CLEAN HANDS, DIRTY MONEY, AND THE CODIFICATION OF SEC DISGORGEMENT

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Disgorgement is the U.S. Securities and Exchange Commission's (SEC) most powerful enforcement tool and among its most controversial. For decades, federal courts treated disgorgement in securities enforcement actions as an equitable remedy, a view that the U.S. Supreme Court confirmed in Liu v. SEC. *Months after* Liu, *Congress passed the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, which codified disgorgement in SEC enforcement actions. The codification of disgorgement sparked a circuit split between the U.S. Courts of Appeals for the Fifth and Second Circuits over whether Congress created a new statutory form of the remedy. This split, however, has focused exclusively on wrongdoers, leaving unresolved how the codified remedy affects relief defendants, who are traditionally required to disgorge only funds that satisfy a two-part equitable test.*

This Note fills that doctrinal gap by extending both circuit interpretations to relief defendants. Extending the Fifth Circuit's expansionist view could displace the two-part test and convert disgorgement into a forfeiture tool that reaches nonwrongdoers. Extending the Second Circuit's continuity view would preserve the two-part test but may leave enforcement gaps that allow wrongdoers to dissipate funds before SEC recovery.

This Note argues that courts should not extend the expansionist view to relief defendants for two reasons. First, the relief-defendant doctrine cannot be severed from its equitable foundation without undermining the principles that justify compelling recovery from nonwrongdoers. Second, absent clear statutory authority, extending broad disgorgement to parties who have not violated securities laws would raise due process concerns. Courts should, therefore, preserve the equitable two-part test absent a clear congressional mandate.

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INTRODUCTION

In typical enforcement actions, if the U.S. Securities and Exchange Commission (SEC) prevails, a federal court can order the violator to surrender illegal profits.[1] Complications arise, however, when the money is no longer in the violator's possession.[2]

Consider, for instance, Person 1,[3] who sells investment programs for a telecommunications company.[4] Relying on company assurances that the programs comply with securities laws,[5] Person 1 has no reason to suspect the business operates as a Ponzi scheme.[6] Person 1 performs routine sales work and receives only standard commissions.[7] When regulators uncover the scheme and the company collapses, Person 1 is implicated in fraud that was never intended or understood.[8] Should Person 1 be ordered to return wages for work that appeared lawful?

Now consider Person 2,[9] whose father-in-law is a vice president of a pharmaceutical company.[10] Person 2's spouse gains confidential information about the company and trades its stock for profit.[11] To conceal these trades, the family establishes an investment firm to execute the transactions and distribute the proceeds to its limited partners, including Person 2.[12] The profits from these transactions are used to purchase a Manhattan condominium.[13] When the SEC brings a securities action against the family, Person 2 is not accused of insider trading.[14] Should Person 2 be allowed to keep property purchased with tainted funds?

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1. *See, e.g.*, SEC v. Cavanagh (*Cavanagh I*), 1 F. Supp. 2d 337, 386–87 (S.D.N.Y. 1998) (recognizing that courts may reach third parties who possess ill-gotten funds when the wrongdoer no longer retains them), *aff'd*, 155 F.3d 129 (2d Cir. 1998); SEC v. Antar, 120 F. Supp. 2d 431, 451 (D.N.J. 2000) (authorizing recovery from a nominal defendant who held fraud proceeds transferred by the violator), *aff'd*, 44 F. App'x 548 (3d Cir. 2002).

2. *See, e.g.*, *Cavanagh I*, 1 F. Supp. 2d at 384–85; *Antar*, 120 F. Supp. 2d at 435–36.

3. This hypothetical is based on the facts of *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007).

4. *See id.* at 1133.

5. *See* Intervenor-Defendants' Memorandum Objecting to the Receiver's Motion for Order Requiring Disgorgement at 8–9, SEC v. Alpha Telcom, Inc., No. CV 01-1283 (D. Or. Mar. 9, 2004).

6. *See id.* at 7 ("[A]gents believed that they were engaging in a lawful activity, and each of these agents formed that opinion after exercising extensive due diligence."); *Ross*, 504 F.3d at 1133.

7. *See Ross*, 504 F.3d at 1133 (indicating that relief defendants were sales agents who were ordered to disgorge "commissions they received through the sale of interests in pay phones").

8. *See* Intervenor-Defendants' Memorandum, *supra* note 5, at 6; *Ross*, 504 F.3d at 1142.

9. This hypothetical is based on the facts of *SEC v. Aragon Capital Advisors, LLC*, No. 07-cv-919, 2011 WL 3278907 (S.D.N.Y. July 26, 2011).

10. *See id.* at *4; Erin Marie Daly, *Family Charged in $3.7M Insider-Trading Scheme*, LAW360 (Feb. 8, 2007), https://www.law360.com/articles/18272 (on file with the *Fordham Law Review*).

11. *See* Daly, *supra* note 10.

12. *See Aragon*, 2011 WL 3278907, at *4.

13. *See id.* at *18.

14. *See id.*

To recapture the wrongdoer's illicit funds in either scenario, the SEC would pursue disgorgement, a remedy that compels surrender of unlawfully obtained assets.[15] With the assets now held by Person 1 and Person 2, however, the SEC must join each person to the action as a relief defendant.[16] Relief defendants, or nominal defendants,[17] are innocent holders of assets tied to another's misconduct.[18] Joining them allows the SEC to reclaim funds that wrongdoers transfer to circumvent securities laws.[19]

Although the SEC names both Person 1 and Person 2 as relief defendants,[20] their situations raise different fairness concerns: compelling Person 1 to return wages earned through legitimate work seems unfair,[21] while allowing Person 2 to keep property purchased with fraudulent funds seems unjust.[22] Courts manage this tension by limiting relief-defendant disgorgement to cases in which the defendant (1) received funds traceable to the violation and (2) lacks a "legitimate claim to those funds."[23] These two factors, which this Note refers to as "the two-part test," balance fairness to innocent asset holders with the SEC's interest in recovering ill-gotten gains.[24]

Federal securities law does not refer to relief defendants by name;[25] the doctrine instead emerged from federal courts' broad equitable authority to grant ancillary relief.[26] That authority produced the two-part test,[27] which continues to govern third-party liability and reflects equity's role in restoring

15. *See Disgorgement*, BLACK'S LAW DICTIONARY (12th ed. 2024).

16. *See Aragon*, 2011 WL 3278907, at *18; SEC v. Ross, 504 F.3d 1130, 1133–34 (9th Cir. 2007).

17. Courts and commentators use the terms relief defendant and nominal defendant interchangeably. *See, e.g.*, SEC v. Cavanagh (*Cavanagh II*), 155 F.3d 129, 136 (2d Cir. 1998); SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005); THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 16.2, at 187 (6th ed. 2009); ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS § 20:109.20, Westlaw (database updated Apr. 2025).

18. *See Cavanagh II*, 155 F.3d at 136.

19. *See id.* at 137; *see also* Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 192 (4th Cir. 2002) (applying SEC relief-defendant doctrine in the commodities setting to prevent wrongdoers from concealing assets through transfers).

20. *See Aragon*, 2011 WL 3278907, at *18; *Ross*, 504 F.3d at 1133–34.

21. *See Ross*, 504 F.3d at 1142 (recognizing that someone who earns compensation for actual work has a legitimate claim to those wages); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2(2) (A.L.I. 2011).

22. *See Aragon*, 2011 WL 3278907, at *18 (ordering disgorgement where the relief defendant received benefits from another's unlawful conduct without a legitimate claim); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (A.L.I. 2011).

23. *Cavanagh II*, 155 F.3d at 136; *see* SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998); SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005) (citing *Cavanagh II*, 155 F.3d at 136).

24. *See* SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991) (drawing an equitable line that protects innocent third parties while preventing wrongdoers from shielding assets).

25. *See Colello*, 139 F.3d at 676. As it stands, the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq, contain no reference to "nominal defendant" or "relief defendant." *See id.* §§ 77a–77aa, 78a–78qq.

26. *See Colello*, 139 F.3d at 676; *Cherif*, 933 F.2d at 403, 414.

27. *See Cavanagh II*, 155 F.3d at 136.

ill-gotten gains.[28] The relief-defendant doctrine has remained stable,[29] but the disgorgement remedy it supports has not.[30] Disgorgement likewise emerged from courts' equitable authority under § 78u(d)(5) of the Securities Exchange Act of 1934[31] (the "Exchange Act"),[32] but its later application often departed from traditional equitable limits.[33]

The U.S. Supreme Court addressed the scope of disgorgement in *Liu v. SEC*.[34] There, the Court clarified that federal courts may award disgorgement as equitable relief under § 78u(d)(5) only if the remedy stays within the bounds of equity, including recovery limited to net profits, prioritization of victim compensation, and the avoidance of joint and several liability.[35] By anchoring disgorgement to these constraints, *Liu* reaffirmed federal courts' equitable authority to order disgorgement while narrowing the remedy's scope.[36]

Congress complicated matters soon thereafter.[37] Through the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021[38] (the "2021 NDAA"), Congress amended the Exchange Act to expressly authorize disgorgement in SEC enforcement actions.[39] In amending a subsection of § 78u(d)(3), Congress framed disgorgement in terms of "unjust enrichment," a concept with deep equitable roots.[40] Yet the statutory language omitted any reference to "equitable relief" and placed the new disgorgement provision separate from § 78u(d)(5).[41] These textual and structural choices, combined with the minimal legislative history and the timing of the amendments,[42] have divided courts: the U.S. Court of Appeals

28. *See id.* at 137 (emphasizing that equity permits disgorgement from third parties to prevent shielding by wrongdoers); *see also* SEC v. Ahmed, 72 F.4th 379, 408, 408 n.17 (2d Cir. 2023).

29. *See Ahmed*, 72 F.4th at 408, 408 n.17.

30. *See infra* Parts I.A–C (describing the unsettled and evolving doctrinal foundations of disgorgement).

31. 15 U.S.C. §§ 78a–78qq.

32. *See* SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971).

33. *See* SEC v. Kokesh, 137 S. Ct. 1635, 1642–44 (2017) (articulating how modern disgorgement practices departed from equity by imposing punitive sanctions); Donna M. Nagy, *Disgorgement: Punitive Demands and Remedial Boundaries*, 71 SMU L. REV. 895, 920 (2018) (highlighting the SEC's reliance on deterrence rather than restitution and the resulting punitive character of disgorgement).

34. 140 S. Ct. 1936 (2020).

35. *See id.* at 1942–44.

36. *See id.*

37. *See infra* Part I.C.

38. Pub. L. No. 116-283, 134 Stat. 3388 (codified as amended in scattered sections of the U.S. Code).

39. *See* 15 U.S.C. § 78u(d)(7).

40. *Id.* § 78u(d)(3)(A)(ii); *see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (A.L.I. 2011).

41. *Compare* 15 U.S.C. § 78u(d)(5) (authorizing courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors"), *with id.* § 78u(d)(3)(A)(ii), (d)(7) (authorizing "disgorgement . . . of any unjust enrichment" without reference to equitable relief).

42. *See* Ike Adams, Chris Mills & David Petron, *SEC Disgorgement Authority May Be Limited Even After Recent Amendments to the Exchange Act*, ABA: BUS. L. TODAY (Jan. 27,

for the Second Circuit interprets the amendments as codifying *Liu*'s equitable framework,[43] while the U.S. Court of Appeals for the Fifth Circuit treats the amendments as conferring new statutory authority unconstrained by equity's limits.[44]

And yet, even as the disgorgement doctrine grows increasingly unsettled,[45] courts continue to treat the relief-defendant framework as if it sits outside that turbulence.[46] The Second Circuit's decision in *SEC v. Ahmed*[47] highlights the disconnect: after engaging in statutory interpretation to assess how the 2021 NDAA amendments affected wrongdoers,[48] the court addressed relief-defendant liability by applying the traditional equitable framework without considering whether the 2021 NDAA amendments might alter that analysis.[49] By decoupling the statutory analysis for wrongdoers from the equitable analysis for relief defendants, the court created a meaningful doctrinal gap.[50]

2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-february/sec-disgorgement-authority-may-be-limited/ (on file with the *Fordham Law Review*). Congress enacted the 2021 NDAA disgorgement amendments just months after *Liu* without any hearings, borrowing language from pre-*Liu* bills responding to *Kokesh* and leaving uncertain whether it intended to codify *Liu* or expand the SEC's authority. *Id.*

43. *See* SEC v. Ahmed, 72 F.4th 379, 396–97 (2d Cir. 2023).

44. *See* SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022).

45. *See, e.g.*, Petition for Writ of Certiorari at 3–4, SEC v. Navellier & Assocs., Inc., 145 S. Ct. 2777 (2025) (No. 24-949).

46. *See Ahmed*, 72 F.4th at 389–90, 407–09 (analyzing § 78u(d)(7) disgorgement as to primary violators without discussing relief defendants); SEC v. Berkeley Healthcare Dynamics, No. 20-16754, 2022 WL 42807, at *2 (9th Cir. Jan. 5, 2022) (ordering disgorgement under § 78u(d)(7) without considering relief-defendant implications); SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *13–17 (10th Cir. Dec. 16, 2021) (interpreting statutory disgorgement without considering relief defendants).

47. 72 F.4th 379 (2d Cir. 2023).

48. *See id.* at 395–96, 402 (explaining why § 78u(d)(7) did not alter disgorgement's equitable framework).

49. *See id.* at 407–10 (emphasizing distinct equitable rules for relief defendants and evaluating the district court's application of the nominee doctrine without considering the impact of the 2021 NDAA).

50. *See* Andrew N. Vollmer, Liu *and the New SEC Disgorgement Statute*, 15 WM. & MARY BUS. L. REV. 307, 359 n.292 (2024) (suggesting that innocent third parties who "received" proceeds may be subject to disgorgement under the 2021 NDAA's broad framework); HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW § 20:14.62 (2d ed. 2025), Westlaw (database updated June 2025) ("Query whether [§ 78u(d)(3)(A) or (d)(7)] could be read to reach a relief defendant who received funds from someone who committed a violation."); Samuel Wolff & Alina Veneziano, *In Lieu of* Liu*?: Disgorgement in SEC Enforcement Practice Following the National Defense Authorization Act*, SEC. & FED. CORP. L. REP., Mar. 2021 ("It remains to be seen how [§ 78u(d)(3)(A)(ii)] is interpreted [pertaining to relief-defendant liability]."); *Camarco*, 2021 WL 5985058, at *25 (Bacharach, J., dissenting) (implying that equitable limits governed because the SEC sought equitable disgorgement, while recognizing the amendments might alter the analysis for statutory disgorgement).

The stakes of that gap are substantial.[51] If, as the Fifth Circuit held,[52] the 2021 NDAA created a form of statutory disgorgement detached from equity—and if that disgorgement reaches relief defendants—the SEC could compel innocent recipients to surrender assets without satisfying the two-part test.[53] This Note addresses the doctrinal territory left unexplored by the Second Circuit in *Ahmed*: whether the 2021 NDAA amendments to § 78u(d)(3) and § 78u(d)(7) transformed relief-defendant disgorgement into a statutory remedy untethered by equity or instead left relief-defendant liability governed by the equitable principles preserved under § 78u(d)(5).

To resolve this question, this Note proceeds in three parts. Part I situates disgorgement within the SEC's enforcement regime, tracing its equitable origins, its contested punitive features, and the complications introduced by the 2021 NDAA that produced a circuit split. Part I also explains the relief-defendant doctrine's two-part test and its continued application amid the broader disgorgement debate. Part II extends the interpretive dispute over the 2021 NDAA amendments to relief defendants, examining how each framework would potentially alter the doctrine. Finally, Part III advances two arguments for judicial restraint in expanding relief-defendant liability beyond the two-part test. First, the relief-defendant doctrine cannot be disentangled from its equitable foundation, unlike the disgorgement doctrine. Second, even if the 2021 amendments could be interpreted to authorize broader liability, such an expansion would raise serious due process concerns. Therefore, in the absence of clear congressional direction, interpretive doubts should be resolved in favor of retaining the two-part test.

I. THE ORIGINS OF DISGORGEMENT AND THE RELIEF-DEFENDANT DOCTRINE

Disgorgement has long served as the SEC's primary monetary remedy,[54] justified as an equitable tool to strip wrongdoers of illicit gains.[55] In recent years, however, the character of disgorgement has undergone substantial recalibration, shaped by both judicial intervention[56] and congressional statutory changes.[57] Meanwhile, disgorgement actions against relief

51. *Compare* Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017) (asserting disgorgement as a penalty does not "simply return[] the defendant to the place he would have occupied had he not broken the law"), *with* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 50(3) (A.L.I. 2011) (recognizing that innocent recipients cannot be compelled to disgorge in a manner that would leave them worse off).

52. *See* SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022).

53. *See Camarco*, 2021 WL 5985058, at *25 (Bacharach, J., dissenting) (implying the amendments might alter relief-defendant analysis for statutory disgorgement).

54. *See* Press Release, SEC, Addendum to Division of Enforcement Press Release: Fiscal Year 2021 (Nov. 18, 2021) (documenting that SEC disgorgement orders exceeded penalty orders for six consecutive years).

55. Liu v. SEC, 140 S. Ct. 1936, 1943–44 (2020).

56. *See id.* at 1946–47; *Kokesh*, 137 S. Ct. at 1643–45.

57. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501(a), 134 Stat. 3388, 4625 (codifying disgorgement authority in § 78u(d)(7)).

defendants have remained governed by equity and bound by the two-part test[58] with minimal evolution.[59]

This part outlines disgorgement's equitable origins in SEC enforcement actions, the Court's recalibration of its limits, Congress's statutory response, and the background of relief-defendant liability. Part I.A identifies disgorgement's equitable foundation and its dual remedial and punitive features, including the Court's recognition of disgorgement as a penalty in *Kokesh v. SEC*.[60] Part I.B turns to *Liu*, where the Court preserved disgorgement as an equitable remedy but confined its scope to traditional equitable limits. Part I.C analyzes the 2021 NDAA's codification of disgorgement in subsections of § 78u(d), resulting in a circuit split over whether Congress displaced or incorporated *Liu*'s equitable constraints. Part I.C.1 presents the Fifth Circuit's expansionist view, which interprets the statute as creating statutory disgorgement authority untethered from equitable limits. Part I.C.2 presents the Second Circuit's continuity view, which maintains that the amendments codified rather than superseded *Liu*'s principles. Finally, Part I.D explains the relief-defendant doctrine, including equity's two-part test, and traces federal courts' continued adherence to that test amid broader uncertainty over disgorgement.

A. Disgorgement's Roots and Evolution in SEC Enforcement Actions

Congress created the SEC in the 1934 Exchange Act to restore confidence in financial markets shaken by the 1929 stock market crash.[61] The Exchange Act authorized the SEC to bring federal enforcement actions but limited the available remedy to injunctive relief.[62] Gradually, Congress broadened the SEC's remedial tools, authorizing civil penalties in § 78u(d)(3)[63] and "any equitable relief that may be appropriate or necessary for the benefit of investors" in § 78u(d)(5).[64]

Long before Congress codified equitable relief in § 78u(d)(5), however, federal courts invoked their equitable jurisdiction under section 27 of the

58. *See Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998); SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998); SEC v. Cherif, 933 F.2d 403, 414 n.11 (7th Cir. 1991).

59. *See supra* note 46 and accompanying text.

60. 137 S. Ct. 1635 (2017).

61. *See* 15 U.S.C. § 78b (articulating the creation of "fair and honest" markets as a policy reason for adopting the Exchange Act); H.R. REP. NO. 73-1383, at 3–4 (1934) (asserting that the Exchange Act seeks to prevent market manipulation).

62. *See* Securities Exchange Act of 1934, ch. 404, § 21(e), 48 Stat. 881, 900 (codified as amended at 15 U.S.C. § 78u(d)(1)); SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971).

63. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 202, 104 Stat. 931, 937 (codified at 15 U.S.C. § 78u(d)(3)). Congress also enabled the SEC to seek disgorgement in administrative proceedings in the Penny Stock Reform Act. *See id.*

64. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305, 116 Stat. 745, 779 (codified at 15 U.S.C. § 78u(d)(5)).

Exchange Act to award disgorgement in enforcement actions.[65] The Second Circuit was the first to rely on its jurisdiction over violations and remedies "at law or in equity"[66] to require wrongdoers to surrender unlawful profits.[67] Other circuits followed, treating disgorgement as equitable, ancillary to injunctions, and necessary to prevent retention of ill-gotten gains.[68] By 1990, it was "well settled" that courts possessed authority to order disgorgement,[69] reflecting the broader principle that courts exercising equitable jurisdiction can employ traditional equitable powers unless Congress clearly restricts them.[70]

Even after Congress authorized the SEC to seek equitable relief, it left the term undefined, leaving courts to continue to determine the scope of their own equitable powers.[71] By that point, courts routinely treated disgorgement as equitable relief[72] but grounded it in both restorative and deterrent rationales.[73] This dual justification undermined disgorgement's foundation because neither rationale is inherently equitable.[74]

Restoration relies on restitution and unjust enrichment.[75] Restitution returns a benefit the wrongdoer gained at another's expense and measures relief by the wrongdoer's unjust enrichment rather than the victim's loss.[76] A wrongdoer is unjustly enriched when obtaining a benefit "not intended as a gift and not legally justifiable."[77] Yet because neither restitution nor unjust enrichment is inherently equitable, the restorative rationale itself is not

65. *See Tex. Gulf Sulphur Co.*, 446 F.2d at 1307–08; SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978); SEC v. First City Fin. Corp., 890 F.2d 1215, 1230–31 (D.C. Cir. 1989) (noting that courts should interpret their equitable jurisdiction expansively unless Congress imposes explicit restrictions).

66. 15 U.S.C. § 78aa.

67. *See Tex. Gulf Sulphur Co.*, 446 F.2d at 1307–08.

68. Fridrich v. Bradford, 542 F.2d 307, 322 n.31 (6th Cir. 1976); *Blatt*, 583 F.2d at 1335; *First City*, 890 F.2d at 1230–31.

69. SEC v. Clark, 915 F.2d 439, 454 (9th Cir. 1990).

70. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); *First City*, 890 F.2d at 1230–31.

71. *See* Liu v. SEC, 140 S. Ct. 1936, 1940 (2020); *see also* Joel Kurtzberg, Lauren Perigut & Jason D. Rozbruch, *Supreme Court Holds That SEC Disgorgement Is a Form of Equitable Relief*, CAHILL GORDON & REINDEL LLP (July 27, 2020), https://www.cahill.com/publications/client-alerts/2020-07-27-supreme-court-holds-that-sec-disgorgement-is-a-form-of-equitable-relief [https://perma.cc/9EGW-5E4T].

72. *See Clark*, 915 F.2d at 454.

73. *See First City*, 890 F.2d at 1230 ("Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1103–04 (2d Cir. 1972) (describing disgorgement as an equitable, ancillary remedy with a deterrent purpose); SEC v. Teo, 746 F.3d 90, 104–05 (3d Cir. 2014) (recognizing disgorgement's dual aims of preventing unjust enrichment and deterrence).

74. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (A.L.I. 2011) (noting that restitution may be available either at law or in equity); Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017) (stating that deterrence is an objective of a penalty).

75. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 49, 51(4) (A.L.I. 2011).

76. *See id.* § 49; *Restitution*, BLACK'S LAW DICTIONARY (12th ed. 2024).

77. *Unjust Enrichment*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (A.L.I. 2011).

inherently equitable.[78] Deterrence, the second rationale, is openly punitive and therefore legal in character.[79] By grounding disgorgement in these rationales, courts cast doubt on whether the remedy is truly equitable or instead serves as a legal penalty.[80] This instability, combined with the increasingly large sums recovered through disgorgement,[81] prompted judicial intervention.[82]

In *Kokesh*, the Court concluded that disgorgement can serve as a penalty when it punishes violations of public law, deters rather than compensates, and directs funds to the U.S. Department of the Treasury rather than to victims.[83] Although disgorgement sometimes advances compensatory aims, the Court concluded that it had been employed primarily as a punitive tool, bringing the remedy within 28 U.S.C. § 2462's five-year statute of limitation for penalties.[84] This unanimous decision was narrow[85] and left unresolved whether courts may order disgorgement in SEC actions.[86] The Court returned to this question three years later in *Liu*.[87]

B. Liu*'s Impact: Disgorgement Within the Constraints of Equity*

In *Liu*, the Court held that the SEC may seek disgorgement under § 78u(d)(5) as equitable relief, but only within traditional equitable limits.[88] Equity has long endorsed profit-based remedies, such as ordering restitution and accounting for profits, designed to strip wrongdoers of net gains.[89] Although disgorgement is a modern label,[90] the Court explained that

78. *See* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (A.L.I. 2011) ("[M]odern restitution is difficult to characterize in law/equity terms.").

79. *See Kokesh*, 137 S. Ct. at 1642.

80. *See id.* at 1642–44; Nagy, *supra* note 33, at 920–24.

81. In the fiscal year leading up to *Kokesh*, the SEC obtained over $2.8 billion in disgorgement compared to just $1.27 billion in civil penalties. *See* SEC, DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT 16 (2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf [https://perma.cc/6HUJ-LJ4C].

82. *See generally Kokesh*, 137 S. Ct. 1635 (considering whether disgorgement awards function as penalties subject to statutory limits); Liu v. SEC, 140 S. Ct. 1936 (2020) (clarifying the scope of permissible disgorgement in SEC enforcement actions).

83. *See Kokesh*, 137 S. Ct. at 1643–44.

84. *See id.* at 1645; 28 U.S.C. § 2462 ("[A]n action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years.").

85. *See Liu*, 140 S. Ct. at 1946.

86. *See Kokesh*, 137 S. Ct. at 1642 n.3.

87. *See Liu*, 140 S. Ct. at 1940.

88. *See id.* at 1947.

89. *See id.* at 1942–43.

90. *See id.* at 1940–41. *But see id.* at 1950–51 (Thomas, J., dissenting) (noting that disgorgement originated in the twentieth century and that equitable relief is limited to remedies available in English Chancery courts at the founding, so disgorgement cannot be equitable relief).

recovering profits reflects the long-standing equitable principle that a "wrongdoer should not profit 'by his own wrong.'"[91]

Accordingly, the Court defined disgorgement under § 78u(d)(5) as permissible only when the amount is limited to a wrongdoer's net profits.[92] A court may not order the turnover of gross receipts and instead must deduct "legitimate expenses" to avoid transforming the remedy into a punishment.[93] The Court also held that the statutory phrase "for the benefit of investors"[94] imposes additional constraints:[95] courts should return disgorged funds to harmed investors rather than the Treasury Department and impose joint and several liability only when the defendants acted in concert.[96]

These limitations, the Court emphasized, preserve disgorgement's remedial character and distinguish it from the penalty described in *Kokesh*.[97] Notably, *Liu* did not overrule *Kokesh*.[98] Where the Court held in *Kokesh* that disgorgement qualifies as a penalty for limitations purposes when deployed punitively, *Liu* clarified that disgorgement can operate as an equitable remedy under § 78u(d)(5) when consistent with equitable principles.[99] After *Liu*, courts began tailoring their disgorgement awards to fit within equitable boundaries, confirming that the decision narrowed—but did not eliminate—the SEC's disgorgement authority.[100]

C. The 2021 NDAA Amendments and the Resulting Circuit Split

Each year, Congress passes a National Defense Authorization Act (NDAA) to set defense programs, policies, and funding priorities.[101] Months after *Liu*, Congress enacted the NDAA for the 2021 fiscal year.[102] Alongside the usual provisions on weapons procurement and national security programs,[103] Congress added a subsection amending the Exchange Act to

91. *Id.* at 1943 (majority opinion) (quoting Tilghman v. Proctor, 125 U.S. 136, 145 (1888)).

92. *See id.* at 1950.

93. *Id.*; *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. h (A.L.I. 2011).

94. 15 U.S.C. § 78u(d)(5) ("[T]he Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

95. *Liu*, 140 S. Ct. at 1947–48.

96. *Id.* at 1948–49.

97. *Id.* at 1947; *see also* Brennen C. Walker, Note, *In* Liu *of Disgorgement: A Call to Revise the SEC's Civil Remedy Toolkit to Effectively Deter Market-Harming Securities Law Violations*, 108 IOWA L. REV. 469, 494 (2022).

98. *See Liu*, 140 S. Ct. at 1946.

99. *See id.*

100. *See* SEC v. Yang, 824 F. App'x 445, 448 (9th Cir. 2020) (remanding the case to recalculate the disgorgement award); SEC v. Rinfret, No. 19-cv-6037, 2020 WL 6559411, at *6 (S.D.N.Y. Nov. 9, 2020) (recalculating the disgorgement award).

101. *See generally* VALERIE HEITSHUSEN & DANIEL M. GETTINGER, CONG. RSCH. SERV., IF10516, DEFENSE PRIMER: NAVIGATING THE NDAA (2025).

102. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

103. *See id.* §§ 601–619, 134 Stat. at 3545–66; *id.* §§ 1211–1251, 134 Stat. at 3964–94.

address the SEC's disgorgement authority.[104] This subsection made three relevant changes: (1) it explicitly authorized courts to order disgorgement in SEC enforcement actions,[105] (2) it created a five-year statute of limitations specific to disgorgement,[106] and (3) it applied these amendments retroactively.[107]

Despite the significance of these changes, Congress offered almost no legislative history explaining them.[108] The disgorgement provision first appeared in a conference report[109] and was enacted without hearings or debate.[110] The language was borrowed from earlier failed bills[111] designed to codify SEC disgorgement in response to *Kokesh*[112] and predated the Court's decision in *Liu*. Because of the scant legislative record, courts have relied on "judicially created rules or canons of statutory interpretation" to interpret the 2021 NDAA amendments.[113]

These interpretive methods have produced conflicting readings, resulting in a circuit split over the impacts of the 2021 NDAA amendments on SEC

104. *See id.* § 6501(a), 134 Stat. at 4625–26 (codified as amended at 15 U.S.C. § 78u(d)(3), (7)–(8)).

105. *See id.* § 6501(a)(3), 134 Stat. at 4626 (codified at 15 U.S.C. § 78u(d)(7)); THOMAS LEE HAZEN, 6 TREATISE ON THE LAW OF SECURITIES REGULATION § 16:18, Westlaw (database updated May 2025) (noting that the 2021 NDAA amendments "expressly gave the SEC authority" to seek disgorgement in enforcement actions).

106. *See* § 6501(a)(3), 134 Stat. at 4626 (codified at 15 U.S.C § 78u(d)(8)). The 2021 NDAA amendments expanded the limitations period from five to ten years for disgorgement claims involving scienter. HAZEN, *supra* note 105, § 16:18 (explaining that the 2021 NDAA amendments "doubled the limitations period" for violations involving scienter).

107. *See* § 6501(b), 134 Stat. at 4626.

108. *See* H.R. REP. No. 116-617, at 1267 (2020) (Conf. Rep.); *see also* Vollmer, *supra* note 50, at 330–31.

109. *See* H.R. REP. No. 116-617, at 1267.

110. *See* Vollmer, *supra* note 50, at 330–31.

111. *See id.* at 328–29. *Compare* Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019) ("[T]he Commission may seek, and any Federal court may grant . . . [d]isgorgement in the amount of any unjust enrichment obtained as a result of the act or in practice with respect to which the Commission is bringing such an action or proceeding."), *and* Securities Fraud Enforcement and Investor Compensation Act of 2019, S. 799, 116th Cong. § 2 ("[T]he Commission may seek, and any Federal court may order, disgorgement of any unjust enrichment that a person obtained as a result of a violation of that provision."), *with* § 6501(a), 134 Stat. at 4625–26 (using identical language).

112. *See* 165 CONG. REC. H8930–31 (daily ed. Nov. 18, 2019) (statement of Rep. Wagner) ("This bill is the result of the Supreme Court's Kokesh decision."); Press Release, Mark R. Warner & John Kennedy, Sens., Warner & Kennedy Introduce Bill to Help Investors Harmed by Fraud (Mar. 14, 2019), https://www.warner.senate.gov/public/index.cfm/2019/3/warner-kennedy-introduce-bill-to-help-investors-harmed-by-fraud [https://perma.cc/65YZ-6GY2] ("Because of a narrow window of time for recouping stolen investment dollars, fraudsters are actually incentivized to keep the shell game going for decades. This bill addresses that problem.").

113. Vollmer, *supra* note 50, at 337; *see* SEC v. Hallam, 42 F.4th 316, 334–40 (5th Cir. 2022) (relying on the rule against surplusage, textualism, and the presumption of congressional awareness of judicial interpretations to construe the 2021 NDAA amendments); SEC v. Ahmed, 72 F.4th 379, 395–96 (2d Cir. 2022) (relying on the canons of consistent usage and belt-and-suspenders to construe the 2021 NDAA amendments).

disgorgement authority.[114] The Fifth Circuit views the amendments as freeing disgorgement from *Liu*'s equitable constraints, whereas the Second Circuit concludes that Congress intended to preserve *Liu*'s equitable limitations.[115]

1. The Fifth Circuit's Expansionist Approach After the 2021 NDAA

The Fifth Circuit has read the 2021 NDAA as "authoriz[ing] disgorgement in a legal—not equitable—sense."[116] The court treated "disgorgement" in § 78u(d)(7) as a "term of art" that "brings the old soil with it" by restoring the pre-*Liu* understanding of unjust enrichment unconstrained by equitable limits.[117] The court then read the amended structure of § 78u(d) as drawing a deliberate line between remedies:[118] § 78u(d)(5) governs "equitable relief," while § 78u(d)(7) separately authorizes "disgorgement."[119] Congress reinforced this distinction by creating separate limitation periods for "disgorgement" and "equitable remedies" in § 78u(d)(8).[120] The Fifth Circuit treats this structural scheme as purposeful, concluding that Congress created a remedy distinct from equity, because a reading that merely codifies *Liu* renders § 78u(d)(5) redundant.[121] Invoking the presumption that Congress legislates against the backdrop of existing precedent,[122] the court views Congress's "swift, expansive action" after *Liu* as evidence that Congress intended to move beyond *Liu*'s narrower equitable framework.[123] Professor Caprice L. Roberts supports this reading, describing the 2021 NDAA as part of Congress's broader response to judicial narrowing of agency authority.[124] Together, these interpretive choices form the foundation for what this Note refers to as the "expansionist view" of the 2021 NDAA amendments.[125]

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114. *See supra* note 44 and accompanying text; *see also* Timothy K. Halloran, *SEC Disgorgement Stuck in Circuit Split After Supreme Court Declines to Intervene*, NAT'L L. REV. (June 6, 2025), https://natlawreview.com/article/sec-disgorgement-stuck-circuit-split-after-supreme-court-declines-intervene [https://perma.cc/X3KZ-38GL].

115. *See Hallam*, 42 F.4th at 338; *see also* Halloran, *supra* note 114.

116. *Hallam*, 42 F.4th at 338–39.

117. *Id.* at 339, 341.

118. *See id.* at 339–40.

119. 15 U.S.C. § 78u(d)(5), (7).

120. *Id.* § 78u(d)(8)(A)–(B).

121. *See Hallam*, 42 F.4th at 339–40.

122. Hall v. Hall, 138 S. Ct. 1118, 1129 (2018) ("Congress, we have held, 'does not alter the fundamental details' of an existing scheme with 'vague terms' and 'subtle device[s].'" (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001))).

123. *See Hallam*, 42 F.4th at 341.

124. *See* Caprice Roberts, *Statutory Interpretation and Agency Disgorgement Power*, 96 ST. JOHN'S L. REV. 243, 254–55 (2022) (arguing that the 2021 NDAA reflects "interbranch dialogue," in which Congress "correct[ed] course" after *Liu* by codifying disgorgement authority and countering the Court's overly restrictive approach to agency equitable power).

125. *See infra* Part II.A.

2. The Second Circuit's Continuity Approach After the 2021 NDAA

Contrary to the Fifth Circuit's interpretation, the Second Circuit reads the 2021 NDAA as a continuity measure that preserves *Liu*'s equitable limitations on disgorgement.[126] The court points to Congress's deliberate use of terms like "disgorgement" and "unjust enrichment"—both of which carry equitable origins—as evidence that Congress intended the remedy to remain within equitable limits.[127] The Second Circuit reasons that when Congress invokes remedies grounded in equity, those remedies carry equity's traditional constraints unless Congress explicitly provides otherwise, and nothing in the 2021 NDAA indicates an intent to remove those limits.[128] The court reinforces this conclusion by invoking the canon against implied repeals, which deduces that Congress will specifically address existing law when it intends to alter it.[129]

Alessandro Piras and Nikolette Dusevic argue that Congress's reliance on text from pre-*Liu* bills indicates that the NDAA was directed at *Kokesh*, not at broadening disgorgement beyond what *Liu* allows.[130] And because Congress left § 78u(d)(5) intact while adding a separate disgorgement provision to § 78u(d)(7), the Second Circuit characterizes the 2021 NDAA amendments as a "belt and suspenders" clarification rather than a substantive expansion.[131] This interpretive framework forms the foundation of what this Note considers the "continuity view." The 2021 NDAA has created unresolved questions about disgorgement's scope,[132] and with the Supreme Court declining to review the amendments' impact,[133] lower courts continue to lack guidance on how the amendments affect disgorgement authority, if at all.

126. *See* SEC v. Ahmed, 72 F.4th 379, 395–96 (2d Cir. 2023); SEC v. Govil, 86 F.4th 89, 98–99 (2d Cir. 2023).

127. *See Ahmed*, 72 F.4th at 396.

128. *See id.*

129. *See id.*

130. *See* Alessandro Piras, Note, *Unraveling the Disgorgement Regime*, 63 SANTA CLARA L. REV. 565, 586–87, 589 (2023) (suggesting that the 2021 NDAA responded to *Kokesh*, leaving *Liu*'s limitations intact); Nikolette C. Dusevic, Note, *Robin Hood or Robbin' the Goods?: The Second Circuit Restores SEC Disgorgement to Equity in* SEC v. Govil, 70 VILL. L. REV. 387, 401–03 (2025) (suggesting that the 2021 NDAA was enacted in response to *Kokesh*).

131. *See Ahmed*, 72 F.4th at 396.

132. *See, e.g.*, *id.* at 401–02 (addressing whether disgorgement after the 2021 NDAA violates the U.S. Constitution's Ex Post Facto Clause); SEC v. Govil, 86 F.4th 89, 93–94 (2d Cir. 2023) (addressing whether the SEC must show pecuniary harm to investors to seek disgorgement after the 2021 NDAA); *see also* Petition for Writ of Certiorari, *supra* note 45, at 3–4.

133. *See* Halloran, *supra* note 114.

D. Beyond Primary Violators: Relief-Defendant Disgorgement

Beyond the doctrinal dispute over disgorgement's statutory basis, courts have separately grappled with the boundaries of who, apart from the primary violator, can be compelled to turn over funds in SEC enforcement proceedings.[134] A relief defendant is often only a "trustee, agent, or depositary" of the disputed funds and is joined solely "to aid the recovery of relief."[135] Relief-defendant liability ensures that violators cannot insulate proceeds by transferring their fraudulent gains to third parties because by the time the SEC files suit, wrongdoers frequently no longer possess their ill-gotten gains.[136] Relief defendants, therefore, "step into the shoes" of the primary violator to ensure that tainted proceeds remain subject to recovery.[137]

The relief-defendant doctrine has no textual basis in the Exchange Act.[138] Instead, it represents a "rather obscure common law concept" developed through courts' equitable powers to recover property from asset holders who lack a legitimate interest.[139] The doctrine emerged in SEC enforcement actions during the late twentieth century, grounded in the same broad equitable jurisdiction under section 27 of the Exchange Act that courts had invoked to order disgorgement.[140] The animating principle reflects the concern that allowing nominal holders to retain fraudulent proceeds would result in unjust enrichment.[141] By the 1990s, relief-defendant liability in securities enforcement was "well settled."[142]

Because the doctrine operates as ancillary relief rather than an independent cause of action, courts do not require an independent basis of subject matter jurisdiction over relief defendants.[143] A relief defendant's participation in enforcement proceedings is derivative of the court's jurisdiction over the primary violator, and the inquiry is limited to entitlement to specific property

134. *See* SEC v. Colello, 139 F.3d 674, 676–77 (9th Cir. 1998) (holding that individuals who merely hold ill-gotten funds may be joined under limited circumstances); SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991) (holding that employees who have access to fraudulently obtained funds may be joined under limited circumstances).

135. *Cherif*, 933 F.2d at 414 (quoting Colman v. Shimer, 163 F. Supp. 347, 351 (W.D. Mich. 1958)).

136. *See id.* at 414 & n.11.

137. Jay A. Dubow, Ghillaine A. Reid & Kaitlin L. O'Donnell, *Oh, What a Relief Liu Is: Liu v. SEC and Relief Defendant Disgorgement*, BUS. L. TODAY (Aug. 7, 2020), https://businesslawtoday.org/2020/08/oh-relief-liu-liu-v-sec-relief-defendant-disgorgement/ [https://perma.cc/MFC2-DL3R]; *see Colello*, 139 F.3d at 676–77.

138. *See Colello*, 139 F.3d at 676.

139. *Cherif*, 933 F.2d at 414.

140. *See Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998); *see also supra* note 65 and accompanying text.

141. *See Cavanagh II*, 155 F.3d at 136; *Cherif*, 933 F.2d at 414.

142. SEC v. Clark, 915 F.2d 439, 454 (9th Cir. 1990).

143. *See Cherif*, 933 F.2d at 414.

rather than to liability for a securities law violation.[144] Accordingly, relief defendants do not trigger the procedural protections that attach to an adjudication of liability.[145]

To prevent the doctrine from sweeping beyond equity's reach, courts developed a two-factor framework.[146] To seek disgorgement from a relief defendant, the SEC must demonstrate that (1) the relief defendant received funds connected to the underlying fraud and thus traceable to the violation, and (2) the relief defendant lacks a legitimate ownership claim to those funds.[147] Once the SEC makes a prima facie showing of both factors, the burden shifts to the relief defendant to establish a valid claim of ownership to shield untainted property from disgorgement.[148] This framework ensures that relief-defendant liability remains remedial rather than punitive, targeting only those who hold property that rightfully belongs to investors while protecting bona fide claimants with valid ownership interests.[149]

Congress's 2002 addition of § 78u(d)(5) to the Exchange Act, authorizing "any equitable relief,"[150] did not disturb the relief-defendant doctrine; courts continued to apply the two-part framework without assessing the statute's relevance.[151] Similarly, following the *Kokesh* decision, which held that disgorgement can operate as a "penalty" for limitations purposes,[152] courts continued to apply the two-factor test to relief defendants.[153]

144. *See id.* ("Because of the non-interested status of the nominal defendant, there is no claim against him and it is unnecessary to obtain subject matter jurisdiction over him once jurisdiction over the defendant is established.").

145. *See* SEC v. Ross, 504 F.3d 1130, 1142 (2007); *cf.* Tull v. United States, 481 U.S. 412, 422–23 (1987) (distinguishing equitable remedies, which restore the status quo, from civil penalties, which are punitive in nature and trigger procedural protections).

146. *See Cavanagh II*, 155 F.3d at 136; *Colello*, 139 F.3d at 676–77.

147. *See Cavanagh II*, 155 F.3d at 136.

148. *See id.*

149. *See* Zoe A. Jones, *Left Out in the Cold: Freezing Innocent Spouses' Assets in SEC Actions*, 24 CORN. J.L. & PUB. POL'Y 381, 386–88 (2014) (describing relief-defendant status as applied to innocent spouses and noting that equity focuses on returning tainted assets while releasing untainted or legitimately owned funds).

150. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305(b), 116 Stat. 745, 779 (codified at 15 U.S.C. § 78u(d)(5)).

151. *See, e.g.*, SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005) (affirming relief-defendant disgorgement without mentioning § 78u(d)(5)); SEC v. Quan, 817 F.3d 583, 593 (8th Cir. 2016) (grounding relief-defendant liability in equitable principles even though the defendant raised § 78u(d)(5)).

152. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1645 (2017).

153. *See* SEC v. Martin, No. 12-CV-2922, 2019 WL 13214088, at *7 (N.D. Ga. Mar. 26, 2019); SEC v. S.F. Reg'l Ctr. LLC (*S.F. Reg'l I*), No. 17-CV-00223, 2019 WL 13215716, at *3 (N.D. Cal. Jan. 10, 2019).

Liu did not meaningfully shift the doctrine.[154] Though *Liu* imposed new limitations on disgorgement,[155] the decision addressed only wrongdoers.[156] *Liu* appeared inapplicable to relief defendants because they surrender funds obtained without consideration, not profits derived from wrongdoing.[157] Additionally, equitable relief sought from innocent parties differs from the legal remedies available against wrongdoers.[158] Therefore, courts continued to apply the familiar two-factor test for relief-defendant liability.[159]

After Congress expressly granted SEC disgorgement authority in the 2021 NDAA,[160] courts remained split on whether the new provisions codified *Liu*'s equitable limits or created a new, unconstrained statutory power.[161] That debate, however, has not addressed how the new amendments affect relief-defendant liability.[162]

II. TWO INTERPRETIVE FRAMEWORKS FOR RELIEF-DEFENDANT LIABILITY

Amid the broader debate over codified disgorgement, courts continue to treat relief-defendant liability as unchanged, applying the equitable two-part test without reassessing whether the amendments affect the doctrine.[163] If the amendments authorize disgorgement beyond equitable limits,[164] then the unresolved question is whether that expanded authority reaches relief defendants and potentially displaces the two-part test.[165] The test was designed with fairness in mind,[166] making the unresolved question of the 2021 NDAA amendments' reach particularly consequential.

A broad reading of the amendments may allow the SEC to collect assets from any recipient without applying the two-part test, effectively transforming relief-defendant disgorgement into a statutory forfeiture

154. *See* SEC v. S.F. Reg'l Ctr. LLC (*S.F. Reg'l II*), No. 17-CV-00223, 2020 WL 4569844, at *3 (N.D. Cal. Aug. 7, 2020) (applying the same two-factor test for relief defendants post-*Liu*), *aff'd*, SEC v. Berkeley Healthcare Dynamics, LLC, No. 20-16754, 2022 WL 42807 (9th Cir. Jan. 5, 2022); SEC v. Erwin, No. 13-CV-03363, 2020 WL 7310583, at *3 (D. Colo. Dec. 11, 2020) (same).

155. *See* Liu v. SEC, 140 S. Ct. 1936, 1940–41, 1945 (2020).

156. *See id.* at 1942.

157. *See Berkeley Healthcare Dynamics*, 2022 WL 42807, at *2.

158. *See* SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *13 (10th Cir. Dec. 16, 2021); Tull v. United States, 481 U.S. 412, 422–23 (1987) (distinguishing equitable remedies, which restore the status quo, from civil penalties, which are punitive in nature and trigger procedural protections).

159. *See supra* note 154 and accompanying text.

160. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501(a), 134 Stat. 3388, 4625 (codified at 15 U.S.C. § 78u(d)(3)(A)(ii), (d)(7)–(8)).

161. *See supra* Parts I.C.1–2 (describing the current circuit split regarding the scope of disgorgement).

162. *See supra* note 46 and accompanying text.

163. *See supra* note 46 and accompanying text.

164. *See* SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022).

165. *See supra* note 50 and accompanying text.

166. *See* SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991) (drawing an equitable line that protects innocent third parties while preventing wrongdoers from shielding assets).

untethered from equity's tracing and legitimate claim limits.[167] If, by contrast, the amendments apply to wrongdoers alone, then relief-defendant liability remains anchored in § 78u(d)(5) and governed by equity, including the two-part test.[168]

Part II addresses this overlooked question by extending the competing interpretations of the 2021 NDAA amendments to relief-defendant liability. Part II.A examines how the Fifth Circuit's expansionist view—which reads the amendments as creating broader statutory disgorgement authority[169]—applies to relief defendants and suggests that the statute's text, structure, and legislative context could support third-party liability. Part II.B examines how the Second Circuit's continuity view—which interprets the amendments as preserving *Liu*'s equitable limits[170]—applies to relief defendants and suggests that their liability remains grounded in § 78u(d)(5) and constrained by the equitable two-part test.

A. Adopting Expansionism: The 2021 NDAA Amendments Broaden Relief-Defendant Liability

This section examines how the Fifth Circuit's expansionist interpretation of the 2021 NDAA amendments would operate if extended to relief defendants. Part II.A.1 explains how the Fifth Circuit's statutory reasoning could bring relief defendants within § 78u(d)(3)'s disgorgement authority. Part II.A.2 then addresses the doctrinal consequences of that extension for the equitable two-part test. Part II.A.3 assesses the trade-offs, weighing enforcement gains against the cost to innocent third parties.

1. Extending the Fifth Circuit's Interpretation to Relief Defendants

The Fifth Circuit interprets the 2021 NDAA amendments as creating statutory disgorgement that departs from the equitable framework described in *Liu*.[171] The court relies on the revised statute's text and structure, along with the presumption that Congress legislates with awareness of judicial precedent.[172] Extending that reasoning to relief defendants suggests that the amended provisions could similarly broaden relief-defendant liability.[173]

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167. *See infra* Part II.A (articulating how applying the expansionist reading of the 2021 NDAA to relief defendants could displace equitable limits).

168. *See infra* Part II.B (articulating how applying the continuity reading of the 2021 NDAA to relief defendants would preserve the two-part test). *But see* Dubow, Reid & O'Donnell, *supra* note 137 (advocating for narrower relief-defendant liability under *Liu* instead of the two-part test because equity permits recovery only from custodial holders, not mere recipients of funds).

169. *See* SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022).

170. *See* SEC v. Ahmed, 72 F.4th 379, 395–96 (2d Cir. 2023).

171. *See Hallam*, 42 F.4th at 338.

172. *See id.* at 339–41.

173. *Compare id.* at 338 (finding that the amended provisions codify disgorgement beyond equitable limitations), *with Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998) (describing the

Under the Fifth Circuit's approach, any such extension would begin with § 78u(d)(3)'s text.[174] Section 78u(d)(3)(A)(i) confines civil penalties to "the person who *committed* such violation,"[175] while § 78u(d)(3)(A)(ii) authorizes disgorgement from "the person who *received* . . . unjust enrichment."[176] The shift from "committed" to "received" distinguishes wrongdoers from downstream recipients, potentially broadening the pool of individuals required to return tainted proceeds.[177]

The amended provision also employs terminology that mirrors the core mechanics of relief-defendant liability.[178] Courts have long framed relief-defendant liability around receipt of funds traceable to a violation.[179] In light of the Fifth Circuit's presumption that Congress legislates against existing judicial frameworks,[180] the incorporation of this receipt-based language in the statute could plausibly extend disgorgement for relief defendants who received proceeds from the violation.[181]

2. Doctrinal Consequences of Applying the Expansionist View

Extending the Fifth Circuit's statutory analysis could bear directly on the equitable two-part test.[182] Equity currently requires the SEC to show that the relief defendant (1) received funds traceable to wrongdoing and (2) lacks a legitimate claim to those funds.[183] If disgorgement operates as a statutory

relief-defendant doctrine and the two-part test as equitable in nature), *and Ahmed*, 72 F.4th at 408 ("For relief defendants, however, equity imposes different rules [than for wrongdoers].").

174. *See Hallam*, 42 F.4th at 339.

175. 15 U.S.C. § 78u(d)(3)(A)(i) (emphasis added).

176. *Id.* § 78u(d)(3)(A)(ii) (emphasis added).

177. *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))); *see also* Lockhart v. United States, 577 U.S. 347, 353–54 (2016) (presuming that different words in neighboring provisions have different meanings).

178. *See* § 78u(d)(3)(A)(ii) (authorizing disgorgement by "the person who received such unjust enrichment"); *Cavanagh II*, 155 F.3d at 136 (defining a relief defendant as a person who "has received ill-gotten funds"); *S.F. Reg'l II*, No. 17-CV-00223, 2020 WL 4569844, at *3 (N.D. Cal. Aug. 7, 2020) (relying on the two-part test, including the "receipt" prong, over two decades after *Cavanagh II*), *aff'd*, SEC v. Berkeley Healthcare Dynamics, LLC, No. 20-16754, 2022 WL 42807 (9th Cir. Jan. 5, 2022).

179. *See Cavanagh II*, 155 F.3d at 136; SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998); SEC v. Miller, 808 F.3d 623, 635 (2d Cir. 2015); *S.F. Reg'l II*, 2020 WL 4569844, at *3.

180. *See* SEC v. Hallam, 42 F.4th 316, 341 (5th Cir. 2022); *see also* Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) (presuming Congress legislates with knowledge of existing judicial precedent and adopts it absent contrary indication); Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law.").

181. *Cf. Cavanagh II*, 155 F.3d at 136 (permitting relief-defendant disgorgement based on receipt of ill-gotten funds and lack of a legitimate claim); *Colello*, 139 F.3d at 676 (explaining that relief defendants have received property obtained from the wrongdoing of others).

182. *See supra* note 173.

183. *See Cavanagh II*, 155 F.3d at 136.

remedy grounded in law rather than equity,[184] both elements of the equitable two-part test may weaken. The reference to "any unjust enrichment"[185] could create liability based on receipt rather than ownership,[186] and the phrase "as a result of"[187] may shift liability from identification of particular assets to any enrichment causally connected to the violation.[188]

Under this reading, "any unjust enrichment" may displace equity's legitimate claim requirement.[189] Equity protects recipients who provided consideration or value in exchange for assets,[190] but legal unjust enrichment is not tied to the recipient's ownership interest in a specific asset and can instead impose personal liability.[191] Congress's inclusion of the modifier "any,"[192] which the Supreme Court has read as an indicator of breadth,[193] reinforces the amended statute's expansionist reading. Together, these features could reframe relief-defendant liability as possession-based rather than entitlement-based, turning on receipt rather than ownership.[194]

Person 1 from the Introduction illustrates the practical effect of this shift. Person 1, a sales agent who earned commissions for what appeared to be legitimate work,[195] would ordinarily retain those commissions under equity's bona fide purchaser principle.[196] Under the expansionist reading, however, that protection may fall away, exposing Person 1 to disgorgement so long as the enrichment flowed from a securities violation, even if the work and the payment appeared legitimate.[197]

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184. *See Hallam*, 42 F.4th at 343.

185. 15 U.S.C. § 78u(d)(3)(A)(ii).

186. *Cf.* SEC v. Ahmed, 72 F.4th 379, 409 (2d Cir. 2023) (stating that liability "turns on a third party's behavior toward a particular asset, such as whether the third party controlled, benefited from, and/or transferred a particular asset held in a nominee's name," implying that something more than mere receipt is required); Janvey v. Adams, 588 F.3d 831, 834 (5th Cir. 2009) ("The jurisprudence requires only an 'ownership interest' to preclude an entity from being a proper relief defendant." (quoting Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191 (4th Cir. 2002))); Vollmer, *supra* note 50, at 359 n.292.

187. § 78u(d)(3)(A)(ii).

188. *Cf.* SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *25 (10th Cir. Dec. 16, 2021) (Bacharach, J., dissenting) (suggesting that the traceability requirement may be different if the SEC sought legal relief as opposed to equitable relief); Paroline v. United States, 572 U.S. 434, 445 (2014) ("The words 'as a result of' plainly suggest causation."); Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020) (explaining that but-for causation means the factor need only be one cause of the action, not the sole or proximate cause).

189. *See supra* note 186.

190. *See Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998); SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998); SEC v. Ross, 504 F.3d 1130, 1142 (9th Cir. 2007).

191. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 1, 4 (A.L.I. 2011); Vollmer, *supra* note 50, at 322.

192. § 78u(d)(3)(A)(ii).

193. *See* United States v. Gonzales, 520 U.S. 1, 5 (1997); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 220 (2008).

194. *See supra* note 186.

195. *See Ross*, 504 F.3d at 1133.

196. *See id.* (concluding that a defendant who "received compensation in return for services rendered" cannot be subject to disgorgement unless alleged to be a primary wrongdoer).

197. *Compare id.* at 1140 (distinguishing between custodians who merely hold another's property and individuals who earn commissions for services rendered), *and* RESTATEMENT

The expansionist reasoning may also undermine equity's tracing requirement.[198] Equity requires the SEC to trace funds[199] in the relief defendant's possession to a "reasonably approximat[ed]"[200] amount of wrongful proceeds, but evidence of commingled funds can prevent the SEC from meeting this burden.[201] Tracing thus links disgorgement to specific property rather than personal liability.[202] In law, by contrast, tracing is not a prerequisite for recovery.[203] Legal restitution depends on causation rather than asset identification.[204] The Fifth Circuit has situated disgorgement in law rather than equity since the 2021 NDAA.[205] Thus, tracing loses force as a constraint on recovery because it is an equitable principle.[206]

Furthermore, an expansionist reading of the amended provisions could interpret "as a result of" in § 78u(d)(3)(A)(ii) to emphasize causation rather than asset identification.[207] Drawing on the Supreme Court's treatment of similar language as a causal link between conduct and outcome,[208] relief-defendant liability could depend on whether enrichment occurred because of a securities violation, rather than whether the SEC can trace particular assets to the violation.[209] This framework may permit recovery of

(THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 66 cmt. a (A.L.I. 2011) (explaining that a bona fide purchaser who gives value in good faith "is not unjustly enriched" and is protected from restitution), *with* SEC v. Hallam, 42 F.4th 316, 331 (5th Cir. 2022) (adopting "disgorgement at law" and expanding recovery beyond traditional equitable limits).

198. *See supra* note 188 and accompanying text.

199. *See Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998).

200. SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *17 (10th Cir. Dec. 16, 2021).

201. *See* SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005); SEC v. Founding Partners Cap. Mgmt., 639 F. Supp. 2d 1291, 1304 (M.D. Fla. 2009); *see also* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213–14 (2002) (acknowledging that restitution is considered equitable only when it seeks the return of specific property or funds held by the defendant, rather than the imposition of personal liability).

202. *See Great-W. Life*, 534 U.S. at 214–15 ("[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.").

203. *See Camarco*, 2021 WL 5985058, at *21 (Hartz, J., dissenting) ("[W]hen a traceable fund has been dissipated, the only available remedy is legal restitution."); Candace Saari Kovacic-Fleisher, *Restitution in Public Concern Cases*, 36 LOY. L.A. L. REV. 901, 912–13 (2003).

204. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (A.L.I. 2011) (explaining that restitution may impose personal liability measured by the defendant's unjust enrichment without requiring identification of particular property or funds).

205. *See* SEC v. Hallam, 42 F.4th 316, 331 (5th Cir. 2022).

206. *Cf. Great-W. Life*, 534 U.S. at 213–14 (explaining that equitable restitution requires identification of "particular funds or property in the defendant's possession"); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (A.L.I. 2011) (describing restitution as capable of operating through personal liability rather than proprietary recovery).

207. *See supra* note 188.

208. *See supra* note 188.

209. *Cf.* SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005) (holding that commingling of legitimate and illegitimate funds defeated the SEC's ability to trace specific assets to fraud proceeds, thereby precluding relief-defendant liability).

commingled funds so long as they remain causally connected to the violation.[210]

Read together, the expansionist framework of the 2021 NDAA amendments points toward an intentional broadening of relief-defendant liability, and courts acting as faithful agents of Congress must give effect to the statute's text even if doing so displaces prior equitable restraints.[211]

3. The Broader Implications of Extending the Expansionist Reading

Adopting an expansive reading of the 2021 NDAA amendments as applied to relief defendants offers two principal advantages. First, it enables fuller recovery by avoiding equity's limits on recovery.[212] By authorizing disgorgement from a "person who received" tainted proceeds,[213] the statute may shift the inquiry away from tracing specific assets and toward whether the defendant received proceeds of the violation. This shift reduces the SEC's evidentiary burden and facilitates recovery of wrongful proceeds more efficiently.[214] Courts would also be better positioned to provide meaningful restitution if liability rested on receipt of tainted assets rather than on the uncertain question of ownership interests.[215]

Second, broader disgorgement authority strengthens deterrence by limiting asset shielding by wrongdoers.[216] If downstream recipients face disgorgement regardless of culpability, wrongdoers lose incentives to dissipate or conceal those proceeds through transfers.[217]

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210. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. b (A.L.I. 2011) (recognizing that legal restitution allows recovery without tracing where enrichment results from a claimant's loss); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000) (explaining that disgorgement must be causally connected to the wrongdoing but need not be limited to the specific property obtained through the violation).

211. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once the meaning of an enactment is discerned . . . the judicial process comes to an end."); United States v. Marshall, 908 F.2d 1312, 1319 (7th Cir. 1990) (asserting that the court's role is to "faithful[ly] interpret[] . . . what the political branches enacted").

212. *See* SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *13 (10th Cir. Dec. 16, 2021) ("'Equitable' relief must mean something less than all relief." (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993))).

213. 15 U.S.C. § 78u(d)(3)(A)(ii).

214. *See, e.g.*, *Banner Fund Int'l*, 211 F.3d at 617 (rejecting strict tracing and requiring only a causal connection between the violation and the disgorged amount); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231–32 (D.C. Cir. 1989) (finding that the SEC need only provide a reasonable approximation of profits causally connected to the violation); SEC v. Sanchez-Diaz, 88 F.4th 81, 95 (1st Cir. 2023) (denying disgorgement against a relief defendant who demonstrated legitimate ownership of the funds).

215. *See, e.g.*, SEC v. George, 426 F.3d 786, 798–99 (6th Cir. 2005); *Sanchez-Diaz*, 88 F.4th at 95.

216. *See* SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991) (holding that relief-defendant liability prevents wrongdoers from avoiding restitution by transferring ill-gotten gains to third parties).

217. *See* SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014) (explaining the deterrence rationale for disgorgement).

The expansionist reading, however, also carries significant risks. Anchoring relief-defendant liability in statutory text rather than equitable principles risks undermining the remedy's doctrinal foundation.[218] Relief defendants are innocent third parties against whom no violation is asserted,[219] making equitable principles the sole justification for compelling turnover. Recharacterizing disgorgement as a statutory penalty risks converting restitution into strict liability, imposing excessive forfeitures on innocent parties and abandoning the principle that liability exists solely to prevent unjust enrichment.[220] This broad construction may chill legitimate transactions[221] and expose individuals like Person 1 to forfeiture despite having no involvement in the underlying violation.[222] Expanding disgorgement this broadly may also implicate due process concerns because penalties trigger heightened procedural protections and a tribunal must provide a meaningful opportunity to contest liability.[223]

In sum, extending the Fifth Circuit's broad scope of SEC disgorgement would strengthen enforcement by reducing the agency's burdens[224] and deterring asset shielding.[225] Yet extending disgorgement this far risks imposing strict forfeiture on innocent recipients[226] and raises procedural concerns.[227] These concerns are particularly acute, as disgorgement is one of the SEC's most lucrative monetary remedies, often exceeding civil penalties.[228]

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218. *See* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 58 WASH. U. J.L. & POL'Y 17, 21–23, 28–31 (2018) (explaining that disgorgement has no traditional equitable pedigree).

219. *See Cherif*, 933 F.2d at 414; *Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998).

220. *See* Liu v. SEC, 140 S. Ct. 1936, 1943–44 (2020) (explaining that disgorgement must be grounded in unjust enrichment rather than punishment); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000) (emphasizing that relief-defendant liability is justified solely to prevent unjust enrichment, not as a penalty).

221. *See* George W. Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865, 896 n.141 (1983) (stating that disgorgement is "identical to damage actions in [its] impact on shareholders and in their tendency to deter legitimate transactions").

222. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 163–64 (2008) (warning that expanding liability in securities actions would "rais[e] the costs of doing business" and deter firms from U.S. markets).

223. *See* Tull v. United States, 481 U.S. 412, 422–23 (1987) (standing for the proposition that civil penalties are punitive legal remedies and trigger procedural protections); SEC v. Ross, 504 F.3d 1130, 1142 (2007) (confirming that a court cannot avoid proper procedure by arbitrarily calling someone a relief defendant).

224. *See* SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005); SEC v. Sanchez-Diaz, 88 F.4th 81, 95 (1st Cir. 2023).

225. *See* SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014).

226. *See* Liu v. SEC, 140 S. Ct. 1936, 1945–47 (2020) (warning that disgorgement must be limited to net profits to avoid transforming the remedy into a punitive sanction).

227. *See Tull*, 481 U.S. at 422–23; *Ross*, 504 F.3d at 1142.

228. *See* Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2024 (Dec. 17, 2024), https://www.sec.gov/newsroom/press-releases/2024-186 [https://perma.cc/A32R-LZH3]; Press Release, SEC, Addendum to Division of Enforcement Press Release: Fiscal Year 2024, https://www.sec.gov/files/fy24-enforcement-statistics.pdf [https://perma.cc/8V6Z-BA3H] (last visited Apr. 2, 2026).

B. Adopting Continuity: Relief-Defendant Liability Is Bound by Equitable Constraints

This section examines how the Second Circuit's continuity interpretation of the 2021 NDAA applies to relief defendants. Part II.B.1 explains how the Second Circuit's statutory reasoning supports reading the 2021 NDAA as preserving disgorgement's equitable character and limiting liability to primary violators. Part II.B.2 addresses the doctrinal consequences of that application for the equitable two-part test. Part II.B.3 assesses the implications of the continuity approach, weighing its protective and stabilizing effects against possible enforcement gaps.

1. Extending the Second Circuit's Interpretation to Relief Defendants

The Second Circuit has interpreted the 2021 NDAA amendments as reaffirming disgorgement's equitable character and preserving the limitations that *Liu* recognized.[229] The court grounded this reading in the statute's text, its structure, and the presumption that Congress legislates with awareness of equitable principles.[230] Applied to relief defendants, this reasoning could suggest that disgorgement remains grounded in the equitable two-part test.[231]

Section 78u(d)(3)(A)(ii) authorizes disgorgement from "the person who received" unjust enrichment,[232] using the definite article "the" rather than the broader phrase "any person" employed elsewhere in § 78u(d).[233] Within the continuity framework, this choice of language may indicate that subsection (ii) refers back to the subject identified in the introductory clause of § 78u(d)(3)(A)—the violator—rather than expanding the class of persons subject to disgorgement.[234] This meaningful variation could suggest that Congress's choice to use narrower phrasing in § 78u(d)(3)(A)(ii) reflects a continued focus on the violator rather than an expanded class of recipients.[235]

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229. *See* SEC v. Ahmed, 72 F.4th 379, 395 (2d Cir. 2022).

230. *See id.* at 395–96.

231. *See* SEC v. Colello, 139 F.3d 674, 676–77 (9th Cir. 1998); *Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998); *cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. a (A.L.I. 2011).

232. 15 U.S.C. § 78u(d)(3)(A)(ii).

233. *See, e.g.*, *id.* § 78u(d)(1) ("Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation . . . it may in its discretion bring an action."); *id.* § 78u(d)(6)(A) ("In any proceeding . . . against any person . . . the court may prohibit that person from participating in . . . an offering of penny stock."); *id.* § 78u(d)(6)(B) ("[T]he term 'person participating in an offering of penny stock' includes any person engaging in activities with a broker.").

234. *See id.* § 78u(d)(3)(A) (noting that the "Commission" has authority "[w]henever it shall appear to the Commission that *any person has violated* any provision of this chapter" (emphasis added)).

235. *See* Nielsen v. Preap, 139 S. Ct. 954, 965–68 (2019) (emphasizing the meaningful variation between "any" and "the"); Bostock v. Clayton County, 140 S. Ct. 1732, 1747, 1753 (2020) (interpreting "any" broadly).

Congress's repeated use of the phrase "such violation" in both § 78u(d)(3)(A)(i) and (ii) lends additional support to expanding the continuity view because the phrase naturally refers back to the violation described in the introductory clause.[236] These textual elements suggest that Congress drafted the amendments to clarify remedies against wrongdoers,[237] not to extend liability to innocent recipients.

The Second Circuit's continuity framework relies on the presumption that repeals by implication are disfavored.[238] Applied to relief defendants, this method supports the view that Congress's silence in the 2021 NDAA amendments preserved, rather than altered, the existing doctrine.[239] When Congress legislates without addressing a settled judicial rule, courts often treat this silence as maintaining the status quo absent clear indication otherwise.[240] The 2021 NDAA amendments do not reference relief defendants or revise the equitable provision from which the doctrine was developed, despite expressly addressing violators, penalties, and unjust enrichment.[241] This omission, together with the long-standing jurisprudential distinction between primary wrongdoers and relief defendants,[242] supports the continuity view that congressional silence preserves the existing relief-defendant doctrine.[243]

2. Doctrinal Consequences of Applying the Continuity View

Although extending the expansionist framework could modify the two-part equitable test,[244] extending the continuity framework suggests otherwise. Section 78u(d)(3)'s reference to "unjust enrichment,"[245] read consistently with the Second Circuit's interpretation of "disgorgement,"[246]

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236. § 78u(d)(3)(A)(i) ("[A court may] impose . . . a civil penalty to be paid by the person who committed such violation."); *id.* § 78u(d)(3)(A)(ii) ("[A court may] require disgorgement . . . by the person who received such unjust enrichment as a result of such violation.").

237. *See* SEC v. Ahmed, 72 F.4th 379, 396 (2d Cir. 2022) (describing the 2021 NDAA amendments as a "belt and suspenders" clarification of disgorgement's existing scope).

238. *See id.*

239. *See* Dent, *supra* note 221, at 888 (stating that while Congress may authorize an equitable power under statute, federal courts cannot "automatically assume or readily infer" such power).

240. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) (observing that "it is always appropriate to assume that our elected representatives . . . know the law" and legislate with awareness of existing judicial precedent); Lorillard v. Pons, 434 U.S. 575, 580 (1978) (recognizing that Congress is presumed to know and accept prior judicial or administrative interpretations when it reenacts statutory language unchanged).

241. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

242. *See* SEC v. Berkeley Healthcare Dynamics, LLC, No. 20-16754, 2022 WL 42807, at *2 (9th Cir. Jan. 5, 2022); *Ahmed*, 72 F.4th at 408.

243. *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 122–23 (2000) (indicating that Congress's inaction effectively ratified long-standing positions).

244. *See supra* Part II.A.2.

245. 15 U.S.C. § 78u(d)(3)(A)(ii).

246. *See Ahmed*, 72 F.4th at 396.

can be understood to retain traditional equitable limits because unjust enrichment is a term of art that historically operates within equitable limits.[247] Congress's use of the term in § 78u(d)(3)(A)(ii), absent a clear indication from Congress to the contrary, therefore could signal an intent to preserve those traditional constraints.[248]

Congress's use of the phrase "as a result of" similarly supports the continuity reading.[249] Courts interpreting analogous language in the Exchange Act's insider trading penalty provisions[250] have required a direct connection between the violation and the benefit received.[251] Taking the continuity view, a court could therefore read Congress's decision not to use broader causal phrases, such as "directly or indirectly"[252]—language that the Exchange Act employs elsewhere to expand causal reach[253]—as evidence that Congress did not intend to extend liability beyond the traditional tracing requirement.[254]

In the end, extending the Second Circuit's textual and structural reasoning to relief defendants would preserve the equitable framework governing relief defendants, confirming that Congress did not intend the 2021 NDAA amendments to broaden liability beyond the equitable two-part test.[255]

3. The Broader Implications of Extending the Continuity Reading

The continuity reading applied to relief-defendant liability has notable strengths. First, it prevents disgorgement from sliding into punitive forfeiture

247. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51(4) (A.L.I. 2011) (tying unjust enrichment to restitutionary remedies); Liu v. SEC, 140 S. Ct. 1936, 1942–43 (2020) (describing disgorgement as restitution for unjust enrichment).

248. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979).

249. 15 U.S.C. § 78u(d)(3)(A)(ii) (permitting disgorgement of "any unjust enrichment . . . as a result of such violation").

250. *See id.* § 78u-1(a)(2) ("The amount of the penalty which may be imposed on the person who committed such violation . . . shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase."); *id.* § 78u-1(a)(3) ("The amount of the penalty which may be imposed on any person who, at the time of the violation, directly or indirectly controlled the person who committed such violation . . . shall not exceed . . . three times the amount of the profit gained or loss avoided as a result of such controlled person's violation.").

251. *See, e.g.*, SEC v. Patel, 61 F.3d 137, 140–41 (2d Cir. 1995) (interpreting "as a result of" as requiring profits to be "derived from" the violative trade); Smith v. Ayres, 845 F.2d 1360, 1365–66 (6th Cir. 1988) (holding that damages "as a result of" insider trading must be "directly traceable" to the violative transaction).

252. 15 U.S.C. § 78j (making it unlawful for any person, "directly or indirectly," to engage in the prohibited conduct set out in the section); *id.* § 78t(a) (imposing liability on "[e]very person who, directly or indirectly, controls" a person liable under the Exchange Act); *id.* § 78t(b) (making it unlawful for any person, "directly or indirectly," to do any act through or by means of another person that would be unlawful to do directly).

253. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10 n.7 (1971); Belmont v. MB Inv. Partners, Inc., 708 F.3d 470, 484–85 (3d Cir. 2013); SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1092 (9th Cir. 2010).

254. *See* Russello v. United States, 464 U.S. 16, 23 (1983).

255. *Cf.* SEC v. Ahmed, 72 F.4th 379, 396 (2023) (applying the traditional two-part test after the 2021 NDAA).

against innocent parties. It does so by limiting liability to those who both hold funds traceable to fraud and lack a legitimate claim.[256] Second, the long-standing two-part test promotes stability and predictability because it provides clear, historically rooted criteria that guide courts and litigants in determining when disgorgement is appropriate.[257] Third, the continuity framework enables effective recovery by allowing the SEC to reclaim proceeds transferred to relatives and friends while protecting bona fide transferees who can demonstrate legitimate ownership interests.[258]

However, limiting relief-defendant liability to equitable constraints can create enforcement gaps. Under the two-part test, sophisticated fraudsters can still evade disgorgement by routing proceeds through commingled accounts[259] or by providing even minimal consideration.[260] These tactics can cause the SEC to fall short of its evidentiary burden in court.[261] This, in turn, would enable wrongdoers to disperse funds before they can be recovered, preventing victim compensation[262] and undermining equity's core purpose of reaching assets beyond the law to achieve complete justice.[263] These limitations expose a tension between equitable restraint and effective recovery.

III. COURTS SHOULD NOT EXPAND STATUTORY DISGORGEMENT TO RELIEF DEFENDANTS

The current circuit split centers on whether Congress, through the 2021 NDAA, created a new statutory form of disgorgement unconstrained by equity or merely codified the equitable remedy recognized in *Liu*.[264] Part II extended this interpretive conflict to relief defendants, with Part II.A presenting the expansionist view that Congress's amendments displaced the traditional two-part equitable test. This Note rejects that interpretation.

256. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 50 (A.L.I. 2011) (stating that liability of innocent recipients is limited to the enrichment retained); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000).

257. *See Cavanagh II*, 155 F.3d 129, 136 (2d Cir. 1998) (stating the two-part test); *Ahmed*, 72 F.4th at 392 (relying on *Cavanagh II* and its principles over two decades later).

258. *See* SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998) (explaining that the SEC may name a nonparty depository to effect full relief in marshalling assets that are the fruit of the underlying fraud and that a nominal defendant must lack a legitimate claim to those funds); Jones, *supra* note 149, at 386–88.

259. *See Cavanagh II*, 155 F.3d at 136 (holding that the SEC must demonstrate that funds are traceable to wrongdoing); SEC v. Team Res., Inc., 942 F.3d 272, 276 (5th Cir. 2019) (finding that relief-defendant liability is limited to assets connected to fraud).

260. *See* SEC v. Berkeley Healthcare Dynamics, LLC, No. 20-16754, 2022 WL 42807, at *2 (9th Cir. Jan. 5, 2022) (stating that relief-defendant protection is strong because disgorgement liability only attaches to "funds not received in exchange for consideration").

261. *See Cavanagh II*, 155 F.3d at 136.

262. *See* Nagy, *supra* note 33, at 898–99 (explaining that limits on disgorgement could substantially restrict the SEC's ability to recover monetary relief in enforcement actions).

263. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting Brown v. Swann, 35 U.S. (1 Pet.) 497, 503 (1836)); *see also Colello*, 139 F.3d at 677.

264. *See supra* Part I.C.

Although the Fifth Circuit offers a strong structural and textual basis for reading the 2021 NDAA amendments as broadening disgorgement for wrongdoers,[265] this Note argues that any such interpretation should not extend to relief defendants.

Continuing to apply § 78u(d)(5)'s equitable framework and the two-part test to the doctrine aligns with established equitable and interpretive principles. Part III.A establishes that relief-defendant liability depends on equity. The doctrine arose from the courts' ancillary equitable jurisdiction,[266] and placing it in a broader legal authority would sever it from the principles that justify its use.[267] Stripped of its equitable foundation, the doctrine loses its legitimacy and turns a remedial device into statutory forfeiture that equity itself rejects.

Even if § 78u(d)(3) and (7) could extend relief-defendant liability, interpretive principles counsel against doing so. Part III.B argues that courts should favor an interpretation that avoids injustice or constitutional objections,[268] particularly because Congress, in responding to the conflict over disgorgement in securities enforcement, offered no clear mandate to alter the established and widely accepted two-part framework.[269]

Together, Parts III.A and B confirm that, although the case for expanding disgorgement against wrongdoers under the 2021 NDAA is strong,[270] Congress left equity as the source for relief-defendant liability and preserved the two-part framework that defines it.

A. Equity Alone Sustains Relief-Defendant Liability

Restitutionary remedies, including unjust enrichment and disgorgement, can exist in the domain of either law or equity.[271] Relief-defendant liability, however, has no such dual nature.[272] Relief defendants are procedural participants joined "purely [as] a means of facilitating collection" and are not

265. *See* SEC v. Hallam, 42 F.4th 316, 334–37 (2022).

266. *See Colello*, 139 F.3d at 676.

267. *Cf. Hallam*, 42 F.4th at 331 (adopting "disgorgement at law" and expanding recovery beyond traditional equitable limits); Dent, *supra* note 221, at 931 n.300 (emphasizing that ancillary relief covers areas that cannot be remedied by law).

268. *See infra* note 301 and accompanying text.

269. *See supra* note 108 and accompanying text.

270. *See Hallam*, 42 F.4th at 338–39.

271. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. b (A.L.I. 2011); Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017) (describing disgorgement as a penalty).

272. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 50 cmt. b (A.L.I. 2011) (clarifying that restitution from an "innocent recipient" proceeds through constructive trust or equitable lien and personal money is ordinarily unavailable); SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991) (emphasizing that a relief defendant is incidental to the suit's outcome and is "joined purely as a means of facilitating" the turnover of tainted funds).

accused of wrongdoing.[273] Examining these parties through their alternative label, nominal defendants,[274] reinforces this notion. A nominal defendant has "no financial interest" in a lawsuit's outcome and "will not be affected by any judgment."[275] As a result of their disinterest, relief defendants are involved in the litigation solely under the court's broad equitable authority to order ancillary relief.[276]

Ancillary relief arises when a court must supplement its equitable powers to ensure that its orders achieve their intended purpose.[277] It fills the procedural space between an equitable injunction and a legal cause of action, permitting a court to restore property or ensure compliance when no independent claim would support recovery.[278] As such, ancillary relief exists only when the law provides no adequate remedy.[279]

Relief-defendant liability cannot operate independently of that ancillary authority. The SEC names an individual or party as a relief defendant, rather than a primary defendant, precisely because no cause of action exists against that person.[280] A relief defendant's participation rests entirely on the court's equitable power to recover assets that rightfully belong to investors but cannot be reached through legal means.[281] Detaching the doctrine from its equitable foundation converts an equitable power into a statutory penalty,[282] erasing the very limits that make it legitimate. Equity's charge to "do complete rather than truncated justice"[283] permits courts to reach all parties to accomplish "full relief."[284] This completeness, however, must be measured by fairness, not total recovery,[285] because equitable relief must

273. *Cherif*, 933 F.2d at 414; *see Party*, BLACK'S LAW DICTIONARY (12th ed. 2024) (stating that a nominal party is "joined in the lawsuit to avoid procedural defects"); SEC v. Colello, 139 F.3d 674, 675 (9th Cir. 1998).

274. *See supra* note 17.

275. *Party*, BLACK'S LAW DICTIONARY (12th ed. 2024).

276. *Colello*, 139 F.3d at 676.

277. *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291–92 (1960) (recognizing courts' power to employ ancillary remedies necessary to effectuate the purpose of a statute); SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971) (asserting that once equity jurisdiction is invoked, courts may order other equitable relief necessary under the circumstances).

278. *See* Dent, *supra* note 221, at 867 n.5 ("[Ancillary relief] has come to be used more broadly to mean any equitable relief not authorized by statute."); *Tex. Gulf Sulphur Co.*, 446 F.2d at 1307–08.

279. *See* Dent, *supra* note 221, at 931, 931 n.300.

280. *See* SEC v. Cherif, 933 F.2d 403, 414–16 (7th Cir. 1991) (explaining the difference between a wrongdoer and a relief defendant and the qualifications for both in SEC enforcement action).

281. *See id.*

282. *Cf.* SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022) (adopting disgorgement at law and expanding recovery beyond traditional equitable limits).

283. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting Brown v. Swann, 35 U.S. (1 Pet.) 497, 503 (1836)); *see also* SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998).

284. *Colello*, 139 F.3d at 677.

285. *See* SEC v. Camarco, No. 19-1486, 2021 WL 5985058, at *13 (10th Cir. Dec. 16, 2021).

remain proportional and nonpunitive.[286] The two-part test reflects that boundary by permitting recovery from innocent parties only when the SEC can prove (1) the assets were traceable to fraud and (2) the holder lacks a legitimate claim.[287] These requirements define the outer limits of equity's jurisdiction and are the only lawful basis for relief-defendant liability.

An expansionist reading of the 2021 NDAA dismantles the equitable framework. By interpreting § 78u(d)(7) as an independent statutory disgorgement remedy and linking it to the penalty provisions of § 78u(d)(3), these interpretations treat disgorgement as a legal sanction rather than an equitable device.[288] Applying a legal disgorgement remedy to relief defendants imposes statutory penalties on parties joined only "to effect full relief in marshalling of assets"[289] and who have "no personal stake in the outcome of the litigation."[290] Such parties participate only to enable equitable enforcement, not to face punitive liability. Put simply, because relief-defendant liability derives entirely from a federal court's equitable authority to grant ancillary relief, it cannot exist outside that framework without losing its jurisdictional foundation. Accordingly, the 2021 NDAA amendments should not be read to extend statutory disgorgement to parties whose involvement depends solely on equity.

B. The Best Reading of the Amendments Forecloses Expanding Relief-Defendant Liability

As Parts I and II.B demonstrate, nothing in the 2021 NDAA amendments to § 78u(d)(3) and (7) clearly signals that Congress intended to upend the equitable framework governing relief-defendant liability.[291] Both the statutory language and legislative record leave that question unresolved.[292] Where statutory language is ambiguous and Congress has provided no clear mandate, federal courts must reject statutory constructions that raise serious constitutional concerns.[293] Applying the expansionist view to relief

286. *See* Liu v. SEC, 140 S. Ct. 1936, 1947 (2020) (limiting equitable disgorgement to a wrongdoer's net profits and rejecting punitive awards); *Porter*, 328 U.S. at 398 (stating that courts exercising statutory equitable jurisdiction retain the full scope of traditional equitable powers unless Congress clearly restricts them); Kansas v. Nebraska, 574 U.S. 445, 454–56 (2015) (affirming that equity's completeness is measured by proportional fairness).

287. *See* SEC v. Ross, 504 F.3d 1130, 1141–42 (9th Cir. 2007).

288. *See* SEC v. Hallam, 42 F.4th 316, 331 (5th Cir. 2022).

289. *Colello*, 139 F.3d at 677.

290. Neubeck v. All Am. Ins. Co., 651 F. Supp. 3d 646, 653 (W.D.N.Y. 2023) (quoting Johnson v. County of Suffolk, 280 F. Supp. 3d 356, 362 (E.D.N.Y. 2017)).

291. *See* BLOOMENTHAL & WOLFF, *supra* note 50 (asserting that the clause "as a result of such violation" in § 78u(d)(3)(A)(ii) is ambiguous). *Compare supra* Part II.A (interpreting the 2021 NDAA amendments as broadening relief-defendant disgorgement), *with supra* Part II.B (interpreting the 2021 NDAA amendments as preserving the equitable constraints of relief-defendant disgorgement).

292. *See supra* note 108 and accompanying text.

293. *See* United States v. Hansen, 143 S. Ct. 1932, 1946 (2023) (applying the constitutional avoidance canon when a statute is susceptible to various plausible readings); Bond v. United

defendants would do exactly that—convert an equitable collection mechanism for recovering traceable property from custodial holders into a statutory forfeiture tool reaching individuals neither accused, charged, nor found to have violated securities laws.[294]

The constitutional stakes of such an expansion are substantial. Both violators and nominal defendants may be ordered to disgorge assets, but the U.S. Constitution entitles them to different degrees of process.[295] Relief defendants differ in kind from wrongdoers: they are not accused of violating the law, face no adjudication of liability, and are joined only to return specific property in which they have no legitimate claim.[296] Because their status in the suit is incidental to a federal court's equitable authority,[297] they are entitled only to notice and an opportunity to be heard—not the full suite of procedural protections that attach when the government seeks to impose sanctions on an accused violator.[298] Thus, adopting the expansionist view—authorizing disgorgement as a form of monetary sanctions against relief defendants—would therefore collapse the doctrinal distinction between wrongdoers and innocent recipients and would raise serious due process concerns.[299]

This constitutional concern should guide the interpretive choice of the 2021 NDAA amendments. If a reading of the statute authorizes punitive monetary sanctions against parties not accused of wrongdoing in violation of Fifth Amendment due process rights,[300] a court must reject that interpretation under the canon of constitutional avoidance.[301] Even if the constitutional issue is not definitively established but an interpretation of an ambiguous statute would generate substantial unfairness, courts must still adopt the construction that "does [the] least violence" to the statutory scheme and avoids unjust outcomes.[302] Applying these principles here points in the same direction: Congress gave no indication that it intended to collapse the long-standing distinction between wrongdoers and innocent recipients, and

States, 572 U.S. 844, 858 (2014) (requiring a clear statement from Congress before construing ambiguous text to alter the balance of powers under federalism principles).

294. *Cf. Colello*, 139 F.3d at 676 (asserting that a relief defendant is not accused of wrongdoing and is only joined to facilitate recovery of assets with no legitimate claim); SEC v. Founding Partners Cap. Mgmt., LLC, 639 F. Supp. 2d 1291, 1293–94 (M.D. Fla. 2009) (warning that relief defendants must not be subject to punitive monetary judgments).

295. *See* SEC v. Ross, 504 F.3d 1130, 1142 (9th Cir. 2007); SEC v. Ahmed, 72 F.4th 379, 408 (2023) ("For relief defendants . . . equity imposes different rules [than for wrongdoers].").

296. *See supra* note 272 and accompanying text.

297. *See* SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991).

298. *See Ross*, 504 F.3d at 1142. Federal courts are not required to have an independent basis for subject matter jurisdiction because they are not the target of liability and no substantive claim is asserted against them. *See Colello*, 139 F.3d at 676.

299. *See Ross*, 504 F.3d at 1142; Bainbridge, *supra* note 218, at 21.

300. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

301. *See* United States v. Hansen, 143 S. Ct. 1932, 1939–40 (2023) (adopting a narrowing construction of the statute to avoid constitutional concerns); Skilling v. United States, 561 U.S. 358, 408 (2010) (rejecting an interpretation to avoid a due process conflict).

302. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring).

preserving that distinction avoids both constitutional concerns and the distortion of the established relief-defendant framework.

CONCLUSION

The 2021 NDAA amendments revived the debate over the scope of SEC disgorgement, yet federal courts have not addressed what the amendments mean for relief-defendant liability. This Note fills that gap by examining the consequences of extending both the Fifth Circuit's expansionist view and the Second Circuit's continuity interpretation to relief defendants. This analysis demonstrates that extending the expansionist view would collapse the equitable two-part test by displacing both the tracing and legitimate-claim requirements, exposing relief defendants to penalty judgments never sanctioned by equity. Extending the continuity view, by contrast, would preserve the two-part test as the governing equitable constraint on relief-defendant liability.

This Note argues that courts should not stretch the Fifth Circuit's expansionist interpretation to relief defendants. Relief-defendant liability emerged to prevent unjust enrichment, not to impose forfeiture on innocent parties. Divorced from equity, it loses the very principles that legitimize compelling disgorgement from nonwrongdoers. Even if the 2021 NDAA amendments could theoretically reach relief defendants, such an expansion raises serious due process concerns. Without a clear congressional mandate to disturb a doctrine that has functioned for decades undisturbed, courts should resist expansion. The two-part test is not merely equity's suggestion; it is equity's mandate. And where equity ends, so too must relief-defendant liability.