No. 14-13562-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

BARRY J. GRAHAM, FRED DAVIS CLARK, JR., A/K/A DAVE CLARK, CRISTAL R. COLEMAN A/K/A CRISTAL CLARK, DAVID W. SCHWARZ, AND RICKY LYNN STOKES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida, No. 13-cv-10011

BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned attorney for *amicus curiae* Securities Industry and Financial Markets Association certifies that, in addition to those persons and entities identified in the briefs previously filed in this matter, the following persons or entities may have an interest in the outcome of this case:

1. Carroll, Kevin M.
2. Gibson, Dunn & Crutcher LLP
3. Gillett, Gabriel K.
4. Perry, Mark A.
5. Securities Industry and Financial Markets Association

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney states that Securities Industry and Financial Markets Association has no parent corporation and does not issue stock.

Dated: February 19, 2015

/s/ Mark A. Perry
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STATEMENT OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA files *amicus curiae* briefs in cases that raise legal issues of vital concern to securities industry participants, including *Gabelli v. SEC*, 133 S. Ct. 1216 (2013).

SIFMA members may be named as respondents in enforcement actions brought by the Securities and Exchange Commission ("SEC") seeking disgorgement, declaratory relief, or injunctive relief. Because the application of 28 U.S.C. § 2462 to such proceedings is of significant importance to SIFMA members, SIFMA submits this brief on the limited issues related to the proper scope and applicability of Section 2462 raised by the district court's judgment in this case. SIFMA does not take a position on the merits of the SEC's allegations against Defendants-Appellees ("Respondents"), and SIFMA's submission should not be construed as supporting or opposing any merits-related arguments.

SIFMA respectfully submits that the judgment below is consistent with the text of the statute, existing case law (especially after *Gabelli*), and important policies of certainty and repose on which securities market participants and SIFMA members rely. Accordingly, SIFMA respectfully urges this Court to affirm the judgment.

All parties have consented to SIFMA filing this brief. No person—other than SIFMA, its members, and its counsel—authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

Whether 28 U.S.C. § 2462 bars the SEC from seeking disgorgement, declaratory relief, or injunctive relief that constitutes a "civil fine, penalty, or forfeiture, pecuniary or otherwise," based on a claim that accrued more than five years before it sued.

SUMMARY OF THE ARGUMENT

When the SEC brings an action to enforce a statute that has no specified limitations period, as many provisions of the securities laws do not, 28 U.S.C. § 2462 serves as the "default" statute of limitations. Section 2462 states in full:

> 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 if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The Supreme Court recently, and unanimously, held that Section 2462 bars the SEC from seeking civil money penalties based on a claim that had accrued more than five years before the enforcement action was filed. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). Instead of accepting its loss in *Gabelli*, the SEC now argues that Section 2462 does not apply at all when it seeks purportedly equitable relief, including disgorgement, declaratory relief, and injunctive relief, regardless of whether that relief is a penalty or forfeiture. In other words, the SEC wants to limit *Gabelli* to the particular facts of that case, while continuing to assert that it has unfettered authority to bring enforcement actions in perpetuity.

The district court, following the thrust of *Gabelli*, rejected the SEC's hypertechnical reading of Section 2462. As the district court recognized, the language of Section 2462 and the logic of *Gabelli* preclude enforcement actions, years after memories have faded and evidence has gone stale, regardless of whether the SEC denominates its requested relief as a civil money penalty or instead seeks to recover money earned by a respondent, to brand a respondent as a securities-law violator, or to compel a respondent to follow the law (as construed, of course, by the SEC itself). This Court should do the same, and hold that the SEC cannot seek relief that operates as a "civil fine, penalty, or forfeiture, pecuniary or otherwise," 28 U.S.C. § 2462, on claims that accrued more than five years before it filed suit.

ARGUMENT

I. SECTION 2462 BARS THE SEC FROM PURSUING CLAIMS THAT ACCRUED MORE THAN FIVE YEARS BEFORE IT SUED

In 2013, the Supreme Court unanimously held that Section 2462 applies to SEC enforcement actions seeking civil money penalties. *See Gabelli*, 133 S. Ct. at 1220. The SEC now contends that Section 2462 is *limited* to claims seeking civil money penalties. But the SEC's construction is not supported by Section 2462, which—viewed through the lens of *Gabelli*—encompasses the relief sought by the SEC here.

A. Section 2462 Is Not Limited to Civil Money Penalties

Section 2462 applies, without qualification, to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." The relief sought by the SEC here falls within the scope of the statute's terms.

In this Circuit, "'a "penalty," as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond *remedying* the damage caused to the harmed parties by the defendant's action.'" *Coghlan v. NTSB*, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam) (quoting *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996)); *accord Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 423, 35 S. Ct. 328, 332 (1915) (noting "penalty or forfeiture" under Section 2462's predecessor "refer[red] to something imposed in a punitive way for an infraction of a public law"). Relief may thus be punitive where it is intended "to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers" or to compensate victims of the wrongdoing. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 101 S. Ct. 2061, 2066 (1981); *see Black's Law Dictionary* 1247 (9th ed. 2009) (defining "penalty" as "[p]unishment imposed on a wrongdoer … as distinguished from compensation for the injured party's loss"); *see also Coghlan*, 470 F.3d at 1305 ("It is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant." (internal quotation marks omitted)).

To determine whether relief is punitive under Section 2462, courts must analyze the nature and effect of the specific relief the SEC seeks, rather than relying on the label the SEC assigns to it. *See*, *e.g.*, *Coghlan*, 470 F.3d at 1305; *Johnson*, 87 F.3d at 491; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441, 31 S. Ct. 492, 498 (1911) ("It is not the fact of punishment but rather its character and purpose that often serve to distinguish between" remedial and punitive relief). Thus, determining whether relief is punitive is context-dependent, and requires thorough analysis rather than mere labels. *See*, *e.g.*, *Coghlan*, 470 F.3d at 1306 (citing *Johnson*, 87 F.3d at 488); *accord Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 777 (11th Cir. 2011).

In conducting this analysis, Section 2462 must be strictly construed to favor the targets of governmental enforcement actions. *See Staples v. United States*, 511 U.S. 600, 619 n.17, 114 S. Ct. 1793, 1804 (1994) (describing Rule of Lenity); *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (emphasizing that a defendant's need for repose outweighs strictly construing statutes of limitations against the government). Reviewing the relief sought by the SEC here, this Court should hold that Section 2462 reaches disgorgement, declaratory relief, and injunctive relief because each constitutes a "penalty, or forfeiture, pecuniary or otherwise."

1. Disgorgement here is a punitive forfeiture

In SEC enforcement actions, disgorgement is a forfeiture under Section 2462.[1] Courts use disgorgement and forfeiture interchangeably to refer to requiring a defendant to surrender property to the government because of conduct aimed

[1] To SIFMA's knowledge, no circuit has ever explicitly addressed this argument. *Accord SEC v. Wyly*, 2014 WL 4792229, at *1 (S.D.N.Y. Sept. 25, 2014) ("[T]he Second Circuit has not addressed the issue of whether disgorgement constitutes a civil forfeiture."). A D.C. Circuit panel recognized the argument's potential viability, but found it "implicitly" foreclosed by circuit precedent holding that disgorgement is not inherently punitive under Section 2462. *See Riordan v. SEC*, 627 F.3d 1230, 1234 & n.1 (D.C. Cir. 2010) (citing *Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009) (per curiam)). As detailed below, *Gabelli* effectively supplanted that precedent, which was in any event wrongly decided. *See Brewster v. Comm'r*, 607 F.2d 1369, 1374 (D.C. Cir. 1979) (per curiam) (noting panel's statutory interpretation may not bind later panels if a subsequent Supreme Court decision "erodes [its] force").

at a third party. *See*, *e.g.*, *United States v. Ursery*, 518 U.S. 267, 284, 116 S. Ct. 2135, 2145 (1996) (forfeiture is "designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct"); *see also SEC v. Contorinis*, 743 F.3d 296, 310 (2d Cir. 2014) (Chin, J., dissenting) (noting "[b]oth forfeiture and disgorgement seek to force a defendant to give up—that is, to forfeit or to disgorge—what he has wrongfully gained," and collecting cases using the terms synonymously), *petition for cert. filed*, No. 14-471 (U.S. Oct. 20, 2014). "Forfeiture" in Section 2462 should therefore be read to cover disgorgement. *See Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734, 93 S. Ct. 1773, 1779 (1973) (reading "catchall provision" to "bring[] within a statute categories similar in type to those specifically enumerated"); Edward Brodsky, *Statutes of Limitations and Civil Enforcement*, N.Y. L.J., Sept. 21, 1993, at 21 ("An SEC civil enforcement action seeking disgorgement of illegally-obtained profits is in the nature of a forfeiture action").

Disgorgement is also a penalty in the SEC enforcement context. To be sure, many courts have recited the anodyne view that disgorgement is meant to be remedial rather than punitive. *See*, *e.g.*, SEC Br. 37-38; *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) ("[O]ur sister circuits have repeatedly used language to the effect that orders issued by the Commission are intended to be remedial, not punitive. Such labels are likely to reflect conclusions rather than analyses, and in any event are not determinative." (internal quotation marks omitted)). But the e*ffect* of disgorgement is what matters, because, no matter how remedial it is intended to be, "disgorgement may not be used punitively." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *see also Coghlan*, 470 F.3d at 1305 (noting a sanction can be simultaneously "remedial" and "punitive"); *Johnson*, 87 F.3d at 491 (determining Section 2462's scope based on "the effect of the SEC's action").

Disgorgement's *effect* is punitive where, as here, a respondent may be required to disgorge more than he actually profited. *See*, *e.g.*, *Contorinis*, 743 F.3d at 309 (deeming disgorgement punitive where "profits were not [defendant's]" and "were never in his possession or control" because "they were earned by the fund by which he was employed"); *SEC v. Wyly*, 860 F. Supp. 2d 275, 277 (S.D.N.Y. 2012) ("awards that exceed the defendant's gains are punitive and beyond the court's equitable powers"); *see also Tull v. United States*, 481 U.S. 412, 423-24, 107 S. Ct. 1831, 1838-39 (1987) (describing disgorgement as "a more limited form of penalty than a civil fine," and finding court "impose[d] punishment" by ordering disgorgement that exceeded profits). In particular, disgorgement would be punitive if the government sought an amount greater than a defendant's liability, *see Coghlan*, 470 F.3d at 1305, or required a defendant to disgorge amounts he did not hold, *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (per curiam) (requiring disgorgement of co-conspirator's funds); *Contorinis*, 743 F.3d at 309-10 (requiring disgorgement of employer's funds).[2]

The SEC does not hide that it may seek excess funds from Respondents here. It notes that it seeks "ill-gotten gains including prejudgment interest … calculated either by reference to the approximately $300 million total sum defendants fraudulently obtained from investors or the individual amounts each defendant personally retained from their violations." SEC Br. 34 (internal quotation marks omitted). In other words, the SEC wants to tack statutory interest onto Respondents' gains (regardless of whether they received that amount of interest), and may hold any one Respondent liable for the entire group's gains (regardless of how the gains were actually distributed). That is classically punitive. *See*, *e.g.*, *Contorinis*, 743 F.3d at 309-10; *Wyly*, 860 F. Supp. 2d at 277.

Disgorgement is also punitive here because the SEC is not using the disgorged funds to compensate victims. Unlike restitution, which "is measured by the defendant's gains, not by the plaintiff's losses," 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 1.1 (2d ed. 1993), disgorgement is punitive when it "goes beyond *remedying* the damage caused to the harmed parties," *Coghlan*, 470 F.3d at 1305. In

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[2] The D.C. Circuit's *Zacharias* decision is not to the contrary. That court recognized that "[i]n theory, a disgorgement order might amount to a penalty," but found the order was not punitive on the specific facts of the case. 569 F.3d at 472-73 & n.2 (citing *First City*, 890 F.2d at 1231). The majority's holding, issued over a strident dissent, years before *Gabelli*, is hardly persuasive.

other words, relief is punitive when it is not compensatory. *See Black's Law Dictionary*, *supra*, at 1247 (defining "penalty" as "[p]unishment imposed on a wrongdoer … as distinguished from compensation for the injured party's loss"). Disgorgement here is certainly not compensatory; SEC rules allow disgorged funds to go to the U.S. Treasury instead of to victims, and *prohibit* disgorged funds from compensating victims through a Fair Fund unless the SEC also obtains civil money penalties (which Section 2462 makes unavailable here). SEC Rules of Practice: Fair Fund and Disgorgement Plans, 17 C.F.R. §§ 201.1100, 201.1102(b). The disgorgement here therefore operates as a penalty, and falls within Section 2462's ambit. *See* 25 Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* § 4:22 (2014) (collecting authorities and finding "the primary purpose of disgorgement is punitive: to punish based on violations of the securities laws rather than to compensate the victims").

2. The declaratory and injunctive relief here operate as non-pecuniary penalties

Section 2462 also bars the SEC from seeking declaratory and injunctive relief that imposes a non-pecuniary penalty on Respondents.[3] Those remedies are punitive here because they go beyond any remedial purpose. An "obey-the-law"

[3] Section 2462 applies to claims seeking non-pecuniary penalties. *See United States v. Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998) (parsing text to show Section 2462 reaches non-pecuniary penalties); *Johnson*, 87 F.3d at 488 n.5 (explaining statutory history shows Section 2462 reaches non-pecuniary penalties).

injunction prohibiting future conduct that is already illegal is not remedial (if it is even enforceable). *SEC v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012) (chastising SEC for seeking injunction that "does little more than order the defendant to obey the law" after the Court "repeatedly questioned the enforceability" of such injunctions); *see also SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007) ("an injunction preventing future violations of the securities laws can be more punitive than remedial"). Likewise, a declaratory judgment stating that securities laws were violated is not remedial, because it does not remedy harms, compensate victims, or necessarily serve as a predicate for other SEC enforcement action. *See*, *e.g.*, *SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867, 886-87 (N.D. Tex. 2011) (adjudicating enforcement action where SEC did not allege wrongdoing), *aff'd sub nom. SEC v. Bartek*, 484 F. App'x 949 (5th Cir. 2012) (per curiam).

The declaratory and injunctive relief sought here are non-pecuniary penalties because they would brand Respondents as lawbreakers and effectively prohibit them from working in the financial services industry, among other fields, without providing any benefit to victims. Those remedies have a "stigmatizing effect[,] long-lasting repercussions," and impose considerable collateral consequences. *Bartek*, 484 F. App'x at 957; *see* 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 16.2[2][A] (2015) ("severe consequences … flow from an SEC injunction"); Gary P. Naftalis & Mark J. Headley, *SEC Ruled Subject to Stat-*

ute of Limitations in Seeking to Bar Securities Professionals, N.Y. L.J., July 19, 1996, at 22 n.27 ("disgorgement … can have similar collateral consequences"). For example, the relief sought by the SEC here is punitive because it could:

- bar a respondent from associating with a "broker, dealer, investment adviser, municipal securities dealer, transfer agent, municipal adviser, or nationally recognized statistical rating organization." 15 U.S.C. §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C), 80b-3(f);
- prohibit a respondent from being employed by an investment adviser or broker-dealer that is acting as investment adviser or principal underwriter for a registered investment company, even if the respondent is not involved in the work. *Id.* § 80a-9;
- cause a respondent to be banned from serving as an officer or director of a public company, *id.* § 78u(d)(2), and forbidden from receiving fees from an investment advisor, 17 C.F.R. § 275.206(4)-3;
- trigger a respondent's "statutory disqualification" from the Financial Industry Regulatory Authority or the New York Stock Exchange, which bars association with any FINRA or NYSE member, *see* 15 U.S.C. § 78c(a)(39), and cause the injunction to be listed in FINRA's BrokerCheck system for the Respondent and any entity he is ever associated with, *see* FINRA Rule 8312; and

- preclude an issuer from hiring a respondent without potentially making the issuer ineligible to use the SEC's exemption for small offerings, safe harbor for certain private placements, and streamlined procedures for Well-Known Seasoned Issuers. *See* 17 C.F.R. §§ 230.405, 230.505, 230.506.

The SEC recognizes that these collateral consequences "may be more devastating than a monetary fine." Luis Aguilar, Comm'r, SEC, Speech at Securities Enforcement Forum 2012: Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws (Oct. 18, 2012), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1365171491510 (noting director/officer bar "is intended to be" punitive by "requiring a significant change in the individual's career"); Daniel M. Gallagher, Comm'r, SEC, Speech at the 37th Annual Conference on Securities Regulation and Business Law: Why is the SEC Wavering on Waivers? (Feb. 13, 2015), *available at* www.sec.gov/news/speech/021315-spc-cdmg.html (describing loss of SEC exemptions as the "corporate death penalty"). Still, even lesser penalties could "serve as the basis for more serious ones" that would render the injunction punitive. Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129, 152 (2014). The relief sought by the SEC here, which could prohibit Respondents from working in their chosen professions, and prevent them from working in the financial services industry, is clearly punitive. *Ibid.*; *see also Bartek*, 484 F. App'x at 957 (finding injunction punitive based on collateral consequences); *Johnson*, 87 F.3d at 488 & n.6 (collecting cases describing loss of employment as punitive); *Jones*, 476 F. Supp. 2d at 385 ("The severity of these collateral consequences indicate that the requested injunction would carry with it the sting of punishment.").

3. Congress has reserved infinite limitations periods for heinous criminal conduct, not civil securities-law violations

Comparing Section 2462 to federal criminal statutes of limitations further illustrates that a five-year limitations period must apply to the SEC's claims seeking disgorgement, declaratory relief, and injunctive relief. "[T]he majority of federal crimes are governed by the general five year statute of limitations." Charles Doyle, Cong. Research Serv., RL 31253, *Statutes of Limitation in Federal Criminal Cases: An Overview* 3, 18-29 (2012). Congress has expanded this limitations period to 10 years "for certain crimes against financial institutions." *Ibid.* And Congress has explicitly provided that no limitations period applies for capital crimes, terrorism, sexually abusing a minor, and genocide, among other things. *Id.* at 2.

Viewed with this context, it strains reason to think Congress intended Section 2462—a catch-all statute that applies to any number of relatively non-serious civil claims—to permit an infinite limitations period in any enforcement action.

See Leocal v. Ashcroft, 543 U.S. 1, 12 n.8, 125 S. Ct. 377, 384 (2004) ("we must interpret the statute consistently whether we encounter its application in a criminal or noncriminal context"); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630 (1988) (explaining statutes must be read to be consistent with the policies embodied in other statutes).

As discussed below, the SEC's reading of Section 2462 is particularly aberrant after *Gabelli*, in which a unanimous Supreme Court held that Section 2462 bars untimely SEC enforcement actions seeking civil penalties. Extending *Gabelli* to apply a single limitations period to SEC enforcement actions seeking the relief sought here would honor the need for uniformity, certainty, predictability, and fair notice in the securities laws. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188, 114 S. Ct. 1439, 1453-54 (1994). It would also provide much needed repose. And so holding would not prevent Congress from enacting a more specific limitations period if warranted. *See Johnson*, 87 F.3d at 492.

B. The SEC's Attempt to Fight a Rearguard Action Against *Gabelli* Is Unavailing

1. After *Gabelli*, Section 2462 covers punitive disgorgement, declaratory relief, and injunctive relief

Gabelli held that Section 2462 bars the SEC from seeking civil money penalties based on claims that had accrued more than five years before it filed suit.

The logical extension of that ruling—based on the Supreme Court's understanding of the statute, history, and policy—is that the SEC also may not seek punitive disgorgement, declaratory relief, or injunctive relief based on claims that accrued more than five years before it filed suit.

The issues in this appeal "[we]re not before" the Supreme Court in *Gabelli*. 133 S. Ct. at 1220 n.1. Nothing in the Court's opinion, however, suggests that its rationale was limited to civil money penalties, or that the SEC could avoid its holding by seeking different forms of relief. To the contrary, taking *Gabelli* to the next logical step, when the issue is squarely presented, is perfectly consistent with the Supreme Court's long-standing practice of accretively interpreting the securities laws. *Compare*, *e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12, 96 S. Ct. 1375, 1381 (1976) (deciding scienter is required for damages but reserving question whether scienter is required for injunctive relief), *with Aaron v. SEC*, 446 U.S. 680, 691, 100 S. Ct. 1945, 1952-53 (1980) (extending *Hochfelder*'s "ineluctabl[e]" conclusion to enforcement actions seeking equitable relief, four years later).

In *Gabelli*, the Supreme Court unanimously rejected the SEC's expansive (mis)reading of Section 2462 and held that the statute limits SEC enforcement actions. 133 S. Ct. at 1220-21. Statutes of limitations, the Court explained, are important because they set "a fixed date when exposure to the specified Government enforcement efforts ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221 (internal quotation marks omitted). Established limitations periods further "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. They provide security and stability to human affairs [and are] vital to the welfare of society." *Ibid.* (internal quotation marks and citations omitted). Although barring untimely suits may frustrate accountability, the Court recognized that "even wrongdoers are entitled to assume that their sins may be forgotten." *Ibid.* (internal quotations omitted). The Court reminded, though, that a wrongdoer's sins are harder to forget when the government is the "victim seeking recompense," rather than the sovereign seeking remediation or retribution. *Id.* at 1221-22 ("the SEC as enforcer is a far cry from the defrauded victim").

Gabelli's reasoning applies with equal force here, where the SEC seeks relief that operates as a "penalty, or forfeiture, pecuniary or otherwise," more than five years after the underlying claim accrued. 28 U.S.C. § 2462. The important policies that *Gabelli* highlighted as underpinning statutes of limitations—repose, efficiency, predictability, and fairness—are no less important simply because the SEC does not seek a "civil fine." *Cf. 3M*, 17 F.3d at 1457 ("Given the reasons why we have statutes of limitations, there is no discernible rationale" for limiting Section 2462 to judicial proceedings).

Indeed, freeing the SEC of any limitations period would make repose impossible because it would "leave defendants 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 (noting rejection of a rule that would have frustrated repose by "extend[ing] the limitations period to many decades" (internal quotation marks omitted)). As Chief Justice Marshall poignantly explained, giving the government such unfettered authority to bring actions "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" for civil securities-law infractions. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

Accepting the SEC's interpretation of Section 2462—which would apply the statute solely based on how the SEC denominates the relief it seeks—would create an exception that subsumes the statute's application. The SEC's reading would allow the government to revive an otherwise time-barred action—in any of the varied contexts the catch-all provision covers—any time it could label its requested relief as something other than a civil money penalty, regardless of its punitive effect. *See Leocal*, 543 U.S. at 11-12 n.8, 125 S. Ct. at 384. But just as Section 2462 does not permit stale claims when the alleged conduct is egregious or when the potential recovery is enormous, it does not permit stale claims when the effect of the SEC's requested relief is punitive. *See United States v. Smith*, 499 U.S. 160, 166-67, 111 S. Ct. 1180, 1185 (1991) (cautioning against creating exceptions not listed in the statute).

Equitable principles also do not support the SEC's interpretation of Section 2462. Those principles require the SEC to proceed with dispatch, following "[t]he venerable maxim … equity aids the vigilant, not those who slumber on their rights[]." *Indep. Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). The SEC's version of Section 2462 would allow it to "slumber on [its] rights," then hit snooze for an indeterminate number of years while securities market participants wait to see if the SEC will wake up at all. That is the opposite of equitable. *See Microtune*, 783 F. Supp. 2d at 879 ("Contrary to the SEC's contention, the Court finds that equity would not be served by allowing the SEC to wait a full five years to file its case …"). There is literally no justification for reading Section 2462 to allow the SEC to seek punitive disgorgement, declaratory relief, or injunctive relief based on a claim that accrued more than five years earlier.

2. ***Gabelli*** **trumps outdated and erroneous Eleventh Circuit precedent**

In its effort to sidestep *Gabelli*, the SEC relies primarily on lower court decisions that *precede* the Supreme Court's interpretation of Section 2462 in the context of SEC enforcement actions. Those rulings do not survive and should not be followed.[4]

First, the SEC argues that *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), controls this Court's decision. *Banks* involved the Clean Water Act, did not implicate the special need for "certainty and predictability" in the securities laws, *Cent. Bank*, 511 U.S. at 188, 114 S. Ct. at 1454 (internal quotation marks omitted), and was decided almost two decades before *Gabelli*. To be sure, the *Banks* court held that Section 2462 "appl[ies] only to civil penalties," not "the government's equitable claims." 115 F.3d at 919. But it reached that conclusion by finding "equitable claims" were not enumerated in Section 2462, and that "an action on behalf of the United States in its governmental capacity … is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *Ibid.* (internal quotation marks omitted).

Both bases for the *Banks* decision have since proven incorrect and have been implicitly overruled. Since *Banks*, this Court and others have made plain that Section 2462's reach depends on the *effect* of the relief sought—specifically, whether it is a penalty or forfeiture—not its title. *See Coghlan*, 470 F.3d at 1306 (citing *Johnson*, 87 F.3d at 488); *see also Bartek*, 484 F. App'x at 957; *SEC v. Quinlan*,

[4] Post-*Gabelli* district court decisions failing to apply Section 2462 to the relief sought here, SEC Br. 51 & n.16, are wrong for the reasons discussed below. Those nonbinding cases deserve no persuasive weight.

373 F. App'x 581, 587 (6th Cir. 2010); *Telluride*, 146 F.3d at 1245-46; *Jones*, 476 F. Supp. 2d at 380. In its terse opinion, which discussed Section 2462 in just over a page, the *Banks* court conducted no analysis whatsoever about whether the supposedly "equitable" relief sought by the government was actually punitive. *See Banks*, 115 F.3d at 918-19. Therefore, it contravenes current law.

In addition, *Gabelli* unequivocally and unanimously rejected *Banks*' position that statutes of limitations do not apply against the government. *Compare Gabelli*, 133 S. Ct. at 1219 ("Under the general statute of limitations for civil penalty actions, [28 U.S.C. § 2462,] the SEC has five years to seek such penalties"), *with Banks*, 115 F.3d at 919 ("a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity"). These statements are irreconcilable; *Banks* does not allow Section 2462 to apply to the government's claim seeking punitive relief. As a result, *Banks* is no longer good law, and this panel need not follow it. *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (a "panel is not obligated to follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong"); *United States v. Smith*, 934 F.2d 270, 274-75 (11th Cir. 1991) (overruling prior circuit precedent that was "implicitly overruled by intervening Supreme Court decisions").

Second, the SEC relies on *SEC v. Calvo*, which held (after scarcely a page of discussion) that Section 2462 does not apply to SEC claims seeking equitable relief, including disgorgement. 378 F.3d at 1218. But *Calvo* is fatally flawed because it relied on *Banks*—which *Gabelli* abrogated—to hold that enforcement actions are not bound by any limitations period. *Ibid.* (citing *Banks*, 115 F.3d at 919).[5]

Calvo's foundation is further undermined by its reliance on *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993). That case did not involve Section 2462, ignored whether the relief was a penalty or forfeiture, and turned on the since-rejected view that limitations periods do not constrain the government. *Id.* at 1488-92. What's more, *Gabelli* rejected *Rind*'s reasoning that, based on analogizing to EEOC actions, no limitations period applies when the government acts in the public interest, violations are hard to detect, and timely prosecution is difficult. *Compare id.* at 1491-92, *with Gabelli*, 133 S. Ct. at 1222-23; *see also*, *e.g.*, Brodsky, *supra* (sharply criticizing *Rind* and its "basic assumption[s]").

At bottom, the text of Section 2462 and the case law interpreting its reach, read in light of the Supreme Court's unanimous *Gabelli* decision, make clear that

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[5] For the same reason, this panel should disregard other cases that directly or indirectly rely on *Banks*, including *National Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 1326 (11th Cir. 2007) (citing *Banks*), and *SEC v. Diversified Corporate Consulting Group*, 378 F.3d 1219, 1224 (11th Cir. 2004) (per curiam) (quoting *Calvo* citing *Banks*).

Section 2462 bars the SEC's action here because it seeks punitive disgorgement, declaratory relief, and injunctive relief based on claims that accrued more than five years before the SEC filed suit.

II. GRANTING THE GOVERNMENT UNLIMITED TIME TO PURSUE THE RELIEF IT SEEKS WOULD BE BAD POLICY

The important policies undergirding the Supreme Court's unanimous *Gabelli* decision apply equally here: the conduct and evidence that serve as the basis for the SEC's claims are the same regardless of whether the remedy it seeks is styled as a civil money penalty, disgorgement, declaratory judgment, or an injunction. So too, the applicable limitations period should also be the same.

A. Giving the SEC Carte Blanche to Bring Decades-Old Cases Would Weaken Enforcement of the Securities Laws

The Supreme Court has recognized that the "objectives" of the securities laws—including "fair dealing and efficiency in the securities markets"—are not inherently "better served" by "[e]xtending" the laws' reach. *Cent. Bank*, 511 U.S. at 188, 114 S. Ct. at 1454. This case offers a compelling example of that bedrock principle.

Cases based on conduct more than five years earlier are harder to prove and disprove. In a case that old, relevant evidence and knowledge of key witnesses become shrouded in the mists of time, if not lost entirely. *Gabelli*, 133 S. Ct. at 1221 (noting that when claims "slumber" for long, often "evidence has been lost, memories have faded, and witnesses have disappeared" (internal quotation marks omitted)); *see United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 356-57 (1979). That makes proving any violation (or defense) exceedingly tough. *See* Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Monetary Penalties*, 58 Alb. L. Rev. 5, 52 (1994) ("As the SEC … bring[s] cases that are increasingly distant from the time of the alleged violations, faded memories and the disappearance of evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)"). This concern is especially acute in the securities industry, which experiences high employee turnover and cyclical downsizing. Five or more years after an event has occurred, the relevant employees are less likely than employees in other industries to be performing the same job function with the same employer, which makes investigation and trial even more difficult and costly.

If anything, imposing a clear and firm end date for enforcement actions—whether seeking a civil penalty or the relief sought here—encourages the SEC to focus its resources on pursuing fresh cases that, if promptly investigated, might prevent investor losses. "The very fact that the SEC has waited so long to bring suit suggests … imposing sanctions on the defendant is not a top priority for the SEC, calling into question whether the defendant actually poses a threat to society." Glaser, *supra*, at 147; *see also Johnson*, 87 F.3d at 490 n.9; *Jones*, 476 F.

Supp. 2d at 384; Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 11 (2013). Hence, granting the SEC unlimited time to pursue old and stale cases—which are "inherently suspect" and likely "marginal" because of their age and low priority—invites distraction from that core mission and a waste of resources. Glaser, *supra*, at 148, 154.

B. The SEC's Vast Resources Allow It to Easily Bring Meritorious Actions Within Five Years of When a Claim Accrues

Not only *should* the SEC bring its enforcement actions within five years, it undoubtedly has the resources to do so. In Fiscal Year 2014, the SEC allotted nearly $450 million for enforcement, which included almost 1,300 full-time employees in that function. SEC, *FY 2015 Congressional Budget Justification* 14, 16 (2014), *available at* http://www.sec.gov/about/reports/secfy15congbudgjust.shtml ("*SEC Cong. Just.*"). The Commission put those resources to good use: 2014 was a banner year, as the SEC brought more enforcement actions (755), and received more in monetary sanctions (over $4 billion), than ever before. *See* Andrew Ceresney, Dir., SEC Div. of Enforcement, Remarks to the ABA Business Law Section Fall Meeting (Nov. 21, 2014), *available at* www.sec.gov/News/Speech/Detail/Speech/1370543515297 ("Ceresney Remarks"). And the Commission brought those actions effectively, obtaining relief on one or more claims in a startling 92% of its cases. *SEC Cong. Just.* 33.

The SEC's in-house investigative resources are augmented by the recent creation of a whistleblower program that offers substantial bounties to encourage insiders to report violations. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (codified at 15 U.S.C. § 78u-6). That program received 3,620 whistleblower tips in Fiscal Year 2014, up more than 20% from two years earlier. SEC, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 3 (2014), *available at* www.sec.gov/about/offices/owb/annual-report-2014.pdf. Those tips also proved fruitful: In 2014 the SEC gave more whistleblower awards than in all other years combined, and doled out record-breaking payments. *Id.* at 1. As the SEC's whistleblower program matures, it is likely to provide even greater benefit to the Division of Enforcement.

With such powerful resources, the SEC has a proven track record of pursuing enforcement actions, no matter how complicated, well within the five-year window allowed by Section 2462. *SEC Cong. Just.* 34 (calculating that on average 20 months elapse between opening investigation and filing action); *see also id.* at 33 (noting SEC files roughly 60% of actions within two years of starting investigation, and seeking to raise that rate to 65%). *Cf.* 15 U.S.C. § 78d-5 (requiring SEC to decide, with exceptions, whether to file an enforcement action within 180 days of issuing a Wells notice). The SEC's average time for prosecuting an action may get even shorter in the future, as it now brings more than twice as many enforcement actions through administrative proceedings, which typically last less than a year, rather than through courts. *See* Ceresney Remarks; *SEC Cong. Just.* 54.

Requiring the SEC to file actions within five years—three times longer than its average—is surely reasonable. Five years is already as long as or longer than the statute of repose provided for every cause of action under either the Securities Act or the Exchange Act. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-62, 111 S. Ct. 2773, 2780-81 (1991). It equals—and often exceeds—the amount of time that victims of securities fraud (who do not have investigative powers) have to file private enforcement actions under Section 10(b). *See Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1790 (2010) (citing 28 U.S.C. § 1658(b)). And in the rare case when the SEC needs more than five years, it can (and often does) seek a tolling agreement, *see* SEC Enforcement Manual 36 (2013), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf, or use civil discovery, *see*, *e.g.*, *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112-13 (S.D.N.Y. 1981) (explaining SEC filed suit to uncover identities of alleged insider traders). Thus, applying Section 2462's five-year limitations period to SEC claims for the relief it seeks here is not likely to harm governmental enforcement of the securities laws, and in fact may enhance it.

C. Granting the Government Unlimited Time to Pursue Relief Harms Businesses and Investors

Applying Section 2462 to the SEC's claims seeking punitive disgorgement, declaratory relief, and injunctive relief additionally advances the important interests of the securities markets and its participants. Untethering the SEC from Section 2462's reasonable limit would create a cloud of potential liability over every participant in the financial markets—including the hundreds of securities firms, banks and asset managers that are engaged in communities across the country to raise capital for businesses, promote job creation and lead economic growth. Without a firm endpoint to liability, these businesses, investors, and individuals could never be certain when potential liability has passed.

Evolving SEC policy heightens the negative impact of this uncertainty. The SEC often looks back at once-widespread market practices and decides that, in retrospect, they were problematic. As a result, many businesses and investors have been caught up in enforcement "sweeps" launched years after the fact. *See*, *e.g.*, Mary Jo White, Chair, SEC, Speech at Sandler O'Neill Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370542004312 (promising stricter scrutiny of use of technology, high-speed trading, and alternative trading systems). The longer the SEC waits to condemn conduct deemed acceptable when it occurred, the greater the risk that its actions will be arbitrary (or perceived as such) and disrupt long-settled expectations. *See*, *e.g.*, *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating SEC censure because the agency knew about the practice in question before it occurred and did not condemn it, and therefore the defendant lacked notice that his conduct was improper).

Under the SEC's interpretation of Section 2462, companies and individuals who reasonably believe that their conduct is lawful—and the entirely innocent persons and entities that transact with them—would never be free from unknown and undiscovered SEC claims, so long as the agency refashions its otherwise punitive relief as equitable. Such insecurity would raise the cost of business transactions, making due diligence more difficult and burdening successor corporations with a predecessor's misconduct. To say the least, knowing that a market participant is not liable for civil money penalties for claims accruing five years earlier provides little solace if that same participant may, at any point in the future, be forced to disgorge funds (whether his own, his co-worker's, or his employer's), or be subject to the considerable collateral consequences that result from being branded a securities-law violator or being told to "obey the law." The possibility that the participant might one day suffer these punishments—any day, ever, indefinitely into the future—is particularly disquieting when these penalties materially impair the participant's ability to earn a paycheck.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(b)(i), the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5), and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief contains 6,943 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, and is prepared in a proportionally spaced typeface (14-point Times New Roman).

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CERTIFICATE OF SERVICE

I, Mark A. Perry, hereby certify that on this 19th day of February, 2015, a true and correct copy of the foregoing Brief for *Amicus Curiae* Securities Industry and Financial Markets Association in Support of Defendants-Appellees was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record. Service was accomplished on the same date via overnight mail on:

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I further certify that on the same date I have caused seven copies of the foregoing brief to be delivered to the Clerk of the Court.

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