No. 25-466

In the Supreme Court of the United States

ONGKARUCK SRIPETCH, PETITIONER

v.

U.S. SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case presents an exceptionally important question regarding the SEC's civil-enforcement power.

In *Liu* v. *SEC*, 591 U.S. 71 (2020), this Court held the SEC may seek equitable "disgorgement" in civil-enforcement actions if an award "does not exceed a wrongdoer's net profits" and "is awarded for *victims*." 591 U.S. at 74-75 (emphasis added).

In the proceedings below, the Ninth Circuit held that investors can be "victims" for disgorgement purposes despite not suffering pecuniary harm. On the identical question, the Second Circuit reached the opposite conclusion. There are millions (if not billions) of dollars at stake.

The question presented is:

Whether the SEC may seek equitable disgorgement under 15 U.S.C. 78u(d)(5) and (d)(7) without showing investors suffered pecuniary harm.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Ongkaruck Sripetch, the appellant below and defendant in the district court.

Respondent is the U.S. Securities and Exchange Commission, the appellee below and plaintiff in the district court.*

* The following parties were defendants in the district court but did not participate in proceedings in the court of appeals: Amanda Flores, Brehnen Knight, Andrew McAlpine, Ashmit Patel, Michael Wexler, Dominic Williams, Adtron Inc. (also known as Stockpalooza.com), ATG Inc., DOIT, Ltd., Doji Capital, Inc., King Mutual Solutions Inc., Optimus Prime Financial Inc., Orca Bridge, Redline International, and UAIM Corporation.

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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 and opinion of the district court (Pet. App. 19a-35a) is unreported but 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, and granted on January 9, 2026. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 78u(d)(5) of Title 15 of the United States Code provides:

> EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

Section 78u(d)(7) of Title 15 of the United States Code provides:

> DISGORGEMENT.—In 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.

Other relevant statutory provisions are reproduced in an appendix to this brief (App., *infra*, 1a-9a).

INTRODUCTION

This case presents an exceptionally important question regarding the SEC's remedial authority: whether the SEC may seek equitable disgorgement in civil-enforcement suits without showing investors suffered pecuniary harm.

In the proceedings below, the Ninth Circuit held that "pecuniary harm" is not a statutory "precondition" to disgorgement. Pet. App. 17a. That decision is wrong. It overrides critical limits on the SEC's enforcement power, and it permits an unbounded form of disgorgement rejected by this Court and unmoored from its traditional common-law roots. Because a proper understanding of disgorgement cabins relief to injured investors, the judgment below should be reversed.

STATEMENT

A. Statutory Background

1. The SEC has long sought disgorgement of defendants' profits in civil-enforcement suits. Yet Congress gave no power to pursue monetary sanctions when it created the SEC in 1934. "Initially, the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws." *Kokesh* v. *SEC*, 581 U.S. 455, 458 (2017).

Still, "[i]n the absence of statutory authorization for monetary remedies, the Commission urged courts to order disgorgement as an exercise of their inherent equity power." *Kokesh*, 581 U.S. at 458 (internal quotation mark omitted). A court agreed for the first time in 1970, invoking "[j]udicial willingness to imply new remedies." *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970), aff'd in part and rev'd in part, 446 F.2d 1301 (2d Cir. 1971); see *Liu* v. *SEC*, 591 U.S. 71, 75 (2020). Other courts followed, adopting the label "disgorgement." *Liu*, 591 U.S. at 75-76.

For decades, disgorgement was the SEC's only monetary remedy. And "[o]ver the years," the SEC sought and obtained disgorgement in "ways that test[ed] the bounds of equity practice"—including by collecting defendants' profits in government coffers "instead of disbursing them to victims." *Id.* at 85 & n.3.

2. In 1990, Congress amended the securities laws to give the SEC "a full panoply of enforcement tools." *Kokesh*, 581 U.S. at 459; see Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act), Pub. L. No. 101-429, 104 Stat. 931. Congress added, among other tools, power to collect monetary civil penalties in federal court. Remedies Act §§ 101, 201, 302, 402, 104 Stat. 932-933, 936-938, 945-946, 949-951; see 15 U.S.C. 77t(d), 78u(d)(3), 80a-41(e), 80b-9(e). Those 1990

amendments did not, however, authorize courts to award disgorgement. Yet "[i]n the years since," the SEC "continued its practice of seeking disgorgement in enforcement proceedings." *Kokesh*, 581 U.S. at 459.

In 2002, Congress authorized the SEC to seek, in federal court, "any equitable relief that may be appropriate or necessary for the benefit of investors." See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305, 116 Stat. 779; see 15 U.S.C. 78u(d)(5). The SEC seized on Section 78u(d)(5) as statutory authority for disgorgement. See, *e.g.*, *SEC* v. *Quan*, 817 F.3d 583, 594 (8th Cir. 2016).

The SEC continued to wield disgorgement as a powerful weapon even after Congress added these other enforcement authorities. Disgorgement was especially potent because—in the SEC's eyes—it had no statute of limitations. See, *e.g.*, *SEC* v. *Rind*, 991 F.2d 1486, 1490-1493 (9th Cir. 1993); *Johnson* v. *SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996). Civil penalties, in contrast, are subject to a five-year limitations period. See 28 U.S.C. 2462; *Gabelli* v. *SEC*, 568 U.S. 442, 448 (2013).

In *Kokesh*, this Court rejected the SEC's unlimited-in-time view of disgorgement, holding instead that the SEC was using disgorgement as "a penalty" subject to the same statute of limitations as civil penalties. 581 U.S. at 461. The SEC's approach to disgorgement bore "all the hallmarks of a penalty": the SEC used it to "remedy harm to the public at large, rather than standing in the shoes of particular injured parties," and "to deter, not to compensate." *Id.* at 463, 465. But *Kokesh* reserved whether courts could "order disgorgement in SEC enforcement proceedings" at all and "whether courts have properly applied disgorgement principles." *Id.* at 461 n.3.

2. In *Liu*, the Court held that the SEC's past use of disgorgement "exceed[ed] the bounds of traditional equitable principles," but the SEC could continue pursuing

disgorgement by "conform[ing] future requests for a defendant's profits to the limits outlined in common-law cases." 591 U.S. at 85-86.

The Court explained that "disgorgement" is a term of "relatively recent vintage." 591 U.S. at 76 n.1. It is a modern label for a "profits-based award," "parallel[ing]" the traditional equitable remedies of "restitution" and "an accounting for profits." *Id.* at 76 & n.1, 79.

While the remedy generally focuses on a defendant's "ill-gotten gains," it is confined by important checks: "to avoid transforming an equitable remedy into a punitive sanction, courts restrict[] the remedy to an individual wrongdoer's net profits to be *awarded for victims*." 591 U.S. at 79 (emphasis added). Under that rule, a "wrongdoer" cannot be "punished by 'pay[ing] more than a *fair compensation* to the *person wronged*.'" *Id.* at 80 (emphases added). That is a "countervailing equitable principle" to the notion "that the wrongdoer should not profit 'by his own wrong.'" *Ibid.*

Within those limits, the Court held, "disgorgement" is "'equitable relief'" available to the SEC—a "power that historically excludes punitive sanctions." 591 U.S. at 74-75 (quoting 15 U.S.C. 78u(d)(5)). The Court thus rejected the SEC's contention that it could obtain disgorgement "even if it exceeds the bounds of equity practice." *Id.* at 86. And although the SEC had identified other statutes referencing SEC "disgorgement," the Court held that "by using the term 'disgorgement,'" "Congress does not enlarge the breadth of an equitable, profit-based remedy." *Ibid.*

3. Six months after *Liu*, Congress—using the term "disgorgement"—amended Section 78u(d) to specifically govern the SEC's use of that remedy. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA), Pub. L. No. 116-283, § 6501, 134

Stat. 4625-4626. The amendments resolved issues that remained after *Kokesh* and *Liu*. While *Kokesh* applied the "penalty" statute of limitations to disgorgement, 581 U.S. at 461, *Liu* displaced that holding by concluding that *Kokesh* "evaluated a version" of disgorgement that "seemed to exceed" equitable limits, to which the SEC must "conform" in the "future." 591 U.S. at 85. That left disgorgement, like the SEC's other equitable remedies, with no limitations period at all.

The 2021 amendments to Section 78u(d) responded by enacting two distinct limitations provisions: one for disgorgement in particular, and another for equitable remedies in general. NDAA § 6501(a)(3), 134 Stat. 4626. Congress first separated disgorgement from other equitable remedies by enacting a specific provision authorizing "disgorgement" in paragraph (7)—thus relocating the SEC's disgorgement power from the general provision authorizing "equitable relief" in paragraph (5). NDAA § 6501(a)(3), 134 Stat. 4626; see 15 U.S.C. 78u(d)(7) ("In 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."). Congress then established a limitations scheme for "disgorgement" keyed to "paragraph (7)." NDAA § 6501(a)(3), 134 Stat. 4626; see 15 U.S.C. 78u(d)(8)(A) (titled "Disgorgement"). Congress established a separate limitations scheme for equitable remedies generally, "including for an injunction or for a bar, suspension, or cease and desist order." NDAA § 6501(a)(3), 134 Stat. 4626; see 15 U.S.C. 78u(d)(8)(B) (titled "Equitable remedies").

The 2021 amendments made other changes to Section 78u(d) to specifically govern disgorgement. Congress specified that the authority for disgorgement "in paragraph (7)" does not "alter[]" private rights to sue. NDAA

§ 6501(a)(3), 134 Stat. 4626; see 15 U.S.C. 78u(d)(9). Congress also expressly authorized "disgorgement under paragraph (7)" in addition to civil penalties. NDAA § 6501(a)(1)(B), 134 Stat. 4625; see 15 U.S.C. 78u(d)(3)(A)(ii). And Congress conformed paragraph (4) to the relocated authority for disgorgement—revising paragraph (4)'s existing language (addressing all funds disgorged, whether in court or administratively) to specify that funds disgorged in court are disgorged "under paragraph (7)." NDAA § 6501(a)(2), 134 Stat. 4626; see 15 U.S.C. 78u(d)(4) (addressing "private parties seeking distribution" of "funds disgorged *under paragraph (7)* as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action" (emphasis added)).

4. Today, federal-court disgorgement sits alongside a variety of tools for the SEC to sanction and prevent securities violations. In neighboring provisions of Section 78(d), for example, the SEC is authorized to obtain severe monetary penalties. 15 U.S.C. 78u(d)(3)(A)(i), (B)-(D). It may also obtain orders barring defendants—possibly forever—from serving as officers or directors of public companies, or from participating in certain stock offerings. 15 U.S.C. 78u(d)(2), (d)(6). Beyond civil enforcement suits, the SEC can pursue remedies in administrative proceedings—including remedies unavailable in court. See, *e.g.*, 15 U.S.C. 78l(j) (suspending or revoking registration of public companies); 15 U.S.C. 78o(b)(4) (barring broker or dealer from the securities industry). And the government can seek criminal punishment. See, *e.g.*, 15 U.S.C. 78u(d)(1).

Yet disgorgement remains a centerpiece of the SEC's multibillion-dollar enforcement arsenal. See Resp. Br. 10. In 2024 (the most recent fiscal year with published data),

the SEC seized $6.1 billion in disgorgement—a new record. *Ibid.*; *SEC Announces Enforcement Results for Fiscal Year 2024* (Nov. 22, 2024) <https://www.sec.gov/news-room/press-releases/2024-186> (*SEC 2024 Results*). Disgorgement even dwarfed the SEC's civil penalties, which totaled roughly a third ($2.1 billion) that year. *SEC 2024 Results*. And despite *Liu*'s holding that disgorgement must "be awarded for victims" (591 U.S. at 79), the SEC returned only $345 million to investors—less than 6% of the amount collected. *SEC 2024 Results*.

B. Factual Background

1. a. The SEC brought this civil-enforcement suit against petitioner and "fourteen other defendants," charging petitioner with six counts of "securities fraud" and one count of "selling unregistered securities." Pet. App. 8a; see also *id.* at 23a-26a (detailing those allegations). Petitioner agreed to a consent judgment, including injunctions against future securities violations and a permanent bar on participating in offerings of penny stock. *Id.* at 8a, 21a, 37a-41a. But he resisted the SEC's disgorgement request under Sections 78u(d)(5) and (d)(7), arguing "that disgorgement under § 78u(d) 'requires a finding that victims suffered pecuniary harm,'" and "the Commission failed to make this showing." Pet. App. 8a-9a; see *id.* at 19a-20a, 22a-23a, 28a.[1]

b. The district court granted the SEC's motion in relevant part. Pet. App. 19a-35a. Rather than resolve the statutory question, the district court "assumed without

[1] While this civil suit was pending, petitioner pleaded guilty to one count of selling unregistered securities, in violation of 15 U.S.C. 77e(a)(1) and 77x, and was sentenced to 21 months' imprisonment. See Pet. App. 22a & n.2. In light of petitioner's criminal sentence, the SEC "declined to seek a monetary civil penalty." *Id.* at 9a n.3.

deciding" that "pecuniary harm was required" for disgorgement, and "concluded the [SEC] had made the requisite showing." *Id.* at 9a (summarizing the district court's decision); see also *id.* at 30a-31a. It accordingly ordered $2,251,923.16 in disgorgement and an additional $1,051,353.77 in prejudgment interest. *Id.* at 34a-35a, 41a-42a.[2]

2. The Ninth Circuit affirmed on different grounds. Pet. App. 1a-18a. Unlike the district court, it squarely decided the statutory question, holding that "pecuniary harm" is not a "precondition" to disgorgement under Section 78u(d). *Id.* at 17a-18a. It thus "d[id] not reach" whether the SEC established "pecuniary harm." *Id.* at 10a.[3]

The Ninth Circuit began by acknowledging that the Second Circuit has held that disgorgement under Section 78u(d) requires pecuniary harm, while the First Circuit has held the opposite. Pet. App. 2a. But it ultimately "reject[ed] the reasoning of the Second Circuit and join[ed] the First Circuit in holding that a finding of pecuniary harm is not required." *Id.* at 10a.

As the Ninth Circuit explained, the Second Circuit was correct that disgorgement requires "[a] victim," a point "made clear" from *Liu*. Pet. App. 10a-11a. But the Ninth

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[2] The district court refused to grant the SEC's full request of $4,115,365.88 in disgorgement. Pet. App. 31a. It found that amount was "not a reasonable approximation" because it failed to credit petitioner's expenses and overstated his gross profit. *Id.* at 33a. It accordingly cut down the SEC's request by nearly half. *Id.* at 33a-34a.

[3] While leaving this separate question technically unresolved, the Ninth Circuit was skeptical that the SEC could prevail under the district court's rationale: "we note that the Commission's contention that the investors suffered pecuniary harm merely because they paid artificially inflated prices for securities is in tension" with this Court's precedent. Pet. App. 10a n.4 (citing *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 342-343 (2005)).

Circuit "disagree[d]" that "'victim' is narrowly defined as an individual or entity that has suffered pecuniary harm." *Id.* at 11a.

The Ninth Circuit initially declared the Second Circuit's approach "contrary to the common law." Pet. App. at 11a. In the court's view, "[a]t common law," disgorgement required only "'an actionable interference by the defendant with the claimant's legally protected interests.'" *Id.* at 11a-12a. Unlike the Second Circuit, the court thus believed a "claimant need not show any loss whatsoever, let alone a pecuniary loss." *Id.* at 12a.

The Ninth Circuit then rejected the Second Circuit's reliance on *Liu*. Pet. App. 13a-15a. It found "the Second Circuit erred by gleaning a pecuniary harm requirement" from specific "observation[s]" in *Liu*. *Ibid.* It likewise declared the Second Circuit "placed great weight" on other "statement[s]" in *Liu* it believed the Second Circuit misread—finding *Liu* "neither adopted a pecuniary harm requirement nor discarded the common law's definition of victim." *Id.* at 15a. And it further rejected the Second Circuit's understanding of the Restatement (Third) of Restitution and Unjust Enrichment (A.L.I. 2010). *Id.* at 15a-16a.

The Ninth Circuit, finally, believed the Second Circuit "erred by equating restoration of the status quo with compensatory damages," and repudiated the Second Circuit's "compar[ison]" of "private securities actions" (which require economic loss) and "disgorgement under § 78u(d)(5)." Pet. App. 15a n.7, 16a-17a. While admitting the Second Circuit's reading alone would align private Section 10(b) litigation with Section 78u(d), the Ninth Circuit concluded the "asymmetry" in its own position was "by design." *Id.* at 16a-17a.

Although the Ninth Circuit's analysis focused predominantly on Section 78u(d)(5), it determined the identical

outcome was required under Section 78u(d)(7). Pet. App. 17a (finding "[n]either party argues" otherwise and "no reason to suppose" otherwise). It thus held "that the SEC is not required to show that investors suffered pecuniary harm as a precondition to a disgorgement award under § 78u(d)(5) or (d)(7)." *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

The SEC may not seek disgorgement under Section 78u(d) without showing investors suffered pecuniary harm, and the government's contrary position is baseless.

A. As *Liu* itself established, disgorgement is an equitable remedy. It cannot be a penalty or deterrent, and it works to restore the status quo—by returning property to its proper owners. Relief that lacks those critical features (or fails to serve a compensatory function) falls outside disgorgement's traditional scope.

Liu confirmed these principles in this statutory context by articulating two key principles. The first was recognizing the inequity of permitting a wrongdoer to retain ill-gotten gains. But, critically, the second "countervailing" principle was designed as a limit on the first—and ensured funds were returned to victims and disgorgement accordingly was not wrongly transformed into a penalty.

The government resists these conclusions, but each of its arguments fail.

First, the government insists that disgorgement is always appropriate to "deprive" a wrongdoer of ill-gotten gains. This flatly ignores this Court's decision in *Liu*: it embraces *Liu*'s first principle while ignoring its second. And the second "countervailing" principle was essential to "restrict" disgorgement to its proper scope.

Second, the government maintains that a victim's loss must not matter because disgorgement is calculated based on a wrongdoer's gain. The government confuses

the *measure* of disgorgement and its *availability*. The fact that disgorgement takes into account net proceeds does not mean a victim without any loss is entitled to a windfall—or that the government can invoke an equitable remedy designed to "restore" the status quo when there are no losses to compensate.

Third, the government errs again in transparently seeking a penalty. The government's version of disgorgement is indistinguishable from a penalty in every sense except the bottom-line amount. It is not designed to compensate or restore funds to rightful owners; it is designed entirely to deprive a wrongdoer of a benefit—which is a penalty and deterrent by any other name.

Fourth, the government suggests that *Liu* did not mean what it said—and its discussion of traditional equitable principles was solely about the specific textual language found in Section 78u(d)(5). This odd contention cannot be squared with even a quick glance at *Liu*'s decision. This Court discussed the foundational equitable principles in its own section of the opinion; it announced those principles with detail and care; and there is no basis for reading this Court's operative rationale as random asides. This Court presumably meant what it said—and what it said confirms the government cannot seek disgorgement without establishing pecuniary loss.

B. Congress further confirmed *Liu*'s traditional limits on disgorgement in its post-*Liu* statutory enactments. Congress acted in *Liu*'s immediate aftermath by relocating the SEC's disgorgement authority to a new statutory paragraph and assigning it a new limitations period.

Under this Court's settled framework, Congress is presumptively aware of this Court's decisions and embraces its conclusions when it adopts the same terminology in new legislation. There is every reason to believe that is precisely what happened here: Congress did not

modify or enlarge "disgorgement" under the Act—it simply adopted the term, unadorned, without comment. There is no basis to presume (as the government nevertheless does) that Congress was somehow disavowing *Liu*'s holding in favor of an unspecified body of lower-court authority that mysteriously enhances the SEC's power. Nor is there any reason to think Congress adopted this traditional common-law term while abandoning the old soil that came with it.

This Court made clear what disgorgement means—it requires restoring the status quo and returning funds to victims (who necessarily must have suffered pecuniary loss). If Congress wished to devise a new SEC-specific brand of disgorgement, it would have done so with actual guidance and instruction—not by simply repeating the very word this Court had just defined.

Finally, the government overlooks the obvious reason Congress amended the statute: when *Liu* cabined disgorgement to its proper *non-penal* scope, it also necessarily removed the limitations period for *penalty-based disgorgement* that had previously constrained SEC authority. Congress relocated the disgorgement power in order to restore the limitations period, which was necessary precisely because Congress was adopting *Liu*'s equitable (read: non-penalty) version of disgorgement. If Congress instead adopted the government's view, the old limitations period would have reattached on its own.

C. The securities laws' context and purpose further reaffirm that disgorgement requires pecuniary loss.

First, the government's view invites a disconnect between the SEC's enforcement authority and private civil litigation. Congress made the determination that uninjured investors should not collect under the securities laws. Yet that determination is in direct tension with the government's position—which would confer a windfall on

those same investors for the same conduct by the same alleged wrongdoers. The government cannot explain why Congress would wish uninjured parties to collect in SEC actions while being deliberately shut out of court in their own private litigation.

Second, the government's version of disgorgement effectively resembles a civil penalty with one difference: the amount is capped at net proceeds instead of gross proceeds. This creates another anomaly: Congress specifically distinguished between "disgorgement" and "penalties" in Section 78u(d), and there is little reason to think Congress would introduce a *second* penalty (with a different name) simply to identify a second charge with a lower amount. The more likely answer is consistent with this Court's own decisions: disgorgement is *not* a penalty; it serves a different compensatory function, and there is every reason for Congress to enumerate each separately (with its distinct operation) in the Act.

Third, the government's position invites a direct end-run around Congress's design and procedural safeguards. Congress granted the SEC robust and powerful tools for pursuing securities violators. Yet some of those tools (like penalties) come with added protections for the accused. The government's version of disgorgement lets the SEC sidestep those protections—via the simple expedient of recasting a quintessential penalty as a (victimless) request for disgorgement. There is no indication Congress permitted such an easy avenue for subverting its statutory scheme.

D. Nothing in the Restatement permits the government (or the Ninth Circuit) to override this Court's decision in *Liu* or discard the traditional limits on disgorgement. First and foremost, there is no reason to elevate the Restatement on a pedestal. Congress did not direct courts to defer to the Restatement in enforcing the securities

laws, and there is zero chance Congress was parsing the Restatement's (many) comments and reporters' notes rather than reading this Court's definitive decisions on the relevant question.

But even setting aside *Liu* and revisiting first principles, it is apparent that *Liu* was correct. Disgorgement is cut from the same cloth as many traditional equitable remedies, and each shares key features—including the requirement of pecuniary harm. While the Restatement (Third) has some errant language casting doubt on this settled doctrine, the Restatement (i) has veered off in normative directions—which undermines its use; and (ii) is properly understood as *requiring pecuniary loss*—which supports petitioner.

ARGUMENT

THE SEC MAY NOT SEEK DISGORGEMENT UNDER 15 U.S.C. 78u(d) WITHOUT SHOWING INVESTORS SUFFERED PECUNIARY HARM

A. Under *Liu*'s Authoritative Construction, Disgorgement Without Pecuniary Harm Contravenes Traditional Equitable Limits As An Impermissible Penalty

Under this Court's established principles, disgorgement requires a showing of pecuniary harm, and Congress did not authorize the non-traditional relief the SEC sought here.

1. As *Liu* itself confirmed, disgorgement is an "'equitable remedy'" bound by traditional equitable principles. 591 U.S. at 76 n.1, 80. It cannot be a penalty or deterrent. *Id.* at 76-77 ("[e]quity never 'lends its aid to enforce a forfeiture or penalty'") (quoting *Marshall* v. *Vicksburg*, 82 U.S. 146, 149 (1823)). Disgorgement's core purpose is instead "compensatory" (*Kokesh*, 581 U.S. at 464): it works to "restore[] the status quo," returning property to its

rightful owners. *Liu*, 591 U.S. at 80 (internal quotation marks omitted). It must be "awarded for victims" as "fair compensation to the person wronged." *Id.* at 74-75, 80 (internal quotation marks omitted). Relief that flunks these benchmarks falls outside disgorgement's equitable footprint: relief that does not "'restore the status quo'" "by definition" is not "equitable" (*SEC* v. *Jarkesy*, 603 U.S. 109, 124 (2024)), and disgorgement becomes a "penalty" when it "'go[es] beyond compensation.'" *Kokesh*, 581 U.S. at 467 (quoting *Gabelli* v. *SEC*, 568 U.S. 442, 451-452 (2013)); *Jarkesy*, 603 U.S. at 125 (relief "designed to punish and deter, not to compensate," is non-equitable).

Liu confirmed these traditional precepts control under Section 78u(d). Applying the key distinction between penalties and equitable relief, *Liu* limited disgorgement to compensating harm: relief must be "restricted" to a "wrongdoer's net profits *to be awarded for victims*." 591 U.S. at 79 (emphasis added); *id.* at 84-85 (remedies must be "assessed against only culpable actors *and for victims*") (emphasis added); *id.* at 88 ("[t]he equitable nature of [disgorgement] generally requires the SEC to *return* a defendant's gains to *wronged investors for their benefit*"). Otherwise, *Liu* explained, if disgorgement does not "return" funds, wrongdoers would simply be "punished"—and disgorgement would be "transform[ed] * * * into a penalty outside [a court's] equitable powers." *Id.* at 80, 82.

In setting out these limits, *Liu* explained this result was driven by a set of twin principles: "[f]irst, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains"; but, critically, "[s]econd, to avoid transforming an equitable remedy into a punitive sanction," the remedy is "restricted" to "net profits to be awarded *for victims*." 591 U.S. at 79 (emphasis added). This is effectively dispositive here: the ability to strip wrongdoers of ill-gotten gains is *limited* by the Court's "countervailing"

principle—wrongdoers should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'" 591 U.S. at 79-80 (quoting *Tilghman* v. *Proctor*, 125 U.S. 136, 145-146 (1888)). Even if a violation produces "ill-gotten gains," there is no "fair compensation" (and thus no disgorgement) unless a victim suffers loss.

In short, disgorgement is an equitable remedy designed to "restore" property to its proper owner. *Jarkesy*, 603 U.S. at 123-124; *Liu*, 591 U.S. at 79-80; *Kokesh*, 581 U.S. at 462, 464-465. It cannot be a "punish[ment] or deter[rent]." *Jarkesy*, 603 U.S. at 123. And an SEC sanction that "does not provide anything to the victims to make them whole or to remedy their losses" is "a penalty, not a remedy." *Saad* v. *SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, then-J., concurring). It necessarily follows that the SEC cannot invoke disgorgement in the absence of pecuniary harm: "[t]he *return* of funds presupposes pecuniary harm," as "[f]unds cannot be returned if there was no deprivation in the first place." *SEC* v. *Govil*, 86 F.4th 89, 103 (2d Cir. 2023).[4]

2. The government resists this conclusion, but its arguments are meritless.

a. The government initially insists that disgorgement's sole concern is "depriv[ing] a wrongdoer of 'ill-gotten profits,'" and it thus makes no difference "whether the victim has suffered a loss." Br. in Opp. 5-6 ("[d]isgorgement is a 'profits-focused remedy' that rests on the principle

[4] The Ninth Circuit asserted that disgorgement traditionally did not require "any loss whatsoever, let alone a pecuniary loss." Pet. App. 11a-12a. This stands the rule upside down. The basic distinguishing feature of equitable remedies (as opposed to penalties) is they "compensat[e] a victim for his loss." *Kokesh*, 581 U.S. at 462 (quoting *Huntington* v. *Attrill*, 146 U.S. 657, 668 (1892)). Again, if there is no loss, there is nothing to compensate.

that a wrongdoer should not "'make a profit out of his own wrong'"").

It is indeed true that *Liu* recognized "'[i]t would be inequitable'" for a wrongdoer to "'profit out of his own wrong.'" 591 U.S. at 79-80. But that was only *half* the operative framework; the government ignores *Liu*'s "countervailing" principle explicitly *cabining* that first principle—by ensuring any funds are *restored to victims*. *Id.* at 79-80 (limiting any "ill-gotten gains" to "fair compensation to the person wronged"); see also *Tull* v. *United States*, 481 U.S. 412, 424 (1987) (proper relief "'order[s] the return of that which rightfully belongs'" to the victim). The government's theory boils down to adopting *Liu*'s first principle while ignoring its second. Yet both principles work in tandem to derive the traditional rule. *Id.* at 79 ("equity jurisprudence reveal[s] *two* principles") (emphasis added). By failing to properly "circumscribe" its request, the government would wrongly "transform[]" disgorgement "into a penalty." *Id.* at 82.

b. According to the government, the fact that disgorgement focuses on profits (not loss) confirms that disgorgement "turns on whether the violator has made a profit, not on whether the victim has suffered a loss." Br. in Opp. 5-6; see also Pet. App. 13a-15a (maintaining similar point). The government is confused. That measure might "correctly describe[] how to *calculate* disgorgement," but it does not suggest disgorgement has a role when there is no one to compensate. *Govil*, 86 F.4th at 105 (emphasis added). If disgorgement is possible for investors who in fact profited or lost nothing, disgorgement would become a "windfall" for investors and a penalty for defendants (*id.* at 103)—violating the rule against forcing "wrongdoer[s]" to "'pay[] more than a fair compensation to the person wronged.'" *Liu*, 591 U.S. at 80; see also Pet.

App. 16a-17a & n.9 (admitting investors could not sue the defendant directly without economic loss).

c. The government likewise errs in transparently seeking a penalty. Indeed, it is impossible to understand how victimless "disgorgement" is *not* a penalty under the government's view. It does not remedy any harm; it does not reimburse any victim. It is designed (according to the SEC itself) to "'*deprive[]*'" the defendant—a clear punitive purpose. Br. in Opp. 5-6 (setting out facially penal objective); compare, *e.g.*, *Kokesh*, 581 U.S. at 464 (deeming "SEC disgorgement" "punitive" where its "'primary purpose" was "'deter[ring] violations of the securities laws by *depriving violators of their ill-gotten gains*'") (emphasis added).

That is precisely the kind of non-traditional relief this Court has already rejected. *Jarkesy*, 603 U.S. at 123-124; *Liu*, 591 U.S. at 79-82. It is penal in nature; it is non-compensatory; and it is not for victims. Nor does it "restore the status quo" (*Jarkesy*, 603 U.S. at 123-124); quite the contrary, it confers a "windfall" on investors who never suffered even a penny of loss. *Govil*, 86 F.4th at 103. In short, the SEC's position "bears all the hallmarks of a penalty"—"it is intended to deter, not to compensate." *Kokesh*, 581 U.S. at 465. It is a mystery how the government can insist disgorgement is both equitable and non-penal when its only objective is depriving the wrongdoer of a gain. See *ibid.* ("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)).

d. The government finally tries to dodge this Court's rationale in *Liu* by rewriting it. According to the government, *Liu* "merely reflects subsection (d)(5)'s require-

ment that equitable relief must be awarded 'for the benefit of investors,'" not any broader equitable principles. Br. in Opp. 6 (brushing aside *Liu*'s "countervailing" principle). This is nonsense. This Court's opinion was divided into multiple parts; Part II focused on traditional disgorgement and its equitable constraints (see 591 U.S. at 78-87); it had nothing to do with Section 78u(d)(5)'s qualifying language ("for the benefit of investors"), much less anything specific to Section 78u(d)(5) itself. Even Part III—which did discuss the import of the textual clause (*id.* at 87-90)—reaffirmed that the statutory precondition *and* equity pointed in the same direction. *E.g.*, *id.* at 90 (asking whether the remedy was "for the benefit of investors as required by § 78u(d)(5) *and* consistent with equitable principles") (emphasis added).[5]

The government has an obvious incentive to minimize *Liu*'s holding and operative rationale. But it cannot simply wish them away by misreading the opinion.

B. Congress Confirmed *Liu*'s Traditional Limits On Disgorgement With Its Post-*Liu* Statutory Enactment

According to the government, Congress's post-*Liu* amendments to Section 78u(d)—including adding a new section authorizing "disgorgement" (15 U.S.C. 78u(d)(7))—expanded the SEC's disgorgement authority.

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[5] The government further faults petitioner for taking *Liu*'s language seriously, whereas "'the language of an opinion is not always to be parsed as though [a court] were dealing with the language of a statute.'" Br. in Opp. 6. We assume this Court is the better judge of how much respect to afford its own opinion. But suffice it to say *Liu*'s comments were not mere throwaway remarks; this was an extended analysis of the core equitable principles undergirding the result. And that same analysis was functionally repeated earlier in *Kokesh* and later in *Jarkesy*. The government will have to redline quite a bit of the U.S. Reports to sweep this Court's rationale under the rug.

The government's reading is upside-down. Congress's immediate enactment both ratified *Liu* and cemented its traditional common-law understanding. It did so in obvious response to *Liu*'s effect on the governing limitations period—which (by rendering disgorgement *non-penal*) necessarily removed SEC disgorgement actions from 28 U.S.C. 2462 and left the SEC without a deadline.

In the end, *Liu* definitively settled the meaning of "disgorgement," and Congress adopted the same term without expansion, clarification, or change. Under this Court's precedent (and simple common sense), Congress solidified *Liu*'s understanding of disgorgement—as an equitable remedy limited to a "wrongdoer's net profits to be awarded for victims." 591 U.S. at 79. The government cannot countermand that legislative directive.

1. a. When Congress inserted the term "disgorgement" into Section 78u(d)(7), it necessarily adopted the settled meaning this Court established in *Liu*. This follows for two separate reasons.

First and foremost, there is a longstanding presumption that Congress is aware of this Court's decisions, and adopts this Court's holdings when incorporating defined terms in new statutes. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978). If anything, that presumption applies with special force here: Congress revised Section 78u immediately after *Liu* and in obvious reaction to it. It gave no indication, anywhere, of any intent to modify, expand, or clarify this Court's definitive construction. It did not attempt to define it in ways that would broaden its traditional scope. It did not add any proviso (specifying disgorgement *could* be punitive or categorically target "ill-gotten gains")—or any explanatory language at all. It simply took the unadorned term, standing alone, and inserted it into the statute.

The only logical explanation is consistent with this Court's directives: Congress necessarily adopted *Liu*'s definition of disgorgement as its own. *E.g.*, *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330-331 (2015).

In response, the government apparently believes Congress instead was (silently) expanding disgorgement beyond its traditional roots. Yet if Congress wanted an SEC-specific form of "disgorgement," it would have said exactly that. It would have dropped at least some hint (textually or otherwise) that it was overruling *Liu* and expanding the SEC's powers. It instead said—nothing. And it said nothing against the backdrop of this Court having just rejected lower-court authority that strayed from disgorgement's traditional scope. See, *e.g.*, *Liu*, 591 U.S. at 76, 85 (cabining courts that "test[ed] the bounds of equity practice"). It is absurd to think Congress disavowed *Liu* and revived those repudiated decisions—by repeating, verbatim, the very term this Court had just construed months earlier.[6]

Second, because "disgorgement" is a term of art, Congress necessarily "brings the old soil with it." *E.g.*, *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) (internal quotation marks omitted). *Liu* reaffirmed the term's traditional parameters by upholding the same equitable principles this Court has applied for centuries. Again: disgorgement is an equitable remedy; it cannot be used as a punishment or deterrence (or be "noncompensatory"); and its entire point is equitably restoring property to its proper owner. *Jarkesy*, 603 U.S. at 123-124; *Liu*, 591 U.S. at 79-85;

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[6] Even if the government doubts *Liu*, it is too late to revisit its holding: the Court set the baseline, and Congress has since ratified that baseline by adopting the term, wholesale, without elaboration or change. That term now appears in Section 78u(d)(7) as the SEC's sole authority for seeking "disgorgement." This Court cannot now revisit or narrow *Liu* without pulling the rug out from under Congress.

Kokesh, 581 U.S. at 465. Those time-honored principles are directly at odds with the government's aggressive new version of disgorgement—as one designed to divest wrongdoers of gains as its direct and deliberate purpose.

If the government wishes to have a penal version of disgorgement, it needs to seek a further amendment from Congress—one that does not employ a traditional term imbued with settled meaning, or one that confirms the SEC can retract "ill-gotten" funds despite investors not suffering any corresponding loss. But Congress instead adopted, verbatim, the term ("disgorgement") by itself; it is stuck with that term's traditional meaning. *Lorillard*, 434 U.S. at 583 ("'[w]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense'").

b. The government briefly suggests that Congress necessarily expanded disgorgement's meaning by dropping certain phrases from Section 78u(d)(7). Br. in Opp. 7-8 (noting Congress separated disgorgement from "equitable relief" and omitted Section 78u(d)(5)'s statutory precondition—"for the benefit of investors"). The government is wrong. The Section 78u(d)(5)'s textual precondition was necessary to narrow that provision to a subset of "equitable relief"—otherwise Section 78u(d)(5) would cover the entire universe of equitable remedies. There was no need to add similar language in Section 78u(d)(7) because a comparable condition automatically inheres in the very definition of "disgorgement" itself. (Read: *all* disgorgement is equitable; *all* disgorgement must "be awarded for victims"; etc. *Liu*, 591 U.S. at 79.) Contrary to the government's contention, Congress had no reason to add a redundancy by reiterating what *Liu* (literally) just confirmed "disgorgement" already means.

Nor does the government do any better latching onto the phrase "unjust enrichment" in Section 78u(d)(3)(A)(ii). See Br. in Opp. 7. That section does not say "unjust enrichment"—full stop. It says "disgorgement under paragraph (7) of any unjust enrichment *by the person who just received such unjust enrichment as a result of such violation*." 15 U.S.C. 78u(d)(3)(A)(ii) (emphasis added). For one, Congress apparently added this language to (again) confirm *Liu*—and ensure wrongdoers are not charged "for benefits that accrue to [their] affiliates." *Liu*, 591 U.S. at 90. For another, the overarching term is still "disgorgement under paragraph (7)"—which still means *disgorgement* (with all its traditional limitations). The government cannot explain how its reading would differ if the provision simply stated "unjust enrichment"—with no mention of "disgorgement" at all. The government's superfluity aside, this is not the "gotcha" the government apparently believes.

2. The government also overlooks the entire reason Congress amended Section 78u(d) in the first place—and how it confirms Congress adopted *Liu*. Simply put: Congress had to restore the prior limitations period (from 28 U.S.C. 2462) precisely because *Liu* "restricted" disgorgement to its traditional *non-penal* scope.

In *Kokesh*, this Court held that Section 2462's five-year limitations period applied because *the government's (bloated) version of disgorgement* "operate[d] as a penalty." *Kokesh*, 581 U.S. at 467; see 28 U.S.C. 2462 (authorizing default five-year limitations period for "any civil fine, penalty, or forfeiture"). But once *Liu* properly cabined disgorgement to its traditional scope, it necessarily removed SEC disgorgement requests from Section 2462—and left the SEC with no statutory deadline at all. Congress responded immediately: in a single joint provision, it first relocated disgorgement from paragraph (5) to its

own category (in paragraph (7)), and it then assigned that separate paragraph its own limitations period—reinstating (for most SEC disgorgement actions) the same five-year period established in *Kokesh*. See NADA, *supra*, § 6501(a)(3); 15 U.S.C. 78u(d)(8)(A).

If Congress believed its new amendment *revived* the penal form of disgorgement, there would have been no need to reinstate the five-year deadline—the SEC actions would again assume a penal character, and Section 2462 would again reattach. The fact that Congress instead had to insert a new deadline across the board confirms Congress's own understanding that *Liu* controls and disgorgement (in its circumscribed form) is no longer a penalty. The government has no answer for this clear progression in the statutory history.[7]

C. The Act's Context And Purpose Further Confirm That Disgorgement Requires Pecuniary Loss

Section 78u(d)'s context and purpose further reinforce that disgorgement requires pecuniary loss.

1. Congress enforces its securities laws both with SEC enforcement actions and private civil litigation. Yet according to the government, the SEC is permitted to seek

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[7] One necessary upshot of Congress's amendments: by relocating the SEC's disgorgement authority to Section 78u(d)(7), that same authority no longer exists under Section 78u(d)(5). This inexorably follows from Congress's limitations provision in Section 78u(d)(8) and its prohibition on using disgorged funds for attorney's fees in Section 78u(d)(4). Each provision specifies "disgorgement under paragraph (7)"—and each would make little sense if the SEC still had the option of pursuing disgorgement under paragraph (5). (Short version: it would give the SEC the option of introducing bizarre exceptions in the Act or opting out of the five-year limitations period.) This consequence has no effect on this case (since Congress codified *Liu*'s reading under paragraph (7)); but it does mean the SEC should elect to modify its statutory authority for disgorgement claims (citing paragraph (7) alone) going forward.

disgorgement on behalf of the same class of *uninjured* investors who could not initiate a civil action on their own. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 338 (2005) ("A private plaintiff who claims securities fraud must prove that the defendant's fraud caused an economic loss."); 15 U.S.C. 78u-4(b)(4). That injects a jarring disconnect into Congress's scheme: it is odd to say Congress would want investors to receive a windfall from the SEC at the same time Congress determined those same investors should not receive *anything* in private litigation—especially when each action targets the identical harm and asserts the identical interests.

There is no reason to read such a stark anomaly into the Act: "[T]he investors whom [a defendant] defrauded could not pursue individual fraud claims against him without showing a pecuniary loss. Were we to call those investors 'victims' without a similar showing, we would allow the SEC to forward proceeds of disgorgement to such investors and circumvent the limitations on private claims under § 10(b) and the common law." *Govil*, 86 F.4th at 104-105.

2. Under the government's view, disgorgement is indistinguishable in all material respects from a civil penalty; the only difference is the statutory cap on amounts collected. See *Liu*, 591 U.S. at 91-92; 15 U.S.C. 78u(d)(3). This again introduces a series of anomalies.

Section 78u(d)(3) expressly distinguishes between penalties and disgorgement. Yet the government's view effectively collapses the two. Why would Congress treat these terms as distinct if the only material difference is the amount? Why would it not simply create a second *penalty* provision for "net proceeds"?

Under a proper reading, Congress separated the two concepts because each operates with an entirely different function. The penalties are *penalties*—they punish the

wrongdoer and collect irrespective of the need to compensate anyone. Disgorgement, by contrast, is *disgorgement*—it restores funds to injured investors. It makes perfectly good sense (under a proper understanding) why Congress would want to preserve the right to pursue remedies on behalf of the injured class while still retaining the right to punish a wrongdoer. That produces a coherent statutory scheme. The government's reading, by contrast, presumes Congress bizarrely introduced a second round of penalties in a section that *already* covers penalties.

3. The government's reading also frustrates Congress's calibrated scheme and permits an end-run around its procedural safeguards.

Congress armed the SEC with robust tools for pursuing securities violators, including a powerful arsenal of penalties. But those powerful remedies come with certain challenges: the defendant has procedural rights (like jury trials) and can resist the government on various grounds. Those obstacles may seem inconvenient but they are imposed for a reason—to protect the accused against wrongful punishments and limit government overreach.

The government's unbounded form of disgorgement simply seeks an end-run around these procedural safeguards. Rather than turn square corners and pursue defendants the right way, the government apparently prefers to label everything "disgorgement," avoid jury trials, and invoke the (looser) equitable procedures to strong-arm settlements and take advantage of intimidated defendants.

No one (petitioner included) believes that defendants should not own up to their mistakes and incur punishment where appropriate. But the government is obligated to enforce Congress's scheme as written. That includes estab-

lishing a charge via full procedural safeguards when seeking penalties—and not simply sidestepping crucial safeguards by recasting every allegation in "equitable" garb.

D. The Government Cannot Use The Restatement To Override *Liu* Or The Traditional Limits On Disgorgement

In the proceedings below, the Ninth Circuit relied heavily on the Restatement (Third), and the government appears ready to take up the mantle in this Court. This last-ditch reliance on this non-judicial document is unavailing. Both the government and the Ninth Circuit have elevated the Restatement to a level where it does not belong—and then proceeded to misread the Restatement.

Suffice it to say this: The Restatement is not the automatic benchmark of the meaning of the U.S. Code. Congress did not codify "disgorgement" *as that term is defined in the Restatement*. Nor did *Marbury* hold that this Court says what the law is—unless the Restatement happens to suggest something else. There is no reason to assign dispositive weight to the views of a random selection of academics serving on a non-judicial committee. And there assuredly is no reason to do so when the group's work product is unreliable, involves editorial judgment, and self-consciously steers the law in desired directions.

Certain Members of this Court have criticized the Restatement along these lines. While there is no reason to discard the Restatement for good—and indeed the Restatement, properly understood, supports petitioner's position—any reliance on the Restatement here is unnecessary. *Liu* has already done the hard work; Congress has already ratified *Liu*'s position; and there is no reason to think Congress was focused instead on random snippets plucked from isolated comments and notes scattered throughout the Restatement—rather than this Court's

definitive pronouncement on the crucial issue that drives the answer to the question presented.

In any event, should this Court decide to re-create the wheel, even the Restatement points in petitioner's favor. The Ninth Circuit's view of the common law is wrong. Restoring a victim's loss is a core principle of equitable profits-based remedies, as this Court has consistently recognized. The Ninth Circuit and the government misconstrue modern doctrinal innovations as license to abandon the loss-restoration principle that has defined these remedies since their inception. That approach would transform disgorgement into a freestanding punitive remedy untethered to actual loss. This Court should once again reject modern attempts to expand disgorgement to "exceed the bounds of traditional equitable principles." *Liu*, 591 U.S. at 85.

***Pecuniary Harm Was a Core Principle of Equitable Profits-Based Remedies at Common Law*

In *Liu*, this Court identified traditional equitable foundations for modern "disgorgement": restitution, accounting for profits, and constructive trusts. 591 U.S. at 76 n.1, 79-82. Pecuniary harm is a fundamental premise of each of those remedies, rooted in centuries of equitable practice.

1. Start with restitution. The equitable doctrine is built on an ancient maxim: "By the law of nature it is fair that no one become richer *by the loss and injury of another*." Dig. 50.17.206 (Pomponius, 9 ex var. lect.) (Alan Watson trans., 1985) (emphasis added); *Bright v. Boyd*, 4 F. Cas. 127, 133 (C.C.D. Me. 1841) (Story, J.) (quoting Dig. 50.17.206 in its original Latin); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 Wash. & Lee L. Rev. 1027, 1044 & n.94 (2011). Lord Mansfield's

opinion in *Moses* v. *Macferlan*—the foundational common-law statement of restitution principles[8]—echoes that focus on restoration: restitution is a remedy "to *recover back money*, which ought not in justice to be kept," lying "only for money which, ex aequo et bono, the defendant ought to *refund*." *Moses* v. *Macferlan*, 97 Eng. Rep. 676, 680 (K.B. 1760) (emphases added) (footnote omitted). "In one word, the gist of this kind of action is, that the defendant . . . is obliged . . . to refund the money." *Id.* at 681.

Common law cases adhered to that principle, defining "restitution" as "the *return or restoration* of a specific thing or condition." 66 Am. Jur. 2d Restitution § 1 (emphasis added). That means that there is no "duty of restitution" when "the plaintiff was deprived of nothing due it" and "[n]othing was taken away from it which belonged to it." *Am. Univ.* v. *Forbes*, 183 A. 860, 862 (N.H. 1936). At bottom, restitution traditionally requires enrichment on one side and loss on the other—if there is no loss, there is no remedy.

This Court has consistently recognized loss-restoration as the core of equitable restitution. Restitution is an equitable remedy that "restor[es] the status quo and order[s] the return of that which rightfully belongs" to the victim. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946); *Tull* v. *United States*, 481 U.S. 412, 422, 424 (1987) (same); see also *AMG Cap. Mgmt., LLC* v. *Fed. Trade Comm'n*, 593 U.S. 67, 75 (2021) (contrasting injunctions

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[8] See, *e.g.*, *Stone* v. *White*, 301 U.S. 532, 534 (1937); John Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087, 1091 (1968) (The Restatement (First) of Restitution was "the most important event in the development of the law of Restitution since Lord Mansfield's decision in *Moses* v. *Macferlan*."); Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L. Q. Rev. 29, 33 (January 1938) (*Moses* v. *Macferlan* was the "first to have recognized the fundamental principle of restitution.").

with restitution, which "typically offers retrospective relief to redress past harm"). Indeed, profits-based restitutionary remedies sit "squarely within the heartland of equity" *because* they "simply restore[] the status quo." *Liu*, 591 U.S. at 80 (alterations and internal quotation marks omitted). These remedies "avoid unjust enrichment by the defendant *at the expense of the plaintiff*." See *Stone* v. *White*, 301 U.S. 532, 534 (1937) (emphasis added). Profit-shifting *without* pecuniary loss is a windfall—and restitution does not provide windfalls. See 66 Am. Jur. 2d. Restitution § 1.

2. The same loss-restoration principle animates the two other remedies identified in *Liu* as the foundation for equitable disgorgement, accounting for profits and constructive trusts. These remedies restore something taken from the victim: the victim's property and the profits derived from its use. *Great-W. Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 214 & n.2 (2002). This return of the property and profits is "an equitable measure of *compensation*" to "the true owner." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916) (emphasis added).

Accounting for profits allows a victim "to recover the amount of gains and profits that the defendants have made by the use of" the victim's property. *Tilghman* v. *Proctor*, 125 U.S. 136, 144 (1888). The remedy is available because "in equity the profits" made using the victim's property "belong to" the victim. *Id.* at 145; *Liu*, 591 U.S. at 98 (Thomas, J., dissenting) ("[T]he traditional remedy of an accounting . . . compels a party to repay profits that belong to a plaintiff."). Thus, like restitution, accounting for profits is an "equitable . . . *refund*" that provides "compensation" for a "past injury." *Root* v. *Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 207 (1881) (emphasis added); *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448,

456 (1932) ("[P]rofits are recoverable not by way of punishment but to insure full compensation to the party injured."); *Tilghman*, 125 U.S. at 145 ("fair compensation to the person wronged," not "to undertake to punish"). This Court has held that accounting is unavailable when the complainants do not suffer pecuniary harm. *Kilbourn v. Sunderland*, 130 U.S. 505, 516-17 (1889).

Constructive trusts likewise restore "money or property identified as belonging in good conscience to the plaintiff." *Great-W. Life & Annuity Ins. Co.*, 534 U.S. at 213. The constructive trust remedy treats the defendant as a trustee for the plaintiff (and unlike accounting for profits, requires "identify[ing] a particular res containing the profits sought to be recovered"). *Id.* at 212 & n.2. The core principle remains: the remedy restores lost profits as "compensation due" to the victim. *Liu*, 591 U.S. at 82 (quotation omitted). This framework collapses without a victim who has suffered pecuniary loss, as "[f]unds cannot be returned if there was no deprivation in the first place." *SEC* v. *Govil*, 86 F.4th 89, 103 (2d Cir. 2023).

Equity used these profits-based remedies to compensate victim loss and restore the status quo. Without pecuniary harm, there is nothing to restore—and thus no claim for an equitable disgorgement. Those are the common-law equitable principles Congress codified in Section 78u(d).

***Modern Extensions of "Restitution" Doctrine Do Not Justify Abandoning Core Principles Requiring Pecuniary Loss*

In the hands of some modern courts, disgorgement drifted away from that traditional equitable core. *Liu*, 591 U.S. at 85. Modern commentaries likewise expand profits-based remedies beyond equitable bounds—often deliberately. The portions of the Restatement (Third) of Restitution and Unjust Enrichment on which the Ninth Circuit and the government rely are emblematic. These doctrinal

innovations do not reflect the equitable version of disgorgement that this Court defined in *Liu* and Congress codified in Section 78u(d).

1. The Restatement of Restitution is not a restatement of historical equitable remedies. That is by design.

"The original Restatement of Restitution" in 1937 set out to "create[] a field of law." Restatement (Third) of Restitution and Unjust Enrichment Foreword (A.L.I. 2011) (Restatement (Third)). As the original authors explained, they amalgamated cases "scattered through many sections of the digests and in treatises on apparently diverse subjects" to form a new doctrine of "restitution"—a term that at the time was not "a title in any law digest or treatise." Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L. Q. Rev. 29, 29 (1938). Restitution in its "modern form and identity" was thus "discovered and created and given to the world by The American Law Institute." American Law Institute, 77th Annual Meeting Proceedings, 77 A.L.I. Proc. 226, 233 (2000) (remarks of Andrew Kull, Reporter for Restatement (Third)); see *ibid.* (in contrast to torts, the Restatement's version of restitution would have "never existed" without the American Law Institute).

This project deliberately and "seamlessly blend[s] law and equity." Restatement (Third) Foreword. In pursuit of a "unified law of unjust enrichment," the Restatement (Third) makes "no systematic attempt in" its "Remedies" chapter "to distinguish with precision the legal and equitable aspects of the various remedies described." Restatement (Third) § 4 & cmts. a, b. That "amalgamation of rights and remedies" was once a "radical proposal," but it is now the basis for the "modern contours" of restitution as set forth in the Restatement. Restatement (Third) § 4 cmt. b. Accordingly, "'Restatement' is an inapt title for

[the Restatement (Third) of Restitution and Unjust Enrichment]." *Liu*, 591 U.S. at 97 (Thomas, J., dissenting).

"Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." See, *e.g.*, *Kansas* v. *Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part); see also Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 Pepp. L. Rev. 23, 25 (1985) ("It is unfortunate that many people, including lawyers and judges in this country and other countries, assume that the original goal of *Restatements* continues — that is, that the ALI is attempting to restate the law essentially 'as it is' and not as the Institute thinks 'it should be.'"). The Restatement (Third) fits this pattern: the drafters' view was that the distinction between law and equity "doesn't matter anymore." American Law Institute, 88th Annual Meeting Proceedings, 88 A.L.I. Proc. 3, 158 (2011). But it makes all the difference here.

2. Unmoored from historical equitable boundaries, the Restatement (Third) embraces an expansive view of restitutionary remedies. This reflects the modern shift away from the historical loss-restoration core of equity's profits-based remedies.

The first Restatement at least acknowledged the "normal[]" rules: "the plaintiff must have suffered a loss," and "an action not based upon loss is not restitutionary." Restatement (First) of Restitution § 128 cmt. f. It noted one exception: "the quasi-contractual action of assumpsit." *Ibid.* Even that exception departed from others' understanding, including in the assumpsit context, that "it is not enough to show that the defendant has been enriched by his wrong; it must further appear that the benefit received by him has been taken from the plaintiff. . . . [T]here must

be 'not only a plus, but a minus quantity.'" Frederic Campbell Woodward, *The Law of Quasi Contracts* 442 (1913); see also, *e.g.*, William A. Keener, *Waiver of Tort*, 6 Harv. L. Rev. 223 (1892).

But the third Restatement erased the historical loss requirement entirely, asserting that "restitution" is available "without the need to show that the claimant has suffered a loss." Restatement (Third) § 1 cmt. a. That is reinvention, not restatement.

In an even more vivid departure from historical limits, the Restatement (Third) redlined the phrase "at the expense of another" out of its predecessor's statement of what constitutes wrongful gain. *Compare* Restatement (First) of Restitution § 3 ("A person is not permitted to profit by his own wrong at the expense of another.") *with* Restatement (Third) § 3 ("A person is not permitted to profit by his own wrong."). As the ALI reporter explained, the modern commentators disagreed with the 1937 version's "implication that the defendant's wrongful gain must correspond to a loss on the part of the plaintiff." Restatement (Third) § 3 reporter's note a. The reporter acknowledged that at its core, restitution is a "transfer of property." American Law Institute, 77th Annual Meeting Proceedings, 77 A.L.I. Proc. 226, 227 (2000) (remarks of Andrew Kull, Reporter for Restatement (Third)). Yet he nonetheless pushed to eliminate a pecuniary harm requirement and establish a new form of restitution that is *not* compensatory. *Id.* at 228, 230-33. Contra, *e.g.*, *Hamilton-Brown Shoe Co.*, 240 U.S. at 259 (accounting for profits is an "equitable measure of *compensation*" (emphasis added)).

3. Even setting aside the Restatement's deliberate disregard for equity's remedial limits, the view that disgorgement does not require pecuniary harm rests on analytical errors.

For one, the Restatement conflates measurement with availability. It starts with an uncontroverted principle—that disgorgement is *measured* by the defendant's wrongful profits rather than the victim's loss—but then operates as though that calculation determines whether disgorgement is *available* in the first place. See, e.g., Restatement (Third) § 51, cmt. i ("Reasonable approximation" of a defendant's unjust enrichment "will suffice to establish the disgorgement *liability* of a conscious wrongdoer" (emphasis added)). But "[w]hether an investor has suffered pecuniary harm—bringing the investor into the category of victims—is a different issue from how to quantify the ill-gotten gains." *Govil*, 86 F.4th at 105. Equity did not award restitution based solely on a defendant's profits; it awarded profits to restore a victim who had suffered pecuniary loss to the status quo. See *supra* Part _(A). Availability precedes calculation, and each is a separate inquiry. The Restatement's failure to recognize that distinction is fatal to its analysis.

For another, even the Restatement's own illustrations do not support its conclusion that restitution is available without pecuniary loss. As "salient examples," the Restatement (Third) points to cases where a defendant uses a victim's property for profit, "whether or not it diminishes the property's value." Restatement (Third) § 3 cmt. b. But that *is* pecuniary harm. The victim owns the property; the victim is entitled to the profits it generates. When those profits flow to the defendant instead, the victim has lost something of economic value. That is the very foundation of the accounting-for-profits remedy. See, *e.g.*, *Liu*, 591 U.S. at 81-82 (describing equitable accounting in patent cases, where a plaintiff may recover "profits that the defendants have made by the use of his invention" (quotation omitted)).

In sum, modern efforts to define—and redefine—non-equitable remedies do not reflect the core common-law principles that define SEC disgorgement under *Liu*. The Restitution Restatements do not even purport to follow those limits.

* * *

In the end, disgorgement is a powerful weapon in the SEC's arsenal, but Congress cabined the SEC's power in critical ways. The Ninth Circuit has now brushed aside those critical limits—and the government has followed suit. Each effectively treats disgorgement as a sanction for wrongdoers; harmed investors are a mere afterthought. That converts Sections 78u(d) into a penalty, not equitable relief.

Equitable disgorgement requires a showing of pecuniary harm, and Congress did not authorize the non-traditional relief the SEC sought here. Because the Ninth Circuit erred in holding otherwise, the judgment below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. Section 78u of Title 15 of the United States Code provides in relevant part:

Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations,

and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

* * * * *

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions; disgorgement

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit

such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) CIVIL MONEY PENALTIES AND AUTHORITY TO SEEK DISGORGEMENT.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u–1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—

(i) impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and

(ii) require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of a civil penalty imposed under subparagraph (A)(i) shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of a civil penalty imposed under subparagraph (A)(i) for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross

amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at

the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(7) DISGORGEMENT.—In 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.

(8) LIMITATIONS PERIODS.—

(A) DISGORGEMENT.—The Commission may bring a claim for disgorgement under paragraph (7)—

(i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs; or

(ii) not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim if the violation involves conduct that violates—

(I) section 78j(b) of this title;

(II) section 77q(a)(1) of this title;

(III) section 80b–6(1) of this title; or

(IV) any other provision of the securities laws for which scienter must be established.

(B) EQUITABLE REMEDIES.—The Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.

(C) CALCULATION.—For the purposes of calculating any limitations period under this paragraph with respect to an action or claim, any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of that period.

(9) RULE OF CONSTRUCTION.—Nothing in paragraph (7) may be construed as altering any right that any private party may have to maintain a suit for a violation of this chapter.

* * * * *

(g) Consolidation of actions; consent of Commission

Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

* * * * *

2. Section 2462 of Title 28 of the United States Code provides:

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.