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 *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA often appears as *amicus curiae* in cases that raise legal issues of vital concern to participants in the securities industry.[1]

28 U.S.C. § 2462 (1948), the default statute of limitations for federal civil enforcement actions, sets a five-year statute of limitations for government actions to enforce "any civil fine, penalty, or forfeiture, pecuniary or otherwise":

> 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

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[1] SIFMA has submitted to the Clerk letters from all parties consenting to this filing. This brief was not authored in whole or in part by counsel for any party. No such counsel or any party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

> entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462.

In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), this Court unanimously held that the five-year limitations period in Section 2462 applies to Securities and Exchange Commission ("SEC") claims for civil money penalties. The Court rejected the SEC's request to add a "discovery rule" that would have exposed defendants to government enforcement actions "not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id*. at 1223. The Court recognized that statutes of limitations play a vital role in cases where the government seeks to punish alleged wrongdoers by (1) providing repose to potential defendants; (2) protecting defendants from the prejudice caused by stale claims and unreliable evidence; and (3) creating certainty about a defendant's potential liabilities. *Id*. at 1221.

Following *Gabelli*, the Eleventh Circuit held that Section 2462's five-year limitations period applies to SEC claims for disgorgement, because disgorgement is a "forfeiture" within the plain meaning of the statute. *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). However, the Tenth Circuit, in the ruling below, joined the pre-*Gabelli* opinions of the First and D.C. Circuits that Section 2462 does not apply to the SEC's disgorgement claims. Pet. App. 2a; *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010). The Tenth Circuit reasoned that disgorgement is traditionally treated as an "equitable" remedy that it is "remedial" and not a "penalty" under Section 2462, and that Section 2462's reference to forfeiture should be read narrowly to refer to *in rem* proceedings and not to SEC disgorgement claims. That ruling is inconsistent with *Gabelli* and the plain language of Section 2462 and overlooks the bedrock principles underlying that statute.

SIFMA's members have a strong interest in the Court's application of Section 2462's five-year limitations period to any SEC claims that are functionally fines, penalties or forfeitures – including disgorgement claims – because SIFMA's members are regulated under the securities laws and require certainty and predictability. SIFMA and its members believe the text of Section 2462 and the Court's rationale for its ruling in *Gabelli* compel the application of the five-year limitations period to SEC disgorgement claims for the following reasons:

First, disgorgement, however labeled, is a punitive remedy that falls within the statute's express reference to a "penalty" or "forfeiture." Disgorgement orders are monetary judgments payable to the government to punish a wrongdoer, not compensatory remedies. Their primary function is ensuring that a wrongdoer does not profit and deterring violations of the securities laws. Indeed, the SEC has argued that disgorgement obligations should be treated as non-dischargeable debts precisely because they are punitive and constitute a "penalty" or "forfeiture" within the meaning of the Bankruptcy Code. The SEC should not take a contrary position here. Doing so would undermine Section 2462 and the effective enforcement of the law. The Tenth Circuit's decision violates the long-settled principle that words in statutes should be given their ordinary meaning. It would allow the SEC to shield actions for a disgorgement penalty or forfeiture from Section 2462's five-year limitations period merely by characterizing the sanction as "equitable." SIFMA and its members recognize the importance of applying laws as they are written by Congress, not based on subjective assertions of legislative purpose that do not take account of the objectives Congress weighed in drafting particular provisions. That is essential to ensure predictability. And predictability is crucial for the effective and efficient functioning of the markets because it allows participants to understand how to comply with the law and how it will be enforced. This Court should restore the focus to Section 2462's text and correct the Tenth Circuit's interpretation that strays from its plain language and structure. A failure to do so would risk encouraging courts around the country to depart from text in a misguided effort to divine intent and policy.

Second, the Tenth Circuit's ruling is inconsistent with *Gabelli*. This Court recognized in *Gabelli* that settled principles of certainty, repose and elimination of stale claims require the application of Section 2462's five-year limitations period as a check on the government's power to punish through civil enforcement penalties. Creating a government "exception" to

Section 2462 for disgorgement would undermine that ruling.

Finally, the Tenth Circuit's ruling, by permitting the government to seek disgorgement in perpetuity, would create uncertainty and instability in the financial markets. SIFMA's members rely on the fair, consistent and timely enforcement of the securities laws to deter and remedy wrongdoing. One key component is the consistent application of statutes of limitations that are a critical part of those laws. By establishing a definitive outside time limit for exposure to government enforcement efforts, Section 2462 provides the markets with a measure of certainty and finality, sets a time after which participants are free from lingering liabilities and stale claims, and ensures that claims can be adjudicated based on evidence that is fresh. SIFMA's members and their investors and customers depend upon such finality in their financial planning and operations. The decision below would undermine the important values and goals that Section 2462 serves and should be reversed.

SUMMARY OF ARGUMENT

This appeal presents the fundamental question whether the dispositive principles of law this Court articulated in *Gabelli* should be *sub silentio* limited, and Section 2462's five-year period for the government to bring an action for a "penalty" or "forfeiture" should be judicially bypassed when the SEC characterizes its "disgorgement" claim as "equitable." SIFMA supports Petitioner's argument that SEC enforcement actions seeking disgorgement are governed by Section 2462's five-year limitations period regardless of the manner in which the SEC characterizes them. The disgorgement sought by the SEC in this case – grounded on conduct dating back to 1995, fourteen years before the SEC filed suit in 2009 – is both a "penalty" and a "forfeiture" within the plain meaning of Section 2462.[2]

The ruling below would allow the government to avoid Section 2462's five-year limitations period merely by labeling the disgorgement it seeks as "equitable." That distinction is not tenable. This Court's decision in *Gabelli* made clear that the core principles underlying Section 2462 (and all statutes of limitations) – certainty, repose and elimination of stale claims – must be applied to government penalty or forfeiture actions. There is nothing about disgorgement claims that makes them less subject to Section 2462 than any other "civil fine, penalty, or forfeiture, pecuniary or otherwise." As Chief Justice Marshall observed centuries ago, "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

[2] SIFMA does not take a position on the merits of the SEC's allegations against Petitioner.

SIFMA's members recognize that the appropriate exercise by the SEC of the investigative and enforcement powers granted to it by Congress plays an important role in the regulation of the nation's financial markets. However, Congress has also concluded that the pursuit of old and stale claims poses a particularly acute threat of government overreaching. Accordingly, Congress has established statutes of limitations and repose for actions involving alleged violations of the federal securities laws. Section 2462's five-year statute of limitations gives the SEC abundant time to discover and investigate violations of the securities laws and bring actions for disgorgement.

Belated enforcement efforts after Section 2462's five-year limitations period has run would have significant adverse consequences for businesses and investors, as well as all market participants. By expanding the government's ability to impose punitive disgorgement sanctions years and decades after alleged misconduct, the decision below would create uncertainty, unpredictability and an indefinite threat of exposure to government enforcement actions and thereby undercut the very purpose of statutes of limitations. This Court should apply Section 2462 in accordance with its text and reverse the decision below.

ARGUMENT

I. SECTION 2462'S FIVE-YEAR STATUTE OF LIMITATIONS APPLIES TO SEC ACTIONS FOR DISGORGEMENT

Section 2462 imposes a default five-year limitations period whenever the government seeks to enforce "any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. The Tenth Circuit's ruling is inconsistent with the plain meaning of that statute. It would allow the government, merely by labeling disgorgement an "equitable" sanction, to sidestep the limitations period in Section 2462 and seek disgorgement for conduct that occurred more than five years earlier – in this case, disgorgement of approximately $35 million, plus an additional $18 million in prejudgment interest, for conduct as long ago as fourteen years before the SEC filed suit.[3] But it is the effect of the sanction, not the label-of-convenience attached to it by a government enforcer, that determines whether Section 2462's limitations period applies. Section 2462 applies to

[3] On October 27, 2009, the SEC filed a civil enforcement action against Petitioner seeking, *inter alia*, disgorgement in connection with alleged securities law violations between 1995 through 2007. Pet. App. 2a, 21a. There is no dispute that if Section 2462's limitations period applied, the SEC could not seek relief for the period prior to October 27, 2004 (five years before the SEC filed its complaint). *Id.* at 26a. In November 2014, following a five-day jury trial, the district court ordered Petitioner to disgorge $34.9 million, of which the SEC conceded only approximately $5 million was the result of conduct that occurred on or after October 27, 2004. *Id.* at 21a, 45a. The district court ordered Petitioner to pay an additional $18 million in prejudgment interest on the disgorgement. *Id*. at 45a.

the disgorgement ruling the SEC obtained against Petitioner below because it is both a "penalty" and a "forfeiture" within the meaning of the statute.

A. The Disgorgement Order is Punitive and a "Penalty" Under Section 2462

A "penalty" under Section 2462 is "a form of punishment imposed by the government for unlawful or proscribed conduct, which *goes beyond remedying the damage caused to the harmed parties* by the defendant's action." *Coghlan v. NTSB*, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam) (quoting *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996)) (emphasis added). As this Court has explained, a penalty is "something imposed in a punitive way for an infraction of a public law." *Gabelli*, 133 S. Ct. at 1223 (quoting *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 423 (1915)).

Because the disgorgement order below was "imposed in a punitive way" at the request of the SEC "for an infraction of a public law," it is a "penalty" within the meaning of Section 2462. However, the Tenth Circuit ruled to the contrary, after determining that disgorgement has traditionally been treated as an "equitable" remedy. Pet. App. 10a-11a. Courts have cautioned, however, that "[s]uch labels are likely to reflect conclusions rather than analyses, and in any event are not determinative." *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977), *abrogated by Steadman v. SEC*, 450 U.S. 91 (1981). The applicability of Section 2462 depends on the *purpose* and *effect* of disgorgement. *See Johnson*, 87 F.3d at 491 (determining Section 2462's scope based on "the effect of the SEC's action"); *Coghlan*, 470 F.3d at 1305; *Johnson*, 87 F.3d at 491; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("It is not the fact of punishment, but rather its character and purpose that often serve to distinguish between" remedial and punitive relief).

Disgorgement is punitive under Section 2462 particularly where, as here, a defendant is required to disgorge *more* than he actually personally profited. Pet. App. 45a; *see*, *e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 309 (2d Cir. 2014) (Chin, J., dissenting) (disgorgement is punitive when "profits were not [defendant's]" and "were never in his possession or control" because "they were earned by the fund by which he was employed"); *SEC v. Wyly*, 860 F. Supp. 2d 275, 277 (S.D.N.Y. 2012) ("awards that exceed the defendant's gains are punitive and beyond the court's equitable powers"); *see also Tull v. United States*, 481 U.S. 412, 423-24 (1987) (disgorgement is "a more limited form of penalty than a civil fine"; court "impose[d] punishment" by ordering disgorgement that exceeded profits).

Such disgorgement is designed both to punish a wrongdoer and "to deter" future violations, which is the touchstone of a punitive remedy. *See*, *e.g.*, *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *see also F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("[W]hen a public entity seeks disgorgement it does not claim any entitlement to particular property; it seeks only to deter violations of the laws by depriving violators of their ill-gotten gains.") (internal quotation marks and alterations omitted); *SEC v. First City Fin. Corp. Ltd.*, 890 F.2d 1215, 1232 n.24 (D.C. Cir. 1989) ("in the context of an SEC enforcement suit, [ ] deterrence is the key objective"); Edward Brodsky & Scott A. Eggers, *The Statute of Limitations in SEC Civil Enforcement Actions*, 23 Sec. Reg. L.J. 123, 135-36 (1995) ("[D]isgorgement serves a primary function of deterring violations of the securities laws, not compensation."). Although the SEC attempts to characterize disgorgement as an "equitable" remedy, "the language of 'deterrence' is not the language of equity." *Id.* at 136.

Disgorgement is also punitive because, as is true of penalties, the SEC's primary purpose is not to compensate victims. Relief that "goes beyond remedying the damage caused to the harmed parties" is punitive. *Coghlan*, 470 F.3d at 1305 (internal quotation marks omitted); *see also Penalty*, *Black's Law Dictionary* (10th ed. 2014) (a "penalty" is "[p]unishment imposed on a wrongdoer . . . as distinguished from compensation for the injured party's loss"); 25 Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* § 4:22 (2016) (collecting authorities and concluding that "the primary purpose of disgorgement is punitive: to punish based on violations of the securities laws rather than to compensate the victims"). The SEC's disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers." *See Gabelli*, 133 S. Ct. at 1223; *see also Tull*, 481 U.S. at 422 (penalties are "intended to punish culpable individuals," not "to extract compensation or restore the status quo"). The SEC's own rules expressly permit disgorged funds to go to the United States Treasury instead of to victims. Although the SEC may compensate victims through a Fair Fund, such funds are permitted only when the SEC obtains civil money penalties which are subject to Section 2462's five-year statute of limitations. *See* SEC Rules of Practice: Fair Fund and Disgorgement Plans, 17 C.F.R. §§ 201.1100, 201.1102(b).

The Tenth Circuit reasoned, however, that despite these quintessentially punitive characteristics, disgorgement is not a "penalty" under Section 2462 because it is "remedial" and "does not inflict punishment." Pet. App. 10a-11a. According to the Tenth Circuit, disgorgement is non-punitive because it "just leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Id*. at 11a (internal citation and internal quotation marks omitted). The court below cited the D.C. and First Circuits' decisions that disgorgement was not a "penalty" under Section 2462. *Id.* at 10a-11a; *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("disgorgement is not a civil penalty" and "not subject to the five-year statute of limitations") (internal quotation marks omitted); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (Section 2462 "applies only to penalties sought by the SEC, not its request for . . . disgorgement"). But the D.C. and First Circuits made those rulings before this Court's decision in *Gabelli* and they cannot be reconciled with its teaching that orders that "go beyond compensation, are intended to punish, and label defendants wrongdoers" are "penalties" under Section 2462.[4] 133 S. Ct. at 1223. Moreover, the Tenth Circuit overlooked all of the punitive characteristics of disgorgement. *See also Johnson*, 87 F.3d at 491 n.11 ("It is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant.").

Further, although an SEC enforcement action for disgorgement is sometimes labeled as "equitable" or "remedial," in practice district courts apply very little discretion in awarding disgorgement. Once a defendant is found liable, disgorgement follows almost automatically without regard for the damages suffered by a wronged party. Unlike SEC requests for injunctive relief, for which district courts perform a multi-factor analysis to determine whether the SEC has established a reasonable likelihood of future violations, *see*, *e.g.*, *SEC v. Gann*, 565 F.3d 932, 940 (5th Cir. 2009) ("[i]n imposing a permanent injunction, the district court must consider a number of factors"), the SEC's burden when it seeks disgorgement is simply to show

[4] *Riordan* is also distinguishable because the disgorgement award there could be viewed as compensatory. In *Riordan*, the defendant broker allegedly engaged in a scheme to defraud the citizens of the State of New Mexico by paying kickbacks to the state treasurer in exchange for obtaining securities transactions from the New Mexico State Treasurer's Office. 627 F.3d at 1231. The D.C. Circuit explained that "the disgorged moneys will apparently be returned to the New Mexico State Government and not retained by the U.S. Government." *Id.* at 1234, n.1.

that the amount to be disgorged "reasonably approximates" the defendant's illicit profits; the burden then shifts to the defendant to rebut the presumption that the profits are illegal, a "near-impossible" task. *SEC v. First City Fin. Corp. Ltd.*, 890 F.2d at 1231-32 ("separating legal from illegal profits exactly may at times be a near-impossible task"). Similarly, a defendant is often required to "disgorge" without receiving any credit for expenses. Pet. App. 12a; *see also SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006) (defendant was not entitled to deduct business and operating expenses from the amount of his disgorgement because "it would be unjust to permit the defendants to offset" such amounts); Russell G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 5 (2013), http://www.hblr.org/?p=3528 (disgorgement's "resemblance to a truly equitable remedy largely disappears" and the punitive attributes of disgorgement "call into question whether the label of equity accurately describes disgorgement"). Accordingly, when the SEC seeks disgorgement, it seeks a "penalty" and Section 2462 applies.

B. The Disgorgement Order is a "Forfeiture" Within the Meaning of Section 2462

There is also no meaningful difference between disgorgement and forfeiture. As the Eleventh Circuit correctly concluded, "under the plain meaning" of Section 2462, "forfeiture and disgorgement are effectively synonyms." *Graham*, 823 F.3d at 1363-64 ("disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture"); *see also* Edward Brodsky, *Statute of Limitations and Civil Enforcement: Corporate and Securities Litigation*, N.Y.L.J., Sept. 21, 1993, at 21 ("An SEC civil enforcement action seeking disgorgement of illegally-obtained profits is in the nature of a forfeiture action."). "Disgorgement" is the "act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Disgorgement*, *Black's Law Dictionary* (10th ed. 2014). Similarly, a "forfeiture" is the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Forfeiture*, *Black's Law Dictionary* (10th ed. 2014). The Tenth Circuit acknowledges this much. Pet. App. 13a (forfeiture and disgorgement "capture similar concepts").

Courts have long used the terms "disgorgement" and "forfeiture" interchangeably to describe orders that require a defendant to give up ill-gotten profits. *See United States v. Ursery*, 518 U.S. 267, 284 (1996) (forfeiture is "designed primarily to confiscate property used in violation of the law, and to require *disgorgement of the fruits of illegal conduct*") (emphasis added); *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) ("Forfeiture, in contrast [to restitution], is punitive; it seeks to *disgorge any profits* that the offender realized from his illegal activity") (emphasis added); *see also Contorinis*, 742 F.3d at 310 (Chin, J., dissenting) (the terms are "largely the same. . . . [b]oth forfeiture and disgorgement seek to force a defendant to give up – that is, to forfeit or to disgorge – what he has wrongfully gained;" collecting cases using the terms synonymously). As the district court concluded in *Graham*, "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws – *i.e.*, requiring defendants to relinquish money and property – can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462." *SEC v. Graham*, 21 F. Supp. 3d 1300, 1310-11 (S.D. Fla. 2014), *aff'd in part and rev'd in part*, 823 F.3d 1357 (11th Cir. 2016).

There can be no question that the disgorgement order here, which requires Petitioner to give up all ill-gotten gains, is a forfeiture. However, despite acknowledging the overwhelming similarities between disgorgement and forfeiture, the court below adopted a "narrow" reading of Section 2462 to define forfeiture in a "historical sense." According to the Tenth Circuit, "forfeiture" as used in Section 2462 refers to *in rem* proceedings – dating back to the "early days of the Republic" – to take "tangible property used in criminal activity." Pet. App. 14a. In substituting its own view of the purpose of Section 2462 for the text of the statute, the Tenth Circuit pointed to historical examples of forfeiture such as "the seizure of ships engaged in piracy" and illegal "distilleries," and reasoned that disgorgement "does not fit in that company." *Id*. at 14a. However, these efforts to artificially distinguish "disgorgement" from "forfeiture" flout Congressional intent as expressed in the plain language of Section 2462.

The Tenth Circuit's decision violates the long-settled principle that words in statutes "should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense." *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978); *see Graham*, 823 F.3d at 1364 ("We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings."). A dominant theme of this Court's jurisprudence is that legislation must be enforced in accordance with its plain language, and not based on a judicial assessment of how best to effectuate a perceived legislative purpose. When Congress crafts legislation and statutes of limitations, it inevitably balances competing policy goals. *See*, *e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) ("[A]lmost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem," but " 'no legislation pursues its purposes at all costs.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam))); *see also Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 374 (1986) ("[T]he final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). This Court has repeatedly reminded courts not to "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v.*

Comm'r of Internal Revenue, 464 U.S. 386, 398 (1984). Untethering statutory construction from the plain language of the statute, and relying instead on subjective judicial speculation about how best to accomplish Congressional policy, would infringe on the role of our elected legislators. *See Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004).

Moreover, by limiting the definition of forfeiture in the statute to *in rem* proceedings, the Tenth Circuit effectively erased the words "pecuniary or otherwise" from Section 2462. While *in rem* proceedings are by definition actions against "tangible property," Pet. App. 14a, "pecuniary" actions are monetary. If Congress had intended forfeiture to apply *only* to non-pecuniary *in rem* actions, it would not have included the phrase "pecuniary or otherwise" immediately following the words "any civil fine, penalty, or forfeiture" in Section 2462. The Tenth Circuit erred by impermissibly treating the words "pecuniary or otherwise" in the statute as superfluous. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . We are thus reluctant to treat statutory terms as surplusage in any setting.") (internal citation and quotation marks omitted); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "); *see also 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) (explaining that courts must look to "what Congress has written. . . . neither to add nor to subtract, neither to delete nor to distort"). As the Eleventh Circuit explained in rejecting the SEC's artificial attempt to distinguish forfeiture and disgorgement by focusing on *technical* definitions, rather than the words' *ordinary* meanings: "Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute." *Graham*, 823 F.3d at 1364 (internal citation and question marks omitted).

Furthermore, as this Court has explained, "catchall" provisions like Section 2462 "are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973). The Tenth Circuit's narrow (and arcane) reading of Section 2462 makes little sense because the statute "applies to a wide variety of agency actions and contexts." *Graham*, 823 F.3d at 1364. Whether forfeiture and disgorgement are synonymous, or disgorgement is a subset of forfeiture, the *effect* on a defendant is the same. Thus, the most natural reading of Section 2462 is that disgorgement is a "forfeiture." *See Gabelli* at 1220. "To hold otherwise would be to open the door to Government plaintiffs' ingenuity in creating new terms for the precise forms of relief expressly covered by the statute in order to avoid its application." *Graham*, 21 F. Supp. 3d at 1311.

C. The SEC Has Previously Taken the Position that Disgorgement is a "Penalty" or "Forfeiture"

It is incongruous for the SEC to deny that disgorgement is a "civil fine, penalty or forfeiture" under Section 2462 when it has asserted that disgorgement is a "penalty" or "forfeiture" in other contexts. In *SEC v. Telsey*, the SEC argued that a disgorgement order is a "fine, penalty or forfeiture" within the meaning of the Bankruptcy Code and not a debt subject to discharge. 144 B.R. 563, 564-65 (Bankr. S.D. Fla. 1992) ("The S.E.C. contends that its debt arising from the District Court [disgorgement] order is excepted from discharge . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."). The *Telsey* court was persuaded that "the deterrence purpose of the disgorgement order [is] sufficiently penal to characterize it as a 'fine, penalty, or forfeiture,'" and therefore not dischargeable in bankruptcy. *Id.* at 565; *see also Johnson*, 87 F.3d at 484 n.10 ("The SEC's own position on what constitutes a penalty appears to vary with the context. . . . The SEC never explains why the position it took in [*Telsey*] should not apply here as well.").[5]

[5] The IRS has taken a similar position that a disgorgement payment by an entity-taxpayer to the SEC for alleged FCPA violations is "primarily punitive" and is therefore a "fine or similar penalty paid to a government for the violation of any law" that is nondeductible under Section 162(f) of the Tax Code. *See* IRS Chief Counsel Mem. 201619008, at 8, 10 (May 6, 2016) (disgorgement in

D. The Decision Below is Inconsistent with *Gabelli*

The ruling below should also be reversed because it conflicts with the principles set out by the Court in *Gabelli*. In *Gabelli*, this Court unanimously held that Section 2462 bars the SEC from seeking civil monetary penalties for violations that occurred more than five years before the SEC brought an enforcement action. 133 S. Ct. 1216, 1220 (2013). The Court explained that Section 2462 sets a fixed date when exposure to government enforcement efforts ends, and thereby advances the basic purpose of limitations periods: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id*. at 1221 (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). *Gabelli* explicitly rejected the SEC's position that a "discovery rule" should apply to Section 2462. As the Court made clear, the SEC's approach would have eroded the core principles of all statute of limitations provisions. *Gabelli* at 1221.

While the applicability of Section 2462 to SEC claims for disgorgement was "not before" the Court in *Gabelli*, nothing in the Court's opinion suggests that its rationale is limited to civil money penalties. And nothing in the opinion suggests that the "vital" concerns expressed by the Court about repose, stale

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federal securities law cases may be primarily punitive or primarily compensatory for federal tax law purposes depending on the facts and circumstances of a particular case. When disgorgement does not compensate victims, it should be treated as a non-deductible penalty).

evidence, and uncertainty would be somehow remediated simply because the SEC styles its disgorgement claim as "equitable" rather than punitive. "Given the reasons why we have statutes of limitations, there is no discernable rationale for applying § 2462 when" the SEC seeks a monetary penalty "but not when" it seeks disgorgement. *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). "The concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to" civil money penalties and disgorgement. *Id*. (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)). The Tenth Circuit's holding would leave defendants exposed to government disgorgement claims "not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223; *see supra* at 1-2. As Chief Justice Marshall observed, such a result would be "utterly repugnant to the genius of our laws." *Gabelli*, 133 S. Ct. at 1223 (quoting *Adams*, 6 U.S. (2 Cranch) at 342).

The logical ramification of *Gabelli* is that the SEC may not impose punitive sanctions like disgorgement if those sanctions are based on claims that accrued more than five years before the SEC initiated an enforcement action. The Court should make clear that it meant what it said in *Gabelli* and that the central purpose of Section 2462 should not be undermined by creating an indefinite threat of government enforcement actions.

II. THE TENTH CIRCUIT'S EXEMPTION OF DISGORGEMENT CLAIMS FROM SECTION 2462'S LIMITATIONS WOULD CREATE UNCERTAINTY AND INSTABILITY IN THE FINANCIAL MARKETS

Applying Section 2462 to all SEC enforcement actions makes sense and advances the important policy reasons for statutes of limitations that this Court articulated in *Gabelli*. The bright line Congress drew when it enacted Section 2462's five-year limitations period serves a vital role in the administration of justice and provides markets with stability and certainty. Requiring the SEC to bring disgorgement claims within five years of an alleged violation promotes effective deterrence, protects against the specter of stale claims, and provides fairness and efficiency in the securities markets. The Tenth Circuit's ruling would undermine these important objectives by permitting the government to bring civil disgorgement claims in perpetuity.

A. The Decision Below Undermines the Enforcement of the Securities Laws by Promoting Stale Claims

The Tenth Circuit's exemption of claims for disgorgement penalties and forfeitures from the limitations of Section 2462 has the potential to degrade the efficient enforcement of the securities laws. This Court explained in *Gabelli* that statutes of limitations provide "security and stability to human affairs" and are "vital to the welfare of society." 133 S. Ct. at 1221 (internal quotation marks and citations omitted). As this Court has long recognized, "it does not follow that" extending the reach of civil remedies in the securities laws "better serve[s]" "the objectives of the statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("mak[ing] the civil remedy more far reaching. . . . may disserve the goals of fair dealing and efficiency in the securities markets").

Section 2462's limitations period protects market participants from the problems of proof that would arise if long-delayed litigation were permissible. Disgorgement claims based on conduct that occurred more than five years before the claims were brought undermines the goals of fairness and efficiency in the securities markets. Cases brought years or decades after the fact become shrouded in faded memories and lost evidence. As this Court has cautioned, when claims are "allowed to slumber" for that long, often "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quoting *R.R. Telegraphers*, 321 U.S. at 348-49). Limitations periods thus "promote justice by preventing surprises through the revival of [such] claims." *Id.*; *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("'[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.'" (quoting *R.R. Telegraphers*, 321 U.S. at 349); *3M Co.*, 17 F.3d at 1457 ("Statutes of limitations also reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'") (internal citation omitted); Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 Alb. L. Rev. 5, 52 (1994) ("As the SEC . . . bring[s] cases that are increasingly distant from the time of the alleged violations, faded memories and the disappearance of evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)"). These concerns ring especially true in the securities industry, which experiences high employee turnover and cyclical downsizing. When the SEC pursues an enforcement action more than five years after an event has occurred, the relevant employees are less likely than in other industries to be performing the same job for the same employer, which makes investigations and trials more costly and less reliable.

Section 2462's five-year limitations period is therefore essential to the functioning of affirmative defenses under the securities laws, which could otherwise be undermined by the passage of time. This is particularly true of disgorgement claims, where the SEC is required to proffer only a "reasonable approximation" of profits to create a "presumption of illegal profits." *SEC v. Teo*, 746 F.3d 90, 105 (3d Cir. 2014). Evidentiary problems associated with stale claims are particularly acute for defendants in rebutting this presumption. The ability to rebut disgorgement claims with viable evidence deteriorates with the passage of time. By subjecting defendants to the indefinite threat of stale claims, the Tenth Circuit's ruling would deprive market participants the opportunity to gather exculpatory evidence and mount a defense while facts are still fresh.[6]

Setting a fixed date when exposure to government enforcement efforts ends no matter what relief is requested has the further salutary effect of encouraging the SEC to focus on its central "mission" to "protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions." SEC Div. of Enforcement, *Enforcement Manual* at 1 (2016). As the SEC has acknowledged, "[s]wift investigations generally are most effective and enhance the public interest." *Id.* at 32. "The public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions." Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC*

[6] The risk of stale and lost evidence for claims based on conduct that occurred more than five years ago is further compounded by the fact that records retention policies for financial services firms often correlate to the time periods in relevant statutes and regulations, which – like Section 2462 – generally do not exceed five years. *See*, *e.g.*, 12 C.F.R. § 219.24 (records retention period for domestic and international funds transfers and transmittals of funds is five years); Robert F. Zielinski & Vito Petretti, *Records Retention: What Banks Don't Know Can and Likely Will Hurt*, 119 Banking L.J. 350, 351-52 (2002); 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (Statement of Sen. Leahy) ("[I]t is intended that the SEC promulgate rules and regulations that require the retention of such substantive material . . . for such a period as is reasonable and necessary for effective enforcement of the securities laws . . . most of which have a five-year statute of limitations.").

Enforcement Actions, 4 Harv. Bus. L. Rev. 129, 155 (2014). It is reasonable to "expect the SEC to focus its efforts on bringing claims in a timely fashion" to protect market participants from being confronted with old and stale claims brought by the SEC decades after the alleged misconduct. *Id.* A rule that allows the government to sleep on its rights for years or decades and then bring a disgorgement claim when a defendant's potential defenses have all but disappeared promotes the wrong kind of incentives and defangs an important check on government enforcement.

The passage of time also diminishes the deterrent effect of disgorgement. *See Johnson*, 87 F.3d at 492 n.14 ("[T]he SEC argues that enforcing § 2462 would 'hobble efforts to prevent future harm to the public.' It is equally likely, however, that once the SEC has delayed more than five years in proceeding against a [defendant] it considers a grave threat to the public, the bulk of the harm has already been done." (internal citation omitted)); *see also Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. On Securities, Insurance, and Investment of the S. Comm. On Banking, Housing, and Urban Affairs*, 111th Cong. 46 (2009) (Statement of Robert Khuzami, Director, SEC) ("[I]f there is a wide gap between conduct and atonement, then the message – to the investing public that the SEC is vigilant and effective, as well as the message to those who might themselves be considering a step outside the law – is diluted. . . . [T]he opportunity to achieve a permanent change in behavior and culture is greatly reduced.").

B. The Decision Below Undermines the Principles of Repose and Certainty

Disgorgement awards generally dwarf the statutory penalties imposed in government enforcement actions. In 2015 alone, the SEC obtained $1.2 billion in civil monetary penalties but an additional $3 billon in disgorgement orders. *See* SEC, *Select SEC and Market Data Fiscal 2015*, 2 (2016).[7] Repose and certainty are accordingly especially important for disgorgement claims because they expose defendants to potentially crippling monetary awards. But the Tenth Circuit's construction of Section 2462 would create a permanent cloud of potential liability over financial market participants. Absent a "fixed date when exposure to Government enforcement efforts ends," businesses, investors, and securities professionals are stripped of the repose that statutes of limitations are designed to provide. *See Gabelli*, 133 S. Ct. at 1221. Such never ending liability would create significant uncertainty for those whose careers, reputations and financial security are at stake.

The Tenth Circuit's ruling would have a destabilizing effect on the efficient functioning of the securities markets by eliminating predictability and undermining the ability of industry participants to act based on reasoned assumptions about the possibility of disgorgement claims and liability. *See Wilson v. Garcia*,

[7] The district court here ordered Petitioner to pay a monetary penalty of $2.4 million. That was a small fraction of the disgorgement award of approximately $35 million plus an additional $18 million in prejudgment interest. Pet. App. 45a.

471 U.S. 261, 275 n.34 (1985) ("Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."). It has long been recognized that securities law is "an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). Claims that can be made forever are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A.*, 511 U.S. at 188 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)). The uncertainty "can have ripple effects" across the financial markets, "increas[ing] costs incurred by professionals" which then "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* at 189. Such open-ended liability increases the cost of business transactions, making due diligence more difficult and burdening successor corporations with a predecessor's misconduct. *See* Catherine E. Maxson, Note, *SEC Enforcement Suits: The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512, 529 (1995) ("If SEC enforcement suits could impose staggering fines on corporate entities at any time, the transaction costs of contracting would increase as parties would have to compensate for this risk of liability.").

In contrast, the enforcement of Section 2462 in SEC disgorgement actions, by eliminating "protracted liability," *CTS*, 134 S. Ct. at 2183, adds predictability that serves the important purpose of enabling financial institutions to deploy for productive use capital that otherwise might be tied up indefinitely in reserves to cover potential liability. It protects new shareholders, bondholders and management from liability for conduct that occurred at a time when they were not associated with the business. And it prevents strategic delay or efforts to seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990).

Applying Section 2462's five-year statute of limitations to claims seeking disgorgement serves a vitally important role in the administration of justice and brings stability and certainty to the law. Like the position of the SEC that this Court rejected in *Gabelli*, the ruling below would frustrate the goals of repose and certainty underlying Section 2462. It is vital to the securities industry and financial markets that laws are construed and applied as enacted by Congress and that statutes of limitations are enforced. In the absence of a limitations period for disgorgement, market participants lack the certainty of knowing that at some point their conduct will be free from scrutiny. Businesses and individuals would never be free from potential SEC claims, so long as the SEC labels its sanctions as "equitable."[8]

[8] Because Section 2462 is also a default statute of limitations for the government outside the securities context, the impact of the Tenth Circuit's decision extends beyond SEC proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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Respectfully submitted,

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For example, it could affect possible claims by the Commodity Futures Trading Commission in the futures and derivatives industry and the Federal Energy Regulatory Commission in the energy industry.