, 2024 (Pet. App. 44a-45a). On December 27, 2024, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including January 30, 2025. On January 23, 2025, Justice Jackson further extended the time to and including March 1, 2025. The petition was filed on March 3, 2025 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) sued petitioners for violating Section 206 of the Investment Advisers Act of 1940 (Advisers Act or Act), ch. 686, Tit. II, 54 Stat. 852 (15 U.S.C. 80b-1 *et seq.*), which establishes fiduciary standards for investment advisers and prohibits advisers from defrauding their clients. See 15 U.S.C. 80b-6(1) and (2). The U.S. District Court for the District of Massachusetts granted summary judgment to the Commission and ordered petitioners to disgorge their wrongful profits. Pet. App. 46a-74a. After the court of appeals remanded the case in light of this Court's intervening decision in *Liu* v. *SEC*, 591 U.S. 71 (2020), the district court entered an amended disgorgement award. Pet. App. 94a-116a. The court of appeals affirmed. *Id.* at 1a-43a.

1. Petitioner Louis Navellier is the founder, Chief Executive Officer, and Chief Investment Officer of petitioner Navellier & Associates, Inc., a registered investment advisory firm. See Pet. App. 3a; 15 U.S.C. 80b-2(a)(11), 80b-3(a) (providing that certain persons who engage in the business of advising others about securities investments must register as investment advisers). In 2009, petitioners licensed certain investment strategies from another investment adviser, F-Squared. See Pet. App. 8a. Petitioners then recommended those strategies to clients, touting F-Squared data ostensibly showing that the strategies had helped other investors avoid the previous two bear markets, including the then-recent Great Recession. See *id.* at 10a-11a.

Petitioners understood, however, that F-Squared's data did not reflect actual, historical trades. See Pet.

App. 8a-10a. The data instead showed, with the benefit of "hindsight," how "hypothetical" investors would have performed if they had used the strategies. *Id.* at 25a. Navellier acknowledged in emails that F-Squared had provided "a bogus spreadsheet"; that its strategies "smell[ed] like pure FRAUD"; that the strategies' past performance was "just made up and pure FRAUD"; and that, "when the lies become evident," his firm would be put "out of business." *Id.* at 8a-10a.

In August 2013, petitioners sold the strategies and associated client accounts back to F-Squared. See Pet. App. 12a. Navellier told employees that the sale was intended "to clean up the mess" from the "obvious fraud." *Ibid.* (brackets omitted). But petitioners did not inform their clients that petitioners' representations about the strategies' past performance did not reflect actual trades. See *id.* at 13a. Nor did petitioners inform clients that petitioners were selling the business to a buyer that they believed had committed fraud. See *ibid.*

2. In 2017, the SEC sued petitioners in federal district court, alleging that they had violated Section 206 of the Advisers Act and its implementing regulations. See Pet. App. 14a, 55a. The court granted summary judgment to the Commission, holding that petitioners had violated Section 206. *Id.* at 46a-74a. The court enjoined petitioners from violating Section 206, imposed civil penalties, and ordered petitioners to disgorge their ill-gotten gains. See *id.* at 76a-81a.

Petitioners appealed, and the court of appeals granted the Commission's motion for a limited remand to permit the district court to reassess the disgorgement award in light of this Court's intervening decision in *Liu*. See Pet. App. 16a. On remand, the district court entered an amended disgorgement award of $22,734,487 plus prejudgment interest. *Id.* at 94a-115a. Consistent with *Liu*, that sum reflected petitioners' profits from their violations of the law. See *id.* at 104a-106a.

3. The court of appeals affirmed. Pet. App. 1a-43a.

Petitioners contended that the SEC was not entitled to summary judgment because there were genuine factual disputes about whether petitioners' misrepresentations were material. The court of appeals rejected that contention. See Pet. App. 23a-26a. The court explained that a misrepresentation is material "if there is a substantial likelihood that a reasonable investor would consider [it] important" in making an investment decision. *Id.* at 24a (citation and emphases omitted). A reasonable investor, the court continued, would find it important that the investment strategies' "performance figures" were "hypothetical" and were not "based on actual trades." *Id.* at 24a-25a. The court noted that the SEC had previously alerted Navellier's firm to the necessity of disclosing whether past-performance figures were based on actual trades, and that "Navellier himself acknowledged the importance of this disclosure" in the firm's internal emails. *Id.* at 26a. The court concluded that the importance of the misrepresentation was so clear that summary judgment for the Commission was warranted. See *ibid.*

The court of appeals also affirmed the disgorgement award. See Pet. App. 32a-41a. Petitioners argued that the SEC could not obtain disgorgement here because petitioners' clients "did not suffer pecuniary harm." *Id.* at 33a. The court rejected that argument, explaining that *Liu* does not "require investors to suffer pecuniary harm as a precondition to a disgorgement award." *Id.* at 33a n.14. The court also determined that, in any event, petitioners' clients *were* harmed because petitioners' misrepresentations had "induced [them] into paying advisory fees." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 14-18) that a district court may award disgorgement to the SEC only if the SEC proves that the defendant's wrongdoing caused pecuniary harm to investors. They also contend (Pet. 18-28) that the evidence created a genuine dispute as to the materiality of petitioners' misrepresentations, and that the district court accordingly should not have granted summary judgment to the Commission. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court. Contrary to petitioners' suggestion, the decision below also does not implicate any circuit conflict that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioners' challenge to the disgorgement award does not warrant further review.

a. Congress has authorized the SEC to seek, and district courts to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). In *Liu* v. *SEC*, 591 U.S. 71 (2020), this Court held that the equitable relief authorized by that provision includes disgorgement—*i.e.*, an order requiring a wrongdoer to surrender profits gained through violations of the securities laws. After this Court issued its decision in *Liu*, Congress enacted an amendment that specifically authorizes the Commission to seek, and district courts to grant, "disgorgement" of "any unjust enrichment" received "as a result of [a] violation." 15 U.S.C. 78u(d)(3)(A)(ii) (Supp. III 2021); see 15 U.S.C. 78u(d)(7) (Supp. III 2021).

The court of appeals correctly determined that an award of disgorgement under those provisions does not require a showing that investors suffered pecuniary harm. Disgorgement is a "profits-focused remedy" that rests on the principle that a wrongdoer should not "'make a profit out of his own wrong.'" *Liu*, 591 U.S. at 80, 90 (citation omitted). While damages "compensate the victim for [a] loss," disgorgement deprives a wrongdoer of "ill-gotten profits." *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 580 U.S. 328, 341-342 (2017). The availability of disgorgement therefore turns on whether the violator has made a profit, not on whether the victim has suffered a loss. A court may order a wrongdoer to disgorge wrongful profits "even if the transaction produce[d] no ascertainable injury to the claimant." Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. d (2011).

Petitioners' contrary argument is especially inapt because this case arises out of their violation of fiduciary duties. See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (explaining that investment advisers owe fiduciary duties to their clients). "The duties of a fiduciary are among the most important known to the law, it is indispensable that there be some sanction for their breach, and often the only effective sanction is restitution in favor of the principal of gains realized by the fiduciary." 1 George E. Palmer, *The Law of Restitution* § 2.12, at 330 (3d ed. 2020). It is "a well settled rule" that a fiduciary may be held liable for profits gained in breach of a fiduciary duty and that "[i]t makes no difference that the [client] was not a loser in the transaction." *Magruder* v. *Drury*, 235 U.S. 106, 119-120 (1914).

Petitioners argue (Pet. 14-17) that *Liu* permits a court to award disgorgement only to "victims," and that an investor who has suffered no pecuniary harm cannot be a "victim." That contention lacks merit. In *Liu*, this Court observed that equitable relief awarded under Section 78u(d)(5) must be "appropriate or necessary for the benefit of investors." 591 U.S. at 75 (quoting 15 U.S.C. 78u(d)(5)). The Court interpreted that phrase to mean that, where feasible, proceeds recovered through disgorgement generally must be "disbursed to known victims" rather than deposited in the Treasury. *Id.* at 88. The disgorgement award in this case complies with that rule; the district court found that "[t]he Commission intends to distribute to [petitioners'] clients any disgorgement awarded." Pet. App. 102a; see D. Ct. Doc. 361 (Sept. 21, 2021) (district court's ruling that "the SEC will return [petitioners'] gain to wronged investors"). Petitioners read *Liu*'s reference to "victims" to require a showing of pecuniary harm, but "the language of an opinion is not always to be parsed as though [a court] were dealing with the language of a statute." *Brown* v. *Davenport*, 596 U.S. 118, 141 (2022) (brackets and citation omitted).

b. Petitioners' argument also fails on its own terms because their clients *did* suffer pecuniary harm. The district court found that petitioners' "victim clients" had suffered "harm" because petitioners had "fraudulently induced [them] to become" clients and to "pa[y] investment advisory fees" totaling "$22,775,867." Pet. App. 102a, 104a-105a, 110a. The court of appeals, too, determined that petitioners' clients had suffered harm because "they were induced into paying advisory fees," and that the disgorgement award "will remedy a direct harm to [petitioners'] clients." *Id.* at 34a n.14.

Petitioners contest (Pet. 17 & n.2) those holdings of the courts below, arguing that their clients "lost no advisory fees" and that "[t]here was no evidence that [the] clients were 'induced' * * * to pay advisory fees in reliance on the alleged misrepresentation." But that factbound contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is especially so when, as here, the court of appeals and district court have drawn the same factual conclusion from the record. See, *e.g.*, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975) (explaining that, under the "'two-court rule,'" this Court usually does not disturb "findings of fact" that were "concurred in by both the District Court and the Court of Appeals") (citation omitted).

c. Petitioners argue (Pet. 14-17) that the decision below conflicts with the Second Circuit's decision in *SEC* v. *Govil*, 86 F.4th 89 (2023). The defendant in that case had engaged in fraud when selling shares in his company to potential investors. See *id.* at 94-95. The Second Circuit determined that the SEC could recover disgorgement only if "the investors suffered pecuniary harm as a result of the fraud." *Id.* at 94. The *Govil* court accordingly remanded to allow the district court to determine whether the defrauded investors in that case had suffered pecuniary harm, in light of conflicting evidence that the parties had presented on that issue. *Id.* at 104 n.16, 111.

Although the decision below is in tension with *Govil*, the two decisions do not squarely conflict. This case involves registered investment advisers who defrauded their clients, while *Govil* involved a seller who defrauded potential buyers when offering securities.

The *Govil* court also reasoned that, if the defrauded investors had pursued individual damages claims under the securities laws or for "common-law deceit and misrepresentation," the investors would have been required to show "pecuniary loss." See 86 F.4th at 104-105. The court believed that permitting the SEC to seek disgorgement without making a similar showing would improperly allow the SEC to "circumvent the limitations on private claims." *Id.* at 105. That concern is misplaced.

The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, imposes on private securities-fraud "plaintiffs 'the burden of proving' that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. 78u-4(b)(4)). But the PSLRA's limitations apply only in "private action[s]" to recover "damages." 15 U.S.C. 78u-4(b)(4). By contrast, the securities-law provisions that authorize disgorgement of unjust enrichment and equitable relief in Commission enforcement actions do not require proof of pecuniary harm. 15 U.S.C. 78u(d)(3) and (5); see *Kokesh* v. *SEC*, 581 U.S. 455, 463 (2017) ("When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties.").

d. Petitioners also highlight (Pet. 17-18) a separate circuit conflict about the effect of the amendment that Congress enacted after *Liu*. The Fifth Circuit has held that, by specifically authorizing "disgorgement," 15

U.S.C. 78u(d)(3)(A)(ii) and (7) (Supp. III 2021), the post-*Liu* amendment creates a distinct legal remedy that is not constrained by the equitable limits identified in *Liu*. See *SEC* v. *Hallam*, 42 F.4th 316, 338-341 (2022). By contrast, the Second Circuit has concluded that the amendment authorizes an equitable remedy that incorporates the equitable limits recognized in *Liu*. See *Govil*, 86 F.4th at 101-102. But the court of appeals did not address that issue; the court instead assumed that *Liu*'s standards do apply and held that the disgorgement award in this case satisfies them. See Pet. App. 32a-41a.

2. Petitioners' challenge to the court of appeals' analysis of materiality does not warrant further review.

Section 206 of the Advisers Act makes it unlawful for an investment adviser to "employ any device, scheme, or artifice to defraud any client or prospective client," or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. 80b-6(1) and (2). "[T]he well-settled meaning of 'fraud' require[s] a misrepresentation or concealment of *material* fact." *Neder* v. *United States*, 527 U.S. 1, 22 (1999). In fraud suits brought by the SEC, "[t]he question of materiality * * * is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 445 (1976). Under that standard, "[t]he Commission, unlike private parties, need not show reliance in its enforcement actions." *Lorenzo* v. *SEC*, 587 U.S. 71, 84 (2019). The Commission instead must show "a substantial likelihood that a reasonable shareholder would consider [the omitted or misrepresented fact] important." *TSC Industries*, 426 U.S. at 449; see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 (1988) ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.").

The court of appeals properly applied that test here. It explained that "[o]missions are material 'if there is a substantial likelihood that a reasonable investor would consider them important in' making an investment decision." Pet. App. 24a (brackets, citation, and emphases omitted). It then concluded that summary judgment was warranted because petitioners' omissions were "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality." *Ibid.* (brackets and citation omitted).

Petitioners urge (Pet. 6-7) this Court to "abrogate or correct" its materiality precedents and to require the SEC to prove that "investors actually relied on the misrepresentation." But they provide no sound reason to think that this Court's decisions have misinterpreted the law. Nor do they discuss the doctrine of statutory *stare decisis* or identify any "special justification" for overruling precedent. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted). They contend (Pet. 7) that this Court's precedents on materiality are "unfair" because they make it too easy for courts to award summary judgment to the SEC; but that policy argument does not establish that the Court's decisions were legally wrong, much less that they should be overruled.

Petitioners also argue (Pet. 6) that the district court should not have granted summary judgment to the SEC because petitioners purportedly provided "affirmative investor evidence of non-reliance." As discussed above, however, materiality turns on an "objective" inquiry into whether a "reasonable investor" would consider the misrepresented fact important, not on a subjective inquiry into actual reliance or non-reliance by particular investors. *TSC*, 426 U.S. at 445. Indeed, this Court has identified, as a salient difference between private securities-fraud suits and Commission enforcement actions, that a private plaintiff must show reliance but the SEC need not. See *Lorenzo*, 587 U.S. at 84 ("The Commission, unlike private parties, need not show reliance in its enforcement actions."); cf. *Neder*, 527 U.S. at 24-25 (explaining that, although the government in a criminal fraud prosecution must prove materiality, "[t]he common-law requirements of 'justifiable reliance' and 'damages[]' * * * plainly have no place in the federal [criminal] fraud statutes."). That principle would be substantially undermined if a defendant's proof of investor non-reliance could prevent the Commission from establishing materiality.

In any event, petitioners did not provide affirmative evidence of investor non-reliance. The court of appeals considered the proffered evidence and found that it did not create a genuine dispute as to materiality because it described only how information about the investment strategies was "presented to potential clients, not how those potential clients themselves considered the statements at issue when choosing to [invest] their money." Pet. App. 25a. Petitioners' fact-bound challenge to the court's assessment of that evidence does not warrant further review. See Sup. Ct. R. 10; *Johnston*, 268 U.S. at 227.

3. Petitioners raise (Pet. 24-26) a slew of additional objections to the court of appeals' decision. They argue (*ibid.*) that the court violated their "rights to due process and a jury trial," misapplied "collateral estoppel," "inverted" the "burden of proof," incorrectly "weighed" the "evidence," miscalculated the "amounts" to be dis-

gorged, wrongly "upheld liability against" Navellier, and erroneously rejected petitioners' "selective enforcement defense." Because those contentions all lie outside the scope of the questions presented (Pet. i), and because petitioners do not meaningfully develop them in the body of the petition for a writ of certiorari, those arguments are not properly before the Court. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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