SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ONGKARUCK SRIPETCH,)
Petitioner,)
v.) No. 25-466
SECURITIES AND EXCHANGE COMMISSION,)
Respondent.)

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Washington, D.C.

Monday, April 20, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of the Petitioner.

MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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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. Geyser.

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 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).

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

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

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

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

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

I welcome the Court's questions.

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

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

So, in some cases --

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

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

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

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

MR. GEYSER: That's right.

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

in, what, Section 7?

MR. GEYSER: That's correct.

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

MR. GEYSER: Oh, absolutely, Your Honor.

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

right parties. But --

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

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

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

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

analytical foundation necessary to decide this case.

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

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

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

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

understand why that's a punishment.

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

It's still a punishment. And --

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

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

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

the victim's losses.

Do you agree with that?

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Let me take you step by step.

MR. GEYSER: Sure.

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

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

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

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

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

gives access not just to the property but to the proceeds from the property.

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

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

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

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

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

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

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

MR. GEYSER: That's exactly right.

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

MR. GEYSER: Well, Your Honor --

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

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

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

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

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

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

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

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

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

MR. GEYSER: Yeah. No, please.

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

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

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

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

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

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

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

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

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

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

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

Under our reading, each has a separate function.

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

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

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

JUSTICE KAGAN: Well, tell -- tell me

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

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

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

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

functions collapse under my --

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEYSER: Please. Go ahead.

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

Jackson was just proposing.

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

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

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

JUSTICE BARRETT: Okay, but you're

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

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

JUSTICE BARRETT: Yeah.

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

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

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

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

indistinguishable from a second penalty.

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

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

JUSTICE BARRETT: Right.

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

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

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

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

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

So I think, if you just look in the

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: Wasn't the aim of the scheme that your client admitted when the consent decree -- when he agreed to the consent decree, to obtain from the people who bought the artificially pumped-up stocks money that they -- that they owned? That the -- in other words, didn't he aim to obtain money from --

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

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

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

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

JUSTICE ALITO: Right.

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

JUSTICE ALITO: Right.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

Which of the two would you prefer to win on?

MR. GEYSER: So --

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

(Laughter.)

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

JUSTICE SOTOMAYOR: Yeah. No, no.

MR. GEYSER: But, if -- if we lose, we lose, Your Honor. I think you can write the opinion however you'd like. But I -- I'd like

to try to take on --

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

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

JUSTICE SOTOMAYOR: Mm-hmm.

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

I don't think that's how Congress would have acted, especially after Liu made

unambiguously clear -- I think, for whatever disagreement we have about what Liu means, there was a sentence in Liu that said, if a word appears in a statute, if the word "disgorgement" appears in a statute, it does not expand it beyond its traditional common law bounds.

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

JUSTICE SOTOMAYOR: But it didn't just --

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

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

MR. GEYSER: Well --

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

MR. GEYSER: Your Honor, the -- that

language that it -- that Congress didn't take is embedded, it's implicit, in the definition of "disgorgement." There was no need to include that language. And I think that argument would be stronger --

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

(Laughter.)

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

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

MR. GEYSER: That you're --

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

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

(Laughter.)

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

JUSTICE SOTOMAYOR: Well, that

suggests I didn't in Part I.

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

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

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

JUSTICE SOTOMAYOR: Is that your bottom line?

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

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

MR. GEYSER: Well -- well --

JUSTICE SOTOMAYOR: The -- the -- I -- I -- I don't want you to backtrack into why you should win. I want you to give me a clear answer, okay?

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

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

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

MR. GEYSER: The -- if it gives a legal entitlement that changes and redefines the core definition at its -- its irreducible core of what disgorgement is by simply using

the word "disgorgement," then I think Congress is going to be very confused on how to write statutes going forward.

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

(Laughter.)

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

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

MR. GEYSER: I think so, Your Honor.

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

MR. GEYSER: Yes.

JUSTICE GORSUCH: Yeah. And -- and so the -- the linkage between that and having to prove that there's investors out there who have been injured -- not injured, that -- that their money take -- their legal right taken, causally connected and identifiable and return the money

to their benefit at least where it's not infeasible, we would understand Congress to have meant all that when it used the word "disgorgement," don't you think?

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

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

And I think it doesn't make much sense

to say you're restoring the status quo by taking money here and giving a windfall somewhere else. That's not leaving things the way they were. That's -- that's fundamentally shifting how this looks.

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

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

When -- when I look at -- if I put that hundred dollars in a bank account and the

bank gives me back my principal without any diminution of value, I get every dollar, but I don't get the interest that I'm owed, I look at that as an economic loss.

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

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

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

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

And the government doesn't take issue with that point. They agree that once Liu said

that disgorgement has to be a fundamentally equitable remedy, it can't be a punishment, it can't be a penalty or a deterrent, that took away Kokesh's holding that the penalty five-year limitations period applied. So the SEC was left facing absolutely no deadline whatsoever.

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

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

JUSTICE KAVANAUGH: Last, do you want to say anything about Seventh Amendment implications of the government's position, if

any?

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

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

JUSTICE BARRETT: I like Liu.

(Laughter.)

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

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

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

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

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

It -- it's about the point of taking it away both to deprive someone, I mean, to

deprive someone is a punishment, and to deter. And, again, my friend in his brief, he -- he's very clear, the purpose of taking it away is to punish and deter.

Deterrent -- deterrence, as Kokesh said, as Liu said, as Jarkesy said, all of these cases agree deterrence is a penal function.

JUSTICE BARRETT: Okay.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

And one thing that you haven't touched upon at all is the very traditional equitable principle of unjust enrichment, which would seem to me to fit squarely into the equitable concept of depriving the defendant of their ill-gotten gains. And that, I thought, was

what the scholars were talking about. That is a traditional equitable principle, not a legal one in the way that you've been defining it.

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

So can you speak to that?

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

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

JUSTICE JACKSON: So you're saying, unless we do this in the way that you're talking about, the Jarkesy case, which is not a common law -- I mean, it's like our case from a couple years ago, right? The -- the idea of

the Seventh Amendment is what we're avoiding with this concept. I guess I just don't understand why the first principle isn't all we need with respect to resolving the issue in this case.

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

JUSTICE JACKSON: Mm-hmm.

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

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

MR. GEYSER: Unjust --

JUSTICE JACKSON: No, it's not?

MR. GEYSER: No, no, no, it is. Unjust enrichment is --

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

MR. GEYSER: I -- the -- in the -- in

the statute, unjust enrichment --

JUSTICE JACKSON: No, in common law. What does unjust enrichment mean and allow the court to do?

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

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

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

should.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GEYSER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

And if you look at dictionary definitions, Black's Law Dictionary, for example, you look at "restitution" and you see lots of entries about passing from a wrongdoer funds or property that rightfully belongs to someone else. If you look at the -- the Black's Law Dictionary definition of

"disgorgement," you just see an act of giving up. It's the surrender, full stop.

And so "disgorgement" is the word Congress would use if it wanted to make it as clear as possible that what we care about is getting the defendant to give up its gains and that any question about where the money -- where the money goes after that is secondary.

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

I welcome the Court's questions.

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

MR. STEWART: I -- I -- it -- it might be cleaner. And we don't -- we don't think our position depends on whether the remedy under (d)(3)(A)(ii) and (d)(7) is legal or equitable. That is, as long as we were operating under (d)(5), which refers specifically to equitable

relief, then we could get disgorgement under that -- that provision only if we could persuade a court that it was equitable.

But the whole thrust of what Congress did in 2021 was to say we want the SEC to have a remedy that compels the defendant to gives -- gives up its profits on the following conditions, whether that is regarded as legal or equitable.

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

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

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

JUSTICE THOMAS: Mm-hmm.

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

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

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

CHIEF JUSTICE ROBERTS: Counsel -- counsel, several times in his opening brief, your friend looked to our recent case in Jarkesy, and we heard it cited several times this morning. You don't cite it at all in your brief. Is there -- do you want to talk about

why it's not relevant at all here?

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

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

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

MR. STEWART: I -- I mean, if that's -- if that's his argument, I don't think it's right because the whole -- the -- the whole rationale for the Court striking down what was done in Jarkesy was that it had been done in an

administrative tribunal acting without a jury rather than by a court. And, you know --

CHIEF JUSTICE ROBERTS: No, no, I mean not for the jury question but more in terms of how the sanction, whether disgorgement or anything else, would be treated.

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

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

JUSTICE GORSUCH: Mr. Stewart, just to follow up on the Chief Justice's questions, yes, Jarkesy concerned administrative proceedings, but -- but it also concerned the Seventh Amendment. And so the question I think the Chief is trying to aim at is, okay, you've

got this (d)(7) remedy, but when might it trigger a jury trial right rather than remain before the judge in equity?

And I -- I just want to make sure I understand a few things. One, you agree that (d)(7) is for net profits only, right?

MR. STEWART: Yes. And I think --

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: Yes -- yes works for me.

MR. STEWART: Right.

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

MR. STEWART: Yeah. Yes.

JUSTICE GORSUCH: Okay. And then, third, and the kind of key one that I think your -- your friend on the other side's been talking about, is where the money goes after that. And to keep it in equity, you've got to

get it back to the investors unless it's infeasible, we said, in Liu.

And do you stand by that?

MR. STEWART: I -- I -- I would quarrel with that part of it. What the Court said in Liu --

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

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

JUSTICE GORSUCH: Yes or no?

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

JUSTICE GORSUCH: No.

MR. STEWART: We -- we --

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

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

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

investors?

MR. STEWART: That would be our position.

JUSTICE GORSUCH: Okay. Let's say that's wrong, okay? Let's say the equitable remedy was all about restoring investors. Let -- let's say we think that. Then what?

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

JUSTICE GORSUCH: And then the jury trial right.

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

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

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

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

MR. STEWART: That's why I said it's a

two-part question. We agree that the statute would permit us to get it without routing it to investors because (d)(3)(A)(ii) lists certain prerequisites and routing to investors is not one of them.

Our position would be that would still be equitable and no jury trial would be available. I know there are arguments on the other side that not routing it to investors would make --

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

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

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

MR. STEWART: Well, in Liu, you said

at the outset that when we get -- when we see a provision that just generally authorizes equitable relief, we ask whether a particular remedy was typically available at equity, and --

JUSTICE GORSUCH: Yes. And the government keeping all the money was not typically available at equity. It was getting it back to the investors.

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

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

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

MR. STEWART: Yes.

JUSTICE JACKSON: But, Mr. Stewart, isn't your point that it's a penalty when it makes the defendant worst off? That's the point that Mr. Geyser keeps saying this is a punishment. But it's not a penalty or a punishment if what is happening is the defendant is just being made to return the money that he never had access to that was not his to begin with?

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

JUSTICE GORSUCH: Mr. -- Mr. Stewart, let me try it this way. You're asking us to

expand (d)(7) beyond equitable practice to allow the government to keep the money. Do we have to decide whether that triggers the Seventh Amendment in this case? Can we reserve that question?

MR. STEWART: Yes.

JUSTICE GORSUCH: All right.

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

MR. STEWART: Understood.

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

MR. STEWART: I mean, I think it varies from case to case, and I think, in some circumstances, they probably wind up with what you might call a windfall. That is, you could

have a circumstance, for instance, if somebody -- if -- if a investment advisor lies about his credentials in order to encourage clients to sign up with them and then the clients can't point to anything about the advisor's services that was actually deficient, but the SEC, having received disgorgement, may try to give the -- the people who were diluted the -- the -- some portion of the recovery in order to compensate them for the fact that they weren't told the -- the truth.

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

MR. STEWART: I mean, I think Mr. Geyser referred to one situation in which we might not make an -- an effort at distribution, and that is if you have violations that cause very diffuse harms, so the defendant may make a lot of money and may cause very small amounts of harm to a very large number of people, and the SEC may conclude that the administrative costs of identifying all these people and what each of

them has lost is just going to eat up too much of the fund in order --

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

MR. STEWART: I don't know that that's the only situation, and I -- you know, this -- this has been our typical --

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

Now I know that's ordered --

MR. STEWART: Yeah.

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

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

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

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

MR. STEWART: Yes.

JUSTICE GORSUCH: How much less?

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

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

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

And it's a long and time-consuming -- both the collection and the distribution can be

a long and time-consuming process. And --

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

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

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

MR. STEWART: Is designated for a --

JUSTICE GORSUCH: Designated?

MR. STEWART: In a particular fiscal year.

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

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

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

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

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

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

MR. STEWART: It -- it's key under (d)(5) but not under (d)(3)(A)(ii) and (d)(7). It's really not relevant at all in our view

under (d)(3)(A)(ii) and (d)(7). And the reason is traditional equitable principles are not limits on Congress's power.

The reason that traditional equitable limits played a key role in Liu was that the statute itself referred to equitable relief. And so, to determine what sort of remedies Congress had implicitly authorized, the Court looked to what courts of equity had traditionally done.

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

JUSTICE JACKSON: As --

JUSTICE GORSUCH: Do you --

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

JUSTICE GORSUCH: You can go ahead.

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

MR. STEWART: It -- it -- it -- it had two -- two pieces of operative language. First was there was language at the end of the provision about "for the benefit of investors." And the Court in Liu also suggested that just the -- the reference to equitable relief might require some effort to compensate victims because that was the way it was typically done.

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

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

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

MR. STEWART: I think that's correct.

JUSTICE GORSUCH: Okay.

MR. STEWART: The -- the other point I was going to make about Liu and about typical equitable practice is that when Liu was asking what courts in equity had typically done, they looked at a broad range of cases involving different subject areas, and because most litigation in this country is private litigation, the Court in Liu looked mostly at private suits.

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

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

to victims.

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

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

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

And the other limits that the Court announced in Liu were intended to -- to draw that line. And, therefore, it's understandable that Congress incorporated those into the new

SEC-specific statute but didn't incorporate a -- a limitation that the money has to go to victims. That seems more in keeping with what we would expect in a private suit.

JUSTICE KAGAN: So, if I could just understand, you've been talking about this, but your decision to lead with (d)(7) rather than (d)(5), I guess my question is, like, what are you worried about on (d)(5)? Why do you think that (d)(7) is a better argument? Why do you think that (d)(5) is a comparatively weak one?

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

And the fact that the Court left it open means there's some possibility that we would lose that issue at the end of the day, and that would put kind of a substantial damper or a potential damper on our disgorgement efforts because there would be lots of questions about is it feasible. Mr. Geyser is

arguing that if -- if the only victims we can find are people who didn't suffer pecuniary harm, then it really isn't feasible to -- to pass along the money to victims because they don't qualify.

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

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

And if it's only deterrence, I think you have a much harder way to go to say that

it's not a Seventh Amendment violation to let the judge decide it.

MR. STEWART: I -- I -- I guess, kind of looking ahead to a hypothetical case in which we were litigating the Seventh Amendment question, we'd -- we would say a couple of things about that. The first is the paradigmatic equitable remedy is a prohibitory injunction. And a prohibitory injunction has no legitimate purpose other than to deter the defendant from future misconduct. And so I -- I don't think the Court would stick to a rule, a categorical rule, that if deterrence is a substantial motivation, the remedy can't be equitable.

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

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

MR. STEWART: The victim did receive the money, but the Court fixed the amount at

a -- at a sum greater than the victim's loss. And -- and --

JUSTICE SOTOMAYOR: Well, that's because -- I agree with you that, at equity, you could measure the victim's compensable damages by unjust enrichment by the defendant. No question. And windfall profits have always been recognized in equity for unjust enrichment or disgorgement concepts.

MR. STEWART: But -- but the --

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

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

JUSTICE SOTOMAYOR: I -- I'm accepting --

MR. STEWART: Okay.

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

MR. STEWART: It -- it is simply accomplishing a -- a public interest in an effort to deprive the defendant of his unlawful profits.

JUSTICE SOTOMAYOR: For purposes of deterrence --

MR. STEWART: For -- for --

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

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

But then the other point I'd -- I'd like to make in response to your question as to why in some circumstances we like (d)(3)(A) --

(d)(3)(A)(ii) better is that, if push comes to shove, we would rather be in a situation where we can get disgorgement but may have to go through a jury trial to get it than to be in a position where we can't get it at all.

And the -- the Petitioner's argument is that we can't get it at all except to the extent that it corresponds to identified pecuniary losses on the part of --

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

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

JUSTICE SOTOMAYOR: All right. Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

Justice Sotomayor?

Justice Kavanaugh?

Justice Barrett, anything further?

Justice Jackson?

Thank you, counsel.

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

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Geyser?

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

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

And if the government thinks it's hard to distribute funds, then they do have the option, seek civil penalties. You can deprive us of every penny, including up to gross proceeds that we've collected, or rely on the -- the very inventive, you know, very powerful private securities bar, which is very

good at filing lawsuits when someone is actually injured to recover and compensate an injured party.

Now my friend, I think, equivocated a little, but I think the bottom-line answer is that the government does not believe that disgorgement requires returning funds to investors. That is a penalty. Then the government is seeking a penalty. It is indistinguishable from penalties. It looks exactly like the penalty in (d)(3), just with a different cap. That is not the way that Congress writes statutes.

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

friend's read.

I don't think my friend has any answer for (d)(9). If Congress's point here is simply to deprive wrongdoers of a gain, it has nothing to do with remedial function, they can keep it, they don't need to pay the funds back to investors, then I don't know why Congress would have been concerned that anyone would have even imagined that somehow empowering the SEC to seek effectively a second penalty that they were precluding private investors from bringing their own lawsuits. That reading of -- of (d)(9) doesn't make sense. Our reading does.

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

I don't think it's a plausible reading

of -- of Congress's amendments in 2021 that they were adopting two-thirds of Liu and -- and then, by negative implication, implicitly redefining in (d)(7) without saying a word about it the very core of what disgorgement means, which really does have that compensatory function of taking an asset that someone took, that doesn't belong to them and it belongs to someone else, we are taking that asset and -- and turning it over.

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

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

If there are no further questions?

CHIEF JUSTICE ROBERTS: Thank you,

counsel.

MR. GEYSER: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

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

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