No. 24-949

IN THE

Supreme Court of the United States

NAVELLIER & ASSOCIATES, INC. *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

REPLY BRIEF

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CERTIORARI SHOULD BE GRANTED

Certiorari should be granted because this is an important securities law case—probably the most important investment advisor liability case since *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed.2d. 757 (1976). Certiorari is needed to resolve the undisputed conflict between the Second Circuit and the First Circuit on the important, recurring issue of whether federal courts have the authority to award monetary disgorgement for investor clients who suffered no pecuniary harm as a result of their investment advisor's purported fraud. Certiorari is needed to restore uniformity in the law to be applied by the federal courts.

The Solicitor General does not dispute the importance of this recurring issue. Nor can he dispute that a fundamental conflict exists between the Circuit Courts of Appeals on this fundamental issue. Instead, he argues that the Second Circuit's decision in *SEC v. Govil* 86 F.4th 89 (2nd Cir. Dec. 31, 2003) is wrong and that the First Circuit's decision below is correct. But that is precisely why certiorari should be granted—so this Court can resolve the conflict on this important issue and bring uniform standards to the federal courts regarding their lack of authority to award disgorgement for securities anti-fraud violations where the investor client "victims" suffered no pecuniary harm.

I. A Conflict Exists Between the Circuit Courts of Appeals Which Requires Resolution By This Court

The Solicitor General argues that "the [First Circuit's] decision below . . . does not implicate any circuit conflict."

(ROB[1], p. 5) Despite the decision below being in "*tension*" with *Govil*, the Solicitor General argues that the two decisions do not "squarely conflict". (ROB, p. 8) Of course, they do. That argument is disingenuous at best. There is a clear, undeniable conflict between the Second Circuit's decision in *Govil* and the First Circuit's decision below on whether the SEC can seek and whether federal courts can award monetary disgorgement where the purported investor client "victims" suffered no *pecuniary* harm.

The Second Circuit Court of Appeals, in *SEC v. Govil* 86 F.4th 89, 98, 103 (2023), repeatedly and convincingly held that the SEC cannot seek monetary disgorgement, and that federal courts have no authority to award monetary disgorgement, where, as here, the client "victims" suffered no *pecuniary* harm.

The First Circuit in this case explicitly disagreed with the Second Circuit's holding in *Govil* and held that "Neither *Liu* nor our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award." *SEC v. Navellier & Associates, Inc.* 108 F.4th 19, 41 n. 14 (1st Cir. 2025).

The Solicitor General argues that while the First Circuit decision in this case "is in *tension* with *Govil*, the two decisions do not *squarely* conflict." (ROB, p. 8) Yes, they do. And it is a fundamental conflict.

The Second Circuit emphatically holds that courts cannot award monetary disgorgement if the purportedly

1. "ROB" refers to the SEC's Brief for the Respondent in Opposition filed May 5, 2025.

"defrauded" investor clients suffered no *pecuniary* harm. *Id.* at 98. The First Circuit holds that federal courts *can* award disgorgement for purportedly defrauded investor clients who suffered no pecuniary harm.

Instead of acknowledging the circuit conflict and their differing constructions of *Liu v. SEC* 591 U.S. 71, 88-90 (2020), the Solicitor General argues (ROB, p. 6) that the Second Circuit's holding is wrong because disgorgement is a "profits-focused remedy" that rests on the principle that "a wrongdoer should not make a profit out of his own wrong". However, that is an incomplete quote, misleadingly and incompletely citing *Liu* 591 U.S. at 80-90. As the Second Circuit, in *Govil*, correctly explained, this Court (in *Liu* 591 U.S. 88-90), rejected the penalty aspect of disgorgement as it evolved prior to *Liu* and held that the government's argument—that the primary function of the remedy of disgorgement is to deny the wrongdoer the fruits of ill-gotten gains—was incorrect. As this Court explained:

> But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by . . . depriving the wrongdoer of ill-gotten gains . . . the [§78u(d)(5)] phrase "appropriate or necessary for the benefit of investors" must mean somethingmore than depriving a wrongdoer of his net profits alone . . .
>
> [Section] 78u(d)(5) does not, after all, authorize 'equitable relief' *at large*." [emphasis in original]

Thus, this Court, in *Liu* 591 U.S. at 75, held that—for a disgorgement award to be authorized under §§78u(d)(5), the award cannot exceed a wrongdoer's net profits *and* is awarded for victims.

Based on *Liu*, the Second Circuit, in *Govil*, explained (86 F.4th 89 at 102-103) that a remedy resides in the "heartland of equity" when it "restores the status quo" (citing *Liu* 140 S. Ct. at 1943) and that if "victim" "include[d] defrauded investors who suffered no pecuniary harm—and thus allowed those investors to receive the proceeds of disgorgement—we would not be restoring the status quo for those investors. We would be conferring a windfall on those who received the benefit of the bargain." *Govil* 86 F.4th at 103.

The Second Circuit went on to explain that "by requiring that disgorgement under §78u(d)(5) be awarded for "victims", the *Liu* Court sought to bring disgorgement within equitable bounds. "When disgorgement is awarded to an investor who suffered no pecuniary harm, the remedy does not aim to restore the status quo at all." *Govil* 86 F.4th at 103, n. 14

That is why the *Liu* Court emphasized that such an equitable remedy is about "*return*[*ing*] [emphasis in original] the funds to victims." Govil 86 F.4th at 103. The *return* [emphasis in original] of funds presupposes pecuniary harm. . . . "Funds cannot be returned if there was no deprivation in the first place." *Govil* 86 F.4th at 103.

II. First Circuit Conflict With this Court's *Liu* Decision

The First Circuit's decision—that equitable disgorgement can be awarded to investors who suffered no pecuniary harm—conflicts with not only the Second

Circuit's decision in *Govil* but also conflicts with and flies in the face of this Court's holding in *Liu*—that equitable disgorgement must be for "*victims*".

If this Court confirms that the Second Circuit is correct (it is), then the SEC will be rightly prevented from continuing its unauthorized practice of bringing enforcement actions seeking monetary disgorgement when the supposed "victim" suffered no pecuniary harm. The SEC's zealous governmental overreach has resulted in hundreds of disgorgement cases and disgorgement settlements where the SEC has recouped hundreds of millions (billions) of windfall dollars in "discouragement" "for" investors who suffered no pecuniary harm and/or where the millions/billions of dollars went into the Treasury, not to the supposedly defrauded "victims".

In this case (and 20 related SEC enforcement cases) alone, the SEC has coerced millions of dollars in "settlements" from twenty other investment advisory firms who licensed F-Squared's various index investment strategies, and whose investor clients suffered no pecuniary harm.

This Court's grant of certiorari will prevent the SEC's current forum shopping and conflicting federal court decisions and put a halt to the SEC's unauthorized disgorgement "enforcement".

III. No Victims, No Disgorgement—No Pecuniary Harm to NAI Vireo Clients

The Solicitor General argues that certiorari should not be granted because even if *pecuniary* harm is a prerequisite for being awarded disgorgement, NAI's Vireo clients *were* "harmed" by paying investment advisory fees, even though all those investment advisory fees were returned to them, and $221 Million more.

The Solicitor General misleadingly argues, as the First Circuit did (108 F.4th 19 at 41, n. 14), that Navellier & Associates, Inc.'s ("NAI's") investor/clients "*did* suffer *pecuniary* [emphasis added] harm" because the First Circuit "determined that petitioners' clients had suffered "*harm*" [emphasis added] because "they were induced into paying advisory fees" and thus, a disgorgement award "will remedy a direct *harm* to [Petitioners'] clients." (ROB, pp. 4-5) Notwithstanding the Solicitor General's and the First Circuit's "slight of words", interchanging "harm" for "pecuniary harm", the conflict that needs to be resolved is ***not*** whether investors who were somehow supposedly "harmed" by supposedly being told a lie[2] can be awarded disgorgement. The conflict, which needs to be resolved by a grant of certiorari here, is whether investors who suffered no *pecuniary* harm can be awarded monetary disgorgement. They cannot.

The Second Circuit, in Govil 86 F.4th at 104-105, quickly rejected the SEC's same "harm" argument, i.e., being falsely induced to pay $7.3 Million, which is later returned, is not being *pecuniarily* harmed. See also *Ciminelli v. United States* 143 S. Ct. 1121, 1125 (2023).

2. NAI's Vireo clients were not lied to. NAI's statements were indisputably true. Despite the First Circuit's "finding" of fraud, there was no admissible evidence that NAI's statements were false. All the evidence (Jay Morton's admission (Appendix M, p. 174a–Appendix N, p. 176a), etc.) established that NAI's statements were true. Therefore, the investors were not defrauded. *Thompson v. U.S.* 145 S. Ct. 821, 826 (2025)

Here, NAI's Vireo clients were not *pecuniarily* harmed by supposedly being falsely induced to pay NAI investment advisory fees. Contrary to the First Circuit's conclusory holding, awarding money to investors who suffered no monetary (pecuniary) harm does *not*, as the Solicitor General argues (ROB, p. 7), "remedy a direct harm to [Petitioners'] clients." They lost no money. Their investment advisory fees were returned to them, plus $221 Million in net profits. They suffered no pecuniary harm. Money will not remedy a monetary loss they did not suffer. Govil 86 F.4th at 103

On the contrary, a monetary disgorgement award will only provide those pecuniarily *unharmed* investor clients with a $29 Million[3] *windfall* and will punish Petitioners, who performed as promised and *made* money for NAI's clients.

IV. Certiorari Should Be Granted to Clarify and Correct the Guidelines for Determining Materiality of "Fraudulent" Representation

Certiorari should be granted to clarify that an alleged misrepresentation or omission cannot be determined to be "material" by summary judgment where there is affirmative investor evidence that investors did not rely on, i.e., did not consider the alleged misrepresentation or

3. The disgorgement award of $23 Million in supposed investment advisory fees and $6 Million in interest thereon consisted of $9 Million in net advisory fees and $14 million NAI received, not from clients for investment advisory fees, but from F-Squared, for NAI's sale of its Vireo business goodwill to F-Squared. The clients did not pay $14 million to NAI. F-Squared paid it. Therefore, the *clients* did not suffer $14 million of pecuniary harm.

omission to be important. *Basic Inc. v. Levinson* 485 U.S. 224, 252 (1988) (White, J., concurring and dissenting); *Zweig v. Hearst Corp.* 594 F.2d. 1261, 1272 (9th Cir. 1979) (Ely J., dissent)

In *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed.2d. 757 (1976), the Court resolved the circuit court split, on determining the materiality of a misrepresentation or omission, by setting the guideline at not what a reasonable shareholder *might* consider important but rather, at a substantial likelihood that a reasonable shareholder *would* consider the misrepresentation or omission important, in making his/her investment decision. But the resolution did not go far enough in setting a guideline for determining materiality.

The Court acknowledged that what a reasonable shareholder would consider material, i.e., important, is a mixed question of law and fact. *Id* at 450. Even if the facts are not in dispute, the materiality determination "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of these inferences to him, and these assessments are peculiarly ones for the trier of fact." *Id.* at 450 "In an analogous context, the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment in negligence cases." *Id.* at 450, n. 12.

"Only if the established omission is 'so obviously important to an investor that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality resolved 'as a matter of law' by summary judgment." *Id.* at 450.

The *TSC* "standard" for materiality has been misconstrued and stretched to the point that courts, such as the First Circuit in this case, hold that *they* can determine by summary judgment, materiality, even if there is affirmative evidence disputing materiality in the form of investors' testimony of non-reliance on the misrepresentation or omission (i.e., that the misrepresented or omitted fact was unimportant to and/or not relied upon by investors).

But such investor non-reliance evidence cannot be disregarded, and materiality cannot be decided by summary judgment, when there is affirmative investor evidence that the misrepresented statement or omission was not relied on because it was unimportant to the investor. Evidence of such non-reliance, at a minimum, creates a disputed issue of fact that must be resolved by a jury, not by summary judgment. *TSC* at 450.

Here, the supposedly "material" "omission"—that NAI's compliance officer asked for, but did not receive, ten-year-old trade confirmations from a different investment advisor (Jay Morton) for a different investment strategy that NAI was not licensing or using—was ***immaterial.*** The investors' investment advisor, who represented them and recommended NAI, testified that the ten-year-old, clearly labeled, hypothetical performance record of another investment advisor's *index* investment strategy was irrelevant and unimportant to his Vireo investor clients. He testified that the F-Squared *index* strategy's clearly marked (by NAI in its Vireo marketing materials) hypothetical performance record was unimportant in his and NAI's Vireo investment clients' decisions to invest in NAI's Vireo strategies and testified that what *was* important (material) to his investor clients was their review of the fully disclosed, indisputably true (Appendix T, pp. 199a–203a), actual performance record of the NAI Vireo investment strategy in which they were investing. (Appendix O, p. 180a)

The First Circuit here and other courts have misconstrued *TSC*'s materiality standard to mean that they can disregard conflicting investor evidence (as to whether allegedly misrepresented facts or omissions are unimportant and/or were not relied upon) to determine, by summary judgment, whether the misrepresentation or omitted information is material.

Certiorari should be granted to make clear that, in SEC enforcement actions regarding face-to-face fraud (as opposed to fraud-on-the-market-false stock-pricing cases), evidence of investor non-reliance cannot be disregarded in determining materiality. The SEC has the burden to prove that the alleged misrepresentation or omission was relied upon by the investor client as part of proving it was a material misrepresentation or omission. *Basic Inc. v. Levinson* 485 U.S. 224, 248 (1988); *Zweig v. Hearst Corp.* supra

The Solicitor General makes the conclusory argument that certiorari should not be granted on the materiality issue because clarifying the law to make clear that requiring the SEC to prove reliance would substantially undermine civil enforcement. No, it would not. The government already has the burden to prove the misrepresentation is important. In cases of face-to-face fraud, the SEC can and does have access to the "defrauded" client investors and routinely can, and does, (as in this case) do investigative interviews and depositions to inquire if the investor client relied on or thought the "misrepresentation" that allegedly defrauded him or her was important. Even in fraud on the market cases, there is a *rebuttable* presumption of reliance which can be refuted by evidence of non-reliance. *Basic Inc. v. Levinson* 485 U.S. 224, 248 (1988) The Court left open the question of the need to factor in reliance (or at least non-reliance) in determining materiality. This is that case.

V. The First Circuit Has So Far Departed From The Usual Course of Judicial Proceedings As To Call For The Court's Exercise of Its Supervisory Powers

While it is true that certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of the law, this is not such a case. Here, there is a crucial conflict between the circuit courts of appeals on the courts' authority to award disgorgement. The First Circuit simply refused to follow *Liu* in order to reach a judgment favorable to the SEC. It resolved by summary judgment disputed issues of fact as to materiality in violation of *Celotex Corp v. Catrett* 477 U.S. 317, 323 (1986). It found "fraud" where there was no admissible evidence of fraud by unconstitutionally going outside the record and relying on a judgment in another case to which Petitioners were not parties. *Taylor v. Sturgell* 128 S. Ct. 2161, 2166–2167 (2008).

Subsumed in that materially false statement determination is the issue of whether a true statement can defraud investors. This Court recently (on March 21, 2025) held, in *Thompson v. United States* 604 U.S. —, 145 S. Ct. 821, 826, (2025) after Petitioners filed their

Petition for Writ of Certiorari on March 3, 2025, that—a true statement cannot be a false statement.

It found that an "omission", that did not change the truth of the affirmative statement, still rendered the true statement false and misleading. An omission is not material and is not a violation of the anti-fraud securities law unless it renders the affirmative statement misleading. *Macquarie Infrastructure Corp v. Moab Partners, LP* 601 U.S. 257, 258, 266, (2024); *Chiarella v. United States* 445 U.S. 222, 234-235, 100 S. Ct. 1008, 63 L. Ed. 2nd 348 (1980)

Disseminating a materially true statement to clients is not a §206(1) or §206(2) fraud violation. *In re Lululemon Sec. Litig.* 14 F. Supp.3d. 553, 571 (S.D.N.Y. 2014)

This Court, in granting certiorari, to resolve the Circuit Court conflict and to clarify materiality, should also grant certiorari, pursuant to its supervisory powers, to reverse or at least vacate the First Circuit's established, precedent setting decision which goes beyond all bounds of accepted judicial proceedings.

CONCLUSION

For the reasons stated above and in Petitioners' Petition for Writ of Certiorari, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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