No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A 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 AS AMICUS 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

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

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INTEREST OF AMICUS 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 Chamber's members recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that financial and other 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 grant certiorari to address this important issue.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this matter have consented to submission of this brief.

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).

The SEC responded that there is *no* statute of limitations for "disgorgement" claims. Pet. App. 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. The SEC's position here is not unique to this case. The SEC regularly brings enforcement actions seeking disgorgement for decades-old conduct. *See, e.g.*, *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (imposing disgorgement in case where "substantial portion" of conduct took place as long as ten years before the SEC brought its action); *SEC* v. *Wyly*, 56 F. Supp. 3d 260, 270 (S.D.N.Y. 2014) (imposing disgorgement in case involving thirteen-year course of conduct that began nearly twenty years before SEC brought its action). Yet the SEC has argued—successfully—that, for purposes of the Bankruptcy

Code, disgorgement is a "fine, penalty, or forfeiture" that is not dischargeable in bankruptcy.

Thus, in the SEC's view, a defendant in an agency enforcement action is forever liable for potentially crippling monetary awards that may never be discharged. This is an extraordinary position. Statutes of limitation "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," *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944), and provide "certainty about … a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). These fairness and certainty principles are particularly important in the case of disgorgement. Disgorgement awards generally far outstrip the statutory penalties imposed, perhaps because the courts require the government to provide only a "reasonable approximation" of ill-gotten gains to be disgorged, shifting to the defendant the burden of demonstrating, potentially decades after the fact, that the government's approximation is imprecise or inaccurate.

The concerns raised by the SEC's enforcement approach are not limited to this enforcement context. Numerous other federal agencies can and do seek disgorgement awards. Basic fairness demands that the liability risk posed by these potentially astronomical awards have an expiration date. Congress agreed in enacting § 2462, which by its terms applies to "any" penalty or forfeiture.

ARGUMENT

I. SECTION 2462'S FIVE-YEAR LIMITATIONS PERIOD APPLIES TO DISGORGEMENT

Section 2462, the default statute of limitations for federal civil enforcement actions, provides that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462.

In *Gabelli* v. *SEC*, the Court recognized the applicability of § 2462 to statutory penalties imposed in SEC enforcement actions, but expressly left open the question whether disgorgement is likewise considered a "fine, penalty, or forfeiture" under that provision. 133 S. Ct. 1216, 1220 n.1 (2013). Four courts of appeals have now addressed the question, but they have differed as to the answer.[2]

The issue is ripe for resolution by this Court. As discussed below, the SEC should not be permitted to shield its enforcement actions from the statutory limitations period simply by seeking expansive disgorgement orders instead of civil penalties. This

[2] *Compare SEC* v. *Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) (disgorgement subject to § 2462) *with* Pet. App. 2a (disgorgement not subject to § 2462); *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (same); *SEC* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (same).

Court should grant certiorari to resolve the circuit split.

A. Disgorgement Is Punitive, And Therefore In The Nature Of A Penalty

As noted above, the five-year limitations period of § 2462 applies to actions seeking "any … penalty." A "penalty" 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." *Johnson* v. *SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A penalty is thus animated by the "traditional aims of punishment—retribution and deterrence," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and is not solely intended to "'afford a private remedy to a person injured by the wrong,'" *Johnson*, 87 F.3d at 487. In determining the punitive nature of a remedy, courts look not only at the labels attached, but the "purpose or effect" of the remedy. *United States* v. *Ward*, 448 U.S. 242, 249 (1980).

To be clear, punishment need not be the sole or primary purpose of a remedy in order to be a penalty. Indeed, civil penalties—the penalties covered by § 2462—are distinguished from criminal penalties by the fact that they are not "so punitive" as to be criminal in nature. *Ward*, 448 U.S. at 249.

Disgorgement has substantial punitive aspects as well. *First*, disgorgement is animated by a deterrent purpose, which is a hallmark of punitive remedies. *See, e.g.*, *SEC* v. *Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The theory behind the remedy is deterrence and not compensation."); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1232 n.24 (D.C. Cir. 1989) ("[I]n the context of an SEC enforcement suit … deterrence is the key objective."); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."); *see also Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 473 n.10 (1982) ("Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served."). This is confirmed by the SEC's public statements about its enforcement actions, which highlight the deterrent and retributive effect of its disgorgement orders. *See, e.g.*, SEC, Press Release No. 2005-93 (June 28, 2005) (in announcing settlement providing for disgorgement plus interest of $474,279 and a civil penalty of $120,000, the SEC stated that "[t]his action is a message to all those who would seek to deprive mutual bank depositors of their rightful opportunity to participate in their bank's IPO. Hopefully, the actions taken today by the SEC and the Justice Department will deter anyone considering this type of misconduct in the future."); SEC, Press Release No. 2016-203 (Sept. 29, 2016) (in announcing settlement providing for nearly $200 million in disgorgement and interest, the SEC emphasized that "[f]irms will be held accountable for their misconduct no matter how they might structure complex transactions").

Second, disgorgement goes beyond the limited goal of preventing unjust enrichment, seeking profits that have not been retained by the defendant. Most directly, courts have sanctioned efforts by the SEC to seek disgorgement of profits made by third parties. For example, in *SEC* v. *Contorinis*, 743 F.3d 296 (2d Cir. 2014), the court affirmed a disgorgement order of over $7 million, plus over $2 million in prejudgment interest, despite the fact that the defendant only made a personal profit of $427,875 from the trades. *Id.* at 300-301. The court reasoned that the defendant "enhanced his reputation" by making profitable trades for his clients, and that therefore there was "no injustice … in making him responsible for the profits he made for others." *Id.* at 304.[3]

Even in cases where the profits all redound to the defendant, disgorgement may be punitive in effect—particularly where enforcement is delayed. The SEC has recognized that profits from fraud are often dissipated, whether through business expenses, personal expenditures, or investment losses. SEC, *Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002*, at 21 (2003). As a result, disgorgement orders regularly force defendants into bankruptcy and burden them with debts that they will never be able to pay. *Id.* This may be justified, but it cannot be doubted that it operates as a harsh punishment for wrongdoing.

Third, where the SEC seeks disgorgement of amounts that cannot be calculated or traced with sufficient certainty, the request "takes on the character of a plea for punitive relief." *SEC* v. *Wills*, 472 F. Supp. 1250, 1276 (D.D.C. 1978). But this is precisely what courts allow: In estimating the amount to be disgorged, the SEC is only required to provide a "reasonable approximation." *SEC* v. *Teo*, 746 F.3d 90, 107 (3d Cir. 2014). The burden then shifts to the defendant to demonstrate that this amount is not a reasonable estimate. *Id.* By putting the entire burden of

[3] Notably, the SEC sought this disgorgement remedy only after it failed to obtain criminal forfeiture of these third-party profits. *Contorinis*, 743 F.3d at 300.

uncertainty on the defendant, the disgorgement remedy has the effect of punishing defendants.

Fourth, like penalties, disgorgement orders are not remedial and compensatory in purpose—disgorgement is not pegged to the losses incurred by victims and the proceeds of a disgorgement order go to the United States, not victims. *SEC* v. *Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("In a securities enforcement action, as in other contexts, 'disgorgement' is not available primarily to compensate victims.").[4] Although the SEC may create "fair funds" to compensate victims, such funds are permitted only when penalties are imposed, and penalties are permitted only for violations within the five-year limitations period of § 2462. *See* 15 U.S.C. § 7246(a); 17 C.F.R. § 201.1100 (providing that disgorgement goes to alleged victims *only if* monetary penalties are also imposed). Thus, applying a five-year limitations period to disgorgement actions would not deprive victims of monetary compensation that would otherwise be available.

These punitive features of disgorgement orders are not incidental.[5] Instead, they derive from the principle that "the risk of uncertainty should fall on the

[4] *See also FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("While agencies may, as a matter of grace, attempt to return as much of the disgorgement proceeds as possible, the remedy is not, strictly speaking, restitutionary at all, in that the award runs in favor of the Treasury, not of the victims.").

[5] *See* Kull, *Restitution's Outlaws*, 78 Chi.-Kent L. Rev. 17, 18 (2003) ("[R]estitution does not punish, but it punishes negatively: not by imposing liability on disfavored parties, nor by enhancing the liability to which disfavored parties are subject, but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled.").

wrongdoer whose illegal conduct created that uncertainty." *First City Fin. Corp.*, 890 F.2d at 1232; *see also id.* ("[T]he line between restitution and penalty is unfortunately blurred[.]"). This is in stark contrast to the remedy of restitution. Where restitution of illegal profits is sought from an innocent recipient, the amount of restitution is calculated "by rules that are notably solicitous of the defendant." *See Restatement (Third) of Restitution and Unjust Enrichment* § 50 cmt. f (2011). When calculated in such a way, restitution does not have the characteristics of a penalty. But in the context of a disgorgement order against a wrongdoer, as the SEC has sought here, harsher rules apply. *Id.* § 51 cmt. i. These harsher rules effectively operate as punishment for the defendant's wrongdoing, and disgorgement should accordingly be treated as a penalty under § 2462.

B. Disgorgement Is A Type Of "Forfeiture"

Disgorgement is subject to the limitations period of § 2462 for the additional reason that it is a "forfeiture." Indeed, there is no meaningful difference between disgorgement and forfeiture, both in definition and in practice.

As a matter of legal parlance, the terms forfeiture and disgorgement are interchangeable. Forfeiture has long been defined as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 765 (10th ed. 2014).[6] Fitting comfortably within that definition,

[6] This meaning has remained stable since § 2462 was adopted in 1948. *See Black's Law Dictionary* 778 (4th ed. 1951) (defining forfeiture as "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty"); *Webster's Collegiate Dictionary* 393 (5th ed. 1946)

disgorgement is defined as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Id.* at 568.[7] Both terms involve the giving up of property, and both terms require the property to be given up as a result of wrongdoing. Accordingly, the case law often uses the terms interchangeably. *See, e.g.*, *United States* v. *Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures 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.").

The underlying policies of disgorgement and forfeiture are also similar. Civil forfeiture "prevent[s] further illicit use of the conveyance and … impos[es] an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).[8] Likewise, disgorgement "operates to make the illicit action unprofitable for the

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(defining forfeit as "[a] thing forfeited; that which is lost by a crime, offense, neglect of duty, or breach of contract; hence, a fine; a penalty").

[7] Disgorgement, in the sense used by the SEC, is a relatively recent term of art, appearing in less than a dozen published cases from 1800 to 1960, and first defined in Black's Law Dictionary after 2000. *See* Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 49 (2007).

[8] *See also Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) ("[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose."); *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) ("Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.").

wrongdoer." *Contorinis*, 743 F.3d at 301; *see also SEC* v. *Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998) ("Disgorgement, like the forfeitures discussed in *Ursery*, is designed in part to ensure that the defendant not profit from his illegal acts."). Moreover, courts put the burden of uncertainty on defendants in both contexts, as a consequence of the defendant's wrongdoing. *Compare Teo*, 746 F.3d at 107 ("but-for" causation sufficient to establish amount of disgorgement) *with United States* v. *Warshak*, 631 F.3d 266, 332 (6th Cir. 2010) (affirming forfeiture of entire business's revenues, whether or not legitimate sales, because sales all resulted "directly or indirectly" from a conspiracy to commit fraud).

Applying the label of "equitable" to disgorgement provides no basis to distinguish between the effect of forfeiture and disgorgement: "In both instances, money liability is predicated upon a finding of the owner's wrongful conduct." *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 718 (1971) (finding no distinction between forfeiture and fine). From the perspective of a business, the liability is the same whether termed as a disgorgement order, or civil forfeiture. The SEC should not be able to avoid the congressionally imposed limitations period of § 2462 by resort to formality.

C. The SEC's Position Is Undermined By The Contradictory Position It Has Advanced In The Bankruptcy Context

The terms of § 2462 are mirrored in the Bankruptcy Code, which provides that debts arising from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" cannot be discharged. 11 U.S.C. § 523(a)(7). Contrary to the position it has taken with respect to § 2462, the SEC has argued—successfully—that disgorgement orders fit within the bankruptcy discharge exception. *See In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992).[9] 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.'" *Id.* 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 conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at p. 9 (May 6, 2016). 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*

[9] *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).

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 Sch.*, 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 SEC's contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow the SEC 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 securities law violators, especially given that many securities law violations require no showing of culpable intent. *See, e.g.*, 15 U.S.C. § 78n(a) (solicitation of proxies); *id.* § 78k(a) (registration of securities); *id.* § 78r(a) (misleading statements); *SEC* v. *Merch. Capital, LLC*, 397 F. App'x 593, 595 (11th Cir. 2010) (per curiam) (district court abused discretion in failing to order disgorgement, where defendants failed to register securities and made material omissions out of "mere negligence"); *SEC* v. *Colello*, 139 F.3d 674, 675 (9th Cir. 1998) ($2.6 million disgorgement order against individual defendant who was non-party to fraud).

II. THE COURT OF APPEAL'S READING OF § 2462 EXPOSES BUSINESS TO UNCERTAIN AND UNFAIR LIABILITY

A. Excluding Disgorgement From § 2462 Imposes A Permanent Cloud Of Liability On Businesses

As a practical matter, disgorgement is the most significant of SEC remedies. Most of the monetary relief obtained by the SEC is disgorgement: In 2015, the SEC obtained $3 billion in disgorgement orders, but only $1.2 billion in civil monetary penalties. SEC, *Select SEC and Market Data Fiscal 2015*, at 2. The SEC's administrative penalties are capped well below what could be obtained through a disgorgement order. 17 C.F.R. pt. 201, subpt. E, tbl. IV (listing maximum civil monetary penalty amounts for securities law violations).

Since first asserting its right to disgorgement of ill-gotten profits in *SEC* v. *Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D.N.Y. 1966), the SEC has aggressively expanded its pursuit of disgorgement awards, pushing the boundaries of what disgorgement's traditional meaning can support. *See* SEC, *Report Pursuant to Sec. 308(c) of the Sarbanes Oxley Act of 2002*, at 24 (2003) (Advocating for the SEC's policy of "aggressively asserting legal arguments for disgorgement in appropriate cases" and "try[ing] to develop the law of disgorgement in a manner favoring compensation of investors"). Rather than merely requiring a defendant to return profits directly obtained through a securities violation, the SEC now views disgorgement as a means of sending a message to future violators. *See* SEC, Press Release No. 2013-182 (Sept. 17, 2013) (stating that in obtaining significant disgorgement from twenty-three investment firms, the SEC is "sending the clear message that firms must pay the price for violations").

Many courts have been receptive to the SEC's theories, imposing harsh disgorgement orders for often long-past conduct. *See, e.g.*, *Teo*, 746 F.3d at 100-109 (ordering individual defendants to disgorge over $17 million in stock sale profits, even though the substantial majority of stock value appreciation was due to an unrelated tender offer rather than defendant's violation); *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (imposing disgorgement on an individual defendant over $1.5 million plus interest for violations, the "substantial portion" of which took place as long as ten years before the SEC brought its action); *Zacharias* v. *SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (per curiam) (requiring individual defendants to disgorge over $6 million for illegal sales that occurred six years before the SEC commenced its action). In other cases, courts have balked at SEC disgorgement calculations. *See, e.g.*, *SEC* v. *Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615, 622 (W.D. Tex. 2014) (finding SEC's proposed disgorgement of $500 million, ten times the defendant's market capitalization, "neither justified nor just," and awarding $15 million instead); *SEC* v. *Wyly*, 56 F. Supp. 3d 260, 270 (S.D.N.Y. 2014) (rejecting the SEC's proposed disgorgement of all profits—$500 million—accrued over a thirteen year period, because it "defies logic to presume that all of the rise in the value of a company's stock price over thirteen years … is reasonably attributable to two directors' failure to disclose their trading"). But the SEC remains free to pursue its most expansive disgorgement theories in seeking a settlement.

The Tenth Circuit's decision here creates uncertainty beyond the context of the securities laws. Section 2462 applies not only to the SEC, but also many other federal agencies empowered to take enforcement action against businesses. The Federal Trade Commission, for example, has begun to rely heavily on disgorgement to penalize long-past conduct on the part of businesses. Previously, the FTC's use of monetary remedies was limited by the analytical framework set forth in its *Policy Statement on Monetary 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." 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* 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).

As another example, the Consumer Financial Protection Bureau—like the SEC—has taken aggressive litigation positions in an effort to avoid statutes of limitations. In *PHH Corp.* v. *CFPB*, — F.3d —, 2016 WL 5898801, at *41 (D.C. Cir. Oct. 11, 2016), which involved an effort by the CFPB to impose a $109 million penalty based on a retroactive interpretation of the law, the CFPB took the startling position that it need not comply with any statutes of limitations when enforcing the Real Estate Settlement

Procedures Act administratively. The D.C. Circuit rejected the CFPB's position, but businesses have little assurance that the CFPB will not follow the SEC's lead and shift its focus to disgorgement. Business should not be forced to trust in agencies' "prosecutorial discretion" not to bring stale cases years or decades after the fact. *Id.*

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*, 133 S. Ct. at 1223; *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.'"). Disgorgement is no less significant—and, as the SEC's enforcement actions show, can be more significant—than other monetary remedies. And by pursuing aggressive theories of liability, agencies can effectively replicate the penalties that are barred by § 2462. This gamesmanship hurts businesses, flouts Congressional intent, and ultimately impedes the effective enforcement of the law. Agencies should focus their resources on fresh cases to protect market participants from ongoing misconduct.

B. Delayed Enforcement Actions Unfairly Increase The Burden On Businesses To Disprove Damages

The SEC's 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, the SEC only needs to propose a "reasonable approximation" of the profits, which "creates a presumption of illegal profits." *Teo*, 746 F.3d at 105. The defendant may seek to show that the calculation is inaccurate, but he bears the risk of uncertainty. *Id.* Rebutting the SEC's "reasonable approximations" is already difficult for defendants. *See First City Fin. Corp.*, 890 F.2d at 1231 ("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."). 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 grant the petition and reverse the decision of the Tenth Circuit.

Respectfully submitted.

MATTHEW T. MARTENS
Counsel of Record
BENJAMIN NEADERLAND
JOHN BYRNES
SEAN DUDDY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
matthew.martens@wilmerhale.com

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

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