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 DONALD R. MILLER, JR., IN HIS CAPACITY AS THE INDEPENDENT EXECUTOR OF THE WILL AND ESTATE OF CHARLES J. WYLY, JR., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Estate of Charles J. Wyly, Jr., along with Charles Wyly's brother Samuel E. Wyly, are subject to one of the largest disgorgement awards ever against individual defendants in an SEC enforcement action—an award currently on appeal to the U.S. Court of Appeals for the Second Circuit. Early in their careers, the brothers founded a software company that later went public. Over the years, the Wylys acquired a controlling stake in the craft retailer Michaels Stores, Inc., took public the reinsurance company Scottish Re, and served on the boards of directors for numerous companies. In 1992, the Wylys each created trusts in the Isle of Man. In 2010, the SEC brought a civil enforcement action against the Wylys for disclosure

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), the Estate notes that all parties have consented to the filing of this brief; their consents have been filed with the Clerk of this Court.

violations dating back to the early 1990s stemming from the treatment of the stocks and options held by these trusts. Charles Wyly died in 2011.

In the Wylys' SEC enforcement action, the district court held that this Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013), barred the SEC from seeking penalties for conduct outside the five-year statute of limitations in 28 U.S.C. § 2462. The district court, however, permitted the SEC to seek disgorgement for conduct dating back to the early 1990s, deeming Section 2462's limitations period inapplicable. Ultimately, the court awarded approximately $300 million in disgorgement and prejudgment interest stretching back nearly twenty-two years. An appeal of the judgment is pending before the Second Circuit. The Estate therefore has a strong interest in supporting petitioner's arguments for treating the disgorgement sought by the SEC as a "forfeiture" and/or "penalty" under 28 U.S.C. § 2462 that is therefore limited to conduct within the five years preceding the SEC's filing of an action.

SUMMARY OF ARGUMENT

Application of 28 U.S.C. § 2462 to SEC actions for disgorgement is necessary to prevent the SEC from undermining the purposes of the statute of limitations that this Court articulated in *Gabelli*. The SEC increasingly has sought larger and larger disgorgement awards for conduct dating back further and further in time, including the $300 million judgment against the Wylys in 2014 for disclosure violations occurring as far back as the early 1990s. The district court recognized that the award against the Wylys is "staggering and among the largest awards ever imposed against individual defendants," *SEC v. Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014), and "equivalent to approximately 10% of the total penalties and disgorgement ordered in SEC enforcement cases nationwide [in 2013]," *id.* at 433 n.242. The SEC should not be able to avoid the force of Congress's time limit through the simple expedient of styling the remedy "disgorgement." The history of the treatment of Section 2462 demonstrates that no reason exists to treat what the SEC terms "disgorgement" any differently from a forfeiture or penalty.

I. In rejecting a discovery rule for accrual of the statute of limitations in Section 2462 where the SEC seeks penalties, this Court noted that the SEC has the responsibility and tools to investigate violations of securities laws in order to bring enforcement actions within a reasonable time period. In the case of the Wylys, the SEC failed for more than a decade to request information from the Wylys or to investigate the relationship between the Wylys and the overseas trusts that were later at issue in the enforcement action, despite public information concerning the Wylys' interest in the trusts. When the district court rejected the SEC's request to toll the statute of limitations, the SEC sought disgorgement under a dizzying array of theories. Ultimately, the district court picked two alternative theories and awarded hundreds of millions of dollars in disgorgement and prejudgment interest dating back twenty-two years.

The Wylys' case demonstrates that the SEC's use of disgorgement runs contrary to the purposes underlying the statute of limitations in Section 2462. The judgment permits a nearly $300 million recovery for conduct long-since past under a so-called "tax-avoidance" theory, which depended upon a novel interpretation of the tax laws. The SEC should not be permitted to fail to investigate violations for an extended period, to re-interpret earlier-existing laws, and to characterize "ill-gotten gains" so loosely as to encompass virtually any amount the SEC chooses—all without any limitation to the Section 2462 time period. Such draconian and inequitable results not only reward the SEC for its nonfeasance but leave individuals exposed to liability for an unlimited period of time, contrary to the purposes of statutes of limitations.

II. The history of Section 2462 does not support the SEC's avoidance of the statute of limitations through the framing of the remedy as equitable "disgorgement" as opposed to a penalty or forfeiture. Forfeiture and the SEC's version of "disgorgement" are synonymous. Even assuming that disgorgement is remedial, Section 2462 does not limit "forfeitures" to punitive rather than remedial forfeitures, which have antecedents going back to the early days of the republic. And any interpretation of Section 2462 as extending only to actions for "penalties" and punitive forfeitures still would cover the SEC's use of disgorgement as a general matter and particularly based on facts like those in the Wylys' case, where the disgorgement lacks any close causal nexus to the violations.

ARGUMENT

I. THE SEC'S USE OF DISGORGEMENT REMEDIES UNLIMITED IN TIME LEADS TO DRACONIAN AND INEQUITABLE RESULTS

As this Court explained in *Gabelli*, the statute of limitations in Section 2462 advances basic policies of "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." 133 S. Ct. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The SEC's increasing pursuit of disgorgement without any time bar runs counter to these important policies and has led to draconian and inequitable results, as illustrated by the disgorgement award the SEC obtained against the Wylys.

A. The SEC's Use Of Unlimited Disgorgement Allowed It To Obtain A "Staggering" Award Against The Wylys Reaching Back Over Two Decades

The Wylys' case demonstrates that the SEC's pursuit of stale claims reaching back decades is not unique to petitioner's case. The SEC took the same approach in seeking recovery from the Wylys as against petitioners. Here, as in the case against petitioner, the SEC turned its own delay into an opportunity to obtain a massive "disgorgement" award unlimited by Section 2462 or any other limitations period.

The disgorgement award against the Wylys stems from an enforcement action the SEC brought in July 2010. *See SEC v. Wyly*, 950 F. Supp. 2d 547, 553 n.30 (S.D.N.Y. 2013). The civil complaint alleged that the

Wylys, their attorney, and their securities brokers violated securities laws by failing to make the requisite disclosures for securities held in overseas trusts. *Id.* at 550-53. The Wylys had set up these overseas trusts in the early 1990s after learning through a tax attorney that such a system would provide tax deferral and asset protection. *See Wyly*, 56 F. Supp. 3d at 410-13. Assets, primarily securities, would be transferred to the trusts in exchange for private annuities. The Wylys each settled the first in a series of offshore trusts in March 1992. *Id.* at 410.

In April 1992, the Wylys transferred stock options to corporate subsidiaries of the first two trusts, which issued private annuities to the Wylys in consideration for the transferred option. *Id.* 411-12, 417. For the next decade, the Wylys continued with this approach, transferring securities to the trusts, which the trusts would sell at times. *Id.* Following an IRS audit of the trusts, the SEC entered into a tolling agreement with the Wylys in 2006. *Id.* at 420-21; *Wyly*, 950 F. Supp. 2d at 553. Only then did the SEC investigate the Wylys for violating the securities laws. After four years, in 2010, the SEC filed its complaint, alleging that the Wylys were beneficial owners of the securities held in the trusts and that the Wylys had failed to make the requisite filings of amendments to their Schedule 13Ds and Form 4s when the trusts engaged in transactions. A jury found Sam Wyly and the Estate of Charles Wyly liable for certain securities disclosure violations in 2014. *See Wyly*, 56 F. Supp. 3d at 401.

In June 2013, the district court rejected the SEC's argument that the statute of limitations should be tolled so that the SEC could seek penalties beyond the penalties falling within the five-year window permitted by Section 2462. *Wyly*, 950 F. Supp. 2d at 557-58. To avoid the force of this ruling, the SEC then sought disgorgement under a series of potential theories. The SEC cycled through numerous options, including a theory based on the idea that shareholders were "misled" as to the total number of shares the Wylys held in approving stock option plans, one based on the Wylys' alleged concealment to avoid depressing stock prices, and one based on the assumption that the Wylys had exercised their options before transferring the securities to the trusts.

Ultimately, following the jury's liability determination, the district court separately held two bench trials to determine the amount of disgorgement. *SEC v. Wyly*, 71 F. Supp. 3d 399, 403 (S.D.N.Y. 2014). Under two alternative approaches, the SEC sought a disgorgement order based on either the amount of tax payments the Wylys had avoided or trading profits they had made from the sale of registered securities. *Id.* at 403-04. The district court awarded disgorgement on each of the two "alternative" theories. *Id.*

Under the first, tax-avoidance theory, the district court ordered Sam Wyly to disgorge nearly $124 million and the Estate to disgorge more than $63 million. *Id.* at 403. The prejudgment interest alone totaled more than $104 million for the twenty-two-year period. *See* Final Judgment, *SEC v. Wyly*, No. 10 Civ. 05760 (S.D.N.Y. Feb. 26, 2015), ECF No. 591. The district court recognized that this award is "staggering and among the largest awards ever imposed against individual defendants," *Wyly*, 56 F. Supp. 3d at 433, and "equivalent to approximately 10% of the total penalties and disgorgement ordered in SEC enforcement cases nationwide [in 2013]." *Id.* at 433 n.242.

The "alternative" disgorgement award, which would take effect only if an appellate court rejected the SEC's novel tax-avoidance method of calculating disgorgement, was based on a trading-profits theory. Under this approach, the district court ordered Sam Wyly to disgorge $83 million and the Estate to disgorge $39 million. *SEC v. Wyly*, 107 F. Supp. 3d 260, 264 (S.D.N.Y. 2015). Total prejudgment interest on these awards totaled $42 million. *Id.* In evaluating prejudgment interest for each award, the district court adopted a lower rate than what the SEC urged, but nonetheless awarded tens of millions of dollars because of the vast passage of time.

B. The SEC's Use Of Unlimited Disgorgement Undermines The Purposes Of Statutes Of Limitations

As this Court stated in *Gabelli*, "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Gabelli*, 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 2 Cranch 336, 342, 2 L.Ed. 297 (1805) (Marshall, C.J.)). The disgorgement award against the Wylys puts in sharp focus the SEC's use of disgorgement to avoid statutes of limitations. Such use conflicts with the purposes underlying limitations provisions like Section 2462: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221. Applying the five-year statute of limitations to disgorgement claims will prevent the SEC from waiting decades and then seeking outsized recoveries based on novel theories.

In *Gabelli*, in rejecting the SEC's effort to avoid Section 2462's five-year clock by means of a "discovery rule," this Court explained that the statute of limitations in Section 2462 "sets a fixed date when exposure to the specified Government enforcement efforts ends." *Id.* Section 2462, like statutes of limitations generally, is "intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (internal quotation marks omitted). Certainty about an individual's liability "provide[s] security and stability to human affairs," which society has "deemed . . . vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (internal quotation marks and citations omitted).

This Court further explained in *Gabelli* that the SEC may not wait to bring an enforcement action and then claim it did not know of the circumstances giving rise to the action in order to seek recovery long after the statute of limitations has passed. To the contrary, the "central mission of the [SEC] is to investigat[e] potential violations of the federal securities laws." *Id.* at 1222 (internal quotation marks omitted). The SEC's core duty is to root out such violations, "and it has many legal tools at hand to aid in that pursuit." *Id.* Similarly for purposes of Section 2462, the SEC should not be allowed to assert that its own failure to investigate allows it to seek disgorgement for conduct dating back more than five years.

The SEC's conduct in the Wylys' case demonstrates why *Gabelli*'s logic should apply directly to disgorgement awards. In the Wylys' case, the SEC waited until 2010—eighteen years following the establishment of the overseas trusts at issue—to bring an enforcement action against the Wylys. The SEC neglected to investigate the relationship between the Wylys and the trusts even though public information indicated that the Wylys controlled a large percentage of the shares of the public companies at issue and that trusts associated with the Wylys had purchased shares in private placements. *Wyly*, 56 F. Supp. 3d at 421-22. Indeed, news reports during the time period characterized the shares in the trusts as among the Wylys' holdings. *Id.* Nonetheless, the SEC sought disgorgement for this entire time period, unconstrained by Section 2462.

In addition, notwithstanding the passage of eighteen years between establishment of the trusts giving rise to the violations and the SEC's filing of the complaint, the district court permitted the award of prejudgment interest for the entire twenty-two-year period. *Id.* at 433. The district court recognized that this Court "noted in *Gabelli*, that the SEC is, at least in part, responsible for the delay." *Id.* Yet, despite bearing some responsibility, the SEC still sought interest at the extraordinarily high IRS underpayment rate. *Id.* Although the district court used the LIBOR rate instead of the rate the SEC urged, the district court did not reduce that period to reflect the SEC's delay in bringing suit or the Wylys' cooperation in entering a tolling agreement. *Id.* The upshot was to reward the SEC for its delay while magnifying the punishment to the Wylys, imposing prejudgment interest running from 1992 throughout the Wyly's tolling agreement with the SEC and totaling more than $100 million on the SEC's primary, tax-avoidance disgorgement theory.

Further, the SEC sought such inflated recovery even though it identified no victims that it sought to compensate. The SEC conceded, in fact, that disgorgement was non-compensatory. *SEC v. Wyly*, 860 F. Supp. 2d 275, 280 (S.D.N.Y. 2012) ("Admittedly, the SEC does not seek compensation."). This fact further undercuts any justification for removing disgorgement from Section 2462. This Court reasoned in *Gabelli* that a statute of limitations may be tolled "to ensure that the injured receive recompense." 133 S. Ct. at 1223. In *Gabelli*, the SEC sought penalties, not compensation for victims, and thus the discovery rule had no application. *Id.* The same is true for the SEC's use of disgorgement against the Wylys, as in petitioner's case. The SEC never alleged that the Wylys' offenses had victims apart from the IRS, which remains well equipped and positioned to vindicate its own interest in recovering any taxes owed.

In effect, the non-application of Section 2462 removes a key incentive for the SEC has to root out violations because the longer the SEC waits to pursue a claim, the larger its recovery. In the Wylys' case, the SEC is being permitted to pursue recovery dating all the way back to *1992* without any regard for whether or when it previously believed that the Wylys' use of the overseas trusts violated securities laws. The SEC should not be permitted to reach back so far, so unconstrainedly. Such an approach "leave[s] defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.*

Moreover, the SEC's practice of bringing stale enforcement actions runs the risk that violators will be hugely penalized for conduct not known to be wrongful at the time it was undertaken. Such long delays in bringing enforcement actions subject individuals to liability based on changing interpretations of the laws. In the case of the Wylys, the SEC proposed (among other methods) a wholly unprecedented measure of disgorgement based on "the amount of federal income taxes that the Wylys allegedly avoided" by transferring stock options to the offshore trusts. *SEC v. Wyly*, No. 10 CIV. 5760 (SAS), 2013 WL 2951960, at *1 (S.D.N.Y. June 13, 2013). In adopting the SEC's novel "tax avoidance" theory, the district court concluded that the Wylys' persuasive control over the trustees of the offshore trusts meant that the Wylys should have been taxed on the sale of assets in the trusts, unless an exception applied. *See Wyly*, 56 F. Supp. 3d at 427-29. The district court's rationale for that determination required rejection of long-standing Tax Court precedent in place during the prior three decades, upending well-settled tax treatment and jeopardizing countless other carefully crafted estate plans.[2]

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[2] The district court's opinion explicitly contradicted longstanding Tax Court precedent found in *Estate of Goodwyn v. C.I.R.*, T.C. Memo 1976-238, 1976 WL 3423 (1976). Indeed, the *Wyly* district court "opinion made several statements about the domestic grantor trust rules (without input from the IRS) that give tax and

The unsettling application of this novel "tax avoidance" theory was compounded by the district court's decision that the disgorgement award was not subject to the time bar at Section 2462. The Wylys, counseled by both tax and securities lawyers, could not have known that the tax treatment of the offshore trusts, resting as it did on well-settled Tax Court precedent, would be overturned by a district court decades after the establishment of the trusts—under the rubric of disgorgement for securities violations. And the Wylys could not have predicted that any potential liability would stretch back over a period of two decades to reach conduct that was clearly "stale." In this way, the SEC's disgorgement award against the Wylys cuts directly against the purposes served by the statute of limitations in "provid[ing] 'security and stability to human affairs.'" *Gabelli*, 133 S. Ct. at 1221 (quoting *Wood v. Carpenter,* 101 U.S. 135, 139 (1879)).

Finally, the harsh effects of the SEC's disregard for the statute of limitations is even more egregious as against the Estate because Charles Wyly died a year after the SEC filed its complaint. *Wyly*, 860 F. Supp. 2d at 275-76. Yet, the SEC continued to seek disgorgement from his Estate for conduct occurring 20 years before his death.

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estate planning professionals pause." Advanced Estate Planning Practice Update – Summer 2016 Cases, Regulations, and Analyses, http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/TSXB30_chapter_01_thumb.pdf.

The Wylys' case exposes the draconian results that would arise if the SEC may seek disgorgement unrestrained by the time bar of Section 2462. Faced with the SEC's extreme delay in bringing an enforcement action, the district court denied the SEC's motion for tolling the statute of limitations. Nonetheless, the district court permitted disgorgement for a two-decade period, with prejudgment interest. In fashioning the nearly $300 million disgorgement award against the Wylys, the district court allowed the SEC to avoid any consequence for its long delay in bringing suit. The SEC should not be permitted to obtain proceeds that are otherwise time-barred by labeling the remedy a "disgorgement" instead of a "forfeiture."

C. The SEC's Increasing Use Of Disgorgement Threatens To Intensify These Harms

The SEC's treatment of petitioner and the Wylys is not unique. The SEC increasingly has sought disgorgement in civil enforcement actions to avoid any limitation on its monetary recoveries for the Government. That trend has only intensified following this Court's ruling in *Gabelli*, after which the SEC extended its use of disgorgement as an alternative to penalties as the means to seek recovery for stale claims.

In recent years, the SEC has recovered growing amounts of supposed "ill-gotten gains" from defendants. From Fiscal Year 2010 to Fiscal Year 2013, total disgorgement awards increased from $1.82 billion to $2.257 billion. *See* SEC, *Year-By-Year Monetary Sanctions in SEC Enforcement Actions*, *available at* https://www.sec.gov/news/newsroom/

images/enfstats2.pdf. The disgorgement awarded was roughly double the amount of penalties over the same time period. *Id.*

In Fiscal Year 2015, the SEC obtained orders for $4.195 billion in monetary relief (up from $2.846 billion in Fiscal Year 2010), consisting of both disgorgement and penalties. *See* SEC, *FY 2017 Congressional Budget Justification, FY 2017 Annual Performance Plan, and FY 2015 Annual Performance Report* 40-41 (Feb. 9, 2016), https://www.sec.gov/about/reports/secfy17congbudg just.pdf. The SEC, however, distributed only $158 million to investors in 2015. *Id.*

The SEC's shift from pursuing penalties—clearly subject to Section 2462—to disgorgement, raises the strong inference that the SEC has increasingly relied upon disgorgement to perform an end-run around the time limit on pecuniary penalties. This trend serves to undermine the purposes of the statute of limitations. This Court should close that loophole and confirm that disgorgement is subject to the limitation of Section 2462.

II. THE SEC'S BROAD USE OF DISGORGEMENT IS UNSUPPORTED BY THE HISTORY OF CONGRESS'S LIMITATIONS ON REMEDIES

Section 2462 provides that, "[e]xcept 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 . . . ." *Id.*

This Court should adopt petitioner's argument that, because the remedy of disgorgement falls squarely within the meaning of "forfeiture," it is subject to the five-year limitations period of Section 2462. Separately, as petitioner also correctly argues, the SEC's use of disgorgement qualifies as a "penalty" subject to the time bar in Section 2462—especially where, as in the Wylys' case, disgorgement is used to recover amounts unconnected to the need to compensate victims and far afield from the underlying offense.

A. At The Time Of Section 2462's Enactment, "Forfeiture" Was Understood As Analogous To "Disgorgement"

In the first half of the 19th century, "disgorgement" was not a widely used legal term, but "forfeiture" had a broad meaning, encompassing any situation "when a man is, by a judicial sentence, compelled to pay a sum of money to another . . . ." Jeremy Bentham, THE RATIONALE OF PUNISHMENT 252 (Robert Heward ed., 1830). This historical understanding of forfeiture encompasses modern-day disgorgement: it applied to monetary sums and was considered a remedial, rather than punitive, measure. Examination of the history of forfeiture confirms that the SEC's "disgorgement" is nothing more than forfeiture by a different name.

1. The Tenth Circuit rejected the argument that disgorgement fell under the rubric of "forfeiture" because it wrongly reasoned that forfeiture was an *in rem* procedure aimed exclusively at taking "'tangible property used in criminal activity.'" *SEC v. Kokesh*, 834 F.3d 1158, 1165 (10th Cir. 2016) (quoting *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118

(1993)). Contrary to the Tenth Circuit's decision, early statutory forfeitures required giving up tangible property—including contraband and instrumentalities—as well as *monetary* sums. In fact, "[f]orfeiture of goods *or their value and the payment of fixed or variable sums of money* are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938) (emphasis added) (citing Act of July 31, 1789, c. 5, s 36, 1 Stat. 29, 47).

In 1824, for example, this Court examined the "29th section of the collection act of 1799," which provided that the master of a ship in violation "shall forfeit and pay the sum of 400 dollars." *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824). Other statutes in that period used "forfeit" in a similar fashion.[3] Likewise, a 1799 enactment "not only provide[d] for a forfeiture of the goods, but in the alternative, for a forfeiture of the value thereof, to be recovered of the person making the false entry." *Wood v. United States*, 41 U.S. 342, 365 (1842). Courts in equity also used the term "forfeit" to describe the forced giving up of monetary sums by

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[3] *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 321-22 (1819) ("forfeit a sum of $500 for each and every offence . . . to be recovered by indictment, or action of debt . . . ."); *United States v. Simms*, 5 U.S. 252, 253 (1803)) (discussing requirement to "forfeit and pay the sum of one hundred and fifty dollars"), *abrogated on other grounds by United States v. More*, 7 U.S. 159 (1805).

judicial decree. *See Diggs v. Wolcott*, 8 U.S. 179 (1807) (obtaining in "suit in chancery" both injunctive relief and forfeiture of $1,500).[4]

2. Nor is it true that forfeiture, as opposed to disgorgement, historically had been considered an exclusively punitive remedy. Early forfeitures often were viewed as serving remedial purposes like that the SEC now attributes to disgorgement. *See, e.g., United States v. Ursery*, 518 U.S. 267, 291 (1996) ("it is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment"). In this regard, it cannot be said that "disgorgement" does not fit among the remedies listed in Section 2462.

In fact, this Court traced the use of forfeiture as a remedial measure to the early days of the republic in *United States v. Bajakajian*, 524 U.S. 321 (1998). In the context of customs violations, the Court explained that "the early monetary 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

[4] The term "forfeiture" also has been used historically to refer to contractual clauses in deeds requiring a party to give up a certain contractual right. It is in this contractual context that courts have noted that "a Court of Chancery [was] not the proper tribunal for enforcing forfeitures." *Horsburg v. Baker*, 26 U.S. 232, 236 (1828). The Court in *Horsburg* referred to the "clause of forfeiture for alienation, which the deed contains"—not the type of forfeiture at issue in this case. *Id.* at 235.

duties." *Id.* at 342. Indeed, forfeitures were considered to be remedial in nature "at the founding," and only encompassed a punitive remedy beginning in the 1970s. *Id.* at 340-41 & n.16. The modern concept of disgorgement shares the same remedial underpinning *Bajakajian* ascribed to the historical concept of forfeiture.

3. This historical overlap between "disgorgement" and "forfeiture" is confirmed by the contemporary use of the two words as interchangeable. Modern legal dictionaries confirm that the two words have equivalent meanings. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) ("forfeiture: 1. The divestiture of property without compensation.") ("disgorgement: The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."). This Court, too, has recognized that the terms "disgorgement" and "forfeiture" may be used interchangeably. *See Ursery*, 518 U.S. at 284 ("[Civil f]orfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.").[5] As a result, the term

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[5] Numerous courts of appeals also have used the terms interchangeably. *See, e.g.*, *United States v. Contorinis*, 692 F.3d 136, 146 (2d Cir. 2012) ("Criminal forfeiture focuses on the disgorgement by a defendant of his 'ill-gotten gains.'"); *United States v. Venturella*, 585 F.3d 1013, 1019 (7th Cir. 2009) ("forfeiture seeks to punish a defendant for his ill-gotten gains by transferring those gains . . . to the United States Department of Justice") (citations and quotations

"forfeiture" in Section 2462 is best read to encompass "disgorgement" as a virtual synonym—the same remedy by a different name. The Eleventh Circuit has recognized this very point, holding that "for the purposes of § 2462 forfeiture and disgorgement are effectively synonyms; § 2462's statute of limitations applies to disgorgement." *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

4. The absence of separate reference to the term "disgorgement" in Section 2462 is best explained by the fact that the term "disgorgement" had not gained currency at the time Congress enacted the predecessor statute in 1839. The 1839 version of the statute read: "No suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued." Act of February 28, 1839, § 4, 5 Stat. 322. Section 2462, enacted in 1948, included mere "changes in phraseology" that did not change the meaning of the statute from its predecessor. *3M Co. (Minn. Min. &*

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omitted); *United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009) ("Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations and quotation omitted); *United States v. Hoover–Hankerson*, 511 F.3d 164, 171 (D.C. Cir. 2007) ("Forfeiture is a means of forcing a criminal defendant to disgorge ill-gotten profits."); *United States v. Casey*, 444 F.3d 1071, 1073-74 (9th Cir. 2006) (similar).

Mfg.) v. Browner, 17 F.3d 1453, 1458 (D.C. Cir. 1994). By contrast, the first disgorgement of ill-gotten gains in the securities context did not occur until the 1970s. *See* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 10, nn.60-61 (2013); *see also SEC v. Cavanagh*, 445 F.3d 105, 118 (2d Cir. 2006) ("[A]lthough the term 'disgorgement' became common only recently, equity courts have traditionally awarded analogous forms of relief under a variety of names."). Accordingly, "forfeiture," as understood by legislators and courts in the early nineteenth century, encompasses modern-day disgorgement.

Because the term "forfeiture" has been historically understood to share the same characteristics as modern day disgorgement, it follows that disgorgement should likewise be subject to the limitations period found in Section 2462 and its predecessors.

B. Section 2462 Applies To Disgorgement Awards That Amount To A "Penalty" Within The Meaning Of 28 U.S.C. § 2462

Even if the term "forfeiture" in Section 2462 were limited to punitive measures and thus made synonymous with "penalty," the statute of limitations should apply to the SEC's use of disgorgement as a general matter and, at a minimum, in a case like petitioner's and that of the Wylys. Where the SEC's version of "disgorgement" lacks any meaningful remedial purpose or causal link to the securities violation, it is necessarily a "penalty" within the meaning of Section 2462.

As a general matter, the SEC seeks disgorgement not to compensate harmed investors but rather to deter and punish defendants, as demonstrated by petitioner's and the Wylys' cases. The district court recognized as much in the Wylys' case, noting that "disgorgement of this magnitude is more than sufficient to deter future violations." *Wyly*, 56 F. Supp. 3d at 433-34; *see also SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (describing deterrence as the "primary purpose of disgorgement orders"). "Deterrence, however, has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. To this extent, the SEC's use of disgorgement is rightfully labeled punitive and treated as a penalty subject to Section 2462.

The SEC cannot avoid this conclusion through an argument that disgorged amounts may be viewed as compensation to harmed investors. Although the SEC may endeavor to provide these disgorged funds to victims of a defendant's fraudulent scheme, *see generally* SEC, *Investor Bulletin: How Harmed Investors May Recover Money* (2014), *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html; SEC, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans* 103-107 (2006), *available at* http://www.sec.gov/about/rulesprac2006.pdf, in fact it rarely does so, *see supra* at 15.

Treatment of such disgorgement awards as subject to the statute of limitations in Section 2462 fits this Court's reasoning in *Gabelli*. As this Court explained, "penalties, which go beyond compensation, are intended to punish." *Gabelli*, 133 S. Ct. at 1223. The same can be said for disgorgement awards like the ones against petitioner and the Wylys, which make whole no victims and have no otherwise compensatory purpose. In fact, the SEC *conceded* in the Wylys' case that its disgorgement request was not meant to compensate victims.

Further, a punitive purpose is evident at a minimum in a case like that of the Wylys, where the disgorgement remedy lacks a causal connection to the securities violations. In securities law enforcement, it is settled that "disgorgement may not be used punitively," *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989), and thus the SEC must "establish[] a reasonable approximation of the profits causally related to the fraud," *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013). Absent the required causal connection, the disgorgement orders serve only as a "penalty" within the ambit of Section 2462.

The SEC's primary disgorgement theory in the Wylys' case, for example, allowed for a $300 million disgorgement award based on supposedly avoided taxes owed to the IRS without regard for what the IRS might determine the Wylys actually owed. This award was nearly twice the "alternative" disgorgement award, based on a trading-profits theory. And the district court permitted the SEC to pursue the trading-profits disgorgement award despite concluding that the SEC had provided "no evidence here that the defendants' unlawful conduct . . . resulted in any market distortion, price impact, or profit tied to the violation." *SEC v. Wyly*, 56 F. Supp. 3d 260, 269 (S.D.N.Y. 2014). The SEC never linked either award in any proximate way to the underlying securities violations—as the SEC's cycling between alternative theories in and of itself illustrates. The award of such large amounts, untethered to any compensatory or remedial purpose, simply serves to punish and qualifies as a penalty under Section 2462.

The Tenth Circuit's citation to damages in tort law inadvertently confirms this point. The Tenth Circuit explained that it "do[es] not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort (say, a motor-vehicle accident) even if he gained nothing thereby." *Kokesh*, 834 F.3d at 1165. But the law permits such awards because tort damages serve to compensate an injured victim, *not* to deter wrongdoers. Punitive damages awarded in tort cases, in contrast, go beyond any such causal link to compensation, and simply seek to deter wrongful conduct. A disgorgement award lacking close connection to underlying securities violations is similarly properly viewed as punitive. In the Wylys' as in petitioner's case, the award of disgorgement to the Government is not compensatory but primarily punitive, and thus properly constitutes a penalty subject to Section 2462.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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