No. 25-466

IN THE
Supreme Court of the United States

ONGKARUCK SRIPETCH,
Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF OF AMICI CURIAE FORMER SECURITIES AND EXCHANGE COMMISSION ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are former attorneys and senior officials of the Securities and Exchange Commission ("SEC" or "Commission"). Having spent their careers ensuring the fair administration of federal securities laws, amici have an abiding interest in ensuring the Commission operates within the boundaries set by Congress and this Court.

Amici are concerned that the Commission is increasingly bypassing the equitable constraints the Court reaffirmed in *Liu v. SEC*, 591 U.S. 71 (2020). By seeking "victimless disgorgement" without a nexus to actual investor loss, the SEC has transformed a restorative and didactic remedy into a de facto penalty. As former agency practitioners, amici believe this expansion not only contradicts the net-profits and victim-benefit requirements of *Liu* but also undermines the SEC's credibility by untethering its enforcement power from traditional equitable principles. Amici submit this brief to highlight how the SEC's current position risks eroding the very rule of law they once worked to uphold.

SUMMARY OF ARGUMENT

This case presents a fundamental question: whether the SEC may use the National Defense Authorization Act for Fiscal Year 2021 ("NDAA") to bypass the equitable limits this Court established in *Liu*

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution to this brief's preparation or submission. A list of amici and their prior institutional affiliations, provided for identification purposes only, is set forth in the Appendix to this brief.

v. SEC, 591 U.S. 71 (2020). The answer is no. Three independent lines of analysis—constitutional, structural, and textual—compel reversal.

First, the Commission's insistence that it needs an expansive disgorgement power to address violations that leave no identifiable victim misunderstands the statutory scheme Congress carefully constructed. Congress addressed that precise scenario—gain-stripping without identified victim losses—with a *legal* remedy: the three-tier civil penalty statute and surrounded that authority with a dense framework of substantive and procedural safeguards. These safeguards are deliberately absent from the *equitable* remedy codified in the NDAA's disgorgement provision. The Commission already possesses every dollar of remedial authority it claims it needs in equity; it simply prefers to access that authority without the guardrails Congress attached. A ruling for Petitioner would not deprive the SEC of any remedial power—it would only require the Commission to use the correct statutory instrument for the purpose at hand.

Second, by codifying "disgorgement" in 15 U.S.C. § 78u(d)(7), Congress used a term of art carrying centuries of equitable meaning, including the foundational limitation—reaffirmed in *Liu*—that disgorgement is a restorative remedy tethered to identifiable victim losses. Congress does not silently abrogate well-established equitable constraints, and nothing in the NDAA's text or structure indicates an intent to do so here. To the contrary, the contemporaneous codification of the victim-benefit requirement in § 78u(d)(5) confirms that Congress understood disgorgement to retain its equitable character after the NDAA's enactment.

Third, and most importantly, this Court's decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024), establishes that monetary sanctions designed to punish and deter, rather than to restore victims, are legal in nature and trigger the Seventh Amendment jury-trial right. Disgorgement untethered from investor harm serves no restorative function; it punishes and deters, making it functionally identical to a civil penalty. Permitting the Commission to evade the constitutional protections *Jarkesy* recognized by relabeling a punitive sanction as "equitable disgorgement" cannot be squared with this Court's precedent. The Court recognized in *Kokesh v. SEC*, 581 U.S. 455 (2017), that disgorgement operated as a penalty for statute-of-limitations purposes; the same functional analysis applies here. Amici's experience with enforcement confirms that if left unchecked, disgorgement will swallow the legal remedies Congress gave the SEC.

To protect the bounds of equity, the Court should reverse the decision below.

ARGUMENT

Petitioner correctly argues that the NDAA's disgorgement provision remains tethered to the equitable principles articulated in *Liu v. SEC*, 591 U.S. 71 (2020). Amici write separately to emphasize three points that the Commission's litigation posture makes particularly urgent: the structural significance of the civil penalty scheme that the Commission is attempting to circumvent; the historical guardrails that protect abuse of equity and their applicability to disgorgement; and the constitutional infirmity of victimless disgorgement as emphasized in *Jarkesy*. Amici conclude by demonstrating how the enforcement record reveals the need for such guardrails because the SEC's

expanding use of disgorgement has departed from the institutional discipline that effective enforcement demands.

I. The SEC Already Possesses a Specific Tool for Stripping Violators of Ill-Gotten Gains When It Cannot Prove Victims Were Harmed, Complete with Statutory Guardrails Against Abuse.

The Commission's principal practical argument is that without disgorgement untethered from investor harm, violators who reap gains but leave no identifiable victim escape meaningful accountability. That premise is false. Congress carefully addressed that exact scenario in the civil penalty statute. The Commission does not need victimless disgorgement to close a remedial gap; there is no gap to close. What it seeks is the same financial result that the civil penalty statute already provides, but without the substantive and procedural constraints that Congress deliberately attached to that legal remedy.

A. Congress Expressly Built Gain-Stripping Without Victim Harm into the Penalty Statute—Not the Disgorgement Provision.

Section 78u(d)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(3)—mirrored by substantially identical provisions in the Securities Act of 1933, 15 U.S.C. § 77t(d), the Investment Advisers Act of 1940, 15 U.S.C. § 80b-9(e), and the Investment Company Act of 1940, 15 U.S.C. § 80a-41(e)—establishes a three-tier system of civil monetary penalties that the Commission may seek in federal court.

Tier 1 applies to any violation; Tier 2 requires that the violation involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and Tier 3 requires that elevated predicate plus a showing that the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 78u(d)(3)(B)(i)-(iii). At every tier, the maximum penalty is the greater of the stated dollar ceiling—subject to periodic inflation adjustment under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 599 (codified at 28 U.S.C. § 2461 note)—or "the gross amount of pecuniary gain to such defendant as a result of the violation."

That "gross pecuniary gain" ceiling is the statutory answer to the Ninth Circuit's concern. Congress recognized that some violations generate gains without generating identifiable victim losses—and it crafted a penalty as a specific remedy for that situation. That remedy at law suffices without resorting to remedies at equity. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1968) ("The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at law."). The Commission can seek the penalty, the court can award it at any tier, and the amount can equal or exceed every dollar the defendant profited from the violation. There is no gap in the remedial scheme for an untethered disgorgement remedy to fill.

The text enabling the SEC to seek the equitable remedy (disgorgement) confirms that only the legal remedy (the penalty) applies to a violation that has no

identifiable victim. Section 78u(d)(5), which the NDAA left intact, authorizes disgorgement's equitable antecedent: "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). That "for the benefit of investors" limitation is not boilerplate. Reading § 78u(d)(7) to authorize disgorgement divorced from investor harm would render § 78u(d)(5)'s "for the benefit of investors" language absurd: Reading § 78u(d)(7) to authorize disgorgement wholly divorced from investor harm would set the two subsections at war with each other—the foundational equitable-relief provision would continue to condition relief on investor benefit, while the codified disgorgement provision would, on the Commission's theory, require no such connection. Sections (d)(5) and (d)(7) operate in different procedural contexts, but together they confirm that Congress understood that disgorgement—wherever sought—must be tethered to investor harm. The Commission's contrary reading would undermine a key equitable guardrail on disgorgement and reduce § 78u(d)(5) to surplusage in the very cases where gain-stripping disgorgement would be sought.

B. The Penalty Statute Surrounds Gain-Stripping Authority with Guardrails Wholly Absent from the NDAA's Disgorgement Provision.

The contrast between the structure of the civil penalty scheme and the NDAA's disgorgement provision confirms that disgorgement cannot supplant the legal remedy. The penalty statute is surrounded by a dense framework of substantive and procedural constraints. The NDAA's disgorgement provision contains none.

The tiered structure of § 78u(d)(3) imposes an egregiousness filter: access to the gross-pecuniary-gain

ceiling is available at every tier, but higher tiers require progressively more culpable conduct. The amount of any penalty within a tier is "determined by the court in light of the facts and circumstances"—a standard that invites the factfinder to consider the defendant's culpability, cooperation, financial condition, and the nature and extent of harm caused or risked. These are questions directly relevant to the punitive function the penalty serves. As a legal remedy, the civil penalty also requires a jury, as discussed more fully below. *See SEC v. Jarkesy*, 603 U.S. 109 (2024).

Now compare the NDAA's disgorgement provision: "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." 15 U.S.C. § 78u(d)(7). Full stop. The provision specifies no factors. It imposes no egregiousness filter. It contains no "in light of the facts and circumstances" instruction. It establishes no public-interest gate. It provides no credit for restitution paid. It sets no ceiling. It says nothing about the relationship between the amount disgorged and the harm—or absence of harm—to investors. In short, it is unbounded by any statutory limitations.

Such a bare statute makes sense only if the term "disgorgement" itself imports the guardrails that always protected law from the overstep of equity. Otherwise, if disgorgement without a pecuniary-harm nexus is permitted, a defendant faces maximum financial exposure through an instrument with no calibration to culpability, no credit for restitution, no egregiousness threshold, and no statutory ceiling other than gains. That is not an equitable remedy. It is the most potent

version of the civil penalty, stripped of every constraint Congress imposed on that remedy. The Commission would have little incentive to invoke the carefully structured penalty regime at all, because the bare disgorgement provision would allow it to achieve the same financial result without any of the guardrails. That end far exceeds the meaning of disgorgement in the NDAA.

II. The Limits Inherent to Equity's Nature Guard Against Abuse of Disgorgement.

Because disgorgement grew out of the power of the courts at equity, it must also share in equity's limitations. The history of equity in the United States has ever been marked with reticence lest equity swallow law. *See* Brooks M. Chupp, Note, *"A Sword in the Bed": Bringing an End to the Fusion of Law and Equity*, 98 Notre Dame L. Rev. 465, 467-72 (2022) (demonstrating the history of the American debates on equity). To protect the people against the potentially limitless authority that a court can wield to do justice, this Court has rightly guarded the boundaries of equitable authority. *See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (recognizing the equitable remedies available in the federal judiciary are limited to the remedies available at the founding); *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025) (enforcing the traditional party-based limits of injunctions). The present case requires the same caution.

Equity's inclusion in the Constitution was met with great misgivings. Before the Revolution, the colonists perceived that the royal governors would abuse their authority in equity. *See* Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over*

Chancery Courts and Equity Law in the Eighteenth Century, *in* 5 Perspectives in American History: Law in American History 257, 278-82 (Donald Fleming & Bernard Bailyn eds., 1971) (discussing accusations against the royal governor of New York's abuse of his power as chancellor). As a result, antifederalists warned that giving this power to federal courts would allow the courts to act with boundless authority. They prophesied that unscrupulous judges would undoubtably use this grant of equitable authority to seize power from both the states and the other branches of government in the name of justice. *See* Essays of Brutus XII, N.Y.J., Feb. 7, 1788, *reprinted in* The Essential Antifederalist 190-96 (eds. W.B. Allen & Gordon Lloyd, 2002).

To appease this fear, the federalists reassured the people that the equity of the courts was limited to the legitimate authority of the courts at equity. The Federalist No. 83 (Alexander Hamilton). Since then, the Court has consistently confirmed that the bounds of its equitable power are those that bound the High Court of Chancery in England at the founding, a well-worn, though flexible system. *Grupo Mexicano*, 527 U.S. at 318 (collecting cases). And the Court has policed those bounds with increased diligence in the last decade. *CASA*, 606 U.S. at 843; *Liu*, 591 U.S. at 78.

The Court is right to ensure that equity remain bounded. Whenever the Court has allowed "an especially muscular use of equitable remedies," the antifederalists' "anxieties about discretion, about power, about legitimacy" have come to the forefront of political discourse. *Id.* at 709. As the Court recognized even in an era marked with the expansion of equity, restraining equity is vital "in order to prevent erosion of

the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger v. Harris*, 401 U.S. 37, 44 (1971). The need for clear limits on equity is even more important since the merger of law and equity: since judges no longer specialize in equity, they need to be reminded that equity plays by different rules. *See* Chupp, 98 Notre Dame L. Rev. at 486-87. Because of the extraordinary power of equity, it is the most perilous for courts to use. Without the bounds of legal tests or juries, judges can easily "overshoot, risking blowback from political actors and institutions." Samuel L. Bray, *Equity Will Not . . .*, at 16, *in Interstitial Private Law* (Samuel L. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith eds., 2024). Maintaining the bounds of equity therefore protects the institutional integrity of the judiciary.

Equity as a system has always been "adjectival," a form of "meta-law," but with potential to overtake law. Samuel L. Bray & Aditya Bamzai, Debs *and the Federal Equity Jurisdiction*, 98 Notre Dame L. Rev. 699, 708 (2022), quoting Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1067 (2021). Equity steps in when law falls short specifically to ensure justice for the injured and provide instruction to the reprobate. As a result, courts have often talked about equity in moral terms, such as how the conscience of the chancellor is the measure of equity, or equity seems penal as it is forming the conscience of the wrongdoer. *See* Richard Hedlund, *The Theological Foundations of Equity's* Conscience, 4 Oxford J.L. & Rel. 119, 124-26 (2015). Because the aim of equity is doing justice when remedies at law fall short, equity's power can seem boundless.

But the aims of equity manifest in natural limits, which include its threshold requirements, its maxims, and its measure. First, there are "sorting rules" that determine when a plaintiff can seek equity. Bray, *Equity Will Not . . .*, at 3. Chief among these, a plaintiff must have an injury that remedies at law cannot ameliorate. *See Younger*, 401 U.S. at 43-44. The sine qua non for access to the concurrent jurisdiction of the courts of equity was always "the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The traditional maxims of equity further limited its scope, reminding those who came to equity what it would not do. As a pertinent example, equity does not punish, even if it sometimes would feel like a punishment to the wrongdoer. Bray, *Equity Will Not . . .*, at 6; *cf. United States v. Bolton*, 496 F. Supp. 3d 146, 163-64 (D.D.C. 2020) ("Though the result might feel like a punishment to Bolton, a constructive trust is an equitable remedy. And equity does not punish."). Finally, the measure of equity is not to extract from the wrongdoer a recompense but rather to correct, to form the conscience of the wrongdoer, and to restore to victims that which they are due. *Id.*

The limitations of equity are not arbitrary rules imposed to leash equity's raw power. Rather, the limits of equity are teleological: they flow from equity's nature. Equity's end is unchanged from its inception: it restores order when remedies at law do not suffice. *See* Thomas Aquinas, *Summa Theologiae*, v. II-II, q. 102, a. 1 (c. 1274) (equity is appropriate when law "will frustrate the *aequalitatem iustitiae*," i.e., the equality or balance of justice). Equity seeks to give each party what he is due—the predominant definition of justice at the time of equity's infancy. *Compare* Aquinas, *Summa Theologiae*, v. II-II, q. 58, a. 1, *with* Henri de

Bracton, 2 *De legibus et consuetudinibus Angliae* 304 (c. 1230) (discussing the King's duty to ensure equity in judgment).

Equity does not punish because equity has something else to do: restore or preserve right relations. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioners at 10, *Liu v. SEC*, No. 18-1501 (2019). That is why remedies as diverse as injunctions and accounting for profits fit into the category of equity: a plaintiff seeking an injunction identifies a specific action the defendant has done or is about to do and ask the court to protect him, *see CASA*, 606 U.S. at 841 (injunctions are between the parties); similarly, a plaintiff seeking an accounting for profit identifies an unjust action the defendant has done that enriched the defendant at the expense of the plaintiff and asks the court to restore what was taken. Neither punishes because it guards the just order of the relation between the parties, and there it stops.

Since disgorgement also lies in equity, it shares equity's overarching goals of restoring right order and instructing the reprobate. The Court confirmed that disgorgement shares these goals by acknowledging that many of these traditional limitations apply to disgorgement. Although the Court in *Kokesh* counted disgorgement as punitive, it did so for the sake of placing a limit on disgorgement: the act's statute of limitations. *Kokesh*, 581 U.S. at 467. In *Liu*, the Court established clearer bounds of disgorgement by placing it within equity, explaining that its aim is restorative and not punitive. *Liu*, 591 U.S. at 78. As Petitioner's brief discusses, *Liu* specifically places disgorgement

among the other restitutionary equitable remedies: accounting for profits and equitable trusts. *Liu*, 591 U.S. at 79-82.

A brief survey of the remedies the Court identified as disgorgement's closest neighbors confirms that their prerequisites and limitations reflect their didactic and restorative goal. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioners at 16-19, *Liu v. SEC*, No. 18-1501 (2019). Accounting for profits was available only when a trustee profited from the use of something that belonged to the plaintiff. 1 D. Dobbs, *Law of Remedies* § 2.6(3), at 158 (2d ed. 1993) ("Dobbs"). Its measure was the specific profit that the trustee made, effectively restoring the plaintiff to what he would have received had the trustee done his duty. Samuel L. Bray, *Fiduciary Remedies*, in *The Oxford Handbook of Fiduciary Law* 452 (Evan J. Criddle, Paul B. Miller & Robert Sitkoff eds., 2018). The amount the defendant had to account for was limited to "the profits actually made," and no more. *Mowry v. Whitney*, 81 U.S. 620, 649 (1871).

Constructive trusts fill in the gap when the defendant did not in fact owe a fiduciary duty to the plaintiff but when nevertheless "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). As with accounting for profits, a constructive trust returns to constructive beneficiary the specific property and any benefit that the defendant gained from it, which in justice should have always belonged to the defendant. Dobbs § 4.3(2), at 392-95. Thus, the plaintiff receives back what was always his due.

These older siblings of disgorgement share key qualities that show that their concern is restoring balance. First, the pecuniary harm to the victim was the baseline for a fair remedy. If the plaintiff were deprived of funds, those funds at least had to be restored. Second, the unjust enrichment of the defendant was the upper limit of the remedy. The equitable remedy would not take more than what the defendant gained, leading to the maxim that equity does not punish. In fact, at least in the case of the constructive trust, the defendant who has to disgorge his property might not even be the wrongdoer. *See* Dobbs § 4.3(2), at 401. Both parties, therefore, were the concern of the courts at equity: the aim was to ensure that each got what they should have received if all had gone aright. *See* Hedlund, 4 Oxford J.L. & Rel. at 124-26. Ultimately, these equitable remedies restored the order of the world and instructed that wrongdoing does not prosper. Samuel L. Bray, *Punitive Damages Against Trustees?*, in *Research Handbook on Fiduciary Law* 211-13 (D. Gordon Smith & Andrew S. Gold eds., 2018).

Disgorgement was initially a term that described the defendant's action in each of these equitable remedies. *See* George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 49 (2007). Regardless of which remedy was provided to the plaintiff, the defendant would have to disgorge all that he gained from his bad action. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioners at 22, *Liu v. SEC*, No. 18-1501 (2019). Those disgorged monies would then be distributed according to the measure of the specific remedy requested. *See SCA Hygiene Products Aktiebolag v. First Quality*

Baby Products, LLC, 580 U.S. (2017) (canvassing patent cases seeking an accounting for profits). Even equitable restitution required that the defendant disgorge the monies that would restore the plaintiff to the status quo ante.

Although disgorgement is now its own remedy, it remains tied to the harm to the public and the instructive purpose of equity. Like its predecessors, the remedy is appropriate only when the remedies at law fail: when the wrongdoer still would benefit from his violations of law despite penalties and the harm the violator caused remains unabated. Its aim remains to restore balance and instruct. To restore balance between the wrongdoer and the victim requires a clear understanding of *each* side of the equation and what is off kilter. Establishing pecuniary harm is necessary to demonstrate what needs to be returned to bring that balance. Accordingly, disgorgement must retain the pecuniary-harm prerequisite that every other compensatory equitable remedy requires.

The Ninth Circuit's error was assuming that the prerequisite pecuniary harm need also be the measure of the relief given. *See* 154 F.4th at 988 n.7. As explained, pecuniary harm is the entry requirement to access equity, but not the measure of the relief in any of the restitutionary equitable remedies. As in each of the other restitutionary equitable remedies, the measure of the plaintiff's just deserts is counterfactual—what the plaintiff would have had if the defendant (or some third party) had not committed the tort. Since counterfactuals are hard to calculate, the substitutional measure is the defendant's ill-gotten gains, under the presumption that the plaintiff would have got-

ten the same had the defendant acted aright. The necessary starting point, however, is always the pecuniary loss to the plaintiff. That harm could be just a mustard seed compared to the profits gained from crafty investments of the seed, but unless acknowledged, the balance is impossible to strike. The pecuniary harm is not the measure of relief; it is merely necessary to justify equity's involvement in the first place.

The limitations innate to equity must be guarded, including the pecuniary harm requirement. Without affirming that these limitations apply to disgorgement, nothing holds it to its restorative purpose. Disgorgement requires an articulable punitive harm, lest disgorgement become a freewheeling remedy that strips a violator of everything a court thinks he does not deserve. That is not restoring balance; that is a vindictive punishment. But as discussed above, the punitive role falls to the well-bounded civil penalty structure. Since the dissolution of the Star Chamber, punishment has never been the role of equity. *See* John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 568-72 (2009). Rather, disgorgement returns the world to its proper order, stripping the wrongdoer of his unjust gains to return to victims that which they would have had but for the wrongdoing.

III. The NDAA's Codification of "Disgorgement" Preserves, Rather Than Displaces, the Equitable Limits This Court Reaffirmed in *Liu*.

The Commission's statutory argument rests on the premise that by enacting § 78u(d)(7) after *Liu*, Congress authorized disgorgement on terms broader than

what equity traditionally permits. That premise misreads both the canon governing terms of art and the structure of the securities laws.

A. The Canons of Statutory Construction Support Consistent, Not Contradictory, Usage of Defined Legal Terms

When Congress borrows a term of art with established legal meaning, it is presumed to adopt the cluster of principles accumulated around that term through centuries of practice. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (Congress "borrows terms of art" from established legal tradition, and courts presume it "knows and adopts the cluster of ideas that were attached to each borrowed word"). "Disgorgement" is precisely such a term. Before, during, and after the NDAA's enactment, disgorgement in the securities laws carried a settled meaning: a restorative, equitable remedy designed to deprive wrongdoers of net profits gained at identified victims' expense. *Liu*, 591 U.S. at 79-80.

The Commission argues that the NDAA's silence on *Liu's* specific requirements signals congressional intent to supersede them. That inference runs backward. Congress was aware of the Court's recent pronouncements regarding the scope of disgorgement in *Liu*. Had Congress intended to grant the Commission a new, punitive power to seize gains regardless of victim harm, it would have said so plainly—and it would have used the phrase it deployed in the three-tier penalty scheme: "gross amount of pecuniary gain." Instead, Congress used the single word "disgorgement," a term the Court had just interpreted and constrained in *Liu*, decided in the same year the NDAA was debated and enacted. That timing strongly supports the

inference that Congress codified disgorgement with *Liu's* constraints intact, not in spite of them.

The Commission's legislative history argument fares no better. The NDAA's disgorgement provision was enacted primarily to supersede the five-year statute of limitations that *Kokesh* had applied to disgorgement—a narrow and specific legislative response that says nothing about whether Congress intended to expand the substantive scope of the remedy. 581 U.S. at 467. A legislature's decision to override one aspect of a judicial interpretation of a statutory remedy does not signal intent to override all other aspects of that interpretation, particularly when the remaining aspects rest on bedrock equitable principles that Congress has never expressly displaced.

B. Permitting "Victimless" Disgorgement Would Circumvent the Seventh Amendment Jury-Trial Right That This Court Recognized in *Jarkesy*.

If Congress did indeed create a new equitable remedy untethered from the traditional bounds of equity and the measure of a victim's harm, disgorgement would inevitably transform from an exercise in correcting the conscience of wrongdoers and protecting victims into unbounded punishment. As discussed below, evidence that disgorgement tends toward punishment abounds. Although the desire for just deserts for wrongdoers makes unbounded equity feel tempting, the bounds of equity give the exercise of equity legitimacy and prevent abuse, particularly in the absence of the primary protection of rights in this country: the civil jury. Bray & Bamzai, 130 Yale L.J. at 1067.

Punishment without a jury is foreign to our republic, as the Court has recently pointed out in *SEC v. Jarkesy*, 603 U.S. 109 (2024). There, this Court held that the Seventh Amendment guarantees defendants a jury trial when the SEC brings a civil penalty action that is legal in nature. The Court anchored that conclusion in the punitive, deterrence-oriented character of civil penalties: they are designed to punish and deter, not to compensate. They therefore bear a close functional resemblance to the legal remedies for which common-law courts historically empaneled juries. *See also Tull v. United States*, 481 U.S. 412, 422 (1987) (Seventh Amendment attaches to statutory penalties that are punitive in nature).

That constitutional principle forecloses the Commission's theory of victimless disgorgement. If the Commission may use the label "disgorgement" to strip defendants of their gains without showing investor harm, it obtains a sanction that is functionally identical to a civil penalty—serving the same punitive and deterrent purposes, extracting the same or greater monetary amounts—while simultaneously evading the jury-trial right that *Jarkesy* held attaches to that sanction. 603 U.S. at 125. The label cannot make the constitutional difference. *Cf. The Passenger Cases*, 48 U.S. 283, 459 (1849) (Grier, J.) ("We have to deal with things, and we cannot change them by changing their names."). As this Court explained in *Jarkesy*, Congress cannot strip a constitutional right by reassigning a matter to a different procedural vehicle while leaving the legal nature of the underlying claim unchanged. 603 U.S. at 126. The same principle applies with equal force when the Commission strips the legal nature of a claim not by routing it to an administrative forum but by relabeling it as equitable disgorgement.

This Court in *Liu* warned that disgorgement ceases to be equitable—and therefore loses its immunity from jury-trial requirements—when it exceeds what is needed to return identified victims to the status quo ante. 591 U.S. at 80. Disgorgement without any requirement of pecuniary harm to investors goes precisely that far: it strips gains without regard for restoring victims, functioning purely to punish and deter. By whatever name, that is a penalty, and the Seventh Amendment entitles defendants to have a jury determine whether it should be imposed.

The functional-equivalence point is reinforced by *Kokesh*, where this Court held that SEC disgorgement is a "penalty" for the sake of the applicable statute of limitations because it is "imposed as a consequence of violating a public law and [is] intended to deter, not to compensate." *Kokesh*, 581 U.S. at 465. The Commission argued in *Kokesh* that disgorgement is remedial, not punitive—and this Court rejected that characterization as applied to the statute of limitations, reasoning that whatever its nature, it functioned as a penalty and should be subject to the limitations on penalties. *Liu* subsequently imposed equitable constraints on disgorgement precisely to preserve its remedial character. If disgorgement could be pursued in the absence of any investor harm, it sheds those remedial constraints and becomes a penalty not only for the sake of the statute of limitations *Kokesh* identified but in fact. Permitting the Commission to use disgorgement to do the work of a penalty—without the safeguards of the penalty statute and without the constitutional protection of a jury trial—cannot be squared with *Liu*, *Jarkesy*, *Kokesh*, or the structure of the securities laws Congress enacted.

IV. The SEC's Own Enforcement Data Confirm That Disgorgement Has Increasingly Functioned as a Punitive Sanction Rather Than an Equitable Remedy.

From the perspective of former Commission attorneys who pursued disgorgement in the field, the enforcement statistics of the past several years confirm the need for equitable guardrails to remain fixed on disgorgement to counteract the tendency for disgorgement to devolve into mere punishment.

In the fiscal years immediately before *Liu*, disgorgement was a dominant component of the Commission's financial remedies program. In Fiscal Year 2019, the Commission obtained approximately $3.2 billion in disgorgement orders, compared to approximately $1.1 billion in civil penalties. *See* U.S. Sec. & Exch. Comm'n, Division of Enforcement Annual Report, FY2019, at 16. In Fiscal Year 2020—the year *Liu* was decided—disgorgement reached approximately $3.6 billion, again dwarfing civil penalties of approximately $1.1 billion. See U.S. Sec. & Exch. Comm'n, Division of Enforcement Annual Report, FY2020, at 17.

What followed is instructive. In Fiscal Year 2021—the first full year in which enforcement staff operated under both *Liu's* constraints and the newly enacted NDAA—disgorgement fell by approximately one-third, to roughly $2.4 billion, while civil penalties were restored to their proper prominence, increasing by approximately one-third to roughly $1.5 billion. *See* U.S. Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release, FY2021, at 2. That inverse shift is consistent with responsible enforcement attorneys recognizing that disgorgement had to be tethered to provable victim losses and, when disgorgement

could not be justified under a rigorous equitable standard, redirecting their requests to the proper punitive tool: civil penalties.

By Fiscal Year 2023, however, the Commission reported approximately $3.4 billion in disgorgement alongside approximately $1.6 billion in civil penalties—reverting toward the pre-*Liu* ratio in which disgorgement far exceeded penalties. *See* U.S. Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release, FY2023, at 2. The Commission has attributed these shifts to the size and complexity of particular cases in each fiscal year, and amici acknowledge that docket composition matters. But the persistent pattern—disgorgement consistently and substantially exceeding civil penalties, even after *Liu* imposed equitable constraints—warrants attention.

As former enforcement officials who pursued these remedies, amici are concerned that without clear and uniform judicial enforcement of *Liu*'s requirements, disgorgement will continue to function as a penalty in practice—precisely the kind of enforcement arbitrariness that the Commission's current Chairman identified as corrosive to institutional credibility when he observed that civil monetary penalties "offer the widest field for the exercise of the agency's discretion" and therefore demand the greatest measure of the agency's "good judgment, integrity, and rectitude."[2]

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[2] Remarks of Chairman Paul S. Atkins, A.A. Sommer Jr. Lecture on Corporate, Securities and Financial Law (Oct. 7, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-100925-keynote-address-25th-annual-aa-sommer-jr-lecture-corporate-securities-financial-law.

CONCLUSION

This Court in *Liu* held that disgorgement is an equitable remedy bounded by longstanding equitable principles: it must not exceed a wrongdoer's net profits, it must be assessed against culpable actors, and it must be awarded for the benefit of identifiable investors. Those constraints are not mere judicial glosses that Congress swept aside by codifying a single word. They are the foundational requirements springing from the very nature of equity that give disgorgement its equitable character—and without which it becomes a penalty in substance, triggering constitutional protections the Commission would prefer to avoid.

For the foregoing reasons, amici curiae respectfully urge the Court to hold that the disgorgement authority codified in 15 U.S.C. § 78u(d)(7) does not authorize the Commission to obtain gain-stripping awards absent a nexus to pecuniary harm suffered by identifiable investors, and to reverse the judgment below.

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APPENDIX

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