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 WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

March 2, 2026

QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as amicus curiae before this Court to advocate for the proper interpretation of the securities laws, *Cyan, Inc. v. Beaver Cnty. Emps. Retirement Fund*, 583 U.S. 416 (2018), including the limits on the Securities and Exchange Commission's (SEC) authority to seek disgorgement. *Liu v. SEC*, 591 U.S. 71 (2020); *Kokesh v. SEC*, 581 U.S. 455 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive Branch can't rely on specious readings of federal law to give itself expansive powers. *Learning Resources v. Trump*, 607 U.S. __ (2026). For the SEC to prevail, that proposition must be false.

Consider the bottom line of the agency's case here: Congress silently overrode *Liu v. SEC* just a few months after it was handed down. How? By placing the word "disgorgement"—the thing defined by *Liu* as an equitable remedy limited to pecuniary harms—into the Securities Exchange Act. 15 U.S.C. § 78u(d)(7). That can't be right.

---

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

Of course, this kind of aggressive play for boundless jurisdiction to obtain disgorgement is hardly new for the Commission. For nearly 50 years, the SEC often obtained so-called disgorgement in actions brought under the securities laws. But that disgorgement was totally alien to the version that survived *Liu*. Old disgorgement was a fine trick for the Commission. It was said to have no statute of limitations and no upper limit on the amount of cash that could be taken from defendants. Ike Adams, et al., *SEC Disgorgement Authority May Be Limited Even After Recent Amendments to the Exchange Act*, Business Law Today – Am. Bar Ass'n (Jan. 27, 2021); http://bit.ly/3P6rRAH.

In *Kokesh v. SEC* and *Liu v. SEC*, this Court fixed that. *Kokesh* held the Commission to a five-year statute of limitations for disgorgement. 581 U.S. at 467. And *Liu* firmly placed disgorgement in "the heartland of equity," resting on "two principles": disgorgement may "strip wrongdoers of their ill-gotten gains," but is "restricted" to bringing "an individual wrongdoer's net profits" as an "award[] for victims." 591 U.S. at 79–80.

That's why the Ninth Circuit's decision to the contrary—relying on 15 U.S.C. § 78u(d)(5)'s vesting the SEC with ability to seek "equitable relief . . . for the benefit of investors," the same statute applied in *Liu*—makes no sense. Moneyless harm that allows for a seven-figure disgorgement is a walking contradiction.

So for the Commission to win, it must be true that § 78u(d)(7) (the "disgorgement" addition) changed everything. It didn't. Subsection (d)(7) was

tucked into the 2021 National Defense Authorization Act (NDAA), and all it does is give the SEC power to request disgorgement in the federal courts. 15 U.S.C. § 78u(d)(7). Congress didn't redefine "disgorgement" in enacting subsection (d)(7). *Id*. And so the prior-construction canon means that Congress could have only been using "disgorgement" as *Liu* settled it.

Subsection (d)(7) also justifies its existence in two other ways—neither of which yanks disgorgement out of equity.

First, the NDAA gives a 10-year statute of limitations for all equitable remedies *except* most disgorgement, which receives *Kokesh*'s five-year limit. 15 U.S.C. § 78u(d)(8). Since the two categories of time-bars are broken out, it's just good statutory housekeeping to also break out the authorizations.

Second, one of the violations where disgorgement receives the now-default 10-year time-bar is a provision of the Investment Advisers Act that makes it illegal for investment advisers to use "any means or instrumentality of interstate commerce . . . to defraud" or deceive "any client or *prospective* client." 15 U.S.C. § 80b-6 (emphasis supplied). Subsection (d)(5) empowered the Commission to seek equitable remedies "for the benefit of investors." Subsection (d)(7) allows a single equitable remedy—disgorgement—to apply when a fraudster swindles money from a *prospective* investor. That's really it.

Finally, a word on consequences. If disgorgement simply means what this Court said it meant six years ago, it's not going to bring an end to

the enforcement of the securities laws. The SEC generally can always seek a civil penalty (which it didn't here) for "the gross amount of pecuniary gain to each defendant." 15 U.S.C. § 78u(d)(3). If that's not good enough, Congress can always raise that cap.

In short, there's a way for the SEC to get what it wants. It just must do so lawfully. Our Constitution instantiates a government of limited powers, and our laws are "concerned with means as well as ends." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152 (2021) (internal quotation marks and citation omitted).

ARGUMENT

I. WHEN DISGORGEMENT ISN'T LIMITED BY EQUITY, IT INVITES ABUSE OF POWER.

In 1971, the Second Circuit permitted the SEC to seek "restitution" as "a proper exercise by the trial judge of the district court's equity powers." *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307–08 (2d Cir. 1971). Soon "restitution" became "disgorgement." *Liu*, 591 U.S. at 75–76 (discussing history of the remedy). Once the SEC got ahold of this new power, things rapidly got out of hand.

Civil servants, like anybody else, respond to incentives. Until 1990, the SEC had no authority to seek civil penalties. Pub. L. 101-429 (Oct. 15, 1990). Not until the Sarbanes-Oxley Act of 2002 could the Commission seek equitable relief by bringing cases to vindicate investors. Pub. L. 107-204 (July 30, 2002). So for some time, court-approved disgorgement was

the only way to get wrongdoers of the securities laws to fork over money.

What's more, because court-ordered disgorgement wasn't limited by statute or regulation, it could take on whatever form the government wanted. In one case, it could look like a request for a court to "exercis[e] the chancellor's discretion." *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978). In another, it could carry "all the hallmarks of a penalty." *Kokesh*, 581 U.S. at 465. So long as the lower courts approved and the money was collected (often for the Treasury, not victims), there was no reason for the SEC to nail down the niceties.

Authority to seek financial penalties didn't derail the disgorgement train. Civil penalties are generally capped by the amount-in-violation and are governed by a tight five-year statute of limitations. 28 U.S.C. § 2462. Unwritten disgorgement didn't suffer from those "flaws." The SEC contended that disgorgement was "not subject to any statute of limitation and the amount of disgorgement was largely left to the discretion of the SEC or lower courts." Adams, *SEC Disgorgement Authority May Be Limited*.

As-the-SEC-likes-it disgorgement was the perfect remedy. An endless writ to battle wrong. No wonder "it became clear that disgorgement would be sought in the case of virtually any securities violation, including those that had no obvious victims." Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning A Disgorgement Remedy Under the Federal Securities Laws*, 105 Cornell L. Rev. 1611, 1624 (2020). A perfect weapon for the SEC, perhaps,

but less than perfect for the rule of law. "The federal government is limited in its powers by the general conception . . . that the government may not do what it is not empowered to do." Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 118 (Oxford Univ. Press 1984). And yet no statute vested the Commission or the courts with bottomless disgorgement authority.

In short, as practiced by the SEC for decades, disgorgement was an abuse of power. Thankfully, this Court finally set things right. In *Kokesh*, the Court struck down the SEC's theory that it could impose disgorgement at any time of its choosing. 581 U.S. at 467. But while the *Kokesh* Court checked that avenue of open-ended discretion, it left unsettled the substance of the Commission's broader claim of a right to unfettered disgorgement. *Id*. at 461 n.3; *Liu*, 591 U.S. at 85–86.

In *Liu*, this Court rejected that claim. Eight justices confirmed that disgorgement functions as "restitution that simply restores the status quo, thus situating the remedy squarely within the heartland of equity." *Liu*, 591 U.S. at 80 (internal punctuation altered, citation omitted). Only because Sarbanes-Oxley gave the agency power to seek equitable relief, 15 U.S.C. § 78u(d)(5), could it seek disgorgement. Michael Columbo & Allison Davis, *Age Before Equity? Federal Regulatory Agency Disgorgement Actions and the Statute of Limitations*, 7 Harv. Bus. L. Rev. Online 32, 45 (2017) ("Courts sitting in equity . . . may not grant equitable relief in the absence of a statute or clear precedent that establishes the right to the remedy requested").

Thanks to those rulings, disgorgement's abusive frontiers were rolled back. Since "equity never 'lends it aid to enforce a forfeiture or penalty,'" disgorgement can't be used as an end-run around statutory caps on civil fines or time-bars on bringing enforcement. *Liu*, 591 U.S. at 77 (quoting *Marshall v. Vicksburg*, 15 Wall. 146, 149 (1872)). Disgorgement may "strip wrongdoers of their ill-gotten gains," but "to avoid transforming an equitable remedy into a punitive sanction," the "wrongdoer's net profits [must] be awarded for victims," not to capitalize the Treasury. *Liu*, 591 U.S. at 79. Disgorgement is a limited remedy to take from the thief and give back to the fleeced.

That makes moneyless disgorgement a walking contradiction. "The *return* of funds" for restoring victims "presupposes pecuniary harm. Funds cannot be returned if there was no deprivation in the first place." *SEC v. Govil*, 86 F.4th 89, 103 (2d Cir. 2023) (emphasis in original).

In short, the lower court was wrong. Pet. App. 17a. The agency's power to seek equitable disgorgement, 15 U.S.C. § 78u(d)(5), is cabined to cases involving pecuniary injury. Deleting that requirement would pull disgorgement out of equity and restore the abusive discretion the Commission enjoyed in the past.

II. THE NDAA DID NOT LIFT DISGORGEMENT OUT OF EQUITY.

The lower court's decision relied solely on § 78u(d)(5) and didn't carefully analyze whether subsection (d)(7) allows for moneyless disgorgement.

Pet. App. 17a. But other courts have substantively answered that question. *SEC v. Ahmad*, 72 F.4th 379, 395–96 (2d Cir. 2023) (no it doesn't); *SEC v. Hallam*, 42 F.4th 316, 338–41 (5th Cir. 2022) (yes it does); Pet. App. 7a (noting circuit split).

It doesn't. *Liu* was handed down in June 2020. That December, Congress passed the NDAA, which became law when the Legislative Branch overrode a presidential veto. Pub. L. 116-283 (Jan. 1, 2021). The annual NDAA is essential for the Nation's defense—and it would be astoundingly unpopular not to pass it. So the bill doesn't just "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8. Members "who have been working on issues for a long time [and] are desperate to get them taken care of" tuck those priorities into this must-pass bill. Statement of Rep. Smith of Wash., 166 Cong. Rec. H6920, 6931 (Dec. 8, 2020).

That messy process is how the SEC got express authority to enforce "any provision of the securities laws" through "disgorgement." 15 U.S.C. § 78u(d)(7). A cursory reading of this addition might counsel that, to avoid becoming duplicative of subsection (d)(5)'s authority, Congress must have unmoored "disgorgement" from its *Liu*-situated equitable home.

Not so. For starters, Congress didn't provide a new definition for "disgorgement," it just authorized the SEC to seek it and federal courts to grant it. *Id.* We must presume that Congress was aware of *Liu*, *Ysleta Del Sur Pueblo v. Tex.*, 596 U.S. 685, 700 (2022), and the prior-construction canon instructs

that when "a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 247 (Kindle Ed.); *cf. Merrill Lynch v. Dabit*, 547 U.S. 71, 85–86 (2006) (Congress presumed to adopt prior judicial construction when enacting new provision in same statutory scheme).

In *Liu*, the Court rejected the government's suggestion that "the prior-construction principle" blessed its open-ended approach to disgorgement because "Congress should [have been] . . . presumed to have been aware of the scope of 'disgorgement' as interpreted by lower courts and as having incorporated the (purportedly) prevailing meaning of that term into its subsequent enactments" of the securities laws. 591 U.S. at 86. The Court properly shot down that proffer—at the time, "the scope of disgorgement was 'far from settled.'" *Id.* (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015)).

But *Liu* settled it. So the NDAA could have only been using "disgorgement" as the *Liu* Court had just defined it.

Perhaps something of doubt as to redundancy remains. *See* Scalia & Garner, *Reading Law* 148–51 (discussing the surplusage canon). But subsection (d)(7) isn't wasted text, since the NDAA also created § 78u(d)(8). Subsection (d)(8) imposed a statute of limitations for the Commission to "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." 15 U.S.C. § 78u(d)(8)(B). That would seem, given *Liu*, to set a 10-year clock on disgorgement.

But Congress concluded that 10 years for most disgorgement actions would be too long. That makes sense. Since disgorgement is a remedy tied to a wrongdoer's ill-gotten profits, over a longer time horizon it's less likely that a wrongdoer will still have access to those funds. And at a decade's remove, it's also less likely there can be an accurate accounting for victims. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 572 (2016) ("The remedies we call *equitable* are precisely the ones that are most management intensive, the ones that most acutely present problems of specifying, measuring, and ensuring compliance") (emphasis in original).

So Congress specified that, in all but four cases (where the 10-year default statute of limitations for equitable relief applies), the SEC "may bring a claim for disgorgement" within *five* years of the violation's occurrence—which, notably, tracks the outcome in *Kokesh*. 15 U.S.C. § 78u(d)(8)(A). Since the statute of limitations provides different time-bars for disgorgement versus other equitable remedies, it's just good statutory housekeeping to provide a standalone reference to the SEC's limited disgorgement powers as well. *Nken v. Holder*, 556 U.S. 418, 431–32 (2009) (similarly interpreting a statutory inclusion which, at first blush, "is not easy to explain").

Okay, but what about an *omission* in subsection (d)(7)? Unlike (d)(5), which delimits the Commission's power to seek equitable relief "for the benefit of investors," (d)(7) carries no such constraint. Open season for unfettered, moneyless disgorgement by implication? Again, no. Disgorgement assumes an expurgation of ill-gotten gains. *Liu*, 591 U.S. at 79. But even putting that aside, (d)(7) is doing independent work without falling out of "the heartland of equity." *Id.* at 80.

The NDAA provided a 10-year statute of limitations for disgorgement for violating 15 U.S.C. § 80b-6. That statute, part of the Investment Advisers Act, makes it illegal for investment advisers to use "any means or instrumentality of interstate commerce . . . to defraud" or deceive "any client or *prospective* client." 15 U.S.C. § 80b-6 (emphasis supplied). "Congress may have been concerned," *Nken*, 556 U.S. at 431, that under (d)(5) alone, disgorgement wouldn't be available when a fraudster swindles money from a *prospective* investor rather than a client. Subsection (d)(7) just precludes that reading—it doesn't convert disgorgement into an acceptable legal penalty for moneyless harm.

We're back to where we started. The NDAA ratified *Liu*. It didn't override it through shadow or silence.

III. THE SEC DOESN'T NEED NON-EQUITABLE DISGORGEMENT TO VINDICATE THE SECURITIES LAWS.

Will this reading allow future scofflaws to escape (perhaps twirling mustaches and cackling as

they ride off-screen) with their ill-gotten gains? Of course not.

In most cases, including this one, the Commission has the power to seek civil penalties up to "the gross amount of pecuniary gain to each defendant." 15 U.S.C. § 78u(d)(3). The SEC decided against seeking a penalty against Mr. Sripetch because he was already incarcerated. Pet. App. 22a. Fair enough, that's prosecutorial discretion. But the agency always had the option of hitting him for his "gross . . . pecuniary gain." 15 U.S.C. § 78u(d)(3). It just chose not to do so here.

If that's still not enough, Congress could always change the penalty calculation to allow the SEC to seek multiples of the amount-in-violation—as the law already does for insider trading. Brennen C. Walker, *In* Liu *of Disgorgement: A Call to Revise the SEC's Civil Remedy Toolkit to Effectively Deter Market-Harming Securities Law Violations*, 108 Iowa L. Rev. 469, 486, 501–02 (2022). And, of course, beyond the penalty provisions, "there's no shortage of private legal claims available against securities-law violators, nor private attorneys incentivized to pursue them." Russ Ryan, *How the SEC Became the Investor's Collection Agent*, LinkedIn (Jan. 2, 2021), https://perma.cc/U37Q-EMBC. And so applying the rule of *Liu* and the plain meaning of subsections (d)(5) and (d)(7) won't bring down the sky.

CONCLUSION

The SEC can only win if Congress silently overruled *Liu* and undid this Court's work to cabin disgorgement from the SEC's abusive discretion. That didn't happen, so the Court should reverse.

Respectfully submitted,

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

March 2, 2026