

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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TEAM RESOURCES INCORPORATED;  
FOSSIL ENERGY CORPORATION; and  
KEVIN A. BOYLES,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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May 1, 2023

## **QUESTION PRESENTED**

Whether a federal court may grant a disgorgement request from the Securities and Exchange Commission without granting a defendant's request for a live evidentiary hearing, and whether the civil penalty imposed below violates the Eighth Amendment to the United States Constitution.

## **PARTIES TO THE PROCEEDING**

Petitioners Team Resources Incorporated, Fossil Energy Corporation and Kevin A. Boyles were defendants in the District Court proceedings and appellants in the Court of Appeals proceedings.

Respondent Securities and Exchange Commission was the plaintiff in the District Court proceedings and the appellee in the Court of Appeals proceedings.

## **CORPORATE DISCLOSURE**

Pursuant to Rule 29.6, Petitioners state that there is no parent corporation or publicly held company owning ten percent (10%) or more of the stock in Team Resources Incorporated or Fossil Energy Corporation.

## **STATEMENT OF RELATED PROCEEDINGS**

- *SEC v. Team Resources Inc., et al.*, 22-10359 (5th Cir.) (opinion issued and judgment entered Feb. 1, 2023; mandate issued Mar. 27, 2023).
- *SEC v. Team Resources Inc., et al.*, No. 3:15-cv-01045-N (N.D. Tex.) (order issued Feb. 15, 2022; final judgment entered Feb 15, 2022).

There are no additional proceedings in any court that are directly related to this case.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
CORPORATE DISCLOSURE .....	ii
STATEMENT OF RELATED PROCEEDINGS....	ii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES AND CONSTITUTIONAL PROVI- SIONS INVOLVED.....	1
INTRODUCTION .....	2
STATEMENT OF THE CASE.....	3
A. Factual Background and Lower Court Pro- ceedings .....	3
B. Court of Appeals Proceedings After the Second Appeal.....	12
REASONS FOR GRANTING THE PETITION.....	13
I. THE DISTRICT COURT DID NOT COM- PLY WITH <i>LIU</i> .....	14
II. PETITIONERS DID NOT WAIVE AN EVI- DENTIARY HEARING.....	19
III. THE CIVIL MONETARY PENALTY VIO- LATES THE EIGHTH AMENDMENT.....	24
CONCLUSION.....	28

## TABLE OF CONTENTS—Continued

	Page
APPENDIX	
United States Court of Appeals for the Fifth Circuit, Opinion, February 1, 2023 .....	App. 1
United States Court of Appeals for the Fifth Circuit, Judgment, February 1, 2023 .....	App. 9
United States District Court for the Northern District of Texas, Dallas Division, Memorandum Opinion and Order, February 15, 2022 .....	App. 11
United States District Court for the Northern District of Texas, Dallas Division, Final Judgment, February 15, 2022 .....	App. 18

## TABLE OF AUTHORITIES

	Page
CASES	
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996) .....	26
<i>Conkling v. Turner</i> , 138 F.3d 577 (5th Cir. 1998).....	24
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....	16
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) .....	21
<i>Kokesh v. Securities and Exchange Commission</i> , 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017) .....	4-6, 21-23
<i>Liu v. Sec. &amp; Exch. Comm’n</i> , 140 S.Ct. 1936 (2020).....	2, 7, 8-10, 14-16, 19, 23, 24
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991).....	26
<i>Rosedale Missionary Baptist Church v. New Orleans City</i> , 641 F.3d 86 (5th Cir. 2011) .....	25
<i>SEC v. Smyth</i> , 420 F.3d 1225 (11th Cir. 2005).....	16-19, 23
<i>Sec. &amp; Exch. Comm’n v. Team Res. Inc.</i> (“ <i>Team Resources I</i> ”), 942 F.3d 272 (5th Cir. 2019), <i>cert. granted, judgment vacated</i> , 141 S.Ct. 186, 207 L.Ed.2d 1113 (2020) .....	6, 9, 13, 18
<i>Sec. &amp; Exch. Comm’n v. Team Res., Inc.</i> , 815 F. App’x 801 (5th Cir. 2020) .....	7, 24
<i>Sec. &amp; Exch. Comm’n v. Team Res. Inc.</i> , No. 22- 10359, 2023 WL 1434277 (5th Cir. Feb. 1, 2023) .....	12, 13
<i>Team Resources, Inc. v. SEC</i> , No. 19-978, 2020 WL 3578673 (U.S. July 2, 2020).....	15

## TABLE OF AUTHORITIES—Continued

	Page
<i>United Artists Corp. v. Freeman</i> , 605 F.2d 854 (5th Cir. 1979).....	17, 23
<i>United States v. 6625 Zumirez Drive</i> , 845 F. Supp. 725 (C.D. Cal. 1994) .....	27
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998) ...	25, 26
<i>United States v. Bank</i> , 965 F.3d 287 (2020) .....	20-22
<i>United States v. Davis</i> , 53 F.3d 638 (4th Cir. 1995).....	28
<i>United States v. James Daniel Good Real Prop- erty</i> , 510 U.S. 43 (1993) .....	27
<i>United States v. Mackby</i> , 261 F.3d 821 (9th Cir. 2001) .....	26
<i>United States v. Martinez</i> , 496 F.3d 387 (5th Cir. 2007) .....	25
<i>United States v. Van Waeyenberghe</i> , 481 F.3d 951 (7th Cir. 2007).....	21

## CONSTITUTIONAL PROVISIONS

Eighth Amendment .....	1-3, 14, 24, 25
------------------------	-----------------

## STATUTES AND RULES

15 U.S.C. § 78u(d)(5) .....	14, 15, 23
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 2462 .....	4, 6
Fed. R. Civ. P. 55(b)(1) .....	17
Fed. R. Civ. P. 55(b)(2) .....	18

## TABLE OF AUTHORITIES—Continued

	Page
OTHER AUTHORITIES	
Sonia A. Steinway, SEC “ <i>Monetary Penalties Speak Very Loudly, But Whatp Do They Say? A Critical Analysis of the SEC’s New Enforcement Approach</i> ,” 124 Yale L.J. 209 (2015) .....	27



## **PETITION FOR WRIT OF CERTIORARI**

Petitioners Team Resources Incorporated, Fossil Energy Corporation and Kevin A. Boyles respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.



## **OPINIONS BELOW**

The Fifth Circuit's opinion is unreported but appears at 2023 WL 1434277 and reproduced at App. 1-8. The District Court's opinion is unreported but appears at 2022 WL 463390 and reproduced at App. 11-17.



## **JURISDICTION**

The Fifth Circuit issued its opinion and entered its judgment on February 1, 2023. App.1-8. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## **STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution is reproduced below:

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*



## INTRODUCTION

This petition involves a question ostensibly left open as a result of this Court’s opinion in *Liu v. Sec. & Exch. Comm’n*, 140 S.Ct. 1936 (2020)—whether the Securities and Exchange Commission (“SEC”) may seek and obtain disgorgement in federal court for violation of securities laws without an evidentiary hearing, despite this Court’s mandate that testing the legitimacy of claimed business expenses “**requires** ascertaining whether expenses are legitimate or whether they are merely wrongful gains ‘under another name.’” *Liu*, 140 S.Ct. at 1950 (emphasis added) (citations omitted).

In Petitioners’ case, when the SEC sued for alleged violations of federal securities laws, Petitioners settled the civil allegations and agreed to entry of civil injunctive relief but reserved the right to contest the amounts of any disgorgement or civil penalties that may be imposed. Granting the SEC’s request for remedies, the District Court ordered disgorgement without granting Petitioners’ request for a live evidentiary hearing to test the legitimacy of Petitioners’ claimed legitimate business expenses. The District Court also imposed civil penalties in an amount roughly 6.5 times the disgorgement amount in violation of the Fines and Penalties Clause of the Eighth Amendment.

The District Court’s decision not to grant Petitioners a live evidentiary hearing regarding the proper amount of disgorgement runs afoul of this Court’s decision in *Liu*, and the principles of equity underlying

that decision. Correspondingly, the civil penalty imposed by the District Court was entered without adequate considerations of due process and violates the excessive fines and penalties prohibition pursuant to the Eighth Amendment to the United States Constitution.

As such, Petitioners respectfully request that this Court reverse the Fifth Circuit Court of Appeals' affirmation of the District Court proceedings, with instructions to the remand this action to the District Court for further proceedings.



## **STATEMENT OF THE CASE**

### **A. Factual Background and Lower Court Proceedings**

On April 6, 2015, the Securities and Exchange Commission (“SEC” or “Commission”) brought a civil enforcement action against the Team Resources Defendants alleging violations of the federal securities laws. ROA.15-ROA.41. As the District Court summarized, the SEC’s Complaint alleged that Petitioners participated in a “fraudulent oil and gas investing scheme” in which Petitioners allegedly “lured investors by touting unreasonable oil and gas production figures and investment returns.” ROA.981. According to the SEC, Petitioners “distributed misleading status updates that led investors to believe that the oil and gas companies were performing well, when in fact the companies’ performance was dismal.” ROA.981. The SEC

also alleged that Petitioners “received large sales commissions ranging from 25% to 35% that they did not disclose to investors,” and that they “failed to register as securities brokers as required by law.” ROA.981-ROA.982.

The parties immediately reached a settlement, with Petitioners consenting to entry of separate April 10, 2015 judgments of “permanent injunction,” without admitting or denying liability. ROA.259-ROA.263, ROA.268-ROA.272, ROA.273-ROA.277. However, pursuant to the terms of the settlement, Petitioners negotiated and reserved the right to contest the amounts of disgorgement and civil penalties they would be required to pay. ROA.261-ROA.262, ROA.270-ROA.271, ROA.275-ROA.276. In addition, the parties agreed that “[i]n connection with the Commission’s motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties.” ROA.262, ROA.271, ROA.276.

On February 28, 2017, the SEC filed a motion for remedies and entry of a final judgment, ROA.499-ROA.507, and then filed an amended motion on October 5, 2017. ROA.828-ROA.839. In the meantime, this Court issued its decision in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), in which this Court held that disgorgement in SEC civil enforcement actions is a “penalty” subject to the five-year statute of limitations contained in 28 U.S.C. § 2462.

In response to the SEC’s amended motion, Petitioners argued that the Supreme Court’s determination in

*Kokesh* that disgorgement is a “penalty,” *i.e.*, a legal remedy, meant that the District Court lacked statutory authority to order it since the federal securities laws only gave District Courts power to award equitable relief and specific monetary civil penalties that did not include disgorgement. ROA.886-ROA.890. Petitioners further asserted that the SEC’s disgorgement calculation was flawed because it was nothing more than a “conclusory approximation” and it failed to account for direct, investment-related expenses, such as the costs associated with “oil field operations (including drilling).” ROA.890-ROA.894. Petitioners therefore requested “an opportunity in discovery, in advance of a hearing, to test and establish the unreasonableness of the approximation and asserted connection of the funds the SEC claims are subject to disgorgement.” ROA.893-ROA.894.

The District Court, however, granted the SEC’s amended motion for remedies without allowing discovery or holding a hearing, evidentiary or otherwise. ROA.981-ROA.987. Instead, relying on an unsubstantiated chart prepared by an SEC investigator, the District Court ordered Petitioners to pay disgorgement in the amount of \$15,508,280.13, ROA.983, which the SEC claimed to represent “the proceeds received by each Defendant from the fraud scheme, net of monies returned to investors.” ROA.832. The court also awarded \$2,998,870.17 in prejudgment interest, as well as civil penalties “equal to the disgorgement amounts.” ROA.983, ROA.986. Petitioners appealed

the District Court's Order and Judgment, seeking the Fifth Circuit's appellate review. ROA.990-ROA.991.

In the previous appeal (No. 18-10931), Petitioners argued “that, by finding disgorgement a ‘penalty’ under § 2462, *Kokesh* necessarily also decided that disgorgement is not an equitable remedy courts may impose in SEC enforcement proceedings.” *Sec. & Exch. Comm’n v. Team Res. Inc.* (“*Team Resources I*”), 942 F.3d 272, 275 (5th Cir. 2019), *cert. granted, judgment vacated*, 141 S.Ct. 186, 207 L.Ed.2d 1113 (2020), *and vacated and remanded*, 815 F. App’x 801 (5th Cir. 2020). Petitioners further argued “that the district court abused its discretion by not ordering discovery or holding a hearing on disgorgement.” *Id.* The Fifth Circuit upheld the District Court’s Order and Judgment, determining that “*Kokesh* itself expressly declined to address” the question of whether disgorgement is an equitable remedy that courts may impose in SEC enforcement proceedings, and that Fifth Circuit “precedent upholding district court authority to order disgorgement controls.” *Id.* The Fifth Circuit further determined that Petitioners’ argument regarding the District Court’s failure to order discovery or hold an evidentiary hearing “also fail[ed] because the district court implemented the terms of the parties’ settlement agreement and [Petitioners] failed to request a hearing or initiate any discovery.” *Id.*

Following the Fifth Circuit’s affirmance of the District Court’s Order and Judgment, Petitioners filed a petition for writ of certiorari to this Court, No. 19-978. The Court granted the petition, vacated the District

Court’s Judgment, and remanded to the Fifth Circuit “for further consideration in light of” *Liu v. Sec. & Exch. Comm’n*, 140 S.Ct. 1936 (2020).

On remand, the Fifth Circuit recognized that “*Liu* held ‘that a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5).’” *Sec. & Exch. Comm’n v. Team Res., Inc.*, 815 F. App’x 801 (5th Cir. 2020) (quoting *Liu*, 140 S.Ct. at 1940). The Fifth Circuit further recognized that “*Liu* also discussed various ‘principles that may guide the lower courts’ assessment’ of the amount of disgorgement that may be lawfully awarded in particular cases.” *Id.* (quoting *Liu*, 140 S.Ct. 1947-50). Determining that the District Court “did not have the benefit of *Liu*’s guidance when it determined the amount of disgorgement,” and that “[a]pplication of *Liu* to the facts of this case should be left in the first instance to the district court’s sound judgement,” the Fifth Circuit remanded this action to the District Court “for further proceedings consistent with the Supreme Court’s decision in *Liu*.” *Id.*

Following remand to the District Court, on August 6, 2021, the SEC filed a renewed motion for remedies and entry of final judgment in which it asserted “the only remaining issue to be resolved on remand is the application of *Liu* to the remedies previously imposed on Defendants.” ROA.1064. The SEC thus “re-calculated its reasonable approximation of [Petitioners’] ill-gotten gains to offset any expenses permitted by *Liu*.” ROA.1073. Based on the SEC’s “approximation,” the

SEC requested that the District Court enter a final judgment for: (1) disgorgement of \$2,410,269.91 against Petitioners, ROA.1069; (2) \$466,148.86 in prejudgment interest against Petitioners, ROA.1074; and (3) a civil penalty of \$15,254,392.73 against Boyles, ROA.1076.

In response, Petitioners argued primarily that the SEC understated *Liu*'s impact and the corresponding undertaking a District Court should take in determining the proper amounts of disgorgement, prejudgment interest, and civil penalty, if any. Specifically, Petitioners argued that "*Liu* 'requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains under another name.'" ROA.1644 (quoting *Liu*). Petitioners further argued that, in addition to the Supreme Court's directive in *Liu*, fundamental principles of due process required the District Court to hold an evidentiary hearing under the circumstances. ROA.1644-ROA.1646. Thus, Petitioners requested that the District Court hold an evidentiary hearing to determine the proper amount of disgorgement based on *Liu*, and to determine the appropriateness and reasonableness of any civil penalty or prejudgment interest to be imposed based on the SEC's request. ROA.1646.

After briefing on the SEC's renewed motion for remedies and final judgment was complete, on December 28, 2021, the District Court ordered that "[t]he parties [were] invited to submit supplemental briefing regarding whether the mandate rule limit[ed] the Court's ability to consider the arguments raised by the



parties in their briefing on the Securities and Exchange Commission's Renewed Motion for Remedies." ROA.1674.

In response to the District Court's order inviting supplementary briefing on the mandate rule, the SEC argued that the Fifth Circuit's Order remanding the case to the District Court was expressly limited to the proper amount of disgorgement in light of *Liu*. ROA.1678. Thus, the SEC asserted that Petitioners' contentions that "(i) the Court is required to conduct an evidentiary hearing to determine disgorgement and prejudgment interest," and (ii) the Court should not order civil penalties or reduce their amount, "should not be considered on remand." ROA.1678. According to the SEC, the mandate rule "foreclose[s] the litigation" of the portion of the Fifth Circuit's decision in *Team Resources I*, "that no evidentiary hearing was required in this case." ROA.1678.

For their part, Petitioners argued first that because the District Court's Judgment and the Fifth Circuit's decision in *Team Resources I* were vacated, neither the District Court's prior Judgment nor the Fifth Circuit's decision in *Team Resources I* had any preclusive effect under the mandate rule or otherwise. ROA.1682-ROA.1684. Moreover, Petitioners argued that, even if the entirety of the Fifth Circuit's decision in *Team Resources I* was not vacated, then those portions dealing with proper amount of disgorgement, and the necessity of an evidentiary hearing to determine the same, certainly were. ROA.1684-ROA.1685 Specifically, Petitioners argued that, under *Liu*'s mandate

and this the Fifth Circuit's Order remanding this case to the District Court, the District Court was required to reexamine the entirety of its determination of the proper amount of disgorgement, including receiving and evaluating the specific evidence that the Team Resources Parties would submit in support thereof at an evidentiary hearing. ROA.1684-ROA.1685.

Ultimately, by Memorandum Opinion and Order, the District Court granted the SEC's renewed motion for remedies, ROA.1688-ROA.1693, and entered judgment adopting the SEC's calculation of the proper amount of disgorgement and prejudgment interest. ROA.1694-ROA.1695. Relying on the mandate rule, the District Court recognized "the command from [the Fifth Circuit] to conduct further proceedings consistent with *Liu*." ROA.1691. Although the District Court also recognized that "[t]he letter of that command would appear to permit th[e] Court to do anything it wants, so long as it does not go against *Liu*" such a reading of the Fifth Circuit's decision remanding the case "appear[ed] to th[e] Court . . . to grossly go against the spirit of [this Court's] directive." *Id.* The District Court thus determined that "the spirit of [this Court's] mandate is for th[e] [District] Court to recalculate the disgorgement amount in light of *Liu*, and do nothing else." *Id.*

The District Court recognized that the Petitioners "once again urg[ed] the Court to conduct an evidentiary hearing to determine the proper amount of disgorgement." ROA.1691. The District Court further stated that it was "unclear whether this argument is

precluded by the mandate rule,” but that the District “Court ha[d] previously denied the Defendants’ request for an evidentiary hearing.” *Id.* Recounting that it previously denied Petitioners’ request, the District Court determined that “[i]n the settlement agreements and the Bifurcated Judgments, the Defendants waived any right to a hearing and expressly agreed for [the District] Court to resolve th[e] issue on the papers.” *Id.* Thus, the District Court “again denie[d] the request for an evidentiary hearing.” *Id.*

In addressing the proper amount of disgorgement, the District Court determined that “the SEC accompanied its motion with documentary evidence,” and “[a]lthough they quarrel with the SEC’s calculation, [Petitioners did] not support their criticism with documentary evidence.” ROA.1692. Thus, the District Court held that “[b]ased on the record . . . the SEC’s calculation of net profit [was] correct.” *Id.* Finally, with respect to civil penalties, the District Court determined that the SEC’s request that the District Court “refine its calculation,” and Petitioners’ request that no civil penalty should be imposed, “both . . . fall afoul of the mandate rule” and addressing those arguments was “outside the scope of [this Court’s] mandate for the [District] Court to consider either sides’ arguments regarding the civil penalties imposed.” *Id.*

The District Court then entered its Judgment, ordering, *inter alia*, that Petitioners “are jointly and severally liable for disgorgement of \$2,401,629.91, representing net profits gained as a result of the conduct alleged in the SEC’s Complaint, together with

prejudgment interest thereon in the amount of \$466,148.86, for a total of \$2,876,778.77,” and that “Boyles is individually liable for a civil penalty in the amount of \$15,508,280.13.” ROA.1694-ROA.1695.

Petitioners again appealed.

### **B. Court of Appeals Proceedings After the Second Appeal**

On appeal before the Fifth Circuit, Petitioners “contend[ed] that the district court erred in denying them a live evidentiary hearing on remand at which they could challenge the SEC’s calculation of disgorgement and civil-penalty amounts.” *Sec. & Exch. Comm’n v. Team Res. Inc.*, No. 22-10359, 2023 WL 1434277, at \*2 (5th Cir. Feb. 1, 2023) Petitioners further argued “that the district court erred by not revisiting its imposition of the civil penalty because the district court misunderstood the scope of its mandate on remand.” *Id.* at \*3. Finally, Petitioners “argue[d] that the civil penalty violates the Eighth Amendment because it is more than six times the disgorgement award.”

In disposing of Petitioners’ first argument, the Fifth Circuit determined that, by refusing to grant Petitioners a live evidentiary hearing, the District Court did not commit reversible error because Petitioners “agreed that the district court could calculate disgorgement and penalties on the basis of the papers alone.” *Id.* at \*2. The Fifth Circuit further determined that “the Federal Rules of Civil Procedure allow district courts to decide motions—including motions for

remedies under the securities laws such as the one at issue here—on briefs, without oral hearings.” *Id.* (internal quotation marks omitted).

In disposing of Petitioners’ second argument, the Fifth Circuit determined that they did not challenge the civil penalty in their initial appeal to the Fifth Circuit, and “[a]ny such challenge, therefore, was forfeited” in the subsequent appeal. *Id.* at \*3. Similarly, the Fifth Circuit determined that Petitioners waived their Eighth Amendment argument because they “did not raise this argument to the district court.” *Id.* The Fifth Circuit thus affirmed the District Court’s decision. *Id.*

This petition followed.



### **REASONS FOR GRANTING THE PETITION**

There are three independent bases for reversal in this case. *First*, the District Court impermissibly limited the scope of its review of its prior Judgment and Order based on its interpretation of the Fifth Circuit’s decision on the first appeal and the mandate rule. Under clear, longstanding precedent, the District Court’s prior Judgment and Order, and the Fifth Circuit’s decision in *Team Resources I* upholding the same were vacated by this Court and were thus rendered null and of no preclusive effect. Moreover, even assuming *arguendo* that the Fifth Circuit’s decision in the first appeal limited the scope of the District Court’s review, those portions of *Team Resources I* addressing the

proper amount of disgorgement were remanded to the District Court for “further proceedings,” thus necessitating an evidentiary hearing in light of *Liu*.

*Second*, *Liu*’s mandate that courts ***must*** deduct legitimate expenses before ordering disgorgement under § 78u(d)(5) necessarily requires that, when presented with conflicting arguments regarding the proper amounts of disgorgement, a court must hold an evidentiary hearing to test the legitimacy of any business expenses a defendant claims should be deducted. Fundamental principles of due process further militate in favor of this approach.

*Third*, the civil penalty ordered against Boyles runs afoul of the Eighth Amendment to the United States Constitution.

## **I. THE DISTRICT COURT DID NOT COMPLY WITH *LIU***

In *Liu*, petitioners objected in the trial court that a disgorgement award must account for legitimate business expenses. Applying the Ninth Circuit precedent that this Court rejected, “[t]he District Court disagreed, concluding that the sum was a ‘reasonable approximation of the profits causally connected to [their] violation.’” 140 S.Ct. at 1942. The District Court, as here ordered disgorgement of the full amount of funds obtained from investors as the SEC requested. *Id.* The Ninth Circuit affirmed, “conclud[ing] that the ‘proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money

paid back to the investors,’ . . . reasoning that it would be ‘unjust to permit the defendants to offset . . . the expenses of running the very business they created to defraud . . . investors.’” *Id.* This Court granted certiorari in *Liu* “to determine whether § 78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant’s net profits from wrongdoing.” *Id.* The Court held that such a disgorgement award is not permissible. Thereafter, this Court remanded this case to the Fifth Circuit to apply the holding in *Liu*. *Team Resources, Inc. v. SEC*, No. 19-978, 2020 WL 3578673, at \*1 (U.S. July 2, 2020).

The *Liu* Court recognized that disgorgement awards may not “exceed the gains ‘made upon any business or investment, **when both the receipts and payments are taken into the account.**’” *Id.* at 1949-50 (citations omitted) (emphasis added). This Court explained that “courts **must deduct legitimate expenses** before ordering disgorgement under § 78u(d)(5). A rule to the contrary that make[s] no allowance for the cost and expense of conducting [a] business would be inconsistent with the ordinary principles and practice of courts of chancery.” *Id.* at 1950 (emphasis added) (internal quotation marks and citations omitted) (alterations in original).

In short, *Liu* “**requires** ascertaining whether expenses are legitimate or whether they are merely wrongful gains ‘under another name.’” *Id.* (emphasis added) (citations omitted). In this case, *Liu*’s mandate required an evidentiary hearing to determine the legitimacy of Petitioners’ expenses. General principles of

due process impose the same mandate and hearing requirement.

The District Court’s refusal to hold an evidentiary hearing flies in the face of *Liu*’s clear mandate that an assessment of whether claimed legitimate business expenses are, indeed, legitimate is **required**. To that end, Petitioners posit that the Rules of Civil Procedure and minimum due process guarantees also require an evidentiary hearing. Indeed, it is a fundamental precept of constitutional law that:

[t]he right to a prior hearing has long been recognized . . . under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case, and depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any), the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

*Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (internal quotation marks and citations omitted). To that end, *SEC v. Smyth*, 420 F.3d 1225 (11th Cir. 2005) is instructive.

In *Smyth*, the Eleventh Circuit held that “common sense notions of justice that inhere in the Due Process Clause” ordinarily require, in cases such as this one, a “fair hearing on the fact issues involved in the disgorgement determination.” *Id.* at 1231 n. 12. Viewing the process of determining disgorgement “upon motion



of the [SEC]" as analogous to deciding damages in the default judgment context, Smyth reasoned that an evidentiary hearing should be held unless the claim is for a "‘sum certain or for a sum which by computation can be made certain.’" *Id.* at 1231, quoting Fed. R. Civ. P. 55(b)(1). That is consistent with Fifth Circuit precedents regarding when evidentiary hearings are necessary. *See United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) (observing that "the case law is clear" that a hearing is required "unless the amount claimed is a liquidated sum or one capable of mathematical calculation").

*Smyth* provides a blueprint for this case. As here, there was a consent decree in *Smyth* providing that one of the defendants would pay disgorgement "in [an] amoun[t] to be resolved upon motion of the Commission at a later date." *SEC v. Smyth*, 420 F.3d at 1229. *Smyth* viewed that stipulation as "reserv[ing] for further proceedings the amount of the profits [the defendant] would disgorge," with the defendant "reserv[ing] the right to litigate the amount of the disgorgement." *Id.* at 1228-29.

The defendant in *Smyth* responded to the SEC's motion to determine the amount of disgorgement and to "enter final judgment" by raising various issues concerning the appropriate disgorgement amount, informing the court that he was "still waiting to depose one of the SEC's key witnesses," and requesting an evidentiary hearing. *Id.* at 1230. The District Court, however, denied the request and entered judgment on the basis of the SEC's submission. *Id.*

The Eleventh Circuit reversed, holding that “[b]asic notions of due process” required an evidentiary hearing like that contemplated in default judgment cases. *Id.* at 1230-32. Rule 55(b)(2), the court explained, requires a hearing unless the amount claimed is a “liquidated sum or one capable of mathematical precision.” *Id.* at 1231. The court recognized that Rule 55 did not fit “hand in glove” to the situation presented by the consent decree and the SEC’s motion, but found that it “most closely satisfies” due process. *Id.* at 1231 n. 12. And while the court acknowledged that an evidentiary hearing is not always required, a hearing must be held if the “essential evidence” is not “already of record.” *Id.* at 1233.

The same analysis applies here. Just as in *Smyth*, Petitioners vigorously contest the amount of disgorgement being requested by the SEC. And, as in *Smyth*, Petitioners have not agreed to a “novel summary proceeding” wherein the court could resolve all disputed factual matters on the papers. *Id.* at 1232-33. Thus, an evidentiary hearing was required under the circumstances, and the District Court erred by denying Petitioners’ request for a hearing.

Petitioners made a similar argument in their previous appeal before the Fifth Circuit in *Team Resources I*. However, the Fifth Circuit held that, because Petitioners had not moved for a hearing, *Smyth* does not help them. *Team Res. Inc.*, 942 F.3d at 279. However, in the proceedings below, in response to the SEC’s renewed Motion, Petitioners explicitly “request[ed] that th[e] [District] Court hold a hearing and take and

rule based on evidence rather than SEC guesswork and approximations.” ROA.1653.

Moreover, in the proceedings below, Petitioners argued that the SEC offered flawed deductions for legitimate expenses associated with the Petitioners’ business operations incurred through, *inter alia*: (1) well operations; (2) overhead; and (3) management fees. ROA.1646-ROA.1650. Petitioners also argued that the SEC grossly miscalculated their revenues. ROA.1647-ROA.1648. Based on the SEC’s miscalculations, a hearing on the proper amount of disgorgement was absolutely necessary under *Liu* and this Court’s directives therein.

At this juncture, *Smyth* is directly on point, and the District Court’s February 15, 2022 Order and Judgment, and the Fifth Circuit’s decision affirming the same, should be reversed, and this action should be remanded with instructions to hold an evidentiary hearing with respect to the proper amounts of disgorgement and civil penalties, if any.

## **II. PETITIONERS DID NOT WAIVE AN EVIDENTIARY HEARING**

The Fifth Circuit’s determination that Petitioners waived their right to an evidentiary hearing was erroneous. Indeed, although the Fifth Circuit ostensibly relied on Petitioners’ respective consent judgments, which contemplated that “the Court may determine the issues raised in the motion [for disgorgement and/or civil penalties] on the basis of affidavits,

declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence,” the judgments also contemplate “any hearing held on such a motion.” ROA.259-ROA.263, ROA.268-ROA.272, ROA.273-ROA.277.

Moreover, the District Court below expressly held that it “previously denied [Petitioners’] request for an evidentiary hearing” because they “waived any right to a hearing and expressly agreed for [the District] Court to resolve this issue [of the proper amount of disgorgement] on the papers.” ROA.1691. The District “Court therefore again denie[d] the requests for an evidentiary hearing.” *Id.* This was the *sole* basis for the District Court’s determination that an evidentiary hearing was unwarranted. Although the District Court also determined that at that “point, the only evidence before the Court on the proper amount of disgorgement [was] from the SEC,” the District Court foreclosed Petitioners from offering contrary evidence at a hearing based on its determination that any right to a hearing had been waived. The District Court’s decision not to hold an evidentiary hearing based on waiver, and the Fifth Circuit’s affirmance of the same, was wrong.

The Fourth Circuit Court of Appeals recently addressed the exact issue regarding waiver that is present in this appeal. In *United States v. Bank*, the Fourth Circuit was tasked with determining whether “disgorgement ordered in a civil Securities Exchange Commission . . . proceedings constitutes a ‘criminal penalty’ for purposes of the Double Jeopardy Clause.” 965 F.3d 287, 291 (2020). There, the appellant signed a

consent agreement, which the Government argued “effected a knowing and intelligent waiver of his right to contest a future prosecution on Double Jeopardy grounds.” *Id.* at 292. Specifically, the consent agreement provided that “Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein.” *Id.*

The Fourth Circuit recognized that parties may “waive [a] constitutional right,” but also recognized that “[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege,” and courts should “indulge every reasonable presumption against waiver of fundamental constitutional rights,” rather than “presume acquiescence in the loss” of such rights.” *Id.* at 292-93 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). The Fourth Circuit also recognized that “the language of the waiver must be ‘crystal clear.’” *Id.* at 293 (quoting *United States v. Van Waeyenberghe*, 481 F.3d 951, 957 (7th Cir. 2007)).

Ultimately, the Fourth Circuit “decline[d] to rely on waiver to dispose of” the appeal. *Id.* Specifically, the Fourth Circuit determined that while “the waiver clause in the Consent Agreement purport[ed] to waive a challenge to ‘the imposition of any remedy or civil penalty,’ . . . [a]t the time Appellant signed the Consent Agreement, the Supreme Court had not considered disgorgement to be a penalty.” *Id.* The Fourth Circuit recognized that, in *Kokesh v. Securities and Exchange Commission*, 137 S.Ct. 1635, 1639, 198 L.Ed.2d 86

(2017), this Court *did* consider disgorgement to be a penalty, and “what Appellant’s waiver represented at the time of the Consent Agreement changed after *Kokesh*.” *Id.* Thus, because the Fourth Circuit would “draw all reasonable presumptions against a waiver of one’s constitutional rights, [the Fourth Circuit] decline[d] to rely on the waiver in the Consent Agreement in disposing of th[e] appeal.” *Id.*

This Court should similarly hold that Petitioners did not waive their right to an evidentiary hearing. Like the appellant in *Bank*, Petitioners entered into the consent judgments on April 10, 2015, before *Liu* was decided. ROA.259-ROA.263, ROA.268-ROA.272, ROA.273-ROA.277. Petitioners also entered into their consents, without admitting or denying the SEC’s allegations, before this Court decided *Kokesh*. And, just as this Court in *Kokesh* recognized the SEC’s longstanding improper use of disgorgement as a penalty, *Liu* drastically changed how trial courts are to determine the proper amount of disgorgement in SEC civil actions. To recall, the *Liu* Court recognized that disgorgement awards may not “exceed the gains ‘made upon any business or investment, **when both the receipts and payments are taken into the account.**’” 140 S.Ct. at 1942 (citations omitted) (emphasis added). And here, to this day, neither the SEC nor the District Court ever has examined closely the voluminous records that have been in the SEC’s possession for more than seven years to take into account the actual receipts and payments to ascertain and determine the precise amount of disgorgement; instead the SEC

pretended to do so by offering an approximation. This Court further explained in *Liu* that “courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5).” The District Court did not do so.

At the time Petitioners entered into the consent judgments, neither the parties nor the District Court had the benefit of this Court’s decision in *Kokesh* or *Liu*’s guidance regarding how a court should determine the proper amount of disgorgement, or what process must be conducted to render that determination. And, under *Smyth*, “common sense notions of justice that inhere in the Due Process Clause” ordinarily require, in cases such as this one, a “fair hearing on the fact issues involved in the disgorgement determination.” *SEC v. Smyth*, 420 F.3d 1225, 1231 n. 12 (11th Cir. 2005); *see also United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) (observing that “the case law is clear” that a hearing is required “unless the amount claimed is a liquidated sum or one capable of mathematical calculation”). Here, there are records upon which the District Court can make the determination of the exact amount of legitimate expenses, and the SEC’s and District Court’s unwillingness to do what this Court requires is not justification for embracing the SEC’s guesswork cloaked as an “approximation.”

In sum, Petitioners did not waive their Due Process rights to an evidentiary hearing, the District Court erred in holding to the contrary, and the Fifth Circuit erred in upholding the District Court’s decision.

### III. THE CIVIL MONETARY PENALTY VIOLATES THE EIGHTH AMENDMENT

The Fifth Circuit’s decision that Petitioners waived their challenges to the District Court’s civil penalty was erroneous.

With respect to the arguments regarding the civil monetary penalty that were not raised in the first appeal, the Fifth Circuit ignored controlling precedent contained in *Conkling v. Turner*, 138 F.3d 577, 587 (5th Cir. 1998), wherein the Fifth Circuit rejected a similar “law of the case” argument where the defendant had never raised the issue in the first appeal. There, the Fifth Circuit reasoned that “[w]hile we recognize that ‘the law of the case’ doctrine ‘comprehends things decided by necessary implication as well as those decided explicitly,’ it nevertheless ‘applies only to issues that were decided’ and ‘does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided.’” *Id.* (internal quotations and citations omitted).

Here, after *Liu* was decided, Petitioners urged the District Court to reconsider both its disgorgement and civil monetary penalty determinations based on this Court’s mandate ordering “further proceedings consistent with the Supreme Court’s decision in *Liu*.” *Sec. & Exch. Comm’n v. Team Res., Inc.*, 815 F. App’x 801 (5th Cir. 2020). The issues in *Liu* were not, and could not, have been presented to either the District Court or this Court on the first appeal, as *Liu* had not yet been decided.



With respect to the Fifth Circuit’s determination that Petitioners’ Eighth Amendment rights were waived, Fifth Circuit precedent holds that it is within this Court’s discretion to review arguments surrounding alleged constitutional violations for the first time on appeal. *United States v. Martinez*, 496 F.3d 387, 389 (5th Cir. 2007). Moreover, Petitioners’ arguments under the Eighth Amendment did not ripen until the District Court actually imposed the civil monetary penalty at issue. Indeed, the Fifth Circuit has held that, in the context of takings claims, “where the injury that resulted from an alleged procedural due process violation is merely a taking without just compensation, [a court] cannot know whether the plaintiff suffered any injury until the takings claim has been adjudicated.” *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 91 (5th Cir. 2011). Thus, because Petitioners’ Eighth Amendment argument is coextensive with its Due Process claims, the Team Resources Defendants did not waive their Eighth Amendment claim for failure to preserve below.

The Fifth Circuit should have considered whether and concluded that the civil monetary penalty violates the Eighth Amendment. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). This “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *Id.* A civil monetary penalty violates the Eighth Amendment if it is “grossly

disproportional to the gravity of a defendant's offense." *Id.* at 334.

The District Court's and the Fifth Circuit's failure to consider the constitutionality of the civil penalty amount requires remand. For example, in *United States v. Mackby*, the Ninth Circuit Court of Appeals determined that a civil penalty was "subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment." 261 F.3d 821, 830 (9th Cir. 2001). That analysis required the record to "be further developed by the district court" to weigh all of the "factors that may be relevant to the inquiry," such as "whether a fine as large as that imposed by the district court is required to achieve the desired deterrence." *Id.* The Ninth Circuit thus remanded for the District Court to conduct that analysis. *Id.*

This Court has been clear in its prior decisions that the safeguards of the Fifth and Eighth Amendments curb overly punitive fines and penalties. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (holding that grossly excessive punitive damage awards can violate Due Process Clause); *Bajakajian*, 524 U.S. at 334 (holding that punitive forfeiture violates Excessive Fines Clause of the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense"). Notably, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), this Court concluded that a punitive damages award of "more than 4 times the amount of compensatory damages" might be

“close to the line,” but did not “cross the line into the area of constitutional impropriety.”

In this case, the penalties imposed exceed roughly 6.5 times Petitioners’ alleged net profits from their alleged wrongdoing. That does not just cross the line; it obliterates it. This Court should settle the law, consistent with constitutional mandates, that a \$15.5 million penalty is grossly disproportionate to the \$2.4 million which SEC alleges that Petitioners earned on the accused conduct. Petitioners dispute the accuracy of the SEC’s \$2.4 million approximation, and that sum cannot be used as a benchmark for the constitutionally violative civil monetary penalty. The SEC must not use its vast power to seek civil penalties to line the agency’s coffers by contradicting the Constitution.

The constitutional protection of the “Excessive Fines Clause is especially important . . . ‘where the Government has a direct pecuniary interest in the outcome of the proceeding.’” *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993)). The application of the Eighth Amendment to the civil monetary penalty imposed below would further operate to temper the SEC’s incentive to “select targets not because they are the worst violators, but for improper reasons such as agency or individual self-aggrandizement.” Sonia A. Steinway, SEC “*Monetary Penalties Speak Very Loudly, But What Do They Say? A Critical Analysis of the SEC’s New Enforcement Approach*,” 124 Yale L.J. 209, 224 (2015).

In sum, while Petitioners acknowledge that federal appellate courts do not require “ritualistic incantation” of factors “to establish [the court’s] consideration of a legal issue,” the court’s analysis of such factors can be “implicit” only as long as it “rule[d] on [the] issues that have been fully presented for determination.” *United States v. Davis*, 53 F.3d 638, 642 (4th Cir. 1995). Here, the District Court and the Fifth Circuit failed even to consider whether the civil monetary penalty is unduly excessive, and the District Court’s excessive and punitive civil monetary penalty should be reversed.

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## CONCLUSION

For all of these reasons, Petitioners respectfully request that the Court reverse the Fifth Circuit’s decision and remand for discovery followed by an evidentiary hearing as to the proper amount of disgorgement and civil penalties, if any.

Respectfully submitted,

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May 1, 2023