January 22, 2020

ATTORNEY GENERAL RAOUL OPPOSES EFFORT TO PREVENT SEC FROM REQUIRING FRAUDULENT ACTORS TO RETURN PROFITS

Raoul, 23 Attorneys General File Amicus Brief with Supreme Court Supporting Courts' Ability to Require Fraudulent Actors to Turn Over Illegal Profits

Chicago — Attorney General Kwame Raoul, leading a bipartisan coalition of 24 attorneys general, today filed an amicus brief with the Supreme Court arguing that the Securities and Exchange Commission (SEC) should be allowed to ask courts to require defendants to return money obtained by defrauding investors.

The brief, filed in Liu v. Securities and Exchange Commission, argues that disgorgement, requiring bad actors to return their gains, is critical to redressing harm and deterring future misconduct. Restricting the SEC from seeking this remedy in its enforcement efforts will harm investors, lead to unfair and dysfunctional securities markets and embolden wrongdoers.

"Individuals who defraud investors should not be able to keep the profits they obtain by breaking the law," Raoul said. "The SEC's ability to ask courts to force wrongdoers to repay stolen money not only holds defendants fully accountable, but it also serves as a powerful deterrent to those who would seek to engage in securities fraud."

Disgorgement is one of the surest ways to restore losses to those who have been harmed by fraudulent actions. In fiscal year 2019, fraudulent actors were ordered to repay more than $3.2 billion in enforcement actions brought by the SEC. Additionally, requiring wrongdoers to return their profits deters future misconduct and promotes confidence in securities markets. Through disgorgement, states and the SEC are able to provide relief to victims of Ponzi schemes and other scams often sold to investors.

In the brief, Raoul and the coalition argue that preventing the SEC from using disgorgement in court actions would permit bad actors to keep their ill-gotten gains and perpetuate their scams. Without disgorgement, wrongdoers have little incentive to stop violating securities laws. As a result, investors may lose confidence in the markets.

Joining Raoul in the brief are the attorneys general of Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, Washington and the District of Columbia.

No. 18-1501

In the Supreme Court of the United States

CHARLES C. LIU AND XIN WANG A/K/A LISA WANG,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, INDIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a district court, in a civil enforcement action brought by the Securities and Exchange Commission, may order disgorgement of money acquired through fraud.

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INTEREST OF AMICI CURIAE

The States of Illinois, Alaska, Colorado, Connecticut, Delaware, Hawai'i, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and Washington, and the District of Columbia (collectively, the "amici States") submit this brief in support of respondent to urge affirmance of the court of appeals, which held that the Securities and Exchange Commission ("SEC") possesses the authority to seek disgorgement in civil actions.

The amici States have a longstanding and substantial interest in protecting the welfare and financial security of investors within their borders by deterring and remediating securities fraud. The repercussions of fraud are exacerbated when a wrongdoer is allowed to keep his or her ill-gotten gains in part because the financial loss is borne by victim investors. In an effort to mitigate this loss, the SEC routinely returns disgorged funds to harmed investors, which often include the amici States' residents and institutional investors, such as state-operated institutions. If the SEC is no longer able to collect disgorgement in civil suits, then the States and their residents will suffer direct financial harm.

Additionally, the amici States have a significant interest in ensuring that the securities markets in which they and their residents operate are fair and functioning. When fraud is committed, the damage is not limited to the investors directly involved in a transaction; on the contrary, the harm extends to other market players. Allowing a wrongdoer to keep

the illicit profits not only signals that crime is beneficial, but also disrupts the markets by disadvantaging investors who play by the rules. Those investors, in turn, are more likely to face increased costs, creating a dysfunctional and unfair marketplace for everyone.

Finally, the amici States' regulatory and enforcement efforts are fortified by having a strong federal partner. Although the States play a vital role in policing fraud through their own regulatory schemes and in coordination with one another, the SEC serves as a collaborator and critical safeguard. Indeed, the States and the SEC often work in tandem to address securities fraud at both the federal and state levels. Precluding the SEC from seeking disgorgement in civil actions would weaken its efforts to combat fraud, which, in turn, would frustrate the comprehensive enforcement scheme in which the States operate.

SUMMARY OF ARGUMENT

Each year, Americans turn to the securities markets to secure their futures and provide for their families—seeking to pay for their homes, send their children to college, or save for their retirement.[1] In recent years, the number of individual investors has grown alongside technical advancements, offering these investors a broader, more sophisticated array of opportunities. But the technological advancements that have made the markets more accessible to individual investors have also made it easier for wrongdoers to reach large numbers of investors through personalized fraudulent schemes, and more difficult for regulators to trace and remedy illegal acts.[2] It is thus all the more important for regulators faced with combating these innovative schemes to have effective, equitable remedies like disgorgement at their disposal.

Petitioners, however, would curtail the SEC's remedial authority by prohibiting the entry of a disgorgement award in civil enforcement actions. In

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[1] See, *e.g.*, *Oversight of the Securities and Exchange Commission: Wall Street's Cop on the Beat: Hearing Before the U.S. House of Representatives Committee on Financial Services*, 116th Cong. 1-2 (2019) (statement of SEC Chairman and Commissioners), *available at* https://www.sec.gov/news/testimony/ testimony09-24-2019; SEC, *What We Do* (June 10, 2013), https://www.sec.gov/Article/whatwedo.html. (For authorities available on the internet, all sites were last visited on January 17, 2020).

[2] See Doug Shadel & Karla Pak, *AARP Investment Fraud Vulnerability Study*, at 3 (2017), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf.

addition to harming the SEC and its enforcement actions, such a limitation would have a substantial impact on the amici States and their residents. The SEC would lose a critical remedial tool for discouraging fraud by making it unprofitable; the stability of the securities markets would be undermined; and the amici States' ability to partner with the SEC to remediate and deter fraud would be impaired.

ARGUMENT

I. Disgorgement Benefits The Amici States, Their Residents, And Their Markets.

The amici States are home to millions of individual and business investors that rely on federal and state enforcement efforts to remedy the billions of dollars in financial loss they suffer from fraudulent conduct each year. Although the SEC has several tools available to it to address the harm caused by fraud, disgorgement—which is "[t]he act of returning or repaying ill-gotten gains obtained from fraudulent activities"[3]—is "often the surest way" to restore these losses.[4] Accordingly, the SEC routinely seeks (and

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[3] SEC, *Agency Financial Report for Fiscal Year 2019* ("*2019 SEC Financial Report*"), at 151, https://www.sec.gov/files/sec-2019-agency-financial-report.pdf#mission; see *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) ("disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain'") (quoting *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. a, at 204 (Am. Law Inst. 2010)) (alteration in original).

[4] Steven Peikin, Co-Director, SEC Div. of Enf't, *Remedies and Relief in SEC Enforcement Actions*, Address at Practicing Law Institute White Collar Crime 2018: Prosecutors and Regulators Speak (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318#_ftnref25.

courts routinely order) disgorgement in securities enforcement actions where a wrongdoer has profited from an illegal transaction.[5] In fact, in fiscal year 2019, parties to judicial and administrative enforcement actions brought by the SEC were ordered to pay $3.248 billion in disgorgement.[6] See also *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008) (noting that the SEC collected more than $10 billion in disgorgement and penalties in enforcement actions between 2002 and 2007, "much of it for distribution to injured investors").

In addition to its efficacy, the SEC's ability to seek disgorgement in civil suits benefits the economic health of the amici States. First, States and their residents are often the direct or indirect recipients of disgorged funds. Second, disgorgement preserves the integrity of the securities markets by deterring fraudulent conduct, remedying harms to anonymous or untraceable investors, and promoting investor confidence.

A. Disgorgement provides a direct financial benefit to the amici States and their residents.

The SEC's ability to seek disgorgement in civil actions benefits the amici States and their residents by enabling the SEC to compensate defrauded inves-

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[5] See Daniel B. Listwa & Charles Seidell, *Penalties in Equity: Disgorgement After* Kokesh v. SEC, 35 Yale J. on Reg. 667, 674 (2018).

[6] SEC, Div. of Enf't, *2019 Annual Report* ("*2019 SEC Annual Report*"), at 16, https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

tors in several different ways. To begin, the SEC returns disgorged funds directly to investors harmed by fraudulent schemes. These investors include residents of the amici States and institutional investors operating within their borders, including state-operated entities that invest in securities. The SEC's efforts thus have a direct and significant impact on the financial welfare of these investors by enabling them to recoup their losses.

Recently, for example, a federal district court ordered perpetrators of a Ponzi scheme to disgorge more than $8 billion for distribution to injured investors, many of whom were senior citizens living in upstate New York.[7] The SEC was also able to redress losses caused by a company that raised money from investors by falsely announcing that they had created a successful treatment for human immunodeficiency virus ("HIV").[8] There, the SEC recovered $128,000 in ill-gotten gains for distribution to the 79 defrauded investors.[9] And in yet another case, the SEC obtained disgorgement[10] to remediate

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[7] See SEC, *Watermark Financial Services Group, Inc.* (Aug. 28, 2017), https://www.sec.gov/divisions/enforce/claims/watermarkfinancial.htm; Order Creating a Fair Fund, *SEC v. Watermark Fin. Servs. Grp., Inc.*, No. 1:08-cv-00361 (W.D.N.Y. May 1, 2013), ECF No. 234, at 1-2.

[8] Litigation Release, SEC, *SEC v. Uniprime Capital Acceptance, Inc. and Alfred J. Flores* (Aug. 13, 1999), https://www.sec.gov/litigation/litreleases/lr16252.htm.

[9] Litigation Release, SEC, *SEC v. Uniprime Capital Acceptance, Inc. and Alfred J. Flores* (Sept. 23, 2005), https://www.sec.gov/divisions/enforce/claims/uniprime.htm.

[10] Order, *SEC v. Universo Foneclub Corp.*, No. 1:06-cv-10940 (D. Mass. Aug. 2, 2008), ECF No. 48.

a Ponzi scheme that had defrauded Christian Brazilian-Americans living in Massachusetts; the victims had been persuaded to invest in the scheme by being told that "God wanted the Brazilian community to be prosperous."[11] Ultimately, more than $1.8 million was distributed to harmed investors, and approximately 90% of harmed investors received compensation.[12]

The SEC is also able to return disgorged funds to the States and their local governments as institutional investors. For instance, the SEC brought an action against a company and its president that fraudulently convinced five Wisconsin school districts to invest $200 million in hopes of securing funds to pay retirement benefits for school employees.[13] Upon the SEC's motion,[14] the federal district court ordered defendants to disgorge their illicit profits of $1,660,000, with the entire amount sent to the harmed school districts.[15]

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[11] Complaint ¶¶ 11, 14, *SEC v. Universo Foneclub Corp.*, No. 1:06-cv-10940 (D. Mass. May 30, 2006), ECF No. 1.

[12] Final Report of Distribution Agent at 3-4, *SEC v. Universo Foneclub Corp.*, No. 1:06-cv-10940 (D. Mass. May 25, 2010), ECF No. 49-2.

[13] Final Judgment at 16-18, *SEC v. Stifel, Nicolaus & Co., Inc.*, No. 2:11-cv-00755 (E.D. Wis. Dec. 6, 2016), ECF No. 338.

[14] See Joint Motion for Entry of Final Judgment, *SEC v. Stifel, Nicolaus & Co., Inc.*, No. 2:11-cv-00755 (E.D. Wis. Oct. 5, 2012), ECF No. 336.

[15] Final Judgment at 3, *SEC v. Stifel*, *supra* note 13; see SEC, *SEC v. Stifel, Nicolaus & Co. Inc.* (Sept. 5, 2017), https://www.sec.gov/ divisions/enforce/claims/stifel.htm.

These distributions are just examples of how this remedy, which can be tailored to fit a wide variety of circumstances, directly benefits the amici States and their residents. See also, *e.g.*, Final Judgment at 11, 13, *SEC v. Faulkner*, No. 3:16-cv-01735 (N.D. Tex. Oct. 23, 2018), ECF No. 330 (defendant who fraudulently obtained $80 million from hundreds of investors nationwide ordered to disgorge more than $23 million in illicit profits for distribution to harmed investors);[16] *SEC v. Brinker*, No. IP01-0259 (C-H-G) (S.D. Ind. 2003) (defendants alleged to have fraudulently raised $20.3 million from more than 600 investors in 11 States ordered to pay nearly $18 million in disgorgement and prejudgment interest).[17]

As a practical matter, when a court orders disgorgement, the awarded funds are collected and held by the court, a court-appointed receiver, or the SEC until they are able to be dispersed.[18] Although the mechanisms for returning disgorged funds may differ depending on the entity holding the funds, these variances do not diminish the SEC's commitment to returning funds to investors. An award directing the SEC (rather than a federal court) to collect the

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[16] See Complaint ¶ 2, *SEC v. Faulkner*, No. 3:16-cv-01735 (N.D. Tex. June 24, 2016), ECF No. 1; Order Granting Receiver's Motion to Approve Proposed Plan of Distribution at 2, *SEC v. Faulkner*, No. 3:16-cv-01735 (N.D. Tex. Mar. 26, 2019), ECF No. 419.

[17] See also Litigation Release, SEC, *SEC v. Brinker* (July 8, 2003), https://www.sec.gov/litigation/litreleases/lr18221.htm; Litigation Release, SEC, *SEC v. Brinker* (Feb. 28, 2001), https://www.sec.gov/litigation/litreleases/lr16915.htm.

[18] See *2019 SEC Financial Report*, *supra* note 3, at 61.

disgorged funds thus does not, as petitioners suggest, see Pet. Br. 6-7, 25, indicate that the disgorged funds will remain with the SEC. On the contrary, the SEC is able to return the funds it holds to harmed investors in many cases.[19] In fact, the SEC has already returned nearly $1.2 billion of the $1.9 billion in total disgorgement and penalties it collected in fiscal year 2019.[20] See Resp. Br. 36 (noting distribution of disgorged funds may take time due to complexity of fraud). As the recipients of these funds, residents of the amici States and institutional investors who operate within their borders rely on the SEC's efforts to mitigate their financial losses.

The same is true for funds collected and held by a court or a court-appointed receiver. This approach may be used for many different reasons, including, for example, where early intervention by a federal court might preserve assets for eventual distribution to investors. In one such case, the SEC alleged that two individuals and their companies had fraudulently induced more than 900 investors nationwide to

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[19] See *2019 SEC Annual Report*, *supra* note 6, at 1; SEC, *Fiscal Year 2020 Congressional Budget Justification Annual Performance Plan and Fiscal Year 2018 Annual Performance Report* (Mar. 18, 2019), at 23, https://www.sec.gov/files/secfy20congbudgj ust_0.pdf.

[20] Compare *2019 SEC Financial Report*, *supra* note 3, at 90, with *2019 SEC Annual Report*, *supra* note 6, at 9; see also SEC, *Information for Harmed Investors* (Jan. 13, 2020), https://www.sec.gov/divisions/enforce/claims.htm (advising harmed investors of cases in which SEC may be distributing disgorgement funds); SEC, *Archive of Completed Distributions* (Jan. 13, 2020), https://www.sec.gov/divisions/enforce/claims/archive.htm (nonexhaustive list of completed distributions).

invest at least $135 million in the rehabilitation of underdeveloped properties primarily located on the south side of Chicago.[21] Given the gross amount of misconduct alleged, the SEC was concerned that the individual and company defendants would mismanage their assets before disgorgement could be ordered and so, immediately upon filing its complaint, requested that the court appoint a receiver to manage and preserve the defendants' assets.[22] The SEC explained that the receiver would ensure that any disgorgement obligations would be satisfied and the disgorged funds would be distributed "to ensure the maximum recovery for the defrauded investors."[23] The court appointed a receiver within two days[24] and eventually ordered the individual defendants to disgorge more than $3 million, which was the amount they had received from their companies.[25]

To be sure, as this Court noted in *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017), it is not always possible to return disgorged funds to investors. But the

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[21] Complaint ¶¶ 1, 17, *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587 (N.D. Ill. Aug. 15, 2018), ECF No. 1.

[22] Motion for Temporary Restraining Order, to Appoint a Receiver, and Provide for Other Ancillary Relief at 2, *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587 (N.D. Ill. Aug. 15, 2018), ECF No. 3; Memorandum in Support at 16-18, *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587 (N.D. Ill. Aug. 15, 2018), ECF No. 4.

[23] Memorandum at 17, *EquityBuild*, *supra* note 22.

[24] Minute Entry, *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587 (N.D. Ill. Aug. 17, 2018), ECF No. 14.

[25] Order at 3, *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587 (N.D. Ill. Sept. 24, 2019), ECF No. 533.

SEC's practice is to returns disgorged funds (or ask that the court or receiver do so) to investors unless doing so is impractical.[26] See Resp. Br. 36-37. Practicality concerns arise because securities markets involve impersonal, geographically diverse, and multi-party transactions.[27] Sellers and buyers of securities often interact indirectly; transactions are carried out by a network of third parties, such as issuers, underwriters, and brokers, scattered across the globe.[28] Thus, it is not always possible to identify every harmed investor and calculate the precise losses suffered.[29] At other times, money is not returned because eligible investors do not timely file claims for the funds or the distribution is not cost-effective.[30] Seeking to overcome these practical

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[26] See *2019 SEC Financial Report*, *supra* note 3, at 89-90; SEC, Div. of Enf't, *2018 Annual Report*, at 11, https://www.sec.gov/files/enforcement-annual-report-2018.pdf ("The Commission places a significant priority on returning funds to harmed investors whenever possible."); see also SEC, *2006 Performance and Accountability Report*, at 8, https://www.sec.gov/about/secpar/secpar2006.pdf ("Whenever practical, the Commission seeks to return funds to harmed investors . . . .").

[27] See Thomas C. Mira, *The Measure of Disgorgement in SEC Enforcement Actions Against Inside Traders Under Rule 10b-5*, 34 Cath. U. L. Rev. 445, 446-47 (1985).

[28] *Ibid.*

[29] See *ibid.*; Micah J. Long, *Reasonable Approximation and Proximate Cause: How the Disgorgement Elements Are Bound Together*, 12 Liberty U. L. Rev. 1, 33 (2017).

[30] See SEC, Office of Inspector Gen., *Improvements Needed in the Division of Enforcement's Oversight of Fund Administrators*, at 24 (Sept. 30, 2015), https://www.sec.gov/oig/reportspubs/

obstacles, the SEC has improved its distribution program in recent years and increased the amount of funds returned to harmed investors.[31]

But even when disgorged funds cannot be distributed directly to investors, the SEC often is able to use the funds to compensate harmed States and their residents. Disgorged funds that are not returned to investors are deposited in either the United States Treasury General Fund or the Investor Protection Fund. Congress established the Investor Protection Fund in 2011 to incentivize whistleblowers to provide the SEC with credible information in exchange for compensation.[32] Since the inception of the program, state residents have provided more than 26,000 tips, including 2,046 tips from California residents, 950 tips from New York residents, and 354 from Illinois residents.[33] These tips have led to enforcement actions resulting in more than $2 billion in financial remedies,[34] which are often used to compensate harmed investors. In return for such tips, the SEC has used the Investor Protection Fund to award approximately $376 million to 61 whistleblowers.[35]

Improvements-Needed-in-the-Division-of-Enforcements-Oversight-of-Fund-Administrators.pdf.

[31] *2019 SEC Annual Report*, *supra* note 6, at 9.

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act, § 922(a), Pub. L. No. 111-203, 124 Stat. 1376, 1842 (2010).

[33] SEC, *Whistleblower Awards Over $300 Million* (Aug. 23, 2019), https://www.sec.gov/page/whistleblower-100million.

[34] *Ibid.*

[35] Press Release, SEC, *SEC Awards $50 Million to Two Whistleblowers* (Mar. 26, 2019), https://www.sec.gov/news/press-release/2019-42.

These awards can range from 10 to 30 percent of the financial remedies collected, and no money is withheld from harmed investors to pay the awards.[36] For example, the SEC awarded more than $8 million each to two whistleblowers whose tips resulted in a disgorgement award of $671 million, primarily for distribution to harmed investors.[37]

B. Disgorgement preserves the integrity of securities markets.

The disgorgement of ill-gotten gains further redounds to the benefit of the amici States because it protects the integrity of the markets. The complexity of the securities markets means that discrete instances of fraud often cause a ripple effect on the rest of the markets and, in turn, on the economy. See *United States v. Naftalin*, 441 U.S. 768, 776 (1979) ("[T]he welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole."). The amici States thus have a significant, nonpunitive interest in taking measures to deter fraud in addition to remedying its broader effects when it occurs. Disgorgement is well suited to address this interest in protecting the markets, as courts have recognized. See, *e.g.*, *SEC v. Diversified Corp. Consulting Grp.*, 378 F.3d 1219, 1224 (11th

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[36] *Ibid.* (noting that this range applies when the total amount collected exceeds $1 million).

[37] Press Release, SEC, *More Than $16 Million Awarded to Two Whistleblowers* (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-216.

Cir. 2004) (disgorgement allows the SEC to "vindicat[e] public rights and further[] public interests"); *SEC v. Teo*, 746 F.3d 90, 109 (3d Cir. 2014) (noting disgorgement enables the SEC to "uphold the integrity of the stock market"); *SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011) (Loken, J., concurring in part and dissenting in part) (disgorgement "protects the integrity of the securities markets" from future violations); *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) ("By deterring violations of the securities laws, disgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets.").

As an initial matter, it is crucial that the SEC be able to collect disgorgement in its civil suits. Disgorgement deters future misconduct by ensuring that crime does not pay.[38] This, in turn, has the nonpunitive benefit of protecting the markets. See Resp. Br. 39. "The deterrent effect of [a Commission] enforcement action would be greatly undermined if securities law violators were not required to disgorge illegal profits." *Rind*, 991 F.2d at 1491 (alteration in original). In fact, the SEC began seeking disgorgement as a remedy from courts in the 1970s because its "experience had shown that injunctive relief did little to dissuade offenders from the often-lucrative violation of securities law."[39] An injunction may prohibit a wrongdoer from violating securities laws, but the wrongdoer lacks incentive to comply if allowed to retain the profits.

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[38] See *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016); Long, *supra* note 29, at 31.

[39] Listwa, *supra* note 5, at 673.

For example, in a recent case where the SEC filed suit against a Minnesota resident and corporation for fraudulently collecting $4.3 million from approximately 90 investors in at least five States,[40] the court enjoined the defendants from violating securities laws and soliciting or accepting money from investors.[41] The defendants nonetheless solicited nearly $600,000 in additional funds before being held in contempt; a few months later, they were held in contempt again for collecting an additional $42,000.[42] Eventually, the court ordered defendants to pay more than $7 million in disgorgement and prejudgment interest.[43] Similarly, in *SEC v. Brinker*, see *supra* p. 8, the court ordered defendants to pay $265,300 in disgorgement and prejudgment interest after they violated an injunction freezing their assets.[44]

Disgorgement is also often a more flexible remedy than civil penalties. The civil penalties that a court may order are subject to three statutory "tiers." 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B). Although civil penalties may be calculated based upon a defendant's pecuniary gain, each tier is subject to a cap. *Id.* Accordingly, civil penalties may be too lenient in

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[40] Complaint ¶¶ 11, 40, *SEC v. Louks*, No. 0:15-cv-03456 (Sept. 1, 2015), ECF No. 1.

[41] Litigation Release, SEC, *Court Enters Final Judgment Against Defendants in "Prime Bank" Offering Fraud* (Jan. 19, 2017), https://www.sec.gov/litigation/litreleases/2017/lr23723.htm.

[42] *Ibid.*

[43] *Ibid.*

[44] Litigation Release, *Brinker* (July 8, 2003), *supra* note 17.

cases where a defendant's profits exceed the cap.[45] The flipside is true, as well: civil penalties may be too harsh where the wrongdoer cannot pay a penalty, or in some cases where the wrongdoer has cooperated with the SEC or made other remedial efforts.[46]

For example, in the above-mentioned lawsuit against the defendants who falsely announced a successful HIV treatment, the court ordered the defendants to pay $127,201 in disgorgement but did not impose a civil penalty because they had demonstrated an inability to pay.[47] In another case, the court ordered defendants to disgorge $700 million for distribution to harmed investors and imposed a comparatively smaller penalty of $100 million because the defendants had cooperated with the SEC.[48] Additionally, the flexibility offered by disgorgement is useful when a case involves multiple wrongdoers of varying culpability. In the aforementioned Ponzi scheme perpetrated against elderly residents of upstate New York, the court ordered all ten defendants to pay disgorgement but found that the conduct of only two defendants warranted civil penalties.[49]

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[45] See Listwa, *supra* note 5, at 675.

[46] See *ibid.*; Peikin, *Remedies and Relief*, *supra* note 4.

[47] Litigation Release, SEC, *Final Judgments Entered Against Uniprime Capital Acceptance, Inc. and Alfred J. Flores* (Sept. 12, 2005), https://www.sec.gov/litigation/litreleases/lr19371.htm.

[48] See Litigation Release, SEC, *SEC Charges AIG with Securities Fraud* (Feb. 9, 2006), https://www.sec.gov/litigation/litreleases/lr19560.htm.

[49] Order at 1-2, *Watermark*, *supra* note 7.

In addition to deterring fraud, disgorgement promotes investor confidence in the markets and maintains a fair and functioning market. When fraud is uncovered in the marketplace, it erodes "'the confidence of the prospective investor in his ability to select sound securities.'" *Naftalin*, 441 U.S. at 775 (quoting S. Rep. No. 73-47, at 1 (1933)).[50] Investor confidence is further damaged when wrongdoers are unjustly enriched by illegal profits. See, *e.g.*, *United States v. Dyer*, 908 F.3d 995, 1003 (6th Cir. 2018) (explaining "there are clear rational purpose[s] for disgorgement other than punishment, including . . . encouraging investor confidence") (internal quotations omitted and alteration in original); *United States v. Melvin*, 918 F.3d 1296, 1300 (11th Cir. 2017) (deterrence serves "important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry"); *SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1036 (9th Cir. 2005) (when fraud goes unchecked, "our nation is the victim, as the public loses confidence in the stock market").

And when investors lose confidence in the markets, they may refrain from making investments, continue to invest but incur costs to avoid dealing with bad actors, or commit fraud to level the playing

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[50] See also Nancy A. Smolensky, *Rights Among Wrongdoers: SEC Enforcement Actions and the Right to Contribution Under Section 10(b) and Rule 10b-5*, 63 Geo. Wash. L. Rev. 444, 451 n.34 (1995) ("Insider trading not only harms those persons involved in the specific trades in which the fraudulent activity occurred but also undermines the integrity of the public securities market, thereby diminishing public confidence.").

field. See *United States v. O'Hagan*, 521 U.S. 642, 658-59 (1997) (investors "hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law").[51] The SEC's ability to obtain disgorgement thus benefits the amici States by deterring future misconduct and otherwise protecting the integrity of the markets and the economy as a whole.

II. The Amici States Benefit From A Comprehensive Federal-State Enforcement System With Robust Equitable Remedies For Securities Fraud.

As part of their state interest in protecting the financial welfare of their residents and institutions within their borders, the amici States have established regulatory systems to deter and combat securities fraud. In many of the amici States, the state securities regulators are expressly authorized by statute to seek disgorgement and other forms of equitable and injunctive relief.[52] These state-specific

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[51] See also Linda Chatman Thomsen, Director of Div. of Enf't, SEC, *True to Our Mission: Why We Need the SEC*, Remarks at the Ninth Annual A.A. Sommer, Jr. Corp., Securities and Fin. Law Lecture (Nov. 6, 2008), https://www.sec.gov/news/speech/2008/spch110608lct.htm ("investor confidence is essential to market viability").

[52] At least 39 States and the District of Columbia have adopted in whole or in part the Uniform Securities Act, which includes disgorgement as a civil remedy. See *State Securities Law Research Guide*, Georgetown Law Library, http://guides.ll.georgetown.edu/c.php?g=365494&p=2469255; Uniform Securities Act § 603(b)(2)(C) (2002); see also, *e.g.*, *People ex rel. Schneiderman v. Greenberg*, 27 N.Y.3d 490, 497-98 (2016) (holding disgorgement available as an equitable remedy).

remedies are necessary and effective components of the amici States' comprehensive strategy for deterring fraud and remedying financial losses.

But as Congress recognized when it established federal enforcement as a supplement to state enforcement of securities fraud laws, the magnitude and harmful impact of securities fraud is so great that State-level enforcement efforts cannot always protect investors from all forms of fraudulent conduct or fully compensate them when they are victimized by fraudulent schemes. The SEC's enforcement efforts are thus a valuable complement to the amici States' own regulatory and enforcement efforts. Indeed, the federal regime was designed to work alongside state efforts to ensure that the full universe of fraudulent conduct would be regulated. Diminishing the SEC's authority to seek a key remedy would alter this longstanding system, and reduce the incentive for collaborative efforts between the amici States and the SEC, such as information sharing, joint investigations, and coordinated enforcement efforts.

A. State and federal agencies regulate investment markets through a comprehensive and collaborative enforcement system.

The regulation of securities has long been a collaborative and cooperative endeavor among state and federal entities. The States initiated these regulatory efforts in 1911, when Kansas enacted the first

"blue sky law"[53] regulating the sale of securities.[54] Within two years, 23 states passed "similar legislation,"[55] and by 1943, every State, with the exception of Nevada, had followed suit.[56] A majority of these laws created civil liability provisions in addition to the preexisting common law remedies.[57] State regulators and prosecutors used their new authority to prevent the sale of illegal securities and to remedy illegal conduct.[58]

Although these state laws provided necessary and substantial protections against the sale of fraudulent securities, wrongdoers continued to operate. According to conservative estimates from the era, "$500 million of fraudulent or worthless stocks" were still being sold annually.[59] Indeed, in the years following

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[53] The term "blue sky law" was coined "after the complaint of one state legislator that some securities swindlers were so barefaced that they would sell building lots in the blue sky." Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1, 20 (1983) (internal quotations omitted).

[54] See Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 Cornell L. Rev. 1, 21 (1998); Jonathan R. Macey, *Origin of the Blue Sky Laws*, 70 Tex. L. Rev. 347, 348 (1991).

[55] Edward Gadsby, SEC Chairman, *Address: Jurisdiction of the SEC in Relation to State Blue Sky Programs*, at 1 (1960), https://www.sec.gov/news/speech/1960/031160gadsby.pdf.

[56] See Painter, *supra*, at 21.

[57] *Ibid.*

[58] See Seligman, *supra* note 53, at 21 (noting, for example, that from 1921 to 1926, Massachusetts prevented attempted sale of nearly $1.7 billion worth of securities).

[59] *Id.* at 21-22.

the enactment of state blue-sky laws, wrongdoers employed "clever and calculated" devices "to avoid state regulation." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 653 (1950) (Douglas, J., concurring). As one common example from this period—during which the country experienced "two major waves of securities fraud"[60] and the 1929 stock market crash—"[i]nstrumentalities of interstate and foreign commerce were extensively employed by those beyond the reach of a state to sell securities to its citizens." *Ibid.* State securities regulators thus supported "a supplemental [f]ederal law . . . to stop this gap."[61]

To address these concerns, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934.[62] In doing so, Congress contemplated a federal regulatory regime that would draw from and supplement the existing state efforts. See *Aaron v. SEC*, 446 U.S. 680, 711 (1980) (Blackmun, J., concurring in part and dissenting in part). To that end, both Acts "explicitly allowed for concurrent securities regulation by the states."[63] The creation of this "dual regulatory structure" was "deliberate," and made in recognition "that the states' experience and expertise in the field would be necessary to provide remedies

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[60] Painter, *supra* note 54, at 23.

[61] Federal Securities Act: Hearings on H.R. 4314 Before the H. Comm. On Interstate and Foreign Commerce, 73d Cong., 1st Sess. 93, 101 (1933) (Department of Commerce Study of the Economic and Legal Aspects of the Proposed Federal Securities Act).

[62] Painter, *supra* note 54, at 21.

[63] *Id.* at 24.

beyond those that the new [federal] statutes created."[64]

Moreover, in the 1990s, although Congress limited state regulatory authority over securities registration and reporting requirements, it expressly preserved the States' ability to pursue enforcement actions against wrongdoers. Thus, the National Securities Markets Improvement Act of 1996 provided that state securities regulators "shall retain jurisdiction" to investigate and bring enforcement actions under state law for fraud, deceit, and unlawful conduct. 15 U.S.C. § 77r(c)(1).

Although the balance of authority between the state and federal regulatory bodies has evolved in the past century, the goal of fostering a complementary, comprehensive system[65] to deter and remedy "all manner of fraud" has not changed. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019). In fact, there are now dozens of state, federal, and private entities that work together to deter and remedy fraud.[66] Each of these entities plays a critical role in our financial system. At the end of the day, however, the SEC is

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[64] Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 Conn. Ins. L. J. 107, 112 (2004).

[65] *Federal Securities Law Requirements*, Cal. Prac. Guide Pass-Through Entities Ch. 7-A (Apr. 2019) ("Where compliance with both federal and state law is required, the two regulatory schemes are designed to be complementary.").

[66] See, *e.g.*, SEC, *What We Do*, *supra* note 1.

the only federal agency with the "primary mission of protecting investors."[67]

In this modern system, state securities regulators focus much of their work on receiving and investigating citizen complaints, initiating investigations, and bringing enforcement actions against wrongdoers.[68] States are often the first to receive complaints from investors and, in many instances, are in the "best position to deal aggressively with securities violations" given their proximity to investors.[69] States are also able to achieve meaningful results by collaborating with one another, often in the form of formal working groups or coordinated regulatory efforts.

Still, the magnitude and extent of securities fraud makes it impossible for the States as a practical matter to combat all of the fraudulent conduct that affects their residents and markets without the assistance of federal regulators. Thus, along with their independent and multistate work, the amici States frequently share information and engage in joint investigations and enforcement actions with the SEC. In 2016, for instance, state securities regulators shared intelligence with the SEC in 164 cases.[70]

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[67] Thomsen, *supra* note 51.

[68] See Letter from N. Am. Sec. Adm'rs Ass'n, Inc. ("NASAA") to the Honorable May Jo White (Feb. 19, 2014), https://www.sec.gov/comments/s7-11-13/s71113-12.pdf.

[69] *Ibid.*

[70] See NASAA, *NASAA 2017 Enforcement Report Based on 2016 Data*, at 5, http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2017/09/2017-Enforcement-Report-Based-on-2016-Data.pdf; see also SEC, Div. of Enf't, *Enforcement Manual*, at 10-11 (Nov. 28 2017) (describing receiving tips and

In 2014, state securities regulators reported 584 outgoing referrals to, and 624 incoming referrals from, sister agencies.[71] Some of these referrals result in parallel investigations by the States and the SEC. Recently, for example, the SEC referred a matter to the Investor Protection Unit of the Delaware Department of Justice involving a company that appears to have fraudulently acquired almost $1 million from an elderly Delaware resident. The SEC is also investigating the company, as are other States, and has conferred with Delaware about the issues involved.

In another recent example, the SEC and Michigan collaborated to investigate a Michigan pastor and financial consultant who were charged with operating a $6.7 million fraud in which they misled 83 people from 14 States, primarily churchgoers, retirees, and laid-off auto workers, to invest in the pastor's real estate business.[72] The SEC filed suit in federal district court and the court ordered the defendants to pay disgorgement.[73] A receiver is

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information from state securities regulators), https://www.sec.gov/divisions/enforce/enforcement manual.pdf.

[71] See NASAA, *NASAA Enforcement Report: 2015 Report on 2014 Data*, at 4, http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data_FINAL.pdf.

[72] See Complaint ¶¶ 1-7, 15, 36, *SEC v. Treasure Enter., LLC*, No. 2:17-cv-10963 (E.D. Mich. Mar. 28, 2017), ECF No. 1.

[73] See *id.*; Judgment as to Patricia Gray at 6, *SEC v. Treasure Enter., LLC*, No. 2:17-cv-10963 (E.D. Mich. May 21, 2017), ECF No. 35; Judgment as to Larry Holley at 6, *SEC v. Treasure Enter., LLC*, No. 2:17-cv-10963 (E.D. Mich. May 21, 2017), ECF No. 36; Judgment as to Treasure Enterprise, LLC

currently working to distribute funds to harmed investors.[74] At the same time, Michigan ordered the defendants to cease and desist their illicit activities and imposed a fine, but it has deferred collection of the fines until after the receivership is completed in the SEC case.[75]

At other times, the SEC and state regulators enter into more formal arrangements, such as information sharing agreements and memoranda of understanding, in order "to strengthen collaboration among state and federal securities regulators."[76] In 2017, for instance, the SEC and state regulators entered into an information-sharing agreement designed to "guard against fraud" as new rules governing crowdfunding and other offerings took effect.[77] Finally, federal and state securities regulators also "meet throughout the year"[78] and attend annual conferences "to share ideas for increasing cooperation and

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at 6, *SEC v. Treasure Enter.* (E.D. Mich. May 21, 2017), ECF No. 39.

[74] See Motion for Order Authorizing First Distribution, *SEC v. Treasure Enter., LLC*, No. 2:17-cv-10963 (E.D. Mich. Nov. 14, 2019), ECF No. 189.

[75] See Consent Order, Michigan Department of Licensing and Regulatory Affairs, No. 328455 (Aug. 30, 2017), at 2.

[76] SEC, *Federal/State Cooperation* (Apr. 14, 2017), https://www.sec.gov/info/smallbus/sbcoop.shtml.

[77] Press Release, SEC, *SEC, NASAA Sign Info-Sharing Agreement for Crowdfunding and Other Offerings* (Feb. 17, 2017), https://www.sec.gov/news/pressrelease/2017-50.html.

[78] *Federal/State Cooperation*, *supra* note 76.

collaboration" in emerging areas.[79] Recently, for example, these efforts have focused on the growth of internet-based communications, social media fraud, cybersecurity breaches, and cryptocurrency.[80]

Information sharing between federal and state regulators can lead to successful enforcement actions, including substantial disgorgement for harmed investors. Often, these actions are effective because States and the SEC share information but file separate civil actions to attack the various components of a fraudulent scheme. For example, following the 2008 financial crisis, the New York Attorney General, the U.S. Attorney for the District of Colorado, the SEC Director of Enforcement, and two federal officials headed the Residential Mortgage-Backed Securities Working Group, which led a broad coalition of state and federal officials to investigate the fraudulent creation and sale of mortgage-backed securities that led to the financial crisis.[81] States

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[79] See Luis A. Aguilar, SEC Commissioner, *Regulators Working Together to Serve Investors*, Address Before the NASAA and SEC 19(d) Conference (Apr. 14, 2015), https://www.sec.gov/news/speech/ regulators-working-together-to-serve-investors.html.

[80] See, *e.g.*, Julia Dimitriadis et al., *Securities Fraud*, 56 Am. Crim. L. Rev. 1379, 1460-62, 1471 (Summer 2019); Steven Peikin, Co-Director, SEC Div. of Enf't, Keynote Speech at Southeastern Securities Conference 2019 (Sept. 6, 2019), https://www.sec.gov/news/speech/peikin-keynote-speech-southeastern-securities-conference-2019; SEC, *Internet and Social Media Fraud*, https://www.investor.gov/protect-your-investments/fraud/types-fraud/internet-social-media-fraud.

[81] U.S. Dep't of Justice ("DOJ"), *Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct* (May 24, 2012),

and the SEC contributed significant personnel and investigatory resources, resulting in settlements nationwide with firms accused of misleading investors.[82] For instance, Bank of America agreed to pay a total of $16.65 billion to federal and state entities, including the SEC, California, Delaware, Illinois, Kentucky, Maryland, and New York, primarily to address harms to the States, their residents, and institutional investors such as state-operated pension funds.[83] In another settlement, Goldman Sachs agreed to pay $875 million to resolve claims by several federal and state entities—including California, Illinois, and New York—and to pay $1.8 billion in relief to harmed consumers.[84]

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https://www.justice.gov/opa/pr/residential-mortgage-backed-securities-rmbs-working-group-announces-new-resources-investigate.

[82] See *ibid.*

[83] See Final Judgment, *SEC v. Bank of America*, No. 3:13-cv-447 (W.D.N.C. Nov. 25, 2014), ECF No. 50; U.S. DOJ, *Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; Press Release, Ill. Att'y Gen., *Madigan Announces Record $300 Million for Illinois' Pension Systems, Consumers in Bank of America Settlement* (Aug. 21, 2014), www.illinoisattorneygeneral.gov/pressroom/2014_08/20140821.html.

[84] U.S. DOJ, *Goldman Sachs to Pay More than $5 Billion for Misconduct Relating to Mortgage-Backed Securities* (Apr. 11, 2016), https://www.justice.gov/usao-edca/pr/goldman-sachs-pay-more-5-billion-misconduct-relating-mortgage-backed-securities.

B. The SEC's ability to obtain disgorgement is critical to continued federal-state collaboration to remediate and deter fraud.

The amici States' ability to work effectively with the SEC on securities enforcement efforts would be diminished by a decision revoking the SEC's authority to seek disgorgement in judicial proceedings. This is because the States benefit from having the SEC as a strong federal counterpart to combat fraud. And when the SEC has "a wider, more flexible arsenal of enforcement powers," it is better able to "fashion[ ] sufficiently meaningful corrective measures" to achieve "future compliance."[85] This includes selecting the best forum based on the specific considerations of each case, such as whether there is a backlog in the federal courts, whether the facts are "so technical that an administrative law judge is better equipped to deal with them," and whether the proposed defendant is a recidivist.[86]

Accordingly, if disgorgement were only available as an administrative remedy, the SEC's ability to select the optimal remedy in the forum best suited to address the specific fraud at issue would be diminished. Introducing weakness into the SEC's well-calibrated enforcement efforts would not only embolden wrongdoers but also undermine the SEC's

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[85] Mary L. Schapiro, Commissioner, SEC, *New SEC Enforcement Remedies*, Remarks Before the Twentieth Annual Securities Regulation Institute at 8 (Jan. 20, 1993), https://www.sec.gov/news/speech/1993/012093schapiro.pdf.

[86] *Ibid.*

ability to play a robust role in the comprehensive federal-state enforcement system that has developed over the past century.

In addition, if the SEC were unable to seek disgorgement in judicial forums, a critical piece of the enforcement efforts resulting from federal-state collaboration would fall away. At present, the amici States collaborate with the SEC for a variety of reasons. For example, some States might face jurisdictional limitations that hinder their enforcement efforts. Or States may face resource constraints where the illicit acts span the country or involve a substantial amount of misappropriated funds that are difficult to trace and return to harmed investors.

In some circumstances, the SEC is able to obtain substantial disgorgement for harmed investors while States pursue other important remedies or make additional efforts to secure compensation for the investors. In one recent example, the SEC worked with other federal officials and regulators from seven States[87] to uncover and bring enforcement actions against those responsible for the Woodbridge Ponzi scheme, which involved a "web of more than 275 Limited Liability Companies" and affected approximately 8,400 investors nationwide.[88] The SEC brought a civil enforcement action against the perpetrators of this fraud, and eight States filed parallel actions alleging fraudulent conduct under state

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[87] See Peikin, *Keynote Speech*, *supra* note 80.

[88] Complaint ¶ 1, *SEC v. Shapiro*, No. 1:17-cv-24624 (S.D. Fla. Dec. 20, 2017), ECF No. 1.

laws.[89] In the SEC action, a federal district court ultimately approved civil judgments against Woodbridge for $892 million in disgorgement, as well as a judgment against the company's former CEO that included an order to return his $18.5 million in ill-gotten SEC anticipates that investors will recover 50% or more of their investments.[90] Meanwhile, States have taken a variety of approaches in addressing this fraudulent scheme. For example, Massachusetts, Texas, Arizona, Pennsylvania, and Michigan obtained cease and desist orders against the corporate defendants.[91]

In other cases, the States are able to protect investors by pursuing criminal prosecution of wrongdoers while the SEC secures disgorgement. For example, the Investor Protection Unit of the Delaware Department of Justice recently conducted an investigation and criminal prosecution in parallel to an SEC civil action against a defendant who ran a Ponzi scheme that he had advertised as a successful mortgage business.[92] In the SEC action, the defendant defaulted, and the court entered a judgment ordering

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[89] *Id.* ¶ 36.

[90] See Press Release, SEC, *Court Orders $1 Billion Judgment Against Operators of Woodbridge Ponzi Scheme Targeting Retail Investors* (Jan. 28, 2019), https://www.sec.gov/news/press-release/2019-3.

[91] See Complaint ¶ 36, *Shapiro*, *supra* note 88.

[92] Litigation Release, SEC, *SEC Obtains Final Judgments of Approximately $2 Million in Mortgage Investment Offering Fraud* (June 27, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24519.htm.

nearly $1 million in disgorgement.[93] In the Delaware criminal action, the defendant entered a guilty plea to five felony counts, including securities fraud and theft.[94]

In yet another example, the New York Attorney General and the Superintendent of Insurance of the State of New York collaborated with the SEC to settle federal and state fraud charges against the American International Group, a global insurance company.[95] The settlements required the company to pay a total of $1.5 billion for distribution to its victims, which included investors, customers, and States that the company cheated by underpaying taxes for workers' compensation premiums earned in those States.[96]

Finally, because of its significant resources, the SEC is well-suited to collect and disburse disgorgement awards. As discussed, there are often difficulties in identifying and locating all of the harmed investors and determining how much each investor should receive. See *supra* Section I.A. Indeed, some cases involve "hundreds of thousands of injured

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[93] *Ibid.*

[94] *Ibid.*

[95] *SEC Charges AIG with Securities Fraud*, *supra* note 48.

[96] See *ibid.* (noting that $700 million in disgorgement paid to SEC); Gretchen Morgenson, *A.I.G. Apologizes and Agrees to $1.64 Billion Settlement*, N.Y. Times (Feb. 10, 2006), https://www.nytimes.com/2006/02/10/business/aig-apologizes-and-agrees-to-164-billion-settlement.html (noting that in addition to fines and penalties, AIG required to pay $1.5 billion for distribution to victims).

investors."[97] In order to fairly distribute the disgorged funds, the SEC must make a number of determinations, such as "what classes of investors, during what time period, were harmed, and the relative harm to each particular class of investor."[98] The SEC must also evaluate "the potential tax consequences and other costs of a particular distribution[,] and manage the mechanics of a distribution, which involves locating and sending checks to what are often large numbers of investors."[99] The SEC's resources have enabled it to "speed the distribution of these funds."[100] In fact, it has created an Office of Distributions that is responsible for "drafting and submitting documents to the [SEC] or District Court for all distribution-related actions"; providing a "list of payees and amounts to be distributed to those payees"; and "managing cost-effective, efficient, and fair and reasonable distributions of money to harmed investors."[101]

All told, the amici States work with the SEC in critical ways to protect investors from the harmful effects of fraud. This ongoing collaboration would be

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[97] SEC, *2006 Performance and Accountability Report*, *supra* note 26, at 23.

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

[101] See SEC, Office of Inspector General, *Improvements Needed in the Division of Enforcement's Oversight of Fund Administrators*, at 7 (Sept. 30, 2015), https://www.sec.gov/oig/reportspubs/Improvements-Needed-in-the-Division-of-Enforcements-Oversight-of-Fund-Administrators.pdf.

undermined by a decision that the SEC can no longer obtain disgorgement in judicial proceedings.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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