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

REPLY BRIEF OF PETITIONER

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To argue that disgorgement is not a "forfeiture," the SEC urges an artificially narrow definition of "forfeiture" that contradicts 200 years of history. To argue that disgorgement is not a "penalty," the SEC invents a new category of remedy that also contradicts 200 years of history—a remedy that is supposedly compensatory enough to get around §2462, yet punitive enough to evade the limitations periods that would apply to genuinely compensatory remedies. And all this to escape any statute of limitations, a result that this Court declared 200 years ago would be "utterly repugnant," *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), and that remains just as repugnant today. *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013) (reaffirming *Adams*).

The Court should reject the SEC's tortured arguments. Disgorgement, like every other backwards-looking money remedy, is subject to a statute of limitations.

I. SEC DISGORGEMENT CLAIMS SEEK A "FORFEITURE."

This case turns on a dispute over the meaning of "forfeiture" under §2462. Petitioner contends that "forfeiture" covers any order to turn over money to the government, as sovereign, due to a violation of law[1]—which readily encompasses disgorgement. Such orders could be either remedial or punitive, *in personam* or *in*

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[1] Contra the SEC (SEC Br. 13), this definition does not encompass *all* money payments to the government. For instance, it does not cover money judgments arising from contract and tort claims brought by the government in its proprietary capacity, which are subject to other limitations periods. 28 U.S.C. §2415.

rem. Pet. Br. 13-15. The SEC advocates a narrower interpretation. In its view, forfeiture covers only two discrete categories of supposedly "penal" forfeitures—*in rem* forfeitures of property, and money fines. SEC Br. 35-37.

The text and history of §2462 demonstrate that Petitioner is correct.

A. "Forfeiture" Is Not Limited To Penalties.

The SEC contends that "forfeiture" encompasses only forfeitures that are also penalties. As a textual matter, this theory has a basic flaw: §2462 *already* covers "penalt[ies]." Thus, under the SEC's interpretation, "forfeiture" is surplusage. Avoiding surplusage requires construing "forfeiture" to include some nonpenal remedies.

Doubtless, "penalty" and "forfeiture" overlap considerably. But as Petitioner explained, "forfeiture" is in some respects broader. Pet. Br. 13-15. And by separately including "forfeiture," Congress ensured courts would not have to decide, case by case, whether a remedy was "penal"—which can be debatable, as this case shows. So long as a remedy was a "forfeiture," Congress ensured §2462 would cover it. Yet the SEC would reintroduce that debate by atextually limiting "forfeiture" to "penal" forfeitures.

The SEC relies on the *noscitur a sociis* canon: that because "penalties" and "fines" are punitive, so are "forfeitures." SEC Br. 34. But the *noscitur a sociis* canon does not support rendering a statutory term superfluous. Indeed, correctly employed, *noscitur a*

sociis supports Petitioner. Fines and penalties encompass *in personam* money judgments; thus, *noscitur a sociis* suggests that forfeitures also encompass *in personam* money judgments, even if not precisely limited to "fines" and "penalties." Disgorgement meets that description; *in rem* remedies do not. Yet the SEC would *include* in rem forfeitures in §2462 while *excluding* disgorgement, precisely contrary to *noscitur a sociis*' teaching.

Contemporary dictionaries support Petitioner's analysis. As Petitioner explained, they define forfeiture as the loss of property based on fault, which readily encompasses disgorgement. Pet. Br. 13.

The SEC responds with various old sources ostensibly characterizing forfeiture as "punishment," leading off with St. George Tucker's edition of Blackstone. SEC Br. 33. The SEC misquotes that source, which states that "forfeiture" includes remedial awards: It describes forfeiture as "a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offense and injury committed against him to whom they are forfeited." The SEC quotes the first part of the sentence, while omitting the second (underlined) part.

Even the sources the SEC accurately quotes do not exclude disgorgement; they simply characterize forfeiture as "[s]omething lost by the commission of a crime" or similar. SEC Br. 33 (quotation marks omitted). But disgorgement, too, can be imposed only as a consequence of illegal activity. The SEC is advancing a hypertechnical argument that even though wrongdoing is a *prerequisite* for disgorgement, and even

though disgorgement's *point* is to redress "wrongdoing," disgorgement is still not a forfeiture for wrongdoing. None of the SEC's old sources recognize this distinction.

The SEC emphasizes that *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412, 423 (1915), used the word "punitive" to characterize §2462's coverage. But *Meeker* then juxtaposed such remedies with "strictly remedial" damages actions which "solely … redress[] a private injury." *Id.* It held that such private damages claims were not subject to §2462, but instead to a statute of limitations governing private claims. *Id.* at 423-24. This does not remotely suggest that *government* actions that do not "solely" redress private injuries may be brought *forever*.

The SEC's theory is also self-contradictory. The SEC claims that "forfeiture" covers *in rem* forfeitures, invoking the legal fiction that they punished the property. SEC Br. 36. But the SEC ignores the more pertinent point: these forfeitures were "not considered punishment" as to their owners. *United States v. Bajakajian*, 524 U.S. 321, 331 (1998); *see* Pet. Br. 14. Yet the SEC claims that §2462 *excludes* disgorgement because it has this same feature.

B. Historically, "Forfeiture" Was Not Limited To *In Rem* Forfeitures And Fines.

The Court need not engage in abstract debate over what "forfeiture" means. It should look to history, which definitively shows that the SEC's narrow understanding of "forfeiture" is wrong. Forfeiture encompasses nonpunitive remedies, and is not limited to fines and *in*

rem forfeitures of property.

As Petitioner explained, early customs statutes required persons to "forfeit" the value of unlawfully imported goods. These were remedies sought by the government in enforcement actions, yet they were considered nonpunitive. *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 546-47 (1871); *Bajakajian*, 524 U.S. at 330-31.

If these remedies—which fall outside of the SEC's two "penal" categories of forfeitures—are "forfeitures," the SEC's case collapses. Not only would these remedies prove that the SEC's taxonomy of "forfeitures" is too narrow, but they would undermine the SEC's assertion that there was no "historic form of 'forfeiture' equivalent to disgorgement." SEC Br. 39. When someone violates customs laws, the unlawfully imported goods are the proceeds—and a forfeiture of their value accomplishes the function of disgorgement.

So to prevail, the SEC must show that these historic remedies are *not* forfeitures under §2462. Here is the argument on which the SEC stakes its case: "[M]ere existence of the word 'forfeit' in the statute does not make the amount in question a 'forfeiture.'" SEC Br. 38.

This is obviously wrong. Petitioner's brief cited an early customs statute requiring persons to "forfeit and pay a sum double the value" of unlawfully imported goods. Pet. Br. 15 (citing Act of July 31, 1789, §25, 1 Stat. 29, 43). *That very Act* includes a three-year statute of limitations applicable to any "penalty or forfeiture." *Id.* §36, 1 Stat. at 48. The SEC cannot be serious that this provision did not encompass the requirement to

"forfeit" money under that same Act, based on a putative distinction between "forfeiture's" verb and noun forms. Moreover, *numerous* early customs statutes used the noun "forfeiture." *See, e.g.*, Act of Aug. 4, 1790, §10, 1 Stat. 145, 156 (violator "shall forfeit a sum of money equal to the value of such goods," and providing rules for trials for "such forfeiture"); Act of Mar. 2, 1791, §20, 1 Stat. 199, 204. Indeed, 19th-century courts actually *applied* §2462's predecessor to a similar customs statute. *United States v. Maillard*, 26 F. Cas. 1140, 1141-42 (S.D.N.Y. 1871). *Maillard* explained that courts should *assume* that such remedies "accruing to the United States" are "intended to be included" within statutes of limitations for "penalties and forfeitures," "unless they are specially excepted." *Id.* at 1142.

By contrast, the SEC's authority consists of a 1943 case offering the irrelevant holding that the False Claims Act is civil rather than criminal; a 2016 New York treatise; and a poem. SEC Br. 38-39.

The SEC also distinguishes such old statutes on the ground that they required forfeiture of a multiple of the ill-gotten gains. SEC Br. 39. That premise is wrong: some early customs statutes forfeited only the value itself. *Bajakajian*, 524 U.S. at 345 (Kennedy, J., dissenting) (noting that fact). Even for double-value forfeitures, the SEC misses the point. These statutes *combined* the functions of today's SEC disgorgements and civil penalties. The entire remedy—including the disgorgement—was "forfeiture." The SEC cannot avoid a limitations period by dividing the remedy in two. Pet. Br. 17-18. More fundamentally, the SEC articulates no coherent definition of forfeiture that includes such

nonpunitive remedies and excludes disgorgement.

Finally, the SEC asserts that disgorgement is an "equitable remedy," which "reinforces the conclusion" that §2462 does not apply. SEC Br. 41. The SEC scatters the adjective "equitable" throughout its brief, and also briefly contends that disgorgement is "equitable" because it is in the "public interest." SEC Br. 18-19. Beyond that, however, the SEC does not defend the claim that disgorgement is "equitable" in the historical sense, or that this matters to §2462. Petitioner's brief addressed this issue in detail, Pet. Br. 49-62, but the SEC completely ignores this section of Petitioner's brief. For the unrebutted reasons explained by Petitioner, disgorgement's supposedly "equitable" nature does not exclude it from §2462.

C. Today's *In Personam* Forfeitures Prove Petitioner's Case.

In the 1970s, Congress enacted *in personam* "forfeitures" of crime's proceeds. Pet. Br. 16. This remedy is functionally identical to disgorgement—and Congress called it "forfeiture." This powerfully supports classifying disgorgement as a "forfeiture" under §2462.

The SEC claims these statutes are irrelevant because they postdated §2462, and that disgorgement is not a "forfeiture" because there were no "historic form[s] of 'forfeiture' equivalent to disgorgement." SEC Br. 39. That is not true, as just explained—but regardless, what matters is that disgorgement falls comfortably within the historic definition of "forfeiture." There were no historic prison decrowding or school

desegregation orders, but they are still "injunctions." So too with "forfeiture."

Critically, the SEC offers no evidence that the meaning of "forfeiture" morphed between 1839 and the 1970s. Definitions in the 1970s were essentially identical to the older definitions. *E.g.*, *Black's Law Dictionary* 584 (5th ed. 1979) ("Something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty"). When Congress enacted *in personam* forfeiture-of-proceeds statutes in the 1970s, it understood that such remedies fell within the longstanding definition of "forfeiture." So too with disgorgement.

* * *

In *Adams*, this Court found the idea that government enforcement actions could "be brought at any distance of time" to be "utterly repugnant to the genius of our laws." 6 U.S. (2 Cranch) at 342. It thus declined to limit §2462's predecessor to a "particular mode of proceeding," because that would "attribute a capriciousness … which could not be accounted for." *Id.* at 340-41. The SEC's efforts to gerrymander "forfeiture" to exclude disgorgement suffer from the same flaw.

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY."

Disgorgement is also a "penalty." As Petitioner argued (Pet. Br. 23-24), and the SEC does not dispute, the question is whether disgorgement serves—even in

part—to punish.[2] It does.

A. Disgorgement Is Punitive Because It Is A Legal Consequence Of Wrongdoing.

The SEC contends that disgorgement is nonpunitive because it "prevents unjust enrichment by forcing a defendant to divest funds that he acquired unlawfully." SEC Br. 16. But as Petitioner explained (Pet. Br. 26), this argument's premise is that the defendant acted "unlawfully" and enrichment would be "unjust." In other words, the defendant did wrong, so there must be legal consequences. That is what punitive remedies do.

Moreover, disgorgement's "primary purpose," *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997), is deterrence—a hallmark of punishment. Pet. Br. 25. The SEC observes that compensatory damages also deter. SEC Br. 28. True, but that is an ancillary effect of their primary (compensatory) purpose. Disgorgement exists to impose negative consequences on wrongdoing, which is why deterrence is a "primary" purpose.

The SEC's fundamental claim is that seizing the tainted effects of wrongdoing cannot be punitive. The SEC offers no historical support for this view, and it is wrong. *In rem* forfeitures of crime's instrumentalities, and *in personam* forfeitures of proceeds, take property to which defendants are not "lawfully entitled." SEC Br. 16. Yet both are considered "punishment." Pet. Br. 25-

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[2] In a "Cf." cite, the SEC intimates (SEC Br. 28) that this test may have been overruled by *Hudson v. United States*, 522 U.S. 93 (1997). Not so. *Hudson* rejected the test as to the Double Jeopardy Clause. *Id.* at 101-02. For civil penalties, however, the "in part" test still applies. *Bajakajian*, 524 U.S. at 331 n.6.

26; *Austin v. United States*, 509 U.S. 602, 621-22 (1993); *Libretti v. United States*, 516 U.S. 29, 39, 45 (1995).

Saying disgorgement "restores the status quo," SEC Br. 17 (quotation marks omitted), does not assist the SEC. To begin, a status quo remedy must compensate the injured party, but that is not disgorgement's purpose. Pet. Br. 32. Even considering only defendants, disgorgement leaves them worse off than before *the judgment*. The SEC claims defendants should be restored to the status quo before *the wrongdoing*. But that claim's premise is that consequences should follow from wrongdoing—again, punishment's hallmark.

The divestiture analogy does not help the SEC. SEC Br. 17. Divestiture is a form of injunction that involves no money payment and breaks up monopolies going forward. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128-29 (1948).

B. Disgorgement Is Punitive Because It Is Noncompensatory.

Debates about whether a remedy is "penal" or "remedial" can acquire an angels-on-the-head-of-a-pin quality. Thus, the Court should look to the history and purpose of this taxonomy. They resolve the case in Petitioner's favor. Historically, this Court has recognized two classes of backward-looking payments to the government: payments that compensate, and penalties. Section 2462 covers the latter and not the former. That distinction accords with the historic purpose of providing special safeguards when the government extracts money payments as sovereign enforcer of the laws. Under this precedent,

disgorgement is a penalty.

1. Disgorgement Is Not Restitution.

The SEC claims disgorgement is nonpunitive because, like restitution, it is compensatory for investors. SEC Br. 19-22. This claim contradicts the SEC's oft-stated positions, and is wrong.

Petitioner gave three examples in which the SEC argued that disgorgement's purpose was *not* to compensate. Pet. Br. 27. In *Custable* and *Martin* (cited at Pet. Br. 27), the SEC made this point to establish victims lacked standing to challenge distribution of disgorged funds. In *Smith*, the SEC defended an $87.5 million disgorgement, despite criminal restitution of only $5.7 million; the SEC explained that "the loss sustained by the victims" is "irrelevant." Br. of SEC at 32, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 (quotation marks and brackets omitted).

Another example: Petitioner argued that disgorgement is not "equitable" under *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Pet. Br. 56-60. As noted, the SEC ignores this argument; it does not even cite *Knudson*. This may be because, in lower courts, the SEC distinguishes *Knudson* by arguing that it involves compensatory restitution, whereas disgorgement "does not aim to compensate." *See, e.g.*, Br. for SEC at 43, *SEC v. Quan*, 817 F.3d 583 (8th Cir. 2016) (No. 14-3707), 2015 WL 1778755 (quotation marks omitted).

The SEC's lower-court positions are correct. Courts may have discretion to direct disgorgement to victims,

but this possibility—which is *never* required, *Fischbach*, 133 F.3d at 176—does not mean disgorgement is compensatory, as multiple courts have held. Pet. Br. 27-28. Indeed, as the SEC acknowledges (SEC Br. 20-21 n.4), it regularly brings cases in which compensation is impossible, such as Foreign Corrupt Practices Act cases, which generate billions in disgorgements for the Treasury. The Court's ruling will apply in those suits. Moreover, a remedy is punitive if it punishes even in part, Pet. Br. 23-24; thus, the fact that payments *sometimes* reach victims cannot make disgorgement *completely* nonpunitive, as required to fall outside §2462. Civil penalties, too, often go to victims, 15 U.S.C. §7246, but that does not make them compensatory.

Moreover, the SEC's premise—that there would be no statute of limitations if the goal was to compensate investors—is false. This Court has long held that when the government is the "complainant party" but sues "for the sole benefit of a private person," time limitations for private plaintiffs apply. *United States v. Beebe*, 127 U.S. 338, 344, 347 (1888). Thus, if disgorgement is compensatory, private statutes of limitations would apply. Yet the SEC has previously persuaded courts *not* to apply such statutes to disgorgement, arguing, predictably, that "[t]he theory behind the remedy is deterrence and not compensation." *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993).

The SEC seems to place disgorgement within some twilight zone of "often compensatory"— compensatory enough to dodge §2462, noncompensatory enough to avoid other legal restrictions on compensatory remedies. This position is untenable. Disgorgement's purpose

should not oscillate depending on the SEC's litigation needs.

The SEC says that Petitioner advocates a case-by-case approach that would "substantially complicate" §2462's application. SEC Br. 27. Not so. Petitioner agrees that a single statute of limitations should apply categorically to disgorgement. This is so for the SEC's practical reasons, and a doctrinal reason: Categorically, disgorgement always yields, in the first instance, payment of unlawful gains to the government not as compensation for the government's loss. Hence, disgorgement is not restitution, regardless of how the government later distributes funds.

2. There Are Only Two Categories Of Backwards-Looking Payments: Compensatory And Punitive.

This Court's cases recognize only two categories of backwards-looking money payments: compensatory and punitive. The key case is *Brady v. Daly*, 175 U.S. 148 (1899), which defines the line between penalties and non-penalties under §2462. Pet. Br. 29-31. *Brady* held that a compensatory payment to a *victim* was remedial, whereas the same payment to the *government* in a qui tam action was punitive. 175 U.S. at 155 (statute that gave "right to recover back money" was "remedial as to the loser" but "penal as regards the suit by" the qui tam plaintiff).

Likewise, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), held that payments to victims were remedial, whereas payments to the government, consisting of a multiple of the unlawfully-earned gains, were penalties.

Pet. Br. 31-32. And *Kelly v. Robinson*, 479 U.S. 36 (1986), held a criminal restitution order was "fine, penalty, or forfeiture" under bankruptcy law because it had a noncompensatory purpose. Pet. Br. 28-29.

The SEC has no adequate answer. As to *Brady*, the SEC says it "establish[es] only that a compensatory remedy is not a penalty." SEC Br. 26. But the SEC just ignores *Brady*'s other statement that the equivalent payment to the government was a penalty *because it was noncompensatory*.

Regarding *Porter*, the SEC emphasizes that the payment to the government exceeded the unlawfully-earned gains. SEC Br. 26-27. That misses the point. *Porter*'s "penalty" merged the "disgorgement" and "civil penalty" remedies in SEC enforcement actions today. But slicing up the remedy does not change its nature. Pet. Br. 32-33.

Finally, the SEC pitches *Kelly* as turning on state sovereignty. SEC Br. 25-26. But it quotes exclusively from *Kelly*'s Part II, which principally addressed the question—irrelevant here—of whether restitution orders were "debts," culminating in the Court expressing "serious doubts." 479 U.S. at 50. The Court's holding came in Part III, which found that even if restitution orders were debts, they were a nondischargeable "fine, penalty, or forfeiture." *Id.* at 50-53. That conclusion turned on the passage Petitioner cited: that criminal restitution's "focus" was not on "the victim's desire for compensation." *Id.* at 53. Indeed, the Court indicated (in dicta) that the same rule would apply to federal restitution orders. *Id.* at 53 n.14.

The SEC has a deeper problem. It does not dispute Petitioner's showing that at §2462's enactment, the categories of "forfeiture" and "penalty" covered every noncompensatory backwards-looking payment to the government. Pet. Br. 34-35. Hence, it is common ground that, until the 1970s, there were only two categories of backwards-looking payments to the government: compensatory and punitive. Yet the SEC claims that its invention of "disgorgement" yielded a *third* category—one that straddles the line between compensatory and punitive remedies, and thus avoids limitations periods for *both* compensatory *and* punitive remedies.

The SEC regards disgorgement's ostensible historical novelty as a reason it should prevail, *e.g.* SEC Br. 39, but it is actually a reason the SEC should lose. The Court should interpret §2462 in light of its drafters' background understanding that backwards-looking payments to the government were either punitive or compensatory. It should reject the SEC's attempt to avoid statutes of limitations by inventing a new, intermediate category that had gone unrecognized for the first two centuries of the Republic.

Moreover, §2462 is an essential constraint on the government's ability to extract noncompensatory payments—the purpose underlying numerous historical provisions, including the Excessive Fines Clause. Pet. Br. 32-35. The SEC insists that those provisions applied only to "penal" remedies and not disgorgement, SEC Br. 28, but that presumes the answer to the question presented. The historic purposes underlying protections against "penal" remedies apply equally to disgorgement, which underscores why disgorgement should be

classified as such.

3. The SEC's Ratification Arguments Fail.

The SEC maintains that because Congress has authorized the SEC to obtain civil penalties beyond disgorgement, and refers separately to "disgorgement" and "civil penalties," this means that Congress has implicitly ratified the SEC's theory that disgorgement is not a "penalty" under §2462. SEC Br. 22-25.

This argument fails. First, there is evidence that Congress views disgorgement as penal: it included CFTC disgorgements (which unlike SEC disgorgements, are expressly authorized by statute) in a section on "civil penalties," and characterized SEC disgorgement as a noncompensatory "sanction." Pet. Br. 25, 28.

Second, when Congress authorized the SEC to seek civil penalties in 1990, there is no indication in the text or legislative history that Congress intended to treat civil penalties and disgorgement differently for limitations purposes. Indeed, given that the measure of civil penalties is identical to the measure of disgorgement—*i.e.*, the defendant's illicit gains (Pet. Br. 44)—it is unlikely that Congress would have meant those two remedies to apply over different time spans.

Congress' use of the word "disgorgement" in the U.S. Code, rather than "penalty," does not reflect an intent to exclude it from §2462. Rather, it reflects the fact that the SEC was already using the word "disgorgement." The SEC began seeking disgorgement in the early 1970s. Pet. Br. 3. "Disgorgement" first appeared in the

U.S. Code in 1988, in a provision directing that "disgorgements" be "[o]ffset[]" against liability to victims of insider trading. 15 U.S.C. §78t-1(b)(2).

The SEC also observes that in 2002, Congress conferred the power on the SEC to seek "equitable relief." It infers that disgorgement is "equitable relief," and hence falls outside of §2462. Not so. First, this provision did not *confer* authority on the SEC to obtain disgorgement, given that the SEC had already been obtaining disgorgement for 30 years. To the extent this provision is understood as *ratifying* the SEC's ability to obtain disgorgement, this has nothing to do with the statute of limitations. Moreover, Petitioner explained how the application of §2462 is compatible with the characterization of disgorgement as "equitable." Pet. Br. 49-56. The SEC ignores this analysis altogether.

The SEC also claims that Congress' failure to enact an express statute of limitations on disgorgement is an implicit ratification of the SEC's ability to seek stale disgorgements. SEC Br. 44-45. But this Court accords "reliance on congressional inaction … little weight." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quotation marks omitted). That rule is especially apt here, because the SEC's efforts to seek disgorgement outside the five-year limitations period are recent. Before 1990, when Congress authorized the SEC to obtain civil penalties, the SEC had *never* sought to do so. Pet. Br. 4. Most reported cases on this issue are from the past five years, following *Gabelli*. *Id.*[3]

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[3] The SEC states that some recent cases in which it sought stale

C. Disgorgement Goes Beyond Restoring A Plaintiff To The Status Quo Ante.

The SEC's characterization of disgorgement as merely restoring the status quo also ignores the real world. The SEC has successfully argued that wrongdoers must disgorge profits that went to *anyone*, with no deduction for expenses. Such disgorgements do not restore the status quo. Pet. Br. 35-37.

The SEC responds that this case "does not implicate that concern" because the payments that went to third parties were for "expenses for which he would otherwise have been responsible." SEC Br. 29 & n.9.

That is wrong on the facts—many payments went to third-party officers, and were not payment for "expenses." SEC Br. 6. It is also wrong on the law. The SEC argues (SEC Br. 27) that disgorgement's limitations period is analyzed categorically. Petitioner agrees, for both doctrinal and practical reasons. Doctrinally, the SEC has *defined* disgorgement as a remedy requiring payment of all proceeds that went to everyone, with no deduction for expenses. Pet. Br. 35-37. The SEC observes (SEC Br. 29-30) that there are "equitable limitations" on disgorgement, but it does not claim that the cases in which it successfully defined disgorgement so broadly were wrongly decided. Thus, that definition should govern for limitations purposes—regardless of whether funds happened to reach third parties in a particular case. Practically, it would be

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disgorgements were *filed* before *Gabelli*. SEC Br. 46 n.17. But the remedial phase—when the SEC sought the disgorgements—began after.

unmanageable for the statute of limitations to depend on remedial-stage evidence regarding how particular dollars were directed.

Thus, the SEC cannot shrug off cases defining disgorgement broadly as factually distinguishable. Indeed, if the SEC prevails here, it will seek to apply that holding in every disgorgement case, including cases where it seeks third-party proceeds. Yet the SEC offers no theory on how such broader disgorgements restore the defendant to the status quo ante—the linchpin of its argument that disgorgement is nonpenal.

D. The Government's Contradictory Positions Are Indefensible.

The SEC is at its worst when defending the proposition that disgorgement changes from a "penalty" to not, depending on what yields the most money to the government. SEC Br. 30-32.

The government has previously filed a brief in this Court arguing that a disgorgement to HUD was a "fine, penalty, or forfeiture" under federal bankruptcy law, and hence nondischargeable. Pet. Br. 37-38. It sticks to that position. The government's justification is to refer back to its discussion of *Kelly* and claim that different "principles" govern bankruptcy. SEC Br. 30. But the "principles" cited in the SEC's discussion of *Kelly* are not only inapposite (*see supra* at 14), but they addressed state criminal judgments; they had nothing to do with disgorgement. The government observes that subsequent legislation rendered SEC disgorgements nondischargeable in bankruptcy, but that does not moot the issue: that legislation does not apply to non-SEC

disgorgements, such as the HUD disgorgement itself.

The government also sticks to its position that Petitioner's disgorgement is simultaneously a "penalty" for limitations purposes and not a "penalty" on his taxes. The government's vague excuse is to assert that the two provisions "have different language" (without specifying the differences), and "different purposes" (also unspecified). SEC Br. 31.

It is evident that the government will characterize disgorgement in whatever way is necessary to maximize government revenues. That should not be. Disgorgement should not mutate from punitive to nonpunitive, depending on the government's litigation needs.

Disgorgement is also functionally identical to the remedy of forfeiture of "proceeds" under statutes like 21 U.S.C. §853(a)(1). The government routinely argues that such statutes are punitive. Petitioner's opening brief cited the example of the government's Brief in Opposition in *Honeycutt v. United States*, which referred to forfeiture as a "'formidable penalty.'" BIO at 17, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854 (citation omitted). As recently as the *Honeycutt* oral argument, the government characterized §853(a)(1) as a "financial penalty that attaches to drug [offenses]," analogous to a jail sentence. Tr. of Oral Argument at 30:16-31:14, *Honeycutt v. United States* (No. 16-142) (U.S. Mar. 29, 2017). Whatever the outcome of *Honeycutt*, the government should be consistent on whether giving up

the proceeds of illegal activity is, or is not, punitive.[4]

III. THE SEC'S POSITION CONTRADICTS THE PURPOSE OF §2462.

Statutes of limitations prevent the government from reviving "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). They reflect the judgment that "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (quotation marks omitted). Yet the SEC would abolish them for disgorgement.

The SEC claims no limitations period should apply because "[n]o principle of fairness" entitles a "robber" to keep his "loot." SEC Br. 42. But statutes of limitations ensure that defendants have a fair chance to defend themselves against government accusations that they are "robbers" with "loot." The risk of lost evidence and faded memories does not disappear because the SEC styles its claim "disgorgement."

The SEC contends that for statutes of limitations purposes, disgorgement should be treated like injunctions rather than penalties. SEC Br. 42-43. But there is a reason, tied to the purposes of statutes of limitations, for treating injunctions differently. Injunctions are forward-looking: There must be a "substantial likelihood that the defendant … will violate

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[4] The SEC's position, which courts have adopted, is that co-conspirators should be jointly and severally liable for disgorgement, regardless of whether a co-conspirator personally benefited. *See, e.g.*, *SEC v. Cole*, 661 F. App'x 52, 53-54 (2d Cir. 2016).

securities laws in the future." Pet. App. 37a (quotation marks omitted). Indeed, courts have held that injunctions that do not prevent present danger, but instead punish for past dereliction, *are* "penalties" under §2462. Pet. Br. 52. Thus, injunctions falling outside §2462 inherently cannot be stale, because the relevant violation lies in the future. By contrast, disgorgement and penalties are backwards-looking remedies calculated in the identical way. Pet. Br. 44. The prejudice associated with the passage of time is therefore identical. *Id.* Labeling disgorgement "equitable" does not change this fact.

The SEC claims statutes of limitations are unnecessary because courts can consider the passage of time in measuring relief. Pet. Br. 43. Not so. First, the SEC's rule would permit courts to consider the passage of time only at the remedial stage—after the trial is over—and thus offers no protection from the burden of defending against stale claims. A distinct equitable doctrine—laches—requires pretrial dismissal based on excessive passage of time. But the government's longstanding position is that laches does not apply to it, Pet. Br. 41, 61, and its brief does not suggest otherwise.

Second, even after trial, this protection is flimsy. That is clear from the *Wyly* case, discussed in the amicus brief by Charles Wyly's executor. The SEC sought disgorgement going back 22 years, with prejudgment interest alone of $257 million. *SEC v. Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014), *appeal docketed*, No. 15-2821 (2d Cir. Sept. 4, 2015); Br. of SEC at 62, *SEC v. Wyly*, No. 15-2821 (2d Cir. Apr. 8, 2016) ("SEC *Wyly* Br."), 2016 WL 1426153. The District Court observed

that "the SEC is, at least in part, responsible for the delay" and found it "appropriate to consider … fairness." *Wyly*, 56 F. Supp. 3d at 433. Over the SEC's objection, it did so by applying a lower interest rate—which decreased prejudgment interest to a mere $105 million, still going back 22 years, plus nearly $200 million in disgorgement. *Id.* at 434; SEC *Wyly* Br. at 62. This is not an adequate substitute for a statute of limitations.

The SEC suggests that statutes of limitations are unnecessary because it can be trusted to bring suits quickly; that it can seek injunctions or penalties arising within the limitations period anyway, so there is no point in protecting defendants from more distant claims; and that imposing a statute of limitations would make it easier for wrongdoers to avoid consequences. (SEC Br. 45-48). These arguments would support abolishing statutes of limitations for SEC penalties—indeed, for *all* government enforcement actions. Centuries of legal tradition, which establish that statutes of limitations are "vital to the welfare of society," dictate otherwise. *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). The SEC's promise that it can be trusted to bring actions quickly is particularly hollow given the recent flood of stale disgorgement claims, and the many reported instances of the SEC pursuing stale claims due to changed enforcement strategies. Pet. Br. 41-43.

But the deepest flaw in the SEC's position is its profound *randomness*. As Petitioner's brief explained, the SEC argues that a punitive judgment payable to the government—*i.e.*, a "fine"—has a statute of limitations, as does a remedial compensatory judgment payable to injured investors. Pet. Br. 44. But per the SEC, *no*

limitations period applies to a remedy that is right in between: A judgment that is (says the SEC) remedial, but payable to the government. *Id.* Petitioner's brief asked: Why would that be? *Id.*

The SEC's feeble response: because it was "Congress's decision." SEC Br. 48-49. This assumes the answer to the question presented, which is whether Congress' enactment—§2462—excludes disgorgement. The SEC's inability to articulate any rational basis for its position beyond the *ipse dixit* that it was "Congress's decision" underscores that its position is wrong.

IV. THE CANON OF NARROW CONSTRUCTION DOES NOT APPLY.

The SEC relies on the canon that statutes of limitations are construed narrowly against the government. SEC Br. 49-51.

But as Petitioner explained, that canon applies where the government vindicates its *own* property rights, given the "public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers." Pet. Br. 46 (quoting *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938)). The SEC asserts that Petitioner's contention is inconsistent with the canon's "rationale," which "rests on the government's sovereignty." SEC Br. 49. But it does not cite *Guaranty Trust*, which rejects that rationale. 304 U.S. at 132 (although the canon is "a vestigial survival of the prerogative of the Crown, ... the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may

in the beginning have had a different policy basis").

History proves the point: the canon has apparently *never* applied when the government was not vindicating its own property rights. The SEC suggests *Baldaracco v. Commissioner*, 464 U.S. 386 (1984), involved penalties, but *Baldaracco*'s rule addressed "limitations statutes barring the collection of taxes otherwise due and unpaid." *Id.* at 392 (quotation marks omitted).

Moreover, as Petitioner explained (Pet. Br. 47-48), the Court has repeatedly *not* applied this canon in government enforcement actions. The SEC distinguishes those cases on the ground that they involved "penal" remedies. SEC Br. 50. But *Maillard*—involving a customs forfeiture closely similar to disgorgement—also explicitly declined to apply this canon. 26 F. Cas. at 1142. Moreover, the SEC's contention contradicts its thesis that the narrow-construction canon applies to *all* government suits.

The SEC's position boils down to this: by inventing the new implied remedy of "disgorgement," the SEC avoids all statutes of limitations—because no existing limitations period expressly utters the word "disgorgement." The Court should reject this untenable position and apply §2462.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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