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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 25-466, Sripetch versus Securities and Exchange Commission.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

According to Section 78u's plain text, history, structure, and purpose, the SEC cannot seek disgorgement without showing investors suffered economic harm.

This Court in Liu directly confronted the meaning of "disgorgement," traced its common law roots, and established its traditional bounds. It confirmed that disgorgement could not be a penalty or a deterrent, and it was limited to restoring the status quo and providing fair compensation to injured investors.

Congress acted against that backdrop to codify disgorgement in subsection (d)(7).

1 It did so by including the very term that Liu
2 had just defined without any further guidance
3 or modification. It simply took that term of
4 art and placed it in the statute. And it
5 separately paired disgorgement with penalties
6 as two different remedies with separate
7 functions, one punitive and the other remedial.

8 Yet the government now maintains that
9 Congress, in its post-Liu amendments,
10 fundamentally redefined the core meaning of
11 disgorgement. The government says disgorgement
12 can serve as a penalty. It can focus solely on
13 depriving wrongdoers and deterring misconduct,
14 and the government can act without any remedial
15 purpose, with no obligation to restore the
16 status quo or return a single penny to
17 investors.

18 The government is wrong. Its view
19 would override critical limits on the SEC's
20 enforcement power. It would permit an
21 unbounded form of disgorgement rejected by this
22 Court and unmoored from its traditional roots.
23 It would treat disgorgement as
24 indistinguishable from a penalty in a provision
25 that separately provides for penalties and

1 draws a textual and functional distinction
2 between penalties and disgorgement. It would
3 assign windfalls to uninjured investors, who
4 Congress already determined have no right to
5 these very funds. And it would let the
6 government subvert the substantive and
7 procedural safeguards, including a jury trial,
8 that protect against -- defendants against SEC
9 overreach and abuse.

10 To be sure, we are not saying that
11 wrongdoers have a right to keep the proceeds
12 from their violations. But we are saying that
13 the SEC has to go through the rules and hoops
14 for civil penalties when it seeks to punish a
15 defendant rather than restore funds to parties
16 with actual injuries.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: So, in your -- under
19 your view, what's the difference between
20 disgorgement and compensatory damage?

21 MR. GEYSER: I think there's an
22 important distinction. Disgorgement is about
23 identifying an asset before the court that
24 rightfully belongs to someone else. Damages
25 are seeking to make an injured party whole.

1 So, in some cases --

2 JUSTICE THOMAS: Well, aren't you -- I
3 thought you were pegging your argument to the
4 existence of an injured party.

5 MR. GEYSER: Oh, we -- we certainly
6 are, Your Honor, but you need -- you need some
7 party with a right or entitlement to the
8 proceed, to the asset before the court, in
9 order for a disgorgement to have a compensatory
10 function.

11 Now it is possible that in some cases
12 disgorgement and damages will overlap, but
13 there are obviously important distinctions,
14 including that disgorgement is capped by net
15 proceeds. And, again, if an injured party's
16 only entitled to part of the asset before the
17 court, then disgorgement is limited to that
18 part of the asset. If you go beyond that, you
19 cross the line into a penalty and a windfall.

20 JUSTICE THOMAS: Well, let's take a
21 step back. This -- you seem to rely quite a
22 bit on Liu, right?

23 MR. GEYSER: That's right.

24 JUSTICE THOMAS: The world has changed
25 in this area since Liu, and disgorgement is now

1 in, what, Section 7?

2 MR. GEYSER: That's correct.

3 JUSTICE THOMAS: And it has a
4 different statute of limitations. And do you
5 think it's still a -- an equitable remedy?

6 MR. GEYSER: Oh, absolutely, Your
7 Honor.

8 JUSTICE THOMAS: It's not in the
9 equitable section, which is Section 5, right?

10 MR. GEYSER: It -- it's not in Section
11 5. Congress gave it a new home in Section 7 so
12 that it could make sense --

13 JUSTICE THOMAS: Well, as far as I was
14 concerned, it was homeless to begin with.

15 (Laughter.)

16 MR. GEYSER: Well, you're not
17 necessarily wrong, but --

18 JUSTICE THOMAS: Yeah. Well, I don't
19 think so.

20 MR. GEYSER: -- but, in light of the
21 Court's reading in Liu, it said disgorgement is
22 an equitable remedy. And -- and -- and Liu is
23 very clear about what Congress needed to do if
24 it wanted to expand disgorgement beyond its
25 traditional bounds as identified in Liu. And

1 it said that if a statute only takes the word
2 "disgorgement," that does not expand the
3 traditional bounds of the equitable remedy.
4 Yet that's exactly what Congress did here.

5 JUSTICE JACKSON: Can we talk about
6 the traditional bounds, though? Because I
7 didn't see any case that you're pointing to
8 that suggests that pecuniary harm was a
9 requirement traditionally. So can you help us
10 to understand where that's coming from?

11 MR. GEYSER: Sure, Your Honor. I -- I
12 think it actually -- if -- if you look at --
13 both at Kokesh before Liu and -- and Jarkesy
14 after Liu and the cases cited in Liu itself,
15 disgorgement is always tied to some party that
16 has a superior right or entitlement to some
17 kind of proceed.

18 So it could be a pecuniary harm,
19 someone has been injured and the -- the proceed
20 that the defendant now holds is rightfully
21 theirs. It could be a situation like
22 copyrights or patents, as we saw in the Sheldon
23 case, where the court says someone used the
24 property and part of the property right comes
25 with a right to the proceeds so that if you

1 don't return the proceeds, then, in fact, that
2 is a loss, that is a pecuniary harm.

3 JUSTICE JACKSON: I understand, but in
4 Liu, didn't we leave open the question at issue
5 here? I mean, didn't -- didn't we say that the
6 parties have not identified authorities
7 revealing the traditional equitable
8 principles -- what traditional equitable
9 principles govern, for instance, the
10 wrongdoer's profits cannot -- when the
11 wrongdoer's profits cannot practically be
12 disbursed to the victims?

13 In other words, in a situation in
14 which you have disgorged the profits, but it is
15 impracticable or infeasible to give them to the
16 victims, we left open whether or not
17 disgorgement was still available under those
18 circumstances. So why doesn't that cut against
19 your view that traditionally there would be no
20 disgorgement available?

21 MR. GEYSER: Well, Your Honor, that --
22 that -- that was the -- the -- the language
23 addressing feasibility is addressing a very
24 limited exception where there happens to be --
25 for some reason, we can't get money to the

1 right parties.

2 JUSTICE JACKSON: No, I understand.
3 But your -- your argument is that there is no
4 disgorgement in a situation in which there has
5 been no harm to the parties. There's no -- to
6 the victim. And I -- I appreciate that you say
7 this is a different circumstance. It's where
8 there's been harm, but somehow it's infeasible
9 to get the money back to them.

10 But it does seem to me to cut against
11 your view when, here, we've left open whether
12 or not disgorgement is available in a situation
13 in which the money is not returnable or can't
14 be returned to any victims or maybe when there
15 is no victim in any meaningful sense.

16 MR. GEYSER: Your Honor, I wouldn't
17 let the tail wag the dog. That is truly a -- a
18 very limited unusual exception where you have a
19 situation, for example, where each
20 shareholder's entitled to 25 cents and you
21 can't figure out how can we even write -- put
22 the stamp on the envelope to send them the
23 money.

24 Now, if you look at Part II of Liu, I
25 think it does, in fact, provide the exact

1 analytical foundation necessary to decide this
2 case.

3 JUSTICE JACKSON: Does it provide a
4 case that says that pecuniary harm was a
5 requirement under traditional equitable
6 principles?

7 MR. GEYSER: Well, what -- what it
8 said, Your Honor, is that -- and I think, if
9 you look at the different predicates that go
10 into Liu, I think this has established this.
11 It can't be a punishment or a deterrent. And,
12 in fact, if you're providing a windfall and
13 you're not -- and you don't have a compensatory
14 function, then you are punishing and -- and you
15 are deterring. And then you're simply taking a
16 disgorge --

17 JUSTICE JACKSON: Why is it a
18 punishment if we're not taking anything more
19 from the defendant than he unlawfully gained?
20 In other words, I would -- I could -- I could
21 see a fine or a punishment if the defendant is
22 actually paying out of his pocket some money
23 that was rightfully his. That's a punishment.

24 But, if we're just disgorging his
25 ill-gotten gains, I -- I guess I'm not sure I

1 understand why that's a punishment.

2 MR. GEYSER: I -- I think two -- two
3 key answers, Your Honor. The first is that
4 it's still depriving the wrongdoer in the same
5 way that a penalty is a punishment and does
6 deprive the wrongdoer, even if it's only
7 targeting, say, half of his net gain.

8 It's still a punishment. And --

9 JUSTICE JACKSON: It's depriving him
10 of money he didn't have, that was never his.
11 Why is that a punishment?

12 MR. GEYSER: It's a punishment because
13 the purpose is to deprive and the purpose is to
14 deter. And the Court was very clear both in
15 Liu and -- and in Jarkesy that if the purpose
16 isn't remedial, if the purpose isn't to restore
17 funds to the proper owner, to the wronged -- to
18 the wronged party, then, in fact, it does cross
19 that line into a penalty.

20 JUSTICE SOTOMAYOR: Mr. Geyser, I --
21 I'm a little bit confused by your argument,
22 okay, on lots of levels, but let's start with
23 the first. At one point in your brief, you
24 agree that disgorgement should be measured by
25 the defendant's wrongful profits rather than

1 the victim's losses.

2 Do you agree with that?

3 MR. GEYSER: We -- we agree that that
4 is part of the equation, Your Honor.

5 JUSTICE SOTOMAYOR: Well, I don't know
6 why it's not the whole equation, meaning one of
7 the reasons to do disgorgement instead of a
8 victim coming to prove losses is because
9 sometimes it's hard to quantify the loss, so
10 you use an alternative, disgorgement, correct?

11 MR. GEYSER: Well, yes and no, Your
12 Honor.

13 JUSTICE SOTOMAYOR: You can't do both,
14 right?

15 MR. GEYSER: You -- you can't do both.
16 But --

17 JUSTICE SOTOMAYOR: Right. And you
18 can't do both because, I thought, that what
19 you're compensating is the invasion of the
20 legal right, correct?

21 MR. GEYSER: Yes, but I think -- I
22 think --

23 JUSTICE SOTOMAYOR: Let me take you
24 step by step.

25 MR. GEYSER: Sure.

1 JUSTICE SOTOMAYOR: So you're not
2 debating that the victim's legal rights were
3 invaded here, correct?

4 MR. GEYSER: The -- we're not debating
5 that they had a legal right invaded. We are
6 debating that they have a right to the proceeds
7 in question.

8 JUSTICE SOTOMAYOR: You -- the problem
9 I have with that is that we've said, and
10 Justice Thomas himself said in *Leman*, that even
11 with profit-based remedies, without a showing
12 of pecuniary loss, can be included in the
13 compensation of compensatory relief.

14 The whole idea behind lost profits is
15 you took my money and you made money from it.
16 You're not entitled to that because you invaded
17 my right to have that money, and maybe I wasn't
18 as smart as you or as corrupt as you, and I
19 didn't make that money, but you took it from
20 me. You invaded my legal rights, so I'm
21 entitled to be compensated.

22 MR. GEYSER: I -- I -- I don't think
23 that's quite right, Your Honor. The -- when
24 you're entitled to lost profits is when there
25 is some legal right or entitlement that gives

1 access not just to the property but to the
2 proceeds from the property.

3 JUSTICE SOTOMAYOR: So what gives --
4 what normally gives right to disgorgement?

5 MR. GEYSER: Well, what normally -- if
6 you look at a case like -- think about patents
7 or copyrights. You have a right to the
8 patented invention. You have a right to the
9 copyright, the inventor --

10 JUSTICE SOTOMAYOR: So you're thinking
11 that slew of copy -- of common law cases that
12 weren't patents or patent cases, where lost
13 profits were measure -- the measure of loss for
14 victims, that those were all wrong?

15 MR. GEYSER: No, not -- not at all,
16 Your Honor. In every single case that I think
17 the government cites and the government's amici
18 cite, it involves a situation where the party
19 before the court who's asking for disgorgement
20 says: I have a legal entitlement, a legal
21 right to those proceeds, to those proceeds.

22 What -- that's very different than
23 this situation, where Congress made a
24 determination, looking at these very victims in
25 this setting with this type of harm trying to

1 get these proceeds that they would lose, they
2 have absolutely no legal entitlement to the
3 proceeds in this case.

4 JUSTICE SOTOMAYOR: So is your
5 position -- and you said it in your reply
6 brief, and I'm a little confused by it -- that
7 in your reply, you say that if there is only
8 provable loss of one dollar, then the maximum
9 measure of disgorgement is one dollar?

10 MR. GEYSER: That's exactly right.

11 JUSTICE SOTOMAYOR: So, basically,
12 what you're saying is the government has to
13 call every victim, prove every dollar of loss?
14 Why bother?

15 MR. GEYSER: Well, Your Honor --

16 JUSTICE SOTOMAYOR: Why bother asking
17 for disgorgement if they have to prove loss to
18 that amount?

19 MR. GEYSER: The -- it -- it --

20 JUSTICE SOTOMAYOR: I thought
21 disgorgement was to make it easier as an
22 alternative.

23 MR. GEYSER: No, Your Honor, not --
24 not in this context. And, again, remember the
25 context. This is the SEC, who's a stranger to

1 the transaction, who has the option, while
2 they're enforcing the security laws, and they
3 can seek penalties where they can get full
4 gross proceeds from the wrongdoer. If at the
5 same time they want to try to compensate the
6 victim, then they can seek disgorgement. If
7 they think it's difficult to add up those
8 losses and to figure that out, one, seek civil
9 penalties --

10 JUSTICE SOTOMAYOR: So does this all
11 come down to is the SEC going to keep the money
12 or if it -- if the order says you pay it to
13 victims, if -- if it -- if they say you pay it
14 to victims, then they can do this?

15 MR. GEYSER: Your Honor, I will say
16 what the Court said in Liu, which is you have
17 to provide fair compensation to the person
18 wronged. Fair compensation doesn't mean a
19 windfall. It doesn't mean exceeding the amount
20 of right that the person has to the proceeds.

21 This is a compensatory remedy. It's
22 about restoring the status quo and it's about
23 not providing windfalls. And --

24 JUSTICE ALITO: Mr. -- I'm sorry.
25 Finish what you were saying.

1 MR. GEYSER: No, please.

2 JUSTICE ALITO: Well, putting aside
3 the question whether, after Congress's most
4 recent enactment, disgorgement under that
5 provision has to be equitable, let's assume
6 that it still has to be equitable, there were
7 forms of equitable disgorgement, right,
8 including an accounting of -- an accounting for
9 profits.

10 And you say that under that -- under
11 such a claim, the victim has "an underlying
12 substantive entitlement to the profits." So
13 why doesn't the SEC have a substantive
14 entitlement to the profits after the enactment
15 of the current statute?

16 MR. GEYSER: Well, because I think all
17 the current statute does is give the SEC the
18 right to seek disgorgement, as this Court then
19 necessarily defined disgorgement in Liu, as an
20 equitable remedy that can't be a punishment, it
21 can't be a deterrent. And the SEC is not
22 seeking disgorgement for itself. It's seeking
23 disgorgement for the injured parties.

24 And, again, I think, under that
25 reading, Your Honor, if you do look at

1 disgorgement as simply saying we can deprive
2 the wrongdoer of an ill-gotten gain, first,
3 that's the first principle in Liu. That was
4 checked by the countervailing principle in Liu
5 that it has to be a compensatory remedy for a
6 victim. The SEC is not the victim. And you
7 also have a situation where you collapse the
8 distinction in (d)(3) between civil penalties
9 and disgorgement.

10 I don't think the Court has to go
11 beyond the four corners of this statute to read
12 the language the way that we're reading it.
13 Congress delineated --

14 JUSTICE ALITO: Well, the statute as
15 it currently stands doesn't say equitable
16 disgorgement. It just says disgorgement.

17 MR. GEYSER: And disgorgement by its
18 very nature is equitable in the same --

19 JUSTICE ALITO: There were forms of --
20 there were legal forms of disgorgement, were
21 there not?

22 MR. GEYSER: I don't believe so, Your
23 Honor. Disgorgement, as Liu explained, is --
24 by its very core is an equitable remedy. So
25 I -- I don't think you can say that, in fact,

1 that this is now a second form of punishment.
2 And if you do read the statute that way, then
3 you're -- again, you're collapsing the
4 distinction between penalties and disgorgement
5 even though Congress delineated between those
6 two things.

7 Under our reading, each has a separate
8 function.

9 JUSTICE KAGAN: If -- if -- if I could
10 just interrupt you, I just want to make sure I
11 understand it. And this goes back to Justice
12 Thomas's first question.

13 You're saying that there is no
14 situation in which disgorgement is appropriate
15 where compensatory damages would not also be
16 appropriate, is that right, that disgorgement
17 can never go above compensatory damages?

18 MR. GEYSER: No, Your Honor. And I --
19 I do want to be clear about this. There are
20 some situations where, by the nature of the way
21 damages are calculated, an injured party could
22 be better off by seeking the net profits, the
23 net proceeds, instead of seeking a damages
24 remedy, but the two overlap --

25 JUSTICE KAGAN: Well, tell -- tell me

1 where we're talking about, because the only
2 thing I've heard from you is situations in
3 which disgorgement doesn't come up to the level
4 of compensatory damages. But how could
5 disgorgement in your view go over the level of
6 compensatory damages?

7 MR. GEYSER: I -- I think, if you look
8 at the copyright and patent cases, like the
9 Sheldon case, those -- those are examples where
10 someone, for example, might have written a
11 play, but they absolutely have no ability to
12 produce a movie on their own.

13 A studio comes in, appropriate --
14 misappropriates their protected copyrighted
15 play, and you might want to seek the net
16 profits from that as opposed to trying to seek
17 damages because you couldn't sell your play to
18 a studio for the same amount.

19 So there are chances -- there are
20 situations where you could see daylight between
21 the two, but I think what really matters here
22 is that if you look at what Congress was trying
23 to do and, when you pair disgorgement and
24 penalties in the same subsection, they must
25 have different functions. And I think those

1 functions collapse under my --

2 JUSTICE KAGAN: But you're saying,
3 though, disgorgement and penalties. I guess
4 what I'm focusing on is disgorgement and
5 compensatory damages because my understanding
6 of disgorgement, you said it's an equitable
7 penalty, it's an equitable penalty. So it was,
8 that it was meant to operate in places where
9 compensatory damages would not operate.

10 That's the whole point of it being
11 equitable. You couldn't get it legally at law,
12 but you could get it by way of this equitable
13 road.

14 MR. GEYSER: Sure, Your Honor. But,
15 in all of those situations, what you're trying
16 to get is you -- you've identified some
17 asset -- property, funds, money, whatever it
18 is -- and you say I have a right to that asset
19 because I have an underlying substantive right
20 to it either as a matter of property, as a
21 matter of patent, as a matter of trusts and
22 beneficiaries, of fiduciary law.

23 There's something that gives the
24 injured party the right to the asset in the
25 same way that if I put a hundred dollars into

1 an interest-bearing bank account and the bank
2 returns a hundred dollars to me without the
3 interest, I think I've suffered a loss and I
4 can seek to recover that interest. That's all
5 those cases say.

6 And you could have situations with
7 damages where you've suffered beyond net
8 proceeds. You could have situations where
9 your -- your tangible concrete harm might be
10 less than the gain that someone produced by
11 misappropriating something that belongs to you.

12 But -- but, again, what we're dealing
13 with here, though, all of these -- in every
14 single case, the remedy is, in fact,
15 compensatory. It's not designed just to
16 deprive someone of an asset. It's designed to
17 compensate an injured party. And, again, that
18 makes sense if you look at the statute with
19 (d) -- under (d)(3) and especially if you
20 fast-forward to (d)(9). And --

21 JUSTICE JACKSON: But what about the
22 fact that the compensatory language and the
23 focus of Liu with respect to compensatory
24 seemed rooted in the language of (d)(5)? That
25 at the time -- Justice Thomas mentions this --

1 that (d)(5) was the only thing on the books,
2 and we say in Liu that this is really about the
3 "appropriate or necessary for the benefit of
4 investors" language, which appears in (d)(5)
5 but not in (d)(7)?

6 MR. GEYSER: Exactly, Your Honor.
7 That comes in Part III of the opinion. And if
8 Part III were the only part of the opinion, I
9 think this would be a harder case for us. In
10 Part II, the Court is focused exclusively on
11 traditional equitable rules. It has nothing to
12 do with the language of (d)(5).

13 And even when the Court did get to
14 (d) -- (d)(5) in Part III, it stressed -- if
15 you look at page 90, it said it applies both
16 because of the specific language of (d)(5) and
17 traditional equitable constraints.

18 JUSTICE BARRETT: Counsel, can I --
19 oh, sorry.

20 MR. GEYSER: Please. Go ahead.

21 JUSTICE BARRETT: This kind of
22 dovetails with Justice Jackson's question and
23 goes back to Justice Thomas's question. Let's
24 say that I don't read Liu the way you do.
25 Let's say that I read it more like Justice

1 Jackson was just proposing.

2 Do you then say, well, I still win
3 because just the word "disgorgement," even
4 though it's been taken out of (d)(5), still has
5 these traditional equitable limitations? So is
6 Liu kind of unnecessary? Obviously, it helps
7 you if it squarely would require us to decide
8 this case in your favor. But take Liu out of
9 the equation. Tell me why your argument would
10 still carry the day.

11 MR. GEYSER: Well, I -- I think we can
12 win in any of three independent paths. First,
13 if -- if we want to relitigate first principles
14 about what "disgorgement" means and how it
15 functions as an equitable penalty -- as an
16 equitable remedy, I think we can win on that.

17 I think, if you read Liu our way and
18 then you understand that Congress ratified Liu,
19 which I think is the only plausible way to
20 understand what Congress did. When it takes a
21 term this Court just defined, I think it's
22 taking this Court's understanding of that term,
23 not some scattershot body of district and
24 circuit decisions.

25 JUSTICE BARRETT: Okay, but you're

1 going back to Liu. If you can't rely on Liu.

2 MR. GEYSER: If I can't rely on Liu --

3 JUSTICE BARRETT: Yeah.

4 MR. GEYSER: -- then, again, I think
5 we can do first principles, or you can just
6 look at the statute itself. I think the best
7 reading of the statute when you pair civil
8 penalties with disgorgement is you have to
9 delineate between the two. They each have to
10 mean something different.

11 Under my friend's reading, Congress
12 would have simply rewritten the statute to say
13 the SEC can seek civil penalties up to gross
14 proceeds, net proceeds, or both because that's
15 how they read the idea of disgorgement. It's
16 simply about taking away the asset. We read it
17 to have a remedial function.

18 JUSTICE BARRETT: But penalties don't
19 have to be limited to net proceeds or gross
20 proceeds. I mean, penalties could be entirely
21 detached from that.

22 MR. GEYSER: Oh, absolutely, Your
23 Honor, but -- but my -- my point is, though,
24 that the way the government is understanding
25 the addition of disgorgement to (d)(3), it's

1 indistinguishable from a second penalty.

2 JUSTICE BARRETT: Okay. Last
3 question. Do you -- the Ninth Circuit said
4 that your victims or your client's victims had
5 suffered a violation of their legal interests.
6 Do you agree?

7 MR. GEYSER: Of their legal interests,
8 but that does not give them a legal right to
9 the proceeds. Those are two different things.

10 JUSTICE BARRETT: Right.

11 MR. GEYSER: And we know that from
12 other provisions of the securities laws. If
13 they filed suit saying we have a right to the
14 proceeds, unlike the plaintiffs in all of the
15 other equity cases that my friend cites, the --
16 the investors here would lose because they have
17 no injury.

18 And -- and I do just want to also
19 supplement this because, if the Court does just
20 want to look to the statute, I think the
21 easiest way to resolve a statutory case is
22 sometimes to look at the statute. One thing we
23 haven't talked about is (d)(9). And in
24 (d)(9) -- and this was an addition that
25 Congress included when it added (d)(7) --

1 the -- Congress made clear that the fact that
2 we are now empowering the SEC to seek
3 disgorgement does not mean that we're
4 precluding the ability of a private investor to
5 file their own lawsuit.

6 Under my friend's understanding, that
7 is a very odd provision. Why would Congress be
8 concerned that a remedy that simply lets --
9 lets the SEC deprive a wrongdoer of an
10 ill-gotten gain -- they don't have to give it
11 to anyone. They don't need to show any harm.
12 They can just take it. Why would anybody even
13 think that might preclude the ability of a
14 private litigant to file their own lawsuit?

15 But, under our reading, where -- where
16 disgorgement is designed for a compensatory
17 function, where the SEC invokes disgorgement in
18 order to compensate an injured investor to
19 stand in their shoes and seek recovery on their
20 behalf, that's where Congress would be
21 concerned that now that we've armed the SEC to
22 do this, maybe a court might think that private
23 parties can't seek that identical relief on
24 their own.

25 So I think, if you just look in the

1 four corners of the statute itself, I think we
2 have the better reading. I think we certainly
3 have the better reading after Liu.

4 And, respectfully, I really do think,
5 if you read Part II, it says -- it says there
6 are two principles. One is you can deprive a
7 wrongdoer of an ill-gotten gain. But then it
8 said there's a countervailing principle.
9 Countervailing, the idea of that term, is it's
10 cutting back or restricting. And the
11 countervailing principle says you have to
12 provide fair compensation to the person wronged
13 so that it does not cross the line into a
14 penalty.

15 Under my friend's view, this is a
16 penalty. This is taking an asset that someone
17 has and it's depriving them of their -- their
18 asset for the sole purpose of depriving them of
19 what they -- we don't think they should have,
20 we're casting judgment, and to deter someone
21 from breaking the law in the future.

22 If the SEC wants to seek that kind of
23 remedy, they have the ability to do it. Invoke
24 a -- a civil penalty. But then you have to
25 provide a jury trial. You have to satisfy

1 under the facts and circumstances that they're
2 entitled to that kind of relief. And -- and
3 they can't just do an end run, which is, I
4 believe, what the SEC is doing now.

5 If all you need to do to get a
6 disgorgement remedy is come to a court, you
7 don't need a jury trial, you can overestimate
8 the amounts of the gains, as they did here --
9 they asked for over \$4 million and the court
10 found over 2 million of that was inflated --
11 and then you coerce defendants to settle
12 because they don't have much of an option when
13 they're facing that kind of demand from the
14 government.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Wasn't the aim of the
20 scheme that your client admitted when the
21 consent decree -- when he agreed to the consent
22 decree, to obtain from the people who bought
23 the artificially pumped-up stocks money that
24 they -- that they owned? In other words,
25 didn't he aim to obtain money from -- weren't

1 those people -- wasn't it his intent to make
2 them victims?

3 MR. GEYSER: Your Honor, I -- I don't
4 know if that was his intent or not. What I do
5 know --

6 JUSTICE ALITO: Well, it's inherent in
7 the scheme, is it not?

8 MR. GEYSER: Well, but you still need
9 to have an actual injury to seek compensation,
10 which is why, if those investors -- if an
11 uninjured investor -- even if a wrongdoer says:
12 I'm going to target you and I'm going to try to
13 get your money --

14 JUSTICE ALITO: Right.

15 MR. GEYSER: -- and I'm going to try
16 to trick you into buying this stock --

17 JUSTICE ALITO: Right.

18 MR. GEYSER: -- if the stock price
19 goes up, but it never drops, they don't have
20 any injury. So Congress made the determination
21 that those investors are not entitled to
22 recovery, the very recovery that the SEC says
23 as a windfall they are entitled to here.

24 JUSTICE ALITO: Well, isn't -- isn't
25 your -- your claim that they didn't suffer an

1 injury or that it's just too hard to prove that
2 they suffered an injury because the stock could
3 have gone up and down for a million other
4 reasons?

5 MR. GEYSER: Your Honor, it -- it --
6 in this case, the contention is the SEC didn't
7 prove that there was an injury at all. And if
8 you -- if you look to -- on page 10a of the
9 appendix, Footnote 4, the Ninth Circuit casts
10 doubt on the SEC's ability to show any injury
11 here because they proved an artificial
12 inflation but no drop.

13 But our contention below -- and this
14 is if you look at page 28 of the record -- is
15 that the SEC also didn't do the work that it
16 has to do if it wants a disgorgement remedy,
17 under a proper reading of disgorgement, to
18 actually track down who is owed what so that
19 the disgorgement order doesn't cross that line
20 into a windfall and a penalty, which makes it
21 impermissible as an equitable remedy.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: I know you think
25 you can win on three grounds, and I don't want

1 you to panic, but assuming you were to lose,
2 there's two grounds. One would be that -- that
3 disgorgement as an equitable remedy never
4 required proof of pecuniary loss, and there's
5 certainly quite a bit -- besides Restatement 3,
6 quite a bit of treatises and cases that support
7 that conclusion.

8 Or we could say that 78u(d)(7) has
9 taken out an -- any equitable -- doesn't
10 require pecuniary loss because it's setting
11 forth just compensable, legal -- invasion of a
12 legal right.

13 Which of the two would you prefer to
14 win on?

15 MR. GEYSER: So --

16 JUSTICE SOTOMAYOR: Or lose on, I'm
17 sorry. Lose on.

18 (Laughter.)

19 MR. GEYSER: Well, I -- I would prefer
20 to win on -- on any of our three grounds.

21 JUSTICE SOTOMAYOR: Yeah. No, no.

22 MR. GEYSER: But, if -- if we lose, we
23 lose, Your Honor. I think you can write the
24 opinion however you'd like. But I -- I'd like
25 to try to take on --

1 JUSTICE SOTOMAYOR: Would it make it
2 easier if we wrote it as that 78u(d)(7) is
3 different? Because then your pecuniary -- your
4 penalty argument would be straighter -- would
5 be stronger for your Seventh Amendment claim?

6 MR. GEYSER: So possibly, Your Honor,
7 but I -- I want to try to also just give the
8 Court some guidance on -- on the -- the
9 collateral damage that could happen depending
10 on how you write the opinion.

11 JUSTICE SOTOMAYOR: Mm-hmm.

12 MR. GEYSER: So, if you were to write
13 an opinion against us that says that when
14 Congress used the word "disgorgement," the word
15 that this Court had just defined in Liu, that
16 Congress was adopting the rejected, repudiated
17 body of lower court decisions instead of this
18 Court's understanding of that term, I -- I
19 think that's going to create a lot of confusion
20 about what Congress needs to do in the future
21 when they're trying to ratify this Court's
22 decisions.

23 I don't think that's how Congress
24 would have acted, especially after Liu made
25 unambiguously clear -- I think, for whatever

1 disagreement we have about what Liu means,
2 there was a sentence in Liu that said, if a
3 word appears in a statute, if the word
4 "disgorgement" appears in a statute, it does
5 not expand it beyond its traditional common law
6 bounds.

7 And that's exactly what Congress did
8 here. So I think --

9 JUSTICE SOTOMAYOR: But it didn't
10 just --

11 MR. GEYSER: -- that path will create
12 confusion.

13 JUSTICE SOTOMAYOR: It didn't -- it
14 didn't do just that. It just took parts of
15 Liu, of what Liu said, and didn't take other
16 parts of it.

17 MR. GEYSER: Well --

18 JUSTICE SOTOMAYOR: It took -- it took
19 limiting damages to what this defendant has
20 done, it took the word "disgorgement," but it
21 didn't take the language we really -- we
22 actually analyzed, which was payment to
23 victims.

24 MR. GEYSER: Your Honor, the -- that
25 language that -- that Congress didn't take is

1 embedded, it's implicit, in the definition of
2 "disgorgement." There was no need to include
3 that language. And I think that argument would
4 be stronger --

5 JUSTICE SOTOMAYOR: So why did we
6 cite -- so why did we bother analyzing that?
7 Well, why did I bother analyzing that language
8 in Liu?

9 (Laughter.)

10 MR. GEYSER: Well, I -- I think Your
11 Honor could --

12 JUSTICE SOTOMAYOR: Why -- why --
13 why -- why so much emphasis by me --

14 MR. GEYSER: That you're --

15 JUSTICE SOTOMAYOR: -- in Liu on
16 that -- on the importance of that language to
17 our determination?

18 MR. GEYSER: Your Honor, I -- I -- I
19 think that Your Honor did a wonderful job in
20 Part II of the opinion --

21 (Laughter.)

22 MR. GEYSER: -- which -- which would
23 have been sufficient.

24 JUSTICE SOTOMAYOR: Well, that
25 suggests I didn't in Part I.

1 MR. GEYSER: And then Part III then,
2 Part III was the belts and suspenders. Now I
3 think that your -- that argument would make a
4 lot more sense if (d)(5) said disgorgement for
5 the benefit of investors. Now that would be
6 entirely redundant, the reasons Congress
7 doesn't speak like that. But (d)(5) says
8 equitable relief for the benefit of investors.
9 That's the entire universe of equitable
10 remedies cabined down --

11 JUSTICE SOTOMAYOR: All right. Thank
12 you, counsel. So you don't care which way?

13 MR. GEYSER: The -- well, I -- I -- I
14 care a little.

15 JUSTICE SOTOMAYOR: Is that your
16 bottom line?

17 MR. GEYSER: But the -- well, what
18 we're trying to do is have -- is both construe
19 the common law correctly and to be very clear
20 too because I do want to --

21 JUSTICE SOTOMAYOR: Counsel, assume
22 you're losing. Which of the two arguments
23 would you like to lose under?

24 MR. GEYSER: Well -- well --

25 JUSTICE SOTOMAYOR: I -- I -- I don't

1 want you to backtrack into why you should win.

2 I want you to give me a clear answer, okay?

3 MR. GEYSER: Well, but -- but, Your
4 Honor, I think -- I think, to explain which
5 argument we'd prefer to lose on, it -- it helps
6 to actually to march through what -- what that
7 would mean. I've explained why I think the
8 statutory argument would be dangerous. I think
9 the common law argument would also be dangerous
10 and create confusion.

11 All of the cases that you're
12 suggesting that don't involve a pecuniary loss,
13 they involve a legal entitlement to the
14 proceeds, and that doesn't exist here. So I
15 think Your Honor is going to have a difficult
16 time squaring --

17 JUSTICE SOTOMAYOR: That's assuming
18 that 78u(d) doesn't give them -- (d)(7) doesn't
19 give them that legal entitlement.

20 MR. GEYSER: The -- if it gives a
21 legal entitlement that changes and redefines
22 the core definition at its -- its irreducible
23 core of what disgorgement is by simply using
24 the word "disgorgement," then I think Congress
25 is going to be very confused on how to write

1 statutes going forward.

2 JUSTICE SOTOMAYOR: Okay. You still
3 didn't give me an answer, but thank you.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Justice Gorsuch?

7 JUSTICE GORSUCH: Just to follow up on
8 that briefly, Mr. Geysler, is it -- is -- is it
9 fair to assume that Congress legislates against
10 the backdrop of the common law?

11 MR. GEYSER: I think so, Your Honor.

12 JUSTICE GORSUCH: And is it fair to,
13 when it uses a word like "disgorgement" that we
14 just used in Liu, assume -- do we usually
15 assume that Congress understands what we've
16 just done?

17 MR. GEYSER: Yes.

18 JUSTICE GORSUCH: Yeah. And -- and so
19 the -- the linkage between that and having to
20 prove that there's investors out there who have
21 been injured -- not injured, that -- that their
22 money take -- their legal right taken, causally
23 connected and identifiable and return the money
24 to their benefit at least where it's not
25 infeasible, we would understand Congress to

1 have meant all that when it used the word
2 "disgorgement," don't you think?

3 MR. GEYSER: I -- I absolutely do
4 think.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: On your first
9 principles argument, do you want to respond to
10 the amicus brief of the Professors Laycock and
11 others on that succinctly? Because they say
12 you're -- you're really quite wrong about the
13 first principles.

14 MR. GEYSER: Well, I -- I -- I'll try
15 to respond as succinctly as possible. I think
16 the first point is that they say, when you're
17 trying to restore the status quo, you're
18 looking solely at taking the funds away from --
19 from the wrongdoer. And Liu made clear that
20 there's that countervailing principle that you
21 have to provide fair compensation to the person
22 wronged.

23 And I think it doesn't make much sense
24 to say you're restoring the status quo by
25 taking money here and giving a windfall

1 somewhere else. That's not leaving things the
2 way they were. That's -- that's fundamentally
3 shifting how this looks.

4 And if -- and if you don't like my
5 reading of Liu, hopefully, you'll like my
6 reading of Jarkesy, where Jarkesy was very
7 clear on pages 123 and 124 that an equitable
8 remedy, and disgorgement is an equitable
9 remedy, the scholars in their brief agree with
10 this, involves restoring the victim, it's about
11 returning assets to the injured party, and you
12 don't restore the status quo unless you're
13 giving that money back to the person who's been
14 injured.

15 So I think that the scholars' brief is
16 fundamentally incompatible with what this Court
17 wrote in unequivocal language in Jarkesy. I
18 also think that ultimately, we agree with the
19 outcome of every case they cite. The -- the
20 real disagreement between us and the scholars'
21 brief is one of pure semantics.

22 When -- when I look at -- if I put
23 that hundred dollars in a bank account and the
24 bank gives me back my principal without any
25 diminution of value, I get every dollar, but I

1 don't get the interest that I'm owed, I look at
2 that as an economic loss.

3 Now the scholars would say, oh, that's
4 not an economic loss. That's -- that's
5 something else. We -- we both agree that if
6 you have a legal entitlement to the asset, then
7 you get it through disgorgement. You can
8 disgorge the asset to the extent that an
9 injured party has a right to that asset.

10 And we're just disagreeing with what
11 we're calling that -- that sort of missing
12 profit. But that doesn't change the analysis.
13 It just changes the terminology.

14 JUSTICE KAVANAUGH: Next question.
15 What -- what do you think Congress was trying
16 to accomplish in 2021 when it enacted that
17 statute?

18 MR. GEYSER: We think that the best
19 reading is they were trying to reattach a
20 limitations period to the SEC's disgorgement
21 authority.

22 And the government doesn't take issue
23 with that point. They agree that once Liu said
24 that disgorgement has to be a fundamentally
25 equitable remedy, it can't be a punishment, it

1 can't be a penalty or a deterrent, that took
2 away Kokesh's holding that the penalty
3 five-year limitations period applied. So the
4 SEC was left facing absolutely no deadline
5 whatsoever.

6 Now the government says, well, there
7 are lots of ways Congress could have written
8 that statute. I think it would be very strange
9 to include, as the government suggests, a new
10 limitations period for disgorgement which at
11 the time is a remedy that isn't mentioned
12 anywhere in the statute.

13 As a matter of simple housekeeping, it
14 makes far more sense to say we're going to
15 create a new limitations period for
16 disgorgement, so we need to include
17 disgorgement somewhere in the statute so that
18 we're making clear there's something here that
19 the -- that the SEC has a timeline on which to
20 seek.

21 JUSTICE KAVANAUGH: Last, do you want
22 to say anything about the Seventh Amendment
23 implications of the government's position, if
24 any?

25 MR. GEYSER: I -- I think that the

1 government kind of has -- has a difficult path
2 no matter how they answer that question. I'm
3 guessing my friend is going to say that their
4 version of disgorgement, despite looking
5 entirely penal, will not be subject to a jury
6 trial. The Seventh Amendment rights won't kick
7 in.

8 I think, if they take that position,
9 then that shows the SEC is trying to set up a
10 penalty with an end run around an actual
11 penalty in the statute. And if the government
12 does concede now that their version of
13 disgorgement would require a jury trial, that
14 just further collapses the distinction in
15 (d)(3) between disgorgement and penalties,
16 which are two very different terms, different
17 concepts.

18 I don't know why Congress would have
19 added disgorgement if all it's supposed to do
20 and all it needs to do is simply deprive the
21 wrongdoer of net proceeds. That -- that looks
22 like a penalty, just with a different cap.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Why does it look
2 like a penalty? If all you're taking away is
3 the ill-gotten gains, so they're the -- the
4 proceeds that the wrongdoer isn't entitled to
5 in the first place, as opposed to being
6 entirely punitive because it's going above and
7 beyond, why would that necessarily be a
8 penalty?

9 MR. GEYSER: It -- anything is a
10 penalty if the point is to take -- take it away
11 from you. We're -- we're making a judgment
12 that you weren't entitled to this, so we're
13 taking it from you.

14 What makes it remedial is you're
15 giving it to the right party, but that means
16 there has to be a right party to give it to.
17 There has to be some party with a right to it.

18 And, again, look to Liu, and if you
19 don't like Liu --

20 JUSTICE BARRETT: I like Liu.

21 (Laughter.)

22 MR. GEYSER: Okay. Well, I'm sure
23 Justice Sotomayor will appreciate that, but --

24 JUSTICE BARRETT: I don't necessarily
25 like your reading of Liu, but I like Liu.

1 MR. GEYSER: Okay. Well, then,
2 hopefully, you'll like again my reading of
3 Jarkesy. Jarkesy is crystal-clear. Look at
4 pages 123 and 124 of the opinion. It's
5 dividing that same line between a legal remedy
6 and an equitable remedy.

7 And it says that something is a
8 punishment if it's not restoring the status
9 quo, which means returning the funds to the
10 injured investor. It's not enough just to
11 deprive. If you deprive, that crosses the line
12 into a punishment.

13 And, again, I don't think that the SEC
14 could credibly say we're -- we're not trying to
15 put you in the red, we don't want gross
16 proceeds. We're just going to take away net
17 proceeds or -- or half of net proceeds.
18 Suddenly, it's not a penalty, it's not a
19 punishment because we're not -- we're not going
20 in -- you know, over the line into punitive
21 damages.

22 It -- it's about the point of taking
23 it away both to deprive someone, I mean, to
24 deprive someone is a punishment, and to deter.
25 And, again, my friend in his brief, he -- he's

1 very clear, the purpose of taking it away is to
2 punish and deter.

3 Deterrent -- deterrence, as Kokesh
4 said, as Liu said, as Jarkey said, all of
5 these cases agree deterrence is a penal
6 function.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I guess this idea
10 of trying to characterize something as penal or
11 not is -- is confusing in this context because
12 I had understood the relevant distinction to be
13 between compensatory damages, which is the idea
14 of making the victims whole, versus
15 disgorgement, which is divesting the defendant
16 of the ill-gotten gains.

17 And one thing that you haven't touched
18 upon at all is the very traditional equitable
19 principle of unjust enrichment, which would
20 seem to me to fit squarely into the equitable
21 concept of depriving the defendant of their
22 ill-gotten gains. And that, I thought, was
23 what the scholars were talking about. That is
24 a traditional equitable principle, not a legal
25 one in the way that you've been defining it.

1 I guess you could characterize it as a
2 penalty, but it doesn't seem to matter because,
3 traditionally, courts have been able to
4 exercise their equitable authority to deprive
5 the defendant of ill-gotten gains, which they
6 term "unjust enrichment."

7 So can you speak to that?

8 MR. GEYSER: Sure, Your Honor. I
9 mean, your -- and -- and I apologize if I sound
10 like I'm repeating myself. Jarquesy and Liu
11 make clear that if that's all you're trying to
12 do, is deprive that ill-gotten gains, that's
13 the first principle that Liu identified.

14 But Liu said there are two principles,
15 and one is a countervailing principle to avoid
16 making that punitive, which is where Jarquesy
17 comes in. Jarquesy makes absolutely clear --

18 JUSTICE JACKSON: So you're saying,
19 unless we do this in the way that you're
20 talking about, the Jarquesy case, which is not a
21 common law -- I mean, it's like our case from a
22 couple years ago, right? The -- the idea of
23 the Seventh Amendment is what we're avoiding
24 with this concept. I guess I just don't
25 understand why the first principle isn't all we

1 need with respect to resolving the issue in
2 this case.

3 MR. GEYSER: Let -- let me try it this
4 way. I -- I think that it's a very traditional
5 principle going back centuries, if -- if not
6 longer, millennia.

7 JUSTICE JACKSON: Hmm.

8 MR. GEYSER: We cite a Roman case in
9 our brief. The -- is that equity doesn't serve
10 punitive functions. The role of equity is not
11 to penalize, it's to deter.

12 JUSTICE JACKSON: All right, but what
13 about the unjust enrichment concept that -- do
14 you agree that that was an equitable concept?
15 Do you -- unjust enrichment, you're not --

16 MR. GEYSER: Unjust --

17 JUSTICE JACKSON: No, it's not?

18 MR. GEYSER: No, no, no, it is.

19 Unjust enrichment is --

20 JUSTICE JACKSON: Okay. So what does
21 that mean, unjust enrichment?

22 MR. GEYSER: In the -- in the statute,
23 unjust enrichment --

24 JUSTICE JACKSON: No, in common law.
25 What does unjust enrichment mean and allow the

1 court to do?

2 MR. GEYSER: The -- unjust enrichment
3 has, I think, two components. One, someone has
4 to be enriched, and they have to be enriched
5 unjustly. Now, in order to recover the unjust
6 enrichment, you need to find some claimant with
7 an entitlement to those proceeds. Equity
8 doesn't award windfalls. It -- I can't come
9 into court as a random stranger saying, hey, I
10 saw someone do something wrong --

11 JUSTICE JACKSON: But how -- and this
12 is -- I -- my time is short. How does finding
13 the claimant and identifying their loss help us
14 to know whether or not it was unjust enrichment
15 from the standpoint of the equitable
16 determination that this defendant should not be
17 allowed to retain this amount of money?

18 MR. GEYSER: Your Honor, the reason
19 you find the victims and determine their loss
20 is because that's the core function of
21 disgorgement. It's to get the asset from the
22 person who shouldn't hold it to the person who
23 should.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Stewart.

3 ORAL ARGUMENT OF MALCOLM L. STEWART

4 ON BEHALF OF THE RESPONDENT

5 MR. STEWART: Thank you, Mr. Chief
6 Justice, and may it please the Court:

7 I'd like to make three quick points at
8 the outset. First, I think it's important to
9 unpack what Petitioner is trying to accomplish
10 here. Petitioner is attempting to make it as
11 difficult as possible for the SEC to pass
12 disgorgement awards over to victims, and
13 Petitioner is trying to do that by urging the
14 Court to adopt the narrowest possible
15 conception of victim.

16 And then, second, Petitioner is asking
17 the Court implicitly to resolve in his favor
18 the question that this Court left open in Liu,
19 namely, if it is infeasible to pass profits --
20 pass disgorgement along to victims, can the
21 money be put in the Treasury?

22 And only by succeeding in both halves
23 can Petitioner prevail. And so, even under
24 subsection (d)(5), this goes well beyond
25 anything that the Court held in Liu.

1 The second thing is it's just wrong to
2 say that the Court in Liu interpreted the term
3 "disgorgement." The Court had no occasion to
4 do that because the term "disgorgement" didn't
5 appear in the statute, (d)(5), that the Court
6 was applying when the Court said, under
7 traditional equitable principles, the
8 government has to -- in order to collect
9 disgorgement, the SEC has to pass funds along
10 to victims if it is feasible to do so. The
11 Court didn't say, otherwise, it wouldn't be
12 disgorgement. The Court said, otherwise, it
13 wouldn't be consistent with what courts of
14 equity have typically done.

15 And if you look at dictionary
16 definitions, Black's Law Dictionary, for
17 example, you look at "restitution" and you see
18 lots of entries about passing from a wrongdoer
19 funds or property that rightfully belongs to
20 someone else. If you look at the -- the
21 Black's Law Dictionary definition of
22 "disgorgement," you just see an act of giving
23 up. It's the surrender, full stop.

24 And so "disgorgement" is the word
25 Congress would use if it wanted to make it as

1 clear as possible that what we care about is
2 getting the defendant to give up its gains and
3 that any question about where the money --
4 where the money goes after that is secondary.

5 And then the last thing I'd say very
6 quickly, Petitioner would fundamentally
7 transform the disgorgement remedy from one that
8 is designed to deprive the defendant of
9 ill-gotten gains and is measure -- measured by
10 profits into a compensatory remedy in which the
11 measure of recovery is losses to the victims.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Wouldn't you have a
14 cleaner argument if you would accept the notion
15 that this is a legal remedy?

16 MR. STEWART: I -- it -- it might be
17 cleaner. And we don't -- we don't think our
18 position depends on whether the remedy under
19 (d)(3)(A)(ii) and (d)(7) is legal or equitable.
20 That is, as long as we were operating under
21 (d)(5), which refers specifically to equitable
22 relief, then we could get disgorgement under
23 that -- that provision only if we could
24 persuade a court that it was equitable.

25 But the whole thrust of what Congress

1 did in 2021 was to say we want the SEC to have
2 a remedy that compels the defendant to give up
3 its profits on the following conditions,
4 whether that is regarded as legal or equitable.

5 And so the question whether it's legal
6 or equitable may have implications for whether
7 you get a right to jury trial, but it doesn't
8 have any implications for whether you can get
9 the remedy at all.

10 JUSTICE THOMAS: But -- but doesn't it
11 look a lot less like an equitable remedy if you
12 keep most of -- what percentage of the
13 disgorgement do you keep now, does the SEC
14 keep?

15 MR. STEWART: I mean, I think we pass
16 along a high percentage of monies that are
17 actually recovered. Now the figures that are
18 cited in Petitioner's brief were not -- I think
19 it's on page 8 --

20 JUSTICE THOMAS: Mm-hmm.

21 MR. STEWART: -- they cite a press
22 relief -- release and they say it shows that
23 \$6.1 billion was seized in a particular year.
24 In fact, that was amount -- the amount that was
25 ordered disgorged, not the amount that was

1 actually collected.

2 So I -- my understanding is something
3 like 88 percent of funds actually collected
4 were designated for distribution. I think the
5 process takes time. And so that's not a
6 guarantee that they would actually be
7 distributed. But I think our practice is to
8 distribute a high percentage of the funds we
9 collect to people we regard as victims.

10 Now Petitioner would make it more
11 difficult for us to do that by saying the only
12 victims we can legally distribute funds to are
13 people who could establish their own right to
14 sue under the private cause of action.

15 CHIEF JUSTICE ROBERTS: Counsel --
16 counsel, several times in his opening brief,
17 your friend looked to our recent case in
18 Jarkesy, and we heard it cited several times
19 this morning. You don't cite it at all in your
20 brief. Is there -- do you want to talk about
21 why it's not relevant at all here?

22 MR. STEWART: I mean, I think the
23 reason we didn't regard it as relevant was that
24 Jarkesy was focused on under what circumstances
25 could the SEC impose monetary remedies in its

1 own administrative proceedings.

2 And, here, the question is, what can
3 the SEC get when it sues in court? And so the
4 SEC is -- kind of has to go before an Article
5 III court. We have to persuade whoever the
6 finder of fact is that there is liability. The
7 court itself will determine the disgorgement
8 amount. It won't be reviewing our assessment
9 of disgorgement under a deferential standard.
10 So it's not really the same question that was
11 presented in Jarkesy.

12 CHIEF JUSTICE ROBERTS: Well, I
13 thought his -- his point was that your -- your
14 argument would treat the case as if it were a
15 case like Jarkesy.

16 MR. STEWART: I mean, if that's -- if
17 that's his argument, I don't think it's right
18 because the whole -- the whole rationale for
19 the Court striking down what was done in
20 Jarkesy was that it had been done in an
21 administrative tribunal acting without a jury
22 rather than by a court. And, you know --

23 CHIEF JUSTICE ROBERTS: No, no, I mean
24 not for the jury question but more in terms of
25 how the sanction, whether disgorgement or

1 anything else, would be treated.

2 MR. STEWART: The other thing that I
3 would say is different between this case and
4 Jarkesy is that, in Jarkesy, we were recovering
5 civil penalties, and civil penalties are often
6 used to make the defendant worse off than he
7 would have been if he hadn't engaged in the
8 violation in order to create punishment and
9 extra deterrents.

10 And, here, the -- the disgorgement
11 award is limited to -- to the amount of the
12 defendant's unjust enrichment, his net profits.
13 It's limited to amounts that the defendant
14 actually received as a result of the violation.

15 JUSTICE GORSUCH: Mr. Stewart, just to
16 follow up on the Chief Justice's questions,
17 yes, Jarkesy concerned administrative
18 proceedings, but -- but it also concerned the
19 Seventh Amendment. And so the question I think
20 the Chief is trying to aim at is, okay, you've
21 got this (d)(7) remedy, but when might it
22 trigger a jury trial right rather than remain
23 before the judge in equity?

24 And I just want to make sure I
25 understand a few things. One, you agree that

1 (d)(7) is for net profits only, right?

2 MR. STEWART: Yes. And I think --

3 JUSTICE GORSUCH: Okay.

4 MR. STEWART: -- that's made clear in
5 (d)(3)(A). Looking at (d)(7) by itself, you
6 couldn't talk about --

7 JUSTICE GORSUCH: Yes -- yes works for
8 me.

9 MR. STEWART: Right.

10 JUSTICE GORSUCH: Okay. Two, you
11 agree that the unjust enrichment has to be
12 causally connected to the defendant's actions,
13 as a result of the defendant's actions is what
14 you say in your brief. And you stand by that?

15 MR. STEWART: Yes.

16 JUSTICE GORSUCH: Okay. And then,
17 third, and the kind of key one that I think
18 your -- your friend on the other side's been
19 talking about, is where the money goes after
20 that. And to keep it in equity, you've got to
21 get it back to the investors unless it's
22 infeasible, we said, in Liu.

23 And do you stand by that?

24 MR. STEWART: I -- I -- I would
25 quarrel with that part of it. What the Court

1 said in Liu --

2 JUSTICE GORSUCH: So you think you can
3 get a disgorgement that -- without any effort
4 to get it back to the investors and keep that
5 in equity in front of a judge rather than
6 trigger a jury trial right as a penalty?

7 MR. STEWART: Well, that's a two --

8 JUSTICE GORSUCH: Yes or no?

9 MR. STEWART: It's a two-part
10 question.

11 JUSTICE GORSUCH: No.

12 MR. STEWART: We -- we --

13 JUSTICE GORSUCH: It's a one -- it's a
14 one-part question.

15 MR. STEWART: We would say yes. But
16 there are -- I think it's a side --

17 JUSTICE GORSUCH: Yes, you can keep it
18 in equity before a judge without a jury and
19 make no effort to send the money back to
20 investors?

21 MR. STEWART: That would be our
22 position.

23 JUSTICE GORSUCH: Okay. Let's say
24 that's wrong, okay? Let's say the equitable
25 remedy was all about restoring investors.

1 Let's say we think that. Then what?

2 MR. STEWART: Then I think it would
3 follow that under (d)(3)(A)(ii) and (d)(7), we
4 can still get disgorgement without routing it
5 to investors, but it would be considered a
6 legal remedy and there --

7 JUSTICE GORSUCH: And then the jury
8 trial right.

9 MR. STEWART: And then you'd have a
10 jury trial.

11 JUSTICE GORSUCH: Oh, so you agree
12 with that? So you agree that if you don't make
13 an effort to get it to investors, you -- you --
14 there's a jury trial right?

15 MR. STEWART: We don't -- we don't
16 agree with that. That's --

17 JUSTICE GORSUCH: Well, hold on.
18 Which is it?

19 MR. STEWART: That's why I said it's a
20 two-part question. We agree that the statute
21 would permit us to get it without routing it to
22 investors because (d)(3)(A)(ii) lists certain
23 prerequisites and routing to investors is not
24 one of them.

25 Our position would be that would still

1 be equitable and no jury trial would be
2 available. I know there are arguments on the
3 other side that not routing it to investors
4 would make --

5 JUSTICE GORSUCH: I think that's
6 pretty perilous, Mr. Stewart. I think, if you
7 want to -- if you want the equitable remedy,
8 you've got to -- you've got to behave. And
9 without a jury trial right, all of equity,
10 you've got -- you've got to follow the rules of
11 equity. If you want a legal penalty, then --
12 then the Seventh Amendment might have something
13 to say about it.

14 MR. STEWART: Again, I'm -- I'm
15 willing --

16 JUSTICE GORSUCH: We said that in Liu,
17 right, I mean, and that -- that is traditional
18 equitable practice.

19 MR. STEWART: Well, in Liu, you said
20 at the outset that when we get -- when we see a
21 provision that just generally authorizes
22 equitable relief, we ask whether a particular
23 remedy was typically available at equity,
24 and --

25 JUSTICE GORSUCH: Yes. And the

1 government keeping all the money was not
2 typically available at equity. It was getting
3 it back to the investors.

4 Now maybe (d)(7) authorizes that, but
5 I don't see how it would not trigger the
6 Seventh Amendment if -- if the government just
7 decided to keep all the money.

8 MR. STEWART: I -- I think our
9 argument would be along the lines of what
10 Justice Barrett and Justice Jackson have
11 suggested, that so long as the monetary remedy
12 does nothing more than preventing the defendant
13 from profiting by his own wrongdoing, so long
14 as it simply takes away the illicit gains, then
15 it's not a penalty and no Seventh Amendment
16 right attaches, whereas the civil penalty
17 provisions can make the defendant worse off
18 than he would be if he hadn't committed the
19 violation. But -- but, again --

20 JUSTICE GORSUCH: Well, some penalties
21 make the defendant worse off. Others do not.
22 Others can be very modest. It doesn't matter.
23 You still get a jury trial right, right?

24 MR. STEWART: Yes.

25 JUSTICE JACKSON: But, Mr. Stewart,

1 isn't your point that it's a penalty when it
2 makes the defendant worse off? That's the
3 point that Mr. Geysler keeps saying this is a
4 punishment. But it's not a penalty or a
5 punishment if what is happening is the
6 defendant is just being made to return the
7 money that he never had access to that was not
8 his to begin with?

9 MR. STEWART: Yes. And what can
10 happen in the SEC suits is if the court -- the
11 court could authorize both disgorgement and a
12 civil penalty. And the disgorgement would
13 ensure that the defendant didn't profit from
14 his -- his own wrong, and then any civil
15 penalty, even in a -- a civil penalty in a
16 fairly small amount, would, by definition, go
17 beyond that and make the defendant worse off.

18 JUSTICE GORSUCH: Mr. -- Mr. Stewart,
19 let me try it this way. You're asking us to
20 expand (d)(7) beyond equitable practice to
21 allow the government to keep the money. Do we
22 have to decide whether that triggers the
23 Seventh Amendment in this case? Can we reserve
24 that question?

25 MR. STEWART: Yes.

1 JUSTICE GORSUCH: All right.

2 JUSTICE BARRETT: Mr. Stewart, I
3 wasn't -- just to be clear, I was just pressing
4 Mr. Geyser, not necessarily saying I agree with
5 you, but --

6 MR. STEWART: Understood.

7 JUSTICE BARRETT: -- I -- I guess one
8 question that I have is how do we define
9 "disgorgement" if not looking to the equitable
10 piece of it? And, actually, let me just back
11 up and ask you, what is the government's
12 practice with respect to distributing it to
13 victims? Do you only try to restore them by
14 calculating what they actually lost, or do you
15 give them a windfall?

16 MR. STEWART: I mean, I think it
17 varies from case to case, and I think, in some
18 circumstances, they probably wind up with what
19 you might call a windfall. That is, you could
20 have a circumstance, for instance, if
21 somebody -- if -- if a investment advisor lies
22 about his credentials in order to encourage
23 clients to sign up with them and then the
24 clients can't point to anything about the
25 advisor's services that was actually deficient,

1 but the SEC, having received disgorgement, may
2 try to give the people who were diluted the --
3 the -- some portion of the recovery in order to
4 compensate them for the fact that they weren't
5 told the -- the truth.

6 JUSTICE BARRETT: But there are
7 circumstances in which the SEC would say:
8 Yeah, we're just going to return to victims
9 what they lost so that we can keep the overage?

10 MR. STEWART: I mean, I think
11 Mr. Geyser referred to one situation in which
12 we might not make an -- an effort at
13 distribution, and that is if you have
14 violations that cause very diffuse harms, so
15 the defendant may make a lot of money and may
16 cause very small amounts of harm to a very
17 large number of people, and the SEC may
18 conclude that the administrative costs of
19 identifying all these people and what each of
20 them has lost is just going to eat up too much
21 of the fund in order --

22 JUSTICE BARRETT: And that's the only
23 situation in which you'd do that?

24 MR. STEWART: I don't know that that's
25 the only situation, and I -- you know, this --

1 this has been our typical --

2 JUSTICE GORSUCH: Do you know what
3 others are? Because the figures from the last
4 couple of years as I have them at least are
5 that the SEC in 2024 collected -- sorry, had
6 ordered disgorgement of over 6 billion and
7 returned 345 million. Last year, in 2025, it
8 was 10.8 billion and returned 262 million.

9 Now I know that's ordered --

10 MR. STEWART: Yeah.

11 JUSTICE GORSUCH: -- versus collected,
12 but even if you're a reasonably good collection
13 agent, and the federal government is a
14 reasonably good collection agent, we all know,
15 let's say you get half of that. That's 5
16 billion versus 262 million. That's 3 billion
17 versus 345 million.

18 What -- what kind of efforts does the
19 government make to get this money back?

20 MR. STEWART: I don't -- I don't think
21 there's any reason to think that we get half of
22 it. What -- what I've been told --

23 JUSTICE GORSUCH: You think it's less
24 than half?

25 MR. STEWART: Yes.

1 JUSTICE GORSUCH: How much less?

2 MR. STEWART: I -- I don't know
3 exactly how much less. I -- I asked the -- the
4 question of do we know what percentage of the
5 6 billion, .1 billion was collected, and we're
6 not sure of the answer.

7 JUSTICE GORSUCH: Well, so do you know
8 that it is less than half, or you just don't
9 know?

10 MR. STEWART: Well, I've been -- I've
11 also been told that of the amounts collected in
12 I think it was 2024, it could have been 2025,
13 88 -- I believe it was 88 percent was
14 designated for a distribution. That doesn't
15 mean it would necessarily have been distributed
16 at the end of the day, but that was something
17 that we intended to -- to do.

18 And it's a long and time-consuming --
19 both the collection and the distribution can be
20 a long and time-consuming process. And --

21 JUSTICE KAVANAUGH: You're getting
22 this from the SEC?

23 MR. STEWART: Yes. I mean, the other
24 thing I would say about the equitable
25 principles --

1 JUSTICE GORSUCH: So you're
2 representing 88 percent of the money that's
3 actually collected is distributed?

4 MR. STEWART: Is designated for a --

5 JUSTICE GORSUCH: Designated?

6 MR. STEWART: In a particular fiscal
7 year.

8 JUSTICE JACKSON: How -- how important
9 is the distribution part of this analysis to
10 your argument? I mean, I -- I had understood
11 that you were differentiating disgorgement from
12 civil penalties.

13 So just in a very simple analogy, this
14 defendant steals a million dollars from a bunch
15 of people, and disgorgement would say you can't
16 keep that million dollars. The court could
17 both order him to give back the million dollars
18 that he stole and fine him for having engaged
19 in that behavior.

20 That would be the civil penalty part,
21 right? It's coming out of his own pocket.
22 It's making him worse off because he's now
23 fined or a civil penalty -- and you're saying
24 you'd have to have a jury trial for that part
25 of it, the -- the -- the penalty part, is that

1 correct?

2 MR. STEWART: We would have to have a
3 jury -- even under our view, the disgorgement
4 wouldn't require a jury. If you were seeking
5 civil penalties as well, you would need a jury
6 trial for that.

7 JUSTICE JACKSON: Okay. So we have a
8 million dollars ordered to give back. We have
9 let's say a hundred thousand dollar fine.
10 You'd have to have a jury trial for that part
11 of it.

12 In terms of the give-back, is it your
13 position that whether that money goes to the
14 victims or goes to the government, that's
15 really not a key aspect as to whether or not
16 disgorgement can be ordered?

17 MR. STEWART: It -- it's key under
18 (d)(5) but not under (d)(3)(A)(ii) and (d)(7).
19 It's really not relevant at all in our view
20 under (d)(3)(A)(ii) and (d)(7). And the reason
21 is traditional equitable principles are not
22 limits on Congress's power.

23 The reason that traditional equitable
24 limits played a key role in Liu was that the
25 statute itself referred to equitable relief.

1 And so, to determine what sort of remedies
2 Congress had implicitly authorized, the Court
3 looked to what courts of equity had
4 traditionally done.

5 But Congress can always create new
6 remedies or adjust the terms on which existing
7 remedies will be available. And -- and that's
8 what it did in (d)(3)(A)(ii) and (d)(7). It
9 said you can get disgorgement of any unjust
10 enrichment that is received by the defendant as
11 a result of the -- the violation.

12 JUSTICE JACKSON: As --

13 JUSTICE GORSUCH: Do you --

14 JUSTICE JACKSON: -- distinguished
15 from (d) -- I'm sorry. Go ahead.

16 JUSTICE GORSUCH: You can go ahead.

17 JUSTICE JACKSON: As distinguished
18 from (d)(5), which was -- which really said
19 something about benefit of the victims? So --

20 MR. STEWART: It -- it -- it -- it had
21 two -- two pieces of operative language. First
22 was there was language at the end of the
23 provision about "for the benefit of investors."
24 And the Court in Liu also suggested that just
25 the -- the reference to equitable relief might

1 require some effort to compensate victims
2 because that was the way it was typically done.

3 The -- the other point I would make is
4 what --

5 JUSTICE GORSUCH: Mr. Stewart, before
6 you go to another point, I -- I just want to
7 capture this one. Do we even need to decide
8 that question? You said we don't need to
9 decide the Seventh Amendment question if you
10 keep the money. Do we even need to decide
11 whether (d)(7) authorizes you to keep the
12 money?

13 To answer the question presented is
14 just simply do we need to show injury to -- to
15 the -- to the investor. We could answer that
16 hypothetically in your favor no without
17 deciding the scope of whether (d)(7) permits
18 you to extend beyond equity to keep the money.
19 Couldn't we do that?

20 MR. STEWART: I think that's correct.

21 JUSTICE GORSUCH: Okay.

22 MR. STEWART: The -- the other point I
23 was going to make about Liu and about typical
24 equitable practice is that when Liu was asking
25 what courts in equity had typically done, they

1 looked at a broad range of cases involving
2 different subject areas, and because most
3 litigation in this country is private
4 litigation, the Court in Liu looked mostly at
5 private suits.

6 And in private suits, it's
7 understandable that any money recovered from
8 the defendant is going to pass to a victim
9 because the only person who's a proper
10 plaintiff is going to be a victim, someone
11 whose -- whose own rights were violated by the
12 misconduct or who -- who is injured in some way
13 by the violation.

14 And it's normal in private civil
15 litigation that there is an award -- if there
16 is an award that the defendant pay money, it
17 will be paid to the victim in order to redress
18 his injury. And so those are good reasons in
19 private suits to expect that the money will go
20 to victims.

21 And when Congress was drafting a
22 disgorgement provision specifically for SEC
23 enforcement suits, it needed to decide to what
24 extent do the rules that have applied in
25 private suits translate over into SEC

1 enforcement actions.

2 And with the other two restrictions
3 this Court had announced, Congress incorporated
4 them into the statute. It incorporated the
5 term "unjust enrichment" to make clear that
6 it's net profits, not gross receipts. And it
7 incorporated the -- the limitation that we can
8 get disgorgement only of unjust enrichment
9 received by the defendant.

10 And both of those really go to kind of
11 the core purpose of disgorgement. Disgorgement
12 is intended to ensure that the defendant does
13 not profit by its own wrong, but it's not
14 intended to go beyond that by making him worse
15 off than if he hadn't committed the violation.

16 And the other limits that the Court
17 announced in Liu were intended to -- to draw
18 that line. And, therefore, it's understandable
19 that Congress incorporated those into the new
20 SEC-specific statute but didn't incorporate
21 a -- a limitation that the money has to go to
22 victims. That seems more in keeping with what
23 we would expect in a private suit.

24 JUSTICE KAGAN: So, if I could just
25 understand, you've been talking about this, but

1 your decision to lead with (d)(7) rather than
2 (d)(5), I guess my question is, like, what are
3 you worried about on (d)(5)? Why do you think
4 that (d)(7) is a better argument? Why do you
5 think that (d)(5) is a comparatively weak one?

6 MR. STEWART: I mean, I think the
7 biggest problem from our standpoint with (d)(5)
8 is the question that the Court left open in
9 Liu, namely, under (d)(5), can we get
10 disgorgement if it is infeasible to distribute
11 the profits to victims -- I mean the
12 disgorgement to victims?

13 And the fact that the Court left it
14 open means there's some possibility that we
15 would lose that issue at the end of the day,
16 and that would put kind of a substantial damper
17 or a potential damper on our disgorgement
18 efforts because there would be lots of
19 questions about is it feasible. Mr. Geysler is
20 arguing that if -- if the only victims we can
21 find are people who didn't suffer pecuniary
22 harm, then it really isn't feasible to -- to
23 pass along the money to victims because they
24 don't qualify.

25 And so part of the value of

1 (d)(3)(A)(ii) from our standpoint is it just
2 takes that question off the table. It says you
3 can get -- you can make the defendant surrender
4 his unjust enrichment, net profits, so long as
5 they are profits that the defendant received
6 and so long as he received them as a result of
7 the violation, with no inquiry into where the
8 money is going or where we could have routed it
9 if we had wanted to.

10 JUSTICE SOTOMAYOR: Mr. Stewart, I --
11 I'm a bit confused by your answer for the
12 following reason, okay? If we go your route,
13 (d)(7), then the Seventh Amendment issue looms
14 large because then the government keeping the
15 money and not paying over to victims as
16 compensation, okay, then serves only one
17 purpose, deterrence.

18 And if it's only deterrence, I think
19 you have a much harder way to go to say that
20 it's not a Seventh Amendment violation to let
21 the judge decide it.

22 MR. STEWART: I -- I -- I guess, kind
23 of looking ahead to a hypothetical case in
24 which we were litigating the Seventh Amendment
25 question, we'd say a couple of things about

1 that. The first is the paradigmatic equitable
2 remedy is a prohibitory injunction. And a
3 prohibitory injunction has no legitimate
4 purpose other than to deter the defendant from
5 future misconduct. And so I -- I don't think
6 the Court would stick to a rule, a categorical
7 rule, that if deterrence is a substantial
8 motivation, the remedy can't be equitable.

9 The second thing I'd say is, 11 years
10 ago, in Kansas versus Nebraska, this Court,
11 exercising original jurisdiction, ordered
12 disgorgement as an equitable remedy and fixed
13 the disgorgement amount at a number, at an
14 amount greater than the --

15 JUSTICE SOTOMAYOR: But that was the
16 victim receiving the money.

17 MR. STEWART: The victim did receive
18 the money, but the Court fixed the amount at
19 a -- at a sum greater than the victim's loss.
20 And -- and --

21 JUSTICE SOTOMAYOR: Well, that's
22 because -- I agree with you that, at equity,
23 you could measure the victim's compensable
24 damages by unjust enrichment by the defendant.
25 No question. And windfall profits have always

1 been recognized in equity for unjust enrichment
2 or disgorgement concepts.

3 MR. STEWART: But -- but the --

4 JUSTICE SOTOMAYOR: But, if the
5 government is receiving the money, what legally
6 protected right did you have to the money?

7 MR. STEWART: I mean, the -- the point
8 I was going to make is the Court, in Kansas
9 versus Nebraska, in explaining why it made
10 sense to set the disgorgement award at that
11 amount, said it will provide additional
12 deterrence to future breaches of the
13 contract -- compact. The -- the parties were
14 in an unusual situation where the water was
15 more valuable to the upstream Nebraska --

16 JUSTICE SOTOMAYOR: I'm accepting --

17 MR. STEWART: Okay.

18 JUSTICE SOTOMAYOR: -- that if you are
19 a victim who's -- who has a legally -- a
20 legally invaded right, you are entitled to also
21 deterrence. But, if the government is keeping
22 the money, what legally recognizable right is
23 it protecting?

24 MR. STEWART: It -- it is simply
25 accomplishing a -- a public interest in an

1 effort to deprive the defendant of his unlawful
2 profits.

3 JUSTICE SOTOMAYOR: For purposes of
4 deterrence --

5 MR. STEWART: For --

6 JUSTICE SOTOMAYOR: -- not -- not
7 compensation. That's my point.

8 MR. STEWART: I think substantially
9 for purposes of deterrence, but I think kind of
10 independent of the -- kind of the utilitarian
11 justification, there -- there is a sense that
12 it is inherently unfair, inherently
13 inequitable, to -- to have an adjudicated
14 violator and say you can keep the money.

15 But then the other point I'd -- I'd
16 like to make in response to your question as to
17 why in some circumstances we like (d)(3)(A) --
18 (d)(3)(A)(ii) better is that, if push comes to
19 shove, we would rather be in a situation where
20 we can get disgorgement but may have to go
21 through a jury trial to get it than to be in a
22 position where we can't get it at all.

23 And the -- the Petitioner's argument
24 is that we can't get it at all except to the
25 extent that it corresponds to identified

1 pecuniary losses on the part of --

2 JUSTICE SOTOMAYOR: That's assuming we
3 accept his underlying premises that equity
4 required proof of pecuniary loss. If we
5 disagree with that, that solves the case.

6 MR. STEWART: And -- and we're --
7 we're happy to win the case under (d)(5), and
8 we think we should win it under (d)(5) because,
9 even looking at that provision, the
10 Petitioner's argument goes substantially
11 beyond --

12 JUSTICE SOTOMAYOR: All right. Thank
13 you, counsel.

14 MR. STEWART: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas, anything further?

18 Justice Alito?

19 Justice Sotomayor?

20 Justice Kavanaugh?

21 Justice Barrett, anything further?

22 Justice Jackson?

23 Thank you, counsel.

24 MR. STEWART: Thank you, Mr. Chief
25 Justice.

1 CHIEF JUSTICE ROBERTS: Rebuttal,
2 Mr. Geysler?

3 REBUTTAL ARGUMENT OF DANIEL L. GEYSER
4 ON BEHALF OF THE PETITIONER

5 MR. GEYSER: Just a few quick points,
6 Your Honor. The first is my friend says we're
7 trying to make it as difficult as possible to
8 get funds to victims. We -- that -- that is
9 not our goal. Our goal is to simply delineate
10 between penalties and disgorgement.

11 And if the government thinks it's hard
12 to distribute funds, then they do have the
13 option, seek civil penalties. You can deprive
14 us of every penny, including up to gross
15 proceeds that we've collected, or rely on
16 the -- the very inventive, you know, very
17 powerful private securities bar, which is very
18 good at filing lawsuits when someone is
19 actually injured to recover and compensate an
20 injured party.

21 Now my friend, I think, equivocated a
22 little, but I think the bottom-line answer is
23 that the government does not believe that
24 disgorgement requires returning funds to
25 investors. That is a penalty. Then the

1 government is seeking a penalty. It is
2 indistinguishable from penalties. It looks
3 exactly like the penalty in (d)(3), just with a
4 different cap. That is not the way that
5 Congress writes statutes.

6 And I -- I do think, Justice Gorsuch,
7 that you do need to decide whether the
8 government can keep the funds or not because
9 that's defining what is disgorgement. We can't
10 just kind of put it in this empty vessel and
11 say, in this case, they can deprive wrongdoers
12 of profit. But we're not going to say what
13 disgorgement means. We're not going to square
14 disgorgement with (d)(3) and the fact that
15 Congress drew a stark distinction between civil
16 penalties and disgorgement even though I think
17 that distinction collapses under my friend's
18 read.

19 I don't think my friend has any answer
20 for (d)(9). If Congress's point here is simply
21 to deprive wrongdoers of a gain, it has nothing
22 to do with remedial function, they can keep it,
23 they don't need to pay the funds back to
24 investors, then I don't know why Congress would
25 have been concerned that anyone would have even

1 imagined that somehow empowering the SEC to
2 seek effectively a second penalty that they
3 were precluding private investors from bringing
4 their own lawsuits. That reading of (d)(9)
5 doesn't make sense. Our reading does.

6 Under our reading of (d)(9), Congress
7 would have been concerned that because the SEC
8 now has separate authority, explicitly,
9 ratifying exactly what Liu, I think, under its
10 best reading said to seek fair compensation on
11 behalf of injured parties, that that might now
12 be the exclusive way for private parties to
13 recover. And Congress wanted to make clear,
14 no, that compensatory function that the SEC now
15 has doesn't take away the right of private
16 parties to seek that same function.

17 I don't think it's a plausible reading
18 of -- of Congress's amendments in 2021 that
19 they were adopting two-thirds of Liu and then,
20 by negative implication, implicitly redefining
21 in (d)(7) without saying a word about it the
22 very core of what disgorgement means, which
23 really does have that compensatory function of
24 taking an asset that someone took, that doesn't
25 belong to them and it belongs to someone else,

1 we are taking that asset and -- and turning it
2 over.

3 The final point I'd like to make is
4 that if you do look to (d)(3), my friend has
5 said a lot about unjust enrichment, but (d)(3)
6 still says you can seek disgorgement under
7 paragraph 7. If it's not disgorgement under
8 paragraph 7, then you can't do it. You start
9 with saying what is disgorgement and then say
10 this is the amount that you are disgorging.

11 And I think Congress used that
12 language in (d)(3) because it simply was trying
13 to come up with some way to describe the amount
14 that you were taking as a disgorgement remedy
15 and redistributing to an injured investor.

16 If there are no further questions?

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. GEYSER: Thank you.

20 CHIEF JUSTICE ROBERTS: The case is
21 submitted.

22 (Whereupon, at 11:16 a.m., the case
23 was submitted.)

24

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