

No. 25-466

In the Supreme Court of the United States

ONGKARUCK SRIPETCH,
Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

**BRIEF OF THE CATO INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Established in 1977, the Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies, established in 1989, seeks to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato is interested in this case because it involves separation of powers and the constitutional right of each person to receive fair notice of conduct that Congress has proscribed and the penalties for that conduct. Cato submits this brief to emphasize why it is important for the Court to grant certiorari: to prevent the SEC's overbroad assertion of legal authority from upsetting constitutional separation of powers and violating due-process rights.

¹ Pursuant to this Court's Rule 37.2 and 37.6, the Cato Institute states that all counsel of record received timely notice of its intent to file this brief, this brief was not authored in whole or in part by counsel for any party, and no entity or person, aside from the Cato Institute and its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND ARGUMENT SUMMARY

At first glance, this case is about whether the SEC may seek disgorgement from a securities defendant without showing that any victim lost money from the defendant's actions. As petitioner demonstrates (Pet. 9–14, 14–17), that issue by itself is an important question of federal law that has divided the courts of appeals, which justifies granting certiorari. See Sup. Ct. R. 10(a).

But the case also implicates much larger issues. It is about separation of powers. It is about whether meaningful limits exist on the SEC's enforcement authority. It is about fair notice and whether an agency may weaponize uncertainty for *in terrorem* effect. And it is about foreclosing the potential for arbitrary enforcement by carefully cabining executive action within the bounds fixed by Congress.

These issues are ripe for review. Americans of all political leanings worry about unchecked executive power and the prospect of targeted and capricious law enforcement for partisan ends. The Court should take up this case to reaffirm three bedrock principles of our constitutional order. First, an executive agency may exercise *only* the powers that Congress clearly authorized it to exercise. Second, each American's due process rights entitle him or her to fair notice of the law and the consequences for breaking it. And third, the prospect of selective law enforcement justifies narrowly construing even powers explicitly granted to executive agencies.

These are additional, "compelling reasons" to grant certiorari. Sup. Ct. R. 10.

ARGUMENT

The Court should hear this case on the merits to make clear that the disgorgement remedy Congress authorized in 15 U.S.C. 78u(d)(5) and (d)(7) is available only where the SEC shows that investors suffered pecuniary harm. That result follows from *Liu v. SEC*'s guidance that disgorgement may not be wielded as a "punitive sanction[]," cannot "exceed a wrongdoer's net profits," and must be "awarded for victims." 591 U.S. 71, 74–75 (2020). Bedrock historical principles of statutory interpretation demand that construction. *Id.* at 78–79, 85–87.

"Administrative agencies" like the SEC "are creatures of statute." *NFIB v. Dep't of Labor*, 595 U.S. 109, 117 (2022). They therefore possess only those enforcement powers conferred by Congress through legislation. *Ibid.* The SEC, though nominally a so-called independent agency, necessarily exercises executive power. It initiates enforcement actions in administrative hearings and in federal court, seeking civil penalties as well as injunctions and other equitable relief. And the SEC prosecutes violations of its orders and rules, often obtaining million-dollar penalties from private parties. See generally *Kokesh v. SEC*, 581 U.S. 455, 459 (2017). To wield the government's prosecutorial arsenal this way is to "wield[] significant executive power." *Seila L. LLC v. CFPB*, 591 U.S. 197, 204 (2020).

For years, SEC authority to seek disgorgement from defendants accused of violating federal securities laws derived from 15 U.S.C. 78u(d)(5). In *Liu*, the Court acknowledged that subsection (d)(5)'s authorization for the SEC to "seek ... equitable relief ... for the benefit of investors" encompassed some form of disgorgement. 591

U.S. at 74–75. *Liu* nevertheless made clear that “disgorgement” must be interpreted to limit the remedy in specific, historically rooted ways. *Id.* at 85–87. After *Liu*, Congress added subsection (d)(7) to section 78u, specifically authorizing the SEC to “seek ... disgorgement.” See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4625–4626 (2021) (“NDAA”).

The surface-level question presented is straightforward: whether, post-*Liu*, the SEC must show that victims of securities fraud suffered pecuniary losses before awarding disgorgement. As the Second Circuit has correctly explained, “the disgorgement analysis under” both 78(d)(5) and (d)(7) is “the same in that both depend on *Liu*.” *SEC v. Govil*, 86 F.4th 89, 102 (2d Cir. 2023). That is because “statutory reference[s] to a remedy grounded in equity ‘must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.’” *SEC v. Ahmed*, 72 F.4th 379, 396 (2d Cir. 2023). As *Liu* explained, these limits require that disgorgement “not exceed a wrongdoer’s net profits” and must be “awarded for victims.” *Id.* at 397 (quoting *Liu*, 591 U.S. at 75).

But the issues in this case are much larger than that first-order question. Clarifying that the SEC must show victims suffered losses to seek disgorgement would reaffirm the general principle that narrowly interpreting grants of executive power is necessary to ensure fidelity to the rule of law and prevent executive overreach. See generally *Medellín v. Texas*, 552 U.S. 491, 525–532 (2008). And the constitutional-avoidance canon compels a limiting construction of subsections (d)(5) and (d)(7)

here because a broader reading raises serious concerns. See *United States v. Hansen*, 599 U.S. 762, 781 (2023); *United States v. Palomar-Santiago*, 593 U.S. 321, 328–329 (2021) (“Courts should ... construe statutes ‘to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score.’”).

Two constitutional pitfalls arise from failing to construe “disgorgement” in alignment with equitable principles. First, interpreting “disgorgement” like the SEC wishes would risk upsetting the Constitution’s careful division of executive, legislative, and judicial power. Second, reading “disgorgement” to create an amorphous remedy—scope to be determined by the SEC—undercuts Americans’ due-process rights to have fair notice of the law’s demands and consequences.

Either risk, standing alone, justifies taking up this case to narrowly interpret the SEC’s powers. Together, even more so.

I. A broad or indeterminate disgorgement remedy creates serious separation-of-powers concerns.

“The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government.” *Freytag v. CIR*, 501 U.S. 868, 870 (1991). This principle “was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.” *INS v. Chadha*, 462 U.S. 919, 946 (1983). “The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III” *Miller v. French*, 530 U.S. 327, 341 (2000).

Yet carefully policing separation of powers is not itself the goal. Maintaining these boundaries is a means to safeguard individual liberties. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (observing that “the Constitution diffuses power the better to secure liberty”). “No political truth,” wrote Madison, “is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than” separation of powers. The Federalist No. 47 (James Madison) (1788). It “preclude[s] the exercise of arbitrary power,” *Trump v. United States*, 603 U.S. 593, 703 (2024) (Jackson, J., dissenting), and “preserve[s] the liberty of all the people,” *Collins v. Yellen*, 594 U.S. 220, 245 (2021); see also *Morrison v. Olson*, 487 U.S. 654, 710–11 (1988) (Scalia, J., dissenting) (stating that separation of powers serves “to ensure that we do not lose liberty”).

In fact, “[l]iberty is *always* at stake when one or more of the branches seek to transgress the separation of powers.” *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (emphasis added). Thus, the “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” *Chadha*, 462 U.S. at 951.

Interpreting “disgorgement” broadly would unlawfully delegate legislative power to executive officials. “All legislative powers” granted by the Constitution are “vested” in Congress. U.S. Const. Art. I, § 1. This reflects the Framers’ judgment that “[i]t is for the people, through their elected representatives, to choose the rules that will govern their future conduct.” *Sessions v. Dimaya*, 584 U.S. 148, 181 (2018) (Gorsuch, J.,

concurring in part and in judgment). Article I does not permit Congress to pass open-ended laws that effectively transfer legislative power to executive officials. In fact, “the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make ‘law’ in the Blackstonian sense of generally applicable rules of private conduct.” *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

To avoid upsetting the careful balance struck by the Constitution, therefore, this Court’s longstanding practice is to narrowly interpret authorizations of executive power. By so doing, federal courts fulfil their “vital functions” “to police with care the separation of the governing powers.” *Pub. Citizen v. DOJ*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). And, in Madison’s words, the courts thus operate as an “impenetrable bulwark against every assumption of power in the ... Executive.” 1 *Annals of Cong.* 439 (James Madison) (Joseph Gales ed., 1834). In fact, these same separation-of-powers concerns also undergird the major questions doctrine. See *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (explaining that “both separation of powers principles and a practical understanding of legislative intent” undergird the major-questions doctrine); *Biden v. Nebraska*, 600 U.S. 477, 515–516 (2023) (Barrett, J., concurring) (explaining that because of separation-of-powers concerns, “an interpreter should ‘typically greet’ an agency’s claim to ‘extravagant statutory power’ with at least ‘some measure of skepticism’”).

The broad—or even undefined—disgorgement power the SEC claims for itself under 15 U.S.C. 78u(d)(5) and (d)(7) would violate these principles and

thus raise serious separation-of-powers concerns. Of course, the Court has recognized that “Congress may ‘vest[] discretion’ in executive agencies to implement and apply the laws it has enacted—for example, by deciding on ‘the details of [their] execution.’” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 672 (2025). Yet interpreting “disgorgement” broadly would not just let SEC decide the “details” of whether to seek a specific remedy in a specific case. It would instead effectively allow the SEC to determine the scope of its own power to seek disgorgement *as well as* federal courts’ power to award it. That goes well beyond the “degree of policy judgment” that can be permissibly “left to those executing or applying the law.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (Scalia, J., dissenting).

At a bare minimum, this Court has said, Congress must provide the executive an “intelligible principle” to guide rulemaking and enforcement actions. *Consumers’ Rsch.*, 606 U.S. at 673 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). If a statute provides “no standard,” “no rule,” and “no policy” to guide the executive’s enforcement actions, the statute is an invalid delegation of Congress’s legislative power. *Panama Refining v. Ryan*, 293 U.S. 388, 430 (1935). The term “disgorgement” provides an intelligible principle only if, as in *Liu*, it incorporates traditional equitable limitations. Otherwise, subsections (d)(5) and (d)(7) raise serious nondelegation concerns by granting the SEC an amorphous and malleable power to pocket a private person’s property. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (“If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”).

Failure to provide a discernible principle grants the SEC unchecked discretion to selectively enforce penalties against foes and pocket the proceeds. That is how the SEC hopes to interpret “disgorgement.” Indeed, “[o]ver the years,” the SEC has applied disgorgement in “ways that test the bounds of equity practice.” *Liu*, 591 U.S. at 85. Yet subsection (d)(7) provides no justification for letting the agency return to its pre-*Liu* heyday because “equity never lends its aid to enforce a forfeiture or penalty.” *Id.* at 77, 85. And interpreting the SEC’s disgorgement power narrowly is of particular importance because in other post-*Liu* cases the SEC has effectively asserted the power to take a private person’s money and then *keep the funds for itself*. See SEC C.A. Br. 16, 19–20 n.4 (noting that in this case “the Commission will return any disgorged funds to the victims of Sripetch’s schemes” but also pointing out court decisions holding that subsection (d)(7) “confer[s] greater flexibility to distribute disgorged funds to the Treasury when distribution to investors is infeasible”). “[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.” *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (plurality opinion of Scalia, J.).

Interpreted as broadly as the SEC prefers, subsections 78u(d)(5) and (d)(7) thus raise serious nondelegation concerns because they risk “unit[ing] in the same person, or body of magistrates” “the legislative and executive powers.” The Federalist No. 47 (James Madison) (1788).

II. A narrow disgorgement remedy is necessary to safeguard individual due-process rights.

Each American is entitled to “due process” before they are deprived of “life, liberty, or property.” U.S. Const. Amend. V. “Perhaps the most basic of due process’s customary protections is the demand of fair notice.” *Sessions*, 584 U.S. at 177 (Gorsuch, J., concurring in part and in judgment). As Justice Scalia famously wrote,

Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. It is said that one of emperor Nero’s nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).²

Relying on this principle, the Court has thus invalidated vague ordinances criminalizing “vagrancy,” “nightwalking,” and “loitering.” *Papachristou v. Jacksonville*, 405 U.S. 156, 158, 168–171 (1972). In *FCC v.*

² Justice Scalia should have referred to Caligula, not Nero. See Jesse M. Cross, *The Fair Notice Fiction*, 75 Ala. L. Rev. 487, 514 (2023) (citing 4 C. Suetonius Tranquillus, *The Lives of the Twelve Caesars* 41 (1686)). He later correctly attributed this practice to Caligula in a partial concurrence in *Figueroa v. United States*, 556 U.S. 646, 658 (2009). That detail aside, the broader point stands.

Fox, furthermore, the Court held that regulations governing television indecency did not provide fair notice of the words or images that would draw civil fines. 567 U.S. 239, 253 (2012). “[C]larity in regulation,” the majority wrote, “is essential to the protections provided by the Due Process Clause.” *Ibid.*

The necessity of legislative precision applies equally to both substantive law as well as penalties. In other words, a statute must provide fair notice not only of *what conduct* the law prohibits, but also of the *consequences* for that conduct.

That is true for criminal penalties: “These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, 576 U.S. 591, 596 (2015). The law, for example, must provide fair notice of whether crimes make an offender eligible for the death penalty. See *Gollehon v. Mahoney*, 626 F.3d 1019, 1024–1025 (9th Cir. 2010). Due-process cases interpreting penalty provisions thus recognize that “[a] statute fixing a sentence imposes no less a deprivation of liberty than does a statute defining a crime.” *Beckles v. United States*, 580 U.S. 256, 273 (2017) (Sotomayor, J., concurring in judgment).

The same principles apply to civil penalties as well: “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (vacating punitive damages award); see also *Sessions*, 584 U.S. at 155–156 (invalidating an INA provision that failed to give immigrants

fair notice of which criminal convictions would make them removable).

This principle applies equally to civil remedies like disgorgement that, though perhaps not penalties in the strictest sense, see *Liu*, 591 U.S. at 76–77, the SEC nevertheless employs to remedy violations of law. “[C]larity in regulation,” including precision on the scope of the remedies that the SEC may seek, “is essential to the protections provided by the Due Process Clause.” *Fox*, 567 U.S. at 253. To provide fair notice, statutes must precisely identify the possible consequences of violating securities law. And if disgorgement under subsections (d)(5) and (d)(7) is as amorphous as the SEC wants it to be, there is substantial risk it would fail that requirement.

The fair-notice requirement doesn’t just provide advance warning of the law’s demands or consequences; it also prevents arbitrary and targeted enforcement. As *Papachristou* observed, if “there are no standards governing the exercise of the discretion granted by the ordinance, the statute permits and encourages an arbitrary and discriminatory enforcement of the law.” 405 U.S. at 170. “It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Ibid.*

Without clear limitations, the SEC could wield subsections 78u(d)(5) and (d)(7) for capricious and arbitrary, or even harassing or discriminatory, purposes. Interpreting “disgorgement” broadly encourages the SEC to seek one disgorgement remedy for one defendant favored by the administration, and another, more onerous penalty for someone disfavored. And it also “invites

arbitrary enforcement by judges” asked to order an appropriate equitable remedy in a specific case. *Johnson*, 576 U.S. at 597. Yet enforcement of the law should not depend on the political whims of the White House or the SEC majority. Latter-day concerns about politically motivated targeting by government officials make this principle particularly important. See Brian Schwartz et al., *Trump Team Plans IRS Overhaul to Enable Pursuit of Left-Leaning Groups*, Wall St. J. (Oct. 15, 2025), <https://bit.ly/3Jmdmqe>; Tyler O’Neil, *SEC targets conservative investors just as IRS targeted Tea Party orgs, shareholder group claims*, Fox Bus. (Sept. 23, 2021), <https://bit.ly/4nJnRlx>.

There is no reason to exempt the SEC’s powers from foundational due-process principles. The SEC and its officials are not immune from the temptation to abuse power. Though commissioners enjoy fixed five-year terms, they are still presidential appointees subject to the intensely partisan confirmation process. 15 U.S.C. 78d(a). The governing statute, in fact, explicitly anticipates that commissioners will have political affiliation, mandating that “[n]ot more than three of such commissioners shall be members of the same political party.” *Ibid.* In practice, “[p]olitical influence could enter” SEC decision-making “either ex ante via the selection of commissioners based on political criteria or ex post via oversight, budgetary control, and future career opportunities.” Reilly S. Steel, *Partisan bias in securities enforcement*, J. Law, Econ. & Org. 1, 4 (2024) (“Steel”).

Of course, the SEC may dispute that its enforcement and investigation decisions might be tainted by partisanship. And perhaps the SEC and its leaders are uniquely incorruptible among government officials (and

humans generally). But empirical research suggests they are not so immune.

One study, for example, found that partisan affiliation influences the severity of enforcement. Steel at 22. It compared companies' partisan leanings (measured by "the political contributions of both firm political action committees (PACs) and employees, including executives") with the political composition of SEC commissioners. Steel at 10. Though there was "little evidence of partisan bias" "[i]n the initial openings of investigations" ("where career civil servants" are primary decisionmakers), the researcher found "evidence consistent with substantial partisan bias" in enforcement actions. *Id.* at 2. Specifically, "at the final enforcement stage—when the influence of political appointees is highest—increased partisan alignment with the SEC reduces both the likelihood of enforcement and the expected number of enforcement actions by substantively large amounts." *Id.* at 21–22. "Partisan alignment also appears to reduce aggregate monetary sanctions, though this estimate is less certain." *Id.* at 22.

Another group of researchers reached similar conclusions. Vivek Pandey et al., *Partisan Regulatory Actions: Evidence from the SEC*, 80 J. Acct. & Econ. 101777 (2025). These researchers similarly measured the "SEC's political leaning through its leadership team composition, i.e., the party affiliation (Democratic vs. Republican) of the majority of the Commissioners at a given point in time." *Id.* at *1. As a "proxy for a firm's political leaning," they considered both "which party the CEO contributes the most to" as well as "the CEO's party (per voter registration records)." *Id.* at *1–2. "Using a sample of 2,156 SEC investigations opened

between 2001 and 2019,” the study found “that firms with political ideologies misaligned with the SEC are significantly more likely to be investigated.” *Id.* at *3. As for what the researchers labeled “AAER (Accounting and Auditing Enforcement Release) enforcement actions,” they found “no difference in the likelihood of receiving an AAER for political misaligned firms compared to other firms,” but *did* find that “misaligned firms that do receive an AAER face harsher penalties.” *Id.* at *3, 4.

Furthermore, the researchers concluded that these “main results are stronger when the majority-party Commissioners are more partisan.” *Id.* at *4. And, relatedly, “Commissioners with more partisan enforcement achieve better post-SEC career outcomes.” *Id.* at *5. That phenomenon is a problem given another study’s finding that SEC commissioners are increasingly political, a trend “driven by more-partisan Commissioners replacing less-partisan ones” from 2010 to 2019. Joseph Engelberg et al., *The Partisanship of Financial Regulators*, 36 Rev. Fin. Stud. 4,373, 4,373 (2023).

This empirical research bolsters the obvious: the SEC’s powers, like those of any other agency, should be narrowly construed to avoid handing fallible people the opportunity for arbitrary enforcement. Due process demands a narrow construction of “disgorgement.”

In short, interpreting “disgorgement” as broadly as the SEC would like gives rise to serious due-process concerns. “The result” would be “that the application of the law depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions” of SEC

officials and district judges. *Connally v. Gen'l Constr. Co.*, 269 U.S. 385, 395 (1926). “The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.” *Ibid.*

CONCLUSION

This Court should grant certiorari to clearly demarcate the metes and bounds of the SEC’s narrow authority to seek disgorgement and avoid the serious constitutional issues a broad interpretation would bring.

November 17, 2025

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