No. 25-466

In the Supreme Court of the United States

ONGKARUCK SRIPETCH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF FOR CALIFORNIA ALTERNATIVE INVESTMENTS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF CALALTS

California Alternative Investments Association ("CalALTs")[1] is a not-for-profit mutual benefit corporation whose members include alternative asset managers, investors, and service providers who are dedicated to the continuing evolution of the alternative asset management industry in California. CalALTs closely tracks the rapidly evolving regulatory landscape and keeps alternative investment managers and their investors informed as international, federal, and state rules evolve. CalALTs hosts education and networking events for members, to provide its members relationships, information, and opportunities to generate better outcomes as participants in the alternative asset management industry.

Innovation and investment opportunities in the alternative asset management industry depend on uniform enforcement of laws and clear guidelines on how to assess liability. The elimination of pecuniary harm as a prerequisite to disgorgement in securities enforcement matters heightens the risk of sanctions that are punitive in nature rather than remedial, chilling U.S. investment opportunities.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than CalALTs, has contributed money that was intended to fund preparing or submitting the brief. Notifications were timely made as required by S. Ct. R. 37 to the counsels of record of the parties, and no objection was received.

SUMMARY OF THE ARGUMENTS

The Ninth Circuit's decision in this matter, which holds that the Securities and Exchange Commission ("SEC") need not establish that any victim suffered a pecuniary harm to obtain a judgment of equitable disgorgement against a stock promoter under 15 U.S.C. § 78u(d)(5) and (d)(7), deepens the existing circuit split concerning the requirements by which the SEC may obtain a disgorgement judgment. As to novel, emerging asset classes, where the legal landscape is already uncertain, the Ninth Circuit's decision—which is at odds with this Court's decisions addressing the SEC's remedial authority—heightens the stakes for asset promoters and managers, at least in the Ninth and First Circuits, where the typically equitable remedy of disgorgement is transformed into something more akin to a punitive remedy. As a result, geographic considerations will determine the liability a litigant may face in an SEC action, rather than uniform application of the law, and the risks to alternative asset managers in the Ninth and First Circuits will be daunting. Sanctioning the SEC's disgorgement authority without a finding of pecuniary harm will produce inequitable and destabilizing consequences, including chilling innovation in the alternative investment sector, which will deprive U.S. investors of novel investment opportunities.

BACKGROUND

In *Kokesh* v. *SEC*, this Court recognized that the disgorgement remedy sought by the SEC in enforcement actions and ordered by lower courts was a punitive, rather than a remedial, sanction. 581 U.S. 455, 467 (2017). In *Liu* v. *SEC*, this Court then prescribed much-needed boundaries to the disgorgement remedy, finding that it must be "awarded for victims" to "restore[] the status quo." 591 U.S. at 75, 80 (2020).

The Ninth Circuit's decision in *SEC* v. *Sripetch*, 154 F.4th 980 (CA9 2025), which rejects the requirement of pecuniary harm as a precondition to a disgorgement award, undermines these precedents. It also deepens the existing circuit split, siding with the First Circuit in *SEC* v. *Navellier & Assocs., Inc.,* 108 F.4th 19, 41 n.14 (CA1 2024), *cert. denied,* 145 S. Ct. 2777 (2025) and rejecting the Second Circuit's contrary view in *SEC* v. *Govil,* 86 F.4th 89, 102-03 (CA2 2023)

ARGUMENT

This Court should grant certiorari to address the important issues surrounding disgorgement awards, as to which there is an inter-circuit split. In *Sripetch*, the Ninth Circuit eliminated any pecuniary harm requirement, departing from the Second Circuit, and joining the First Circuit. The Ninth Circuit's reasoning, which will be applied even to scienter-less securities violations, such as registration violations, threatens to unfairly penalize individuals and entities who engage in the promotion

of an emerging type of asset but who, despite their good faith efforts to comply with the law, may run afoul of securities regulations. Permitting the disgorgement remedy to be applied under the vague and overbroad standard endorsed by the Ninth Circuit will chill innovation in the investment industry and deprive U.S. investors of domestic investment opportunities.

A. The Ninth Circuit's Elimination of Pecuniary Harm to Victims as a Prerequisite to Disgorgement Cannot Be Squared with *Kokesh* and *Liu*

In *Kokesh*, this Court was asked to determine whether the five-year statute of limitations applicable to monetary civil penalties under 28 U.S.C. § 2462 applied to the remedy of disgorgement in an enforcement action brought by the Commission. 581 U.S. at 457. The Court held that a sanction represents a penalty when "the wrong sought to be redressed is a wrong to the public" rather than "a wrong to the individual" and when the sanction is sought for punishment and deterrence rather than to "compensate[e] a victim for his loss." *Id*. at 461-462 (citing *Huntington* v. *Attrill*, 146 U.S. 657, 667-668 (1892)). Rejecting the Commission's claim that SEC disgorgement was remedial, not punitive, the Court found that SEC disgorgement "[bore] all the hallmarks of a penalty" because "[i]t is imposed as a consequence of violating a public law and it is intended to deter, not compensate." *Id.* at 465.

A few years later in *Liu*, this Court explained the basis on which disgorgement operates as an

equitable, rather than punitive, remedy, through tracing the jurisprudence on disgorgement in equity. 591 U.S. at 79-89. The Court 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)." 591 U.S. at 79 (emphasis added); *see also id.* at 88 ("[t]he equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit.").

This Court further defined the limited bounds of the SEC's remedial authority in *SEC* v. *Jarkesy*, holding that where a remedy "is designed to punish or deter the wrongdoer rather than solely to 'restore the status quo'[,]" it is a legal, not equitable, remedy that cannot unilaterally be imposed by a court. 603 U.S. 109, 111 (2024). The Court further held that such legal remedies cannot be imposed without implicating the Seventh Amendment of the Constitution. *Id*.

By failing to require pecuniary harm, the Ninth Circuit would permit the disgorgement remedy to breach the bounds of equity as this Court delineated them in *Kokesh*, *Liu*, and *Jarkesy*. In *Liu*, this Court declared that a disgorgement award must be "awarded for victims." 591 U.S. at 75. The requirement of "victims" is necessary to avoid turning the equitable remedy of disgorgement into an impermissible penalty. *See id.* at 74; *see also Kokesh*, 581 U.S. at 461-62 (disgorgement becomes a penalty when sought for deterrence rather than victim compensation). Contrary to the Ninth Circuit's conclusion, focusing on ill-gotten gains

alone, this Court held in *Liu* that "the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains." 591 U.S. at 89.

The Second Circuit in *Govil*, applying *Liu*, correctly concluded that "[a]n investor who suffered no pecuniary harm as a result of the [violation] is not a victim," 86 F.4th at 98, noting:

> If we were to understand "victim" as including defrauded investors who suffered no pecuniary harm—and thus to allow 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.

Id. at 103.

In *Sripetch*, the Ninth Circuit rejected the Second Circuit's reasoning, claiming that there was a "fundamental distinction" between "compensatory damages, which are designed to compensate the victim for her losses, and restitution, which is designed to deprive the wrongdoer of his ill-gotten gains." *Sripetch,* 154 F.4th at 987. But the Ninth Circuit has it wrong—to stay within the bounds of an equitable remedy, the disgorgement remedy, like damages, must be compensatory. *Cf. Kokesh,* 581 U.S. at 465 ("When an individual is made to pay a noncompensatory sanction to the Government as a

consequence of a legal violation, the payment operates as a penalty.") (citing *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402, (1946)).

Indeed, surveying the disgorgement remedy pre-*Kokesh,* this Court concluded that "deterrence [was] not simply an incidental effect of disgorgement." *Kokesh,* 581 U.S. at 464-465. Rather, lower courts had expressly avowed that the purpose of the disgorgement remedy was to "deprive violators of their ill-gotten gains" *for deterrent purposes*, which this Court determined was punitive. *Id.* (collecting cases). The Ninth Circuit's conclusion that disgorgement can be imposed based on ill-gotten gains untethered to *victim losses* would return the remedy to the pre-*Kokesh* state of affairs that *Liu* and *Kokesh* intended to alter.

If this Court does not grant certiorari, the Ninth and First Circuits will permit courts to impose disgorgement in SEC cases of amounts that are not tied to a victim's pecuniary harm and whose purpose therefore is not remedial but punitive. *See Kokesh*, 581 U.S. at 467 ("A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.") (cleaned up) (emphasis in original). The Court should grant certiorari to resolve this split among the circuits and make clear that the Ninth and First Circuit's holdings run afoul of *Kokesh*, *Liu,* and *Jarkesy*.

B. Eliminating Pecuniary Harm as a Prerequisite to Disgorgement Undermines the Causal Link Between a Defendant's Wrongful Conduct and the Alleged "Ill-Gotten" Gains, Resulting in Punitive Disgorgement Awards

Despite acknowledging that, to award disgorgement as a remedy, "victims" are required, the Ninth Circuit rejected the Second Circuit's holding that victims included only those who suffered pecuniary harm, concluding instead that "victims" can include anyone who can show "an actionable interference by the defendant with [their] legally protected interests." *Sripetch,* 154 F.4th at 981 (quoting *Restatement (Third) of Restitution and Unjust Enrichment* § 51(1), (3), (4) (A.L.I. 2011)).

The Ninth Circuit's "victim" definition begs further questions, as the Court did not explain what "an actionable interference" or "legally protected interest" means and how such an interference relates to whether a defendant's gains were "ill-gotten." *Id.* at 986 n.6 (noting it was not addressing the issue of whether Sripetch's victims suffered a violation of their legally protected interests). This is a critical omission when the plaintiff is not a private citizen asserting a particularized interest, but a government agency asserting a general—possibly even hypothetical—interest. As this Court held in *Kokesh*, disgorgement is often imposed "as a consequence of violating a public law" and the violation "is committed against the United States rather than an aggrieved individual." 581 U.S. at 463. By its own admission, the SEC does not stand in the shoes of

any particular injured party, and, indeed, an SEC enforcement action may proceed even if victims do not support it. *Id.* Given that the SEC asserts a public not private harm, it is entirely unclear whose legally protected interests are at issue in the Ninth Circuit's victim formulation, much less how courts are to determine whether there has been actionable interference with such interests.

Further, the Ninth Circuit does not explain how, if there are no victims who suffered pecuniary harm, a court should determine how much of a defendant's profits were "ill-gotten." Indeed, despite endorsing the First Circuit's reasoning in *Navellier*, the Ninth Circuit in *Sripetch* ignores the other First Circuit mandate that the SEC first establish the "causal relationships between [the defendant's] profits and its alleged violations[,]" as a precursor to imposing disgorgement under *SEC* v. *Commonwealth Equity Services, LLC*, 133 F.4th 152 (CA1 2025).[2]

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[2] The Ninth Circuit eroded the causation requirement in *Sripetch* but dispensed with it entirely in *SEC* v. *Barry*, 146 F.4th 1242, 1262-63 (CA9 2025), *petition for reh'g en banc filed*, No. 23-2699 (CA9 Oct. 3, 2025) (proceedings stayed Oct. 17, 2025, due to federal appropriations lapse). There, the Ninth Circuit simply assumed away the victim loss requirement by holding that investors suffer "pecuniary harm" through the mere "loss of the time value of their money" from non-fraudulent registration violations, even where principal is projected to be recouped and there is no proof of causation or actual opportunity costs. *Id*. at 1263-64. The Ninth Circuit further affirmed disgorgement awards against the defendants in *Barry* that amounted to the entirety of their sales commissions, without requiring the SEC to provide any nexus between the commissions and the violations. *Id*. at 1262-63.

As such, *Sripetch* is itself a cautionary tale: There, the District Court presumed pecuniary harm from the SEC's complaint, which claimed in conclusory fashion that Sripetch engaged in schemes and manipulations to inflate stock prices and investors were thereby harmed. *SEC* v. *Sripetch*, 2024 WL 1546917, *5 (S.D. Cal. Apr. 8, 2024) (citing ECF No. 145 at 5-6). The Ninth Circuit observed, however, that, under *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342-343 (2005), pecuniary harm could not simply be assumed from inflated prices. *Sripetch*, 154 F.4th at 985, n.4.

Although it remained an open question whether the investors were indeed harmed by inflated prices, the Ninth Circuit nevertheless affirmed the District Court's disgorgement award of $2,251,923.16, which amounted to *all* of defendant Sripetch's net profits between 2013 and 2019. 2024 WL 1546917 at *6. The Ninth Circuit additionally affirmed the prejudgment interest award in the amount of $1,051,353.77. *Id.*

This presents a problem that is capable of recurring: without limiting the disgorgement to a compensatory remedy linked to the pecuniary harm of victims, disgorging "ill-gotten gains" risks sweeping in all of a defendant's profits that may or may not have been linked to the wrongful conduct. Take the example of registration violations. Such violations will almost never be the cause of any pecuniary harm, but under the First and Ninth Circuits' rule, disgorgement could be ordered as to the entirety of an individual's compensation, as it was in *Barry*. (*See supra* n.2). This draconian result

is patently punitive, untethered as it is to any harm actually suffered by victims.

This risk is exacerbated by the low burden of proof that the Ninth Circuit applies to the Commission as a plaintiff in an SEC enforcement matter, in which the Commission is required only to prove a "reasonable approximation" of "the amount of unjust enrichment" before shifting the burden "to the defendants to 'demonstrate the disgorgement figure was not a reasonable approximation.'" 2024 WL 1546917 at *6 (district court order, citing *SEC* v. *Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (CA9 2010)). The absence of any standard to determine what gains are "ill gotten," coupled with the low "reasonable approximation" burden of proof, heighten the risk that a disgorgement order amounts to an impermissible penalty because it "'[goes] beyond compensation, [is] intended to punish, and label[s] defendant wrongdoers' as a consequence of violation of public laws." *Kokesh*, 581 U.S. at 467 (citing *Gabelli* v. *SEC*, 568 U.S. 442, 451-452 (2013)).

C. Eliminating Pecuniary Harm as a Prerequisite to Disgorgement Will Chill Financial Innovation and Deprive Investors of Alternative Investment Opportunities

This Court should grant certiorari to provide uniformity in the application of the SEC's disgorgement remedy nationwide. Uniformity is urgently needed to provide clear and fair guidance to the many individuals and entities involved in the alternative investment industry. As technology

evolves and financial innovation continues, there is often uncertainty as to whether alternative investments, for example, digital assets and certain types of credit products, are subject to SEC registration and other regulatory requirements, and it takes time for the legal landscape on such emerging assets to be settled. *See, e.g., Kirschner* v. *JP Morgan Chase Bank, N.A.*, 2023 WL 5437811, at *11 (CA2 Aug. 24, 2023) (holding as a matter of first impression that notes evidencing syndicated loans did not qualify as securities covered by state and federal securities laws). In the interim, in order to offer novel investment opportunities to investors, investment promoters and managers acting in good faith must rely on legal advice to interpret the securities laws, while accepting a certain amount of legal risk.

Permitting courts to impose disgorgement awards, without any showing that the violations caused pecuniary harm to any victims, would greatly compound such risks, disincentivizing individuals and entities from participating in the alternative investment industry. The uncertainty is particularly pernicious where alleged violations are scienter-less, as in *Barry*, which involved registration violations under Sections 5(a) and 5(c) of the Securities Act related to fractional interests in life settlements, and where the Ninth Circuit ordered disgorgement of the defendants' sales commissions, despite no evidence of pecuniary harm to investors or any causal link between the violations and the commissions. *Barry*, 146 F.4th at 1262-63. Asset promoters and managers are unlikely to participate in alternative investments at all if an innocent error, even if supported by legal

advice, can result in unanticipated and devastating disgorgement awards.

Expanding the potential legal liability for a promoter of any novel, emerging type of asset despite the promoter's good faith efforts to operate within the regulatory framework and avoid investor losses would inevitably chill innovation in the alternative investment industry. This would further deprive U.S. investors of domestic investment opportunities, making the appeal of foreign markets greater.

CONCLUSION

This Court should grant the petition for writ of certiorari to resolve the deepening circuit split by requiring a showing of pecuniary harm as a precondition to awarding disgorgement for securities violations.

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