No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF OF PETITIONER

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QUESTION PRESENTED

Under 28 U.S.C. §2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. §2462 apply to claims for "disgorgement"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a–19a) is reported at 834 F.3d 1158 (10th Cir. 2016). The decision of the District Court (Pet. App. 20a–47a) is unreported but is available at 2015 WL 11142470.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT OF THE CASE

A. Statutory Background

1. Limitations Periods for Government Enforcement Actions.

Section 2462 traces to the Founding. In 1790, the First Congress enacted a two-year limit "for any fine or forfeiture under any penal statute." Act of Apr. 30, 1790, ch. 9, §32, 1 Stat. 112, 119; *see 3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994) (identifying 1790 statute as precursor to §2462).

In 1839, Congress enacted the statute that became §2462, providing that "no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, … unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued." Act of Feb. 28, 1839, ch. 36, §4, 5 Stat. 321, 322. Although the statute has been amended and recodified several times, today's §2462 hews closely to the 1839 Act. *Gabelli v. SEC*, 133 S. Ct. 1216, 1219 (2013).

2. SEC "Disgorgement" Claims.

This suit concerns §2462's application to SEC claims for "disgorgement," a monetary remedy that the SEC today seeks "in the majority of its enforcement actions." BIO 10.

When Congress created the SEC in 1934, and when Congress last amended §2462 in 1948, the SEC did not have power to pursue monetary sanctions for securities violations. The SEC could only seek injunctions or ancillary relief. *See* 1 Thomas Lee Hazen, *Law of Securities Regulation* §1.37 (7th ed., rev. vol. 2016).

Three decades later, however, the SEC began pursuing monetary sanctions under a theory it called "disgorgement." *See generally* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 Duke L.J. 641, 641 & n.1. The first success came in 1970, when the SEC persuaded the district court in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, 446 F.2d 1301, 1308 (2d Cir. 1971), to impose this sanction. The court embraced the "[j]udicial willingness to imply new remedies in areas governed by federal law." *Id.* at 91. It found that "requir[ing] defendants to give up profits realized in [unlawful] transactions" would "effectuate the [securities laws'] purpose" based on the SEC's representation that this remedy would "provid[e] an effective deterrent." *Id.* at 92.

After *Texas Gulf Sulphur*, the SEC began consistently requiring wrongdoers to disgorge the proceeds of their illegal activity. And while *Texas Gulf Sulphur* ordered "restitution" in favor of injured parties, *id.* at 93, the SEC soon began demanding "disgorgement" even when it was "not feasible" to repay victims; instead, payments went to the U.S. Treasury. *See, e.g.*, *SEC v. Lund*, 570 F. Supp. 1397, 1404–05 (C.D. Cal. 1983).

In 1990, Congress authorized the SEC to seek monetary penalties in the "gross amount of pecuniary gain." *See* 15 U.S.C. §77t(d)(2). Following the statute's enactment, the SEC began using disgorgement for a new purpose: to bring enforcement actions that would otherwise be time-barred. Before 1990, limitations issues virtually never arose in disgorgement cases, and there is no evidence the SEC pursued stale claims that could have been barred by any limitations period.[1] After 1990, however, the SEC began asserting that "disgorgement" was limitless in time, unconstrained by §2462 or any other limitations period. *See SEC v. Rind*, 991 F.2d 1486, 1490-93 (9th Cir. 1993); *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996).

But it was *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), that caused the SEC to multiply its efforts to bring stale disgorgement claims. *Gabelli* rejected the government's request to peg limitations periods for statutory penalties to the SEC's "discovery" of wrongdoing. *Id.* at 1224. Now, the SEC's only option for seeking money judgments for violations over five years old is disgorgement. It thus has brought numerous stale disgorgement claims nationwide, leading to four appellate cases in quick succession: the Tenth and Eleventh Circuits reached conflicting conclusions in 2016,[2] while the Second and Eighth Circuits have pending cases.[3]

As the number of disgorgement cases has risen, so

[1] The only pre-1990 case addressing limitations issues appears to be *SEC v. Penn Central Co.*, 425 F. Supp. 593 (E.D. Pa. 1976), which rejected a laches defense. *Id.* at 599. But the opinion does not indicate that the SEC *actually* delayed in suing.

[2] *Compare* Pet. App. 1a-19a (decision below), *with SEC v. Graham*, 823 F.3d 1357, 1359 (11th Cir. 2016).

[3] *SEC v. Wyly*, No. 15-2821 (2d Cir.); *SEC v. Crawford*, No. 16-1405 (8th Cir.).

too has the amount of payments: between 2013 and 2016, disgorgement payments jumped 25%, as against only a 9% increase in penalties.[4] As a result, supposedly "ancillary" disgorgement payments now dwarf the civil penalties expressly authorized by statute—$2.8 billion in disgorgement as against only $1.27 billion in penalties.[5]

B. Factual Background

1. Petitioner's Securities-Law Violations

On October 27, 2009, the SEC filed an enforcement action alleging that, from 1995 through 2006, Petitioner violated federal securities laws by misappropriating funds. Pet. App. 3a, 21a. The SEC's claims concerned two SEC-registered investment-adviser firms—Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI")—that contracted to provide investment advice to four SEC-registered business-development companies ("the Funds"). Pet. App. 2a–3a. The SEC alleged that, via TFL and TFI, Petitioner caused improper distributions from the Funds. Pet. App. 21a.

A jury found that Petitioner contravened the

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[4] *Compare* SEC, Select SEC and Market Data, Fiscal 2016, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf (disgorgement of $2.809 billion and penalties of $1.273 billion) ("2016 Data"), *with* SEC, Select SEC and Market Data, Fiscal 2013, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2013.pdf (disgorgement of $2.257 billion and penalties of $1.167 billion).

[5] 2016 Data at 2.

securities laws, based on three violations. Pet. App. 4a–5a. First, from 1995 through 2006, Petitioner impermissibly directed the treasurer of TFL and TFI to withdraw $23.8 million from the Funds to pay salaries and bonuses, including to Petitioner and others. Pet. App. 3a, 22a.

Second, from 1995 through 2006, Petitioner impermissibly directed the treasurer of TFL and TFI to withdraw $5 million to cover office rent, which went to landlords. Pet. App. 3a, 22a.

Third, in 2000, Petitioner impermissibly caused TFL and TFI to take $6.1 million in "tax distributions." Pet. App. 3a–4a. These payments went to Petitioner and others. *Id.*

The jury found Petitioner had violated the Investment Company Act of 1940, 15 U.S.C. §80a-36, and that he had aided and abetted TFL and TFI in violating the Investment Advisers Act, 15 U.S.C. §§80b-5, 80b-6(1)-(2), and the Exchange Act of 1934, 15 U.S.C. §§78m, 78n, and its implementing regulations. Pet. App. 23a–24a.

2. Lower Court Proceedings

The district court ordered Petitioner to pay a penalty of $2.4 million, equal to "the amount of funds that [Petitioner] himself received during [§2462's five-year] limitations period"—that is, after October 27, 2004. Pet. App. 31a–32a.

The SEC, however, also wished to pursue monetary sanctions for conduct "outside the five-year window" in §2462. Pet. App. 42a. It sought a $34.9 million "disgorgement" judgment, of which $29.9 million concededly was based on violations outside the limitations period. Pet. App. 42a; *see* Reply to Opp'n to Mot. For Final J. at 2, *SEC v. Kokesh*, No. 1:09-cv-01021-SMV-LAM (D.N.M. Jan. 21, 2015), Dkt. 181. Much of this amount also concededly reflected "funds paid to third parties," including "landlords or other … persons to whom [Petitioner] was not related." Pet. App. 42a. And this amount concededly was far greater than Petitioner could "disgorge"—Petitioner no longer had the funds he had received, and he was "insolvent," with "no prospect of recovering." Pet. App. 31a.

The court granted the SEC's request, agreeing with the SEC that no limitations period applied. Pet. App. 35a-36a. It ordered Petitioner to pay $34.9 million in disgorgement, plus $18 million in prejudgment interest. Pet. App. 45.

The Tenth Circuit affirmed. The court acknowledged that §2462 "sets a five-year limitations period for claims seeking" "'any civil … penalty, or forfeiture.'" Pet. App. 5a–6a (quoting 28 U.S.C. §2462). The Tenth Circuit believed, however, that §2462 used "forfeiture" in a "narrow" "historical sense"—as "an in rem procedure to take 'tangible property used in criminal activity.'" Pet. App. 14a (citation omitted). It reasoned that "[w]hen the term *forfeiture* is linked in §2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, … Congress was contemplating the meaning of *forfeiture* in this historical sense." Pet. App. 15a. The court found that the "nonpunitive remedy of disgorgement does not fit in that company." *Id.*

SUMMARY OF ARGUMENT

A five-year limitations period applies to government enforcement actions seeking "any civil fine, penalty, or forfeiture." 28 U.S.C. §2462. This limitation period applies to disgorgement because it is a "forfeiture" and a "penalty."

I. Disgorgement is a "forfeiture." At §2462's enactment, "forfeiture" was an umbrella term covering any order to turn over money to the government, as sovereign, as a result of wrongdoing. The term encompassed both remedial and punitive remedies, and remedies directed at either money or property. Disgorgement—an order to turn over the proceeds of wrongdoing to the government—falls within forfeiture's broad definition.

The Tenth Circuit concluded that disgorgement is not a forfeiture because the SEC did not bring disgorgement claims until the 1970s, long after §2462's enactment. But even though disgorgement is a type of forfeiture that did not exist in the early Republic, it remains a "forfeiture" under that term's broad definition. Congress recognized as much when, in the 1970s, it enacted statutes requiring defendants to give up tainted proceeds—and called them "forfeiture." Congress's choice matched forfeiture's history: Like modern-day disgorgement, early forfeitures had the *effect* of depriving wrongdoers of illicit proceeds, and so accomplished the same result as disgorgement today.

The Tenth Circuit also interpreted §2462 to apply only to punitive remedies. But that interpretation is inconsistent with both statutory text (which draws no such distinction), and history (which shows that punitive and nonpunitive remedies alike were understood as "forfeitures"). Indeed, it is inconsistent with the Tenth Circuit's *own* conclusion that nonpunitive forfeitures of the instrumentalities of crime fall within §2462.

II. Disgorgement is also a "penalty." As this Court has held, a remedy is a "penalty" so long as it is partly punitive. Disgorgement qualifies. It imposes negative legal consequences because the defendant did wrong. And it deters future violations. Those are hallmarks of punishment.

Just as important is what disgorgement does *not* do: Its goal, as the SEC and courts have made clear, is not to compensate. And when a remedy imposes negative consequences on wrongdoing without compensating victims, it is a penalty. That is true because the only reason to impose that type of remedy is that the defendant's wrongdoing *deserves* sanction. This Court has held as much: criminal restitution is a "fine, penalty, or forfeiture" under federal bankruptcy law because it has a noncompensatory "focus." *Kelly v. Robinson*, 479 U.S. 36, 53 (1986). Disgorgement's noncompensatory "focus" similarly places it within §2462.

The Court has applied that same test under §2462's predecessor: Noncompensatory payments to the Treasury are subject to the statute of limitations, while compensatory payments are not. Indeed, these decisions reflect a tradition dating to Magna Carta: When the government pursues payments that will fill its own coffers, rather than compensate for loss, the dangers of abuse are especially acute, and the need for limits is especially essential.

The government claims that disgorgement merely restores the status quo ante. That is false. Disgorgement cannot restore the status quo when payments go to the government, not victims. Disgorgement also makes defendants worse off: It requires payment of proceeds that went to third parties, and proceeds with only an attenuated link to wrongdoing.

The government itself has recognized that disgorgement is punitive in bankruptcy and tax law, where this categorization yields greater payments to the government. It remains so here. Disgorgement's nature does not change depending on which categorization will maximize government revenues in a particular case.

III. Statutes of limitations are critical to the fair enforcement of the laws. Yet the government's position would allow it to avoid the statute of limitations in almost every case. Given the SEC's practice of expanding securities laws by seeking novel judicial glosses on old rules, the potential for abuse is grave. And this unfairness arises with no justification: Other forms of backwards-looking relief are subject to statutes of limitations, including remedies that are functionally identical to disgorgement and sanctions for far worse misconduct. There is no reason to subject those remedies, but not disgorgement, to time limits.

Contra the Tenth Circuit, there is no presumption against applying a statute of limitations. Quite the opposite. For two centuries, in government enforcement suits seeking backwards-looking monetary relief, courts have applied a presumption in *favor* of statutes of limitations.

IV. The government's position that disgorgement is an "equitable" remedy is irrelevant. Section 2462 covers legal and equitable remedies.

History also rejects the government's claim that it can avoid a limitations period by styling a remedy "equitable." Courts of equity subjected equitable remedies to time limits. They would never have allowed the government to bring backwards-looking enforcement actions with no time limit.

If the Court deems the issue relevant, it should hold that disgorgement is not "equitable" for purposes of §2462. The government analogizes disgorgement to traditional equitable restitution. But equitable restitution is a turnover of specific assets to their owner. Disgorgement compels payment from general assets to the government. The SEC's analogy to equitable restitution is particularly unpersuasive because the SEC simultaneously contends that disgorgement is *different* from equitable restitution, in order to obtain government-friendly legal rules—including the lack of a statute of limitations.

ARGUMENT

Under 28 U.S.C. §2462, a five-year limitations period applies to government enforcement actions seeking "any civil fine, penalty, or forfeiture." This list—in a statute dating from 1839, last amended in 1948—does not expressly use the word "disgorgement."

That is not a surprise: The remedy now styled "disgorgement" is a child of the 1970s.

But this remedy, though new, falls squarely within what §2462 and its predecessors have always covered. In the 19th century, "forfeiture" broadly included any order to turn over money to the government as a result of a legal violation. Likewise, a monetary sanction was a "penalty" whenever it stepped beyond compensating injured victims. Those definitions encompass SEC disgorgement judgments: They are pegged to violations of the securities laws, are pursued by the government as sovereign enforcer, and fill government coffers, without necessarily compensating injured victims. Hence, §2462 applies.

I. SEC DISGORGEMENT CLAIMS SEEK "FORFEITURE."

A. In The Early Republic, "Forfeiture" Covered Any Order To Turn Over Money To The Government, as Sovereign, Due To A Violation Of Law.

Disgorgement falls within §2462 because it is a "forfeiture." The Tenth Circuit disagreed largely because it believed that, historically, "forfeiture" had "a narrow focus" as an "in rem" and "nonpunitive" remedy "to take tangible property." Pet. App. 14a (quotation marks omitted). It thought §2462 used "forfeiture in this historical sense." Pet. App. 15a. But the Tenth Circuit got forfeiture's definition badly wrong. At §2462's enactment, "forfeiture" was an umbrella term covering any order to turn over money to the government, as sovereign, as a result of a legal transgression—in personam or in rem, remedial or punitive. "Disgorgement" fits that definition.

1. In interpreting "forfeiture," the Court starts with what it meant to the Congress that enacted §2462's 1839 forbearer. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning … at the time Congress enacted the statute"). In his dictionary's first edition, Webster defined "forfeiture" as "the losing of some right … or effects, by an offense, crime, breach of condition or other act." 1 Noah Webster, *An American Dictionary of the English Language* 86 (1828). Other contemporary definitions are similar. *See, e.g.*, Alexander M. Burrill, *A New Law Dictionary* 507 (1850) (the "loss of what belongs to one, by some fault, misconduct or transgression of law" or an "involuntary or compulsory transfer or surrender, consequent upon one's own unlawful or wrongful act"); Samuel Johnson et al., *Johnson's English Dictionary* 400 (1834) (to "forfeit" is to "lose by some breach of condition" or "some offense").

These definitions readily encompass SEC disgorgement orders. Petitioner committed an "offense," "breach of condition," or "other act": He violated the securities laws. 1 Webster, *supra*, at 86. Because of this violation, Petitioner "los[t] … effects," *id.*—the $34.9 million disgorgement. That judgment was therefore a "forfeiture," as the 1839 Act's drafters would have understood the term.

2. Lawmakers in the early Republic legislated based on the same broad definitions. Contra the Tenth

Circuit, "forfeiture" covered any obligation to pay money to the government, as sovereign, as a result of wrongdoing—including punitive or remedial sanctions, and *in rem* or *in personam* remedies.

Punitive orders directed at specific property. In England, "forfeiture" punished felons and traitors: The "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). This use of "forfeiture" was well-known in the early Republic. The Constitution prohibits this form of "forfeiture" as punishment for treason, *see* U.S. Const. art. III, §3, and the First Congress prohibited such forfeitures for felonies in the Crimes Act of 1790—the same statute that enacted the two-year statute of limitations for "forfeitures." Act of Apr. 30, 1790, ch. 9, §24, 1 Stat. at 117; *see also Austin v. United States*, 509 U.S. 602, 613 (1993).

Remedial orders directed at specific property. "Forfeiture" also referred to "statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo*, 416 U.S. at 682. Such "forfeitures" were familiar in England, *id.*, and the early Republic: By 1807, Congress had enacted statutes subjecting ships and cargoes involved in customs offenses, as well as vessels used to deliver slaves to foreign countries, to "forfeiture." *Id.* at 683 & nn.21-23. Such statutes were "not considered punishment." *United States v. Bajakajian*, 524 U.S. 321, 331 (1998). Rather, they were "truly … remedial." *Taylor v. United States*, 44 U.S. (3 How.) 197, 210 (1845); *see*

Bajakajian, 524 U.S. at 331.

Punitive orders directed at a sum of money. In the early Republic, the word "forfeiture" also encompassed fines—that is, punitive orders to pay money. *See Austin*, 509 U.S. at 614 (collecting statutes from First Congress showing "'forfeit' is the word Congress used for fine"); *id.* at 614 n.7 (collecting dictionaries from the 1700s showing "'fine' was understood to include 'forfeiture' and vice versa").

Remedial orders directed at a sum of money. "Forfeiture" also referred to purely *remedial* money judgments. The First Congress enacted customs statutes requiring forfeiture of "the value of" unlawfully imported goods. *E.g.*, Act of July 31, 1789, §25, 1 Stat. 29, 43 (requirement to "forfeit and pay a sum double the value of the goods … concealed or purchased" knowingly in violation of the customs laws). These "forfeitures … were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties." *Bajakajian*, 524 U.S. at 342; *see United States v. Maillard*, 26 F. Cas. 1140, 1141 (S.D.N.Y. 1871) (applying §2462's predecessor to one such statute).

These disparate "forfeitures" share a unifying characteristic: All were orders to turn over money or property to the government, as sovereign, as a result of wrongdoing. Disgorgement fits that definition.

B. The Novelty Of SEC Disgorgement Claims Does Not Exempt Them From §2462.

This history leaves one gap, which poses the question presented here. Government enforcement actions for "disgorgement" date only from the 1970s, and none of the "forfeitures" in the early Republic *precisely* matches. So, the question is: Does disgorgement's historical novelty place it outside §2462's definition of "forfeiture"?

The answer is no. Disgorgement may be a type of forfeiture that did not exist in the early Republic, but that does not mean it is not a forfeiture. Injunctions to desegregate schools, or reform prisons, for example, were unimaginable in 1790. Yet still they are "injunctions." So too with "forfeiture."

Modern Congresses understood this point. Congress did not until the 1970s begin enacting statutes expressly targeting gains from illegal activity. But when it did, Congress called those remedies "forfeitures." In 1970, as a sanction for "continuing criminal enterprise," Congress required convicted defendants to "forfeit to the United States the profits obtained by [them] in such enterprise." Controlled Substance Act, Pub. L. No. 91-513, tit. II, §408(a)(2), 84 Stat. 1242, 1265 (1970). Today, many statutes require defendants to relinquish the "proceeds" of their crimes. All these statutes refer to that remedy as "forfeiture." *See, e.g.*, 18 U.S.C. §1963(a); 21 U.S.C. §853(a). The government also can now bring *in rem* civil actions against the proceeds of crime—which are also styled "forfeitures." *See, e.g.*, 21 U.S.C. §881(a)(6). Congress recognized that these new remedies are still "forfeitures." Disgorgement is a "forfeiture" for the same reason.

The Tenth Circuit acknowledged that, as used in modern criminal forfeiture statutes, the word "forfeiture" includes "disgorgement-type remedies," via the mandate to forfeit "proceeds" of wrongdoing. Pet. App. 15a-16a. The court, however, dismissed these usages as reflecting an "'*expansion* of governmental power'" that did not justify applying §2462 to "remedies outside th[e] forfeiture statutes" that existed in 1839. Pet. App. 16a (citation omitted).

What the Tenth Circuit got wrong is that Congress did not limit §2462 to the "specific set of circumstances that may have precipitated its passage"—that is, specific forfeitures existing in 1839. *United States v. Rodgers*, 466 U.S. 475, 480 (1984). Rather, Congress enacted a general limitations period, which governs across the U.S. Code, and applied that statute to any "forfeiture." *See Gabelli*, 133 S. Ct. at 1219. That term's broad 1839 meaning readily fits modern disgorgement actions. Indeed, no principled definition could gerrymander "forfeiture" to *include* each of the four types of "forfeiture" that existed in the early Republic—remedial and punitive, directed at specific property or money—and *exclude* the remedy the SEC today pursues via "disgorgement."

Moreover, the assertion that modern-day forfeitures are an "expansion of governmental power" is wrong. Early Congresses were aware of the need to deprive wrongdoers of "ill-gotten gains," Pet. App. 45a. They styled the *mechanisms* for achieving this end as "forfeiture."

Early statutes deprived wrongdoers of the benefits of illegal activity by imposing forfeitures pegged to multiples of the defendant's ill-gotten gains, achieving the same result as the SEC's disgorgements. A pre-Revolution English statute, for example, compelled defendants who illegally sold books to forfeit "five pounds, and double the value of every book." *Backus v. Gould*, 48 U.S. 798, 805 (1849) (quotation marks omitted). This provision, thus, required defendants to turn over the amount of their "ill-gotten gains," Pet. App. 45a, plus an additional sanction of the same amount. Early American statutes followed the same model. For instance, the customs statutes discussed above imposed a forfeiture of "double the value of the goods" wrongfully imported. *Bajakajian*, 524 U.S. at 341-42 (quotation marks omitted). Likewise, Congress provided that if a postmaster did not "render his account for one month," he would "forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time." *United States v. Roberts*, 50 U.S. 501, 518 (1850). Again, that forfeiture is, in substance, disgorgement of the amount that the postmaster failed to account for, plus another sanction of the same amount.

The SEC's scheme works the same. The SEC can obtain "disgorgement" equal to "the ill-gotten gains," Pet. App. 25a, plus a fine also equal to the "amount of pecuniary gain," 15 U.S.C. §§78u(d)(3)(B), 80a-41(e)(2), 80b-9(e)(2); *see* Pet. App. 25a. That is *precisely* the same as the "double the value" forfeitures known in the early Republic. The government has merely split up its enforcement actions into two parts—calling the amount up to the ill-gotten gains "disgorgement" and anything else a "penalty."

The government contends that by slicing and dicing, it has rendered §2462's limitations period inapplicable to the "disgorgement" piece. This Court rejected a similar argument two centuries ago in *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805). There, too, the government contended that §2462's 1790 predecessor was inapplicable because it had proceeded via a "form of action"—for "debt"—that the statute did not expressly cover. *Id.* at 341. In the government's view, the statute applied only to criminal proceedings "carried on in the form of an indictment or information." *Id.* at 340. But Chief Justice Marshall, writing for the Court, disagreed. "[I]f the words … be examined, they will be found to apply not to any particular mode of proceeding, but generally." *Id.* And giving the statute its full breadth was essential because otherwise, government enforcement actions could "be brought at any distance of time," which would be "utterly repugnant to the genius of our laws." *Id.* at 342. When "not even treason can be prosecuted after a lapse of three years," the Chief Justice stressed, "it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Id.*

This case calls for the same result. "Forfeiture" readily covers "disgorgement." The Court should reject the government's position that this novel "form of action," *id.* at 341, puts disgorgement beyond any statute of limitations and renders an individual "forever liable" to the government, *id.* at 342.

C. The Tenth Circuit Made Basic Textual, Historical, And Logical Errors.

The Tenth Circuit's analysis was incorrect in multiple additional respects.

1. The Tenth Circuit's main claim—that "forfeiture" historically had "a narrow focus" referring solely to "an in rem procedure to take tangible property," Pet. App. 14a (quotation marks omitted)—is not just backwards on the history. It squarely contradicts the statutory text. The immediately preceding U.S. Code section explicitly discusses two types of "forfeiture": "pecuniary forfeiture," 28 U.S.C. §2461(a), and "forfeiture of property" *id.* §2461(b). Thus, §2462—which applies to *all* forfeitures, "pecuniary or otherwise"—cannot be limited to "in rem procedure[s] to take tangible property." Pet. App. 14a (quotation marks omitted). Indeed, in *Adams*, this Court specifically applied §2462's predecessor to an *in personam* forfeiture of money: The statute there provided that a defendant "carrying on the slave trade" "shall *forfeit* … two thousand dollars," and this Court regarded it as intolerable that a person might "remain forever liable to a *pecuniary forfeiture*." 6 U.S. (2 Cranch) at 336, 342 (quotation marks omitted).

2. The Tenth Circuit also invoked the *noscitur a sociis* canon. It believed §2462's enumerated sanctions are all punitive, and so concluded that the section cannot cover disgorgement, which it thought was remedial. Pet. App. 10a, 15a; *see id.* 15a ("[T]he term forfeiture is linked in §2462 to the undoubtedly punitive actions for a civil fine or penalty" and the "nonpunitive remedy of disgorgement does not fit in that company").

This argument fails because its premise is false: As just explained, many "forfeitures" in the early Republic were nonpunitive. *Supra*, at 14-15. Indeed, the Tenth Circuit admitted as much: It conceded that "forfeiture" covers *in rem* forfeitures used to take goods associated with violations of customs and revenue laws. Pet. App. 14a. But those forfeitures were *remedial* and *nonpunitive*. *Bajakajian*, 524 U.S. at 340-41 ("[s]uch forfeitures … were not considered at the founding to be punishment"); *Austin*, 509 U.S. at 621 ("the forfeiture of contraband itself may be characterized as remedial" (quotation marks omitted)). So, the word "forfeiture" encompasses nonpunitive remedies. That means disgorgement's supposedly "nonpunitive" nature cannot remove it from §2462.

Indeed, faithfully applied, the *noscitur a sociis* canon supports Petitioner: If the task is to see how "[a]ssociated words bear on one another's meaning," Pet. App. 15a (quotation marks omitted), the words "fine" and "penalty" are far more similar to "disgorgement" (which, likewise, is an *in personam* obligation to pay money) than to an *in rem* duty to turn over tangible property (which the Tenth Circuit conceded falls under §2462).

This *noscitur a sociis* argument, though wrong, reinforces that the SEC and Tenth Circuit's position is an egregious gerrymander. In their view, the phrase "fine, penalty, or forfeiture," 28 U.S.C. §2462, includes: (1) "undoubtedly punitive" *in personam* judgments from general assets; and (2) purely remedial *in rem* forfeitures of "tangible property." Pet. App. 14a-15a (quotation marks omitted); BIO 8-9. Yet they say §2462 excludes a remedy *directly in the middle*: *in personam* disgorgement judgments from general assets that—in the government's view—serve a remedial purpose. *But see infra* Part II. There is no principled way to draw a line that includes the first two categories but excludes the last.

3. The Tenth Circuit also hypothesized that "forfeiture" under §2462 is inherently different from "traditional disgorgement." Pet. App. 16a.

But there is no "traditional disgorgement." The word "disgorgement" does not appear in the Pomeroy or Story equity treatises. It first appeared in Black's Law Dictionary in 2000. It did not show up in the U.S. Code until 1988, and only then in recognition of the fact that the SEC had started using this term in the 1970s. 15 U.S.C. §78t-1(b)(2) (directing that "disgorgements" be "offset[]" against liability to victims of insider trading). And in unguarded moments, courts use "disgorgement" and "forfeiture" interchangeably. *See, e.g.*, *United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures … require disgorgement of the fruits of illegal conduct"); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (equating disgorgement with "forfeiture of illegal proceeds" (quotation marks omitted)). Given that SEC disgorgement claims are a historical novelty, there could not have been a historical distinction between such "disgorgement" claims and "forfeiture."

* * *

At §2462's enactment, any lawyer would have understood what the SEC today pursues as "disgorgement" to be a forfeiture. That resolves this case.

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY."

Section 2462 also applies to SEC disgorgement claims because such claims seek a "penalty." This Court has repeatedly held that when monetary sanctions for wrongdoing fill the Treasury, rather than compensate victims, these sanctions are penalties. Indeed, the Solicitor General has previously *told* this Court that SEC disgorgement claims are penalties, and the government continues to take that position whenever doing so will boost government revenues.

A. A Sanction Is Punitive, And Hence A "Penalty," If It Serves In Part To Punish.

To hold that SEC disgorgement claims seek a "penalty," the Court need not conclude that they serve *only* to punish. Many sanctions are neither purely remedial nor purely punitive but have aspects of both. *See Austin*, 509 U.S. at 610 ("proceedings may advance punitive as well as remedial goals" (quotation marks omitted)).

This Court has held that if a sanction "serv[es] in part to punish," it is punitive. *Id.* That is, if the sanction "cannot fairly be said *solely* to serve a remedial purposes," but "also serv[es] either retributive or deterrent purposes," it "is punishment[.]" *Id.* (quotation marks omitted); *see also Bajakajian*, 524 U.S. at 331 n.6 (sanction is punitive "if it constitutes punishment even in part").

That approach makes sense: So long as a sanction is partly punitive, defendants should receive the protections for punitive sanctions. The presence of some nonpunitive purpose should not eliminate them. And while this Court adopted this approach under the Excessive Fines Clause, *Austin*, 509 U.S. at 610; *Bajakajian*, 524 U.S. at 324, identical considerations apply here. Section 2462's 1790 predecessor was enacted almost contemporaneously with the Excessive Fines Clause, and the two provisions serve complementary purposes: the Clause protects against penalties excessive in scope, while the statute protects against penalties stale in time.

Here, SEC disgorgement claims clearly serve in part to punish.

B. SEC Disgorgement Claims Are Penalties Because They Go To The Government As A Sanction For Wrongdoing.

SEC disgorgement claims have the key features that define punitive sanctions: In purpose and effect, these claims seize funds because a defendant did wrong by violating the securities laws, without compensating victims.

The 1828 version of Webster's defined a "penalty" as "[t]he suffering in person or property which is annexed by law or judicial decision to the commission of a crime[,] offense, or trespass, as a punishment." 2 Webster's, *supra*, at 32. Disgorgement falls within that definition. The threshold finding triggering disgorgement is "the commission of a crime, offense, or trespass." *Id.* The proceeds that disgorgement targets are "ill-gotten gains" precisely because they were "acquired through wrongdoing." Pet. App. 10a (quotation marks omitted). Disgorgement is thus a mandatory payment to the government, "annexed by … judicial decision to the commission of [an] … offense." Indeed, this Court has held when "Congress has chosen to tie" sanctions "directly to the commission of … offenses" against the public laws, that indicates the sanction is punitive. *Austin*, 509 U.S. at 620. With disgorgement, Congress did precisely that.

Disgorgement also deters: Rather than compensating the government for its own loss, disgorgement deters wrongdoers by ensuring the wrongful conduct will not be profitable. Indeed, the Second Circuit has characterized deterrence as the "primary purpose of disgorgement orders." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). Deterrence is a hallmark of punishment. *Bajakajian*, 524 U.S. at 329 ("Deterrence … has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss").

Congress has understood "disgorgement" the same way: When Congress expressly authorized the Commodities Futures Trading Commission to seek disgorgement, it placed disgorgement in the statutory subsection on "civil penalties." 7 U.S.C. §13a-1(d), (d)(3). The SEC's authority to seek disgorgement in civil actions is implied, but that should not permit it to avoid §2462's statute of limitations for "penalt[ies]."

Likewise, this Court has characterized similar remedies as penalties. *In rem* civil forfeitures of the instrumentalities of crime are penalties. *Austin*, 509 U.S. at 621-22. Likewise, *in personam* criminal forfeitures of the proceeds of crime "operate as punishment." *Libretti v. United States*, 516 U.S. 29, 39, 45 (1995). Disgorgement falls in between: it is an *in personam* civil judgment for the proceeds of illegal activity. It is just as much a "penalty," even if the SEC chooses to label it differently.

The SEC insists that disgorgement claims are nonpunitive because they "only … depriv[e] the wrongdoer of the benefits of wrongdoing." Pet. App. 11a; *see* BIO 8-9. But the government ignores *why* disgorgement does so: It strips the defendant of money because *wrongdoing* occurred, but as explained below, its purpose is *not* to compensate victims. The only reason for a sanction *like that* is to impose negative legal consequences on a bad actor. That is classic punishment.

At minimum, these aspects of disgorgement show it is *partially* punitive—even if, as the government says, stripping wrongdoers of ill-gotten gains also has a remedial component. These punitive aspects make disgorgement a "penalty" under §2462.

C. SEC Disgorgement Claims Are Subject To §2462 Because They Are Noncompensatory.

Perhaps the most fundamental reason disgorgement falls within §2462 is that it is not *compensatory*. Payments go to the government, not victims. Such noncompensatory remedies, this Court has held, are subject to §2462.

1. Disgorgement serves no compensatory purpose. The SEC pursues, and obtains, disgorgement as the sovereign enforcer of the laws. Although the SEC has discretion to create "fair funds" to compensate victims,

it can do so only if it "also assess[es] a civil money penalty." 17 C.F.R. §201.1100. That means whenever a penalty claim would be outside the five-year limitations period—when the question presented here matters—the SEC *cannot* compensate victims. In all cases, moreover, the SEC has discretion not to compensate victims when it deems compensation infeasible. *See id.* §201.1102(b). And in SEC enforcement actions under statutes where victims are not readily ascertainable, such as the Foreign Corrupt Practices Act, disgorgements simply go to the Treasury.

Accordingly, the SEC and courts have been emphatic that disgorgement is not compensatory. The SEC, for example, has explained that the "purpose of disgorgement … is … *not* satisfying creditors or repaying investors," but to "depriv[e] wrongdoers of their ill-gotten gains." Br. of SEC at 24, *SEC v. Custable*, 796 F.3d 653 (7th Cir. 2015) (No. 15-1442), 2015 WL 3383280 (emphasis in original; brackets and quotation marks omitted). "Compensation to injured investors is a distinctly secondary goal." Br. of SEC at 4, *Martin v. SEC*, 734 F.3d 169 (2d Cir. 2013) (No. 11-3011), 2012 WL 8126225 (quotation marks and citations omitted). In fact, "loss sustained by the victims … is irrelevant to the calculation of disgorgement in an SEC enforcement action." Br. of SEC at 32, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 (quotation marks omitted). Courts have said the same thing: The "primary purpose of disgorgement is not to compensate investors," *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978), and hence the government need not "make any particular effort to compensate the victims"; instead, compensation is a "matter of grace." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011).

Indeed, Congress has recognized disgorgement as a noncompensatory sanction. Under 15 U.S.C. §78u-6(b)(1), whistleblowers in certain cases receive 10% to 30% of any "monetary sanctions," defined to include "penalties, disgorgement, and interest." *Id.* §78u-6(a)(4)(A). This provision shows three things. First, it underscores that disgorgement is not compensatory, but goes to whistleblowers and the government. Second, it treats "penalties" and "disgorgement" interchangeably. Third, the catchall word Congress used—"sanction"—means a "penalty or coercive measure that results from failure to comply with a law, rule or order." *Black's Law Dictionary* 1541 (10th ed. 2014).

2. The fact that disgorgement is noncompensatory is dispositive: That feature defines the line between what is a "penalty" and what is not.

This Court so held in *Kelly v. Robinson*, 479 U.S. 36 (1986). *Kelly* concerned a virtually indistinguishable statute—a Bankruptcy Code provision that renders nondischargeable any debt for "a fine, penalty, or forfeiture," 11 U.S.C. §523(a)(7)—and asked whether criminal restitution is a "penalty." The Court said yes, even though restitution ultimately reaches victims. 479 U.S. at 52. The Court deemed restitution a penalty because "[t]he victim has no control" over the action, and the "focus" was not on "the victim's desire for compensation"; rather, the "decision …turn[s] on … the

… goals of the State." *Id.* at 52-53. *Kelly* resolves this case. All these features of restitution also hold true of disgorgement; indeed, disgorgement looks even *less* like compensation than restitution, given that the government has the discretion to, and often does, keep the money.

Kelly is only the most recent in a long line of cases establishing that similar noncompensatory remedies are "penalties." The Court reached the same result in *Brady v. Daly*, 175 U.S. 148 (1899). *Brady* concerned whether a copyright owner's suit seeking statutory damages for infringement was an action "to recover a penalty." *Id.* at 152. The Court held that these damages were nonpunitive precisely because they concerned "entirely damages suffered by the wrongful act"; the "whole recovery is given to the" copyright owner; and "the statute does not provide for a recovery by any other person in case the [owner] neglects to sue." *Id.* at 154-55. *Brady* distinguished the copyright owner's suit from a "*qui tam* action," explaining that because *qui tam* actions provided for payments to someone other than "the party grieved," they were punitive. *Id.* at 155 (quotation marks omitted). So, for example, if a statute gave "the right to recover back money lost at gaming" and "if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person," then the action would be "remedial as to the loser" but "penal as regards the suit by a common informer." *Id.* (quoting *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

This Court has held that *Brady* governs limitations questions. In *Chattanooga Foundry & Pipe Works v.*

City of Atlanta, 203 U.S. 390 (1906), this Court addressed a limitations issue under §2462's predecessor.[6] It held that the "construction of the phrase 'suit for a penalty,' and the reasons for that construction, have been stated so fully by this court that it is not necessary to repeat them," citing *Brady* and *Huntington*. *Id.* at 397. This Court did the same thing in *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915), which concerned whether §2462's predecessor applied to a private damages claim. The Court juxtaposed the "strictly remedial" damages action there, which imposed "liability … solely for the purpose of redressing a private injury," from "something imposed in a punitive way *for an infraction of a public law*." *Id.* at 423 (emphasis added).[7]

Hence, the questions that were controlling in *Brady*—whether the "whole recovery is given to the" victim, or whether the statute "provide[s] for a recovery by an[] other person," 175 U.S. at 154—are dispositive under §2462. And under *Brady*, this case is easy. When the SEC pursues disgorgement, the "whole recovery" goes to the Treasury, not victims. Indeed, SEC disgorgement actions are just a twist on the qui tam actions discussed in *Brady*: Claims for securities-law that might have been "remedial" if

[6] The law at issue was Rev. Stat. §1047 (1901), which applied a five-year limitations period to any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." *Chattanooga*, 203 U.S. at 397.

[7] Early lower court decisions drew the same line. *See Raymond v. United States*, 20 F. Cas. 337, 337-38 (C.C.S.D.N.Y. 1876); *Stearns v. Lawrence*, 83 F. 738, 741 (6th Cir. 1897).

brought by victims are "penal as regards" the SEC, which sues to enforce the laws against wrongdoers, and may keep any recovery. 175 U.S. at 154-55 (quotation marks omitted).

This Court followed *Brady*'s line again in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). The government's certiorari-stage brief cited *Porter* for the proposition that "disgorgement 'differs greatly from … damages and penalties.'" BIO 8 (quoting *Porter*, 328 U.S. at 402). But the "disgorgement" remedy in *Porter* was *compensatory*: *Porter* held that under the Emergency Price Control Act of 1942, the Administrator could bring a "restitution" claim that would require landlords to disgorge unlawful rents to the tenants *who paid them*, "restoring the status quo [by] ordering the return of that which rightfully belongs to the purchaser or tenant." *Porter*, 328 U.S. at 401-02. *Porter* distinguished this compensatory remedy from a *different* remedy, likewise pegged to "the amount of the overcharge," that the Administrator could also pursue: "damages in the nature of penalties" that would "go to the United States Treasury." *Id.* at 401-02; *id.* at 406 (Rutledge, J., dissenting). This remedy was a penalty precisely because it went to the Treasury. Notably, this "penalty" encompasses exactly what the SEC obtains via "disgorgement": An order to pay to the government an amount tied to the defendant's ill-gotten gains, but which does not compensate victims. *Porter* properly characterized this sanction as a penalty, and this Court should do the same.

Indeed, *Porter* is a perfect example of how courts have historically vindicated the SEC's "disgorgement" goal through remedies styled "penalties" or "forfeitures." The "penalty" in *Porter* could be up to "three times the amount of the overcharge." 328 U.S. at 406 & n.9 (Rutledge, J., dissenting). In modern parlance, it required disgorgement of the overcharge, plus an additional penalty. Yet the whole remedy, including the disgorgement, was a "penalty." The government cannot avoid statutory limitations on such remedies by dividing them into a "disgorgement" piece and a "penalty" piece.

D. Section 2462 Carries Forward a Centuries-Old Legal Tradition of Guarding Against the Special Dangers of Government Enforcement Suits.

History also demonstrates *why* §2462 draws a bright line between compensatory payments to victims, and noncompensatory payments to the government. The government strains to depict disgorgement as merely restoring the status quo. But for one litigant, it plainly does *not*: The government suffered no injury, yet deposits disgorgement payments into the Treasury. And for 800 years, English and American law have recognized that the dangers of abuse are especially acute—and the need for safeguards like limitations periods especially great—when enforcement suits fill the government's coffers. Section 2462 carries forward this ancient tradition by applying its limitations period to all such suits.

The Court applied this principle in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), where it held that "the Excessive Fines

Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* at 268. The Court explained that the Clause "limit[s] the ability of the sovereign to use its prosecutorial power … for improper ends." *Id.* at 267. The Court traced such limitations on prosecutorial power back to 13th-century England, where the King's "abusive" use of royal penalties known as "amercements" resulted in "'tyrannical extortions … with which John … oppressed his people.'" *Id.* at 270, 272 (citation omitted). In response, the "barons who forced John to agree to Magna Carta sought to … limit the King's use of amercements as a source of royal revenue." *Id.* at 270-71. Magna Carta did so by pegging penalties to *harm*—"requiring that one be amerced only for some genuine harm to the Crown," and that the "amount … be proportioned to" that harm. *Id.* at 271. Thus, the Excessive Fines Clause embodies a legal tradition carving out *noncompensatory* payments to the government as uniquely deserving of protection.

English law extended the protections from revenue-raising government suits to statutes of limitations. An Elizabethan statute provided a one- or two-year limitations period for any action "upon any penal statute … where the forfeiture is originally given only to the king," or to "in part to the king and in part to [a qui tam] prosecutor." 4 William Blackstone, *Commentaries* *304. Notably, this Elizabethan statute did not apply when the recovery went to the injured party—as early American courts noted in drawing the same line as *Brady*. *See, e.g.*, *Mansfield v. Ward*, 16 Me. 433, 437-38 (1840) (noting that the "statute of Eliz.

does not extend to an action brought by the party aggrieved," but "a statute is to be considered penal, when the party recovering is not obliged to make any … proof of injury"); *see also Goodridge v. Rogers*, 39 Mass. 495, 498 (1839). The statute's protections were necessary precisely because of the special dangers of enforcement suits that raised revenue for the Crown.

Section 2462, whose predecessor was enacted contemporaneously with the Excessive Fines Clause, protects against these same dangers by distinguishing between compensatory claims on the one hand, and noncompensatory enforcement claims on the other. At the time of §2462's enactment, "fines," "penalties," and "forfeitures" covered the full gamut of judgments payable to the government in its capacity as sovereign enforcer. *Cf. In re Landsberg*, 14 F. Cas. 1065, 1067 (E.D. Mich. 1870) ("Every offence against the customs laws … belongs to some one of the following classes: (1) Crimes, punishable … by fine and imprisonment. (2) Forfeitures…. (3) Pecuniary penalties, recoverable by action, all of which are clearly within the provisions of the one or the other of the [statutes of limitations] above named." (citation omitted)). And in Petitioner's view, §2462 continues to provide this broad protection, applying to all money sanctions that the government obtains as enforcer of the laws. Meanwhile, when the government brings contract or tort claims to redress its own injuries, separate statutes enacted in the 1960s provide a limitations period. *See* 28 U.S.C. §2415.

By contrast, the SEC contends that its newly-invented type of monetary sanction—disgorgement—falls outside §2462, or any statute of limitations. The government thus asserts there are *three* types of backwards-looking money judgments payable to the government: purely punitive fines (covered by §2462), purely remedial compensatory awards (covered by other limitations periods), and "disgorgement" (which lies somewhere in between and can be pursued forever). This taxonomy has no historical pedigree: The SEC created it to further modern litigation goals, and it would badly undermine the ancient tradition that §2462 embodies. The Court should reject it.

E. The Specific Features Of SEC Disgorgement Claims Reinforce That They Are Penalties.

The SEC's claim that disgorgement restores the status quo ante also ignores how disgorgement works in practice. In the real world, disgorgement sweeps beyond what any nonpunitive remedy would reach.

The SEC has argued, and courts have agreed, that wrongdoers must disgorge proceeds that went to other people. That happened in this case, *supra* at 7, and in many others. For instance, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014). Thus, a tipper must disgorge proceeds that goes to a tippee, *id.* at 302-03, and an employee must disgorge proceeds that go to his employer. *Id.* at 300, 307 (affirming employee's disgorgement of $7.2 million despite "personal profit" of only $427,875). Even if the defendant himself "ultimately … lost" money, still disgorgement may be ordered. *SEC v. First Pac.*

Bancorp, 142 F.3d 1186, 1192 & n.6 (9th Cir. 1998).

Such disgorgements go well beyond traditional remedial replevy orders requiring the defendant to return something he misappropriated. They require defendants to pay disgorgement awards, exceeding any amount they ever obtained, from their own untainted assets—as occurred here. Pet. App. 12a-13a. The Tenth Circuit acknowledged this point, but stressed that "we do not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort … even if he gained nothing." Pet. App. 13a. But tort awards are nonpunitive because they are compensatory. SEC disgorgement claims are not.

Similarly, as the District Court explained below, defendants may not "deduct … expenses from the net proceeds to reduce their liability for ill-gotten gains." Pet. App. 43a (quotation marks omitted). The justification for this rule is that deductions would be "unjust," and disgorgement is designed not only to "prevent the wrongdoer's unjust enrichment," but also "to deter others' violations of the securities laws." *Id.* Barring the deduction of expenses ensures that the defendant will *not* be restored to the status quo ante. It may indeed promote justice and advance deterrence, but those are the classic goals of punishment.

Finally, disgorgement is not subject to causation principles that courts apply to compensatory damages. Courts require disgorgement when the actual "cause of all the[] profits" was not any securities-law violation, but rather an "intervening cause" that was linked to the violation only by "dumb luck." *SEC v. Teo*, 746

F.3d 90, 107–09 (3d Cir. 2014). This principle is not motivated by any compensatory rationale, but instead by maximizing the sanction's "deterrent impact." *Id.*

If further proof were needed that SEC disgorgement claims are penalties, these features provide it. To decide whether disgorgement is a penalty, the Court must understand what disgorgement *is*. The SEC has persuaded lower courts that disgorgement requires payments of proceeds that went to *any* party, without deduction for expenses—and has thus made disgorgement a powerful remedy indeed. The SEC cannot dodge the consequences of its success: Disgorgement is a penalty subject to §2462's limitations period.

F. The Government Has Previously, And Correctly, Argued That SEC Disgorgement Claims Are Punitive.

In other contexts, the government has insisted disgorgement claims are penalties. To avoid §2462's time bar, it has switched positions here. It was right before.

Bankruptcy orders. Consistent with *Kelly*, the SEC has successfully argued that disgorgement is not dischargeable in bankruptcy because it is a "fine, penalty, or forfeiture" under §523(a)(7) of the Code. *In re Telsey*, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992). The government persuaded the Fourth Circuit to adopt that view in *U.S. HUD v. Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920 (4th Cir. 1995), which held that a disgorgement judgment was a penalty because it "order[ed] payment to HUD and impose[d] no obligation on HUD to disburse the money to anyone." *Id.* at 927-28. And when the debtor sought certiorari, the Solicitor General told this Court that the disgorgement judgment was "sufficiently penal to be considered a 'fine, penalty, or forfeiture.'" BIO at 11, *Cost Control Mkt. & Sales Mgmt. of Va., Inc. v. Cisneros*, 517 U.S. 1187 (1996) (No. 95-1233), 1996 WL 33467992. Indeed, as to the "forfeiture" prong, the Solicitor General said it was "unquestionably a 'forfeiture' in the common usage of that term, since the amount disgorged represents … profits … petitioners have been required to forfeit as a result of their breach of their legal obligations." *Id.* at 11 n.4.

Tax deductions. The government takes the same position today. The Internal Revenue Code prohibits deductions for "any fine or similar penalty paid to a government for the violation of any law." 26 U.S.C. §162(f). In 2016, the IRS concluded that SEC disgorgement orders are nondeductible where, as here, they "serve[] primarily to prevent wrongdoers from profiting from their illegal conduct and deter[] subsequent illegal conduct." Office of Chief Counsel, IRS, Memorandum, Section 162(f) and Disgorgement to the SEC, No. 201619008, at 9 (Jan. 29, 2016). It was "determinative," the IRS elaborated, that there was "nothing indicating that the purpose of the disgorgement payment was to compensate the United States Government or some non-governmental party for its specific losses." *Id.* at 10.

Criminal forfeitures of "proceeds." As explained above, several criminal forfeiture statutes require forfeiture of the proceeds of illegality, in a remedy functionally identical to disgorgement. *E.g.*, 21 U.S.C. §853(a)(1); *see supra* at 16. And this Term, the government is emphasizing the point in another case. Per the Solicitor General, an "in personam criminal forfeiture" is "clearly a form of monetary punishment" analogous to a "traditional 'fine'" because it (1) "requires forfeiture of the gross receipts from criminal activity, not just its net profits"; (2) "extends to proceeds that the defendant merely held before transferring to others"; and (3) "permits the imposition of a personal money judgment, not just the forfeiture of specific tainted assets." BIO at 17, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854. All those facts are true for disgorgement. It reaches all wrongfully obtained funds without offset; it extends to funds that go to third parties; and it is a personal money judgment that does not require tracing to tainted assets. *Supra* at 35-37. Hence, the judgment is "punishment," and a "forfeiture," under the Solicitor General's own understanding of those terms.

The government's position is especially indefensible because it treats *the same* payments differently. If Petitioner seeks discharge in bankruptcy, or tax deductions, the government will call its disgorgement claim a "penalty." Yet per the government, this same claim changes, chameleon-like, when necessary to hide from §2462's limitations bar. That cannot be so. At bottom, the government is consistent only in its desire to extract *more money*.

III. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE PURPOSES OF LIMITATIONS PERIODS GENERALLY, AND §2462 SPECIFICALLY.

A. Allowing Government Enforcement Actions To Stretch Back Forever Violates The Core Purpose Of Limitations Periods.

Limitations periods are critical to the fair enforcement of the laws. In *Gabelli*, this Court explained that §2462 "sets a fixed date when exposure to ... Government enforcement efforts ends." 133 S. Ct. at 1221. In so doing, it "advanc[es] the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* (quotation marks omitted). Such statutes are necessary to "promote justice" and "prevent[] surprises." *Id.* (quotation marks omitted). Otherwise, the government could "reviv[e] claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (quotation marks omitted). Hence, this Court has concluded that limitations periods are "vital to the welfare of society," reflecting the judgment that "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (quotation marks omitted).

The government's position here violates those foundational commitments. Per the government, SEC disgorgement claims are "not subject to any statute of limitations." BIO 9 (quotation marks omitted). No matter how great the "surprise[]," or that the government has waited "until evidence has been lost, memories have faded, and witnesses have disappeared," *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted), the government claims it can pursue actions as far back as it chooses to look, so long as it captions its claim "disgorgement."

In fact, the dangers here are more acute than in *Gabelli*. *Gabelli* relied on these limitations principles to reject the government's request to apply a "discovery rule" to fraud claims under §2462. The Court stressed that "grafting the discovery rule onto §2462 would … leave defendants exposed to Government enforcement action not only for five years …, but for an additional uncertain period." *Id.* at 1223. At least in *Gabelli*, however, the government could extend the limitations period only by showing it could not "reasonably … have known" about the fraud. *Id.* Here, the government can sue forever simply by showing the defendant has "wrongfully obtained" money, BIO 9 (quotation marks omitted). That will be true in virtually every case. Indeed, given that the SEC "seeks disgorgement in the majority of its enforcement actions," *id.* at 10-11, its position here is just a thinly veiled attempt to avoid *any* time limit. It contends that no statute of limitations applies, and that no laches defense applies either. *See, e.g.*, Br. of SEC, *SEC v. Silverman*, 328 F. App'x 601 (11th Cir. 2009) (No. 08-16710-FF), 2009 WL 1674430.

This result is especially troubling because of how the SEC enforces the law. Important rules go decades without amendment; Rule 10b-5, for example, remains identical to what the SEC promulgated in 1942. *See*

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975). Instead, the SEC expands the securities laws by seeking novel judicial glosses on old rules, which it applies retroactively. In *Gabelli*, as Justice Kagan pointed out at argument, the delay between violation and enforcement arose because of changed "enforcement priorities"—the "government had decided not to go after market timers," but when Eliot Spitzer started to do so the SEC became "embarrassed," and "made a different enforcement priority decision." Tr. of Oral Argument, *Gabelli v. SEC*, at 38:1-22. Likewise, private equity fund advisers did not register with the Commission until required to do so by the 2010 Dodd-Frank Act. Andrew Ceresney, Director of Enforcement, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement* (May 21, 2016), http://bit.ly/2kuNQBD. Yet after the SEC "began its focus on private equity," it did not promulgate *new* rules; rather, it asserted that the advisers "have always been … subject to" the Investment Advisers Act. *Id.* And it sought "disgorgement" based on alleged violations that predated this "focus" and were outside §2462's limitations period—rejecting defendants' arguments that it was "unfair to charge [them] for … failures in … documents that were drafted long before the SEC began its focus." *Id.*[8]

[8] *See* Blackstreet Capital Mgmt. LLC, Investment Advisers Act of 1940, Release No. 4411 (June 1, 2016) (disgorgement claims dating to 2005); Kohlberg Kravis Roberts & Co. LP, Investment Advisers Act of 1940, Release No. 4131 (June 29, 2015) (disgorgement claims dating to 2006).

Nor is the danger limited to the SEC. Section 2462 "governs many penalty provisions throughout the U.S. Code." *Gabelli*¸ 133 S. Ct. at 1219. For instance, it applies to enforcement actions under the Clean Air Act, *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 282 n.9, 296 (3d Cir. 2013); Clean Water Act, *United States v. Telluride Co.*, 146 F.3d 1241, 1243 (10th Cir. 1998); and Federal Power Act, *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1130-31 (E.D. Cal. 2015). And the government pursues disgorgement actions across a wide range of statutes. *See, e.g.*, 105 F. Supp. 3d at 1127 (Federal Power Act). Endorsing the government's position here would confer fearsome power upon agencies across the federal government.

This result would put disgorgement claims in unfamiliar company. Virtually all federal crimes have statutes of limitations—including crimes such as arson, slave trafficking, biological weapons offenses, murder of foreign officials, and terrorist attacks on trains and mass transit. *See* Charles Doyle, Cong. Research Serv., RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, at 25-27 (2012), http://bit.ly/2jBRfPo. Only for a handful of the most serious crimes has Congress provided that *no* limitations period applies—certain murder offenses, treason, certain acts of terrorism, and certain child abduction and sex crimes. *Id.* at 18-21. Disgorgement claims do not belong in this company.

B. The Government's Position Results In A Bizarre And Indefensible Line.

Here is the result the government's position yields:

A purely *punitive* judgment payable to the government—*i.e.*, a "fine"—has a statute of limitations. 28 U.S.C. §2462. The same is true of a purely *remedial* judgment payable to injured parties—say, a compensatory damages award to investors. *Merck & Co. v. Reynolds*, 559 U.S. 633, 637 (2010). But *no* limitations period applies to one that, in the government's view, is right in between: A judgment that is (says the government) remedial, but payable to the government. BIO 8. Why would that be? That bizarre line tests the boundaries of the Fourteenth Amendment's rational-basis test.

In particular, this line makes nonsense of the purposes of limitations periods. Whether the government seeks a "penalty" or "disgorgement," the cause of action is the same (securities-law violations), the type of remedy is the same (backwards-looking money sanctions), and in many cases, the amount is the same, too: Here, for example, Petitioner's penalty was based on the "gross amount of pecuniary gain," just like the disgorgement judgment. Pet. App. 28a (quoting 15 U.S.C. §§78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2)); *see id.* at 33a. And with the claims so indistinguishable, so too are the purposes served by the statute of limitations: the need for "repose," and avoiding delays until "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). Certainly, the government does not need *more* time to prepare its disgorgement claims than its penalty claims.

All this is also true of private damages actions. If anything, such actions would be a *stronger* case for waiving the limitations period: Damages actions compensate victims, and victims sometimes struggle to discover claims and develop evidence. *Cf. Gabelli*, 133 S. Ct. at 1221. Yet still a five-year limit applies. 28 U.S.C. §1658(b)(2); *see Merck*, 559 U.S. at 650. By contrast, the SEC has every ability to bring claims in a timely fashion. Its "central mission" is to "investigat[e] potential violations of the federal securities laws," and it has "many legal tools at hand" to further this mission. *Gabelli*, 133 S. Ct. at 1222 (quotation marks omitted). In light of the special interest in repose associated with government enforcement actions, it is incongruous to suggest that *only* such actions can be brought with no time limitation.

The government will emphasize its interest in stripping wrongdoers of profits. BIO 10-11. But by their nature, statutes of limitations preclude claims that, absent the time bar, would further the law's purposes. For example, the government assuredly has an interest in imposing civil penalties on securities-law violators, and in prosecuting arsonists, slave traffickers, and the architects of biological weapons. *Supra* at 43. Likewise, investors surely have an interest in compensation for injury. Yet limitation periods apply. That is because, as time passes, another interest comes to the fore—in "provid[ing] security and stability to human affairs," which this court has called "vital to the welfare of society." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). Eliminating the limitations period for SEC disgorgement actions *alone* advances no sensible purpose.

Adams rejected a similar argument. As explained, the government there argued it could evade the limitations period by seeking a $2,000 sanction in a civil "debt" action, rather than a criminal prosecution. 6 U.S. (2 Cranch) at 336. This Court rejected that argument because "to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness … which could not be accounted for." *Id.* at 341. "It would be singular," the Court continued, "if the one remedy should be barred and the other left unrestrained." *Id.* Two hundred years later, and the government's position is just as capricious.

C. The Applicable Presumption Counsels In Favor Of, Not Against, Applying §2462's Limitations Period.

The Tenth Circuit incorrectly believed that §2462 should be "interpreted narrowly in the government's favor" based on a "public policy [of] not imposing … statutes of limitations on the government." Pet. App. 6a.

The Tenth Circuit misunderstood the presumption. This presumption works in the government's favor when it sues to vindicate *its own* rights to money and property. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006) (royalties); *Badaracco v. Comm'r*, 464 U.S. 386 (1984) (taxes); *E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456 (1924) (government property). In this context, the presumption furthers the "great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers." *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938). Early courts, for example, feared that limitations periods might cause it to lose public lands by adverse possession. *Lindsey v. Lessee of Miller*, 31 U.S. (6 Pet.) 666, 673 (1832).

This case, however, concerns an enforcement action yielding government revenues without government injury. In *this* context, the presumption is the opposite. That is evident from *Adams*, where the Court refused to limit the 1790 statute to criminal actions, despite a plausible textual argument for doing so. 6 U.S. (2 Cranch) at 341.[9]

It is even more clear from *United States v. Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813), in which Justice Story, riding circuit, found a presumption *in favor* of limitations period for enforcement suits yielding sanctions to the government. In that case, Justice Story considered the proper limitations period for a customs violation—in particular, whether to apply a 1799 statute of limitations. Justice Story found that the "natural and ordinary import" of the "language employed" in the 1799 statute suggested it would not apply. *Id.* at 1231. But if that would result in "no act limiting the time," Justice Story would have found "considerable force in the argument" that the 1799 act nonetheless should apply, precisely for the "reason stated by the court in *Adams*"—that it would be "utterly repugnant to the genius of our laws, to allow"

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[9] The 1790 Act provided that after three years, "no person … shall … be prosecuted, tried or punished for any offense…, nor for any fine or forfeiture under any penal statute." The first part plainly concerns criminal proceedings, and it would have required no great leap to conclude the second was similarly limited.

government enforcement actions "a perpetuity of existence." *Id.* Thus, Justice Story applied a presumption *in favor of* a statute of limitations, which trumped the "natural and ordinary import" of the statutory text. Justice Story ultimately declined to apply the 1799 act because he found that the 1790 statute at issue in *Adams* applied instead—which was even *shorter*. *Id.*

The same point is plain from *Gabelli*. It was common ground that the "discovery rule" sought by the government applied to "a defrauded victim seeking recompense." 133 S. Ct. at 1221. If a presumption worked in the government's favor, it would dictate treating the government no less favorably than private plaintiffs. But this Court held the opposite, explaining that where "the Government bring[s] an enforcement action," rigorous adherence to the statute of limitations was *more* necessary than in private suits. *Id.* at 1221, 1223.

Indeed, applying a pro-government clear-statement rule would be bizarre. SEC disgorgement claims are an implied remedy courts created in the 1970s. *Supra* at 3. Section 2462 was last amended in 1948. So *of course* §2462 does not utter the word "disgorgement." The Tenth Circuit's presumption would eliminate a limitations period from virtually any implied claim—because when Congress did not provide an express cause of action, it is unlikely to have enacted an express limitations period. That makes little sense. *Cf. UPS, Inc. v. Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in judgment) ("[T]he fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in [a statute] is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute.").

IV. THE CHARACTERIZATION OF DISGORGEMENT AS "EQUITABLE" IS BOTH IRRELEVANT AND WRONG.

At the certiorari stage, the government suggested that SEC disgorgement claims cannot fall within §2462 because such claims are "equitable"—in the sense that, before the merger of law and equity, "chancery courts possessed the power to order" the relief that such claims seek. BIO 8 (quotation marks omitted); *see Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (defining "equitable relief" as "categories of relief that were typically available in equity" (quotation marks omitted)).

This argument fails. Section 2462 contains no exception for "equitable" remedies. Even if it did, SEC disgorgement claims would not fall within this exception.[10]

A. Section 2462 Applies To Equitable Remedies.

The government's certiorari-stage brief intimates that there is some background principle holding that

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[10] The government occasionally conflates "equitable" with "remedial." BIO 8. "Remedial" often refers to remedies that are not punitive, *see*, *e.g.*, *Ursery*, 518 U.S. at 277, while "equitable" refers to relief typically available from chancery. *Knudson*, 534 U.S. at 210. These are different things: Suits for compensatory damages are remedial, but they are actions at law. *See id.*

equitable remedies are exempt from statutes of limitations. BIO 8. There is not. It is true that when Congress creates "an equitable right," but "leaves to the federal courts the formulation of remedial details" like limitations periods, federal courts follow "historic principles of equity" under which "statutes of limitation are not controlling measures of … relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 395-96 (1946). But that principle applies when Congress is silent as to the "remedial details": if "Congress explicitly puts a limit upon the time for enforc[ement], there is an end of the matter." *Id.* at 395.

The legislature regularly limits equitable claims. Even before the merger of law and equity, statutes of limitations often covered equitable claims. As Pomeroy explains, although "[i]n the early forms of the statute of limitations, the provisions were, in express terms, confined to actions at law," "modern forms of these statutes, in the American states, generally declare, in express terms, that the periods of limitations shall apply to all equitable suits as well as to legal actions." 1 John N. Pomeroy, *Pomeroy's Equity Jurisprudence* §419 (3d ed. 1905). Likewise, this Court has recognized as "well settled" that "a statute of limitations may be set up in defence in equity, as well as at law." *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831). And today, almost all statutes of limitations are tied to the underlying cause of action, and thus apply to all remedies, legal or equitable. *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014) (noting that the three-year statute of limitations for copyright claims applies to "relief of any kind," whether legal or equitable).

In §2462 as well, Congress limited both legal and equitable claims. Section 2462 covers, without exception, "any civil fine, penalty, or forfeiture." There is no exclusion for "equitable" remedies. Indeed, the absence of such exclusion is particularly telling because Congress routinely *does* distinguish equitable claims from others. *See, e.g.*, 29 U.S.C. §1132(a) (ERISA); 42 U.S.C. §2000e-5(g) (Title VII). This Court should not introduce that distinction into a statute that nowhere mentions it. This Court does not "read … unmentioned, open-ended, 'equitable' exceptions into [a] statute" of limitations. *United States v. Brockamp*, 519 U.S. 347, 352 (1997). Inserting such an exception is especially unattractive here, because for modern lawyers, discerning what relief was available at chancery can be *hard*. As to ERISA, for example, this Court routinely has to resolve circuit splits over what is "equitable" relief. *See, e.g.*, *Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013). The Court should not embark on that project here by creating an atextual exception to §2462 based on a supposed background principle that, in reality, does not exist.

Indeed, the government's position is even more untenable because at least *some* equitable remedies plainly qualify as "forfeitures" and "penalties." For instance, in equity courts, the government has for centuries brought actions to restrain public nuisances. 4 Pomeroy §1349. In *Bennis v. Michigan*, 516 U.S. 442 (1996), this Court upheld Michigan's equitable action to abate a public nuisance—a car used for prostitution—via "forfeit[ure]" of the car. *Id.* at 443. The Michigan courts deemed it "critical" that the proceeding was an "equitable action," and the Court relied on that characterization in upholding the forfeiture. *Id.* at 446, 452; *see also id.* at 457 (Ginsburg, J., concurring) (explaining the "critical" importance of the equitable nature of the action). Thus, the word "forfeiture" encompasses both legal and equitable remedies.

Likewise, Congress has denominated certain equitable remedies as "penalties": When it authorized the CFTC to seek restitution and disgorgement, it called these remedies "[e]quitable remedies," while addressing them in the statutory subsection on "[c]ivil penalties." 7 U.S.C. §13a-1(d), (d)(3). Moreover, consistent with §2462's coverage of remedies that are not "pecuniary," lower courts have held that some injunctions are penalties. That is so when an injunction is imposed as "punishment for past dereliction," rather than to prevent "present danger to the public." *Johnson*, 87 F.3d at 490; *accord SEC v. Bartek*, 484 F. App'x 949, 956 (5th Cir. 2012). So while injunctions are quintessentially equitable relief, *see Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993), they also can be penalties.

Thus, §2462 cannot contain a categorical exception for equitable remedies. The Court should follow the text and apply §2462 to all "forfeitures" and "penalties," whether legal or equitable.

B. Traditional Equitable Principles Would Have Required Application Of The Statute Of Limitations.

The SEC also gets history wrong. In the SEC's view, by labeling its disgorgement claim as "equitable," it can bring claims for "disgorgement" based on conduct going back forever. Early American courts would have rejected this maneuver. They did not allow plaintiffs to bring stale claims merely by styling them "equitable."

The bedrock principle was that "[e]quity aids the vigilant." 1 Pomeroy §418. This maxim "operate[d] throughout the entire remedial portion of equity jurisprudence." *Id.* It was a "special form of the yet more general principle, He who seeks equity must do equity." *Id.*

American courts implemented this principle in multiple ways. Under the "concurrent remedies" doctrine, American courts held that "[t]he Statutes of Limitations, when they are addressed to Courts of Equity, as well as to Courts of Law, as they seem to be in all cases of concurrent jurisdiction at law and in Equity … seem equally obligatory in each Court. … [I]n such cases, Courts of Equity do not act so much in analogy to the statutes, as in obedience to them." 2 Joseph Story, *Commentaries on Equity Jurisprudence* §1520 (1846); *accord Union Bank of La. v. Stafford*, 53 U.S. 327, 340-41 (1851).

Even when jurisdiction was *not* concurrent, such as in mortgage cases, equity courts *still* followed the statute of limitations. They did so by "act[ing] upon the analogy of the limitations at Law." 2 Story §1520. This

Court confirmed that even when "[c]ourts of equity are not within the statute of limitations" because "the words apply to particular legal remedies," they remain within the spirit and meaning of the statutes, and have been always so considered." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 173 (1825) (Marshall, C.J.) (quotation marks omitted); *see also Badger v. Badger*, 69 U.S. 87, 94 (1864) ("In many other [equity] cases [statutes of limitations] act upon the analogy of the like limitation at law.").

Most relevant here, when plaintiffs brought a claim for *equitable* restitution—the equitable remedy that, per the government, is analogous to present-day disgorgement—courts would typically apply the same statute of limitations as *legal* restitution. *Restatement (First) of Restitution* §148, cmts. b, d, f (1937). Courts recognized that principles of repose applied equally to both forms of restitution. *Id.* cmt. d.

The questions of equity this Court must reach to reverse are narrow. This case, for example, does not implicate the question that has divided the circuits on whether government actions for *injunctions* are subject to statutes of limitations under the "concurrent remedies" doctrine when the government also seeks civil *penalties*. *Compare FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), *with, e.g.*, *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997).[11] Nor must the Court address any other broad question about how old equitable doctrines relate to modern enforcement

[11] The Court denied the Solicitor General's petition for certiorari. *FEC v. Williams*, 522 U.S. 1015 (1997).

actions. Here, the government brings a claim for "equitable disgorgement" that is some combination of (1) a suit for civil penalties by the government; and (2) a restitution suit between private plaintiffs—both subject to statutes of limitations. The only question even potentially raised here is whether an equity court would have permitted *that claim* to proceed without any time limit.

The answer is no. An on-point decision from Chancery is lacking only because SEC-type disgorgement claims were unknown before law and equity merged. But an ancient equity court, just like a modern court, would have recognized that civil penalties and disgorgement are two peas in a pod: Both claims are brought by the government as enforcer of the laws, both yield recoveries payable to the government, and both are calculated the same way. Most likely, an equity court would have concluded that disgorgement is a "penalty" or "forfeiture" and applied §2462 by its terms. Alternatively, it might have applied the concurrent remedies doctrine (in cases where the SEC sought both penalties and disgorgement) or the doctrine that equitable claims import analogous legal statutes of limitations (in all cases, regardless of whether the SEC sought penalties).

For one or both of these reasons, an equity court would have rejected the government's attempt to wriggle free of the limitations period. Nineteenth-century courts vigilantly enforced time bars on equitable claims brought by private plaintiffs. And they were even more vigilant about imposing time bars on government enforcement actions. They would not have allowed the government to seek money sanctions with no time limit whatsoever.

C. If Necessary, This Court Should Hold That SEC Disgorgement Claims Are Not "Equitable" Remedies Outside §2462.

In Petitioner's view, whether SEC disgorgement claims are "equitable" is irrelevant. But if the Court believes that question is dispositive, it has only one answer. No chancellor at equity would have recognized SEC disgorgement claims.

1. That is so for the same reason that drove *Gabelli*: The government is the wrong plaintiff, seeking the wrong relief. The "discovery rule" the government sought in *Gabelli* had historically applied to defrauded plaintiffs seeking to recover for their losses, including the government when it sued as an injured party. 133 S. Ct. at 1221-22; *see Exploration Co. v. United States*, 247 U.S. 435, 447 (1918) (this rule was "undisputed doctrine of courts of equity"). But when the government sought to extend that rule to "an enforcement action," the Court rejected the attempt. 133 S. Ct. at 1221-22. It explained that the "Government is … a different kind of plaintiff" seeking "a different kind of relief." *Id.* at 1223. When the government was not "suing to recover its loss," it could not invoke equitable rules applied in favor of injured parties. *Id.* at 1222. *Gabelli* accords with myriad decisions that examine *with specificity* whether chancery courts typically granted a particular remedy; if there is no such record, the remedy is not "equitable." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); *Knudson*, 534 U.S. at

712; *Montanile*, 136 S. Ct. at 657.

Here, courts of equity did not provide the remedy the SEC calls "disgorgement." Nowhere is there record of equity courts allowing the government, as enforcer, not injured party, to obtain a retrospective money judgment based on a violation of public laws. The Restatement (First) of Restitution, written in the 1930s, does not discuss such "disgorgement." Nor do the treatises of Blackstone, Pomeroy, or Story. The sovereign could bring other types of equitable actions, such as actions to abate public nuisances. *E.g.*, 2 Story §923. But such actions were "rare" and "principally confined to informations seeking preventative relief." *Id.* Indeed, Blackstone relates that while the government could obtain money sanctions for public nuisances, it did so via "public prosecution," "indictment," and "fine"—not actions in equity courts. 4 Blackstone, *Commentaries* *167-68.

At the certiorari stage, the government quoted the Second Circuit's statement that "chancery courts possessed the power to order equitable disgorgement in the eighteenth century," analogizing to equitable remedies like accounting, constructive trust, and restitution. *SEC v. Cavanagh*, 445 F.3d 105, 118-20 (2d Cir. 2006). The Second Circuit acknowledged that equity granted these remedies in favor of injured private parties, not the government as enforcer, but deemed that distinction "inapposite" based on this Court's statement in *Grupo Mexicano* that equity courts "go 'much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.* at 118 n.29 (quoting *Grupo Mexicano*, 527 U.S. at 326).

This argument fails for the same reason as the government's similar argument in *Gabelli*. Government "enforcement action[s]" differ from traditional equitable actions not just in the plaintiff's identity, but in the very *nature* of the claim and "kind of relief" sought. 133 S. Ct. at 1223. As this Court explained in *Knudson*, the essential premise of these traditional equitable claims was that the defendant had property "belonging in good conscience *to the plaintiff*," and equity would "transfer title … to a plaintiff who was … *the true owner*." *Knudson*, 534 U.S. at 213-14 & n.2 (emphasis added). Government enforcement actions, by contrast, do not vindicate an owner's property interest. The Court's statement in *Grupo Mexicano* is similarly off point: That case was discussing injunctive relief, and merely pointed out that when such indisputably equitable relief is at issue, "the public interest" carries greater weight in the equitable balancing than "only private interests." 527 U.S. at 326 (quotation marks omitted). It did not suggest that legal claims brought by private plaintiffs would transform into equitable claims if brought by the government.

Tull v. United States, 481 U.S. 412 (1987), is consistent with this view. There, the government argued that a suit seeking money sanctions for violations of "the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy." 481 U.S. at 424. But *Tull* deemed that "a poor analogy" because disgorgement "is a remedy only for restitution," which is "limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the'" injured party. *Id.* (quoting *Porter*, 328 U.S. at 404). Likewise, this Court's cases characterizing disgorgement-type remedies as "equitable" have uniformly restored property to rightful owners. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (disgorgement from Nebraska to Kansas "prevent[s] a geographically favored State from appropriating more than its share of a river"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960) (recognizing "equitable jurisdiction to restore lost wages" to employees); *United States v. Moore*, 340 U.S. 616, 618 (1951) (equitable power to provide "restitution to the tenant of all overcharges" for illegal rents); *Porter*, 328 U.S. at 402 (similar).

Equity courts thus adhered to the same line §2462 draws: Suits to redress private injuries differ fundamentally from enforcement actions that extract money sanctions. When the government brings suits of the second type, it cannot rely on rules for the first.

2. SEC disgorgement claims also differ from equitable restitution because they impose a personal money judgment, without tracing "specific assets … back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *supra* at 35-36. As *Knudson* explained, for "restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." 534 U.S. at 214; *Montanile*, 136 S. Ct at 658-59 (restitution claim is legal, not equitable, when money comes from

defendant's general assets).[12]

This lack of a traceability requirement vastly expands disgorgement's scope. It allows the SEC to require disgorgement of funds that go to third parties—as occurred in this case and others. *Supra*, at 35-36. An equity court would not have allowed recovery of such funds because they are not, and never were, "in the defendant's possession." *Knudson*, 534 U.S. at 214.

3. Again and again, the SEC has urged courts, successfully, to create a "disgorgement" remedy that is different from, and broader than, equitable restitution. Simply put, per the SEC, "Disgorgement Isn't Restitution." SEC, Report Pursuant to Section 308(c) of the Sarbanes-Oxley Act of 2002 at 19, http://bit.ly/2lJ2HVN; *see also id.* at 3 n.2 ("the concepts" of disgorgement and restitution "are distinct"). For this reason, too, the SEC cannot now avoid any limitations period by claiming disgorgement is the *same* as equitable restitution.

As previously noted, statutes of limitations applied to equitable restitution claims—either via "statutes specifically applicable to equitable proceedings," or

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[12] *Knudson* noted a "limited exception for an accounting of profits." 534 U.S. at 214 n.2. Under this remedy, a plaintiff "entitled to a constructive trust on particular property … may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing" them. *Id.* Here, though, the SEC sought disgorgement of the funds that Petitioner *originally* misappropriated, not additional *profits*. Pet. App. 10a.

because of the "concurrent legal remedy" doctrine, or "by analogy to the statute of limitations." *Restatement (First) of Restitution* §148, cmt. f (1937); *see id.* cmts. b, d. Such courts also applied the equitable defense of laches. *Id.* cmt. c. Yet the SEC's position is that the "concurrent legal remedy" doctrine and the laches defense should not apply *because it is the government*, and that it should get a special, government-friendly presumption against application of a statute of limitations. *Supra*, at 46-49; *cf.* Pet. For Cert. at 15, *FEC v. Williams*, 522 U.S. 1015 (1997) (No. 97-601), 1997 WL 33549957 (concurrent-remedy doctrine inapplicable because it "involve[s] litigation between private parties in which the rule of strict construction of statutes of limitation asserted against the government [i]s not implicated"). The SEC cannot have it both ways: it cannot claim disgorgement is "equitable" because chancery courts recognized restitution claims by private plaintiffs, while avoiding the statute of limitations because the SEC is *not* a private plaintiff.

The government has persuaded courts to distinguish disgorgement from equitable restitution in other respects. For instance, in *Teo*, the SEC persuaded the Third Circuit to hold that "[t]he analytic framework for determining a remedy in an SEC enforcement suit is different from private suits." 746 F.3d at 105. The court held that unlike in private suits, the SEC must produce evidence merely supporting a "reasonable approximation" of the profits of transactions, which "creates a presumption of illegal profits," causing the burden to shift to the defendant to show that the disgorgement figure is "unreasonable." *Id.* (quotation marks omitted). This government-friendly rule exists because "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Id.* Again, the government should not be able to pick and choose when it should get special government-friendly treatment.

Of course, all of this does not suggest that Congress cannot, or has not, authorized the SEC to seek disgorgement. Rather, it means that disgorgement, as presently applied, would not have been recognized as an "equitable" remedy before the merger of law and equity. So, even if §2462 contained an atextual exception for equitable claims, disgorgement would not fit.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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