No. _______

IN THE

GUY GENTILE,

Petitioner,

—v.—

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "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."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to "obey the law" injunctions and penny stock industry bars pursuant to 15 U.S.C. § 78u(d)(1), (6)?

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PETITION FOR WRIT OF CERTIORARI

Guy Gentile petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit decision is published as *SEC v. Gentile*, 939 F.3d 549 (3d Cir. 2019). The district court's order is unreported, but is available at 2017 WL 6371301 (D.N.J. Dec. 13, 2017).

JURISDICTION

The judgment of the Third Circuit was entered on September 26, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2462 provides:

> 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.

15 U.S.C. § 78u(d)(1) provides:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the

rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

15 U.S.C. § 78u(d)(6)(A) provides:

In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock,

> conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

INTRODUCTION

Under 28 U.S.C. § 2462, a five-year statute of limitations applies to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), this Court held that § 2462 applies to SEC claims seeking disgorgement, unanimously rejecting the SEC's argument that disgorgement is "remedial" in that it "lessen[s] the effects of a violation" by "restor[ing] the status quo." *Id.* at 1644 (quoting Brief for Respondent). This Court held that "[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462," and, thus, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Id.* at 1645.

In so holding, this Court set forth a simple two-part test for determining whether relief sought by the SEC constitutes a penalty under § 2462: whether the relief is sought to be imposed (1) for a violation of a public law and (2) at least in part for punitive purposes. *Id.* at 1642. This Court found that a "civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)) (emphasis original). Mirroring § 2462's application to penalties, "pecuniary or otherwise," this Court further defined

"penalty" as "punishment, whether corporal or pecuniary." *Id.* at 1642.

Whether an injunction or industry bar may be a penalty under § 2462 is now the subject of an acknowledged circuit split. *See SEC v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017) ("The courts of appeals split over whether an injunction can be a § 2462 'penalty'."); *Gentile*, 939 F.3d at 561 ("Other courts are divided on whether an injunction can ever be a § 2462 penalty."). The Fifth Circuit, Ninth Circuit, and D.C. Circuit have held that § 2462 applies to injunctions, and the Tenth Circuit has agreed in *dicta*. *See SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (non-precedential); *Federal Election Com'n. v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996); *United States v. Telluride Co.*, 146 F.3d 1241, 1245–48 (10th Cir. 1998) (stating in *dicta* "we construe § 2462 as applying to non-monetary penalties"). The Eighth Circuit and Sixth Circuit have issued more circumscribed rulings, declining to say whether injunctions can ever be § 2462 penalties, holding only that the particular injunctions before them were not punitive. *See Collyard*, 861 F.3d at 764; *SEC v. Quinlan*, 373 F. App'x 581, 587–88 (6th Cir. 2010) (non-precedential). The Eleventh Circuit and Third Circuit have held that injunctions cannot be penalties under § 2462 because they are equitable. *SEC v. Graham*, 823 F.3d 1357, 1360 (11th Cir. 2016); *Gentile*, 939 F.3d at 561–62.

This case squarely and cleanly presents the issue that has divided the circuits. Despite the SEC's acknowledgment that any alleged wrongdoing by Gentile last occurred in July 2008, the SEC did not file suit against Gentile until March 2016. Having acknowledged that any of its potential "claims"

against Gentile were time-barred and agreeing that § 2462 precludes it from seeking civil money penalties or disgorgement, the SEC nonetheless filed an amended complaint suggesting it could seek an "obey the law" injunction and penny stock bar because they were "remedies" not "claims" and therefore not subject to any statute of limitations. Plaintiffs' Memorandum of Law in Opposition to the Defendant's Motion to Dismiss, pg. 33, *SEC v. Gentile*, No. 16-1619 (D.N.J. July 17, 2018). The district court dismissed the amended complaint, finding that it failed to allege a plausible non-punitive purpose for the injunctions. *SEC v. Gentile*, No. CV 16-1619 (JLL), 2017 WL 6371301, at *4 (D.N.J. Dec. 13, 2017).

The Third Circuit vacated and remanded. *Gentile*, 939 F.3d at 566. After determining that a penny stock bar under § 78u(d)(6) is "injunctive in nature," it reframed the issue on appeal, considering "the question whether *properly issued and framed* § 78u(d)(1) and (6) injunctions can be penalties." *Id.* at 555 (emphasis added). It concluded that "proper injunctions do not fall within the definition of penalties as defined in *Kokesh*." *Id.* at 563. It held that "SEC injunctions that are properly issued and valid in scope are not penalties and thus are not governed by § 2462," reasoning that "[i]f an injunction cannot be supported by a meaningful showing of actual risk of harm, it must be denied as a matter of equitable discretion—not held time barred by § 2462." *Id.* at 562.

This Court should grant certiorari to resolve the conflict. The question presented recurs frequently and is important. *Kokesh* set forth a clear two-part test for determining whether relief sought constitutes a "penalty" under § 2462. Yet the Third Circuit

declined to apply the *Kokesh* test in deciding the exact question of whether § 2462 applies to a sanction sought under it. The Court instead reasoned that since injunctions were historically rooted in equity and require showing "a cognizable risk of future harm," they cannot be penalties under § 2462. *Id.* at 555-56.

Resolution of this issue is critical, especially since the SEC has held itself out as using its injunctive power as part of "a maximum deterrence strategy that focuses on using available sanctions to effectively deter and punish misconduct." Indeed, Former SEC Commissioner Luis Aguilar has stated that "[i]n terms of general deterrence" injunctions are "one of the most effective enforcement mechanisms at the SEC's disposal." He has noted that injunctions are "one of the sanctions that [defendants] fear the most, which is what precisely makes it one of the most effective sanctions available. For that deterrence to exist, potential fraudsters need to know the Commission is willing to impose this sanction."[1]

STATEMENT OF THE CASE

A. The SEC's Abandoned Claims of Securities Law Violations

The SEC entered into a cooperation agreement with Guy Gentile in July 2012, which lasted until shortly before the complaint was filed four years later. After being an active cooperator for the SEC since July 2012 and having been responsible for

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[1] Commissioner Luis Aguilar, Securities and Exchange Commission, Speech at Securities Enforcement Forum 2012 (Oct. 18, 2012), available at: https://www.sec.gov/news/speech/2012-spch101812laahtm.

assisting the SEC and DOJ in bringing dozens of cases resulting in multiple convictions, plea agreements, settlement agreements, and tens of millions of dollars in disgorgement and civil money penalties, on March 23, 2016, the SEC filed a complaint against Gentile alleging involvement in schemes occurring in 2007 and 2008.

The complaint sought to impose staggering civil penalties on Gentile, including civil money penalties, disgorgement, and permanent "obey the law" injunctions and a permanent bar from the penny stock industry. Complaint at 23–24, *SEC v. Gentile*, 2017 WL 6371301 (D.N.J. March 23, 2016). The SEC complaint did not allege that Gentile engaged in any conduct that violated any securities law after June 2008. Several months after the SEC filed its complaint (during which time the case was stayed), the district court dismissed a related, parallel criminal indictment against Gentile as the corresponding five-year criminal statute of limitations had run, finding that "[t]here is no dispute, as previously stated" that Gentile's alleged involvement in the schemes terminated in 2008. *See United States v. Gentile*, 235 F. Supp. 3d 649, 650–51 (D.N.J. 2017). In that criminal case, the Assistant United States Attorney further confirmed that Gentile had been truthful and had acted with honesty and integrity during his four years serving as a nearly full-time cooperator on behalf of the DOJ and SEC.

Following dismissal of the criminal indictment, the district court stayed the SEC's parallel civil action, pending the Supreme Court's then-forthcoming decision in *Kokesh*, decided on June 5, 2017, in which the Supreme Court clarified what constitutes a "penalty" under § 2462, the five-year statute of

limitations applicable to SEC actions against alleged securities law violators. Following this Court's issuance of its *Kokesh* decision, Gentile moved to dismiss the action against him as time-barred. Memorandum of Law in Support of Defendant Guy Gentile's Motion to Dismiss, *SEC v. Gentile*, No. 16-1619 (D.N.J. June 30, 2017). Confronted with the motion to dismiss, the SEC, by way of its opposition brief, voluntarily withdrew its request for civil money penalties and disgorgement and admitted that all of its five "claims" seeking these penalties were time-barred. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, at p. 16, n.5, *SEC v. Gentile,* No. 16-1619 (D.N.J. July 17, 2017). The SEC, nonetheless, argued that it could proceed without any timely claims on a theory that the "remedies" it sought—an "obey the law injunction" and penny stock bar—were not subject to any statute of limitations. *Id.* at 33.

On September 18, 2017, the district court administratively terminated Gentile's motion to dismiss, and ordered the SEC to refile an amended complaint clarifying which claims and remedies had been withdrawn and alleging wrongdoing within the statutory time limit. Opinion & Order, *SEC v. Gentile,* No. 16-1619 (D.N.J. Sept. 18, 2017). The SEC again admitted that all of its claims were time-barred but nevertheless filed a nearly identical complaint, removing its requests for disgorgement and civil money penalties, and including a few short paragraphs of recent statements made by Gentile on social media and in the press such as a tweet in which he claimed to have "never scammed anyone." Amended Complaint, *SEC v.* Gentile, No. 16-1619 (D.N.J. Oct. 6, 2017). Gentile moved to dismiss the amended complaint as beyond the statute of

limitations. Motion to Dismiss the Amended Complaint, *SEC v. Gentile*, No. 16-1619 (D.N.J. Oct. 27, 2017).

B. The District Court's Order Dismissing Case

The district court granted the motion. In so ruling, it found:

> The resolution of Defendant's Motion turns on whether the relief sought by Plaintiff are penal. This is because 28 U.S.C. § 2462 provides that "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…." The parties all agree, and this Court has previously found, that Defendant's allegedly illegal conduct ended in June of 2008. Accordingly, if Defendant is subject to Section 2462's five-year statute of limitation, Plaintiff had until June 2013 to institute the within action. However, Plaintiff filed this action in March 2016. As noted above, Section 2462's statute of limitations only applies when the action brought by the Government seeks a remedy that is penal in nature. Hence, if this action is subject to Section 2462, it is untimely. However, if this action is not subject to Section 2462, it may proceed in due course. Thus, whether Plaintiff's demanded relief are penal in nature is dispositive.

Gentile, No. 16-1619, 2017 WL 6371301, at *2 (D.N.J. Dec. 13, 2017).

Having set forth the issues, the district court looked to "Courts throughout the country" that "have consistently held" that relief "is penal in nature" when it serves "no remedial purpose and merely seeks to punish the individual." The district court looked to these holdings as well as Black's Law Dictionary to determine that a "penalty" is "punishment imposed on a wrongdoer" and to the Tenth Circuit for its statement that a penalty is "a sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant." *Gentile*, 2017 WL 6371301, at *3 (citing *Telluride Co.*, 146 F.3d at 1245-46). Moreover, while noting that the remedy sought in *Kokesh* differed from the instant action, the district court found "the Supreme Court's reasoning is quite instructive" because, "[c]onsistent with the above law, the Court found that '[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State.'" *Id.*

Based on these black-letter legal principles, the district court held, even accepting all facts as true, the face of the amended complaint made clear that the relief sought, specifically a permanent "obey the law" injunction and a permanent industry bar, were for punitive purposes as the amended complaint included no allegations of any securities violations beyond 2007 and 2008, nor allegations that Gentile was about to violate any securities laws. *Id.* at *4. Specifically, the district court found that nothing in the amended complaint suggested that the injunctions would "restore any *status quo ante*," noting that "[a]s a matter of fact, [the SEC] has not identified a single 'victim' or specific harmed party that these injunctions would be designed to compensate or benefit." *Id.* Rather, "the only person

who would be impacted by such an order would be Defendant, and the only purpose for such an order would be to penalize him for his alleged involvement in the [2007] and [2008] schemes." *Id.* At the same time that the district court found that the Amended Complaint failed to allege any remedial, or nonpunitive purpose, it also found the Amended Complaint made clear that the "obey the law" injunction "would simply require [Gentile] to obey the already established federal laws and regulations relating to securities. Should the Court enter such an order, [Gentile] would not be required to do anything more than obey the law; a basic understanding of all citizens and those involved with securities. However, such an order would also stigmatize [Gentile] in the eyes of the public." *Id.* Similarly, the penny stock bars sought "would not restore any '*status quo ante*'" but "would merely restrict [Gentile's] business structure and methodology, *in perpetuity*, simply because he was alleged to have violated the securities laws" in 2007 and 2008. *Id.* The district court, moreover, limited its ruling to the instant facts as alleged in the amended complaint, noting that "[w]hile the Court understands Plaintiff's desire to protect the public from predatory conduct, the Court cannot conclude, that, under the limited set of facts currently before it, the requested injunctions are anything more than a penalty." *Id.* Accordingly, the District Court dismissed the amended complaint as time-barred under § 2462. *Id.*

C. The Third Circuit's Opinion

The SEC appealed the district court's order to the Third Circuit, renewing its argument that "injunctions in Commission actions *cannot* be used to punish past wrongdoing and may be issued only to protect against future violations," and therefore may

not be considered "penalties" under § 2462. Opening Brief for the SEC, Appellant at 10, *SEC v. Gentile*, 939 F.3d 549 (3rd Cir. 2019) (No. 18-1242).

The Third Circuit vacated and remanded the district court's order. *Gentile*, 939 F.3d at 566. The Third Circuit recognized the issues on appeal—whether "an injunction against further violations of certain securities laws and an injunction barring participation in the penny stock industry" are subject to § 2462's statute of limitations—were "questions of first impression." *Id.* at 552. The Third Circuit acknowledged that a "five-year statute of limitations applies to any action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." *Id.* Nonetheless, it reframed the question on appeal, asking "whether properly issued and framed § 78u(d)(1) and (6) injunctions can be penalties subject to the statute of limitations." *Id.* at 555. The Court answered, "because 15 U.S.C. § 78u(d) does not permit the issuance of punitive injunctions, the injunctions at issue do not fall within the reach of § 2462." *Id.* at 552.

Having first concluded that "industry bars are injunctive," the Third Circuit reasoned that "[t]he historic injunctive process was designed to deter, not to punish," and "[i]n short, injunctions may properly issue only to prevent harm—not to punish the defendant." *Id.* at 556. Specifically, the Third Circuit found that "start[ing] with the text" "nothing in either provision [§ 78u(d)(1), (6)] . . . suggests Congress meant to depart from the rule that injunctions are issued to prevent harm rather than to punish past wrongdoing." *Id.* at 557. It further reasoned that "[t]he history of the Commission's

injunction authority leads to the same conclusion." *Id.* at 558.

Thus, the Third Circuit, while excising injunctions and industry bars from § 2462's purview, stated that SEC injunctions "must be justified by a substantial showing of threatened harm, assuring the court that the opprobrium and other collateral consequences that accompany it are outweighed by a demonstrated public need; retribution is not a proper consideration to support this showing." *Id.* at 560. Rather, SEC injunctions "must be intended to deter the violator from further infractions . . . ." *Id.* The Third Circuit highlighted that "[t]he SEC itself agrees with this approach in principle." *Id.* at 560 (citing *In re Saad*, Exchange Act Release No. 86751, 2019 WL 3995968 (Aug. 23, 2019)).

The Third Circuit rejected Gentile's argument that "*Kokesh* holds deterrence is punitive," reasoning that "this overreads *Kokesh*," because "[t]hough the Court referred several times to 'deterrence' without elaboration, we understand those references to address general deterrence." *Id.* at 563.

The Third Circuit, therefore, held that "properly issued and framed injunctions under § 78u(d)(1) and (6) are not penalties governed by § 2462." *Id.* at 566.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED

This case presents ideal facts to resolve a circuit split on an important question of federal law. As the Third Circuit acknowledged, its decision is consistent with the decisions of the Eleventh Circuit, *Graham*, 823 F.3d at 1360, but directly conflicts with decisions

of the Fifth Circuit and D.C. Circuit. *Gentile*, 939 F.3d at 561. *See also Bartek*, 484 F. App'x at 957; *Johnson*, 87 F.3d at 491–92. The decision and reasoning also conflict with the Ninth Circuit's holding that § 2462 applies to injunctive relief, *Williams*, 104 F.3d at 240, and has not been endorsed by the Tenth Circuit or Eighth Circuit. *See Telluride Co.*, 146 F.3d at 1245 ("we construe § 2462 as applying to non-monetary penalties"); *Collyard*, 861 F.3d at 763 ("Just as disgorgement's 'equitable' label does not exempt it from being a § 2462 'penalty,' injunction's 'equitable' label does not exempt it from being a § 2462 'penalty'.").

This disagreement is significant: overzealous SEC enforcement has permitted the agency to assume a quasi-prosecutorial role whereby it admittedly uses tools of enforcement, such as generic "obey the law" injunctions and industry bars to punish and deter wrongdoers. But the Third Circuit's ruling, if left to stand, would permit the SEC to bring cases "at any distance in time," a power "repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. 336, 342 (1805). This unfettered power now may or may not exist depending on where the SEC chooses to prosecute the violations, and only this Court can restore national uniformity. This case provides the ideal facts to do so. The Court should grant Gentile's petition for writ of certiorari.

a. The Fifth Circuit, Ninth Circuit, and D.C. Circuit Have Held That Section 2462 Applies to Injunctions, and the Tenth Circuit Has Stated in *Dicta* That Section 2462 Applies to Injunctions

In an unpublished opinion, *SEC v. Bartek*, the Fifth Circuit considered the issue of whether

"permanent injunctions and officer and director bars" sought by the SEC against individuals more than five-years after they allegedly violated securities laws constitute a "penalty" subject to § 2462's statute of limitations. 484 Fed. App'x at 956. The Fifth Circuit determined:

> A "penalty" is defined as "[p]unishment imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine . . ." Black's Law Dictionary 1247 (9th ed. 2009). A "penalty" is "[ ] punishment imposed by statute as a consequence of the commission of an offense." *Johnson v. S.E.C.,* 87 F.3d 484, 487 (D.C. Cir. 1996) (citing Black's Law Dictionary 1020 (5th ed. 1979)). Other legal sources similarly define "penalty" as "[a] punishment; a punishment imposed by statute as a consequence of the commission of a certain act." *Id.* (citing 2 Burrill's Law Dictionary (1871)). The words " 'penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States' . . . refer to something imposed in a punitive way for an infraction of a public law . . ." *Meeker v. Lehigh Valley R.R. Co.,* 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915) (interpreting the predecessor statute to § 2462).

Id. Rejecting the SEC's argument that "penalties" are "limited to a sanction that involves the collecting of money or property," the Fifth Circuit looked at the nature and characteristics of the injunction at issue in determining that the "permanent injunction and O/D bars" were "punitive, and thus subject to § 2462's time limitations." *Id.* at 956–57. The Fifth Circuit

affirmed the district court's dismissal of the suit as untimely.

That holding relied heavily on *Johnson v. SEC*, 87 F.3d at 492, a case in which the D.C. Circuit vacated a six-month industry censure and suspension issued pursuant to an SEC proceeding as a time-barred "penalty" under § 2462. In *Johnson*, the D.C. Circuit presaged this Court's ruling in *Kokesh*, applying the same two-part test set forth in *Kokesh*. *Id.* at 487–88. Specifically, the *Johnson* court cited the Supreme Court's holding in *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915), which determined the word "penalty" in § 2462's predecessor refers to "something imposed in a punitive way for an infraction of a public law . . . ." *Cf. Kokesh*, 137 S. Ct. at 1642–43 (quoting *Meeker*). Based on this well-established definition, the *Johnson* court held, "[i]n sum, we conclude that 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." *Johnson*, 87 F.3d at 488. Thus, after thorough historical review, that court rejected "the SEC's bare assertion that 'history and common understanding of such professional sanctions has always been one associated with regulation and remedial purposes, not with punishment.' " *Id.* at 488, n.6. Rather, it held that the SEC injunctions "clearly resemble punishment in the ordinary sense of the word," finding that "the five-year statute of limitations set forth in § 2462 does apply . . . ." *Id.* at 488, 492.[2]

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[2] The Third Circuit took direct issue with the *Johnson* court's holding, stating "[w]e question too the consistency and

Notably, the Ninth Circuit—evaluating an injunction sought by the Federal Election Commission—rejected the FEC's argument that "§ 2462 does not apply to actions for injunctive relief" as an "assertion [that] runs directly contrary" to Supreme Court precedent. *Williams*, 104 F.3d at 240. The *Williams* court reversed the district court's order, concluding that the "FEC's suit was untimely and should have been dismissed." *Id.* at 241.

The Tenth Circuit, in *dicta*, has also determined that § 2462 applies to non-pecuniary relief, including injunctions. *United States v. Telluride, Co.*, 146 F.3d at 1245. In *Telluride Co.*, the government sought injunctive relief against a developer pursuant to the Clean Water Act for discharges of fill material into wetlands. *Id.* at 1243. The issue on appeal was "whether the five-year statute of limitations provided in 28 U.S.C. § 2462 applies to government claims for injunctive relief." *Id.* at 1243. Like the Fifth Circuit and D.C. Circuit, *Telluride Co.* found that "a penalty for purposes of § 2462 [i]s a sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant." *Id.* at 1246. Having distinguished injunctions that function to punish from injunctions that seek to restore the "*status quo*", the court ruled that the specific injunction at issue was not punitive because the sole purpose of the "restorative injunction" was to "restore only the wetlands damaged by [the defendant's] acts to the status quo or to create new wetlands for those that cannot be restored." *Id.* at 1246. Since the injunction was solely remedial and did not go beyond restoring the *status quo ante*, the

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administrability of [the *Johnson* court's] approach . . . ." *Gentile*, 939 F.3d at 561, n.8.

court held the injunction was not punitive. *Id.* at 1247–48.

These opinions directly contradict with the Third Circuit's holding that SEC injunctions and industry bars can never constitute a penalty under § 2462.[3] *See Gentile*, 939 F.3d at 566.

b. The Eighth Circuit's Narrow Ruling

Post-*Kokesh*, the Eighth Circuit issued a more circumscribed opinion, declining to "resolve whether an injunction can be a § 2462 'penalty'." *Collyard*, 861 F.3d at 764. Rather, *Collyard* found that on the developed record before it, the injunction sought was not a "penalty" because the district court found that the defendant was "reasonably likely to violate Section 15(a) again unless enjoined." *Id.* But the Eighth Circuit made equally clear that *Kokesh* "undermines" its prior determination in *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018 (8th Cir. 2010), that "a claim is not a 'penalty' simply because it is 'equitable.'" *Id.* at 763. As the Eighth Circuit clarified: post-*Kokesh*, "[j]ust as disgorgement's 'equitable' label does not exempt it from being a § 2462 'penalty,' injunction's 'equitable' label does not exempt it from being a § 2462 'penalty'." *Id.* Thus, the Eighth Circuit recognized that the "courts of appeals split over whether an injunction can be a § 2462 'penalty'." *Id.*

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[3] It is worth noting that the Third Circuit in an unpublished opinion, *United States v. Rebelo*, 394 Fed App'x 850, 852 (3d Cir. 2010), has also defined a "penalty" under § 2462 as "something imposed in a *punitive* way for an infraction of a public law." *Id.* at 853. In *Rebelo*, the Third Circuit *assumed* that § 2462 applies to non-pecuniary relief before concluding that the relief at issue in that case was not penal because it sought *solely* to restore the *status quo ante*. *Id.*

c. The Eleventh Circuit and Third Circuit Have Held That Section 2462 Does Not Apply to Injunctions and Industry Bars

The Circuits are now in express disagreement over whether § 2462's limitations period applies to injunctive relief, such as "obey the law" injunctions and industry bars. While the Fifth Circuit, D.C. Circuit, Ninth Circuit, and Tenth Circuit have answered that it does, the Eleventh Circuit and Third Circuit have held that § 2462 can never apply to SEC injunctions.

Eleventh Circuit. In *SEC v. Graham*, 823 F.3d at 1357, the Eleventh Circuit reversed the district court's holding that "§ 2462 applied here because the injunction the SEC requested was 'nothing short of a penalty' . . . ." *Id.* at 1360. *Graham* held, "[o]ur precedent forecloses the argument that § 2462 applies to injunctions, which are equitable remedies." *Id.* The court reasoned that "[e]ach of these definitions [of penalty] has the common element of looking backward in time. That is, a penalty addresses a wrong done in the past." *Id.* at 1361. The court thus contrasted "penalties" with "injunctions" which "typically look forward in time." *Id.*

Third Circuit. In *Gentile*, discussed more fully above, the Court held that "SEC injunctions that are properly issued and valid in scope are not penalties and thus are not governed by § 2462," reasoning that "[i]f an injunction cannot be supported by a meaningful showing of actual risk of harm, it must be denied as a matter of equitable discretion – not held time barred by § 2462." *Gentile*, 939 F.3d at 562. The Third Circuit acknowledged that its ruling directly conflicts with the position of other circuits.

Id. at 560. ("Other courts are divided on whether an injunction can ever be a § 2462 penalty.").

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW

This case meets all of the Court's criteria for granting certiorari. The question presented is important, it concerns a circuit split on a recurring question that only this Court can resolve, and provides this court the opportunity to fully resolve the split.[4]

a. The Question Presented Is Important

Resolution of this issue is critical, especially since the SEC has held itself out as using its injunctive power as part of "a maximum deterrence strategy that focuses on using available sanctions to effectively deter and punish misconduct."[5] Indeed, Former SEC Commissioner Luis Aguilar has stated that "[i]n terms of general deterrence," industry bars are "one of the most effective enforcement mechanisms at the SEC's disposal."[6] He has noted that industry bars are "one of the sanctions that [defendants] fear the most, which is what precisely makes it one of the most effective sanctions available. For that deterrence to exist, potential fraudsters need

[4] *See, e.g.*, *SEC v. Cohen*, 332 F. Supp. 3d 575, 592–95 (E.D.N.Y. 2018) (discussing the circuit split on the issue of whether injunctions can be penalties under § 2462, holding that SEC claims which accrued more than five years before the SEC filed suit were time-barred under § 2462 because they operated at least partially has a penalty, and applying the *Kokesh* criteria to determine that the injunction at issue was a penalty as it redressed a wrong to the public and was not solely remedial in purpose).

[5] *See supra* note 1.

[6] *Id.*

to know the Commission is willing to impose this sanction."[7]

At a recent training on remedies and relief in SEC Enforcement Actions, co-director of the SEC's Division of Enforcement Steven Peiken emphasized and encouraged the use of "conduct-based injunctions, and bars and suspensions" as a form of relief intended to "punish bad actors" and to "advance the goals of specific and general deterrence."[8]

As the Third Circuit acknowledged, "[i]t may well be that in its zeal for enforcement, the Commission more recently has tended to seek injunctions in part for their general deterrent effect." *Gentile*, 939 F.3d at 563 (citing James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 751 (2003)).

b. This Court Should Resolve the Circuit Split

The issue whether § 2462 applies to injunctive relief continues to present itself frequently—with trial courts arriving at different conclusions. *See, e.g.*, *SEC v. Spartan Securities Group, Ltd.*, 2019 WL 2372277, at *7 (M.D. Fla. June 5, 2019) ("The first and fourth requests seek equitable relief to enjoin future conduct, and therefore, Section 2462 does not apply to them."); *SEC v. Place*, 2018 WL 6727998, at *6 (E.D. Pa. Dec. 21, 2018) ("However, there is disagreement amongst circuits courts about whether an injunction is a 'penalty' subject to the [§ 2462] statute of limitations."); *Cohen*, 332 F. Supp. 3d at

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[7] *Id.*

[8] Steven Peikin, Securities and Exchange Commission, Speech at PLI White Collar Crime 2018, (Oct. 3, 2018), available at: https://www.sec.gov/news/speech/speech-peikin-100318.

595 ("[t]he court need not decide whether an SEC obey-the-law injunction is always a penalty for purposes of § 2462. It concludes only that, in this case, the SEC's requested injunction would function at least partly to punish Defendants and is therefore a penalty for purposes of § 2462."); *FTC v. DIRECTTV, Inc.*, 2017 WL 3453376, at *6 (N.D. Cal. Aug. 12, 2017) ("[T]he Court follows the prudent approach of courts that, in the wake of *Kokesh*, have limited their inquiry to whether the particular remedy sought operates as a penalty."); *SEC v. Hooper*, 2017 WL 6550636, at *4 (E.D. Wash. Aug. 10, 2017) ("Section 2462 does not apply to injunctive remedies because it is plainly recognized that an injunction is an equitable remedy."); *Cf. Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) ("expulsion or suspension of a securities broker is a penalty, not a remedy") (Kavanaugh, J., concurring).

Moreover, § 2462 "governs many penalty provisions throughout the U.S. Code," and its "origins date back to at least 1839." *Gabelli v. SEC*, 568 U.S. 442, 445 (2013). Opinions addressing this issue have emerged across agencies, but disproportionately have occurred in the securities context, suggesting that overzealous SEC prosecution has resulted in an improper expansion of its authority. *Gentile*, 939 F.3d at 563 (commenting on the SEC's "zeal for enforcement" but rationalizing that the "impetus may be understandable; after all, SEC enforcement actions are independent of the claims of individual investors and are aimed at promoting economic and social policies") (quotation marks omitted).

As in the present case, this "zeal for enforcement" has led to an anomaly whereby courts have exempted injunctions from any statutory time-limitations. In essence, this judicial expansion in some circuits

permits the SEC to obtain a declaration of wrongdoing—for example, in the form of a generic "obey the law" injunction—even where those courts recognize all "claims" as time-barred as well as nearly all remedies, including a declaratory judgment. *Cf. Graham*, 823 F.3d at 1362 ("We agree with the district court, however, that the declaratory relief the SEC sought is backward-looking and thus would operate as a penalty under § 2462…[a] public declaration that the defendants violated the law does little other than label the defendants as wrongdoers.").

Thus, in certain jurisdictions, for example, the SEC may avoid a congressionally imposed statute of limitations on declaratory judgments of wrongdoing by merely labeling that relief equitable or remedial, that is, as an "obey the law" injunction. Yet, even cases adopting a more circumscribed approach to § 2462 have cautioned against precisely this circular reasoning. *Collyard*, 861 F.3d at 763 ("injunction's 'equitable' label does not exempt it from being a § 2462 'penalty' "); *Saad*, 873 F.3d at 304 ("the term 'remedial' makes little sense when describing the expulsion or suspension of a securities broker").

Indeed, while an "obey the law" injunction based on past-violations and declaratory judgment share the same essence—notifying the world of a past violation of the securities law without identifying any specific future conduct sought to be enjoined—the "obey the law" injunction goes *beyond* this punitive purpose, imposing even greater penal sanctions. As the Third Circuit found in *SEC v. Warren* in dissolving an "obey the law" injunction:

> In effect, the injunction merely requires defendants "to obey the law" in the future

> when obtaining loans for the purchase of margin securities, a requirement with which they must comply regardless of the injunction. Dissolution of the injunction decree removes the possibility of contempt proceedings in the event of a future violation; the right to prosecute criminally or proceed civilly still exists."

583 F.2d 115, 121 (3d Cir. 1978).

This apparent contradiction has been heightened, if not created, by the judicial expansion of the plain language of § 78u(d)(1) far beyond its actual words. This expansion permits issuance of non-remedial injunctions, that is, in cases without a showing an individual "is engaged or about to engage" in a securities law violation—in other words, an injunction designed to remedy something other than an imminent or ongoing securities violation that restores the *status quo ante*. *Compare* 15 U.S.C. § 78u(d)(1) (authorizing issuance of injunctions "[w]henever it shall appear to the Commission that any person is engaged or is about to engage" in a violation of the securities law) *with SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980) ("The well established standard developed by the courts to determine if an injunction should issue in a case involving securities violations . . . is based on a determination of whether there is a *reasonable likelihood* that the defendant, if not enjoined, will again engage in the illegal conduct.") (emphasis added).

The SEC, therefore, may seek injunctions based on a "reasonable likelihood" of violation, which does not satisfy the injunction's historical equitable role of remedial purpose of restoring the *status quo ante*,

and grants the SEC the right to seek punitive sanctions not authorized by statute. This contradiction appears more pronounced with regard to "penny stock bars" under § 78u(d)(6), which may be issued for *past* violations, thus making the bars punitive on their face. *See* 15 U.S.C. 78u(d)(6) (permitting a court to "permanently" enjoin an individual who "at the time of alleged misconduct . . . *was* participating in, an offering of penny stock") (emphasis added).

This creation of indefinite liability undermines the very purpose of statutory limitations. *See Gabelli*, 568 U.S. at 448–49 (statutes of limitation are critical 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 liability' " and because they "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") (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000) and *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). As such, it promotes forum shopping by the SEC in jurisdictions that permit issuance of injunctions and industry bars at any distance in time. Indeed, during oral argument in *Gentile*, Judge Hardiman asked the SEC if, under its theory, it could first bring a lawsuit seeking an injunction against Gentile fifty years from now based on alleged conduct from 2007. The SEC answered that it believed it could, and given the Third Circuit's ruling it now has that option.

c. Review of The Third Circuit's Ruling Is Ideal for Resolving These Issues

Review of the Third Circuit's decision vacating and remanding the district court's dismissal is ideal for resolving these issues. The Third Circuit expressly recognized a circuit split:

> Other courts are divided on whether an injunction can ever be a § 2462 penalty. The Eleventh Circuit, bound by its precedent, held that injunctions cannot be penalties under § 2462 because they are equitable. *Graham*, 823 F.3d at 1360. It went on to explain that even had that precedent not been established, it would hold § 2462 "does not apply to injunctions like the one in [that] case." *Id.* The court reasoned that injunctive relief is forward looking, while penalties address past wrongdoing. *See id.* at 1361-62. By contrast, the Fifth Circuit held in a non-precedential opinion that SEC injunctions and D&O bars could be—and in that case were—penalties under § 2462. *SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (per curiam). The Eighth, Sixth, and Tenth Circuits declined to say whether injunctions can ever be § 2462 penalties, instead holding the particular injunctions before them were not punitive. *SEC v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017); *SEC v. Quinlan*, 373 F. App'x 581, 587 (6th Cir. 2010) (non-precedential); *United States v. Telluride, Co.*, 146 F.3d 1241, 1245–48 (10th Cir. 1998). The D.C. Circuit has taken yet another approach in the agency context. That court evaluates whether an administrative sanction constitutes a

> penalty for purposes of § 2462 on a case-by-case basis, considering "the degree and extent of the consequences to the subject of the sanction." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996).

Gentile, 939 F.3d at 561. The Third Circuit, however, expressly adopted the Eleventh Circuit's view. *Id.* at 562. ("In our view, the *Graham* court got it right."). The Third Circuit's ruling further deepens the existing split.

As importantly, the instant case highlights the extreme of how willing the SEC is to punish wrongdoers long after the statute of limitations has expired. Here, the SEC seeks an "obey the law" injunction (in essence a declaration of past wrongdoing) and penny stock bar against Gentile for conduct he allegedly engaged in over 11 years ago with no allegations of wrongdoing after that time. Thus, the SEC has expressly conceded that all of its "claims" of securities violations were time-barred, yet insists that it can continue to pursue "remedies" without any "claims" in perpetuity.[9] Whether the SEC may engage in such aggressive enforcement—seeking "remedies" without any viable claims—should be reviewed by this Court.

[9] Plaintiffs' Memorandum of Law in Opposition to the Defendant's Motion to Dismiss at p. 33, *SEC v. Gentile*, No. 16-1619 (D.N.J. July 17, 2018); Opinion & Order, *SEC v. Gentile,* 2017 WL 6371301 (2017) (No. 16-1619), at ¶¶ 6–7 (stating "the SEC seeks to proceed in this case based upon claims and factual allegations that: (a) have been withdrawn; (b) are not asserted in the complaint, and are being raised for the first time in response to the motion to dismiss; or (c) are hopelessly intertwined with the claims and allegations that have been withdrawn").

III. THE THIRD CIRCUIT'S OPINION IS WRONG

The Third Circuit erred in ruling that § 2462 does not apply to the "obey the law" injunction and penny stock bar sought here.

By its plain language, § 2462 applies to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, *pecuniary or otherwise*." (emphasis added). Courts have repeatedly confirmed that § 2462 places a five-year time limit on *both* pecuniary and *non-pecuniary* penalties, since "pecuniary or otherwise" modifies "penalty." *See* Rev. Stat. § 1047, Comp. Stat. 1913, § 1712; *Meeker*, 236 U.S. at 423; *Telluride Co.*, 146 F.3d at 1244–45 (reviewing statute's history and concluding "we construe § 2462 as applying to non-monetary penalties").

The Supreme Court confirmed this analysis in *Kokesh*, relying on case law going back nearly 150 years in finding that under § 2462 a "penalty" is a "punishment, *whether corporal or pecuniary*," and whether "*pecuniary or otherwise*." *Kokesh*, 137 S. Ct. at 1642.

In *Kokesh*, the Supreme Court set forth a two-part test for determining whether relief constitutes a "penalty" under § 2462, and thus is subject to a five-year statute of limitations. To make the determination, courts must consider: (1) whether the SEC seeks to impose the relief sought "as a consequence of violating a public law"; and (2) whether the relief is at least in part "imposed for punitive purposes." *Kokesh*, 137 S. Ct. at 1643; *see also Gabelli*, 568 U.S. at 452 (a "penalty" under § 2462 is "something imposed in a punitive way for an infraction of a public law"). *Kokesh* further clarified that any relief must be considered a penalty even if

the objective is only partly to penalize and partly equitable: "[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment…." *Id.* at 1645 (emphasis original); *see also Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 7 (D.C. Cir. 2000) ("[A] penalty [is] a sanction that goes *beyond* remedying the damage caused to the harmed parties by the defendant's action" and "a sanction is a penalty even if only one of its various objectives is to punish wrongful conduct; that is, if it serves *in part* to punish") (*quoting Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996) and *Austin v. United States*, 509 U.S. 602, 610 (1993)) (emphasis original). As further explained by this Court in *Gabelli*, "penalties are 'intended to punish culpable individuals,' not 'to extract compensation or *restore the status quo*.'" 568 U.S. at 452 (citing *Tull v. United States*, 481 U.S. 412, 422 (1987)) (emphasis original).

While the district court granted Gentile's motion to dismiss, holding that the amended complaint failed to allege any plausible non-punitive purpose for the "obey the law" injunction and penny stock bar, the Third Circuit reframed the issue on appeal: "We see these questions of first impression differently and hold that because 15 U.S.C. § 78u(d) does not permit the issuance of punitive injunctions, the injunctions at issue do not fall within the reach of § 2462." *Gentile*, 939 F.3d at 552.

The Third Circuit reasoned that the notion that SEC injunctions could be "penalties" "runs headlong into a core tenet of equity jurisprudence." *Id.* at 556. Specifically, the Third Circuit relied on the Supreme Court's statement in *Hecht* that "[t]he historic injunctive process was designed to deter, not to

punish." *Id.* (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). The Third Circuit concluded that "an injunction is permissible only where necessary to prevent [] misconduct from occurring in the future." *Id.* at 561.

The Third Circuit's approach is wrong and unworkable. At the outset, it sets forth a dichotomy—punishment vs. deterrence—that confuses the *Kokesh* holding that a "penalty" is relief imposed at least in part for "punitive purposes," and "deterrence" is a "punitive purpose."[10] As *Kokesh* made clear, "deterrence" is a punitive purpose. *Kokesh*, 137 S. Ct. at 1643–44 ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective.") (citing *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979); *United States v. Bajakajian*, 524 U.S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment")) (internal quotation marks and brackets omitted).

The Third Circuit sought to avoid this contradiction by asserting that Gentile's argument "overreads *Kokesh*," because "[t]hough the Court referred several times to 'deterrence' without elaboration, we understand those references to address general deterrence." *Gentile*, 939 F.3d at 563. But this is a distinction without a difference. *Cf. United States v. Peltier*, 422 U.S. 531, 556 (1975) (Douglas, J., dissenting) (defining "specific deterrence" as "punishing an individual so that he will not repeat the same behavior"). Rather, the Supreme Court has

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[10] This Court may take note that Third Circuit's citations to *Hecht* that form the foundation of its "historical purpose" or "primary purpose" test are misplaced.

made clear that a form of relief is solely remedial when its purpose is (1) to "compensate" the victim, *Kokesh*, 137 S. Ct. at 1644, or "restore the *status quo ante*," *Gabelli*, 133 S. Ct. at 452. A form of relief designed to "specifically deter" an individual is by definition punitive. *United States v. Leon*, 468 U.S. 897, 953, n.12 (1984) ("specific deterrence function" is "to punish") (Brennan, J., dissenting). Just as a pecuniary remedy may serve solely to compensate a victim, non-pecuniary relief, such as injunctions, may serve solely to restore the *statutes quo ante*—such as where an injunction issues to halt an imminent or ongoing securities violation. *Cf. Rebelo*, 394 Fed. App'x at 852–853 ("denaturalization" as "a remedy for citizenship fraudulently obtained" serves a *solely* remedial purpose in that it restores the *status quo ante* by denaturalizing an individual who never would have been approved for naturalization had he "been truthful in his application" and thus is not a "penalty" under § 2462); *Telluride Co.*, 146 F.3d at 1245–46 (order to clean up wetlands to return the land to its natural state that existed prior to the violation sought solely to restore the *status quo ante*, and thus not "penalty" under § 2462).

The Third Circuit has sought to redraw the lines—distinguishing "specific deterrence" from punishment rather than accept this Court's distinction between punitive purposes, including deterrence, and compensating the victim or restoring the *status quo* ante. This attempted distinction overlooks or discounts the Third Circuit's expansion (in *Bonastia*) of the plain language of §78u(d)(1) far beyond its actual words. This expansion permits issuance of non-remedial injunctions, that is, in cases without a showing an individual "is engaged or about to engage" in a securities law violation. *Compare* 15

U.S.C. § 78u(d)(1) (authorizing issuance of injunctions "[w]henever it shall appear to the Commission that any person is engaged or is about to engage" in a violation of securities law) *with Bonastia*, 614 F.2d at 912 ("The well established standard developed by the courts to determine if an injunction should issue in a case involving securities violations . . . is based on a determination of whether there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the illegal conduct").

Thus, under the Third Circuit's ruling, the SEC can seek injunctions based on a "reasonably likelihood" of violation, which does not satisfy the injunction's historical equitable role and remedial purpose of restoring the *status quo ante,* and grants the SEC the right to seek punitive sanctions not authorized by statute merely by labeling them as equitable—the exact position the SEC erroneously argued in *Kokesh* concerning disgorgement.

Moreover, the Third Circuit's adoption of the Eleventh Circuit's "primary purpose" or "historical purpose" test, which asks whether the primary purpose of the relief sought is to "prevent future harm" is unworkable. *See Gentile*, 939 F.3d at 556. Setting aside that incarceration—for specific deterrence—would not be "punitive" under this definition, it contradicts this Court's pronouncements in *Kokesh* and *Gabelli* that relief that goes beyond compensating the victim or restoring the *status quo ante* "for the purpose of deterring infractions of public laws" is "inherently punitive," as articulated in over 200 years of caselaw. *Kokesh*, 137 S. Ct. at 1643; *Gabelli v. S.E.C.*, 568 U.S. at 452.

The error of this approach is even more apparent in the context of industry bars which courts have repeatedly held are punitive. *See del la Fuente v. F.D.I.C.*, 332 F.3d 1208, 1219 (9th Cir. 2003) (order seeking removal from banking constitutes a penalty under § 2462 subject to five-year statute of limitations); *Proffitt v. F.D.I.C.*, 200 F.3d 855, 857, 861 (D.C. Cir. 2000) (expulsion of defendant from banking industry constituted civil penalty although it had dual effect of protecting public and punishing defendant as "manifested by the fact that the FDIC did not act for more than six years after Proffitt's misdeeds"); *Johnson*, 87 F.3d at 491–92 (vacating industry suspension under § 2462 because it was not "directed toward correcting or undoing the effects" of defendant's conduct, and implying that "the putatively civil or regulatory sanction is in actuality a back-door form of punishment"); *see also Saad*, 873 F.3d at 304–05 (Kavanaugh, J., concurring).

The appropriate inquiry here is whether on the face of the amended complaint the SEC has plausibly alleged that the "obey the law" injunctions and industry bar sought against Gentile are intended to compensate a victim or restore the *status quo ante*. Permitting the SEC to effectively resuscitate its stale claims by asserting that they do not have any claims to prove, but only are seeking "remedies" (labelled "equitable") is "utterly repugnant to the genius of our laws." *Adams*, 6 U.S. 336, 342 (1805).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 8, 2019

No. 18-1242

SECURITIES AND EXCHANGE COMMISSION,

Appellant

—v.—

GUY GENTILE

(D.N.J. No. 2-16-cv-01619)

Present: HARDIMAN, KRAUSE and GREENBERG, Circuit Judges

1. Motion by Appellee to Stay Issuance of Mandate Pending Disposition by the Supreme Court of Petition for Writ of Certiorari

Respectfully,
Clerk/CJG

ORDER

The foregoing Motion is DENIED.

By the Court,

s/ *Thomas M. Hardiman*
Circuit Judge

Dated: November 22, 2019
Lmr/cc: Sarah Prins
Daniel Staroselsky
Adam C. Ford

Appendix B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1242

SECURITIES AND EXCHANGE COMMISSION,
Appellant

—v.—

GUY GENTILE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:16-cv-01619)
District Judge: Honorable Jose L. Linares

Argued November 6, 2018
Before: HARDIMAN, KRAUSE,
and GREENBERG, *Circuit Judges*.

(Opinion Filed: September 26, 2019)

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OPINION OF THE COURT

HARDIMAN, Circuit Judge.

A five-year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court held that "[d]isgorgement in the securities-enforcement context" is a "penalty" subject to that five-year limitations period. *Id.* at 1639. At issue in this appeal are two different remedies sought by the SEC: an injunction against further violations of certain securities laws and an injunction barring participation in the penny stock industry. The District Court held that those remedies—like the

disgorgement remedy at issue in *Kokesh*—were penalties. We see these questions of first impression differently and hold that because 15 U.S.C. § 78u(d) does not permit the issuance of punitive injunctions, the injunctions at issue do not fall within the reach of § 2462. We will vacate the District Court's order dismissing the Commission's enforcement action and remand the case for the District Court to decide whether the injunctions sought are permitted under § 78u(d).

I[1]

Appellant Guy Gentile, the owner of an upstate New York broker-dealer, was involved in two pump-and-dump schemes to manipulate penny stocks[2] from 2007 to 2008. In both schemes, Gentile promoted and "manipulated the market for

[1] The District Court had jurisdiction under sections 20(b) and 22(a) of the Securities Act (15 U.S.C. §§ 77t(b) and 77v(a)), sections 21(d) and 27 of the Exchange Act (15 U.S.C. §§ 78u(d) and 78aa), and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the District Court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Mayer v. Belichick*, 605 F.3d 223, 229 (3d Cir. 2010). We accept the Commission's well-pleaded allegations as true, construe them in the light most favorable to the Commission, and draw all reasonable inferences from those allegations in the Commission's favor. *Davis v. Wells Fargo*, 824 F.3d 333, 341, 351 (3d Cir. 2016).

[2] "Penny stocks are low-priced, high-risk equity securities for which there is frequently no well-developed market." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 175 n.14 (3d Cir. 2001), *as amended* (Oct. 16, 2001) (quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 914 n.1 (3d Cir. 1992)).

. . . stock by placing trades and trade orders that created the false appearance of liquidity, market depth, and demand for the stock." Am. Compl. ¶ 3, No. 2:16-cv-01619 (D.N.J. Oct. 6, 2017), ECF No. 47 (Complaint); *see id.* ¶ 7.

The United States Attorney's Office for the District of New Jersey filed a sealed criminal complaint against Gentile in June 2012 and he was arrested a few weeks later. Gentile agreed to cooperate against his confederates, but the deal fell apart in 2016 after the Government rejected Gentile's demand for a non-felony disposition. *United States v. Gentile*, 235 F. Supp. 3d 649, 651 (D.N.J. 2017). A grand jury indicted Gentile, but the District Court dismissed the indictment as untimely. *Id.* at 656.

Gentile "maintains an active presence in the securities industry" as the CEO of a Bahamas-based brokerage and the beneficial owner of a broker-dealer. Compl. ¶ 82. Since his criminal charges were dismissed, he has expressed an intention to expand that brokerage and hire new employees. *Id.* ¶ 14 (alleging Gentile announced plans to "increas[e] staff by 60 to 80 employees by year-end 2017, target[] 30 per cent growth, and reactivat[e] 'stalled' expansion plans"). And he has been quite candid about his view of the Commission's enforcement action. He called it a "witch hunt," and stated in the news and on social media that he "did nothing wrong" and "never scammed anyone." *Id.* ¶ 80.

The Commission disagrees. In this civil enforcement action, filed eight years after Gentile's involvement in the second scheme, it alleges

violations of several provisions of the Securities and Exchange Acts.[3] It initially sought: (1) an injunction prohibiting Gentile from violating those provisions in the future; (2) disgorgement of wrongful profits; (3) civil money penalties; and (4) an order barring him from the penny stock industry. Following *Kokesh*, the Commission dropped its requests for disgorgement and penalties. That left only its requests for an "obey-the-law" injunction and a prohibition on Gentile's participation in penny-stock offerings. *SEC v. Gentile*, No. 2:16-cv-01619, 2017 WL 6371301, at *1 (D.N.J. Dec. 13, 2017).

The District Court granted Gentile's motion to dismiss. *Id.* at *4. Applying *Kokesh*, the Court found that the remedies the Commission sought were penalties under § 2462. *Id.* at *3–4. And because Gentile's illegal activity ceased in 2008, *id.* at *1, the Court dismissed the case as untimely.

In holding the obey-the-law injunction was a penalty, the Court first noted that the injunction would not require Gentile to do anything the public at large is not already obliged to do, but it would stigmatize him. Nor would the injunction restore the status quo ante or compensate any victim of Gentile's schemes. Similarly, the Court found the penny stock bar would punish Gentile by "restrict[ing] [his] business structure and methodology, *in perpetuity*," without benefitting

[3] Section 5(a) and 5(c) of the Securities Act, 15 U.S.C. § 77e(a), (c); section 17(b) of the Securities Act, 15 U.S.C. § 77q(b); section 17(a) of the Securities Act, 15 U.S.C. § 77q(a); and section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5.

any victim or remediating the schemes' effects. *Id.* at *4. Though it "underst[ood] [the Commission's] desire to protect the public from predatory conduct," the Court could not conclude "that, under the limited set of facts currently before it, the requested injunctions are anything more than a penalty." *Id.* The Commission filed this appeal.

II

The default federal statute of limitations requires that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," be brought within five years of the claim's accrual. 28 U.S.C. § 2462. In *Kokesh*, the Supreme Court held disgorgement, "as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462." 137 S. Ct. at 1645. The Court defined a "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Id.* at 1642 (alteration in original) (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)). The Court's definition of "penalty" was informed by two principles. First, whether a sanction is a penalty turns in part on whether the wrongdoing it targets was perpetrated against the public, rather than an individual. *Id.* Second, "a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss." *Id.* (quoting *Huntington*, 146 U.S. at 668).

The Court held SEC disgorgement "readily" satisfies these criteria because (1) it is imposed for

violations of public laws; (2) it is imposed for punitive purposes; and (3) in many cases the disgorged money is not used to compensate victims. *Id.* at 1643–44. The Commission protested that disgorgement sometimes does compensate victims, but the Court was unpersuaded. While "sanctions frequently serve more than one purpose," a "civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 610, 621 (1993)).

According to Gentile, the Supreme Court's definition of "penalty" applies equally to injunctions prohibiting future lawbreaking and participation in penny stock offerings. There is no question the Commission's action is to enforce what *Kokesh* described as "public laws." *Id.* at 1643; *see SEC v. Teo*, 746 F.3d 90, 101–02 (3d Cir. 2014). So this case turns on whether the remedies the Commission seeks are imposed for punitive reasons.

III

Both remedies are found in 15 U.S.C. § 78u(d).[4] The Commission's general authority to seek injunctions against ongoing or threatened violations, § 78u(d)(1), states:

[4] The Commission has parallel injunction and penny-stock bar authority under the Securities Act. *See* 15 U.S.C. § 77t(b), (g). Those provisions are materially indistinguishable from the Exchange Act provisions we set forth below, and our analysis applies equally to them.

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, [or] the rules or regulations thereunder . . . it may in its discretion bring an action in [district court] to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Section 78u(d)(1) injunctions that simply reference or restate the text of statutory prohibitions are called "obey-the-law" injunctions.

The Commission's authority to seek a penny-stock industry bar is found in § 78u(d)(6)(A):

> In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

Paragraph (6) does not use the word "enjoin" like paragraph (1) does, so first we must determine whether § 78u(d)(6) penny-stock industry bars are a species of injunction. Several considerations convince us they are.

First, take the text. Section 78u(d)(6) authorizes a court to "prohibit" a defendant from participating in penny stock offerings. Just like a typical injunction, this is a judicial order "to refrain from

doing a particular thing .... which operates as a restraint upon the party in the exercise of his real or supposed rights." 2 Joseph Story, Commentaries on Equity Jurisprudence § 861, at 154 (1836). It is "wholly preventive, prohibitory, or protective," 4 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 1337, at 3206 (4th ed. 1919), and it "directs the conduct of a party ... with the backing of [the court's] full coercive powers." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

The statute's structure also suggests the penny stock bar is injunctive. It is only "in a[] proceeding [for an injunction under § 78u(d)(1)]" that the statute empowers courts to issue the bar. Consistent with that close relation, courts use similar factors to decide whether to issue both industry bars and obey-the-law injunctions. *See SEC v. Kahlon*, 873 F.3d 500, 506–07 (5th Cir. 2017) (per curiam). *Compare SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980), *with SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995). And paragraph (6), like paragraph (1), bespeaks equitable discretion. *See* 15 U.S.C. § 78u(d)(6)(A) ("[T]he court *may* prohibit that person from participating in an offering of penny stock, *conditionally or unconditionally*, and permanently *or for such period of time as the court shall determine*." (emphases added)). Because it can be sought only "[i]n a[] proceeding under paragraph (1)," *id.*, a district court may impose a penny stock bar only "upon a proper showing," *id.* § 78u(d)(1). Thus, like paragraph (1), paragraph (6) contemplates injunctive relief's "nice adjustment and reconciliation between the public interest and

private needs," *Aaron v. SEC*, 446 U.S. 680, 701 (1980) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

Finally, at least two courts of appeals have acknowledged that these court-ordered industry bars are injunctive. *See Kahlon*, 873 F.3d at 508 (penny stock bar); *Patel*, 61 F.3d at 141 (director-and-officer bar). That makes sense, since courts have also reasoned that the statutory D&O bar authority merely codifies courts' preexisting power to include these bars in injunctions. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 & n.8 (9th Cir. 1998); *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994). For all these reasons, we hold § 78u(d)(6) penny-stock industry bars are injunctive in nature.

IV

We next consider the question whether properly issued and framed § 78u(d)(1) and (6) injunctions can be penalties subject to the statute of limitations. We look first to the equitable principles governing injunctions, before turning to the text and history of the Commission's authority to seek them.

A

The federal courts' equity jurisdiction mirrors that of the High Court of Chancery in England in 1789, when Congress passed the first Judiciary Act. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). This does not mean, however, that equitable relief is strictly a common law matter. Innumerable acts of Congress explicitly provide for injunctions, and

courts must account for the policy judgments exemplified by those statutes when exercising their equitable discretion. *See Hecht*, 321 U.S. at 331. But unless Congress clearly states an intention to the contrary, statutory injunctions are governed by the same "established principles" of equity that have developed over centuries of practice. *Weinberger*, 456 U.S. at 313; *see eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Hecht*, 321 U.S. at 329. This clear statement rule applies to regulatory statutes enforced by government agencies. *Hecht*, 321 U.S. at 329–30.

Gentile's argument that SEC injunctions are penalties, even when properly issued and framed, runs headlong into a core tenet of equity jurisprudence. "The historic injunctive process was designed to deter, not to punish." *Hecht*, 321 U.S. at 329. Or as one treatise put it, a court may not by injunction "interfere for purposes of punishment, or . . . compel persons to do right" but may only "prevent them from doing wrong." 1 James L. High, A Treatise on the Law of Injunctions § 1, at 3 (4th ed. 1905). This principle is a corollary to the most basic rule of preventive injunctive relief—that the plaintiff must show a cognizable risk of future harm. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952).

Besides being an element of Article III standing for prospective relief, the need to show risk of harm is also a traditional equitable requirement that applies to enforcement agencies pursuing statutory injunctions. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); Douglas Laycock, Modern American Remedies 278 (4th ed. 2010); Gene R. Shreve, Federal Injunctions and

the Public Interest, 51 Geo. Wash. L. Rev. 382, 405 (1983). Unless the agency shows a real threat of future harm, "there is in fact no lawful purpose to be served" by a preventive injunction. *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937).

In *Kokesh*'s parlance, a preventive injunction unsupported by that showing could not "fairly be said *solely* to serve a remedial purpose," 137 S. Ct. at 1645 (quoting *Austin*, 509 U.S. at 621). *Cf. Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155–56 (2d Cir. 1949) (L. Hand, C.J.) (rejecting injunction that would not prevent harm and so "must rest upon the theory that it is a proper penalty for the [defendant's] wrong" because "we can find no support [for the injunction] in principle"). But a properly issued and framed injunction is "fairly" so described, because its "sole function ... is to forestall future violations." *Or. State Med. Soc'y*, 343 U.S. at 333. We think this prevention principle most sharply distinguishes SEC injunctions from the disgorgement remedy at issue in *Kokesh*. *See SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 103 n.13 (2d Cir. 1978) (Friendly, J.) (holding that even if the Commission fails "to show the likelihood of recurrence required to justify an injunction," courts may still impose disgorgement); Jayne W. Barnard, The SEC's Suspension and Bar Powers in Perspective, 76 Tul. L. Rev. 1253, 1258 (2002) ("All of these [SEC] injunctions except the disgorgement injunction depend on the government's ability to demonstrate that, in the absence of an injunction, there is a reasonable likelihood of future violations."). In short, injunctions may properly issue only to prevent harm—not to punish the defendant.

B

As we have explained, Congress must provide a clear statement to substantially depart from traditional equitable principles like that one. *See Hecht*, 321 U.S. at 329 ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). We perceive no such intent in the text of § 78u(d)(1) and (6). And while this clear statement rule might suffice to decide the case, requiring all injunctions under § 78u(d)(1) and (6) to be preventive and thus bringing them out of the realm of penalties, we are mindful that the *Kokesh* Court analyzed how SEC disgorgement operates in practice.[5] So we also analyze the history and caselaw surrounding these provisions. That analysis reinforces our conclusion but also impels us to reinforce the parameters within which an SEC injunction is properly issued and framed.

1

Once again, we start with the text. When the Commission believes a person "is engaged or is about to engage" in securities violations, it may bring a suit "to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted

[5] The disgorgement remedy addressed in *Kokesh* was not created by statute, *see* 137 S. Ct. at 1640, so there would have been nowhere to look for a clear statement of congressional intent to deviate from traditional equitable principles. *See infra* Part IV(B)(2).

without bond." 15 U.S.C. § 78u(d)(1). If the suit is against a "person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock" and a "proper showing" has been made as to likelihood of future harm, the court may also "prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine." *Id.* § 78u(d)(1), (6)(A).

Nothing in either provision just quoted suggests Congress meant to depart from the rule that injunctions are issued to prevent harm rather than to punish past wrongdoing. Neither provision mentions retribution or general deterrence. *See Kokesh*, 137 S. Ct. at 1645; *cf. Tull v. United States*, 481 U.S. 412, 423 (1987) ("[A provision's] authorization of punishment to further retribution and deterrence clearly evidences that [it] reflects more than a concern to provide equitable relief."). Neither shows an intent—let alone a clear intent—that injunctions should issue automatically on a finding of past violations or without a proper showing of the likelihood of future harm. Each uses open-ended language that suggests traditional equitable discretion. *Compare* 15 U.S.C. § 78u(d)(1) ("[U]pon a proper showing . . . ."), *and id.* § 78u(d)(6)(A) ("[T]he court *may* prohibit that person from participating in an offering of penny stock, *conditionally or unconditionally*, *and permanently or for such period of time as the court shall determine*." (emphases added)), *with Hecht*, 321 U.S. at 321–22, 329–30 (holding no clear intent to strip traditional discretion in statute that provided that an injunction or other order "shall be

granted" "upon a showing ... that [the defendant] has engaged or is about to engage in [prohibited] acts or practices"), *and id.* at 327 (noting distinction between "shall be granted" language and statutes, like § 78u(d)(1), that "provide that an injunction or restraining order shall be granted 'upon a proper showing'" (citations omitted)). In sum, "[a]bsent much clearer language than is found in the [Exchange Act], the entitlement of a plaintiff to an injunction thereunder remains subject to principles of equitable discretion." *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 868–69 (2d Cir. 1968) (en banc) (Friendly, J., concurring).

2

The history of the Commission's injunction authority leads to the same conclusion. "Prior to the labor injunctions of the late 1800's, injunctions were issued primarily in relatively narrow disputes over property." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 842 (1994) (Scalia, J., concurring). But that changed as more and more conduct came to be regulated by injunction through a rough analogy to public nuisance. *See* Comment, The Statutory Injunction as an Enforcement Weapon of Federal Agencies, 57 Yale L.J. 1023, 1024 n.5 (1948). Securities enforcement injunctions emerged as part of this expansion of American equity jurisprudence into public law enforcement. *See* Daniel J. Morrissey, SEC Injunctions, 68 Tenn. L. Rev. 427, 437–39 (2001).

Before Congress created the SEC, states authorized injunctive enforcement of laws that targeted "speculative schemes which have no more

basis than so many feet of 'blue sky,'" *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917). Part of a new breed of statutory remedy, these injunctions were an extension of traditional equity "even less directly traceable to the remedial devices fashioned by the common law" than previous remedies that had "f[ound] a basic analogy in the common-law right of the state to abate and restrain public nuisances." Note, Statutory Extension of Injunctive Law Enforcement, 45 Harv. L. Rev. 1096, 1097, 1099 (1932). Those predecessor nuisance actions distinguished punishment from prevention. *See Eilenbecker v. Dist. Court of Plymouth Cty.*, 134 U.S. 31, 40 (1890) ("[I]t seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offence as a crime after it has been committed."), *overruled in part on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968); *Mugler v. Kansas*, 123 U.S. 623, 672–73 (1887) ("In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction." (quoting 2 Story, *supra*, §§ 921–922)). And while statutory injunctions aimed at fraud on the public were an innovation, they too respected this fundamental distinction.

New York's Martin Act is perhaps the best-known example. That blue sky law empowered the state attorney general to seek information and commence actions in equity or criminal prosecutions. *See Dunham v. Ottinger*, 154 N.E. 298, 300 (N.Y. 1926). Injunction actions were meant to "stop[]" or "prevent" threatened violations, *id.*, while prosecutions were meant to "punish" them.

Id. Other states sought to use the injunctive process to "stop" and "suppress" securities fraud. *E.g.*, *Stevens v. Washington Loan Co.*, 152 A. 20, 23 (N.J. Ch. 1930). Then, responding to the 1929 stock market crash and the Great Depression, Congress entered the fray. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). It enacted first the Securities Act of 1933 and then the Securities Exchange Act of 1934, which created the SEC.

At first the Commission had only one arrow in its quiver: injunctions against future violations of the securities laws.[6] *See Kokesh*, 137 S. Ct. at 1640. Much like those authorized by blue sky laws, SEC injunctions were "a classic example of modern utilization of traditional equity jurisdiction for the enforcement of a congressionally declared public policy administered by a regulatory agency established for that purpose." *SEC v. Advance Growth Capital Corp.*, 470 F.2d 40, 53 (7th Cir. 1972). For a time, courts were too quick to issue injunctions on modest showings of threatened harm. *See Commonwealth Chem.*, 574 F.2d at 99 ("It is fair to say that the current judicial attitude toward the issuance of injunctions on the basis of past violations at the SEC's request has become more circumspect than in earlier days."). But

[6] Decades later, Congress granted the authority to seek penny stock bars. That authority came in 1990 as part of an amendment to the Exchange Act designed "to provide additional enforcement remedies for violations of [the securities] laws and to eliminate abuses in transactions in penny stocks, and for other purposes." Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931, 931 pmbl.

spurred by renewed attention to the statute's text and the harsh consequences of SEC injunctions, courts began taking a harder look at whether violators posed a real threat of recidivism. *See id.* at 99–100 (collecting cases).

Citing *Commonwealth Chemical* with approval, the Supreme Court said of SEC injunctions that "the proper exercise of equitable discretion is necessary to ensure a 'nice adjustment and reconciliation between the public interest and private needs.'" *Aaron*, 446 U.S. at 701 (quoting *Hecht*, 321 U.S. at 329). To merit an injunction based on threatened harm, "the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur." *Id.* Our Court makes that determination based on factors including not merely the fact of a past violation, but more importantly "the degree of scienter involved [in the past violation], the isolated or recurrent nature of the infraction, the defendant's recognition of the wrongful nature of his conduct, [and] the sincerity of his assurances against future violations." *Bonastia*, 614 F.2d at 912.

Moreover, "in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1102 (2d Cir. 1972) (citing *Hecht*, 321 U.S. at 328–30). Those considerations include not only the need to protect the public where the circumstances of the offense and of the offender give rise to a substantial risk of future harm, *Bonastia*, 614 F.2d at 912, but also the stigma, humiliation, and loss of livelihood attendant to the imposition of the two

injunctions sought here, whether temporary or permanent. So "the adverse effect of an injunction upon defendants is a factor to be considered by the district court in exercising its discretion." *Manor Nursing Ctrs.*, 458 F.2d at 1102; *see Aaron*, 446 U.S. at 703 (Burger, C.J., concurring) ("An [SEC] injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith."); *SEC v. Warren*, 583 F.2d 115, 122 (3d Cir. 1978) (weighing hardship to defendant in approving injunction's dissolution). In other words, the harsh effects of an SEC injunction demand that it not be imposed lightly or as a matter of course, that it be imposed only upon a meaningful showing of necessity, and when it is imposed, that it be as short and narrow as reasonably possible.

These principles would be dishonored if courts aimed to inflict hardship instead of tailoring injunctions to minimize it. A preventive injunction must be justified by a substantial showing of threatened harm, assuring the court that the opprobrium and other collateral consequences that accompany it are outweighed by a demonstrated public need; retribution is not a proper consideration to support this showing. *See Hartford-Empire Co. v. United States*, 323 U.S. 386, 433–35 (1945) (striking part of antitrust injunction applicable to directors and officers who, though they "may have rendered themselves liable to prosecution," had not been shown to pose a threat of future violations), *supplemented*, 324 U.S. 570. As the Court of Appeals for the D.C. Circuit aptly explained, "[j]ustifying an injunction, even in part, in terms of propitiating public sentiment, is

objectionable as a matter of law." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989). Nor is general deterrence a proper consideration. *See Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 n.6 (2d Cir. 1976) (Friendly, J.) (distinguishing "injunctive proceedings, the objective of which is solely to prevent threatened future harm" from administrative sanctions used "not so much to control the respondent as to warn others ... [which] has a significant 'penal' component" (quoting Louis L. Jaffe, Judicial Control of Administrative Action 267–68 (1965))).

And the principle that injunctions may issue only "to prevent threatened future harm," not to punish, *Arthur Lipper*, 547 F.2d at 180 n.6, applies equally to an injunction's scope. *See SEC v. Am. Bd. of Trade, Inc.*, 751 F.2d 529, 542–43 (2d Cir. 1984) (Friendly, J.). Just as it is error to issue an injunction for punishment's sake, it is error to broaden the scope of an injunction because of moral desert or to make an example of the defendant. That principle is implicit in the well-established rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

Indeed, rather than using punishment to *justify* SEC injunctions, courts must shape those injunctions to provide full relief without inflicting unnecessary pain. *See, e.g.*, *Patel*, 61 F.3d at 142 ("The loss of livelihood and the stigma attached to permanent exclusion from the corporate suite certainly requires more."); *Am. Bd. of Trade*, 751

F.2d at 542–43. And courts have consistently explained that SEC injunctions must be intended to deter the violator from further infractions (and thereby protect the public), not punish past misconduct. *See, e.g.*, *Bonastia*, 614 F.2d at 912; *SEC v. Graham*, 823 F.3d 1357, 1361–62 (11th Cir. 2016); *SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1169 (D.C. Cir. 1978); *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 54–56 (2d Cir. 1976) (Friendly, J.). Because an injunction must be fully supported by threatened harm, we reject Gentile's argument that a properly issued and framed SEC injunction can be a "penalty" as defined by *Kokesh*.

The SEC itself agrees with this approach in principle. In *Saad*, Exchange Act Release No. 86751, 2019 WL 3995968 (Aug. 23, 2019), the Commission was asked to evaluate a disciplinary sanction barring an individual from associating with any FINRA member firm. *Id.* at *1. The Commission observed at the outset that "if a sanction is imposed for punitive purposes as opposed to remedial purposes, the sanction is excessive or oppressive and therefore impermissible." *Id.* at *3. The Commission went on to explain that a reasonable, well-grounded finding that the sanctioned party "posed a clear risk of future misconduct" such that "the bar was . . . necessary to protect investors" was what distinguished an "appropriately-issued FINRA bar[]" from an impermissibly punitive bar. *Id.* at *4 (internal quotation marks and citation omitted). Conversely, "[a] sanction based solely on past misconduct . . . would be impermissibly punitive and thus excessive or oppressive." *Id.* at *5.

That an injunction is permissible only where necessary "to prevent ... misconduct from occurring in the future," and not merely "to punish past transgressions," *Saad*, 2019 WL 3995968, at *12, is a standard to which the SEC must also hold itself. When it does not, the buck stops here: Lest we return to those days when only a modest showing was considered sufficient, *Commonwealth Chem.*, 574 F.2d at 99, federal courts may not grant SEC injunctions except "upon a proper showing" of the likelihood of future harm.[7]

Other courts are divided on whether an injunction can ever be a § 2462 penalty. The Eleventh Circuit, bound by its precedent, held that injunctions cannot be penalties under § 2462 because they are equitable. *Graham*, 823 F.3d at 1360. It went on to explain that even had that precedent not been established, it would hold § 2462 "does not apply to injunctions like the one in [that] case." *Id.* The court reasoned that injunctive relief is forward looking, while penalties address past wrongdoing. *See id.* at 1361–62. By contrast, the Fifth Circuit held in a non-precedential opinion that SEC injunctions and D&O bars could be—and in that case were—penalties under § 2462. *SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (per

[7] As we explain below, we perceive an important distinction between the statutorily authorized equitable relief at issue here and the administrative sanctions at issue in *Saad*. So we do not think all of the *Saad* Release's reasoning is applicable to the injunction context. In particular, we do not believe that, under § 78u(d)(1) or (6), "general deterrence ... may be considered as part of the overall remedial inquiry." *Saad*, 2019 WL 3995968, at *2 (alteration in original) (quoting *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007)).

curiam). The Eighth, Sixth, and Tenth Circuits declined to say whether injunctions can ever be § 2462 penalties, instead holding the particular injunctions before them were not punitive. *See SEC v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017); *SEC v. Quinlan*, 373 F. App'x 581, 587 (6th Cir. 2010) (non-precedential); *United States v. Telluride Co.*, 146 F.3d 1241, 1245–48 (10th Cir. 1998). The D.C. Circuit has taken yet another approach in the agency context. That court evaluates whether an administrative sanction constitutes a penalty for purposes of § 2462 on a case-by-case basis, considering "the degree and extent of the consequences to the subject of the sanction." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996).[8] None of this is inconsistent with our holdings here; these courts simply have not decided the scope of injunctions permitted under § 78u(d).

In our view, the *Graham* court got it right. We have deemed inappropriate an injunction that was

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[8] While we agree with the D.C. Circuit that considerations of both purpose and effect are relevant to whether an injunction constitutes a penalty, we believe these considerations bear on the authority of the district court to enter an SEC injunction, not on whether that injunction, while within the court's power to grant, is nonetheless time barred. We question too the consistency and administrability of this approach, which appears to contemplate the imposition of both punitive and remedial injunctions within § 2462's limitations period but of only remedial injunctions outside of it, with the time bar conclusively determined on appeal only after the fact. The approach we espouse today has the virtue of providing clear guidance ex ante by focusing instead on the SEC's authority to seek and the court's authority to impose an injunction under § 78u(d)(1) and (6).

the functional equivalent of a monetary penalty. *United States v. EME Homer City Generation, LP*, 727 F.3d 274, 295–96 (3d Cir. 2013) ("Such injunctive cap-and-trade relief is the equivalent of awarding monetary relief and 'could not reasonably be characterized as an injunction.'" (quoting *United States v. Midwest Generation*, 781 F. Supp. 2d 677, 685 (N.D. Ill. 2011))); *see United States v. Luminant Generation Co.*, 905 F.3d 874, 890–91 (5th Cir. 2018) (Elrod, J., concurring in part and dissenting in part) (advocating our Court's approach in *EME Homer City*), *reh'g en banc granted*, 929 F.3d 316 (5th Cir. 2019); *cf. Edelman v. Jordan*, 415 U.S. 651, 668 (1974) ("While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State."). A similar principle applies here. Injunctions may not be supported by the desire to punish the defendant or deter others, so courts abuse their discretion when they issue or broaden injunctions for those reasons. We therefore hold SEC injunctions that are properly issued and valid in scope are not penalties and thus are not governed by § 2462. If an injunction cannot be supported by a meaningful showing of actual risk of harm, it must be denied as a matter of equitable discretion—not held time barred by § 2462.

There is one puzzle we feel compelled to address. The *Kokesh* Court held SEC disgorgement is a penalty—despite the maxim that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law," *Tull*, 481 U.S. at

421–22; *see Decorative Stone Co. v. Bldg. Trades Council of Westchester Cty.*, 23 F.2d 426, 427–28 (2d Cir. 1928) ("Courts of equity do not award as incidental relief damages penal in character without express statutory authority . . . ."). If SEC disgorgement is both an equitable remedy and a § 2462 penalty, could an injunction be both too?

We think not. First, unlike § 78u(d)(1) and (6) injunctions, SEC disgorgement is not authorized by statute. It has instead been justified as part of courts' "inherent equity power to grant relief ancillary to an injunction." *Kokesh*, 137 S. Ct. at 1640 (quoting *SEC v. Tex. Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970)). Without any textual basis, it is hard to see where the Supreme Court would look for a clear statement of congressional intent to deviate from equitable traditions. Indeed, at the *Kokesh* oral argument several Justices expressed frustration that the lack of statutory text made it hard to define SEC disgorgement. *See* Transcript of Oral Argument at 7–9, 13, 31, 52, *Kokesh*, 137 S. Ct. 1635 (No. 16-529), 2017 WL 1399509.

Second, the *Hecht* admonition—that "[t]he historic injunctive process was designed to deter, not to punish," 321 U.S. at 329—is at the core of preventive injunctive relief. By contrast, *Tull* spoke to equity more broadly. So notwithstanding what *Kokesh* might suggest about equitable relief in general, we do not believe it opens the door to punitive injunctions.

Finally, though the *Kokesh* Court was careful to reserve the issue, *see* 137 S. Ct. at 1642 n.3, we note its skepticism that SEC disgorgement is

applied in conformity with traditional equitable principles. *Compare id.* at 1640 ("Generally, disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain.'" (alteration in original) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a, at 204 (Am. Law Inst. 2010))), *with id.* at 1644 ("[I]t is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation."). For these reasons, we conclude that proper injunctions do not fall within the definition of penalties as defined in *Kokesh*.

V

Our analysis to this point disposes of most of Gentile's arguments, but a few remain. First, Gentile argues that the *Hecht* admonition—that "[t]he historic injunctive process was designed to deter, not to punish"—does not apply because it is inconsistent with *Kokesh*'s treatment of § 2462. That is, *Hecht* sets forth a dichotomy—punishment versus deterrence—that is untenable because *Kokesh* holds deterrence is punitive. We think this overreads *Kokesh*. Though the Court referred several times to "deterrence" without elaboration, we understand those references to address general deterrence. *See Kokesh*, 137 S. Ct. at 1642 ("[A] pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner' . . . ."

(quoting *Huntington*, 146 U.S. at 668)). Our Court's gloss on *Hecht* reflects this important distinction between restraining the defendant on fear of contempt and making an example of him to deter others. *See Bonastia*, 614 F.2d at 912 (noting that injunctive relief serves "to *deter* [the violator] from committing future infractions of the securities laws," not to "punish" him for past misconduct (emphasis added)). The former is the very point of preventive injunctive relief; the latter is punitive. "When it comes to discerning and applying [traditional equitable] standards … 'a page of history is worth a volume of logic.'" *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (quoting *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921)). All the more so here—where Gentile's logic is based on a strained reading of a single word in a case addressing a different remedy.

And unlike in *Kokesh*, there are few signs that courts issue SEC injunctions for general deterrence. True, there are isolated examples. *See, e.g.*, *Posner*, 16 F.3d at 522 ("We intend our affirmance … as a sharp warning to those who violate the securities laws that they face precisely such banishment."). But the caselaw in the main reflects the traditional principles we have discussed. We also find it significant that cases prior to *Kokesh* addressing both SEC injunctions and disgorgement often discuss general deterrence only with respect to the latter. *See, e.g.*, *SEC v. Kokesh*, 834 F.3d 1158, 1162–64 (10th Cir. 2016), *rev'd*, 137 S. Ct. 1635; *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474, 1477–78 (2d Cir. 1996); *First City Fin. Corp.*, 890 F.2d at 1228–29, 1231–

32; *see also Collyard*, 861 F.3d at 765. What is more, we have explained in an SEC case that "there is no great public or national interest to be served by an injunction in essence against a single individual." *Warren*, 583 F.2d at 121. That would hardly be true if we sought to implement a program of general deterrence through injunctions.

Part of our disagreement with Gentile stems from his focus on the Commission's intent. It may well be that in its zeal for enforcement, the Commission more recently has tended to seek injunctions in part for their general deterrent effect. *See* James D. Cox et al., SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L.J. 737, 751 (2003). The impetus may be understandable; after all, SEC enforcement actions are "independent of the claims of individual investors" and are aimed at "promot[ing] economic and social policies." *Teo*, 746 F.3d at 102 (alteration in original) (quoting *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993)); *see* Comment, Federal Agencies, *supra*, at 1048–49. But any tendency in that direction would be at odds with the Commission's own understanding of the limits on its powers, *cf. Saad*, 2019 WL 3995968, at *3–5, *12. And ultimately, rather than probe the agency's rationale for seeking a judicial remedy, we look to the nature of the remedy itself as explained by the courts imposing it. *See Kokesh*, 137 S. Ct. at 1643–44 (analyzing why disgorgement "is imposed by the courts"); *cf. Tull*, 481 U.S. at 423 ("Thus, the District Court intended not simply to disgorge profits but also to impose punishment.").

Second, Gentile argues that because obey-the-law injunctions require mere compliance with preexisting obligations, they must be punitive. Citing *Bonastia*, the Commission responds that "injunctions that track the statutory language charged in a complaint are permissible in this Circuit." SEC Br. 30 n.5. Gentile's argument has some force to the extent that obey-the-law injunctions pose a risk of overbreadth, lack of fair notice, unmanageability, and noncompliance with Federal Rule of Civil Procedure 65(d). *See Graham*, 823 F.3d at 1362 n.2 (collecting cases); *SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005) (collecting cases); *Savoy*, 665 F.2d at 1318; *United States v. Corn*, 836 F.2d 889, 892 & n.6 (5th Cir. 1988); Laycock, *supra*, at 274–75. So in some cases—and perhaps in this one—an obey-the-law injunction will add little if anything to the sanctions already in place. There has been and continues to be "a difference of opinion as to whether as a general proposition injunctions to 'obey the law' should be issued in order that enforcement by administrative agencies may be sought by contempt rather than by the statutory route." *SEC v. Thermodynamics, Inc.*, 464 F.2d 457, 461 (10th Cir. 1972).

But Gentile has not asked us to hold obey-the-law injunctions impermissible—he argues only that they are subject to the § 2462 statute of limitations. So we note only that the appropriate scope of an injunction against further lawbreaking depends on the facts and circumstances of each case. Courts should make this determination on a developed record, *SEC v. Gabelli*, 653 F.3d 49, 61 (2d Cir. 2011), *rev'd on other grounds*, 568 U.S. 442

(2013), assuming the plaintiff has stated a plausible claim for relief, *see EME Homer City Generation*, 727 F.3d at 295–96 (affirming dismissal of claims for improper injunctive relief). It is true that in *Bonastia* we reversed the district court's refusal to grant an obey-the-law injunction. *See* 614 F.2d at 910–11. We have also struck overbroad language enjoining parties to obey the law. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003) (citing *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 83 (3d Cir. 1990), and *Warren*, 583 F.2d at 121). The "degree of particularity required of an injunction depends on the subject matter involved." *Pub. Interest Research Grp.*, 913 F.2d at 83 (quoting *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987)). Ultimately, "[t]he district courts are invested with discretion to model their orders to fit the exigencies of the particular case, and have the power to enjoin related unlawful acts which may fairly be anticipated from the defendants' conduct in the past, but a decree cannot enjoin conduct about which there has been no complaint." *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1180 (3d Cir. 1976) (footnotes omitted); *see NLRB v. Express Publ'g. Co.*, 312 U.S. 426, 435–37 (1941).

We stress that the District Court, on remand, should not rubber-stamp the Commission's request for an obey-the-law injunction simply because it has been historically permitted to do so by various courts. After all, *Bonastia* was decided almost 40 years ago, when the landscape for SEC enforcement actions was significantly different than today's. *See Kokesh*, 137 S. Ct. at 1640. Indeed,

Congress did not enact the penny-stock bar until ten years later. If the District Court, after weighing the facts and circumstances of this case as alleged or otherwise, concludes that the obey-the-law injunction sought here serves no preventive purpose, or is not carefully tailored to enjoin only that conduct necessary to prevent a future harm, then it should, and must, reject the Commission's request. We note that the District Court has already addressed some of the relevant concerns involved in its opinion. We are also troubled by the fact that the Commission appears to seek two injunctions that attempt to achieve the same result.

Third, Gentile argues the penny stock bar is punitive because it "provides no benefit to victims of alleged past securities violations, nor does it purport to do so." Gentile Br. 27. In making this argument, he tacitly agrees with us that § 78u(d)(6) penny stock bars are injunctive in nature. But then he cites a series of cases that involve administrative suspensions and debarments, not court-ordered injunctive relief. *See De La Fuente v. FDIC*, 332 F.3d 1208, 1214–15, 1219–20 (9th Cir. 2003); *Proffitt v. FDIC*, 200 F.3d 855, 860–61 (D.C. Cir. 2000); *Johnson*, 87 F.3d at 488; *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) (Kavanaugh, J., concurring). We concede some courts have used similar logic. *See Collyard*, 861 F.3d at 764 (citing *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (Kavanaugh, J.), *abrogated on other grounds by Kokesh*, 137 S. Ct. 1635); *Telluride*, 146 F.3d at 1246–47; *Bartek*, 484 F. App'x at 956–57. But we think the distinction between injunctions and administrative sanctions makes all the difference.

See supra Part IV; *Arthur Lipper*, 547 F.2d at 180 n.6. Our analysis is, after all, predicated on traditional principles of *judicial* relief. Gentile is quite right to point out that exclusion from one's chosen profession is a devastating sanction. But the question is not whether an administrative sanction can be punitive; it is whether a federal court can issue a § 78u(d)(6) injunction for punitive purposes. It cannot.

Finally, Gentile argues that the obey-the-law injunction and penny stock bar are punitive because they do not seek to restrain imminent violations. Gentile concedes, as he must, that an injunction against an imminent violation is not a penalty. *See* Gentile Br. 42 ("Of course the SEC has unlimited power to obtain an injunction against an individual who is actually violating the securities laws or on the precipice of doing so."). He objects that his case does not rise to that standard. It is true that we apply a somewhat less demanding imminence standard in SEC enforcement cases than we do in reviewing the FTC's exercise of similar statutory injunction authority. *Compare Bonastia*, 614 F.2d at 912 ("The well established standard . . . is based on a determination of whether there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the illegal conduct."), *with FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 158 (3d Cir. 2019) ("'[I]s about to violate' means something more than a past violation and a likelihood of recurrence."). But neither *Bonastia* nor the *Aaron* Court (which seemed to approve a test much like ours) dispensed with the requirement of "a proper showing." *See Aaron*, 446 U.S. at 701 ("[T]he Commission must

establish a sufficient evidentiary predicate to show that such future violation may occur." (citing *Commonwealth Chem.*, 574 F.2d at 98–100)); *Bonastia*, 614 F.2d at 913 (concluding that the SEC had made "a strong showing" that justified the reversal of the district court and entry of an injunction). Nor did either suggest that the fact of a past violation alone was sufficient to impose so onerous and stigmatizing a sanction as an industry bar or obey-the-law injunction. Rather, even with a lesser imminence requirement, we insisted the showing itself be substantial and based as well on "the circumstances surrounding the particular defendant." *Bonastia*, 614 F.2d at 912.

Along those same lines, we are mindful that we are interpreting the meaning of "penalty" for statute of limitations purposes. Even assuming a valid preventive injunction could be a penalty, it is hard to see when it would accrue. *See Johnson*, 87 F.3d at 489 n.7. Gentile's argument must reject either *Bonastia* or our conclusion that § 78u(d)(1) and (6) conform to traditional equitable principles. We can do neither.

VI

SEC injunctions come with serious collateral consequences. *Commonwealth Chem.*, 574 F.2d at 99; *Am. Bd. of Trade*, 751 F.2d at 535. They can lead to administrative sanctions and disabilities, *see* Thomas J. Andre, Jr., The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard?, 1981 U. Ill. L. Rev. 625, 643–68, and collaterally estop defendants in subsequent private litigation, *see*

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979). Enjoined defendants suffer harm to their personal and business reputations. *See Sec. Inv'r Prot. Corp. v. Barbour*, 421 U.S. 412, 423 n.5 (1975) ("The moment you bring a public proceeding against a broker-dealer who depends upon public confidence in his reputation, he is to all intents and purposes out of business." (quoting Milton V. Freeman, Administrative Procedures, 22 Bus. Law 891, 897 (1967))); *Warren*, 583 F.2d at 122; ABA Committee on Federal Regulation of Securities, Report of the Task Force on SEC Settlements, 47 Bus. Law. 1083, 1091, 1149–50 (1992). And when a court bans a defendant from his industry, it imposes what in the administrative context has been called the "securities industry equivalent of capital punishment." *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (quoting *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)).

So we conclude by repeating Judge Friendly's warning: an SEC injunction "often is much more than [a] 'mild prophylactic.'" *Commonwealth Chem.*, 574 F.2d at 99. When the Commission seeks an injunction, "the famous admonitions in [*Hecht*] must never be forgotten." *Am. Bd. of Trade*, 751 F.2d at 535–36.

* * *

Because properly issued and framed injunctions under § 78u(d)(1) and (6) are not penalties governed by § 2462, we will vacate the District Court's judgment and remand for proceedings consistent with this opinion.

Appendix C

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[LETTERHEAD]

[STAMP]

September 26, 2019

Adam C. Ford
Ford O'Brien
575 5th Avenue
17th Floor
New York, NY 10017

Sarah Prins
Daniel Staroselsky
United States Securities & Exchange Commission
100 F Street, N.E.
Washington, DC 20549

RE: SEC v. Guy Gentile
Case Number: 18-1242
District Court Case Number: 2-16-cv-01619

ENTRY OF JUDGMENT

Today, **September 26, 2019** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App.P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Laurie
Case Manager
267-299-4936

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1242

SECURITIES AND EXCHANGE COMMISSION,

Appellant

—v.—

GUY GENTILE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-16-cv-01619)
District Judge: Honorable Jose L. Linares

Argued November 6, 2018
Before: HARDIMAN, KRAUSE, and GREENBERG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on November 6, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED that the order of the United States District Court for the District of New Jersey entered December 13, 2017 be and the same is hereby VACATED. The cause is REMANDED to the District Court. All of the above in accordance with the Opinion of this Court.

No costs shall be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: September 26, 2019

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 16-1619 (JLL)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

GUY GENTILE,

Defendant,

OPINION

LINARES, Chief District Judge.

This matter comes before the Court by way of Defendant Guy Gentile's Motion to Dismiss Plaintiff Securities and Exchange Commission's First Amended Complaint ("FAC"). (ECF No. 50 ("Def. Mov. Br.")). Plaintiff has submitted opposition (ECF No. 54 ("Pl. Opp. Br.")), which Defendant has replied to. (ECF No. 23 ("Def. Rep. Br.")). The Court decides this matter without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure. For the reasons set forth

below, the Court grants Defendant's Motion to Dismiss.

I. BACKGROUND[1]

Plaintiff brings the within action seeking "equitable" relief in connection with "two penny stock manipulation schemes [allegedly] perpetrated by [Defendant] Gentile." (FAC ¶ 1). These schemes allegedly began in April of 2007 and ended approximately in June 2008. (Id.). The 2007 scheme "involved the stock of Raven Gold Corporation" ("RVNG Scheme"), while the 2008 scheme "involved the stock of Kentucky USA Energy, Inc." ("KYUS Scheme"). (Id.). Plaintiffs FAC asserts the following causes of actions: 1) Count I – "Violations of Sections 5(a) and 5(c) of the Securities Act;" 2) Count II – "Violations of Section l7(b) of the Securities Act;" 3) Count III – "Violations of Section 17(a) of the Securities Act;" 4) Count IV – "Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder;" and 5) Count V – "Aiding and Abetting Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder." (FAC ¶¶ 86-100).[2] Plaintiff seeks two "equitable" forms of relief for the aforementioned violations:

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[1] This background is derived from Plaintiffs FAC, which the Court must accept as true at this stage of the proceedings. *See Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 758 (3d Cir. 2009).

[2] The Court notes that the Government filed a parallel criminal action against Defendant under Docket No. 16-cr-155 (JLL) ("Parallel Criminal Action"). The allegations therein are identical to those in FAC. (*See generally* Crim. No. 16-cr-155, ECF No. 1). On January 30, 2017, this Court dismissed

1) an "obey-the-law" injunction; and 2) a "penny stock" bar. (FAC at 25-26, "Prayer For Relief").

The Court need not restate the intricate details of the schemes as Defendant's Motion to Dismiss requests dismissal of the FAC pursuant to the statute of limitations, and there is no dispute that, as previously stated, Defendant's alleged criminal activity ended as of June 2008. *(See* Crim. No. 16-cr-155, December 21, 2016 Transcript at 41:21-42:11; *see also* FAC ¶ 1; Def. Mov. Br. at 3-4; Pl. Opp. Br. at 4-6). Specifically, Defendant moves to dismiss the FAC asserting it is untimely pursuant to the statute of limitations set forth in 28 U.S.C. § 2462. (Def. Mov. Br. at 9). Plaintiff opposes Defendant's Motion asserting that the relief sought in the FAC is not punitive and therefore not subject to the five-year statute of limitations. *(See generally* Pl. Opp. Br.).

II. <u>LEGAL STANDARD</u>

To withstand a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

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the Parallel Criminal Action as time barred pursuant to the relevant statute of limitations. *See United States v. Gentile*, 235 F. Supp. 3d 649 (D.N.J. 2017).

Iqbal, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

To determine the sufficiency of a complaint under *Twombly* and *Iqbal* in the Third Circuit, the court must take three steps: first, the court must take note of the elements a plaintiff must plead to state a claim; second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth; finally, where there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief. *See Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (citations omitted). "In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

Defendants may prevail on the statute of limitations at the motion to dismiss stage "if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *See Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (citation omitted); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the

complaint under Rule 12(b)(6)." *Cain v. Dep't of Pub. Welfare,* 442 F. App'x 638, 638 (3d Cir. 2011) (quoting *Bethel v. Jendoco Constr. Corp.,* 570 F.2d 1168, 1174 (3d Cir. 1978)).

III. ANALYSIS

The resolution of Defendant's Motion turns on whether the reliefs sought by Plaintiff are penal. This is because 28 U.S.C. § 2462 provides that "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 (emphasis added). The parties all agree, and this Court has previously found, that Defendant's allegedly illegal conduct ended in June of 2008. Accordingly, if Defendant is subject to Section 2462's five-year statute of limitation, Plaintiff had until June of 2013 to institute the within action. However, Plaintiff filed this action in March 2016. As noted above, Section 2462's statute of limitations only applies when the action brought by the Government seeks a remedy that is penal in nature. Hence, if this action is subject to Section 2462, it is untimely. However, if this action is not subject to Section 2462, it may proceed in due course. Thus, whether Plaintiff's demanded reliefs are penal in nature is dispositive.[3]

[3] The Court is aware that Defendant signed two tolling waivers in the Parallel Criminal Action, which extended the criminal statute of limitations therein by two years and 55 days. While those waivers are not applicable to this civil action, the Court concludes that, even if the Court were to

Courts throughout the country have consistently held that a remedy, including an injunction, is penal in nature when it serves no retributive or remedial purpose and merely seeks to punish an individual. *See*, *e.g.*, *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007); *SEC v. Alexander*, 248 F.R.D. 108, 115-16 (E.D.N.Y. 2007). "Penalty" is defined as "*punishment imposed on a wrongdoer*." *Penalty*, Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS (emphasis added). In discussing Section 2462, the Tenth Circuit interpreted the term "penalty" "as a sanction or punishment imposed for violating a public law *which goes beyond compensation for the injury caused by the defendant*." *United States v. Telluride*, 146 F.3d 1241, 1245-46 (10th Cir. 1998) (emphasis added). The D.C. Circuit has explained that 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 actions*." *Johnson*, 87 F.3d at 488 (emphasis added). The Second Circuit has noted that "[a]n injunction, while not always a 'drastic remedy' as appellants contend, often is much more than the 'mild prophylactic'" and that "[i]n some cases the collateral consequences [of an injunction] can be very grave." *SEC v. Commonwealth Chem. Sec., Inc.*, 574, F.2d 90, 99 (2d Cir. 1978) (citations omitted).

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consider them, the analysis is unchanged. This is because of the fact that, even if said waivers were applicable here, the statute of limitations would have been extended to the end of August 2015. Yet, Plaintiff's Complaint was first filed in March of 2016. Accordingly, if Section 2462's statute of limitations is applicable, the Complaint would be untimely, regardless of which statute of limitations' date is applied.

Recently, the Supreme Court discussed Section 2462's applicability with respect to disgorgement. *See Kokesh v. SEC*, 137 S. Ct. 1635 (2017). While the remedy therein differs from the one in the matter *sub judice* (*i.e.*, disgorgement versus injunction), the Supreme Court's reasoning is quite instructive. Consistent with the above law, the Court found that "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Kokesh,* 137 S. Ct. at 1642 (citations and internal quotation marks omitted). The Court concluded that "[w]hen an individual is made to pay a *noncompensatory sanction* to the Government as a consequence of a legal violation, *the payment operates as a penalty*." *Id.* at 1644 (emphasis added).

As discussed above, Plaintiff seeks two remedies. The first is the so called "obey-the-law" injunction. (FAC at 25). There, Plaintiff seeks to

> [p]ermanently restrain[] and enjoin [Defendant] Gentile, his agents, servants, employees, attorneys and other persons in active concert or participation with him who receive actual notice by personal service or otherwise, from violating Sections 5(a), 5(c), 17(a), and 17(b) of the Securities Act, 15 U.S.C. §§ 77e(a), 77e(c), 77q(a) and 77q(b), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240. 10b-5.

(FAC at 25-26, "Prayer For Relief"). Additionally, Plaintiff seeks a "penny stock bar." With regards to the "penny stock bar," Plaintiff asks this Court to issue an injunction "[p]ermanently prohibiting [Defendant] Gentile from participating in any

offering of penny stock pursuant to Section 20(g) of the Securities Act, 15 U.S.C. § 77t(g), and Section 21(d)(6) of the Exchange Act, 15 U.S.C. § 78u(d)(6).” (FAC at 26, “Prayer for Relief”).

Plaintiff seeks both of these “remedies” based on Defendant’s alleged involvement in the RVNG and KYUS schemes. (*See generally* FAC). According to Plaintiff, Defendant is likely to commit similar violations in the future, thereby necessitating the requested injunctions. (*See*, *e.g.*, FAC ¶¶ 79, 87-88, 90-91, 93-94, 96-97, 99-100). Plaintiff attempts to bolster this assertion by alleging that Defendant has taken no responsibility for the alleged wrongdoings. Specifically, Plaintiff points to an interview with Bloomberg Businessweek, where Defendant stated “he did nothing wrong.” (FAC ¶ 80). Plaintiff also alleges that Defendant “has [publicly] labeled [Plaintiff’s] instant action a ‘witch hunt’” and has declared on his social media that he “never scammed anyone.” (Id.). Furthermore, Plaintiff asserts that Defendant “Gentile has not offered any assurance that he will not violate the securities laws in the future.” (FAC ¶ 81). Finally, Plaintiff asserts that Defendant “maintains an active presence in the securities industry as a beneficiary of a Commission-registered broker-dealer” and that Defendant has recently publicly stated his intent to expand his business. (FAC ¶¶ 14, 82). Plaintiff avers that these facts, along with the allegations regarding the RVNG and KYUS schemes, support the request for the two injunctions.

The Court disagrees with Plaintiff’s arguments. First, and most importantly, both injunctions sought by Plaintiff are punitive in nature. Indeed, the “obey-the-law” injunction would simply require

Defendant to obey the already established federal laws and regulations relating to securities. Should the Court enter such an order, Defendant would not be required to do anything more than obey the law; a basic understanding of all citizens and those involved with securities. However, such an order would also stigmatize Defendant in the eyes of the public.

Additionally, there would be no retributive effect from such an order, nor would such an order restore any "*status quo ante*." As a matter of fact, Plaintiff has not identified a single "victim" or a specific harmed party that these injunctions would be designed to compensate or benefit. Hence, the only person who would be impacted by such an order would be Defendant, and the only purpose for such an order would be to penalize him for his alleged involvement in the RVNG and KYUS schemes.

The same analysis applies to the "penny stock bar." This injunction would specifically prohibit Defendant from being involved in any "penny stock" offerings. Once again, this order would only serve to punish Defendant. The order would not restore any "*status quo ante*" nor would it serve any retributive purposes. Rather, it would merely restrict Defendant's business structure and methodology, *in perpetuity*, simply because he was alleged to have violated securities laws when he purportedly was involved in the RVNG and KYUS schemes.

None of Plaintiff's arguments are persuasive. Simply alleging that Defendant violated securities laws does not lead the Court to conclude that Plaintiff is likely to violate securities laws in the future. The fact that Defendant boasted about "not

scamming anyone" during an interview and made shrewd comments about the Securities and Exchange Commission on social media also does not indicate that Defendant will violate federal securities laws in the future. While the Court understands Plaintiff's desire to protect the public from predatory conduct, the Court cannot conclude that, under the limited set of facts currently before it, the requested injunctions are anything more than a penalty. Simply, Plaintiff's requested reliefs herein are "*noncompensatory sanctions*" and must be considered penalties.

Because the relief sought by Plaintiff is penal in nature, Section 2462 is applicable. As noted, Section 2462 places a five-year statute of limitations on the civil remedy actions brought by Plaintiff herein. It is undisputed that Defendant's alleged illegal conduct concluded in June 2008. Accordingly, Plaintiff had until June 2013 to institute the within action. Plaintiff did not file this lawsuit until March 2016. As such, this action is time barred under Section 2462 and must be dismissed.

IV. CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss Plaintiff's First Amended Complaint is granted. An appropriate Order accompanies this Opinion.

DATED: December 13, 2017

s/ Jose L. Linares
JOSE L. LINARES
Chief Judge,
United States District Court

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 16-1619 (JLL)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

GUY GENTILE,

Defendant.

ORDER

This matter comes before the Court by way of Defendant Guy Gentile's Motion to Dismiss Plaintiff Securities and Exchange Commission's First Amended Complaint. (ECF No. 50). For the reasons set forth in the Court's corresponding Opinion,

IT IS on this 13th day of December, 2017,

ORDERED that Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 50) is hereby GRANTED; and it is further

ORDERED that Plaintiff's First Amended Complaint (ECF No. 47) is hereby DISMISSED; and it is further

ORDERED that the Clerk of the Court shall mark this matter closed.

SO ORDERED.

s/ Jose L. Linares
JOSE L. LINARES
Chief Judge,
United States District Court