No. 19-878

IN THE

Supreme Court of the United States

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

REPLY TO OPPOSITION

ADAM C. FORD
Counsel of Record
FORD O'BRIEN LLP
575 Fifth Avenue, 17th Floor
New York, New York 10017
(212) 858-0040
aford@fordobrien.com

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 6

TABLE OF AUTHORITIES

PAGE(S)

Johnson v. SEC,
87 F.3d 484 (D.C. Cir. 1996) 2, 3

Kokesh v. SEC,
137 S. Ct. 1635 (2017) 1, 2, 4, 6

Meeker v. Lehigh Valley R.R. Co.,
236 U.S. 412 (1915) 3

Riordan v. SEC,
627 F.3d 1230 (D.C. Cir. 2010) 3

Saad v. SEC,
873 F.3d 297 (D.C. Cir. 2017) 5

SEC v. Bartek,
484 Fed. Appx. 949 (5th Cir. 2012) 2

SEC v. Collyard,
861 F.3d 760 (8th Cir. 2017) 2

SEC v. Gentile,
939 F.3d 549 (3d Cir. 2019) 2, 4

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) 4, 5

SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008)..... 3

SEC v. Warren,
583 F.2d 115 (3d Cir. 1978) 5

United States v. Rebelo,
394 Fed. Appx. 850 (3d. Cir. 2010)..... 3

United States v. Telluride, Co.,
146 F.3d 1241 (10th Cir. 1998) 3

PAGE(S)

Statutes

15 U.S.C. § 78u(d)(1) 4, 5

28 U.S.C. § 2462 ..... *passim*

Other Authorities

Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court,* 79 VA. L. REV. 717, 726 (1993) 6

PETITIONER'S REPLY BRIEF

The Government's opposition hinges on three erroneous positions. First, the Government suggests that no circuit split exists on the question of whether an injunction may constitute a "penalty" under 28 U.S.C. § 2462. This is inaccurate. As the lower court's decision makes clear, "[o]ther courts are divided on whether an injunction can ever be a § 2462 penalty." Second, the Government's argument rests on the faulty assertion that the phrase "pecuniary or otherwise" in § 2462 does not modify "penalty," an argument that has already been rejected by the Supreme Court. From this flawed reasoning, the Government argues that the word "penalty" in § 2462 should be given substantively different meanings depending on whether the relief sought by the SEC is pecuniary or nonpecuniary. Third, and relatedly, the Government argues that the definition of "penalty" under § 2462 set forth by this Court in *Kokesh* only applies to pecuniary relief and does not apply to nonpecuniary relief, such as the "obey the law" injunctions and industry bar challenged here. This Court can and should now clarify whether the *Kokesh* test applies to nonpecuniary forms of relief. This case sets forth the perfect vehicle for this Court to clarify this critical issue.

ARGUMENT

1. In *Kokesh*, this Court defined a "penalty" under § 2462, whether "pecuniary or otherwise," as follows: any "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." *Kokesh v. SEC*, 137 S. Ct.

1635, 1645 (2017) (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)) (emphasis original). The Government, nonetheless, urges this Court to let stand the lower court decision—acknowledged to be in conflict with other circuits—by arguing that the definition of "penalty" set forth in *Kokesh* applies only to "a pecuniary sanction." (Opp. pg. 8). Thus, the Government claims that where the SEC seeks non-pecuniary relief, the word "penalty" means relief that does not "function" to "prevent[] *future* misconduct." (Opp. pg. 7) (emphasis original).

2. The Government inaccurately claims that "the decision below does not conflict with the decision of any other court of appeals." (Opp. pg. 10). This claim is wrong. First, the lower court expressly recognizes the circuit split in the opinion at issue. *Gentile*, 939 F.3d 549, 561 (2019) ("Other courts are divided on whether an injunction can ever be a § 2462 penalty."). The decision below also directly takes issue with the D.C. Circuit's approach to determining whether an injunction may constitute a penalty under § 2462, finding that "[w]e question too the consistency and administrability of [the *Johnson* court's] approach . . . ." *Id.* at 561, n.8. Likewise, the Eighth Circuit issued a post-*Kokesh* decision recognizing disagreement among the circuits, writing: "The courts of appeals split over whether an injunction can be a § 2462 'penalty'." *SEC v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017). Lastly, the Government's own brief acknowledges conflicting opinions among the courts of appeals by conceding that the Fifth Circuit has held that "an injunction against future securities violations constituted a penalty under Section 2462," (Opp. pg. 11, describing holding of *SEC v. Bartek*, 484 Fed. Appx. 949 (5th Cir. 2012)), and that the D.C. Circuit has held that an industry suspension "imposed

by the SEC was a penalty under Section 2462," (Opp. pg. 11, describing holding of *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996)). As set forth in Petitioner's opening memorandum (Pet. Br. pgs. 4, 13–20), multiple courts of appeals have addressed this question—with conflicting holdings.[1]

3. The Government's contention that *Kokesh's* definition of a § 2462 penalty does not apply to nonpecuniary relief (Opp. pg. 8) conflicts with the statute's plain language and Supreme Court precedent. Section 2462 makes clear that its five-year statute of limitations applies to any "penalty" whether "pecuniary or otherwise." In *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915), the Supreme Court analyzed § 2462's predecessor and found that "pecuniary or otherwise" modifies the word "penalty." *See also United States v. Telluride, Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998) ("Based on this construction, we view 'pecuniary or otherwise' as modifying both the terms penalty and forfeiture."). That § 2462's limitation applies to nonpecuniary relief, including injunctive relief, has been widely accepted, whether expressly or impliedly. *See, e.g.*, *United States v. Rebelo*, 394 Fed. Appx. 850, 852 (3d. Cir. 2010); *Telluride Co.*, 146 F.3d at 1245.

---

[1] The Government apparently seeks to minimize the significance of this split by citing to two inapposite cases. (Opp. pgs. 10–11). For example, it cites *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008), which merely found that the statute of limitations was "tolled" and thus the claims timely. It also cites *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), which merely affirmed the noncontroversial position that "cease and desist" orders are "purely remedial and preventative" and thus "not a 'penalty' or 'forfeiture'. . . ." Neither case addresses the issues raised here.

4. Notwithstanding § 2462's plain language, the Government contends that when the SEC seeks nonpecuniary relief courts should apply a different test than set forth in *Kokesh* for determining whether that nonpecuniary relief constitutes a penalty. (Opp. pg. 8). Specifically, the Government maintains that courts should apply a "primary purpose" or "historical purpose" test, which asks whether the nonpecuniary relief is primarily (or was historically) intended "to protect against future violations." (*See* Opening Brief for the SEC, Appellant at 10, *SEC v. Gentile*, 939 F.3d 549 (3d Cir. 2019)). While this approach has been adopted in the decision below and by the Eleventh Circuit in *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), it contradicts *Kokesh* and conflicts with the approach of other circuits (*see* Pet. Br. pgs. 13–20). Additionally, it erroneously assumes "deterrence" is a legitimate nonpunitive purpose and is otherwise entirely unworkable (*see* Pet. Br. pgs. 28–33). Regardless, the Government's advocacy in favor of the "primary purpose" test instead of the *Kokesh* test to determine whether an injunction (or industry bar) is punitive, serves to further support this petition for writ of certiorari, which seeks resolution of this disagreement among the courts of appeals.

5. Finally, the Government's argument hinges on the flawed assumption that all forms of injunctive relief are homogenous. Specifically, it conflates (a) "obey the law" injunctions and industry bars with (b) injunctive relief intended to halt an ongoing or "imminent" securities law violation. (Opp. pg. 14). But the distinction between these forms of injunctive relief is critical in determining whether the relief is punitive. Indeed, while Gentile concedes that 15 U.S.C. § 78u(d)(1) authorizes injunctions to halt

ongoing or "imminent" securities law violations, the Amended Complaint here alleges only misconduct from 2007 and 2008. That is, the SEC's Amended Complaint contains no allegations of wrongdoing for at least twelve years and is therefore plainly not seeking an injunction premised on an "imminent" securities law violation. Unlike an injunction designed to stop an ongoing or "imminent" violation, "obey the law" injunctions and industry bars do not seek to thwart specific, identifiable conduct. *See SEC v. Warren*, 583 F.2d 115, 121 (3d Cir. 1978) ("In effect, the injunction merely requires defendants 'to obey the law' in the future. . . , a requirement with which they must comply regardless of the injunction."). Admittedly, an injunction against an ongoing or "imminent" securities law violation can be described as solely remedial, since it seeks to restore the *status quo ante*. *See* 15 U.S.C. § 78u(d)(1) (authorizing courts to issue an injunction where "any person is engaged or is about to engage" in a securities law violation). By contrast, "obey the law" injunctions function like a declaratory judgment, but with even more harsh punitive purposes: among other things, to strip the individual of procedural and constitutional safeguards and to deter wrongdoing. *Cf. Graham*, 823 F.3d at 1362 ("A declaration of liability goes beyond compensation and is intended to punish because it serves neither a remedial nor a preventative purpose. . . ."). Nor do industry bars serve any identifiable remedial purpose. *See, e.g.*, *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) (Kavanaugh, J., concurring) ("Under any common understanding of the term 'remedial,' expulsion and suspension of a securities broker are not remedial.").

6. The lower court's determination that the SEC may bring a suit or action for an "obey the law"

injunction or penny stock industry bar at any distance in time conflicts with Congress' express restriction of SEC power found in § 2462. In so ruling, the lower court's decision permits an end run-around § 2462's time limitation and disregards this Court's holding in *Kokesh*, which defined a "penalty" under § 2462. As this Court is aware, "the 'single most important' factor for granting certiorari petitions…is a split within the circuits that have considered the issue below." Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court,* 79 VA. L. REV. 717, 726 (1993) (*quoting* H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)). The Government's opposition fails to set forth any good reason for the Court to decline to resolve the split among the courts of appeals on the recurring issue presented here.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ADAM C. FORD
Counsel of Record
FORD O'BRIEN LLP
575 Fifth Avenue, 17th Floor
New York, New York 10017
(212) 858-0040
aford@fordobrien.com

Counsel for Petitioner