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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES C. LIU, ET AL.,)

Petitioners,)

v.) No. 18-1501

SECURITIES AND EXCHANGE COMMISSION,))

Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 3, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:25 a.m.

APPEARANCES:

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on behalf of the Petitioners.

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P R O C E E D I N G S

(11:25 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-1501, Liu versus the Securities and Exchange Commission.

Mr. Rapawy.

ORAL ARGUMENT OF GREGORY G. RAPAWY

ON BEHALF OF THE PETITIONERS

MR. RAPAWY: Mr. Chief Justice, and may it please the Court:

SEC disgorgement orders compel a payment to the Treasury as a consequence for violation of a public law. An order like that is a penalty, as this Court's unanimous decision in Kokesh makes clear.

A penalty must be authorized by statute. So must any action by an administrative agency. There is no statutory authority for the SEC to seek disgorgement orders from a federal court and, therefore, it cannot.

I have three main points to make this morning. First, the text, structure, and context of the securities laws offer a straightforward route to reversal. Congress has

1 created for SEC court actions a tiered system of
2 civil money penalties that does not include
3 disgorgement.

4 Congress has also given the SEC
5 authority for an order requiring accounting and
6 disgorgement, using those very words, in an --
7 in an administered proceeding but no similar
8 authority for court actions.

9 And Congress has given other agencies
10 clear textual authority for judicial
11 disgorgement orders. Using traditional tools of
12 statutory construction, the result is clear:
13 The SEC can seek the authorized penalties but no
14 others.

15 Second, the statute's allowance for
16 equitable relief does not help the SEC because
17 penalties are not equitable relief. That has
18 been the law for centuries.

19 There is no principal distinction
20 between the characteristics that make SEC
21 disgorgement a penalty under Kokesh and those
22 that make it a penalty under the old equity
23 rule. Its purpose is to punish disobedience of
24 a public law. Any return of money or property
25 to those injured by the violation is

1 discretionary at best and often never happens.

2 Third, the phrase "equitable relief,"
3 enacted as part of Sarbanes-Oxley in 2002, did
4 not ratify circuit court cases that had approved
5 SEC disgorgement. Those cases, beginning with
6 Texas Gulf Sulphur, did not look to statutory
7 text. They certainly did not settle the meaning
8 of text that did not even exist yet.

9 Instead, we have here only
10 congressional silence, and silence does not give
11 an agency any authority to act, much less the
12 authority to punish.

13 JUSTICE GINSBURG: Mr. Rapawy, you
14 started out by saying Kokesh labeled this a
15 penalty and equity doesn't enforce penalties and
16 that's it.

17 But Kokesh was in a specific context.
18 It said, for statute of limitations purposes, it
19 is a penalty. For a different purpose, it need
20 not be characterized as -- as a penalty for
21 determining whether the fraudster can retain the
22 profits of the fraud. That's something
23 different.

24 But the notion that because we
25 categorize it in one context, disgorgement, as a

1 penalty, does not necessarily carry over to
2 another. There was a great legal scholar who
3 has been often quoted by this Court, Walter
4 Wheeler Cook, who said the tendency to assume
5 that a word appearing in two or more legal
6 contexts and so in connection with more than one
7 purpose -- one purpose is statute of
8 limitations, another is depriving the fraudster
9 of the profits of the fraud -- to assume that
10 characterization in one context carries over to
11 another is a notion that has all the tenacity of
12 original sin and must constantly be guarded
13 against.

14 So all Kokesh did was say, for statute
15 of limitations purposes, this is a penalty. It
16 did not say -- in fact, it was specific in
17 footnoting that it was not saying that in every
18 context it is a penalty.

19 MR. RAPAWY: Justice Ginsburg, I
20 certainly agree that this Court reserved this
21 question in Kokesh in Footnote 3. And my
22 argument is not that the holding of that case
23 resolves this case but that the reasoning of
24 that case can't effectively been -- be
25 distinguished from this case.

1 And my reasons for saying that, the
2 issues to which this Court looked in Kokesh in
3 determining whether SEC disgorgement is a
4 penalty track the reason or the -- the
5 justifications or the -- the cases in which
6 equity said it would not enforce penalties.

7 The -- the most important of those is
8 Kokesh's second reason, which is the -- that --
9 it found that SEC disgorgement has primarily a
10 punitive purpose, and that goes directly to the
11 core of the equity distinction.

12 JUSTICE GINSBURG: Why is it -- is
13 that so? Is it not an equitable principle that
14 no one should be allowed to profit from his own
15 wrong? That's not an equitable principle?

16 MR. RAPAWY: That is certainly an
17 equitable principle, Your Honor. However, it is
18 -- it is also an equitable principle that --
19 that a court of equity will not inflict a
20 penalty; it will make the person no worse off
21 than they were had they not committed the wrong.

22 And SEC disgorgement is a penalty
23 within the meaning of that rule because, as the
24 Court stated in Kokesh, it does, in fact, it
25 frequently does, did in this case, leave the

1 wrongdoer worse off than if the wrong had never
2 been committed.

3 JUSTICE ALITO: But is your argument
4 that disgorgement is never possible or that
5 disgorgement has been interpreted too broadly by
6 the courts?

7 Suppose it were limited to net profits
8 and suppose every effort was made to return the
9 money to the victims of the fraud. Would that
10 not fall within a traditional form of equitable
11 relief?

12 MR. RAPAWEY: I think it still would
13 not, Your Honor, and the reason is that the --
14 the traditional form of equitable relief to
15 which the government has drawn an analogy is the
16 accounting, and an accounting did have those
17 characteristics that Your Honor has stated.

18 But it also had the characteristic
19 that it was typically available only in cases
20 involving a breach of fiduciary duty. Now there
21 are instances in which it was applied outside
22 breaches of fiduciary duty, but I believe that
23 in those cases it would be properly
24 characterized as part of the equity court's
25 ancillary jurisdiction. And a remedy that was

1 only within the ancillary jurisdiction of a
2 court of equity would not be a remedy that was
3 typically available in equity, as this Court has
4 interpreted that phrase.

5 JUSTICE GINSBURG: What -- what do you
6 mean by "ancillary"?

7 MR. RAPAWY: Ancillary jurisdiction
8 meaning that once a court had some other
9 independent ground of equitable jurisdiction
10 over the case, and this is true of the old
11 patent and copyright cases, it might then to go
12 on -- go on to award an accounting in order to
13 afford complete relief.

14 JUSTICE SOTOMAYOR: How about the
15 fraud cases in which it was granted?

16 MR. RAPAWY: So I believe that the
17 fraud cases -- and we do address this in our --
18 in our reply, Your Honor -- I believe the fraud
19 cases all -- that the professors -- I assume
20 you're referring to the fraud cases cited in
21 Professor Laycock's brief, and I think those all
22 involve fiduciary relationships.

23 JUSTICE SOTOMAYOR: But let me -- let
24 me go back to that answer you gave. There is a
25 statute here that entitles the court to give

1 equitable relief that may be appropriate or
2 necessary for the benefit of investors.

3 I'm not sure why this doesn't provide
4 ancillary jurisdiction in the manner that you've
5 spoken about, assuming, as Justice Alito has
6 just stated, that the accounting is only for net
7 profits that are given to the actual people
8 injured.

9 We -- we have other -- I recognize the
10 multitude of questions, joint and several
11 liability, recovery for net profits of people,
12 tippees and things like that. Putting all of
13 that aside, just a simple straightforward case
14 of net profits from investors who are actually
15 injured.

16 MR. RAPAWY: So I have -- I have two
17 answers to that, Justice Sotomayor, if I may.
18 And one -- the first answer is that precisely
19 because of the complexities that your question
20 recognizes, the better course would be to say
21 this remedy that the SEC has sought here, SEC
22 disgorgement, which does not have a historical
23 parallel, does not exist. And if the S --

24 JUSTICE SOTOMAYOR: So why is it okay
25 in the administrative process and in all the

1 other laws where you say disgorgement is
2 referenced? You're making an argument that
3 there should never, ever be disgorgement --

4 MR. RAPAWY: Not at all, Your Honor.

5 JUSTICE SOTOMAYOR: -- in any statute,
6 because it's undefined in some way outside the
7 common law?

8 MR. RAPAWY: Not at all, Your Honor.
9 I am saying that in those con -- when Congress
10 says disgorgement, then it is the Court's task
11 to figure out what does disgorgement mean.

12 And perhaps in doing so, it would look
13 at that history and say, well, it would -- you
14 know, the money has to go back to the
15 individuals and it can be no more than -- than
16 the amount of the gains and so forth.

17 But, in the case where Congress has
18 not said disgorgement, and they did not say so
19 here, I think the Court should hesitate to read
20 it into a general provision for equitable
21 relief.

22 JUSTICE KAVANAUGH: If we --

23 MR. RAPAWY: And my --

24 JUSTICE KAVANAUGH: Keep going, sorry.

25 MR. RAPAWY: And my second point in

1 connection with that is that the reason not to
2 read equitable relief to encompass ancillary
3 jurisdiction is the same one this Court gave in
4 Great-West.

5 And that is that if you -- because, if
6 an equity court having jurisdiction of the case
7 could award any kind of relief using its
8 ancillary jurisdiction, including even
9 compensatory or punitive damages, if you were to
10 read the term that broadly, it would be no
11 limitation at all.

12 JUSTICE KAVANAUGH: If we were not to
13 agree with you on this last point, what do you
14 then say to Justice Alito's two conditions, net
15 profits, returned to victims?

16 MR. RAPAWY: If you were not to agree
17 with me on that point, then those are the -- the
18 primary inconsistencies that we've identified,
19 we've established with regard to historical
20 remedy.

21 I do think that the remedy that was
22 applied here, that the SEC sought here, was --
23 was clearly a penalty and clearly inconsistent
24 with Kokesh and that the -- there -- there is an
25 important background principle that --

1 JUSTICE KAVANAUGH: And that's because
2 it was not limited to net profits and was not
3 returned to the victims, at least not
4 necessarily?

5 MR. RAPAWY: Yes. And I would also
6 say because it -- it doesn't have the historical
7 parallel because there was no fiduciary duty
8 pleaded or proved, but --

9 JUSTICE KAVANAUGH: Right. That's the
10 --

11 MR. RAPAWY: -- Your Honor has
12 questioned that point.

13 JUSTICE KAVANAUGH: Yeah.

14 MR. RAPAWY: And --

15 JUSTICE KAVANAUGH: You may be right
16 or wrong on that point. I just wanted to
17 isolate your answer just to be --

18 MR. RAPAWY: Okay. So --

19 JUSTICE KAVANAUGH: -- just to be
20 clear.

21 MR. RAPAWY: -- analytically, Your
22 Honor, the point is -- the point is separate.

23 I do think that there are substantive
24 reasons for limiting the remedy to the fiduciary
25 duty as well, and that goes -- and this is

1 discussed in the amicus brief by Professors Bray
2 and Smith that talk about the origins of the
3 fiduciary or, rather, the accounting remedy, and
4 -- and explain that it is -- it is in some
5 respect equity forcing the fiduciary to do what
6 the fiduciary should have been doing in the
7 first place, which is to keep -- keep track of
8 the property that person is holding for someone
9 else, to make no profits on it, and to remit to
10 that person any -- any profits they had gained.

11 Those are substantive duties that do
12 not apply to everyone who is subject to the
13 securities law.

14 JUSTICE ALITO: But how -- how
15 realistic do you think it is to assume that when
16 Congress used this term equitable relief,
17 Congress meant to incorporate every curlicue of
18 old equity jurisprudence?

19 MR. RAPAWY: My best answer to that,
20 Your Honor, is that this Court had given the
21 phrase equitable relief in ERISA that meaning
22 six months before Congress passed this statute.

23 So, if Congress had wanted to know
24 exactly what equitable relief meant in the most
25 recent precedent of this Court, in a statute

1 that I think has some similar structure --
2 structural issues to this one, and I'd like to
3 get to those, they would have gone to Great-West
4 and they would have said, huh, okay, this --
5 they will look to history if we use these words.

6 If we don't want them to look to
7 history, we should use other words. We should
8 use words, for example, such as they later used
9 for the -- for the CFTC where they said
10 equitable remedies and disgorgement and
11 restitution count as equitable remedies. They
12 would have enlarged it if they wanted to go
13 beyond historical remedies, given the -- the
14 interpretation that this Court had -- has -- had
15 given those words so recently.

16 JUSTICE KAGAN: But, Mr. Rapawy,
17 Congress acted against a backdrop in which the
18 SEC was routinely seeking disgorgement, didn't
19 it?

20 MR. RAPAWY: It did, Your Honor.
21 However, I do not think that that supports the
22 government's position here for two reasons.

23 The first is that those cases, the
24 cases that form that backdrop were not
25 interpreting the text, not interpreting the

1 words, and so the prior construction canon by
2 its terms does not apply.

3 The second and perhaps more
4 substantive reason is that the decisions in the
5 court -- in the circuit courts were not,
6 although there was -- there was a consensus that
7 the SEC could get something accounted as
8 disgorgement, there was not a consensus as to
9 what the -- what that disgorgement was. And I
10 would point to two specific examples.

11 One is the Lipson case, which the
12 government cites in its brief as one of its
13 consensus cases. That's a Seventh Circuit
14 decision by Judge Posner. It's earlier the same
15 year that Sarbanes-Oxley was enacted. And that
16 decision says that the relief in that case, the
17 disgorgement in that case, counted as equitable
18 relief under Section 21(d) only because it was
19 relief against a fiduciary.

20 So, if you think that Congress meant
21 to adopt the circuits, you would then have to
22 decide did it mean to adopt Judge Posner's view,
23 in which case we would be correct that only
24 fiduciaries are covered.

25 The second example that I would give

1 you is the Fifth Circuit's decision in SEC
2 versus Blatt, and that was a decision in which
3 explicitly seeded money was going back to the
4 investors.

5 And so, to the extent that what the
6 government has sought to assert here is the
7 authority to send the money to the Treasury,
8 well, would Congress have looked to the decision
9 in Blatt and said: Well, no, actually, the
10 money, it looks like it would go back to the
11 investors and not to the Treasury.

12 JUSTICE KAGAN: Well, that may raise
13 the qualifications that Justice Alito was
14 talking about on what the disgorgement remedy
15 would entail. But the basic understanding that
16 there was something that counted as -- as -- as
17 that, that was in line with equitable powers,
18 isn't that a reasonable way to read the statute?

19 MR. RAPAWY: I don't think it is, Your
20 Honor, because I think it would leave too many
21 -- it would essentially leave this Court in the
22 position of deciding how the traditional remedy,
23 which would not by its terms apply here, the
24 government agrees in its brief that SEC
25 disgorgement is a substantial departure from

1 historical norms.

2 How do you craft that historical
3 remedy in light of all the policies under the
4 securities acts to -- to make sense here and
5 apply here? And I think that should be done by
6 the legislature in the first instance.

7 JUSTICE SOTOMAYOR: I'm sorry, but
8 they don't do it when they gave the SEC
9 administrative authority for disgorgement. And
10 if we have an administrative order by the SEC,
11 we have to do exactly what you're telling us not
12 to do. We would have to define what they meant
13 by that.

14 And -- and so what's the difference
15 between doing it in that context where Congress
16 has used the word disgorgement and this context
17 where we can presume or would presume that there
18 was something called disgorgement that could
19 have been restitution on -- or unjust enrichment
20 or something else of that ilk?

21 MR. RAPAWY: Well, Your Honor, with
22 respect, I think in -- in the -- in the
23 administrative context, they did. They gave the
24 SEC regulatory -- rule-making authority
25 concerning its disgorgement proceedings.

1 So that question is not going to go to
2 the courts in the first instance. It's going to
3 go to the agency in the first instance, and then
4 the agency will balance all the policy
5 considerations that I'm talking about.

6 But at least Congress has clearly said
7 you, agency, may do this, and you, agency, may
8 do this even if it's a punishment, I would -- I
9 would submit. And there are important
10 background principles that this Court should not
11 and -- and the courts in general should not say
12 an agency may do this where Congress has not
13 said so. And equally to the court -- the -- the
14 -- that the court should not say this person may
15 be punished where Congress has not said so.

16 And I would refer back in that context
17 to this Court's decision in Wallace versus
18 Cutten, one of the early administrative law
19 decisions, the Court's opinion through Justice
20 Brandeis where the -- the agency in that case
21 had the authority to bar people from trading in
22 grain futures. But the language of the statute
23 permitted them to do it only for -- in cases of
24 ongoing violations. And they wanted to do it in
25 cases of past violations, effectively to serve

1 as a punishment for those past violations.

2 And the Court said we will not --
3 Justice Brandeis for the Court said: We will
4 not enlarge the statute. We will not put
5 something in that Congress has -- has not put
6 there to make punishable what the stat -- what
7 -- what -- by the terms of the statute, I'm not
8 quoting exactly now but paraphrasing, what by
9 the terms of the statute was only to be
10 prevented.

11 And I think that that is a principle
12 that ought to, you know, have some weight here
13 as the Court considers what to do. This
14 authority is being used by the agency to punish,
15 that their justification for it is punitive.
16 The Court's decision in Kokesh said that it is
17 punitive.

18 JUSTICE GINSBURG: But I believe you
19 agreed with me that it's an equitable principle,
20 that no one should profit from his or her own
21 wrong. And I already suggested to you that it
22 can be punishment in one context and it can be
23 an equitable remedy in another context.

24 MR. RAPAWEY: Yes, Justice Ginsburg,
25 but I would say that in -- I would refer back to

1 this Court's decision in Livingston, which
2 talked specifically about what counts as
3 punishment in terms of the equitable rule.

4 And in that case, it's -- it's one of
5 the older patent cases, the special master had
6 imposed a remedy, a -- that -- that effectively
7 was what we probably would call a damages remedy
8 now. He allowed the -- the -- the patent owner
9 to recover from the infringer not what the
10 infringer actually did gain but what the
11 infringer might have gained. And he said the
12 measure is going to be -- because this person is
13 a trespasser and a wrongdoer, the -- the measure
14 of recovery is going to be what the -- the
15 patent owner lost, not what the infringer
16 gained.

17 And this Court said no, that is a
18 penalty that goes beyond the practices of
19 equity. We are aware of no rule that converts a
20 court of equity into an institute for the
21 punishment of simple torts.

22 And I think with all -- with the
23 greatest respect, when you take the principle
24 that no one can punish by their own -- no one
25 can benefit from their own wrong, excuse me, and

1 you decouple that from the historical context
2 and the historical remedies in which those rules
3 would apply, and you turn it into something, as
4 was done here, where it exceeds what the
5 district court found to be the gross pecuniary
6 gain and where it requires a payment to the
7 Treasury, it has gone beyond the realm of -- of
8 what equity would have recognized.

9 JUSTICE GINSBURG: Would it be -- I
10 thought there were efforts to get the money to
11 the investors. It doesn't require the money to
12 be paid into the Treasury. If the SEC can
13 locate the investors and get the money back to
14 them, the SEC says that's what it would do.

15 MR. RAPAWEY: They -- they do that in
16 some cases, Your Honor. They do not do it in
17 all cases. It is difficult from the public
18 materials to determine how often they do it and
19 how much money they do give back to investors.

20 JUSTICE KAGAN: Well, suppose we were
21 to reject your broad argument and focus the
22 question on -- on this issue and also on the net
23 profits issue.

24 What constraints do you think the SEC
25 is under?

1 MR. RAPAWY: I'm sorry, Your Honor.

2 Constraints --

3 JUSTICE KAGAN: On the -- on the
4 question of giving money back to the investors,
5 I think Justice Ginsburg raised the issue about
6 maybe you can't find them, they're not
7 identifiable, there are too many of them.

8 How -- what -- what do you think that
9 if -- if we -- if we said, you know, it's an
10 equitable principle that the money should go
11 back to the investors if possible, what does
12 that mean exactly that the SEC has to do?

13 MR. RAPAWY: I would say that if you
14 were to take that position and disagree with my
15 primary argument, it would -- then the -- the
16 rule should be, if you're giving the money back
17 to the investors, then you can take it and not
18 otherwise, because if you're not giving it back
19 to the investors, then it's just a punishment.

20 JUSTICE KAGAN: So not otherwise, even
21 if like you -- you've tried to find the
22 investors and you can't?

23 MR. RAPAWY: Well, I mean, I don't
24 know that there's any way in which the Court
25 could workably police how hard they're trying,

1 Your Honor. And their --

2 JUSTICE KAGAN: Well, you know, make
3 -- make good-faith efforts; make, you know,
4 diligent efforts. What -- whatever words you
5 want to use.

6 MR. RAPAWEY: I -- I mean, Your Honor
7 could certainly write that a decision -- in a
8 decision. I don't think it would be sufficient
9 guidance or sufficient compulsion to the agency
10 to ensure that this was used for compensatory
11 purposes and not for punitory --

12 JUSTICE GORSUCH: Counsel --

13 CHIEF JUSTICE ROBERTS: How --

14 JUSTICE GORSUCH: -- why -- why -- oh,
15 I'm sorry, Chief.

16 CHIEF JUSTICE ROBERTS: Excuse me.
17 How hard is that? Presumably, the investors
18 would want money, and I -- I suppose these
19 things could be done, you know, secretly or --
20 but, if -- if the SEC is engaged in a proceeding
21 like this with respect to investments, I would
22 assume that investors should be pretty easy to
23 find if there's money available.

24 MR. RAPAWEY: I -- I guess what I would
25 say, Your Honor, is that the -- the -- in many

1 cases that they currently use the power, they
2 don't even believe that it's appropriate to
3 return the money to investors. And I would
4 point to the Foreign Corrupt Practices Act cases
5 as the biggest example of that.

6 In theory, you know, could they find
7 them? They apparently do find it difficult in
8 many cases because, in many cases, the money
9 goes to the Treasury, but there are many cases
10 in which it is currently applied under which
11 none of this rationale would -- would apply at
12 all, including nine- and ten-figure recoveries
13 against private companies that are basically
14 just money taken from the investors and put to
15 the Treasury because they -- because that's how
16 they -- because they -- they want to use it as a
17 deterrent. They want to use it as a deterrent
18 and a punishment and to make an example out of
19 the violators of the securities laws.

20 JUSTICE GORSUCH: Counsel, in -- in --
21 in equity and kind of paralleled in our class
22 action practice today, we do police the efforts
23 of the defendant to find and return money to the
24 investors that he or she's defrauded. Sometimes
25 there's some left over and -- and -- because

1 people can't be found and we've had cases about
2 what to do with that money as well.

3 But why doesn't that supply at least a
4 ready guide and maybe make it impermissible for
5 the government to not make any effort at all or
6 -- but why can't we police it, assuming we
7 reject your primary argument?

8 MR. RAPAWY: I guess that would go --
9 I would -- I'm not saying you couldn't draw an
10 analogy to the class action cases, Justice
11 Gorsuch. Clearly you could. I think at that
12 point --

13 JUSTICE GORSUCH: And they come from
14 equity and traditional principles of equity,
15 right? I mean, they're drawn from that?

16 MR. RAPAWY: Under traditional
17 principles of equity, they couldn't recover
18 because there's no fiduciary here, Your Honor,
19 but --

20 JUSTICE GORSUCH: I understand your
21 argument.

22 MR. RAPAWY: But -- but in the class
23 action context as a workable matter, you could,
24 but I really think that is getting to the Court
25 is creating a new regulatory scheme where one

1 doesn't currently exist to save a remedy that
2 was originally created on the basis of circuit
3 court decisions that the government doesn't
4 really defend anymore and that the best course
5 would be to say: This remedy that the agency
6 sought here does not exist, and if -- if they
7 think that they need this remedy, they should go
8 to Congress for it.

9 JUSTICE KAGAN: And may I ask you
10 about your net profits rule, similar kind of
11 question? I mean, what does the SEC, in your
12 view, have to deduct?

13 MR. RAPAWY: So, at a minimum, they
14 have to start from the right place, which is
15 they have to start from the gains to the
16 individual defendant rather than what they did
17 in this case, which is starting from the losses
18 to investors.

19 And then I believe the standard that
20 this Court -- if you're -- if you're going to go
21 by the accounting standard that's applied in --
22 in the old patent cases, you would say it's you
23 calculate the profits as a manufacturer
24 calculates the profits of his -- of their own
25 business.

1 So it would be certainly legitimate
2 expenses. Here, we had lease payments that
3 weren't disputed -- there were actual lease
4 payments -- and equipment payments that -- it
5 wasn't disputed it was actual equipment payment.
6 And the district court said: I'm not going to
7 count any of that essentially for punitive
8 reasons. I think you're bad guys. You had
9 fraudulent intent from the start and so none of
10 it counts.

11 JUSTICE BREYER: If the leases in the
12 machinery was just a printout, only used for
13 more fraudulent stuff, would you deduct it then?
14 I mean, what they did is they had fliers going
15 around saying invest in my fraudulent gold
16 company, the equivalent thereof.

17 MR. RAPAWY: Well, I suppose that --

18 JUSTICE BREYER: Then you'd deduct it?

19 MR. RAPAWY: I'm sorry.

20 JUSTICE BREYER: Is that legitimate?

21 MR. RAPAWY: I think there may be a
22 certain point at which you could say -- I mean,
23 there's -- you could imagine a Ponzi scheme,
24 Your Honor, and in the case of the Ponzi scheme,
25 okay, it's all tainted.

1 But I think that the decision below
2 did not give the kind of consideration you would
3 need to give before reaching that kind of
4 conclusion about these defendants, where --

5 CHIEF JUSTICE ROBERTS: You -- finish
6 that sentence.

7 MR. RAPAWY: I'll wrap it up there,
8 Your Honor.

9 CHIEF JUSTICE ROBERTS: You may not
10 want to -- okay. Thank -- thank you, counsel.

11 Mr. Stewart.

12 ORAL ARGUMENT OF MALCOLM L. STEWART

13 ON BEHALF OF THE RESPONDENT

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

16 I'd like to begin by discussing the
17 significance of Kokesh, and, as some of the
18 questions have illuminated, the Court in Kokesh
19 said that SE -- disgorgement in SEC cases was a
20 penalty for purposes of a statute of limitations
21 provision. There's no reason to read the
22 decision more broadly.

23 And, in particular, the three reasons
24 that the Court gave for concluding that it was a
25 penalty for these purposes don't -- they can't

1 map onto the criteria for determining whether
2 something is equitable relief. The three
3 characteristics that the Court identified were
4 it's imposed as a consequence of violating a
5 public law, it serves a deterrent purpose, and
6 it's not compensatory.

7 And I'd say first that all three of
8 those characteristics were present in Kansas
9 versus Nebraska, in which this Court, sitting as
10 a court of original jurisdiction, ordered
11 disgorgement in an interstate compact case. And
12 in that case, the Court emphasized that when the
13 interstate compact was ratified by Congress, it
14 took on the character of a public law. And the
15 Court said the equitable power of a court of
16 equity is all the greater when the public
17 interest is concerned.

18 Second, the disgorgement remedy in
19 that case was intended only to serve deterrent
20 purposes. That was the whole justification for
21 the remedy, because, due to the fairly
22 idiosyncratic economic circumstances of the
23 parties, the special master concluded and the
24 Court agreed that a compensatory damages remedy
25 would not be sufficient to deter future

1 violations. And so compensatory damages were
2 awarded, but the Court ordered disgorge --
3 partial disgorgement on top of that in order to
4 ensure that there would be an adequate
5 deterrent.

6 And for the same reason, the third
7 characteristic that the Court identified in
8 Kokesh, namely, that disgorgement in SEC cases
9 is not compensatory, was true in Kansas versus
10 Nebraska as well. The disgorgement remedy was
11 ordered on top of the compensatory damages
12 award. That was deemed adequate to compensate
13 Kansas for its losses.

14 I'd like to turn next to the issue
15 that was taking up the discussion towards the
16 end of Mr. Rapawy's argument, which is the
17 formula by which the SEC urges that disgorgement
18 be calculated and courts ordinarily calculate
19 disgorgement in -- in fraud cases.

20 The Court in Kokesh cited the third
21 restatement of restitution and unjust enrichment
22 for the general rule that net profits are the
23 measure of disgorgement and that the defendant
24 is entitled to deduct its marginal costs.

25 Now the term "general rule" implies

1 that there will be exceptions. And if you look
2 at literally the next page of the restatement
3 from the one that the Court cited, the
4 restatement says the defendant will not be
5 allowed a deduction for the direct expenses of
6 an attempt to defraud the claimant.

7 And so, for example, if part of your
8 expenditures are, as Justice Breyer was
9 hypothesizing, if part of your expenditures are
10 sending out fraudulent communications, false
11 sales pitches that are intended to deceive
12 consumers in to -- to buying securities, that
13 would be the kind of expense that under
14 traditional equitable expenses -- under
15 traditional equitable principles would not be
16 allowed.

17 A second example. In Foreign Corrupt
18 Practices cases -- Act cases, the wrong is that
19 the defendant company has obtained a contract by
20 paying a bribe to the public official, and the
21 SEC would say, in those cases, the proper
22 measure of disgorgement is net profits earned on
23 the contract.

24 And so the defendant wouldn't be
25 charged gross receipts. The defendant would be

1 allowed to deduct its operating expenses, but we
2 wouldn't allow the defendant to count the bribe
3 itself as a cost of doing business, as a
4 deductible expense. That, in our view, wouldn't
5 be allowed in computing the amount of
6 disgorgement that would be ordered.

7 So the one thing that I would
8 emphasize most strongly is we are not, as to
9 measure of disgorgement, we are not asking for
10 an SEC-specific rule. We believe that the
11 arguments we've made in prior cases have been
12 consistent with traditional equitable principles
13 because, even though the general rule is that
14 you use net profits as the measure, that is
15 subject to exceptions. And we rely on the
16 exceptions in a variety of circumstances.

17 The second point I would make is, if
18 we're wrong, if in some instance or instances or
19 in some category of cases courts have been
20 awarding disgorgement in an amount that exceeds
21 what traditional equitable principles would
22 produce, then the correct answer is not to give
23 us everything and it's not to give us nothing.
24 It's that courts should continue to order
25 disgorgement but compute it in accordance with

1 traditional general equitable rules, not in
2 accordance with any SEC-specific formula.

3 JUSTICE SOTOMAYOR: But your -- your
4 position is, if I understand it correctly,
5 follow whatever the common law rule was with
6 respect to calculating net profits, return it to
7 investors, but that you're also a victim and so
8 that you -- you could take the money ahead of
9 investors, that you can keep the leftover
10 amounts? What -- what is your position with
11 respect to that broader question of who gets the
12 money? Why is it the Treasury? It's not the
13 SEC getting the money.

14 And one could see if -- potentially an
15 argument that if the SEC got the money, it could
16 then spend it on protecting investors, but if
17 the Treasury's getting it -- and I know you're
18 going to say money is fungible -- but, if the
19 Treasury is getting it, we don't really know if
20 it's being used to help investors.

21 MR. STEWART: Let me say three or four
22 things in -- in response to that. The first is
23 that, as an empirical matter, the SEC tries to
24 return the money to investors when it can, and
25 we're largely successful in doing that.

1 Now there is a category of cases like
2 the FCPA cases, the Foreign Corrupt Practices
3 Act cases, where sometimes we do get big
4 judgments. They're not returned to investors
5 because there really is no obvious universe of
6 individual victims from an FCPA violation -- an
7 FCPA violation. But, in cases where individual
8 victims can be located and the money can be
9 distributed, it's our general practice to do so.

10 The second thing is that --

11 JUSTICE GORSUCH: Before you -- before
12 you leave that, I'm sorry to interrupt, but I --
13 I thought last time around in Kokesh that the
14 representation from the government was different
15 on that score and that sometimes you do and
16 sometimes you don't.

17 MR. STEWART: I mean, sometimes it is
18 done and sometimes it is not done. Sometimes
19 the reason that it is not done is, as I was
20 saying with respect to the FCPA, there just is
21 no obvious universe of investors.

22 Sometimes it's not done because it's a
23 fraud that involves bilking a very large number
24 of investors out of a very small amount of money
25 each, and it's deemed infeasible to go to the

1 expense of locating the individuals given the
2 small amount that each would receive.

3 JUSTICE GORSUCH: Is it sometimes not
4 done just because it's not done?

5 MR. STEWART: I -- I can't rule out
6 that possibility. I will say that this is at
7 the discretion of the court. Now the statute
8 doesn't require that it be forwarded to
9 investors in any particular category of cases,
10 but this is at the court's discretion.

11 JUSTICE GORSUCH: Would the government
12 have any difficulty with a rule that the money
13 should be returned to investors where feasible?

14 MR. STEWART: I would say if -- if
15 that is couched as a general equitable
16 principle; that is, the court is sitting as a
17 court of equity, there would be nothing wrong
18 with a district judge in an individual case
19 saying unless you can persuade me that it is
20 infeasible to return this money to investors, I
21 am going to order that that be done. I don't
22 think that's typical practice, but --

23 JUSTICE GORSUCH: I'm sorry, I didn't
24 mean to interrupt from Justice Sotomayor's
25 question. I apologize.

1 MR. STEWART: No. And -- and so, yes,
2 there -- there is nothing in the statute that
3 precludes -- in individual cases where it seems
4 to be feasible, there's nothing that would
5 preclude the district court from insisting on
6 that.

7 Now, as we pointed out in the brief,
8 the Dodd-Frank Act does have these -- I'm sorry,
9 the Dodd-Frank Act has these provisions that
10 identify permissible uses of money that is
11 disgorged in a judicial or administrative action
12 but is not ultimately forwarded to investors.
13 It can be used, for instance, to pay
14 whistleblowers.

15 And so the statute specifically
16 contemplates the possibility that disgorged
17 funds sometimes will not be distributed for what
18 -- whatever reason. And it would really
19 undermine the statutory scheme to say that
20 distribution to investors is in all
21 circumstances a prerequisite to disgorgement.

22 JUSTICE SOTOMAYOR: Why? If -- if --
23 if the statute says that equitable relief that
24 may be appropriate or necessary for the benefit
25 of investors, do we have to say here and should

1 we say or not say here that that means if it's
2 not feasible to return it to investors, that
3 it's for the benefit of investors to give it to
4 the SEC?

5 MR. STEWART: I -- that statutory
6 language, we think, and I want to explain why,
7 refers to measures that will benefit the
8 investor community generally, not necessarily
9 the particular individual victims.

10 And I'd give the following reasons.
11 The first is that language applies to equitable
12 relief generally under Section 21(d)(5). And
13 so, if you imagine a court contemplating an
14 injunction, it would obviously be a very
15 constrained view of the court's injunctive
16 authority in an SEC enforcement action to say
17 that the court can only issue an injunction that
18 will benefit the particular individuals who have
19 been victimized.

20 JUSTICE GORSUCH: But if we can get
21 back to the money, which is where we're at, not
22 injunctive relief. I -- I -- I just want to --
23 I would like an answer to Justice Sotomayor's
24 question, which is if -- if it's feasible, on
25 what account should the government not be in the

1 business of returning the money, given -- given
2 the statement in the statute that we're supposed
3 to be following equitable principles here?

4 MR. STEWART: I -- I -- I --

5 JUSTICE GORSUCH: I take that to be
6 her point or her question to you, and -- and I
7 would appreciate an answer to that.

8 MR. STEWART: I -- I -- I don't -- I
9 don't see a problem with saying it is
10 appropriate or necessary only if it is forwarded
11 to investors if it is feasible to do that. The
12 point I was making about the -- the
13 whistleblowers and such was Congress clearly
14 didn't think that a disgorgement award could be
15 appropriate or necessary only if it was
16 forwarded to investors, because it made specific
17 provision for the circumstance in which
18 disgorged funds were left over.

19 The other point I'd like to address,
20 and Mr. --

21 JUSTICE KAVANAUGH: Can I make sure
22 I'm clear on your answer to Justice Gorsuch and
23 Justice Sotomayor? Because the first time you
24 answered it, you said it would be appropriate
25 for a district court to say that.

1 And I think Justice Gorsuch then
2 followed up and Justice Sotomayor. Would it be
3 appropriate for this Court to say that's the
4 rule; namely, that it has to be returned to
5 investors where feasible?

6 MR. STEWART: I -- I -- I wouldn't
7 have a problem with that. I mean, I don't know
8 that it is kind of in accordance with usual
9 principles for the Court to announce that sort
10 of instruction, but it would be consistent with
11 the SEC's practice. It would certainly be
12 directing the district courts to do something
13 that they could do already as an exercise of
14 their equitable discretion.

15 The only other thing I would say is
16 it's common ground that the SEC is authorized to
17 impose disgorgement administratively, and its
18 decisions are reviewable, but they're reviewed
19 under a more deferential standard.

20 And so the Court reviewing an SEC
21 disgorgement order is not going to be asking was
22 this a correct exercise of equitable discretion,
23 just was it within the range of reasonableness.

24 JUSTICE GINSBURG: The --

25 MR. STEWART: The other thing I wanted

1 to say that I think is -- I'm sorry, Justice
2 Ginsburg.

3 JUSTICE GINSBURG: Well, you -- you
4 were talking about the administrative authority
5 to order disgorgement, but you said that an
6 admin -- an ALJ can't do what a court could do,
7 as it did in this case, order an asset freeze.

8 But couldn't you take the
9 administrative decision and ask a court to
10 enforce that decision by freezing assets?

11 MR. STEWART: I mean, we sometime --
12 we sometimes do, after issuing an administrative
13 order, go to a court for enforcement if the
14 defendant is not obeying, and I think one of the
15 reasons that the SEC sometimes elects to proceed
16 in court originally is if we have doubts about
17 the defendant's compliance and we think we're
18 going to be in court anyway, then we might want
19 to save a step and go there first.

20 I guess part of our response to the
21 arguments about could we do this
22 administratively are to the effect that it
23 wouldn't be entirely unworkable. It would be
24 better than no alternative at all, but there's
25 no reason for the Court to set up an incentive

1 that creates an artificial -- a system that
2 creates an artificial incentive for us to
3 proceed in that way, since the defendant will
4 receive additional proceed -- protections if the
5 case is in court.

6 The -- the other thing I would say
7 that I -- I think is at least in part respective
8 -- responsive to Justice Sotomayor's question
9 and -- and also responds to something that Mr.
10 Rapawy said, he -- he characterized the
11 government as having conceded that our
12 disgorgement is a substantial departure from
13 historical norms. And that -- that's not really
14 what we said.

15 In the last paragraph of our brief,
16 the point we were trying to make was that you
17 look back at the 19th-century cases in which
18 disgorgement was ordered, and they all involved
19 awards to individual victims. That wasn't
20 because there was a large body of law saying you
21 couldn't award disgorgement to the government.
22 It was simply because until the middle part of
23 the 20th century, civil enforcement actions
24 filed by federal regulatory agencies were not a
25 thing. And so the question didn't come up one

1 way or the other.

2 And when those types of actions
3 started to become prevalent, courts had to -- to
4 grapple with questions about how do legal
5 principles that were developed in the context of
6 private suits map onto government enforcement
7 actions?

8 And in 1950, somebody could have
9 argued very plausibly that it just doesn't make
10 sense to order disgorgement to the government
11 because the essence of disgorgement has always
12 been payment to the wronged entity. You could
13 also have made a strong argument on the other
14 side that the core purposes of disgorgement are
15 to prevent the wrongdoer from profiting from its
16 own wrong and thereby to deter future
17 violations, and disgorgement can serve those
18 traditional purposes, regardless of where the
19 money ends up.

20 And as of 1850, that was an open
21 question. By the time that Congress enacted
22 Section 21(d)(5) in 2002, that question had
23 really been resolved because this Court in
24 Porter and Mitchell had said the federal courts'
25 equitable powers are at their height when the

1 public interest is involved. For 30 years,
2 courts in SEC enforcement actions had been
3 awarding disgorgement. Congress had passed
4 statutory provisions that pre- -- both
5 presuppose the availability of disgorgement in
6 SEC judicial proceedings and that authorized the
7 SEC to impose disgorgement administratively.

8 And so whatever else you -- whatever
9 other lessons you might derive from the decision
10 to authorize this to be done at administrative
11 proceedings, clearly Congress didn't think that
12 there was anything incongruous about the idea of
13 disgorgement going to the government,
14 disgorgement going in an SE -- in a government
15 enforcement action.

16 And so when Congress passed
17 Section 21(d)(5) in 2002, if you were asking a
18 kind of a conscientious well-informed member of
19 Congress what do you think you are authorizing
20 when you authorize district courts to issue
21 appropriate -- equitable relief that may be
22 appropriate or necessary, the first thing they
23 would ask is what kind of equitable relief have
24 courts been awarding up to this point?

25 For -- for instance, when you get

1 statutes where -- that authorize a court to
2 issue an injunction in accordance with the
3 principles of equity, how do you decide whether
4 a particular injunction is in accordance with
5 the principles of equity? You look at the way
6 that equity courts have been doing it in the
7 past.

8 And the lesson the Court has drawn is
9 you look to factors like adequacy of the remedy
10 at law, irreparable injury, a grant of authority
11 to proceed in accordance with the principles of
12 equity, is basically an admonition, keep doing
13 it the way that courts of equity have been doing
14 it.

15 And, similarly, in 2002, a
16 conscientious member of Congress would have
17 thought, at the very least, I'm authorizing
18 courts to continue to enter the equitable
19 remedies that they have entered up to that
20 point. And that was buttressed by the other
21 provision of the Sarbanes-Oxley Act in -- in
22 2002 that we've emphasized in our brief, which
23 was the fair funds provision that establishes a
24 mechanism to facilitate the distribution to
25 investors of funds that are disgorged in a

1 judicial or administrative proceeding. And it
2 also authorizes civil penalties to be added to
3 those funds.

4 JUSTICE BREYER: What is your answer
5 -- what is your response to the argument, if I
6 have it right, that in equity, the closest thing
7 is restitution, and in Great-West, the majority
8 said: Well, restitution was an equitable remedy
9 when it was a case in equity, but it was a legal
10 remedy it was a case in law?

11 MR. STEWART: Well, I think what
12 Great-West was dealing with specifically was --

13 JUSTICE BREYER: Different thing. I
14 agree with that, but there's this statement
15 there that restitution -- just what I said.

16 MR. STEWART: Let me say two things in
17 response to that. The -- the first, Great-West
18 was dealing with a breach of contract action.
19 And so the Court in Great-West said that, in
20 breach -- in breach of contract suits, if the
21 contract calls for party A to pay money to party
22 B, a suit seeking to compel A to pay the money
23 to B had historically been regarded as seeking
24 legal relief, not equitable relief.

25 And then, as Mr. Rapawy was saying,

1 the Court in Great-West emphasized that, yes,
2 there's some sorts of legal remedies. They're
3 not considered inherently equitable, but courts
4 of equity could sometimes award them as a matter
5 ancillary to their equitable jurisdiction. And
6 the Court said, at least under ERISA, that's not
7 what equitable relief meant.

8 I -- I don't think disgorgement can
9 really be portrayed in that way. I mean,
10 obviously, in Kansas versus Nebraska, the Court
11 ordered the disgorgement as -- treated
12 disgorgement as inherently equitable relief.
13 And one sign that it regard disgorgement as
14 equitable rather than legal was it said it is an
15 appropriate exercise of authority to enter
16 partial disgorgement. Yes, we would have
17 authority to issue -- require the defendant to
18 hand over the full amount of its profits, but
19 under the circumstances of the case, we think an
20 adequate deterrent purpose would be served by
21 requiring Nebraska to hand over a fraction of
22 its profits but far from the whole.

23 That -- that's the kind of equitable
24 discretion that the -- that's the kind of
25 discretionary judgment that is inherent in

1 equity.

2 The other thing I would say about
3 Mr. Rapawy's argument with respect to Livingston
4 and the patent cases, I mean, before the Court
5 had specific statutory authority to do so, in
6 cases like Livingston, the Court held that a
7 defendant's profits were the -- were an
8 appropriate element of relief in a patent
9 infringement suit. And the defendant was not
10 acting as a fiduciary or trustee; the defendant
11 was simply committing a wrong using an invention
12 in which the plaintiff had a property right, and
13 that was found to be an appropriate element of
14 relief. And the Court in Livingston said it is
15 not permissible for a court of equity to also
16 award interest because that would be a penalty.

17 Now, I think our legal system regards
18 interest differently than it did back in the
19 day, but I think the general principle from
20 Livingston remains sound. That is, if a court
21 were to compute disgorgement in accordance with
22 traditional equitable principles, both the
23 general rule that net profits are the measure
24 and any established equitable exceptions to that
25 rule, if the court computed its -- a

1 disgorgement award in that manner and then said
2 I'm tacking on another 50 percent because your
3 behavior was so egregious, we would agree that
4 that would be a penalty. That would be
5 something that would not be an appropriate
6 exercise of equitable authority under
7 Section 21(d)(5).

8 It -- it could still be done in the
9 SEC cases, because the Congress has authorized
10 civil penalties in addition to equitable relief,
11 but it could not be justified as an exercise of
12 equitable authority. But that's not what --
13 what's being done in this case.

14 JUSTICE GINSBURG: What do you do with
15 the Ninth Circuit saying there were no
16 legitimate expenses to -- to deduct, to arrive
17 at net profit?

18 MR. STEWART: I -- they -- they
19 allowed us a very small deduction for the amount
20 that remained in the corporate account and could
21 be distributed to investors, and certainly that
22 would always be an appropriate deduction, any --
23 any benefit that the investors received at the
24 end of the day.

25 But there were basically two

1 categories of expenses that the Ninth Circuit
2 and the district court didn't allow. One was
3 for the overseas marketing attempts. And I
4 think that was simply the -- the type of expense
5 that Justice Breyer was talking about. This was
6 money spent to perpetrate the fraud, money spent
7 to try to induce other investors to pay their
8 money into what was an -- essentially a --
9 pervasively a fraudulent scheme.

10 The other was Mr. Rapawy is correct
11 that some of the money was spent on things like
12 equipment, facilities, things that in another
13 context might have qualified as legitimate
14 business expenses, had there been a true intent
15 to construct a cancer treatment facility and do
16 what the marketer said they were going to do.

17 What the district court said, and I
18 believe this is on page 18A of the Petition
19 Appendix, it characterized those expenses as a
20 half-hearted attempt to convey the illusion of
21 progress.

22 And so the court's analysis on that
23 point was not extensive, but -- but we take the
24 point to have been these were not legitimate
25 business expenses because they didn't represent

1 a true good-faith effort to construct the
2 relevant facility. They simply represented an
3 effort to fool investors into thinking that
4 things were going along as planned.

5 And those -- those findings were
6 certainly subject to being reviewed on appeal.
7 We would agree that, had the investors had it in
8 their minds to construct the facility and it
9 just didn't pan out at the end of the day, those
10 would have been the sorts of things that could
11 have been used as deductions.

12 But given the conclusion of the lower
13 courts that this was a pervasively fraudulent
14 scheme in which essentially all of the expenses
15 were made to perpetrate the fraud, then we think
16 it's in accordance with traditional equitable
17 principles to allow no deductions.

18 But, again, the point we had stressed
19 most strongly is we think that Congress has
20 authorized courts to award disgorgement as
21 computed under traditional rules of equity.

22 If in a particular case or even if in
23 some larger category of cases the court believes
24 that exorbitant disgorgement has been awarded,
25 then the proper response is be more careful

1 about -- to tell lower courts be more careful
2 about the computation.

3 It -- it couldn't under any
4 circumstances be a justification for holding
5 that Congress has not authorized disgorgement at
6 all.

7 If there -- there are no further
8 questions, we would urge the Court to affirm.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Four minutes, Mr. Rapawy.

12 REBUTTAL ARGUMENT OF GREGORY G. RAPAWY
13 ON BEHALF OF THE PETITIONERS

14 MR. RAPAWY: Thank you, Your Honor. I
15 will be brief.

16 On the question of Kansas versus
17 Nebraska, I believe that the Court was
18 explicitly in that case exercising its authority
19 in the singular sphere of interstate relations
20 to craft a new remedy. It was not applying
21 traditional equitable principles.

22 There was a dispute between the
23 majority and the dissent about whether it was
24 appropriate to adopt Section 39 of the third
25 restatement, but, either way, that was a case of

1 the Court making a new remedy that did not
2 previously historically exist.

3 And that would not be appropriate to
4 do here where you are interpreting a statute in
5 which Congress has already set forth a detailed
6 remedial scheme.

7 On the question of the calculation of
8 the individuals -- of the amounts of
9 disgorgement, there are explicit findings in
10 this record as to the gross pecuniary gain to
11 each individual. It's 6.7 for Mr. Liu and it is
12 1.5 million for -- for Ms. Wang.

13 And if you are applying the
14 traditional historical approach, you would start
15 at the gain to each defendant -- to each
16 defendant. You wouldn't start at the total
17 losses to investors and take deductions from
18 there. And I think that goes to show how far
19 the -- the -- both -- both what happened in this
20 individual case and also how far the analysis
21 that's going on here is from the historical
22 approach.

23 I think the scope of disgorgement has
24 grown over time in part because it is not
25 grounded in statutory text, and that counsel's

1 for returning it to Congress, rather than
2 crafting a new remedy and -- and -- by -- as a
3 sort of adapting equitable principles.

4 I think its practical function has
5 been to compel payments to the Treasury. There
6 is no historical precedent for that.

7 I would cite to the Court's Gabelli
8 case in which the Court found that there was no
9 precedent for applying the equitable doctrine of
10 the discovery rule to -- to cases by the
11 government.

12 So, too, here there is no precedent
13 for using an accounting to compel funds to be
14 paid to the Treasury.

15 Finally --

16 JUSTICE GINSBURG: What -- what about
17 the statutes that assume the availability of
18 disgorgement? Those statutes would have no work
19 to do if -- if the Court can order disgorgement,
20 absent express statutory authority?

21 MR. RAPAWY: We tried to show in our
22 opening brief, Your Honor, that -- that most of
23 those statutes do have some work to do. There
24 are one or two that don't.

25 Even in those cases, I would say that

1 those statutes at most reflect a presupposition
2 or awareness by Congress that courts were doing
3 this, not an authorization, and authorization is
4 what's needed to authorize -- to inflict a
5 penalty.

6 Finally, if the Court does conclude
7 that some remedy may survive -- may survive in
8 some case, I would urge it, nevertheless, to
9 reverse and not to remand in this case.

10 These individuals have already been
11 ordered to pay their entire gross pecuniary
12 gains. And anything above and beyond that would
13 go beyond the equitable principle that no
14 individual should be -- should be permitted to
15 profit from his or her own wrong.

16 And with that, Your Honors, I would
17 respectfully request the Court reverse.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:18 p.m., the case
21 was submitted.)

22

23

24

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