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 REMEDIES AND RESTITUTION SCHOLARS DOUGLAS LAYCOCK, COLLEEN P. MURPHY, CAPRICE L. ROBERTS, CHAIM SAIMAN, AND MICHAEL TRAYNOR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* (3d ed. 2018) 5, 17, 20

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and a senior practitioner who study and publish on the law of restitution or the law of remedies more generally, including restitution. Two were Advisers to the *Restatement (Third) of Restitution and Unjust Enrichment* (Am. L. Inst. 2011), and two more served on the Members Consultative Group for that project. One is the co-reporter, one is an Adviser, and two more serve on the Members Consultative Group for the *Restatement (Third) of Torts: Remedies* (in progress). One is President Emeritus of the American Law Institute (ALI). Two are editors of major casebooks on Remedies, and one is the editor of the leading treatise on Remedies. All five have taught Remedies or related subjects at major law schools. Given their work in this area, *amici* have an interest in ensuring that long-settled principles underlying the equitable remedy of disgorgement are respected and accordingly have an interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Disgorgement requires a defendant to give up wrongful gains. Compensatory damages require the defendant to make the plaintiff whole. The two remedies are fundamentally distinct. The first is measured by the defendant's gain; the second is measured by the plaintiff's loss. Only the second has ever required proof of financial harm.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Petitioner asks this Court to hold that this bedrock principle of the law of restitution does not apply in the securities enforcement context—specifically, that a showing of pecuniary harm to investors is a prerequisite to an award of disgorgement in a civil action brought by the Securities and Exchange Commission. In support of this position, Petitioner argues that this Court should collapse the longstanding distinction between disgorgement and compensatory damages and hold that disgorgement, like damages, requires a showing that the plaintiff suffered pecuniary loss. That position is utterly inconsistent with the most basic principles of the law of restitution and unjust enrichment, principles this Court relied on in *Liu v. SEC*, 591 U.S. 71 (2020), when it held that disgorgement is an equitable remedy.

For three centuries, courts have ordered disgorgement without proof of plaintiff loss across the major domains of the law of restitution: intellectual property, fiduciary duty, confidential information, trespass, and conversion. Playwrights whose work was made into a movie they never could have produced themselves, a trademark owner who never sold the product the infringer was selling, trust beneficiaries who suffered no financial loss from their trustees' self-dealing, and employers whose agents took kickbacks that ultimately did not alter any business transactions—they all recovered defendants' profits through the remedy of disgorgement.

The law of restitution allows these plaintiffs to recover for the interference with their legally protected interests even when they suffer no measurable loss because of the foundational principle that a person may not profit from his own wrong. The disgorgement remedy effectuates that principle by stripping the defendant of ill-gotten gains. Because disgorgement is

measured by the defendant's gain rather than the plaintiff's loss, it is available even when the plaintiff has suffered no financial harm—indeed, even when the plaintiff has suffered no harm at all beyond the violation of a legally protected right.

The Second Circuit's contrary holding in *SEC v. Govil*, 86 F.4th 89 (2023), rests on a series of errors about the nature of disgorgement and the authorities on which the court relied. The court confused disgorgement with compensatory damages, reasoning that because disgorgement restores the status quo, it requires proof of pecuniary harm. But that reasoning applies to damages, which restore *the plaintiff's* status quo, and not to disgorgement, which restores *the defendant's* status quo by stripping wrongful gains. *Govil* also misread the *Restatement (Third) of Restitution and Unjust Enrichment* (Am. L. Inst. 2011), citing a reporter's note for the proposition that restitution requires "impoverishment," when the very passage cited rejects that requirement as "too narrow," *id.* § 1 reporter's note *d* (internal quotation marks omitted).

Petitioner goes even further than the Second Circuit did, attacking the *Restatement* itself as a normative project that invented the principle that disgorgement does not require proof of plaintiff loss. *See* Pet. Br. 33-37. That attack is refuted by the case law: courts were ordering disgorgement under equitable principles without any such proof for more than two centuries before the first *Restatement* was published. Petitioner also argues that the *measure* of disgorgement—defendant's gain—is a separate question from its *availability*, which, Petitioner insists, requires proof of victim loss. *Id.* at 36. But disgorgement exists as a distinct remedy precisely because it provides recovery when the plaintiff's loss is absent, unquantifiable, or unprovable.

Requiring proof of loss as a threshold showing would eliminate the very function the disgorgement remedy has served for centuries—and would unsettle the foundational principles of restitution law that extend far beyond the securities context. This Court should reject Petitioner's request to upend this settled area of law and should affirm.

ARGUMENT

I. Disgorgement Has Never Required Proof of Harm Beyond the Violation of Plaintiff's Legal Rights.

Petitioner asks this Court to hold that an award of disgorgement under 15 U.S.C. § 78u(d)(5) and (d)(7) requires a showing of pecuniary harm. This position is utterly inconsistent with the fundamental principles of the law of restitution and unjust enrichment—principles this Court relied on in *Liu*, 591 U.S. at 78-87, when it held that disgorgement is a traditional equitable remedy. Disgorgement has never been measured by the plaintiff's loss. It is measured by the defendant's wrongful gain. And for three centuries, courts have ordered disgorgement without requiring any showing that the plaintiff suffered financial harm.

A. The Measure of Restitution of Unjust Enrichment Is Defendant's Gain, Not Plaintiff's Loss.

"A person is not permitted to profit by his own wrong." *Restatement (Third) of Restitution and Unjust Enrichment* § 3. This statement of black letter law is "one of the cornerstones of the law of restitution and unjust enrichment." *Id.* § 3 cmt. *a*. It is the principle underlying the remedy of disgorgement in restitution law, which allows a plaintiff to recover "more than a provable loss so that the defendant may be stripped of a wrongful gain." *Id.*; Dan B. Dobbs & Caprice L.

Roberts, *Law of Remedies* § 1.1, at 4 (3d ed. 2018) ("[R]estitution is measured by defendant's gain, not by plaintiff's losses.").

Restitution of unjust enrichment is distinct from compensatory damages. "[I]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* § 2.1, at 51 (1978).

This Court has recognized this distinction repeatedly. A restitutionary remedy that seeks "disgorgement of ill-gotten profits" is "not the same as damages," which "seeks to compensate the victim for its loss." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 341 (2017); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002) (contrasting restitution with damages).

In many cases, the plaintiff's loss and the defendant's gain will correspond. If a thief steals $100, the plaintiff has lost $100 and the defendant has gained $100—and either measure will yield the same recovery. *See Restatement (Third) of Torts: Remedies* § 42 cmt. *h* (Am. L. Inst., Tentative Draft No. 3, Apr. 2024).[2] But because damages and restitution measure different things, the two measures often diverge. Sometimes the defendant's wrongdoing produces a gain exceeding the plaintiff's loss. *See Restatement*

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[2] This draft has been approved by the bicameral process of the American Law Institute and is available on Westlaw. Final publication is awaiting the completion of other sections of the Restatement. ALI Reporter 3 (Summer 2024), https://www.ali.org/sites/default/files/2024-10/ALI%20Reporter%20-%20Summer%202024%20-%203170_3.pdf.

(Third) of Restitution and Unjust Enrichment § 3 cmt. *b* ("The advantage [of restitution] is obvious when the defendant's wrongdoing results in a gain to the defendant exceeding the injury to the claimant."). And sometimes the plaintiff has suffered no measurable loss at all—yet the defendant has profited from the violation of the plaintiff's rights. *See Restatement (Third) of Torts: Remedies* § 42 cmt. *h* & illus. 5 (plaintiff with "no out-of-pocket loss of any kind" recovers defendant's unjust enrichment from unauthorized use of plaintiff's property). Restitution is available in all three scenarios because the basis of the claim is the defendant's wrongful gain, not the plaintiff's loss.

The black-letter formulation of the restitution claim is that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution." *Restatement (Third) of Restitution and Unjust Enrichment* § 1. The phrase "at the expense of another" may seem to imply financial loss, but it does not. "[T]he consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." *Id.* § 1 cmt. *a*. A claimant need only show "an actionable interference by the defendant with the claimant's legally protected interests." *Id.* § 51(1).

The current *Restatement* expressly disclaims "any implication that the defendant's wrongful gain must correspond to a loss on the part of the plaintiff." *Id.* § 3 reporter's note *a*. "[T]here can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever." *Id.* In short, a plaintiff with "no provable damages, or no damages at all, can nonetheless recover the gains of a wrongdoer who

acquired those gains by violating plaintiff's rights." *Restatement (Third) of Torts: Remedies* § 42 cmt. *h.*

Courts ordering restitution without requiring proof of plaintiff loss have offered various characterizations of what they are doing. Some treat the violation of the plaintiff's legal right as itself a cognizable injury, even absent any further harm. *See, e.g.*, *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 654 (Wash. 1946). Others do not identify the rights violation as an injury at all, but instead hold that disgorgement of the defendant's ill-gotten gains simply does not depend on whether the plaintiff was injured. *See, e.g.*, *Jackson v. Smith*, 254 U.S. 586, 589 (1921) (defendant liable for profits even though "the estate may not have been injured thereby"). The disgorgement remedy does not turn on this distinction. Under either approach, the plaintiff can recover the defendant's wrongful profits without establishing financial harm.

B. Courts Have Ordered Disgorgement, or Accounting for Profits, for Three Centuries Without Requiring Proof of Plaintiff Loss.

The specific remedy at issue—disgorgement—is the traditional equitable remedy of accounting for profits (or accounting, or accounting of profits) under a modern label. *See Liu*, 591 U.S. at 79 ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names."). This Court expressly rejected the view that the relatively recent vintage of the term "disgorgement" placed it outside the class of traditional equitable remedies, explaining that "casting aside a form of relief solely based on the particular label affixed to it would elevate form over substance." *Id.* at 76 n.1 (internal quotation marks, brackets, and citation omitted); *see also Restatement (Third) of Torts:*

Remedies § 42 cmt. *b* (explaining that "accounting, accounting for profits, disgorgement, and restitution of gains or profits [are] equivalent terms").

Courts have ordered this remedy—whatever its label—without proof of plaintiff loss across the major domains of restitution law for nearly three centuries.

1. Early Equity Practice

The remedy of accounting for profits has deep roots in equity practice. In *Keech v. Sandford*, 25 Eng. Rep. 223 (Ch. 1726), a landlord refused to renew a lease to a trust for an infant beneficiary, on the ground that the infant lacked capacity to enter the covenant. The landlord instead granted the lease to the trustee personally. Nothing the trustee did had cost the infant the lease, and the minor had suffered no harm beyond the violation of the duty of undivided loyalty the trustee had owed. Nonetheless, the Chancellor ordered "an account of the profits" the trustee had earned since the renewal, with no inquiry into whether the trustee's conflict of interest had caused the minor any harm. *Id.* at 224. The Chancellor acknowledged: "This may seem hard, . . . but it is very proper that rule should be strictly pursued, and not in the least relaxed." *Id.* at 223.

2. Infringement of Intellectual Property

In cases of infringement of intellectual property, an infringer who reaches new customers or transforms a work into a different medium may generate profits without diverting a single sale from the plaintiff. The plaintiff can nonetheless sue for the defendant's profits without showing any harm. *See Restatement (Third) of Restitution and Unjust Enrichment* § 42 illus. 7-9 & reporter's note *g*.

Consider this Court's decision in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940). In 1932, MGM produced a major motion picture whose script had been plagiarized from a copyrighted play. The playwrights could never have made the movie themselves; their provable damages, if any, were modest, and the lower courts did not even try to determine whether the plaintiffs had actually suffered any financial loss. This Court nevertheless affirmed the award of an accounting of profits in the amount of 20% of MGM's profits from the movie, which was the lower court's most generous estimate of the copyrighted material's contribution to the film's profits. *Id.* at 408-09. As the Court explained, the Copyright Act's provision for the recovery of profits was based on "the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment." *Id.* at 399.

A more recent copyright example is *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). A jury had found that popstar Michael Bolton's 1991 hit song "Love Is a Wonderful Thing" had infringed on the copyright of a 1964 song by the Isley Brothers. The court affirmed the award of the share of Bolton's profits attributable to the infringement, *id.* at 487, even though it was highly unlikely that the Isley Brothers had lost any sales of their decades-old song because of Bolton. Copyright is thus one more context in which courts have long disgorged defendants' unjust gains without requiring proof of any loss to the plaintiff.

In trademark, accounting for profits followed the same equitable logic of preventing unjust enrichment. In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), this Court adopted the constructive-trustee analogy: a trademark infringer "is

required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property." *Id.* at 259. In affirming an award of accounting of profits for trademark infringement, the Court relied solely on the equity power and did not cite the Trademark Act's provision for the recovery of profits. And it upheld the judgment even though the plaintiff "made no attempt to introduce substantial proof as to the amount of its damages" and "[a]ll the testimony was directed to the question of defendant's profits." *Id.* at 254-55.

Another illustrative trademark example is *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968). An American brewing company that made low-priced beer infringed on the trademark of a widely known producer of Scotch whisky. The court upheld an award of an accounting of the brewery's profits, even though it noted that plaintiffs "have shown no injury to themselves, no diversion of sales from them to the appellants, no direct competition from which injury may be inferable." *Id.* at 120. The court explained that in trademark infringement cases where there is no direct competition and therefore no diverted profits, it can nonetheless order "an accounting of profits based on [an] unjust enrichment rationale." *Id.* at 123.

Similarly, in *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942), this Court held that a trademark infringer's profits presumptively belong to the mark's owner, with the burden on the infringer to prove otherwise. The plaintiff manufactured shoes bearing heels with a distinctive mark and sold its heels only as attached to shoes—never as a separate product. *Id.* at 203-04. The defendant sold separate heels bearing a similar mark. *Id.* at 204. The

plaintiff, therefore, could not have lost any sales of the product the defendant was selling. This Court nonetheless held that all profits from the infringing sales presumptively belonged to the plaintiff, without requiring proof of any quantified loss: "one who makes profits derived from the unlawful appropriation of a mark belonging to another cannot relieve himself of his obligation to restore the profits to their rightful owner merely by showing that the latter did not choose to use the mark in the particular manner employed by the wrongdoer." *Id.* at 207.

3. Conflicts of Interests and Bribes

The rule that disgorgement does not require proof of plaintiff loss has deep roots in the law of fiduciary duty, beginning with *Keech*, as discussed above. Courts have consistently ordered fiduciaries to disgorge profits from conflicted transactions without inquiring into whether the beneficiary was financially harmed. *See Restatement (Third) of Agency* § 8.02 & cmt. *b* (Am. L. Inst. 2006) ("[I]t is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal.").

In *Jackson v. Smith*, this Court applied the longstanding rule that the receiver or trustee of an insolvent estate cannot be a party to a bid at his own sale, even where the auction is public and the bidding is genuinely competitive. 254 U.S. at 587-89. A receiver of an insolvent building association had secretly arranged to share in the profits if a confederate purchased trust property at a foreclosure sale. *Id.* at 587. The Court observed that "it affirmatively appears that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder." *Id.* Nevertheless, the Court held that the receiver and his confederates were "accountable . . . for all the profits obtained by him and

those who were associated with him in the matter, although the estate may not have been injured thereby." *Id*. at 589.

In *Mosser v. Darrow*, 341 U.S. 267 (1951), a reorganization trustee expressly authorized key employees to trade for their own accounts in securities of the debtor's subsidiaries. The trustee himself made no personal profit. He argued that the trades had caused no loss to the estate and that his buying program as a whole had actually been to the trust's benefit. *Id.* at 272. The Court acknowledged this argument but held that it could not excuse the arrangement: "the prohibition is not merely against injuring the estate—it is against profiting out of the position of trust." *Id.* at 273. The trustee was personally liable for the full amount of his employee's profits. *Id.* at 270.

A related rule prohibits a trustee or agent from using trust assets—or arranging for their use—in a manner that generates personal profit for the fiduciary. Even if the borrowed funds are returned in full with interest, the fiduciary must disgorge any profits. In *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945), trustees of a charitable trust secretly arranged to share in the profits when a third party borrowed trust funds to purchase interests in an oil and gas venture. Most of the loan was repaid with interest by the time of trial. *Id.* at 387. Defendants argued that the trust had suffered no material loss. The court, nevertheless, held that the trustees were liable for their profits, explaining that "[b]y the operation of a rule of equity well established, . . . the profits . . . become the property of the trust, even though the trust may not have suffered any loss." *Id.* at 393. In other words, under the law of restitution, any profits wrongfully made by the fiduciary belong to the trust, even if the trust cannot prove that it would have made those profits or prove that the

interest rate it earned on the loaned funds was inadequate. Disgorging the gain is the appropriate remedy. *See also* Doug Rendleman, *Measure of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 Wash. & Lee L. Rev. 973, 995 (2011) (explaining that a trustee who "borrows" trust money to make a speculative investment must disgorge all profits, even if the trust could not legally have made the same investment).

The same principle underlies the corporate-opportunity doctrine: a fiduciary who diverts a business opportunity from a principal must account for all resulting profits, whether or not the principal would have pursued that opportunity. *Restatement (Third) of Restitution and Unjust Enrichment* § 43 illus. 14-15 & reporter's note *d*; *Restatement (Third) of Agency* § 8.02 & cmt. *d*, reporter's note *d*.

A similar rule applies to commercial bribes and kickbacks. An employer or principal is entitled to recover any bribe or secret commission received by an employee or agent, without having to show that the bribe actually influenced the agent's conduct or altered the terms of any transaction. In *Tarnowski v. Resop*, 51 N.W.2d 801 (Minn. 1952), an agent engaged to investigate and negotiate a business purchase secretly collected a commission from the seller. The court ordered disgorgement: "It matters not that the principal has suffered no damage or even that the transaction has been profitable to him . . . . 'Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at . . . . It is not material that no actual injury to the company (principal) resulted, or that the policy recommended may have been for its best interest.'" *Id.* at 803 (quoting *Lum v. McEwen (Lum v. Clark)*, 57 N.W. 662, 662-63 (Minn. 1894)).

In *United States v. Carter*, 217 U.S. 286 (1910), an Army engineer officer assigned to supervise harbor improvement contracts secretly received a kickback of approximately one-third of the contractors' profits channeled through an intermediary. *Id.* at 300. This Court held that the engineer "must account to his principal for every dollar of gain or profit or advantage which has been derived by him from these contracts." *Id.* at 310. On the question of harm, this Court was emphatic: "It is immaterial . . . whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise." *Id.* at 305.

4. Misuse of Confidential Information

A person who profits from the unauthorized use of confidential information must account for those profits regardless of whether the breach caused any demonstrable financial harm. In *Snepp v. United States*, 444 U.S. 507 (1980), a former CIA officer published a book about CIA activities without submitting the manuscript for prepublication review, as required by his employment agreement. The government conceded that the book did not contain any classified information, *id.* at 510, and it was undisputed that the actual damages attributable to the publication were "unquantifiable," *id.* at 514. Yet this Court imposed a constructive trust on all of the profits from the book, reasoning that "the trust remedy simply requires him to disgorge the benefits of his faithlessness." *Id.* at 515.

The same principle applies to insider trading. Insiders who trade on material nonpublic information must account to the corporation for their profits, even if the corporation itself suffered no financial injury from the trades. In *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y. 1969), two corporate officers learned that a sharp increase in costs had caused the company's

earnings to plummet. Before this information became public, they sold off company shares at the prevailing market price. *Id.* at 911. The court of appeals rejected the defendants' argument that the corporation had not been harmed by the sales: "It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty." *Id.* at 912. The function of the disgorgement remedy, the court explained, is "not merely to compensate the plaintiff for wrongs committed by the defendant but . . . to [p]revent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit." *Id.* (internal quotation marks omitted).

5. Harmless Trespass and Conversion

Even an entirely harmless act of trespass or conversion can warrant disgorgement of profits. A property owner whose land or chattels are used without authorization can recover the wrongdoer's profits, even where the owner was not using the property, could not have used it, or suffered no diminution in its value.

In *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936), the defendant operated a profitable tourist cave, but about one-third of the cave ran beneath a neighbor's land. The neighbor had no way to reach or exploit his portion of the cave, which was accessible only through a mouth on the defendant's property. *Id.* at 1030. The court ordered the defendant to pay one-third of his net profits to his neighbor, even in the absence of damages, reasoning that "a wrongdoer shall not be permitted to make a profit from his own wrong." *Id.* at 1032; *see also* Rendleman, *supra*, at 998 (explaining that the award in *Edwards* was not a "windfall" or overpayment because disgorgement reversed the defendant's unjust enrichment).

The same principle applies to conversion of personal property. In *Olwell*, the defendant used the plaintiff's egg-washing machine without authorization for over three years. The plaintiff had put the machine into storage and was not using it at the time; indeed, he was not even aware that it had been put into operation until a chance visit to the defendant's plant on unrelated business. 173 P.2d at 653. The defendant's position was not implausible: he argued that because the machine had not been damaged and the plaintiff had no use for it and was unaware of its use, the plaintiff was "as well off as if the machine had not been used." *Id.* at 654. The court rejected this defense, holding that the defendant's use was a benefit to the defendant and the violation of the plaintiff's property rights was an injury to the plaintiff. *Id.* Applying the theory of unjust enrichment, the court ordered restitution of the profits derived from the defendant's use of the machine. *Id.*

* * *

The breadth and consistency of these holdings are striking. Across the major domains of restitution law, courts have ordered disgorgement without requiring proof that the plaintiff suffered financial harm. Trademark holders who did not even sell the infringing product, trust beneficiaries whose interests were unharmed, employers whose agents' kickbacks had not affected any business transactions—they all recovered the defendant's profits. The reason is the same in every context: disgorgement is measured by the defendant's wrongful gain and has never been conditioned on the plaintiff having experienced a financial loss.

II. Petitioner's Position Misunderstands the Nature of Disgorgement and Would Imperil Settled Law Far Beyond the Securities Context.

In *SEC v. Govil*, 86 F.4th 89 (2d Cir. 2023), the Second Circuit held that disgorgement under 15 U.S.C. § 78u(d)(5) and (d)(7) required a finding that the defrauded investors suffered pecuniary harm. That holding rests on a series of errors about the nature of disgorgement and the authorities on which the court relied.

Govil's most fundamental error is its confusion of disgorgement with compensatory damages. The Second Circuit reasoned that under equitable principles, disgorgement "restores the status quo" and that without pecuniary harm, distributing disgorged funds to investors would confer a "windfall." *Id.* at 103 (internal citation omitted). But this reasoning conflates two distinct remedies that operate on opposite sides of the ledger. Compensatory damages restore *the plaintiff* to the position occupied before the wrong—those damages are measured by, and depend upon, the plaintiff's loss. *See* Dobbs & Roberts, *supra*, § 3.1, at 215 ("The stated goal of the damages remedy is compensation of plaintiff for legally recognized losses . . . [and] to put plaintiff in his or her rightful position."). But disgorgement restores *the defendant* to the position occupied before the wrong—it is measured by, and depends upon, the defendant's gain. *See id.* § 4.1(1), at 374 ("Restitution measures the remedy by defendant's gain and seeks to force disgorgement of that gain."). Recovery through disgorgement, therefore, "may potentially exceed any loss to the claimant." *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. *a.* That is not a "windfall." It is the ordinary operation of an unjust enrichment remedy that has

always been measured by the defendant's gain, not the plaintiff's loss.

As *amici*, some of whom served as advisers on the *Restatement*, know well, *Govil* also misread the *Restatement* itself. The opinion cited § 1, reporter's note *d*, for the proposition that an unjust enrichment claim requires "impoverishment." 86 F.4th at 103 n.15. That is wrong. Indeed, the cited passage says the opposite. The note warns that attempts to reduce unjust enrichment to a rigid formula "usually lead[] to trouble." *Restatement (Third) of Restitution and Unjust Enrichment* § 1, reporter's note *d*. The note then criticizes that very element: "the reference to 'impoverishment' is too narrow: there is often no 'impoverishment' other than a violation of the claimant's rights." *Id.* The passage on which *Govil* relied thus expressly rejects the proposition for which the court cited it.

Petitioner goes further than *Govil*, attacking the *Restatement* itself as unreliable—a "reinvention, not restatement," that deliberately erased the historical loss requirement in pursuit of a normative agenda. Pet. Br. 35. The history is entirely to the contrary.

The claim that the *Restatement* invented the principle that disgorgement does not require proof of loss and established a brand-new form of restitution is, as discussed earlier, refuted by centuries of cases spanning the major domains of restitution law. *See supra* Part I. The Chancellor in *Keech v. Sandford* ordered an accounting for profits without proof of loss in 1726—more than two centuries before the first *Restatement* was published. This Court affirmed the same principle in *Jackson v. Smith* in 1921, in *Mosser v. Darrow* in 1951, and in *Snepp v. United States* in 1980. These holdings exist independently of the *Restatement*; the *Restatement* merely relies upon them to

show that the rule it restates has long been the rule in the courts.

Petitioner focuses on the *Restatement*'s deletion of the phrase "at the expense of another" from § 3, characterizing it as evidence that the reporter was pushing the law in a desired direction. Pet. Br. 35. But as the reporter's note makes clear, the deletion was a drafting correction, not a substantive change. It was made "to avoid any implication that the defendant's wrongful gain must correspond to a loss on the part of the plaintiff"—an implication the note calls wrong, citing extensive prior authority including the original 1937 *Restatement* itself, the tentative draft of the second *Restatement*, and the leading treatise on the topic. *Restatement (Third) of Restitution and Unjust Enrichment* § 3 reporter's note *a*. The prior formulation's inclusion of "at the expense of another" in § 3 had led some courts to make precisely the error *Govil* committed: inferring that the defendant's gain must correspond to a loss. The note warns that such formulations are "seriously out of place in any discussion of restitution of wrongful gain." *Id.* In short, the phrase "at the expense of another" was omitted to make clear that the black-letter text was in alignment with what the cases had always held.

Nor is the *Restatement (Third) of Restitution and Unjust Enrichment* an outlier. The tentative draft of the *Restatement (Third) of Torts: Remedies*—a separate ALI project with its own reporters and advisers—confirms the same principle: "Even a plaintiff with no provable damages, or no damages at all, can nonetheless recover the gains of a wrongdoer who acquired those gains by violating plaintiff's rights." *Restatement (Third) of Torts: Remedies* § 42 cmt. *h.*

Petitioner also argues that the measure of disgorgement—defendant's gain—is a separate question

from its availability, which Petitioner insists, requires proof of victim loss. Pet. Br. 36. But this argument simply ignores that a fundamental rationale for disgorgement is to provide recovery where the plaintiff's loss is absent or unquantifiable. *See Restatement (Third) of Restitution and Unjust Enrichment* § 3 cmt. *b*; Dobbs & Roberts, *supra*, § 4.1(1), at 374 ("Restitution . . . differs in its goal or principle from damages . . . ."). In other words, disgorgement is not an alternative method of calculating compensatory damages. It is a different remedy with a different purpose. And if proof of plaintiff loss were a threshold requirement for disgorgement, the remedy would be available only when damages would also be available. That is not the law now, and it has never been the law.

Notably, the cases discussed in Part I involved plaintiffs who invoked disgorgement precisely because compensatory damages were unavailable, unquantifiable, or inadequate: the owner of the egg-washing machine who suffered no financial loss from its unauthorized use, the owners of intellectual property whose infringement caused no financial harm, the landowner who had no means of exploiting the cave beneath his property. Disgorgement fills a gap that compensatory damages cannot reach. Requiring proof of loss as a prerequisite would eliminate the very function the disgorgement remedy has served for centuries.

The consequences of Petitioner's position would also extend well beyond the securities context. The equitable principles governing disgorgement are the same whether the claim arises under securities law, the law of fiduciary duty, intellectual property law, or the law of trespass and conversion. As discussed above, courts have ordered disgorgement in all of these areas of law without proof of pecuniary harm—in some cases for centuries. Maintaining these principles

comports with the history and tradition of equity for accounting for profits and disgorgement. A holding by this Court that these principles require proof of pecuniary harm would overturn large bodies of law that have long been settled. Claims to recover commercial bribes and kickbacks, claims for infringement of intellectual property, claims to recover wrongful profits from fiduciary self-dealing, and claims for insider trading all rest on the principle that disgorgement does not require proof of plaintiff loss. A decision endorsing the contrary view would unsettle fundamental principles of restitution law that long predate the Securities Acts and serve essential functions throughout private and public law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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LIST OF *AMICI* 2A

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