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 FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PETROLEUM INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

STACY LINDEN
PETER TOLSDORF
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, NW
Washington, DC 20005

MATTHEW T. MARTENS
Counsel of Record
JOHN BYRNES
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

AGENCY PROCEEDINGS

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Petroleum Institute (API) is a national trade association representing more than 640 companies in the oil and natural gas industry. Its members range from the largest major integrated oil companies to the smallest of independents, as well as other producers, refiners, suppliers, pipeline operators, marine transporters, and service and supply companies that support all segments of the industry. Together with its member companies, API is committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner. API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues related to the enforcement of federal energy and environmental regulations.

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

The members of the Chamber and API recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that our markets function fairly and effectively. As Congress has established, however, those enforcement powers must be checked by reasonable statutes of limitation and repose that apply as strongly to punitive disgorgement as to other fines, penalties, and forfeitures. Regardless of its particular form, the cloud of potential liability hampers business and investment activity, and long-belated enforcement actions are less likely to protect or help market participants. The Court should reverse the decision of the Tenth Circuit.

SUMMARY OF ARGUMENT

In October 2009, the SEC filed suit against petitioner seeking, among other things, "disgorgement" of ill-gotten gains from alleged securities law violations. Pet. App. 2a. After a trial more than five years later (in November 2014), the district court ordered that petitioner disgorge approximately $35 million, of which approximately $30 million was the result of conduct that occurred more than five years before the SEC's complaint was filed. *Id.* 45a; Dist. Dkt. 181, at 2. The district court further ordered that petitioner pay $18 million in prejudgment interest on the disgorgement award. Pet. App. 45a. Petitioner argued that he should not be faced with crippling monetary penalties based on conduct occurring as much as fourteen years before the SEC filed suit (and twenty years before the matter was finally litigated). However, the SEC responded that there is *no* statute of limitations for "disgorgement" claims. *Id.* 41a. According to the SEC, disgorgement is not a "fine, penalty, or forfeiture" subject to the five-year statute of limitations set out in 28 U.S.C. § 2462.

This is not an isolated issue. Like the SEC, numerous other federal agencies rely on disgorgement and restitution orders to obtain major monetary awards against defendants. *See, e.g.*, Consent Order, *In re Citibank, N.A.*, 2015-CFPB-0015 ¶¶ 7(h), 32, 79, 104 (July 21, 2015) (CFPB order imposing civil penalties of $35 million and restitution of $700 million for deceptively marketed credit monitoring services, for conduct beginning as early as 2003); *United States* v. *Philip Morris Inc.*, 116 F. Supp. 2d 131, 150 & n.27 (D.D.C. 2000) (permitting Department of Justice to seek disgorgement for profits earned by tobacco companies from 1953 to the present); *United States ex rel. Zissler* v. *Regents of Univ. of Minnesota*, 992 F. Supp. 1097, 1109 (D. Minn. 1998) (permitting government to seek disgorgement of profits from sale of drug over two decades, in violation of FDA order). And like the SEC, numerous other federal agencies enforce statutes that are subject only to the limitations period of § 2462. Thus, under the Tenth Circuit's reading of § 2462, businesses are faced with the permanent specter of massive liability (with constantly accruing prejudgment interest) from across the regulatory spectrum. As more agencies follow the SEC's lead in pursuing aggressive theories of disgorgement—emboldened by the Tenth Circuit's decision—the risk to businesses will only grow.

Allowing agencies to seek disgorgement orders without limitation is contrary to the basic principles of repose and certainty. In addition to a lack of certainty, the Tenth Circuit's decision, if upheld, will be unfair to businesses in multiple ways. *First*, given that agencies regularly seek to impose liability based on new interpretations of the law or enforcement priorities, the Tenth Circuit's rule would increase the risk that agencies will seek disgorgement for long-past conduct that may have been acceptable at the time. *Second*, the potential for disgorgement liability is not only indefinite, but irreversible—in the bankruptcy context, agencies have taken the contradictory position that disgorgement orders are non-dischargeable penalties. *Third*, because agencies are only required to provide a "reasonable approximation" of the amount to be disgorged, it is defendants that bear the burden of fading memories and lost documents in belated enforcement actions.

Basic fairness demands that the liability risk posed by these potentially astronomical disgorgement awards have an expiration date. In enacting § 2462, Congress agreed. Accordingly, this Court should reverse the decision of the Tenth Circuit.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WOULD ALLOW AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT TO SEEK PUNITIVE DISGORGEMENT WITHOUT LIMITATION

Aggressive disgorgement is not just a tactic employed by the SEC to avoid statutory limitations periods. Since the SEC pioneered the use of disgorgement in the 1970s, *see SEC* v. *Texas Gulf Sulphur Co*., 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, 446 F.2d 1301 (2d Cir. 1971), agencies throughout the federal government have adopted disgorgement as a powerful tool to punish and deter misconduct. Under the Tenth Circuit's decision, many of these agencies would be free to seek disgorgement without any time limitation: Just like the SEC-enforced Securities Act, Exchange Act, Advisers Act, and Investment Company Act, countless federal statutes fail to specify a limitations period, relying instead on the default period congressionally established by § 2462.

While it is impractical to describe the enforcement practices of every one of the many agencies that seek to recover disgorgement, the following discussion illustrates the broad range of uses—and abuses—of disgorgement throughout the federal government.[2]

A. The Consumer Financial Protection Bureau (CFPB)

In its early years as the enforcer of a range of federal consumer protection laws, the CFPB has shown a willingness to take aggressive litigation positions in an effort to maximize monetary payments from companies and to avoid statutes of limitations.

As is the case with the SEC, the disgorgement sought by the CFPB may dwarf the civil penalties imposed. *See*, *e.g.*, *CFPB* v. *Corinthian Colls.*, *Inc.*, 2015

---

[2] In addition to the agencies discussed below, a partial list of other agencies that seek disgorgement and other equitable monetary relief includes the Department of Energy, *United States* v. *Sutton*, 795 F.2d 1040, 1062 (Temp. Emer. Ct. App. 1986) (ordering over $200 million in disgorgement for price control violations); the Department of Housing and Urban Development, *United States* v. *Incorporated Vill. of Island Park*, 791 F. Supp. 354, 370 (E.D.N.Y. 1992) (holding that government claim for disgorgement of profits from developers of housing project was not barred by statute of limitations); the Department of Justice, *United States* v. *Keyspan Corp.*, 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011) (permitting disgorgement for antitrust violations); the Federal Communications Commission, *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1105 (D.C. Cir. 1987) (ordering over $100 million in disgorgement for excessive rates); the Federal Election Commission, *FEC* v. *Craig for U.S. Senate*, 816 F.3d 829, 848 (D.C. Cir. 2016) (ordering senator to disgorge nearly $200,000 in improperly used campaign funds); and the Federal Reserve Bank, Order ¶¶ 6, 12, *In re Higher One, Inc.*, No. 15-026-E-I (Dec. 23, 2015) (ordering restitution of $24 million and imposing civil penalty of $2 million for unlawful conduct related to student loans).

WL 10854380, at *6 (N.D. Ill. Oct. 27, 2015) (entering disgorgement order of $531 million against for-profit college, equal to the entire face value of loans issued, plus fees and interest); Consent Order, *In re Citibank, N.A.*, 2015-CFPB-0015 ¶¶ 7(h), 32, 79, 104 (July 21, 2015) (ordering civil penalties of $35 million and restitution of $700 million for deceptively marketed credit monitoring services, for conduct beginning as early as 2003). In pursuing these disgorgement orders, the CFPB discards traditional notions of equity and seeks amounts that exceed both the benefits to defendants and the harm to consumers—*i.e.*, refusing to deduct business expenses or offset benefits to consumers. *See, e.g.*, *CFPB* v. *Mortgage Law Grp., LLP*, 196 F. Supp. 3d 920, 950 (W.D. Wis. 2016) (ordering two law firms to disgorge over $20 million, consisting of the firms' total revenues, not profits, from providing home loan modification services).

Although a number of the consumer protection statutes enforced by the CFPB contain express limitation periods, the CFPB has argued that those limitations apply only to private actions brought under the statute. *See, e.g.*, *CFPB* v. *Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1376 (N.D. Ga. 2015) (arguing that one-year limitations period in Fair Debt Collection Practices Act does not apply to the government); *CFPB* v. *ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015) (arguing that one-year limitations period in Truth In Lending Act does not apply to the government). If the limitations periods in these statutes do not apply, § 2462 stands as a needed protection against indefinite government action.[3]

---

[3] Section 2462 also operates as a backstop to other statutes of limitation that have a discovery rule. For example, enforcement proceedings by the CFPB against "unfair, deceptive, or abusive act

The CFPB has also taken the startling position that it need not comply with *any* statutes of limitations when proceeding administratively. *See PHH Corp.* v. *CFPB*, 839 F.3d 1, 50 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). *PHH* involved an effort by the CFPB to impose a $109 million disgorgement order based on a retroactive interpretation of the Real Estate Settlement Procedures Act, for conduct occurring as far back as 2008. *Id.* at 46. A panel of the D.C. Circuit rejected the CFPB's position, citing § 2462 for the proposition that "[t]he general working presumption in federal civil and criminal cases is that a federal civil cause of action or criminal offense must have some statute of limitations and must not allow suits to be brought forever and ever after the acts in question." *Id.* at 50. Although the Bureau's approach has so far been unsuccessful, businesses have little assurance that the CFPB will not follow the SEC's lead and shift to using disgorgement to avoid statutes of limitations. Business should not be forced to trust in agencies' "prosecutorial discretion" not to bring stale cases years or decades after the fact. *Id.*

---

or practice[s]" (UDAAP) may not be brought "more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. §§ 5531(a), 5564(g)(1). This general limitations period, however, does not override § 2462's 5-year limitations period, which is specific to actions for the enforcement of a "civil fine, penalty, or forfeiture." *Cf. Ditthardt* v. *North Ocean Condos, L.P.*, 580 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008) (considering two separate federal statutes of limitations, concluding that "where two statutes of limitations might be read to apply in a particular situation, one general and one more specific, the general rule is that the court must apply the more specific limitations period" (citing cases)).

B. The Environmental Protection Agency (EPA)

Like the SEC, many of the statutes enforced by the EPA lack statutory limitations periods. *See, e.g.*, *United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 646 (7th Cir. 2013) (Clean Air Act); *United States* v. *Mlaskoch*, 2014 WL 1281523, at *10 (D. Minn. Mar. 31, 2014) (Clean Water Act); *Mayes* v. *EPA*, 2008 WL 65178, at *7 (E.D. Tenn. Jan. 4, 2008) (Resource Conservation and Recovery Act). As a result, EPA is subject to § 2462's five-year limitations period when pursuing enforcement actions. *See Mlaskoch*, 2014 WL 1281523, at *10.

As a general practice, the EPA relies heavily on civil penalties to obtain monetary relief in its enforcement actions. However, there is little substantive difference between the civil penalties imposed by the EPA and the type of disgorgement sought by the SEC. For example, in calculating penalties under the Clean Water Act, courts will look to the "wrongful profits" obtained while the defendant was operating in violation of the law. *United States* v. *Mun. Auth.*, 150 F.3d 259, 267 (3d Cir. 1998); *see also* 33 U.S.C. § 1319(d) (requiring consideration of "economic benefit" in setting penalty). Then, when calculating the amount of those wrongful profits, courts will rely on "'reasonable approximations of economic benefit.'" *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999); *accord In re B.J. Carney Indus.*, 7 E.A.D. 171, 217-218 (EPA 1997). Notably, these are precisely the standards the courts use in calculating disgorgement in SEC enforcement actions. *See* Pet. App. 44a. Thus, in seeking the same type of punitive disgorgement used by the SEC, the EPA would be able to avoid the five-year statute of limitations simply by characterizing its remedy as "disgorgement" rather than a "penalty." The Court should not sanction this anomalous result and should instead properly recognize disgorgement as equivalent to a penalty or forfeiture.

C. The Federal Energy Regulatory Commission (FERC)

After the SEC began pursuing disgorgement in the 1970s, FERC quickly followed suit. *See, e.g.*, *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99, 101-102 (10th Cir. 1984) (ordering payment of appropriate rates for past deliveries of natural gas); *Mesa Petroleum Co.* v. *Federal Power Comm'n*, 441 F.2d 182, 186 (5th Cir. 1971) (ordering refund of excessive amounts paid for natural gas). Before the Energy Policy Act of 2005,[4] FERC did not have the authority to impose civil penalties, so disgorgement was the only option for monetary relief. *See Coastal Oil & Gas Corp.* v. *FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986). Given the limitations on FERC's enforcement powers, courts were careful to ensure that FERC disgorgement orders did not take on the characteristics of a penalty. *See id.* (finding that FERC disgorgement order constituted an unauthorized penalty, on grounds that order required company to "forfeit[] all of its profits, but … also [be] denied any payment whatsoever for the gas, including the recoupment of costs"); *see also People of State of California ex rel. Brown* v. *Powerex Corp.*, 135 FERC ¶ 61,178, ¶ 62,073 (May 24, 2011) (rejecting California's

---

[4] *See* Pub. L. No. 109-58, § 314, 119 Stat. 594, 690-691 (2005) (codified at 15 U.S.C. § 717t-1). The penalty provisions of the Energy Policy Act are harsh—$1 million per day per violation—and have the potential to lead to heavy liability. *See, e.g.*, *FERC* v. *Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1127 (E.D. Cal. 2015) (upholding FERC order with $435 million in civil penalties and $34.9 million in disgorgement).

requested disgorgement order as a time-barred penalty, and rejecting argument that the relief was "appropriate because it would make the ratepayers of California whole").[5]

Other than § 2462, FERC enforcement actions are not subject to any statutes of limitation—both the Federal Power Act and the Natural Gas Act are silent on limitations periods. *See Prohibition of Energy Mkt. Manipulation*, 114 FERC ¶ 61,047, 61,128 (Jan. 19, 2006). As a result, if § 2462 is read not to cover disgorgement orders, energy companies and other market participants will face substantial uncertainty as to whether long-past conduct will be subject to disgorgement. Furthermore, upholding the Tenth Circuit's decision will sanction the SEC's aggressive use of the disgorgement remedy, providing a model for FERC to expand its enforcement tools.

D. The Federal Trade Commission (FTC)

The FTC has been direct in its intent to use disgorgement to avoid limitations on its ability to penalize long-past conduct.

In the past, the FTC's use of monetary equitable remedies was limited by the analytical framework set forth in its *Policy Statement on Monetary Equitable Remedies in Competition Cases*. 68 Fed. Reg. 45,820 (Aug. 4, 2003). In 2012, however, the FTC withdrew that guidance, noting that "Supreme Court jurisprudence has increased burdens on plaintiffs, and legal thinking has begun to encourage greater seeking of disgorgement."

---

[5] Although these courts analyzed whether FERC disgorgement orders were "penalties," they did not analyze whether those orders were "forfeitures."

FTC, Statement of the Commission (July 31, 2012). Consistent with the new guidance, the FTC has aggressively pursued disgorgement, including for conduct outside the five-year limitations period of § 2462. *See* FTC, Dissenting Statement of Comm'r Ohlhausen (Apr. 17, 2015) (dissenting from FTC's decision in 2015 to pursue disgorgement against Cardinal Health based on its allegedly monopolistic conduct between 2003-2008—despite the lack of any clear violation and the inability to calculate damages with any certainty).

Even before the FTC's recent shift in enforcement strategy, its disgorgement and restitution orders had the effect of punishing defendants. Instead of basing its calculations on the defendant's profits or unjust enrichment, the FTC calculates the amount of disgorgement or restitution as the amount paid by consumers, offsetting only for direct refunds. *See, e.g.*, *FTC* v. *Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (affirming restitution order of up to $49.95 million for fraudulent heat detectors); *FTC* v. *Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (ordering restitution of $9 million for fraudulent sale of weight loss and other pills).[6] The FTC certainly has the authority to seek such remedies. *See* 15 U.S.C. § 53(b) (authorizing injunctive relief); *id.* § 57b(b) ("The court … shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers …. Such relief may include, but shall not be limited to, rescission or

---

[6] *See also FTC* v. *AMG Servs., Inc.*, 2016 WL 5791416, at *12 (D. Nev. Sept. 30, 2016) (ordering restitution of $1.3 billion, calculated by totaling all finance charges paid on payday loans and applying presumption that every consumer actually relied on the misleading loan disclosures).

reformation of contracts, [and] the refund of money or return of property[.]"). But such remedies should be recognized as equivalent to civil penalties or forfeitures, and thus subject to the five-year limitations period of § 2462, unless Congress expressly provides otherwise.

E. The Food and Drug Administration (FDA)

Invoking the courts' equitable power to "restrain violations" of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 332(a), the FDA has had success in obtaining significant disgorgement orders. *See United States* v. *Lane Labs-USA Inc.*, 427 F.3d 219, 234 (3d Cir. 2005) (discussing consent decrees ordering disgorgement with Abbott Labs ($100 million), Wyeth-Ayerst ($30 million), and Schering-Plough ($500 million)).[7]

Courts have generally affirmed the FDA's ability to seek disgorgement.[8] The FDA's use of restitution and

---

[7] The FDCA "does not provide a statute of limitations." *United States* v. *Scenic View Dairy, LLC*., 2011 WL 3879490, at *18 (W.D. Mich. Sept. 1, 2011) (the FDCA itself does not provide a statute of limitations). As a result, § 2462 provides the only time limit on civil actions brought under the statute. *Cf. United States* v. *Caputo*, 288 F. Supp. 2d 912, 919 (N.D. Ill. 2003) (applying five-year default statute of limitations for criminal actions, 18 U.S.C. § 3282, in prosecution involving violations of the FDCA).

[8] *E.g.*, *United States* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006) (reversing district court order denying disgorgement of profits from company selling Canadian prescription drugs); *Lane Labs-USA Inc.*, 427 F.3d at 236 (affirming district court order granting restitution to purchasers of unapproved drugs); *United States* v. *Universal Mgmt. Servs., Corp.*, 191 F.3d 750, 764 (6th Cir. 1999) (affirming district court order granting restitution to purchasers of unapproved medical device); *but see United States* v. *Ten Cartons, Ener-B Nasal Gel*, 888 F. Supp. 381, 404 (E.D.N.Y.) ("Disgorgement, in the Court's view, will

disgorgement, however, has engendered substantial debate. *See Lane Labs-USA Inc.*, 427 F.3d at 234-235 (citing articles). As courts and commentators have recognized, disgorging profits or requiring restitution operates as a harsh remedy—in some cases as serious as the FDA's ultimate remedy of seizure. *See United States* v. *C.E.B. Prods., Inc.*, 380 F. Supp. 664, 668 (N.D. Ill. 1974) ("This passage strongly suggests that the House, at least, considered seizure to be the most severe remedy and that injunctive proceedings were viewed as a means to alleviate the hardships seizures might cause to manufacturers."); Vodra & Levine, *Anchors Away: The Food and Drug Administration's Use of Disgorgement Abandons Legal Moorings*, 59 Food & Drug L.J. 1 (2004) (arguing that FDA's use of disgorgement is punitive and illegal).

In short, numerous federal agencies can and do use disgorgement to punish misconduct. The Court should look to the practical effect of disgorgement orders—not their label as "equitable"—and recognize them as the penalties and forfeitures they are.

II. THE COURT OF APPEALS' READING OF SECTION 2462 IS UNFAIR AND HARMFUL TO BUSINESSES

As a practical matter, disgorgement is one of the most significant remedies available to government agencies, often vastly outstripping the dollar value of civil penalties imposed. *See, e.g.*, CFPB, *Factsheet: Enforcing Federal Consumer Protection Laws* at 1 (July 13, 2016) ($11.7 billion in disgorgement and restitution orders; $440 million in civil penalties); Press Release, No. 7488-16, *CFTC Releases Annual Enforcement*

---

only serve a punitive purpose and is not appropriate or necessary."), *aff'd on other grounds*, 72 F.3d 285 (2d Cir. 1995).

Results for Fiscal Year 2016 (Nov. 21, 2016) ($543 million in disgorgement and restitution orders; $748 million in civil penalties); FTC, *Stats & Data 2015*, at 3 ($2 billion in redress and disgorgement; $21.8 million in civil penalties); SEC, *Select SEC and Market Data Fiscal 2016*, at 2 ($2.8 billion in disgorgement orders; $1.3 billion in civil penalties). As a consequence, if only civil penalties and fines are subject to § 2462's limitations period, companies will never have repose from much of the liability they face. Indeed, because agencies can readily replicate civil penalties by pursuing aggressive theories of liability, the Tenth Circuit's reading of § 2462 renders the statute largely irrelevant.

This is not an outcome intended by Congress or sanctioned by the Court. As the Court has recognized, without a statute of limitations, businesses are left "exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013); *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.'"); *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (reasoning that permitting an action for debt to "be brought at any distance of time … would be utterly repugnant to the genius of our laws. In 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."). In addition to providing much needed certainty to businesses, statutes of limitation promote effective enforcement of the law, by focusing agencies on responding to fresh cases and uncovering ongoing misconduct.

These general concerns are compounded by enforcement practices that further increase the level of uncertainty and unfairness to businesses.

First, agencies often seek to impose liability, including disgorgement, based on retroactive interpretations of the law. For example, until 2011, private equity advisers were not required to register with the SEC under the Investment Advisers Act of 1940. *See* 17 C.F.R. 275.203A-1; 76 Fed. Reg. 42,950, 42,951 (July 19, 2011). Despite this, the SEC proceeded to launch a series of enforcement actions against private equity advisers for long-past conduct that, in many cases, ended *before* the new regulation came into effect. *See, e.g.*, *In re Blackstreet Capital Mgmt. LLC*, SEC Release No. 77959 (June 1, 2016) (requiring disgorgement of over $2.5 million and imposing $500,000 civil penalty for conduct from 2005 to 2012); *In re Kohlberg Kravis Roberts & Co. LP*, SEC Release No. 4131 (June 29, 2015) (requiring disgorgement of over $18 million and imposing a $10 million civil penalty for conduct from 2006 to 2011).[9] Likewise, the CFPB has attempted to apply retroactive interpretations of various consumer protection laws in seeking disgorgement—although it has not had much success in court. *See, e.g.*, *PHH Corp* , 839 F.3d at 46 (rejecting argument that 2015 interpretation of Real Estate Settlement Practices Act should be applied to conduct starting in 2008); *CFPB* v. *Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016) (petition for certiorari docketed) (reversing and remanding $11 million disgorgement

---

[9] *See also* Press Release No. 2015-245, *SEC Announces Enforcement Results For FY 2015* (Oct. 22, 2015) (characterizing enforcement action against Kohlberg Kravis Roberts & Co. as "first-of-[its]-kind").

order against attorney providing home loan modification services, where CFPB sought retroactive application of regulation). The propensity of agencies to seek retroactive application of the law and to shift their enforcement priorities underscores the need for a predictable and firm limit on an agency's ability to reach into the past.

Second, contrary to the SEC's characterization of disgorgement as a non-punitive equitable remedy in this case, the SEC and other agencies have successfully argued that a disgorgement order is not dischargeable in bankruptcy, as a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." 11 U.S.C. § 523(a)(7); *see In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992).[10] In accepting the SEC's argument that disgorgement is a nondischargeable "fine, penalty, or forfeiture," one court explained that the "deterrence purpose" of disgorgement is "sufficiently penal to characterize the resulting debt as a 'fine, penalty, or forfeiture.'" 144 B.R. at 565. Similarly, the IRS has taken the position that disgorgement orders may be nondeductible, "punitive" debts where the order "serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal

[10] *See also, e.g., In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998) ("It is easy enough to call restitution under the Illinois Consumer Fraud and Deceptive Business Practices Act 'a fine, penalty, or forfeiture.'"); *HUD* v. *Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) ($8.65 million disgorgement order obtained by Department of Housing and Urban Development not dischargeable in bankruptcy, because government's interest in enforcing debt was "penal"); *In re Jensen*, 395 B.R. 472, 484 (Bankr. D. Colo. 2008) ($228,836 disgorgement order obtained by State of Colorado not dischargeable in bankruptcy, because of "penal and deterrence goals" of Colorado consumer protection statutes).

conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at 9 (May 6, 2016) (addressing disgorgement order sought by SEC under the Foreign Corrupt Practices Act). The IRS noted that "cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute." *Id.*

The government should not be permitted to pick and choose when its disgorgement orders are penalties or forfeitures by advancing contradictory interpretations of the same language in different statutes. *See Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) ("[l]inguistic consistency" requires reading identical language in different statutes the same); *Northcross* v. *Board of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam) ("similarity of language" is "strong indication" that statutes should be interpreted together, particularly where "'the two provisions share a common raison d'etre'"). When considered together, the contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow agencies to impose nondischargeable monetary obligations without any time restriction and without regard to whether the defendant himself ever obtained or still holds the monies ordered disgorged. It should not be lightly assumed that Congress intended to impose such a draconian burden on those subject to disgorgement and restitution orders.

Third, agency efforts to circumvent § 2462 are exacerbated by the permissive standard of proof for calculating disgorgement damages. A central policy of statutes of limitation is that "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117. Typically, these evidentiary issues affect the ability of both the defense and the prosecution to effectively litigate. Indeed, in a criminal case, the "passage of time may make it difficult or impossible for the Government" to carry its burden of proving its case beyond a reasonable doubt. *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).

Not so with disgorgement. In seeking disgorgement, an agency only needs to propose a "reasonable approximation" of the profits, which "creates a presumption of illegal profits." *SEC* v. *Teo*, 746 F.3d 90, 105 (3d Cir. 2014). The defendant may seek to show that the calculation is inaccurate, but he bears the risk of uncertainty. *Id.* Rebutting an agency's "reasonable approximations" is already difficult for defendants. *See SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Unfortunately, we encounter imprecision and imperfect information. Despite sophisticated econometric modelling, predicting stock market responses to alternative variables is, as the district court found, at best speculative. Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task."); *see also Gordon*, 819 F.3d at 1196 (approximating amount of disgorgement at the full value of unlawful legal services provided, and putting burden on defendant to show that consumers were "satisfied" with their services, received refunds, or did not rely on fraudulent statements). But when enforcement actions are brought years after the fact, it may be all but impossible for the defendant to trace the chain of causation and segregate legitimate profits. In effect, the defendant must bear not only the uncertainty created by his misconduct, but by the government's delay. Accordingly, because of this reversal of the typical burdens, it is even more critical for § 2462's limitations period to apply to disgorgement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Tenth Circuit.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

STACY LINDEN
PETER TOLSDORF
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, NW
Washington, DC 20005

MATTHEW T. MARTENS
Counsel of Record
JOHN BYRNES
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

MARCH 2017