No. 25-466

IN THE

Supreme Court of the United States

ONGKARUCK SRIPETCH,

Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF BRENDA BARRY, CALEB MOODY, AND ERIC CANNON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Brenda Christine Barry, Eric Christopher Cannon, and Caleb Austin Moody are appellants in a case pending on rehearing before the United States Court of Appeals for the Ninth Circuit, *SEC v. Barry* (No. 23-2699). There, a Ninth Circuit panel recently endorsed an unwarrantedly expansive application of the federal securities laws and imposed a substantial disgorgement award that ignores the limits on equitable relief established by the First and Second Circuits and mandated by this Court's decision in *Liu v. SEC*, 591 U.S. 71 (2020). *See SEC v. Barry*, 146 F.4th 1242, 1262-64 (9th Cir. 2025). Specifically, the panel invented a novel theory of pecuniary harm—the "loss of the time value of money"—to justify disgorgement for non-fraud registration violations, entirely abandoning any requirement that the SEC prove a causal link between the violation and the ill-gotten gains. *Id.* at 1263-64 & n.5. This holding exacerbates the circuit split presented in the instant petition regarding the viability of the equitable remedy of disgorgement following *Liu*.

Amici have filed a petition for en banc rehearing, which addresses this critical disgorgement issue, as well as a second, foundational circuit split concerning the definition of an "investment contract" security under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). As *amici* explain, while pretending to side-step the circuit

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties received advance notice of the *amici*'s intention to file this brief. This brief is also accompanied by a motion for leave to file a brief as *amici curiae*.

split on whether disgorgement requires a showing of pecuniary harm, *Barry*, 146 F.4th at 1264 n.6, the Ninth Circuit panel effectively eviscerated the requirement adopted by the Second Circuit in *SEC v. Govil*, 86 F.4th 89, 103-05 (2d Cir. 2023). *Amici* thus have a substantial interest in this petition, which provides the Court with the opportunity not only to resolve the circuit split on that important issue, but also to clarify what constitutes the requisite pecuniary harm.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari presents an important and certworthy question on whether the remedy of disgorgement requires a showing that investors have suffered pecuniary harm. The Ninth Circuit's decision below, which rejected that requirement, conflicts squarely with the Second Circuit's decision in *SEC v. Govil*, 86 F.4th 89 (2d Cir. 2023), which held that disgorgement demands a showing of inability to restore investors to the status quo. This Court should grant certiorari to resolve this split between two leading securities-law circuits, and to reaffirm that the equitable nature of disgorgement and this Court's decision in *Liu v. SEC*, 591 U.S. 71 (2020), require a proof of pecuniary harm before disgorgement may be imposed.

The need for this Court's intervention to reaffirm the equitable limits on the SEC's disgorgement authority is further demonstrated by *amici*'s own experience. In their case (decided shortly before the case below), the Ninth Circuit purported to side-step the circuit split identified in Mr. Sripetch's petition by adopting an unprecedented and expansive theory of harm—the "loss of the time value of money"—to justify disgorgement, even absent evidence of unrecoupable losses or a causal connection between the violation and any alleged harm. *SEC v. Barry*, 146 F.4th 1242, 1262-64 & n.5 (9th Cir. 2025). This novel approach—for which the *Barry* court cited no support in relevant case law or scholarship—demonstrates the extent to which the Ninth Circuit is willing to dispense with meaningful restraints on the SEC's disgorgement authority. This Court should grant certiorari in this case, confirm that disgorgement requires a showing of pecuniary harm, and clarify that the "time value of money" theory does not satisfy that rigorous standard.

ARGUMENT

I. The Petition Presents a Certworthy Question on Whether Disgorgement Requires a Showing of Pecuniary Harm.

This Court's decision in *Liu v. SEC*, 591 U.S. 71 (2020), cabined the SEC's authority to seek disgorgement as an equitable remedy under 15 U.S.C. § 78u(d)(5), limiting it to circumstances where "net profits" are awarded "for the benefit of investors" and consistent with longstanding equitable principles. *Id.* at 74–75. In the wake of *Liu*, a sharp circuit split has emerged regarding the predicate requirements for disgorgement, particularly whether the SEC must demonstrate that investors suffered actual pecuniary harm causally linked to the alleged securities violation.

In *SEC v. Govil*, 86 F.4th 89 (2d Cir. 2023), the Second Circuit held that disgorgement is unavailable unless the SEC identifies actual "pecuniary harm" to investors, meaning a demonstrable inability to restore them to the *status quo ante* through repayment of principal or other means. *Id.* at 103–05. The court of appeals emphasized that disgorgement must adhere to equity's core purpose of preventing unjust enrichment at the expense of victims, thus requiring proof that investors suffered financial losses that cannot otherwise be remedied. *Id.* at 105 ("whether disgorgement is equitable relief turns in part on whether it is 'awarded for victims'") (quoting *Liu*, 591 U.S. at 75). The Second Circuit's decision in *Govil* faithfully implements *Liu*'s mandate that disgorgement remain tethered to equitable traditions, avoiding its transformation into a punitive tool.

By contrast, in the decision below, the Ninth Circuit upheld disgorgement without proof of pecuniary harm to victims. *See SEC v. Sripetch*, 154 F.4th 980, 986 (9th Cir. 2025) (available at Pet. App. 10a); *see also* Pet. 6. In doing so, the Ninth Circuit directly rejected the Second Circuit's statutory analysis, asserting that it is "contrary to the common law" and "misapprehended the meaning of certain language in *Liu*." Pet. App. 11a, 13a; *see also* Pet. 7-8. The Ninth Circuit opined that, at common law, "a claimant seeking disgorgement … need not show any loss whatsoever, let alone a pecuniary loss." Pet. 11a-12a (citations omitted). The court of appeals also brushed aside this Court's observations in *Liu* that disgorgement "restores the status quo," and that "[t]he equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit," 591 U.S. at 80, 88 (brackets and citation omitted), *quoted in* Pet. App. 13a, 15a.

This Court's intervention is needed to resolve this express disagreement between the two circuits where the majority of securities cases are brought, and to vindicate the equitable limits of the disgorgement remedy. As this Court emphasized in *Liu*, "[t]he equitable nature" of disgorgement requires the SEC "to return the funds to victims." 591 U.S. at 88-89 & n.5; *see also Govil*, 86 F.4th at 103. And the Court "compared disgorgement to restitution that simply 'restor[es] the status quo,' thus situating the remedy squarely within the heartland of equity." *Liu*, 591 U.S. at 80 (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)) (selected internal quotation marks omitted). This Court's focus on the *return* of funds and the restoration of investors to status quo signals that disgorgement is intended to recoup to investors the funds they had contributed. By allowing investors who suffered no pecuniary harm to receive the proceeds of disgorgement, the Ninth Circuit is conferring a windfall and transforming disgorgement into a punitive measure—a result squarely at odds with this Court's teachings in *Liu*.

II. *Amici*'s Experience Demonstrates the Importance of the Question Presented.

Amici's experience further demonstrates the need for this Court's intervention to reaffirm the equitable limits on the SEC's disgorgement authority. In *amici*'s case, the Ninth Circuit, in a decision issued shortly before the decision below, acknowledged that the First and the Second Circuits "have split on whether pecuniary harm is required for a disgorgement award under the federal securities law." *Barry*, 146 F.4th at 1264 n.6 (discussing *Govil* and *SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19 (1st Cir. 2024)). The court of appeals asserted that it did not need to address that question because, it held, investors inherently suffer pecuniary harm through the "loss of the time value of their money" whenever funds are invested in an unregistered offering, regardless of whether they ultimately recoup their principal or even profit. *Id.* at 1263-64. The Ninth Circuit then affirmed a substantial disgorgement award based solely on this abstract theory—for which the court of appeals cited no support in securities case law or academic scholarship—without quantifying any actual opportunity costs (such as foregone alternative investments) or requiring the SEC to prove that the alleged registration violations caused the purported harm. *Id.*

The Ninth Circuit in *Barry*, moreover, applied its novel "time value of money" pecuniary harm standard to non-fraudulent registration violations under Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a), (c), against defendants who acted in good faith and without scienter. *Barry*, 146 F.4th at 1248-49. (The SEC brought no fraud allegations against *amici*, who acted solely as sales agents, only charging them with selling unregistered securities and failing to register as broker-dealers under federal securities laws.) The Ninth Circuit affirmed the disgorgement award despite the absence of any proof that investors suffered *any* harm as a result of *amici*'s registration violations.

The Ninth Circuit's approach in *Barry* abandons *Liu*'s emphasis on concrete victim restitution, *see* 591 U.S. at 89 (noting that disgorgement should not exceed "net profits" after deducting legitimate expenses), and instead permits disgorgement as a *de facto* penalty for technical violations of federal securities laws. It also ignores the equitable principle that disgorgement must be "for the benefit of investors," *id.* at 75, as the award in *Barry* was ordered despite undisputed projections that investors would recover their full principal through the ongoing maturity of the life settlement policies, 146 F.4th at 1262-63.

The decision in *Barry* highlights the inequities of the Ninth Circuit's approach: It allows the SEC to extract windfall penalties disguised as equity, even where no investors are left unwhole and no causal nexus exists between the violation and any gains. Such a regime contravenes *Liu*'s directive that disgorgement "must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains." 591 U.S. at 89.

This Court should grant certiorari in this case and hold that the equitable remedy of disgorgement requires a showing of pecuniary harm. The Court should also clarify that the Ninth Circuit's newly minted "time value of money" theory does not satisfy this requirement. Otherwise, the Ninth Circuit will have license to evade this Court's ruling—and to ignore equitable constraints on the SEC's disgorgement authority—by invoking the unbounded concept of pecuniary harm it articulated in *Barry*.[2]

[2] In addition to widening the split on disgorgement, the Ninth Circuit's decision in *Barry* takes sides in a longstanding circuit divide over whether pre-purchase efforts by a promoter may satisfy the "efforts of others" element of an investment contract under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The Ninth Circuit's decision exacerbated that split by rejecting the D.C. Circuit's reasoning in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), which discounts pre-purchase efforts, and aligning instead with the Fifth and Eleventh Circuits. *Barry*, 146 F.4th at 1255. This expansion of *Howey*—which is yet another example of the Ninth Circuit's pro-regulatory bent—compounds legal uncer-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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tainties in emerging investment sectors, such as alternative assets and digital markets, where pre-market activities are common but post-purchase profits often depend on market forces or investor decisions rather than promoter efforts.