

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 THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA AS
AMICUS CURIAE IN SUPPORT
OF PETITIONER

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INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The members of the Chamber recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that markets function fairly and effectively. Those enforcement powers, however, must be exercised within the limits Congress has provided. That includes allowing the SEC to seek disgorgement of profits only when there has been some pecuniary harm to investors, as traditional equitable principles require. The Court should vacate the decision of the Ninth Circuit.

¹ In accordance with this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Under traditional principles of equity, disgorgement is available only after an antecedent showing that the claimant's legal rights or interests have been invaded. That is true both for suits brought by the sovereign, as well as private individuals.

In many cases, the predicate invasion of legal rights is obvious. If Person A steals Person B's property then sells the property for a profit, Person A must provide Person B the full sale amount. Person B owns the property from which the profits were derived, and in the but-for world Person B would have been entitled to those profits. Thus, restitution is available to deliver those profits to him.

In more complex cases, however, there is frequently no injury compared to the but-for world, and therefore no invasion of legal or equitable rights. If Persons A and B contract for services, and during negotiations Person A misrepresents their qualifications but then delivers the services exactly as contemplated, there has been no harm and Person B has not been deprived of any property. Similarly, if Person A provides Person B with advice, Person B acts on that advice and turns a profit, but later finds out that Person A failed to file the necessary paperwork with the government to be authorized to provide such advice, Person B still has not suffered any harm or lost any property.

In both of these situations, it would be profoundly unfair for Person B to demand that, in addition to keeping the profits they earned from Person A's services or advice, Person B should also be entitled to a

refund of any payments they made to Person A. If these situations were to occur in the securities field, however, that is precisely what the SEC would claim authority to do—*i.e.*, to demand disgorgement of Person A’s profits, despite Person B suffering no harm, thereby allowing Person B to keep both their profits *and* obtain the return of any payments previously made.

This windfall cannot be described as compensatory in any meaningful sense and, accordingly, is contrary to basic equity principles. Indeed, this Court already articulated the relevant principle in *Liu v. SEC*, 591 U.S. 71 (2020). Although a “wrongdoer should not profit ‘by his own wrong,’” there is a “countervailing equitable principle that the wrongdoer should not be punished by ‘pay[ing] more than a fair compensation to the person wronged.’” *Id.* at 80 (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145-46 (1888) (modifications omitted)). In cases where an investor has suffered no harm compared to the but-for world, ordering disgorgement is necessarily a remedy that affords “more than a fair compensation to the person wronged.” *Id.*

For that reason, disgorgement is available to the SEC only when investors have suffered a concrete pecuniary harm. That result is compelled by Article III, principles of equity, as well as the Securities Exchange Act itself. The SEC cannot seek the equitable remedy of disgorgement without an antecedent showing that investors’ legal rights have been invaded, which in the securities context requires a showing of pecuniary harm. Any contrary rule would fundamentally transform the SEC’s disgorgement remedy into a punitive one, contrary to this Court’s recent holding in *Liu*, 591 U.S.

at 82, and would provide the agency with an end-run around private parties’ Seventh Amendment rights that this Court recently recognized and reinvigorated. *See SEC v. Jarkesy*, 603 U.S. 109 (2024). Accordingly, this Court should vacate the Ninth Circuit’s decision below and remand for a determination about whether the particular conduct in this case caused pecuniary harm to investors.

ARGUMENT

As this Court has explained, when Congress empowers courts to grant “equitable relief,” as Congress has done here, 15 U.S.C. § 78u(d)(5), that is a term of art that “must refer to ‘those categories of relief that were typically available in equity.’” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). Similarly, statutory authority to administer suits “in equity” authorizes only “relief . . . traditionally accorded by courts of equity.” *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). The SEC’s position—that it may seek disgorgement whenever a violation occurs, regardless of whether investors suffered any pecuniary harm as a result of that violation—is contrary to that equitable tradition as well as the overall statutory scheme.

I. Claims for Disgorgement By the Sovereign Must Comport with Traditional Principles of Equity

Principles of equity are the foundation for any claim of restitution or disgorgement, regardless of whether the claim is brought by the sovereign or a private

individual. *See Liu*, 591 U.S. at 79-80 (applying equitable principles to such remedies “whatever the name”).

Fundamentally, restitution involves “restor[ing] something to someone, or restor[ing] someone to a previous position.” *Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. e (2011); *see also Restatement (First) of Restitution* § 1 cmt. a (1937) (“A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.”). Thus, an equitable claim for restitution must not seek “to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.” *Knudson*, 534 U.S. at 214; *see also Hughey v. United States*, 495 U.S. 411, 416 (1990) (“[T]he ordinary meaning of ‘restitution’ is restoring someone to a position he occupied before a particular event.”).

There is a long tradition, for at least the past eighty years, of the government pursuing this type of restitution remedy consistent with traditional equitable principles—including the requirement that restitution be compensatory and awarded for the benefit of individuals who suffered an actual wrong. Going back to *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), this Court upheld the government’s authority to seek restitution under an emergency price control statute, precisely because “[w]hen the Administrator seeks restitution . . . he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury,” but asks the court to “restor[e]

the status quo and order[] the return of that which rightfully belongs to the purchaser or tenant.” *Id.* at 402. “Such action is within the recognized power and within the highest tradition of a court of equity.” *Id.*

Likewise, in *United States v. Moore*, 340 U.S. 616 (1951), the Court upheld the United States’ ability to seek an order against a landlord directing “restitution to the tenant of all [rent] overcharges received” by the landlord. *Id.* at 618. And in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), this Court allowed the government to seek equitable relief to “restor[e] wage losses to employees discharged” unlawfully “where the measure of reimbursement is compensatory only.” *Id.* at 293-96.

The securities laws carry forward this tradition of permitting the government to seek restitution or disgorgement consistent with traditional equitable principles. *See* 15 U.S.C. § 78u(d)(5) (authorizing “any equitable relief that may be appropriate or necessary for the benefit of investors”); *id.* § 78u(d)(3)(A)(ii), (7) (authorizing “disgorgement” of “any unjust enrichment by the person who received such unjust enrichment as a result of such violation”). In *Liu*, this Court upheld the SEC’s ability to pursue disgorgement as an equitable remedy. 591 U.S. at 85. But the Court did so only after confirming that Congress “incorporat[ed] . . . longstanding equitable principles into § 78u(d)(5).” *Id.* And because the SEC’s then-prevailing view of disgorgement “seemed to exceed the bounds of traditional equitable principles” the SEC was obliged “to conform future requests for a defendant’s profits” to traditional equitable limits. *Id.* at 85-86.

As *Liu* itself made clear, those equitable limits include the requirement that disgorgement be compensatory and awarded for the benefit of wronged individuals: “The equitable nature of the profits remedy generally requires the SEC to return a defendant’s gains to wronged investors for their benefit. After all, the Government has pointed to no analogous common-law remedy permitting a wrongdoer’s profits to be withheld from a victim indefinitely without being disbursed to known victims.” *Id.* at 88; *see also id.* at 79 (“[T]o avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer’s net profits to be awarded for victims.”). And Congress’s amendment of the securities laws shortly after *Liu*, expressly authorizing “disgorgement” as a remedy, 15 U.S.C. § 78u(d)(7)—the very same term that *Liu* had just interpreted, 591 U.S. at 79-81—means that Congress embraced *Liu*’s equitable principles as the starting point for relief under that subsection as well. *See, e.g., Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Thus, the SEC’s authority to pursue relief must comport with traditional principles of equity, including the requirement that any restitution or disgorgement remedy serve to compensate identifiable parties whose rights were invaded.

II. Disgorgement Is Available Only When a Cognizable Interest Has Been Invaded, Which Requires Pecuniary Harm in the Securities Context

Because the sovereign’s authority to pursue disgorgement is limited by traditional equitable

principles, that necessarily requires evaluating the types of relief traditionally available to private plaintiffs. *Cf. Grupo Mexicano*, 527 U.S. at 319 (“We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.”). And any attempt by private plaintiffs to obtain equitable relief is limited first and foremost by Article III. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (“It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.”).

Under Article III, the baseline requirement for any suit is that “plaintiffs must demonstrate, among other things, that they suffered a concrete harm.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). In cases invoking equity or seeking disgorgement, the concrete harm requirement mandates that plaintiffs do more than simply demand additional money; they must demonstrate that a legal or equitable interest has been invaded. And in the securities context, the way to demonstrate the invasion of such interests is by proving economic harm.

A. Individuals Must Identify a Cognizable Interest in the Property They Seek to Have Returned

1. An equitable claim for restitution or disgorgement involves two distinct questions: first, whether liability exists under the law of unjust enrichment; and second, whether restitution or disgorgement is an available and proper remedy for the claim. As one leading treatise explains:

Unjust enrichment has both a substantive and a remedial aspect. The substantive question is whether plaintiff has a right at all, that is, whether defendant is unjustly enriched by legal standards. . . .

The remedial question is concerned first with whether, among the remedies possible, restitution is an appropriate or the most appropriate choice. Second, because defendant's gains can often be measured in different ways, the remedial question regards the appropriate measure or form of restitution.

Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* § 4.1(1) (3d ed. 2018); *see also Restatement (Third) of Restitution and Unjust Enrichment* § 3 cmt. d (“The law of restitution and unjust enrichment requires the surrender of benefits wrongfully obtained, but it does not tell us whether the defendant’s conduct is wrongful in a particular case.”).

The SEC’s certiorari-stage brief focuses primarily on the remedial question, defending disgorgement as an appropriate remedy even when there is no identified loss. *See, e.g.*, Br. at 6 (“The availability of disgorgement therefore turns on whether the violator has made a profit, not on whether the victim has suffered a loss.”). But the SEC never analyzes the threshold question, *i.e.*, the circumstances under which a legal or equitable interest exists sufficient to obtain a remedy at all (disgorgement or otherwise). And by ignoring that threshold requirement, the SEC’s position is that disgorgement is *always* available simply to “take[]

money out of the wrongdoer's hands," *Liu*, 591 U.S. at 80, which highlights that the SEC is seeking a fundamentally punitive remedy rather than an equitable remedy designed to restore the status quo. *Id.*

2. Importantly, a plaintiff cannot invoke equity and the disgorgement remedy simply by demanding that a constructive trust be imposed or that a particular pot of money be delivered to him. That approach, as this Court has recognized, "would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong." *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 214 (1881); *see also* 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 464 (12th ed. 1877) ("The true source of jurisdiction in such cases, is not the mere notion of a virtual trust; for then Equity Jurisdiction would cover every case of bailment.").

Rather, the plaintiff must identify a legal right or equitable interest that the defendant's conduct has invaded. *Cf. Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016) ("Because the doctrine of standing . . . is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as a basis for a lawsuit in English or American courts."). Only after establishing that threshold wrong can the plaintiff bring suit and seek disgorgement.

This Court applied these principles in *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), to conclude that plaintiffs lacked standing to bring their claims. It was not enough that the plaintiffs demanded disgorgement

and the return to their ERISA plan of particular lost profits. *Id.* at 541. Nor did standing exist simply by virtue of the alleged breach of fiduciary duty. *See id.* at 542. Instead, the plaintiffs needed a “concrete stake in this lawsuit,” which they lacked because they “have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments.” *Id.* at 541.

Similarly, in *Gollust v. Mendell*, 501 U.S. 115 (1991), this Court held that a stockholder seeking disgorgement must “maintain some continuing financial stake in the litigation.” *Id.* at 125. Otherwise, allowing suit without such a concrete interest would raise “serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III’s case-or-controversy limitation on federal court jurisdiction.” *Id.*; *see also CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (“[T]o obtain relief by surcharge . . . a plan participant or beneficiary must show that the violation injured him or her.”). This Court has thus already determined that a breach of duty alone does not establish standing to seek equitable relief; Article III requires a cognizable interest in the funds over which disgorgement is sought.

Equitable doctrines independently confirm that a claim for restitution must involve property over which the plaintiff has some legal claim. Specifically, restitution “concern[s] the identification and measurement of those gains to the defendant that should be regarded as unjust enrichment, in that they are properly attributable to the defendant’s interference with the claimant’s legally protected rights.”

Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a (emphasis added). Thus, an invasion of “legally protected rights” is a threshold requirement for any restitution claim.

Moreover, restitution and disgorgement frequently draw on principles of trusts. *Cf. Liu*, 591 U.S. at 82. Under that doctrine, too, only those with a cognizable interest are entitled to sue. *See Russell v. Clark’s Ex’rs*, 11 U.S. (7 Cranch) 69, 97 (1812) (“It is settled in this Court, that *the person for whose benefit a trust is created*, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself.” (emphasis added)). Thus, a suit to enforce a private trust “may be maintained by any beneficiary *whose rights are or may be adversely affected* by the matters at issue.” *Restatement (Third) of Trusts* § 94 cmt. b (2012) (emphasis added); *see also Restatement (Second) of Trusts* § 214 cmt. b (1959) (“A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him.”). As the Bogert treatise explains, “[a]ny beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief.” Bogert’s *The Law of Trusts and Trustees* § 871, Westlaw (updated May 2025). And Scott & Ascher states the rule plainly: “In order to maintain a suit against the trustee, the beneficiary must show that the beneficiary’s own interest is affected.” *Scott & Ascher on Trusts* § 24.19, Lexis (updated Sept. 2025).

3. Before even considering whether disgorgement or restitution would be a proper remedy, therefore, a party

first must establish that they have some cognizable interest in the property or funds that they are seeking.

A plaintiff lacks a cognizable interest whenever their position would be unchanged compared to the but-for world of no breach or wrongdoing. In *Thole*, for example, even if the alleged breach had never occurred, the plaintiffs would be in exactly the same position and receive exactly the same benefits. 590 U.S. at 541. Thus, the plaintiffs did not have an “equitable or property interest” sufficient to give them a “concrete stake in th[e] lawsuit.” *Id.* at 541-43.

In contrast, when someone unlawfully steals or uses property belonging to another to generate a profit, disgorgement is appropriate because in the but-for world the property owner would be entitled to those profits (either by doing the profit-generating activities himself, or by bargaining with the third-party for payment for use of his property). *Cf. Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. d (“Restitution is the law of nonconsensual and nonbargained benefits.”). That but-for harm exists regardless of whether the property itself was damaged. *See id.* § 3 cmt. b (“Restitution in such cases protects the owner’s right to insist that any use of property by another—whether or not it diminishes the property’s value—be made with the owner’s consent and on the owner’s terms.”).

Additionally, in many cases where disgorgement is awarded, the remedy functions as an approximation of damages where the harm would otherwise be difficult to calculate. *Cf. Restatement (Third) of Restitution and Unjust Enrichment* § 3 cmt. b (discussing the

“advantage” of restitution when “the amount of the gain is at least more easily proven” than the amount of injury). In cases involving a fiduciary’s self-dealing, for example, sometimes harm is presumed because “the beneficiaries will be at a disadvantage in terms of information concerning the transaction,” and a presumption of harm guards against that asymmetry. Bogert’s *The Law of Trusts and Trustees* § 543; see also 1 Story, *Commentaries on Equity Jurisprudence* § 322 (equity allows the beneficiary to void a transaction without proving precise harm “to guard against this uncertainty and hazard of abuse”); *Restatement (Third) of Agency* § 8.02 cmt. b (2006) (“The benefit realized by the agent can often be calculated more readily than any harm suffered by the principal.”). A presumption of harm is therefore consistent with (rather than an exception to) the general requirement that restitution be available to remedy harms existing in the but-for world. Regardless of the appropriate evidentiary burden for establishing those harms in particular cases, such harms still must exist as a requirement for unlocking equity’s suite of remedies.

In short, to bring a claim for restitution or disgorgement, the mere fact that a wrong occurred and profits resulted is not enough. The plaintiff must instead demonstrate that they have a cognizable interest in the funds or property for which restitution or disgorgement is sought, meaning that the plaintiff suffered concrete harm compared to the but-for world where no breach occurred.

B. In the Securities Context, Investors Who Were Not Harmed Have No Cognizable Interest in Someone Else's Profits

Applying these principles to the securities context, investors who suffered no pecuniary harm from a defendant's activities have no legally protected interest in the profits stemming from those activities. Such investors stand in functionally the same position as the plaintiffs in *Thole*—they can point to a breach of duty, but that breach did not affect their own rights or financial position.

1. To illustrate the issues, consider several different situations. In the simplest case, “[s]uppose a thief takes plaintiff’s \$30 watch and sells it for \$40. The thief is liable for \$40, as ‘restitution.’” Dobbs & Roberts, § 4.1(1). In that scenario, it is easy to demonstrate but-for harm: the plaintiff not only lost his \$30 watch but also the \$10 in profit he would have made if he (rather than defendant) elected to sell the property rightfully belonging to him. *See id.* (“Sometimes unjust enrichment is so obvious that it is not important in the analysis: if defendant steals plaintiff’s watch, he must restore it. Defendant in such a case is a wrongdoer, and plaintiff has title to the goods.”). As the watch’s rightful owner, the plaintiff is entitled to the full profits deriving from the watch.

Suppose instead that someone pays \$5 to their friend to inspect a watch and advise them on a potential purchase. The friend recommends that they purchase the watch at its listed price of \$30 because it will soon be re-sellable for \$40, and the person does in fact purchase and re-sell the watch at those prices. Unbeknownst to

the purchaser, however, the friend had failed to register with the government as a “watch adviser.”

In this scenario, the watch re-seller’s own legal rights have not been violated at all. They suffered no harm—in fact, they turned a profit—which is exactly the same position they would occupy in the but-for world (where no breach occurred and the friend *had* registered with the government). Alternatively, if the friend had never been hired at all, the but-for world would leave the watch purchaser in a *worse* position, having never made the recommended watch transactions and profited thereby.

To be sure, the friend’s failure to register was a public law violation that could expose them to criminal or other penalties. The friend’s failure to disclose their non-registered status might also constitute fraud, to the extent that non-disclosure was material to their being hired. *Cf. Kousisis v. United States*, 605 U.S. 114, 124 (2025) (federal wire fraud statute does not require proof of economic loss in scheme to defraud). And if the friend had provided bad advice—such that the \$30 watch resold only for \$20—that would be pecuniary harm entitling the purchaser to seek recovery. In the absence of such pecuniary harm, however, there is no freestanding basis for restitution, given that the watch purchaser suffered no harm and his rights were not invaded.

Indeed, the absence of pecuniary harm demonstrates that restitution on these facts would be highly inequitable. The watch purchaser received sound advice in exchange for his \$5; he then used that advice to turn a profit of \$10; and allowing him to seek restitution of his

\$5 fee (on top of his profit of \$10) significantly overcompensates him, far above his position in the status quo *ante*. That result would not be “traditionally considered an equitable remedy” given that it is not “limited to restoration of the status quo.” *Tull v. United States*, 481 U.S. 412, 424 (1987); *cf.* *Dobbs & Roberts*, § 4.4(3) (“Even the willful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder.”). Thus, restitution in the absence of pecuniary harm does not fulfill the doctrine’s central purpose of restoring individuals to their rightful position—it goes beyond that, essentially “transforming an equitable remedy into a punitive sanction.” *Liu*, 591 U.S. at 79.

2. The error of the SEC’s legal position is apparent not just in the above hypothetical, but also in real-world securities cases where the requested disgorgement goes far beyond traditional equitable principles.

Take the Second Circuit’s decision in *SEC v. Govil*, 86 F.4th 89 (2023), where the defendant allegedly made fraudulent securities offerings, misrepresented the intended use of the proceeds being raised, and diverted over \$7.3 million to his personal accounts. There is no question that Govil harmed the company by misappropriating its assets (and thus he settled with the company directly, by agreeing to return assets valued at \$7.1 million). *Id.* at 95-96. Govil also conceded that he engaged in misconduct, justifying injunctive relief against him as well as a civil penalty of \$600,000. *Id.* at 96-97 & n.6. In addition to those remedies, the SEC also sought disgorgement of the full amount that Govil had misappropriated—over \$7.3 million—purportedly for distribution to individual investors. *Id.* at 96.

As the Second Circuit explained, however, those individual investors “may not have been financially harmed as a result of Govil’s misconduct because the investors received the return on the investment contemplated at the outset.” *Id.* at 105 (internal quotation marks omitted); *see also id.* at 104 n.16. Just like the watch purchaser, therefore, in the absence of pecuniary harm those individual investors had no legal or equitable right to Govil’s alleged proceeds. In the but-for world (where Govil engaged in no misconduct), the investors would have been in exactly the same position, or worse off (to the extent they never invested). Thus, there is no equitable basis for allowing disgorgement on such facts—which would result in double recovery for investors, allowing them both to retain their investment gains *and* recover the proceeds from their original investments. Such a double recovery would be inconsistent with restitution’s goal of restoring the status quo. *Cf. Liu*, 591 U.S. at 80 (“At the same time courts recognized that the wrongdoer should not profit ‘by his own wrong,’ they also recognized the countervailing equitable principle that the wrongdoer should not be punished by ‘pay[ing] more than a fair compensation to the person wronged.’” (quoting *Tilghman*, 125 U.S. at 145-46)).

Similarly, in *SEC v. Navellier & Associates, Inc.*, 108 F.4th 19 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 2777 (2025), the SEC sought disgorgement of over \$22 million in investment adviser fees, plus \$14 million in profits from the sale of an investment strategy, because the defendant company misrepresented how long it had been using its investment strategy—“notwithstanding

the fact that . . . clients profited from their investments” pursuant to the strategy. *Id.* at 41 n.14. Again, the company’s misrepresentations were likely fraud to the extent they were material. *Cf. Kousisis*, 605 U.S. at 124. And the SEC was free to pursue injunctive relief and civil penalties for such conduct, which it also did. *Navellier*, 108 F.4th at 33.

On the question of disgorgement, however, the investors suffered no harm and lost no rights. They paid fees for services that they actually received, and that performed as expected. The investors thus suffered no harm compared to the but-for world (where either they did not invest, or would have made the same profits because the investment strategy performed as-advertised). These investors are indistinguishable from the *Thole* beneficiaries: a breach of duty is alleged, but no invasion of their legally protected interests occurred. The First Circuit thus erred in upholding the \$22 million disgorgement order, without attempting to “trac[e]” the profits to the allegedly “wrongful act.” *Id.* at 43 (internal quotation marks omitted); *contra Restatement (Third) of Restitution and Unjust Enrichment* § 51(4) (“[T]he unjust enrichment of a conscious wrongdoer . . . is the net profit *attributable to the underlying wrong.*” (emphasis added)).

Finally, consider *SEC v. Ripple Labs, Inc.*, No. 20-cv-10832, 2024 WL 3730403 (S.D.N.Y. Aug. 7, 2024), in which the defendant engaged in unregistered securities offerings and the SEC sought over \$876 million in disgorgement on the theory that registration would have required the company to disclose certain pricing discounts they had previously offered to investors. *Id.*

at *2, 5. Again, that was on top of the SEC seeking a civil penalty of the same amount, as well as seeking injunctive remedies against the defendant companies. *Id.* at *2. In terms of disgorgement, however, “the SEC does not (and cannot) establish that [the company] would have, in fact, offered any additional discounts to investors had it complied with Section 5’s registration requirements.” *Id.* at *6. The violation thus had no effect on investors’ purchases compared to the but-for world where the company had made all required disclosures.

In each of these cases, the SEC was free to pursue injunctive relief, civil monetary penalties, and other forms of relief against the alleged misconduct. But disgorgement was inappropriate because there was no antecedent showing that the defendants’ conduct invaded any investors’ legal rights or interests. A tangible economic loss would have meant that investors failed to receive what they were promised, and thus they suffered harm compared to the but-for world. In the above cases, however, the investors suffered no harm compared to the but-for world because their property was not stolen and the alleged breaches did not result in any harm—instead, the investors were left better off. Just like the beneficiaries in *Thole*, the alleged breaches did not affect investors’ legal or equitable interests, and thus restitution was inappropriate.²

² In this case, the Ninth Circuit erred in resolving the threshold legal question about whether economic harm is required, and thus found it unnecessary to decide whether the SEC had, in fact “made a showing of pecuniary harm.” Pet. App. 10a n.4. The proper disposition, therefore, would be to vacate the Ninth Circuit’s

III. The Plain Text of the Securities Exchange Act Requires a Showing of Pecuniary Harm

Under the Securities Exchange Act, courts are authorized to award “any equitable relief that may be appropriate or necessary for the benefit of investors,” 15 U.S.C. § 78u(d)(5), as well as “disgorgement” of “any unjust enrichment by the person who received such unjust enrichment as a result of [a] violation.” 15 U.S.C. § 78u(d)(3)(A)(ii), (7). The text of these provisions authorizes restitution or disgorgement only upon a showing of pecuniary harm to investors, and the overall statutory scheme further confirms that conclusion. In particular, adopting a version of disgorgement rooted in deterrent purposes would contravene the statute’s existing penalty provisions, and allowing the SEC to pursue disgorgement without a showing of pecuniary harm would undermine private parties’ Seventh Amendment rights.

A. The Disgorgement Statutory Provisions Themselves Require Pecuniary Harm

The governing statutes authorize only those forms of restitution and disgorgement that are consistent with the equitable principles discussed in Parts I-II, *supra*.

Specifically, § 78u(d)(5) expressly references “equitable relief,” and then goes further to limit the available remedies only to “equitable relief that may be appropriate or necessary for the benefit of investors.” This Court has already interpreted such language to

opinion and remand for further proceedings on whether Sripetch’s conduct caused actual pecuniary harm to investors.

mean less than the full range of remedies potentially available in equity, but instead to mean only “those categories of relief that were *typically* available in equity.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *see also Liu*, 591 U.S. at 89. Although § 78u(d)(7) does not contain the “for the benefit of investors” language, the statute authorizes “disgorgement,” a term interpreted in *Liu* as necessarily requiring compliance with traditional equitable principles. *See* 591 U.S. at 86 (“Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term ‘disgorgement’ in various statutes.”).

Thus, the statute requires that any restitution or disgorgement remedy comply with the equitable principles set forth above and as discussed in *Liu*—including the requirement that disgorgement must “return a defendant’s gains to wronged investors for their benefit.” 591 U.S. at 88. As *Liu* held, that requirement cannot be satisfied merely by depriving a wrongdoer of profits; the remedy must benefit specific, harmed investors. *See id.* (“The equitable nature of the profits remedy generally requires the SEC to return a defendant’s gains to wronged investors for their benefit.”). If no investors were financially harmed, there is no identifiable class of beneficiaries, the proceeds have nowhere to go, and the statutory basis for disgorgement goes unsatisfied.

Contrary to the SEC’s contention, this argument is not based on parsing “the language of an opinion” as though it were “a statute.” Br. at 6 (quoting *Brown v. Davenport*, 596 U.S. 118, 141 (2022)). Rather, it is rooted in the statute itself. *Liu* interpreted the word

“equitable,” 15 U.S.C. § 78u(d)(5), and the principles embedded within that authorization for “equitable” relief require that disgorgement fulfill compensatory rather than punitive purposes. *See Liu*, 591 U.S. at 80 (“While the Court acknowledged that disgorgement was a ‘limited form of penalty’ insofar as it takes money out of the wrongdoer’s hands, it nevertheless compared disgorgement to restitution that simply ‘restor[es] the status quo,’ thus situating the remedy squarely within the heartland of equity.” (quoting *Tull*, 481 U.S. at 424)). The SEC’s claimed authority to obtain disgorgement even in the absence of pecuniary harm is neither compensatory nor “for the benefit of investors,” 15 U.S.C. § 78u(d)(5), and would effectively read that requirement out of the statute and override Congress’s express choice to use the term “disgorgement” in § 78u(d)(7). *See Liu*, 591 U.S. at 89 (“[T]he SEC’s equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of § 78u(d)(5).”); *id.* at 86 (“Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term ‘disgorgement’ in various statutes.”).

B. The Statutory Scheme Precludes Adopting the SEC’s Version of Disgorgement Rooted in Deterrence

Beyond just the text of the disgorgement provisions themselves, the Securities Exchange Act’s overall enforcement scheme supports authorizing disgorgement only when investors have suffered pecuniary harm.

The SEC's theory of disgorgement—that the SEC is permitted to recover a defendant's profits anytime there has been a violation, regardless of whether that violation caused any harm to investors—is fundamentally rooted in principles of deterrence, not compensation. Even in those cases where disgorgement is permitted because quantifiable harms exist but may be difficult to prove, commentators recognize that the rationale is rooted in part in deterrence:

Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive to take without asking—since the nonconsensual transaction promises to be more profitable than the forgone negotiation with B.

Restatement (Third) of Restitution and Unjust Enrichment § 3 cmt. c; see also *id.* § 51 cmt. f (“[T]here would be an incentive to embezzlement if the defendant were permitted to retain the profits realized in such a transaction.”).

Here, the SEC's version of disgorgement goes even further—claiming the ability to disgorge profits even when there has been no harm to investors whatsoever, and frequently where the conduct actually *benefitted* investors. In those situations, the disgorgement remedy

does not serve any plausible compensatory purpose, and instead operates only to deter future violations.

Within the Securities Exchange Act, however, there are already separate penalty provisions allowing the government to deter misconduct. In particular, the Act provides for criminal penalties, which the United States pursued and obtained in this very case. *See United States v. Sripetch*, No. 3:20-cr-160 (S.D. Cal. Aug. 1, 2022), ECF No. 128 (imposing a 21-month term of imprisonment for violations of 15 U.S.C. §§ 77e(a)(1), 77x). Moreover, in addition to disgorgement and other remedies, the SEC may pursue civil penalties, including civil penalties for “the gross amount of pecuniary gain to such defendant as a result of the violation.” 15 U.S.C. § 78u(d)(3)(B).

Thus, there is no need to expand—and it would be inappropriate to interpret—the disgorgement remedy under § 78u(d)(5) and (7) as applying to situations where investors have not suffered any pecuniary harm, as those situations are already addressed in other provisions of the statute. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 80 (2021) (a statute’s “grant of equitable authority does not authorize” a particular form of relief where “the relevant statutory scheme . . . contain[s] other ‘elaborate enforcement provisions,’” including separate “provisions that explicitly provide for that form of relief” (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487 (1996))).

C. A Contrary Conclusion Would Allow the SEC to Undermine Seventh Amendment Rights

The existence of these alternate civil penalty provisions is significant for a further reason: they highlight the dangers of the SEC's position. Specifically, under *SEC v. Jarkesy*, 603 U.S. 109 (2024), the SEC's civil monetary penalties are legal claims that trigger Seventh Amendment jury trial rights. Disgorgement, however, is an equitable remedy that is not subject to the Seventh Amendment. *Id.* at 122. The SEC therefore has a powerful incentive to expand equitable disgorgement as broadly as possible, because doing so allows it to seek profit-stripping monetary sanctions while avoiding the constitutional protections that attend legal remedies.

The SEC's position here is that they should be allowed to seek equitable disgorgement in every case, even where investors suffered no harm, and that there is no need for that remedy to actually compensate any harmed investors. *Cf. Liu*, 591 U.S. at 89. That is a civil penalty in all but name. *See Kokesh v. SEC*, 581 U.S. 455, 467 (2017) (when "disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers' as a consequence of violating public laws, they represent a penalty" (quoting *Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013))). Yet this type of surreptitious civil penalty, sought under the guise of disgorgement, would allow the agency to operate outside the Seventh Amendment's protections.

These dangers are not hypothetical: the SEC already seeks disgorgement frequently and in large amounts, without directing the bulk of collected funds to any

identifiable victim. For example, in 2024 (the most recent year for which SEC data is publicly available), the Commission collected a record amount of \$6.1 billion in disgorgement and prejudgment interest, but only \$2.1 billion in civil penalties, and the Commission distributed only \$345 million to harmed investors. *See* Press Release, SEC, *SEC Announces Enforcement Results for Fiscal Year 2024* (Nov. 22, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186>. These numbers reflect an agency committed to using equitable disgorgement as aggressively as possible, regardless of the degree to which it results in real-world compensatory relief for investors. The SEC also wields other powerful remedial tools, such as the ability to seek “obey the law” injunctions that leave regulated entities under continuous threat of contempt. *Cf. SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005). Allowing disgorgement to expand further—untethered from any showing of investor harm—would compound these dangers and provide the Commission an easy end-run around the Seventh Amendment limits that *Jarkesy* sought to impose on the agency.

This Court should therefore confine disgorgement to its equitable roots: a remedy for the benefit of specific investors whose legally protected interests were actually invaded by the defendant’s conduct. Consistent with those principles, the judgment below should be vacated and the case remanded for a determination whether Sripetch’s alleged conduct caused actual pecuniary harm to investors.

CONCLUSION

For the foregoing reasons, the Court should vacate the Ninth Circuit's decision and remand for further proceedings.

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Respectfully submitted,

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