

Case No. 24A622

IN THE
SUPREME COURT OF THE UNITED STATES

Navellier & Associates, Inc. and Louis Navellier
Applicants

Securities and Exchange Commission
Respondent

**APPLICATION FOR AN ADDITIONAL EXTENSION OF TIME
WITHIN WHICH TO FILE A
JOINT PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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Navellier & Associates, Inc. and Louis Navellier

January 20, 2025

PARTIES TO THE PROCEEDINGS BELOW

Applicants *Navellier & Associates, Inc. and Louis Navellier* were the Defendants in the United States District Court for the District of Massachusetts and the Appellants in the United States Court of Appeals for the First Circuit, Consolidated Appeals Nos. 20-1581, 21-1857, 22-1733 and 23-1509. The Respondent Securities and Exchange Commission was the Plaintiff in the District Court and the Appellee in the Court of Appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant *Navellier & Associates, Inc.* is a corporation whose stock is not publicly traded. It has no parent corporation and no publicly traded corporation, or any corporation owns 10% or more of its stock. Applicant *Louis Navellier* is an individual who was a defendant in the District Court and an Appellant in the First Circuit Court of Appeals in this case.

RELATED CASES

1. *Securities and Exchange Commission v. Navellier & Associates, Inc. and Louis Navellier*, United States District Court, District of Massachusetts, Case No. 1:17-CV-11633-DJC.
2. *Securities and Exchange Commission v. Navellier & Associates, Inc. and Louis Navellier*, 108 F.4th 19 (1st Cir. 2024)

APPLICATION FOR AN ADDITIONAL EXTENSION OF TIME WITHIN WHICH TO FILE A JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Ketanji Brown Jackson, Associate Justice of the Supreme Court and Circuit Justice for the First Circuit:

Pursuant to 28 U.S.C. §2101(c) and Rules 12.4, 13.5, 22, and 30.2 and 30.3 of the Rules of this Court, applicants *Navellier & Associates, Inc. and Louis Navellier* respectfully request an additional thirty (30) day extension of time, up to and including February 28 2025, within which to file their joint petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit. Absent the requested extension, the petition for writ of certiorari would be due by January 30, 2025.

Applicants timely requested a 30-day extension to file their petition for writ of certiorari, which extension to January 30, 2025 was granted on December 27, 2024 and entered on January 3, 2025. A copy of the grant of extension is attached hereto as Exhibit 1.

This case involves questions of exceptional importance because the First Circuit's published decision in this case (108 F.4th 19 at 41, n. 14) holding - that the SEC has authority, under 15 U.S.C. §78u(d)(5) or (7), to obtain equitable

disgorgement from an investment advisor for allegedly defrauding its investor clients even though those clients suffered no pecuniary harm (and in fact made \$221 Million in profits) from the investment advisor's investment advice - conflicts with the decision of the United States Court of Appeals for the Second Circuit in *Govil v. SEC* 86 F.4th 89, 93, 98, 102-106 (2nd Cir. 2023) which held that the SEC has no right to seek, and courts have no authority to award disgorgement, under 15 U.S.C. §78u(d)(5) or (7), for investors who suffered no pecuniary harm as a result of the wrongdoer's alleged fraud.

The First Circuit Court of Appeals in this case (and the Fifth Circuit Court of Appeals in *SEC v. Hallam* 42 F.4th 316, 334-343 (5th Cir. 2022)) have come to different conclusions which materially conflict with the Second Circuit Court of Appeals decision in *Govil v. SEC* 86 F.4th 89, 93, 98, 102-106 (2nd Cir. 2023) on this important issue of whether a federal court has authority to award disgorgement for an alleged violation of the securities laws where the "victims" of the alleged securities law violation suffered no pecuniary harm.

A writ of certiorari is necessary to resolve the conflict between the First Circuit Court of Appeals in this case (and the Fifth Circuit Court of Appeals in *SEC v. Hallam* 42 F.4th 316, 334-343 (5th Cir. 2022)) and the Second Circuit Court of Appeals in *Govil v. SEC* 86 F.4th 89, 93, 98, 102-106 (2nd Cir. 2023)

A writ of certiorari is also necessary to resolve the conflict between the First Circuit's decision in this case (108 F.4th 19 at 41, n. 14) and this Court's decision in *Liu v. SEC* 591 U.S. 71 at 75 - that disgorgement can only be awarded for "victims". Persons who do not suffer pecuniary harm are not victims. *Govil* supra 86 F.4th 89 at 93, 98, 102-106. Therefore, a district court has no authority to award disgorgement for them.

The First Circuit in this case attempted to distinguish *Liu* and *Govil* by refusing to follow *Liu*, claiming that "[n]either *Liu* or our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award." (*Navellier* 108 F.4th at 41, n. 14) That is incorrect. *Liu* does require that disgorgement must be equitable and "remedial" and must be for "victims" to remedy their harm. If investors have suffered no pecuniary harm, they are not victims and therefore, disgorgement will not remedy their non-existent harm. To the contrary, it will punish the "wrongdoers" by making them pay \$30 Million more than fair compensation to persons that were not wronged.

A writ of certiorari is also necessary to secure uniformity of this Court's decisions, because the First Circuit Panel's decision - that the amount of disgorgement does not have to be causally connected to the advisor's wrongdoing (108 F. 4th at 40) ["this requirement does not imply that a court may order a malefactor to disgorge *only* the actual property obtained by means of {their}

wrongful act”] - conflicts with this Court’s holding in *Liu* supra 591 U.S. 71 at 83-84 – [“courts limited awards to the net profits *from wrongdoing*” (citing *Seymour v. McCormick* 16 How. 480, 490, 14 L. Ed. 1024 (1854))] - i.e., that the amount of disgorgement must be causally connected to the wrongdoing.

A writ of certiorari should also be granted so that this Court’s holding in *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 192, n. 39, and 205 (1963) can be revisited and corrected and clarified as to - whether a statement or omission is “material” so as constitute a fraud or misrepresentation under 15 U.S.C. §80b-(1) or (2) when there is no reliance on the statement or omission by the purportedly defrauded clients or prospective clients. The courts have deemed a statement or omission to be material if the statement or omission is “obviously important” to an investor (*Securities and Exchange Commission v. Navellier & Associates, Inc. and Louis Navellier*; 108 F.4th 19 at 37) but that actual reliance is not required to establish materiality, citing *SEC v. Capital Gains Research Bureau, Inc.* supra 375 U.S. 180 at 192-193. However, the statement or omission that is not relied on cannot be “important” to an investor as part of the “mix” in deciding whether to make the investment. Indeed, this Court in *SEC v. Capital Gains Research Bureau, Inc.* supra at 193, n. 39, stated that to have an antifraud violation under §206(1), “it is only necessary that [the wrongdoer] intend action *in reliance* on the truth of his misrepresentations.” Thus, this Court should grant Petitioners’

Writ of Certiorari to revisit *Capital Gains* to make clear that the “materiality” requirement for a §206(1), (2) violation requires actual reliance, at least in a face-to-face fraud situation like this case, as opposed to class action “fraud on the market” situations (*Basic, Inc. v. Levinson* 485 U.S. 224, 244 (1988)), by the client in order to have a §206(1) or (2) antifraud violation. *Flannery v. S.E.C.*, 810 F.3d 1, 9 (2015)

REASONS FOR GRANTING THE REQUEST FOR EXTENSION OF TIME TO FILE THE JOINT PETITION FOR WRIT OF CERTIORARI

1. Applicants’ counsel, the undersigned, had been involved in preparing for and trying a jury trial in another case and post-trial briefing (which is ongoing) from September 13, 2024 through November 22, 2024 which prevented the undersigned from preparing the writ of certiorari in this case during that period.
2. Applicants’ counsel, the undersigned, was ill with the flu and was unable to prepare the writ from December 7, 2024 through December 15, 2024.
3. Appellants’ counsel has been in continuing discussions with outside counsel about possibly associating with the undersigned for the preparation of the petition for writ of certiorari. Due to those counsels’ other time commitments on other cases, those counsel need additional time to familiarize themselves with this matter and prepare, before being able to decide if he (and his firm) can associate and participate in the preparation of the petition for writ of certiorari herein.

Appellants' counsel is also continuing to discuss with, possible *amici* in connection with this petition for writ of certiorari and needs additional time to obtain their potential input in preparing for filing the petition.

4. There is no prejudice to the SEC in allowing Applicants a short 30-day additional extension from January 30, 2025 to February 28, 2025 to prepare and file their petition for writ of certiorari.

CONCLUSION

For these reasons set forth above, Applicants' request for an additional thirty (30) day extension from January 30, 2025 to February 28, 2025 to complete preparation and file their petition for writ of certiorari in this case should be granted.

January 20, 2025

Respectfully Submitted

Samuel Kornhauser
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Counsel of Record
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EXHIBIT 1

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 27, 2024

Clerk
United States Court of Appeals for the First
Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210

Re: Navellier & Associates, Inc., et al.
v. Securities and Exchange Commission
Application No. 24A622
(Your No. 20-1581, 21-1857, 22-1733, 23-1509)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Jackson, who on December 27, 2024, extended the time to and including January 30, 2025.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by



Rashonda Garner
Case Analyst

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US COURT OF APPEALS
FOR THE FIRST CIRCUIT

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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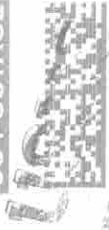
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