

No. 25-466

IN THE
Supreme Court of the United States

ONGKARUCK SRIPETCH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

**BRIEF OF CONSUMER FEDERATION
OF AMERICA AS *AMICUS CURIAE*
SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether a court may award disgorgement in a Securities and Exchange Commission action without a showing of pecuniary harm to a victim.

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INTEREST OF THE AMICUS CURIAE

The Consumer Federation of America¹ (“CFA”) is an association of non-profit consumer organizations dedicated to advancing the interests of the American consumer through research, advocacy, and education. Established in 1968, today nearly 250 organizations participate in the federation. CFA advocates for pro-consumer policies before federal and state legislatures, agencies, and courts. It educates policymakers and other public-interest advocates on consumer issues. The CFA reaches out directly to consumers through educational conferences. It also assists individuals and organizations through its America Saves campaigns—designed to encourage low- and moderate-income households to save money, reduce debt, and build wealth.

Investor protection is among the areas in which CFA advances consumer interests. CFA works to achieve the goals of millions of Americans who rely on investments to fund their retirement and other life goals. CFA advocates for a marketplace that provides safe and fair investment options, that is free from fraud and abuse, and that is subject to strong oversight and enforcement to protect investors and recover losses when they are wronged.

With this mission in mind, CFA’s interest in this case is apparent. Effective civil enforcement remedies are a pillar of fair and trustworthy markets, whether they serve

1. Pursuant to Supreme Court Rule 37.6, CFA states that this brief was not authored in whole or in part by counsel for any party, and no entity or person made a monetary contribution to fund the brief’s preparation or submission.

to reimburse victims of wrongdoing, provide a deterrent effect against fraud, or both. A ruling in favor of Petitioner would harm retail investors and retirement savers by severely undermining the Security and Exchange Commission's ability to enforce the securities laws, putting investors and the markets they rely on at risk. CFA submits this brief because limiting the disgorgement remedy to cases where there is pecuniary harm violates Congress's clear intention to provide the SEC with the tools to ensure that, for perpetrators, enforcement actions are an effective deterrent and not just the cost of doing business.

SUMMARY OF THE ARGUMENT

For more than fifty years, pursuant to the equitable powers Congress granted courts in the federal securities laws, courts have ordered wrongdoers to disgorge their ill-gotten gains in cases brought by the Securities and Exchange Commission ("SEC"). As the Second Circuit stated, "effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972). That premise is so fundamental to a well-operating SEC enforcement program and investor protection that, since equitable disgorgement was recognized by the Second Circuit, it was adopted widely in federal courts.

The Court's decision in *Liu v. SEC*, 591 U.S. 71 (2020) subjected disgorgement under 15 U.S.C. § 78u(d)(5) to historical principles of equitable jurisdiction. Congress immediately realized the ruling impaired the SEC's ability to accomplish its fundamental mission and acted

uncharacteristically quickly to amend the Securities Exchange Act. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (“NDAA”), Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4625–26 (Jan. 1, 2021) (amending 15 U.S.C. § 78u). Congress added Section 78(u)(d)(7), which restored the SEC’s and courts’ robust pre-*Liu* authority to seek and award non-equitable disgorgement to ensure that wrongdoers do not profit from their violations of the federal securities laws.

Disgorgement is critical to faithfully executing Congress’s vision and fulfilling its three-part statutory mandate to the SEC: to protect investors, promote capital formation, and maintain fair, orderly, and efficient markets. *See, e.g.*, 15 U.S.C. §§ 77b(b), 78c(f); *see also* <https://www.sec.gov/about/mission> (updated Aug. 9, 2023). Each of these goals is advanced by not only the anti-fraud authorities, but statutory and regulatory provisions governing, *inter alia*, the registration and trading of securities, the conduct of market participants such as broker-dealers and exchanges, and disclosures by issuers. Securities law violations, like other offenses against free markets, affect a multitude of victims who may be difficult to comprehensively identify, particularly when the harm is attenuated. Without disgorgement of ill-gotten profits, wrongdoers that receive windfalls from their malfeasance remain economically incentivized to violate the securities laws. Such a perverse outcome invites harm to investors and erodes public confidence in our capital markets.

Congress acted decisively and promptly to reverse this unintended outcome by including amendments in the NDAA, legislation adopted annually to provide for defense spending and therefore sure to become law. By doing so,

Congress took advantage of the procedural expediency of the defense-authorization process. The amendments provide for a separate disgorgement remedy in Section 78u(d)(7). In doing so, Congress allowed for courts to award traditional equity-based disgorgement pursuant to Section 78u(d)(5) or to award disgorgement as necessary under Section 78u(d)(7) to ensure that wrongdoers do not profit from their illegal conduct.

ARGUMENT

I. CONGRESS EMPOWERED COURTS TO AWARD DISGORGEMENT WITHOUT A SHOWING OF PECUNIARY HARM

The term “disgorgement” does not refer to any long-recognized equitable remedy. *See Liu*, 591 U.S. at 76 n.1 (citing *SEC v. Cavanagh*, 445 F.3d 105, 116 n.24 (2d Cir. 2006)). Thus, the term “disgorgement” was not in wide use when, in June 1971, the Second Circuit issued the first published opinion affirming disgorgement-style remedies in SEC proceedings. James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS. ENTREPRENEURSHIP & L. 131 (2015) (describing *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971)). A year later, the court first used the term “disgorgement” to describe remedies authorized in an SEC case. *Manor Nursing*, 458 F.2d at 1103.

Following the Second Circuit, courts widely adopted disgorgement as an equitable remedy. *See, e.g., SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (disgorgement is “designed to deprive a wrongdoer of his unjust enrichment”); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (courts may order

disgorgement “without inquiring whether, or to what extent, identifiable private parties” were harmed); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (disgorgement “forces the defendant to give up . . . the amount by which he was unjustly enriched”). Thus, when Congress first used the term “disgorgement” in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (“Remedies Act”), it did not enshrine some archaic concept that predated the merger of law and equity. Instead, Congress used a recently-coined term of art that described the SEC’s existing enforcement practices.

Both before and after the Remedies Act, courts ordered disgorgement, often regardless of whether the prerequisites for equitable relief were present (for example, where there was an identifiable victim or pecuniary harm). *See, e.g., Kokesh v. SEC*, 581 U.S. 455, 465 (2017) (courts ordered disgorgement regardless of whether funds would be paid to victims); *First City Financial Corp.*, 890 F.2d at 1230 (ordering disgorgement for failure to file disclosure required by 15 U.S.C. § 78m(d)); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) (whether “investors may be entitled to money damages is immaterial”); *Blatt*, 583 F.2d at 1335.

Thus, by the time subsection (d)(7) was enacted in 2021, disgorgement had become “an established legal term with plenty of ‘soil’” in the federal common law of SEC enforcement, *see SEC v. Hallam*, 42 F.4th 316, 339 (5th Cir. 2022), none of which required a showing a pecuniary harm to a victim.

A. Congress Enacted Subsection (d)(7) Authorizing “Disgorgement” Immediately Following the *Liu* Decision

The first courts awarding disgorgement remedies had all acted under the theory that courts were authorized under their inherent “general equity power” rather than any “specific statutory authority.” *Texas Gulf Sulphur*, 446 F.2d at 1307-08. After Sarbanes-Oxley in 2002, they could also rely on Subsection (d)(5)’s grant of equitable authority. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305, 116 Stat. 745, 778-79 (2002) (adding 15 U.S.C. § 78u(d)(5)).

Relying only on these equitable powers, the SEC routinely paid disgorgement not only to injured investors, but to the Treasury as well. *Kokesh*, 581 U.S. at 464–65. Indeed, in order to further its mandate to protect investors and the marketplace, the SEC could obtain disgorgement even where there were no identifiable injured parties. *See Kokesh*, 581 U.S. at 463. Courts sometimes even allowed disgorgement of gross profits, with no offset for expenses. *See, e.g., SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) (“[T]he overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses.”).

The *Liu* decision ruled that these characteristics are inconsistent with the limits of monetary relief in equity. 591 U.S. at 82-85. It held that the text of Subsection (d)(5) (“for the benefit of investors”) requires that the remedy reach the victim, but left open whether equity alone would require that result and what the result might be if disgorgement “cannot practically be disbursed to victims.” *Id.* at 89. And the Court required that disgorgement

be limited to net profits unless special circumstances are present. *Id.* at 92 (describing inquiry into “whether expenses are legitimate or whether they are merely wrongful gains under another name” (internal citation omitted)).

Congress responded within six months by enacting § 78u(d)(7) as part of the NDAA. Subsection (d)(7) authorizes the SEC to seek disgorgement, and the courts to award it. The timing and context of this amendment is critical to interpreting it.

B. Congress Intended Subsection (d)(7) to Grant Powers Not Available for Equitable Disgorgement

Applying the relevant canons of statutory construction leads to the conclusion that subsection (d)(7)’s “disgorgement” remedy is not bound by the limits of equity described in *Liu*. A legislature is presumed to be aware of relevant judicial precedent. *Ryan v. Valencia Gonzales*, 568 U.S. 57, 66 (2013). Given the precedent at the time, Congress’s quick action in adopting Subsection (d)(7) is most consistent with an effort to preserve the longstanding and widely adopted disgorgement practices employed by courts despite the equitable limitations articulated in *Liu*. *Hallam*, 42 F.4th at 341.

Other traditional tools of statutory construction confirm this analysis. When Congress amends a statute, courts presume it “intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995). To read Subsection (d)(7) as doing no more than Subsection (d)(5) already did would presume that Congress undertook

that swift and targeted amendment for no purpose. Similarly, the rule against surplusage requires that every provision of a statute be given independent effect. *See Liu*, 591 U.S. at 89 (courts must give effect “to every clause and word of a statute”). If “disgorgement” under Subsection (d) (7) is merely the same equitable powers already available under Subsection (d)(5), the 2021 amendment becomes mere surplus.

The *expressio unius est exclusion alterius* canon points in the same direction. *See Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (“expressing one item of an associated group of series excludes another left unmentioned”) (cleaned up). Subsection (d)(5) expressly limits the SEC’s authority to “equitable relief” that is “appropriate or necessary for the benefit of investors.” 15 U.S.C. § 78u(d)(5). Subsection (d)(7) contains neither qualifier, and the Court should presume that was intentional.

This conclusion is reinforced by the fact that Congress expressly incorporated other elements of *Liu*’s holding into Subsection (d)(3). Subsection (d)(3)(A)(ii) allows for disgorgement awards against violators for “unjust enrichment by the person who received such unjust enrichment as a result of the violation.”² This was a clear indication in the NDAA that Congress did not want to reinstitute the practice of some courts in awarding disgorgement of gross profits. *See Brown*, 658 F.3d at 861. Yet Congress did not incorporate any provision requiring

2. Respondents state that Subsection (d)(3)(A)(ii) is limited to net profits that are received by the violator which is consistent with the equitable limitations in *Liu*. Resp. Br. 38-39.

a showing of pecuniary harm or that disgorged funds (under Subsection (d)(7)) be used to compensate victims—although of course they could be used for that purpose.

C. Disgorgement is a Flexible but Limited Remedy

As Section 21(d) stands now, the SEC may seek, and courts may award, disgorgement under Subsection (d) (5), limited by the equitable principles announced in *Liu*, or pursuant to the specific statutory grant in Subsection (d)(7), limited by the requirements of Subsection (d)(3) (A)(ii). This statutory arrangement provides the SEC with the flexibility to enforce compliance with the federal securities laws even in absence of pecuniary harm to a victim. These laws regulate myriad conduct: from the registration of securities exchanges, 15 U.S.C. § 78e, and broker-dealers, 15 U.S.C. § 78o; to corporate reporting, *e.g.*, 15 U.S.C. § 78m(a); to shareholder reporting, *e.g.*, 15 U.S.C. § 78p; to the anti-fraud provisions, *e.g.*, 15 U.S.C. § 78j. But the broad scope of these provisions were intended to “achieve a high standard of business ethics in the securities industry.” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

Violators’ profits from violations of these provisions may take many forms. Nevertheless, some violations may not result in pecuniary harm to an identifiable victim (or at least a practically identifiable victim). For example, violations of the disclosure requirements in Exchange Act Section 13(d), 15 U.S.C. § 78m(d), may result in profits from the purchases of stock at artificially low prices. *See First City Financial*, 890 F.2d at 1220-21. Yet, the sellers from whom a violator purchased their securities may be impossible to identify. In insider-trading cases, the

victim is typically the company whose information was misappropriated, *see Chiarella v. U.S.*, 445 U.S. 222, 231-35 (1980), who may not suffer a pecuniary harm from the misappropriation. An unregistered broker may profit from commissions charged on securities transactions where loss to investors is questioned or in doubt. *See SEC v. Barry*, 146 F.4th 1242, 1262-63 (9th Cir. 2025). Congress acted to ensure that violators in these circumstances would not be unjustly enriched by their illegal activity by passing Subsection (d)(7).

Even so, disgorgement is not an unlimited remedy in these circumstances. Whether under the equitable limitations articulated in *Liu* or under Subsection (d) (3)(A)(ii), disgorgement is limited to net profits and only the person who actually received the ill-gotten gains. In doing so, Congress added a provision that adopted some equitable limitations in *Liu* while rejecting others, such as that disgorgement be awarded “for the benefit of investors” rather than to deter and punish.

II. DISGORGEMENT IS A CRITICAL REMEDY FOR PROTECTING INVESTORS AND ENSURING A FAIR MARKET

Since the passage of the Securities Act of 1933 and the Exchange Act, growth of U.S. capital markets has enabled investors to ensure themselves a sustainable and adequate standard of living in retirement. Those markets grew because investors—both retail and institutional—trust that they are well-regulated, fair, efficient, and that they embed critical fraud protections. Maintaining those markets and investor trust requires that the SEC honor its Congressional mandate to police the market and

enforce the laws and regulations that have led to such massive wealth creation. “The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

While Congress expects the SEC to govern a vast marketplace, it does not provide the agency with the unlimited resources that would be required to prosecute every market participant that violates the law. Each year, the SEC receives tens of thousands of tips, complaints, and reports of potential securities law violations. *See* Press Release, U.S. Sec. Exch. Comm’n, SEC Announces Enforcement Results for Fiscal Year 2024 (Dec. 17, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186> (“SEC 2024 Results”). The necessarily limited set of enforcement actions investigated and brought by the SEC’s dedicated staff must therefore be a broad deterrent to those who would abuse investors and our markets. The SEC rightfully relies on every tool provided by Congress to meet the expectation that the agency efficiently but effectively vindicates its investor-protection and market-integrity missions.

A. The Amount of Disgorgement Ordered in SEC Cases Demonstrates a Powerful Incentive to Violate the Securities Laws

Each year, violators of the federal securities laws are ordered (whether following litigation or through settlement) to disgorge billions of dollars. *See* SEC 2024 Results. Petitioner cherry-picks an outlier amount (\$6.1 billion in fiscal year 2024) to argue that “less than 6% of

the amount collected” is returned to investors. Pet. Br. 8. But this point fundamentally misunderstands what the data shows.

First, the disgorgement figures in the Enforcement Statistics represent the amount “ordered,” not “collected.” Many judgments are uncollectible, even by the federal government. In some cases, a violator may have spent ill-gotten gains on assets that are irrecoverable or worth a fraction of the proceeds from their offences. In other cases, a violative firm may have gone bankrupt. The SEC and courts cannot distribute funds violators do not pay. Even those disgorgement and penalty amounts that are paid may be collected in different years than when they were ordered.

Second, the SEC returns billions of dollars to harmed investors. Totaling the amounts the SEC reported as distributed between fiscal year 2019 and 2024 shows that the SEC distributed \$4.5 billion to victims. Given the processes designed to ensure fair distributions, *see, e.g.*, 17 C.F.R. § 201.00 *et seq.* (Fair Fund regulations for administrative Fair Funds), funds collected by the SEC are often not distributed in the same year as they are collected. Between the time it takes to collect disgorgement, draft and propose plans for distribution, process comments and objections, collect claims, make determinations on claims, and send payments, distributions can lag significantly behind when disgorgement was ordered in a particular case.

Third, between fiscal year 2019 and fiscal year 2023, the annual amount of disgorgement ordered was between \$2.4 billion and \$3.4 billion. *See Addendum to Division of Enforcement Press Release*, U.S. Sec. Exch. Comm’n, 1, 2 (2024), <https://www.sec.gov/files/fy24-enforcement->

statistics.pdf (“Enforcement Statistics”). Fiscal year 2024 was an outlier occasioned by a settlement, following a jury verdict, in which one defendant agreed to pay approximately \$3.6 billion in disgorgement. *See* Press Release, U.S. Sec. Exch. Comm’n, Terraform and Kwon to Pay \$4.5 Billion Following Fraud Verdict (July, 2, 2024), <https://www.sec.gov/newsroom/press-releases/2024-73>.

Finally, to the extent the Court credits Petitioner’s oranges-to-apples methodology, consider the other fiscal years in the Enforcement Statistics. In fiscal year 2022, the disgorgement orders obtained by the SEC totaled \$2.2 billion. The agency distributed \$937 million to investors, which is 42% of the total ordered—not collected. In the other fiscal years between 2019 and 2023, the agency’s distributions to investors ranged from 17% and 37% compared to amounts ordered disgorged (but not collected) in those years.

What the data shows, then, is not that disgorgement is a cudgel being used by an out-of-control agency. Instead, it shows that violators are being deprived of billions of dollars in profits accrued by causing market-wide harms. Without adequate means to curtail ill-gotten profits, there exists a powerful incentive to violate the laws Congress passed to protect investors and ensure fair markets. Disgorgement removes that incentive by making violations of the federal securities laws unprofitable.

B. Civil Penalties Are Not a Substitute for Disgorgement

In passing the Remedies Act, the House Report stated that disgorgement “merely requires the return of wrongfully obtained profits[.]” H.R. Rep. No. 101-616 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1379,

1384. Whether under Subsection (d)(5) or (d)(7), the focus remains on the wrongfully obtained profits. Accordingly, Congress added the ability for the SEC to seek and obtain civil penalties in the Remedies Act because disgorgement alone—equitable or otherwise—leaves a violator “no worse off financially than if he had not violated the law.” *Id.*

Thus, Congress intended for civil penalties to be in addition to the disgorgement of ill-gotten profits in both the Remedies Act and the NDAA. It authorized courts to penalize violators for certain statutory amounts or amounts up to the “gross amount of pecuniary gain” to a defendant. 15 U.S.C. § 78u(d)(3)(B). The Exchange Act also authorizes up to three times the profit gained or loss avoided as a result of insider trading. 15 U.S.C. § 78u-1(a)(2). But these are maximum amounts, and penalties must be evaluated “in light of the facts and circumstances.” 15 U.S.C. §§ 78u(d)(3)(B)(i), 78u-1(a)(2). In many circumstances, those penalties may still be insufficient to ensure that the degree of civil consequences matches the gravity of the misconduct. They may also be insufficient to remove the economic incentive to violate the law.

Courts determining penalties often consider numerous, non-exclusive factors. *SEC v. Rajaratnam*, 918 F.3d 36, 44-45 (2d Cir. 2019). These include the egregiousness of defendant’s conduct, the degree of scienter, whether there was loss to victims, the isolated or recurrent nature of the conduct, and the defendant’s financial condition. Accordingly, courts can fix penalty amounts in light of a disgorgement award to appropriately penalize the conduct at issue in light of Congress’s prescribed penalties. Importantly, however, such penalties may be less than the net pecuniary gain to a defendant from their illegal conduct. Even an award of gross pecuniary gain may simply render a violator “no worse off financially”

where the costs of operating a fraud are negligible (or non-existent) compared with the gain. Thus, penalties—if any—should be imposed following a disgorgement award that strips violators of their profits from the misconduct, and focus solely on culpability.

C. Disgorgement is Necessary Even Where There Is No Pecuniary Harm to Investors

Congress established a national marketplace for securities by passing comprehensive legislation to ensure integrity and fairness in it. The SEC, pursuant to the rulemaking authority Congress granted to it, passed regulations in furtherance of that mission. Regulation of the marketplace from exchanges, broker-dealers, and clearing agencies to investors themselves has resulted in tremendous wealth creation for the American public. It has also enshrined the United States as the undisputed center of the financial world, bolstering not just the broader economy but its position as a leader of the free world. It is the rule of law that provides faith in our markets and attracts investors from the United States and from around the globe. That, in turn, requires unrelenting enforcement of the securities acts.

Compliance is enforced, in part, through deterrence. The deterrent effect of disgorgement is well recognized by courts. *See, e.g., Kokesh*, 581 U.S. at 464. Congress recognized its weighty significance as well. Disgorgement is so critical to protecting our markets that Congress renewed the SEC’s authority within a year of the Court’s decision in *Liu*. Congress acted decisively and promptly to reinstitute aspects of disgorgement not permitted in equity, including the addition of subsection (d)(7) without the provision that disgorgement be awarded “for the benefit of investors.”

As discussed *supra*, violations of many provisions of the securities acts may result in profits for the wrongdoer without pecuniary harm to a victim. The incentive to violate these provisions is increased where a person believes the violation is not subject to disgorgement because it is “victimless” or where the identities of the victims are unknown. In these cases, disgorgement is paramount to vindicating the critical federal interest in market integrity promoted by the myriad statutes and regulations that achieve that end.

CONCLUSION

Congress specifically authorized the SEC to pursue, and courts to award, disgorgement even when pecuniary harm to a victim cannot be identified. *Amicus curiae* respectfully submits that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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