No. 19-878

In the Supreme Court of the United States

GUY GENTILE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the five-year statute of limitations prescribed by 28 U.S.C. 2462 for actions to enforce penalties applies to civil enforcement actions brought by the Securities and Exchange Commission to obtain injunctive relief.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.J.):

SEC v. *Gentile*, 16-cv-1619 (Dec. 13, 2017)

United States Court of Appeals (3d Cir.):

SEC v. *Gentile*, No. 18-1242 (Sept. 26, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–36a) is reported at 939 F.3d 549. The opinion of the district court (Pet. App. 42a–51a) is not published in the Federal Supplement, but is available at 2017 WL 6371301. The order of the district court (Pet. App. 52a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40a-41a) was entered on September 26, 2019. The petition for a writ of certiorari was filed on December 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this civil enforcement action against petitioner, seeking to have him enjoined from vio-

lating securities laws and barred from participating in offerings of penny stock. Pet. App. 6a-7a. The district court dismissed the action as untimely under 28 U.S.C. 2462. Pet. App. 42a-51a. The court of appeals vacated the district court's judgment and remanded the case for further proceedings. *Id.* at 3a-36a.

1. From 2007 to 2008, petitioner was involved in two "pump-and-dump schemes" to manipulate the prices of penny stocks. Pet. App. 5a. Penny stocks are low-price, thinly traded, high-risk stocks that frequently lack a well-developed market. *Id.* at 5a n.2. In each scheme, petitioner and his associates acquired shares in a penny-stock shell company; pumped up stock prices by publicly disseminating false information about the company and by making trades and placing orders to create a false appearance of demand for the shares; and ultimately sold the shares at inflated prices. *Id.* at 5a-6a; Gov't C.A. Br. 12-14. Petitioner and his collaborators generated $5 million in gross proceeds from the first scheme and $10 million from the second. Gov't C.A. Br. 13-14.

In 2012, the government arrested petitioner for his participation in those frauds. Pet. App. 6a. Petitioner at first agreed to cooperate with the criminal investigation, but in 2016, the cooperation broke down. *Ibid.* A grand jury indicted petitioner, but the district court dismissed the indictment as untimely. See 235 F. Supp. 3d 649, 651, 653. After the criminal action was dismissed, petitioner publicly announced his intention to expand a brokerage firm that he owned in the Bahamas. Pet. App. 6a.

2. The SEC—which had refrained from filing a civil enforcement action during the pendency of the criminal investigation—filed this civil case in March 2016. See Pet.

App. 51a. The SEC alleged that petitioner had violated various provisions of the securities laws. See 15 U.S.C. 77e, 77q(a), 78j(b) (2006); 15 U.S.C. 77q(b); 17 C.F.R. 240.10b-5; see also Pet. App. 7a & n.3. As relevant here, the SEC sought an injunction prohibiting petitioner from violating those laws in the future, see 15 U.S.C. 78u(d)(1), as well as an order barring petitioner from participating in any future offerings of penny stocks, see 15 U.S.C. 78u(d)(6)(A). Pet. App. 7a.

The district court dismissed the SEC's claims under the statute of limitations set out in 28 U.S.C. 2462. See Pet. App. 42a-51a. Section 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. The court held that each of the remedies requested by the SEC—an injunction prohibiting petitioner from violating the securities laws and an order barring petitioner from the penny-stock industry—constituted a "penalty" within the meaning of Section 2462. Pet. App. 51a. The court based that conclusion on its view that each of those remedies would "stigmatize" petitioner, would not "restore any '*status quo ante*,'" would not "be designed to compensate or benefit" any "specific harmed party," and would serve only "to penalize [petitioner] for his alleged involvement" in the fraudulent schemes. *Id.* at 49a-50a. The court concluded that, because petitioner's "alleged illegal conduct concluded in June 2008," and the SEC "did not file this lawsuit until March 2016," the five-year statute of limitations barred the SEC's action. *Id.* at 51a.

3. The court of appeals vacated the district court's judgment and remanded the case for further proceedings. Pet. App. 3a-36a.

The court of appeals explained that, in *Kokesh* v. *Securities & Exchange Commission*, 137 S. Ct. 1635 (2017), this Court had held that the remedy of disgorgement, "as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462." Pet. App. 8a (quoting *Kokesh*, 137 S. Ct. at 1645). The court of appeals observed that, under *Kokesh*, disgorgement as sought by the SEC qualifies as a penalty for purposes of the statute of limitations because (1) disgorgement "is imposed for violations of public laws," (2) it "'cannot fairly be said *solely* to serve a remedial purpose,'" and (3) in some cases, "the disgorged money is not used to compensate victims." *Id.* at 8a-9a (citation omitted).

The court of appeals held that "properly issued and framed" injunctions and penny-stock industry bars (which "are injunctive in nature") do not constitute penalties under Section 2462. Pet. App. 12a, 14a. The court explained that, as a general matter, "injunctions are issued to prevent harm rather than to punish past wrongdoing," and that the "'sole function'" of a properly framed injunction "'is to forestall future violations.'" *Id.* at 14a, 16a (citation omitted). The court viewed that general rule as applicable to injunctions sought by the SEC, explaining that "SEC injunctions must be intended to deter the violator from further infractions (and thereby protect the public), not punish past misconduct." *Id.* at 23a. The court concluded that "this prevention principle most sharply distinguishes SEC injunctions from the disgorgement remedy at issue in *Kokesh*." *Id.* at 14a. "Because an injunction must be fully supported by threatened harm," the court "reject[ed] [petitioner's] argument that a properly issued and framed SEC injunction can be a 'penalty' as defined by *Kokesh*." *Id.* at 23a. The court also stated 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 26a.

The court of appeals rejected petitioner's contrary contentions. Pet. App. 28a-35a. While acknowledging the *Kokesh* Court's statement that a "pecuniary sanction operates as a penalty" if it serves "'to deter others from offending in like manner,'" the court of appeals read that statement to refer only to "making an example [of the defendant] to deter others," not to "restraining the defendant on fear of contempt." *Id.* at 28a-29a. The court also concluded that petitioner's objections to the scope of any injunction were premature, explaining that "the appropriate scope of an injunction against further lawbreaking depends on the facts and circumstances of each case," and that "[c]ourts should make this determination on a developed record." *Id.* at 31a. Finally, the court recognized that some courts had treated "administrative suspensions and debarments" as punitive, but explained that the penny-stock bar at issue in this case is a form of "court-ordered injunctive relief" rather than an "administrative" sanction. *Id.* at 33a.

The court of appeals remanded the case to the district court for further proceedings. Pet. App. 36a. Those proceedings remain ongoing.

ARGUMENT

Petitioner contends (Pet. 13-33) that any form of injunctive relief that a court could order in this case, no matter how likely petitioner is to violate the law in the future, would constitute a "penalty" within the meaning of Section 2462. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. The current interlocutory posture of this case also makes it an

unsuitable vehicle for deciding the question presented. Further review is not warranted.

1. The court of appeals correctly held that a properly issued and framed injunction does not constitute a penalty for purposes of Section 2462. "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already." *Lacassagne* v. *Chapuis*, 144 U.S. 119, 124 (1892). Because "[t]he sole function of an action for injunction is to forestall future violations," "[a]ll it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952). Thus, although a plaintiff may rely on a record of past violations as evidence that "illuminates or explains the present and predicts the shape of things to come," an injunction is "unrelated to punishment" for past wrongs. *Ibid.* An injunction accordingly does not constitute a "penalty" within the meaning of 28 U.S.C. 2462.

That analysis applies to injunctions sought by the SEC in the same way as to injunctions generally. Federal law provides that, "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation," the Commission may "bring an action" to "enjoin such acts or practices." 15 U.S.C. 78u(d)(1). As in other legal settings, an injunction in an SEC action thus serves to prevent future or ongoing violations of the law, not to punish past violations. This Court accordingly has explained that, when the SEC seeks an injunction to prevent a future violation, it "must establish a sufficient evidentiary predicate to show that such a future violation may occur." *Aaron* v. *Securities & Exchange Commission*, 446 U.S. 680, 701 (1980). In prac-

tice, "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." Pet. App. 23a.

An order restraining future participation in an offering of penny stocks likewise does not constitute a penalty. The same securities-law provision that authorizes courts to enjoin violations of the securities laws provides that, "[i]n any proceeding" for an injunction against a "person participating in * * * an offering of penny stock," the court has the power to "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." 15 U.S.C. 78u(d)(6). As the court below correctly held, such "penny-stock industry bars" are a "species of injunction." Pet. App. 10a. As with other injunctive relief, the function of the "penny-stock bar" is "preventing *future* misconduct," not punishing past wrongs. *Securities & Exchange Commission* v. *E-Smart Technologies, Inc.*, 139 F. Supp. 3d 170, 182 (D.D.C. 2015). Prior wrongdoing is relevant to the court's inquiry only insofar as future violations may be "predicted by specific inferences drawn from a defendant's past conduct." *Ibid.*

A contrary reading of the statute of limitations would produce anomalous results. The five-year limitations period starts running "from the date when the claim first accrued." 28 U.S.C. 2462. But "[e]ven assuming a valid preventive injunction could be a penalty, it is hard to see when it would accrue." Pet. App. 35a. Petitioner appears to suggest (Pet. 4-5) that an action for an injunction accrues when the "alleged wrongdoing by [the defendant] last occurred," but, as just explained, the determination

whether to enjoin a defendant's actions turns on the defendant's capacity and opportunity for future misconduct.

2. Petitioner's contrary arguments lack merit. Petitioner principally relies (Pet. 28) on this Court's holding in *Kokesh* v. *Securities & Exchange Commission*, 137 S. Ct. 1635 (2017), that disgorgement as ordered in SEC actions constitutes a penalty under 28 U.S.C. 2462 because that remedy is not purely compensatory and serves in part to deter violations of the securities laws. 137 S. Ct. at 1641-1644. Petitioner's reliance on *Kokesh* is misplaced.

For one thing, the *Kokesh* Court addressed the circumstances under which "a *pecuniary* sanction operates as a penalty" for purposes of Section 2462. 137 S. Ct. at 1642 (emphasis added). 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 (emphases added). The Court did not suggest that the factors it considered in the context of a pecuniary remedy would govern the availability of a nonpecuniary remedy like an injunction. For another thing, the *Kokesh* Court emphasized that disgorgement as obtained by the SEC "cannot fairly be said *solely* to serve a remedial purpose." *Id.* at 1645 (citation omitted). "But a properly issued and framed injunction is 'fairly' so described, because its 'sole function . . . is to forestall future violations.'" Pet. App. 14a (citation omitted).

Petitioner also argues (Pet. 24) that courts have "expan[ded]" the standard for awarding injunctions to the SEC so as to "permit[] issuance of non-remedial injunctions." This Court, however, has already set forth the relevant standard: "In cases where the Commission is seek-

ing to enjoin a person 'about to engage in any acts or practices which will constitute' a violation of [the securities laws], the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur." *Aaron*, 446 U.S. at 701 (ellipsis and emphases omitted). Thus, if a particular action for 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." Pet. App. 26a.

Petitioner relies (Pet. 6 & n.1, 21 & n.8) on two speeches by SEC officials that, in petitioner's view, show that injunctions obtained by the SEC serve a punitive purpose. That argument is incorrect. Each of the speakers whom petitioner cites explained that injunctive relief serves preventive rather than punitive purposes. See Luis Aguilar, Comm'r, U.S. SEC, Taking A No-Nonsense Approach to Enforcing the Federal Securities Laws 4 (Oct. 18, 2012) (explaining that industry bars allow the SEC to "proactively protect investors" by "mak[ing] sure that bad actors are prevented from doing future harm"); Steven Peikin, Co-Director, SEC Div. of Enforcement, Remedies and Relief in SEC Enforcement Actions 4 (Oct. 3, 2018) (explaining that bars "are not a punishment," but rather "serve a critical prophylactic function"). More fundamentally, as the court of appeals concluded, the application of the statute of limitations turns on the objective "nature of the remedy itself," not on the agency's (or bygone officials') subjective "intent." Pet. App. 30a.

Petitioner also contends (Pet. 7, 10, 29) that an injunction would operate as a penalty in this particular case, because the SEC's "complaint" failed to include "allegations" demonstrating a "non-punitive purpose" for such an injunction. That argument is misconceived. Because the statute of limitations is an affirmative defense, see

Fed. R. Civ. P. 8(c)(1), the defendant bears the burden of pleading it in his answer. A plaintiff (like the SEC here) is not required "to anticipate" such a defense and refute it "in [the] complaint." *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980); see *United States Gypsum Co.* v. *Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003) ("Complaints need not anticipate or attempt to defuse potential defenses."). In any event, the SEC has alleged facts that plausibly suggest a likelihood of future violations, see Gov't C.A. Br. 36, and petitioner's contrary factbound contentions do not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Finally, petitioner misstates the facts of this case. See Sup. Ct. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."). Contrary to petitioner's contention, the SEC has not "[a]bandoned" arguments that petitioner has violated the securities laws. Pet. 6 (emphasis omitted). The SEC also has not "admitted that all of its claims were time-barred." Pet. 8.

3. Contrary to petitioner's contention (Pet. 13-20), the decision below does not conflict with the decision of any other court of appeals. Every court of appeals to consider the issue before *Kokesh* agreed that a properly issued injunction does not constitute a penalty under Section 2462. See *Securities & Exchange Commission* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), reh'g granted, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436, 450 (1st Cir. 2010) (en banc); *Securities & Exchange Commission* v. *Kokesh*, 834 F.3d 1158, 1162 (10th Cir. 2016), rev'd on other grounds,

137 S. Ct. 1635 (2017); *Securities & Exchange Commission* v. *Graham*, 823 F.3d 1357, 1361 (11th Cir. 2016); see also *Riordan* v. *Securities & Exchange Commission*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (Kavanaugh, J.) (concluding that a cease-and-desist order that requires a person "not to violate the relevant securities laws in the future" is not a penalty for purposes of the statute of limitations). And the only other court of appeals to address the question since *Kokesh* agrees that a properly imposed injunction is not a penalty under Section 2462. See *Securities & Exchange Commission* v. *Collyard*, 861 F.3d 760, 765 (8th Cir. 2017).

The decisions on which petitioner relies (Pet. 14-18) do not show otherwise. In *Securities & Exchange Commission* v. *Bartek*, 484 Fed. Appx. 949 (2012) (per curiam), cert. dismissed, 569 U.S. 901 (2013), the Fifth Circuit held, in an unpublished opinion, that an injunction against future securities violations consituted a penalty under Section 2462 where the district court had found on summary judgment that the requested relief did not "address the prevention of future harm in light of the minimal likelihood of similar conduct in the future." *Id.* at 956-957. In *Johnson* v. *Securities & Exchange Commission*, 87 F.3d 484 (1996), the D.C. Circuit held that an administrative suspension imposed by the SEC was a penalty under Section 2462 where the agency had based that sanction "solely" on "past misconduct" and had failed to consider whether the violator posed any continuing danger to the public. *Id.* at 490. And in *Proffitt* v. *Federal Deposit Insurance Commission*, 200 F.3d 855 (2000), the D.C. Circuit held that the Federal Deposit Insurance Corporation's administrative exclusion of a person from the banking industry was a penalty where that agency had "based its action

solely on [the person's] long past conduct and made no attempt to evaluate his present fitness or competence." *Id.* at 862. Those decisions—one of which is unpublished, one of which does not involve an injunction, one of which involves neither an injunction nor the SEC, and all of which were decided on a developed record—show only that some courts have engaged in "fact-intensive analyses" to determine whether particular injunctions or bars, as applied in individual cases, operate as penalties for purposes of Section 2462. *Collyard*, 861 F.3d at 764.

Any such fact-intensive analysis would be premature in this case, which is still at the motion-to-dismiss stage. See pp. 9-10, *supra*. And as the court of appeals observed, nothing in the decisions applying that fact-intensive approach "is inconsistent with [the decision] here," for none of those decisions addressed "properly issued and framed injunctions." Pet. App. 25a, 36a. Indeed, the court made clear that, if it is ultimately determined that petitioner poses no risk of future harm, the injunctive relief that the SEC seeks will be unavailable "as a matter of equitable discretion." *Id.* at 26a; see *id.* at 24a-26a.

The remaining decisions on which petitioner relies also do not conflict with the decision below. In *United States* v. *Telluride Co.*, 146 F.3d 1241 (1998), the Tenth Circuit stated that Section 2462 "appl[ies] to non-monetary penalties," but ultimately concluded that "the restorative injunction in th[at] case [wa]s not a penalty." *Id.* at 1245-1246. In *Federal Election Commission* v. *Williams*, 104 F.3d 237 (1996), cert. denied, 522 U.S. 1015 (1997) the Ninth Circuit concluded that, under the doctrine that "'equity will withhold its relief * * * where the applicable statute of limitations would

bar the concurrent legal remedy,'" a "claim for injunctive relief [that] is connected to the claim for legal relief" may be subject to the statute of limitations. *Id.* at 240. And Judge Kavanaugh's concurrence in *Saad* v. *Securities & Exchange Commission*, 873 F.3d 297 (D.C. Cir. 2017), did not address Section 2462 at all; rather, it concerned the proper standard for imposing an associational bar, a question that is not presented here. None of those opinions is inconsistent with the holding of the court below that properly issued and framed injunctions do not constitute penalties under Section 2462.

4. This case is an unsuitable vehicle for reviewing the question presented. Because the court of appeals vacated the district court's judgment and remanded the case to the district court for further proceedings, the case is currently in an interlocutory posture. That circumstance "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); see *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari); *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (statement of Scalia, J., respecting the denial of the petition for writ of certiorari). Petitioner will have the opportunity to raise his current claim, together with any other claims that may arise during the proceedings on remand, in a single petition for a writ of certiorari after those proceedings. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

This Court's review would be especially premature here because the courts below issued their decisions at the motion-to-dismiss stage of the case. Neither lower court

has yet determined whether the SEC can establish a sufficient likelihood of future wrongdoing to warrant injunctive relief under traditional equitable principles. Petitioner appears to concede (Pet. 24), moreover, that injunctions against "imminent" violations of the securities laws are not penalties for the purposes of Section 2462. It is not clear how petitioner defines imminence, but additional factual and legal development might result in relief that satisfies even the test that petitioner advocates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2020