No. 25-466

In the Supreme Court of the United States

ONGKARUCK SRIPETCH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT

D. JOHN SAUER
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JEFFREY B. FINNELL
Acting General Counsel
TRACEY A. HARDIN
Solicitor
DANIEL STAROSELSKY
Assistant General Counsel
KERRY J. DINGLE
Senior Appellate Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether a showing that investors suffered pecuniary harm is a prerequisite to an award of disgorgement in a civil action brought by the Securities and Exchange Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 154 F.4th 980. The order of the district court (Pet. App. 19a-35a) is available at 2024 WL 1546917.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2025. The petition for a writ of certiorari was filed on October 14, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this civil action against petitioner for defrauding investors in at least 20 publicly traded companies. Petitioner consented to the entry of judgment and agreed to pay disgorgement in an amount to be determined by the district court. After a hearing, the court

ordered petitioner to disgorge $2,252,923.16, together with prejudgment interest of $1,051,353.77, for a total of $3,303,276.93. Pet. App. 41a; see *id.* at 19a-35a. The court of appeals affirmed. *Id.* at 18a.

1. Petitioner engaged in fraudulent schemes involving at least 20 penny-stock companies. Pet. App. 23a. "Penny stocks are low-priced, high-risk equity securities for which there is frequently no well-developed market." *SEC* v. *Gentile*, 939 F.3d 549, 552 n.2 (3d Cir. 2019) (citation omitted), cert. denied, 140 S. Ct. 2669 (2020). For example, in one set of schemes, petitioner and his associates obtained shares of penny-stock companies; promoted the companies through intermediaries or through petitioner's website; waited for the share price to rise because of the promotions; and then promptly sold the shares. Pet. App. 23a-24a. Petitioner and his associates neither identified themselves as the promotions' funders nor disclosed that they intended to sell stock in the issuers being promoted. *Ibid.* Through those and other schemes, petitioner and his associates obtained illicit proceeds of more than $6.6 million. *Id.* at 24a.

In a parallel criminal case, petitioner pleaded guilty to one count of offering and selling securities in unregistered transactions, in violation of 15 U.S.C. 77e(a)(1) and 77x, and was sentenced to 21 months of imprisonment. 20-cr-160 Judgment 1-2 (S.D. Cal. Aug. 1, 2022). In the course of that prosecution, petitioner acknowledged the "reality" that his conduct "had actual impact on the lives of real people—people who invested their money in empty companies so that [petitioner] and his partners could buy nice cars and houses"—and that "many of the investors" had suffered "financial trou-

bles" because of the fraud. 20-cr-160 D. Ct. Doc. 125, at 3, 6 (July 26, 2022).

2. In 2020, the SEC commenced a civil action in the United States District Court for the Southern District of California, alleging that petitioner had violated various provisions of the securities laws. Pet. App. 19a-20a. Petitioner consented to the entry of judgment against him, agreeing that the district court "'shall order disgorgement of ill-gotten gains and prejudgment interest thereon' and that, 'solely for the purposes of the SEC's motion for disgorgement, the allegations of the Complaint shall be accepted as and deemed true by the Court.'" *Id.* at 8a (brackets omitted).

As relevant here, the district court rejected petitioner's contention that no disgorgement should be ordered because the SEC did not identify harmed investors. Pet. App. 28a-31a. Without deciding whether such evidence is required, the district court found that, "in light of the allegations in [the] SEC's first amended complaint, which the Court must accept as true pursuant to the parties' consent judgment, [the] SEC has demonstrated that investors have been harmed by [petitioner's] fraudulent schemes." *Id.* at 30a.

The district court ordered petitioner to disgorge $3,303,276.93 ($2,251,923.16 in ill-gotten gains, plus $1,051,353.77 in prejudgment interest). Pet. App. 41a. Noting the SEC's representation that "it will make good faith efforts to ensure that any disgorgement award will go to * * * harmed investors," *id.* at 31a, the court "retain[ed] jurisdiction of this matter for the purposes of enforcing the terms of th[e] Final Judgment," *id.* at 46a.

3. The Ninth Circuit affirmed, holding that a finding of pecuniary harm is not a prerequisite to an award of disgorgement. Pet. App. 1a-18a.

The court of appeals observed that, in *Liu* v. *SEC*, 591 U.S. 71 (2020), this Court had interpreted a federal statute authorizing the SEC to seek "equitable relief" in civil actions, 15 U.S.C. 78u(d)(5), to encompass awards of disgorgement. Pet. App. 5a. The court of appeals further explained that, a year after this Court decided *Liu*, "Congress created a second statutory basis for awarding disgorgement," *id.* at 6a, by enacting a provision (15 U.S.C. 78u(d)(7)) that specifically authorizes the Commission to seek "disgorgement" in a civil action to enforce the securities laws.

The court of appeals determined that an award of disgorgement under Section 78u(d)(5) does not require a finding of pecuniary harm to investors. Pet. App. 10a-17a. The court explained that, under *Liu*, disgorgement under Section 78u(d)(5) is governed by "common-law" principles and "traditional equity practice." *Id.* at 11a (quoting *Liu*, 591 U.S. at 85, 87). Under those principles, the court continued, "a claimant seeking disgorgement need only show 'an actionable interference by the defendant with the claimant's legally protected interests'"; "the claimant need not show any loss whatsoever, let alone a pecuniary loss." *Id.* at 11a-12a (citation omitted). The court stated that the contrary view "ignores the fundamental distinction between compensatory damages, which are designed to compensate the victim for her losses, and [disgorgement], which is designed to deprive the wrongdoer of his ill-gotten gains." *Id.* at 14a.

The court of appeals then observed that petitioner did not argue that "the disgorgement remedy authorized by subsection (d)(7) is narrower than the one available under subsection (d)(5)." Pet. App. 17a. The court stated that its "holding that pecuniary harm is not re-

quired under subsection (d)(5) thus also means that it is not required under subsection (d)(7)." *Ibid.*

DISCUSSION

Petitioner contends (Pet. 9-21) that a district court may award disgorgement in an SEC action only if the Commission proves that the defendant's wrongdoing caused pecuniary harm to investors. The court of appeals correctly rejected that contention. But its decision conflicts with a decision of the Second Circuit; the question presented is recurring and important; and this case is a suitable vehicle for resolving the conflict. This Court should therefore grant the petition for a writ of certiorari.

1. To prevail, the government must show that 15 U.S.C. 78u(d)(5) or 15 U.S.C. 78u(d)(7) authorizes a court to award disgorgement in an SEC suit without a finding of pecuniary harm to investors. The court of appeals correctly determined that both provisions do so.

a. Subsection (d)(5) authorizes 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. The Court explained that an award of disgorgement under subsection (d)(5) must comport with "equitable principles." *Id.* at 85.

Under those principles, an award of disgorgement does not require a finding of 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 (Restatement) § 51 cmt. d (2011).

Petitioner invokes (Pet. 18) *Liu*'s statement that disgorgement under subsection (d)(5) must be "restricted" to a "wrongdoer's net profits to be awarded for victims," 591 U.S. at 79, and contends (Pet. 18-19) that a person can be a "victim" only if he has suffered a pecuniary loss. 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). The quoted statement from *Liu* merely reflects subsection (d)(5)'s requirement that equitable relief must be awarded "for the benefit of investors," 15 U.S.C. 78u(d)(5), and clarifies that equitable disgorgement proceeds awarded under subsection (d)(5) generally must be "disbursed to known victims" rather than simply "deposited in [the] Treasury," 591 U.S. at 85, 88. The statement does not require the SEC to show pecuniary harm.

b. Subsection (d)(7) independently authorizes a district court to award disgorgement without a showing of pecuniary harm to investors. Congress enacted that provision in 2021, months after this Court decided *Liu*, as a rider to an appropriations statute. See William M. (Mac) Thornberry National Defense Authorization Act

for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 4625-4626. The provision states that, "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." 15 U.S.C. 78u(d)(7). A separate clause added in the same 2021 appropriations law elaborates that the court may award "disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of [the] violation." 15 U.S.C. 78u(d)(3)(A)(ii).

As the term "unjust enrichment" in subsection (d)(3)(A)(ii) makes clear, an award of disgorgement under subsection (d)(7) focuses on the enrichment of the defendant rather than the loss to the victim. It is well established that a claimant can recover for unjust enrichment "without the need to show that the claimant has suffered a loss." Restatement § 1 cmt. a; see Restatement § 3 cmt. b (explaining that a "disgorgement remedy" is available even in "cases in which a property owner may have suffered no quantifiable injury").

Unlike subsection (d)(5), moreover, subsection (d)(7) does not contain the specific language—*i.e.*, the requirement that relief be "for the benefit of investors," 15 U.S.C. 78u(d)(5) —that the *Liu* Court interpreted to require that disgorgement be "awarded for victims," 591 U.S. at 75. To the extent that petitioner attempts (Pet. 18-19) to derive a pecuniary-harm requirement from *Liu*'s interpretation of that language, petitioner's argument has no grounding in the distinct text of subsection (d)(7). Petitioner also invokes (*e.g.*, Pet. 9) the Second Circuit's statement that "'[e]quitable relief' requires that the relief be 'awarded for victims,' and that in turn requires a finding of pecuniary harm." *SEC* v.

Govil, 86 F.4th 89, 106 (2023) (citation omitted). But subsection (d)(7) does not contain the term "equitable relief" either. Thus, it is particularly clear that the award at issue here is authorized by subsection (d)(7), both because subsection (d)(7) refers specifically to "disgorgement" and because it does not include the terms ("equitable relief" and "for the benefit of investors") that have been offered as justifications for reading subsection (d)(5) to require pecuniary harm.

2. Although the court of appeals correctly resolved the question presented, its decision warrants this Court's review.

a. The Ninth Circuit's decision in this case conflicts with the Second Circuit's decision in *Govil*. Based on circuit precedent, the *Govil* court held that the constraints subsection (d)(5) imposes on disgorgement in SEC suits apply equally to disgorgement under subsection (d)(7). 86 F.4th at 100; see *id.* at 100-102. The court further held that a showing of pecuniary harm to victims is a prerequisite to disgorgement under subsection (d)(5) (and thus to disgorgement under subsection (d)(7) as well). *Id.* at 106; see *id.* at 102-106. In this case, the Ninth Circuit "reject[ed] the reasoning of the Second Circuit" and determined that "a finding of pecuniary harm is not required." Pet. App. 10a; see *id.* at 11a ("The Second Circuit's analysis fails to persuade.").

Petitioner argues (Pet. 12-13) that the First Circuit's decision in *SEC* v. *Navellier & Associates*, 108 F.4th 19 (2024), cert. denied, 145 S. Ct. 2777 (2025)—a case in which the First Circuit determined that a court could award disgorgement even if the investors "suffered no pecuniary harm," *id.* at 41—also forms part of the circuit conflict. In opposing certiorari in that case, the government acknowledged that the First Circuit's deci-

sion was "in tension" with the Second Circuit's decision in *Govil* but argued that "the two decisions do not squarely conflict." Br. in Opp. at 8, *Navellier* v. *SEC*, 145 S. Ct. 2777 (2025) (No. 24-949). The government explained that *Navellier* had "involv[ed] registered investment advisers who defrauded their clients, while *Govil* involved a seller who defrauded potential buyers when offering securities." *Id.* at 8-9. The government argued that a pecuniary-harm requirement "is especially inapt" in cases involving fraud by registered investment advisers, who owe "fiduciary duties to their clients." *Id.* at 6. It is a "well settled rule" that a fiduciary may be held liable for profits gained in breach of a fiduciary duty, even if the client "was not a loser in the transaction." *Magruder* v. *Drury*, 235 U.S. 106, 119-120 (1914).

Unlike the First Circuit's decision in *Navellier*, the Ninth Circuit's decision in this case squarely conflicts with the Second Circuit's decision in *Govil*. Like *Govil*, this case involves fraud perpetrated against buyers of securities; unlike *Navellier*, it does not involve fraud by a fiduciary against his clients. In any event, regardless of whether the question presented is the subject of a 1-1 conflict or a 2-1 conflict, the question presented warrants this Court's review.

This case also is a better vehicle than *Navellier* for resolving the circuit conflict. In *Navellier*, the First Circuit's opinion made clear that the victims *had* suffered pecuniary harm because of the defendant's violations. See 108 F.4th at 41 n.14. Any dispute about whether a finding of pecuniary harm was required was therefore academic. See Br. in Opp. at 7-8, *Navellier*, *supra* (No. 24-949). In this case, by contrast, the Ninth Circuit affirmed the district court's judgment solely on

the legal ground that a finding of pecuniary harm is not required. See Pet. App. 10a. It expressly declined to rely on the SEC's argument that the Commission had shown pecuniary harm here. See *id.* at 10a & n.4. This Court should therefore grant review to determine whether a showing of pecuniary harm is required. If the Court concludes that such a showing is required, it should remand the case so that the court of appeals can determine whether that showing has been made.

b. The question presented is important. Since 1971, the SEC has sought and courts have awarded disgorgement of ill-gotten gains as a remedy for violations of the securities laws. See *Liu*, 591 U.S. at 75-76. Congress recently reaffirmed that "disgorgement" of "*any* unjust enrichment" is a proper remedy in "*any* action or proceeding brought by the Commission under *any* provision of the securities laws." 15 U.S.C. 78u(d)(3) and (d)(7) (emphases added). In recent years, disgorgement has remained a central feature of the congressional scheme. In fiscal year 2024, for example, the SEC obtained orders for $8.2 billion in financial remedies, including $6.1 billion in disgorgement and prejudgment interest. See Press Release, SEC, *SEC Announces Enforcement Results for Fiscal Year 2024* (Dec. 17, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

Over the past eight years, the Court has granted review in two cases to consider legal questions concerning the SEC's authority to seek disgorgement. It granted certiorari in *Kokesh* v. *SEC*, 581 U.S. 455 (2017), to consider the statute of limitations for civil actions seeking disgorgement, and then in *Liu* to consider whether subsection (d)(5) authorized the SEC to seek disgorgement in the first place. Those grants of certiorari reflect the Court's recognition of the importance of disgorgement

in the SEC's enforcement scheme, and they confirm that the question presented here warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

JEFFREY B. FINNELL
Acting General Counsel
TRACEY A. HARDIN
Solicitor
DANIEL STAROSELSKY
Assistant General Counsel
KERRY J. DINGLE
Senior Appellate Counsel
Securities and Exchange Commission

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