No. 25-466

IN THE

Supreme Court of the United States

ONGKARUCK SRIPETCH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF *AMICI CURIAE* KALISTRATOS KABILAFKAS AND TIMOLEON KABILAFKAS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the SEC may seek equitable disgorgement without showing investors suffered pecuniary harm.

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INTEREST OF *AMICI CURIAE*[1]

Kalistratos Kabilafkas is an American investor. Timoleon Kabilafkas is his father. Amici are appellants in a case pending before the United States Court of Appeals for the Second Circuit[2] arising from their investment in Airborne Wireless Network ("Airborne").

In that case, the district court awarded approximately $56 million in disgorgement against amici, jointly and severally, plus approximately $17 million in prejudgment interest. The court did not determine whether any investors receiving disgorgement had suffered any pecuniary loss. In fact, direct investors in Airborne had collectively realized more than $8.5 million in profits on their investments prior to the disgorgement award.

If upheld and distributed *pro rata*, the award would confer a windfall, not restore the status quo *ante*. Appendix A illustrates the effect of such a distribution. Amici submit this brief to underscore the importance of administrable limits that preserve disgorgement's equitable character.

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1. Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. *SEC v. Kabilafkas*, 23-1285-cv (L) (United States Court of Appeals for the Second Circuit).

SUMMARY OF ARGUMENT

The question presented is whether the SEC may seek equitable disgorgement without showing investors suffered pecuniary harm.

The SEC may obtain disgorgement for the benefit of investors — but only if disgorgement is equitable. 15 U.S.C. § 78u(d)(5); *Liu v. SEC*, 591 U.S. 71, 75 (2020). Equity does not require a wrongdoer to "pay[] more than a fair compensation to the person wronged." *Liu*, 591 U.S. at 80 (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145-46 (1888)). Disgorgement must therefore restore the status quo, not "go beyond compensation." *Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013).

If the SEC obtains disgorgement in an amount more than investors lost, a surplus results. Distributing this surplus to investors confers a windfall; depositing the surplus to the Treasury of the United States would not constitute relief "for the benefit of investors." 15 U.S.C. § 78u(d)(5); *see also Liu*, 591 U.S. at 75.

In *SEC v. Govil*, the Second Circuit avoided that dilemma by requiring the SEC to show that investors suffered pecuniary harm *before* receiving disgorgement. 86 F.4th 89, 98 (2d Cir. 2023).[3] Other courts have not provided an administrable benchmark for determining when an award to investors exceeds the bounds of equity. Absent such a limiting principle, the distribution of such an award becomes a matter of discretion untethered from judicially administrable standards. It "bears all the

3. Counsel of record for amici, Matthew Ford, also represented the appellant in *Govil*.

hallmarks of a penalty." *Kokesh v. SEC*, 581 U.S. 455, 465 (2017).

ARGUMENT

I. Equitable Monetary Relief is Limited to Restoring the Status Quo

Legal and equitable remedies serve distinct purposes. A legal remedy may be compensatory, but it may also "punish or deter the wrongdoer;" an equitable monetary remedy, however, is designed "to 'restore the status quo'" before the conduct leading to the litigation. *SEC v. Jarkesy*, 603 U.S. 109, 123 (2024) (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (government may deposit penalty awards to the Treasury or "restor[e] the status quo and order[] the return of that which rightfully belongs to the" victim). Equitable monetary remedies often treat the wrongdoer as a "constructive trust[ee] on wrongful gains for wronged victims." *Liu*, 591 U.S. at 82.

Courts exercise these equitable monetary remedies — whether labeled "restitution" or "disgorgement" — subject to two countervailing principles: wrongdoers should neither profit from wrongdoing nor "pay[] more than a fair compensation to the person wronged." *Id.* at 80 (quoting *Tilghman*, 125 U.S. at 145-46). Courts thus reject attempts to seek disgorgement awards that exceed wrongdoers' net unjust gains, or the victims' losses attributable to the violation, as conferring a windfall outside of the bounds of equity. *Govil*, 86 F.4th at 103; *see also Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 808 F. App'x 459, 460-61 (9th Cir. 2020) (rejecting disgorgement where defendant did not profit from trademark infringement as an inequitable

"windfall"); *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 919 F.3d 869, 878-79 (5th Cir. 2019) (same in false advertising case where the advertising did not divert sales from plaintiff to defendant).

Even where courts differ as to the particulars, equitable remedies adhere to the "boundaries of traditional equitable relief." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). A "wrenching departure from past practice" is a matter for Congress, not the courts. *Id.*

The distinction between law and equity constrains agency remedial authority since "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). This Court has enforced these statutory limits by rejecting *ultra vires* agency practices. *See, e.g., AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 593 U.S. 67, 81-82 (2021) (rejecting the FTC's attempt to seek monetary relief as outside the congressional authorization to seek a "permanent injunction"). The SEC's practices, too, have tested the boundary between law and equity. *See, e.g., Jarkesy*, 603 U.S. at 122-23 (SEC imposition of penalties through in-house administrative courts derogates the right to trial by jury).

II. Because Congress Authorized Only Equitable Disgorgement, SEC Disgorgement Cannot Confer a Windfall

This Court has regularly limited the scope of the SEC's monetary remedies by examining how these remedies functioned, not how they were labeled. That same methodology governs here.

In *Gabelli*, this Court found that the SEC does not benefit from the "discovery rule" when bringing enforcement actions. 568 U.S. at 447. The Court explained that the "discovery rule helps to ensure that the injured receive recompense," but the SEC pursues penalties that "go beyond compensation, are intended to punish, and label defendants wrongdoers." *Id.* at 451-52.

In *Kokesh*, this Court found that SEC's practice of awarding disgorgement bore "all the hallmarks of a penalty." 581 U.S. at 465 (28 U.S.C. § 2462's five-year statute of limitations for penalties applies to disgorgement). Determining "how and to whom the money will be distributed" was left to discretion. *Id.* at 464 (internal quotation marks omitted). "Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury." *Id.* at 465. But the Court reserved the question of whether disgorgement as practiced in SEC enforcement actions was proper. *Id.* at 461 n.3.

In *Liu*, the Court answered that question. 591 U.S. at 71-73. The Court held that disgorgement may be awarded under 15 U.S.C. § 78u(d)(5)'s authorization of "equitable relief … for the benefit of investors," but only within equity's traditional limits: it must "not exceed a wrongdoer's net profits" and must be "awarded for victims." *Id.* at 75. To "avoid transforming an equitable remedy into a punitive sanction," the Court "restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." *Id.* at 79.

The SEC's practice, however, departed from these equitable principles. The SEC failed to deduct legitimate expenses, pursued disgorgement on a joint and several basis, and deposited funds into the Treasury. *Id.* at 85.

Since an equitable "profits-based remedy must do more than simply benefit the public at large," the SEC cannot satisfy the requirements of equity by merely "depriving wrongdoers of profits." *Id.* at 88-89.

Congress's 2021 authorization of "disgorgement … of any unjust enrichment by the person who received such unjust enrichment as a result of such violation," 15 U.S.C. § 78u(d)(3)(A)(ii), did not detach disgorgement from these equitable constraints. *See Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (a statutory term borrowed from another source brings the "old soil" with it) (quoting *Hall v. Hall*, 584 U.S. 59, 73 (2018)). As the Second Circuit has held, that amendment confirms the availability of equitable disgorgement without expanding the SEC's remedial authority. *SEC v. Ahmed*, 72 F.4th 379, 395-96 (2d Cir. 2023).

III. Equitable Disgorgement Requires Proof of Pecuniary Harm, a Corresponding Unjust Gain, and Causation

Together, *Gabelli*, *Kokesh*, *Liu*, and the 2021 amendment to § 78u all confirm three requirements for equitable disgorgement in SEC enforcement actions: (1) the investor suffered a pecuniary loss; (2) the wrongdoer received a net pecuniary gain of that amount; and (3) both the loss and gain resulted from the securities law violation.

A. The Investor Suffered a Pecuniary Loss

Requiring proof that an investor suffered pecuniary harm before receiving disgorgement implements the principles the Court has elucidated into a workable guide for courts and for litigants.

If disgorgement is proper in the absence of such harm, awards would necessarily "go beyond compensation." *Gabelli*, 568 U.S. at 451-52. Once an award exceeds the losses it purports to remedy, it is no longer compensatory. It must either be retained by the government or be distributed to investors who suffered no corresponding loss.

The Court has been clear that depositing disgorged funds straight to the Treasury "test[s] the bounds of equity practice." *Liu*, 591 U.S. at 85. A remedy bears "hallmarks of a penalty" when "[s]ome disgorged funds are paid to victims; other funds are dispersed to the United States Treasury." *Kokesh*, 581 U.S. at 465. Although the Court left open the *possibility* that depositing disgorged funds to the Treasury may be permissible when the funds "cannot practically be disbursed to the victims," *Liu*, 591 U.S. at 90, embedding disbursal of funds to the Treasury as a routine feature of disgorgement would sever the connection between the wrong and the remedy. *See id. at* 88 ("The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit."); *see also* 15 U.S.C. § 78u(d)(5) (authorizing equitable relief "for the benefit of investors.").

The alternative fares no better. Were surplus funds to be distributed to investors who suffered no corresponding loss, those recipients would be in a better position than if the violation had not occurred. That is not restorative; it confers a windfall.

Appendix A illustrates this result. It reflects a portion of a disgorgement award that a district court ordered distributed to all direct investors in a company, regardless

of whether they suffered any pecuniary harm.[4] Those investors had collectively invested approximately $23 million and had already realized more than $8.5 million in net profits before receiving any disgorgement proceeds. *See* Appendix A. The resulting distributions placed investors in a far better position than if no violation had occurred.

Requiring the SEC to show that investors suffered pecuniary harm as a precondition to obtaining disgorgement avoids this dilemma by supplying a concrete benchmark to judge a disgorgement award. That requirement provides an administrable standard to instantiate the clear directive by this Court and Congress that disgorgement must be "for the benefit of investors." 15 U.S.C. § 78u(d)(5); *Liu*, 591 U.S. at 87-91. Neither the SEC nor the courts rejecting this requirement have articulated an alternative administrable standard for determining whether a monetary award to investors is restorative or goes beyond compensation.

B. The Wrongdoer Received a Corresponding Net Pecuniary Gain

This Court has been clear that a disgorgement award cannot "exceed a wrongdoer's net profits." *Liu*, 591 U.S. at 75. This requirement mirrors the first: just as equitable remedies cannot overcompensate investors, it cannot over-extract from defendants.

Determining the wrongdoer's net profits is an individual inquiry. Equity courts exercised equitable

4. *See SEC v. Airborne*, 1:21-cv-01772, ECF No. 280 (S.D.N.Y. Nov. 26, 2024).

"profits-based remedies against individuals or partners engaged in concerted wrongdoing, [but] not against multiple wrongdoers under a joint-and-several liability theory." *Id.* at 82-83. And to the extent courts order disgorgement from relief defendants or assets held in another's name, they must make the findings necessary to treat those assets as the wrongdoer's unjust enrichment. *See, e.g., Ahmed*, 72 F.4th at 407-10; *SEC v. Sanchez-Diaz*, 88 F.4th 81, 87-95 (1st Cir. 2023); *SEC v. George*, 426 F.3d 786, 798-800 (6th Cir. 2005). Congress reinforced the individualized nature of disgorgement a year after *Liu* by authorizing disgorgement only of "unjust enrichment by the person who received such unjust enrichment." 15 U.S.C. § 78u(d)(3)(A)(ii).

C. The Gain and Loss Resulted from the Violation

Causation supplies the connection between the wrong and the remedy necessary to prevent transformation of equitable relief into a penalty. As this Court has explained, disgorgement must remain tethered to the violation to be restorative, not punitive. *Liu*, 591 U.S. at 80.

Congress's authorization of the SEC to seek disgorgement of unjust enrichment "as a result of such violation," 15 U.S.C. § 78u(d)(3)(A)(ii), reflects the general requirement that a court "may exercise its equitable power only over property that is causally related to the wrongdoing." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). And although, unlike private plaintiffs, the SEC need not establish loss causation or reliance to prove *liability*, "the difference between private enforcement suits and SEC suits does not entirely eliminate the need for proof of a causal connection between the securities violation and the disgorged funds."

SEC v. Teo, 746 F.3d 90, 103 (3d Cir. 2014). That requirement aligns with the purpose of the securities laws, which is "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

A causal requirement is not novel to equitable remedies. Congress imposed a similar requirement in its authorization of penalties, which are assessed based on the gain "as a result of the violation." *See e.g.*, 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii). It would be anomalous to require causation only for penalties but not disgorgement, as equitable remedies typically require a tighter connection between the wrong and the remedy than legal remedies do.

IV. The Second Circuit Approach Preserves the Equitable Character of Disgorgement

The dispute is not whether disgorgement must be compensatory, but how courts determine whether disgorgement is compensatory. In *Govil*, the Second Circuit held that "[a]n investor who suffered no pecuniary harm as a result of the fraud is not a victim" eligible to receive disgorgement. 86 F.4th at 98. That holding gives effect to this Court's instruction that equitable monetary relief must not go beyond compensation.

Other courts have taken a different approach, including the Ninth Circuit in *SEC v. Sripetch*, 154 F.4th 980, 982 (9th Cir. 2025). Those courts do not require a showing that investors suffered pecuniary harm before receiving disgorgement.

In *Sripetch*, the Ninth Circuit interpreted *Govil* as imposing an "economic loss requirement" onto SEC enforcement actions. *Id.* at 989. But that interpretation conflates the requirements for establishing liability with the distinct requirements governing remedies. The SEC need not prove pecuniary loss to establish a violation of the securities laws, nor to obtain penalties, cease-and-desist orders, or injunctive relief. Disgorgement, by contrast, is an equitable monetary remedy. The SEC's ability to obtain other forms of relief without showing pecuniary harm does not eliminate equity's separate constraint that monetary relief restore the status quo rather than place investors in a better position than if no violation occurred.

Observing that distinction reveals a structural deficiency in decisions rejecting the pecuniary-harm requirement. Those decisions do not articulate an alternative limiting principle for determining when an investor-directed award exceeds equity's bounds. For example, the Ninth Circuit suggested that injury to "protected interests" may suffice, yet it did not identify criteria for determining when such non-pecuniary interests warrant monetary distribution — or how such harms would be measured in quantitative terms. *Id.* at 986 (internal quotation marks omitted). Without a benchmark tied to loss and gain, courts lack a judicially administrable standard for distinguishing restoration from windfall. *See* Appendix A.

Equity demands limits capable of principled administration and appellate review. An award left to "discretion" over "how and to whom the money will be distributed" bears the "hallmarks of a penalty." *Kokesh,* 581 U.S. at 464 (internal quotation marks omitted). The

Second Circuit's approach supplies the limiting content necessary to keep disgorgement tethered to the violation and to preserve its equitable character.

CONCLUSION

This Court has permitted disgorgement in SEC enforcement actions only within the limits of equity. Those limits require a close connection between the violation, the defendants' net unjust enrichment, and the investors' loss. Permitting distribution to investors who suffered no pecuniary harm transforms disgorgement into a penalty. The Court should reaffirm the equitable constraints articulated in *Liu* and reverse the judgment below.

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Respectfully submitted,

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APPENDIX

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APPENDIX A — CHART WITH INVESTOR RETURNS — DISGORGEMENT AND TOTAL PROFIT

Investor	Investment	Pre-Order Profit ($)	Post-Order Profit ($) aka "Disgorgement"	Total Profit including "Disgorgement"	Return on Investment With Disgorgement Award
Adar Bays LLC	$1,600,000	$602,338.40	$1,600,000	$2,202,338.40	137.65%
Anson Investments Master	$2,000,000	$227,064.43	$2,000,000	$2,227,064.43	111.35%
Auctus Fund LLC	$277,500	$117,780.50	$277,500	$395,280.50	142.44%
Black Mountain Equities	$0	$115,562.40	$0	$115,562.40	
Concord Holding Group LLC	$962,499	$652,338.90	$962,499	$1,614,837.90	167.78%
Eagle Equities, LLC	$1,600,000	$764,874.31	$1,600,000	$2,364,874.31	147.80%
Einstein Investments LLC	$254,100	($26,377.79)	$254,100	$227,722.21	89.62%
GS Capital Partners LLC	$444,000	$232,130.60	$444,000	$676,130.60	152.28%
Lucas Hoppel	$86,250	$105,623.25	$86,250	$191,873.25	222.46%
Hudson Bay Capital MGMT LP	$2,000,000	$2,727,103.17	$2,000,000	$4,727,103.17	236.36%
Ionic Ventures, LLC	$2,000,000	$607,521.44	$2,000,000	$2,607,521.44	130.38%
JSJ Investments Inc.	$200,000	$249,066.69	$200,000	$449,066.69	224.53%
Sabby Management, LLC	$3,510,000	$2,270,434.95	$3,510,000	$5,780,434.95	164.68%
Total	$14,934,349	$8,645,461.25	$14,934,349	$23,579,810.25	