No. 21-

In The
Supreme Court of the United States

Donald J. Fowler,

Petitioner,

v.

Securities and Exchange Commission,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where 28 U.S.C. § 2462 provides in relevant part that, "[e]xcept 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…," may the district court exercise subject matter jurisdiction over an action commenced more than five years after accrual of the claim, where the parties by private agreement purport to have tolled the five-year period?

2. May the district court enter a civil penalty in an SEC enforcement action that is more than 18 times the disgorgement amount (before interest), thereby exceeding the $150,000 cap set by Congress in 15 U.S.C. § 77t(d)(2), without contravening the Constitutional prohibition against excessive penalties reflected in the Court's prior decisions?

PARTIES TO THE PROCEEDINGS

The parties to this case are:

- Donald J. Fowler (Petitioner)
- Securities and Exchange Commission (Respondent)

RELATED CASES

- *Securities and Exchange Commission v. Dean et al.*, Case No. 1:17-cv-00139-GHW, U.S. District Court for the Southern District of New York. Judgment entered February 28, 2020.
- *Securities and Exchange Commission v. Fowler*, Docket No. 20-1081, U.S. Court of Appeals for the Second Circuit. Judgment entered July 22, 2021.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 22, 2021. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question presented relates to 28 U.S.C. § 2462, which provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United

> States in order that proper service may be made thereon.

The second question presented relates to the Fifth and Eighth Amendments to the U.S. Constitution and to 15 U.S.C. § 77t(d)(2). The Fifth Amendment provides in relevant part that: "No person shall…be deprived of life, liberty, or property, without due process of law…." U.S. Const. Amend. 5. The Eighth Amendment, in turn, provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. 8.

Lastly, 15 U.S.C. § 77t(d) ("Money Penalties in Civil Actions"), subsection (2) ("Amount of Penalty"), provides that:

> (A)First tier
>
> The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B)Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C)Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I)the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II)such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

The $100,000 third tier penalty for natural persons was inflation-adjusted to $150,000 for the relevant time period. *See* 17 C.F.R. § 201.1001 tbl.I.

STATEMENT OF THE CASE

For the reasons below, this Petition raises important and recurring questions of federal law that have not been, but should be, settled by the Court, regarding: (a) the jurisdictional nature of 28 U.S.C. § 2462, the time bar applicable to all civil penalty actions brought by the government; and (b) the scope of penalties permitted of the SEC under 15 U.S.C. § 77t(d) and the Fifth and Eighth Amendments to the U.S. Constitution.

Petitioner cannot find conflicting opinions of other courts of appeal, but the Opinion below conflicts with the reasoning and holdings of several prior decisions of the Court. Further, the Opinion implicates the functioning and operations of the SEC, whose activities affect the securities markets and the economy generally. According to the most recent Annual Report of the SEC's Enforcement Division: "In fiscal year 2020, the SEC brought a diverse mix of 715 enforcement actions,…and obtained judgments and orders totaling approximately $4.68 billion in disgorgement and penalties."

PROCEEDINGS IN THIS CASE

This case developed out of a 2014 investigation by Respondent Securities and Exchange Commission ("SEC") of activities that began in at least 2011. In March 2016, and again in August 2016, the SEC and Petitioner Donald J. Fowler ("Petitioner") entered into tolling agreements.

In January 2017, the SEC filed this action against Petitioner and his business partner, Gregory Dean. (The SEC settled with Mr. Dean prior to trial.) On April 21, 2017, the SEC filed its Amended Complaint. In it, the SEC asserted two causes of action. The SEC's First Claim for Relief alleged that Petitioner violated Sections 17(a)(1), (2) and (3) of the Securities Act of 1933, 15 U.S.C. §§ 77q(a)(1), (2) and (3). The SEC's Second Claim for Relief alleged that Petitioner violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. According to the Amended Complaint, Petitioner "recommended a trading strategy to [13 customers] without any reasonable basis to believe that the strategy was suitable for anyone," in order to generate "exorbitant commissions." The SEC further alleged that "the same basic strategy" was used for the accounts of all 13 customers.

Trial was held on June 10-19, 2019. The jury found for the SEC on both counts. After the verdict, the district court was called on to issue an award of remedies to the SEC, both in terms of injunctions and

in terms of penalties and disgorgement. On February 25, 2020, the district court ordered Petitioner to disgorge $132,076 (plus interest), representing $104,568.40 in commissions and $27,498 in postage fees he received from the 13 affected customers. On top of that, the district court also directed Petitioner to pay civil penalties of $1,950,000. Specifically, the district court first found that the jury's scienter findings warranted Third Tier penalties—*i.e.,* fines up to the greater of: (1) $150,000 for each violation committed by the defendant; and (2) such defendant's "gross amount of pecuniary gain." 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B) (iii), 80b–9(e)(2)(C). It then multiplied that $150,000 maximum penalty by 13, concluding that, because "the penalty provisions of the relevant securities laws do not define 'violation,'" it had discretion to deem each customer a separate "violation." Thus, the district court imposed a total penalty of $1.95 million.

On July 22, 2021, the court of appeals affirmed the $1.95 million penalty, but reduced the disgorgement award to $107,591. The court of appeals also rejected Petitioner's claim of lack of subject matter jurisdiction, holding that, although the SEC's causes of action accrued, at least in part, more than five years before suit was commenced, the action was not time-barred, because the parties had privately tolled the running of 28 U.S.C. § 2462.

REASONS FOR GRANTING THE PETITION

Under Rule 10(c) of the Rules of the Supreme Court ("Considerations Governing Review on Certiorari"), "[a] petition for a writ of certiorari will be granted only for compelling reasons," including where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court." That is exactly what has happened here.

As discussed below, the court of appeals' Opinion decides important federal questions in a way that conflicts with relevant decisions of the Court. Alternatively, the Opinion raises important questions of federal law that have not been, but should be, settled by the Court.

I. WHETHER 28 U.S.C. § 2462 MAY BE WAIVED RAISES AN IMPORTANT FEDERAL QUESTION NOT RESOLVED BY THE COURT'S PRIOR RULING IN *GABELLI*

The court of appeals held that 28 U.S.C. § 2462 was not a jurisdictional statute, but rather a garden-variety statute of limitations that the parties were free to waive by private agreement. This contradicted

the plain language of the statute. Section 2462 does not prohibit litigants from bringing suits beyond five years, but rather prohibits district courts from "entertaining" such suits--language that has traditionally been construed as jurisdictional in nature. The Opinion below thus empowers the SEC to coerce tolling agreements which can lead, and in many cases have led, to the imposition of penalties long after the alleged violations occurred.

In its Opinion below, the court of appeals acknowledged that: "Until now, we have not squarely addressed the issue in a precedential opinion," although it claimed that "some of our sister circuits have treated § 2462 as a nonjurisdictional statute without specifically holding that it is." App. 12. But whether the federal courts have subject matter jurisdiction to hear cases Congress expressly barred them from "entertaining" is a question too significant to leave to mere implicit rulings.

With respect to enforcement proceedings, Congress has limited the SEC's powers via 28 U.S.C. § 2462, which provides that: "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 …." The SEC is a creature of statute, and consequently has only those powers Congress confers upon it. *Louisiana Pub. Serv. Comm'n v. F.C.C.,* 476 U.S. 355, 374 (1986)*; Lyng v. Payne*, 476 U.S. 926, 937 (1986).

As the Court held in *Gen. Inv. Co. v. New York Cent.R. Co.,* 271 U.S. 228, 230 (1926): "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon…."

The court of appeals ignored the plain language of the statute in favor of an anonymous 1947 "Reviser's Note" describing the amendments to § 2462 as "[c]hanges…made in phraseology." H.R. Rep. 80-308, 11 at A191 (1947). In doing so, the Opinion below runs afoul of the Court's rulings that legislative history should never be used to "muddy" the meaning of "clear statutory language." *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011).

The Opinion below also runs afoul of the principles set forth in *Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013), wherein the Court held that Congress did not expressly vest the SEC with authority to use equitable tolling to bring civil enforcement actions "at any distance of time." (quoting *Adams v. Woods*, 2 L.Ed. 297 (1805)). Nor did Congress expressly vest the SEC with authority to use contractual tolling to achieve the same objective. Yet, the Opinion below does not discuss *Gabelli.*

Commentators have questioned the ability of the SEC to contract around an otherwise unwaivable jurisdictional bar. *See, e.g.,* Ryan, Russell, "What If SEC Tolling Agreements Are Unenforceable In Court?," *Law360* (July 24, 2020). "[U]nlike ordinary statutes of limitations, Section 2462 focuses not on when the plaintiff must do something but rather on whether the tribunal may or may not entertain the

action or proceeding brought before it." *Id*. "In its most natural reading, Section 2462 literally forbids federal courts to entertain a category of cases unless a specific condition exists." *Id*. "In the context of Section 2462, tolling agreements serve essentially as contractual permission slips, signed by the SEC and a private party, that purport to empower courts to do something that Congress has plainly said they cannot do—namely, to entertain a case that seeks a fine, penalty or forfeiture based on a claim that first accrued more than five years earlier." *Id*.

At least one lower court has agreed that Section 2462 is "a jurisdictional statute of limitation which operates to remove the Court's subject-matter jurisdiction to entertain cases not brought within the statutory time limit…" *SEC v. Graham*, 21 F. Supp. 3d 1300, 1311 (S.D. Fla. 2014), *aff'd in part, rev'd in part on other grounds and remanded sub nom*., 823 F.3d 1357, 1362 n.1 (11th Cir. 2016). The district court opinion relied on decisions of the Court to differentiate a mere statutory time bar from a jurisdictional statute such as Section 2462, as the former says nothing about a court's power to "entertain" an action, but instead refers only to the timeliness of a particular claim. By contrast, the phrase "'shall not be entertained'…amounts to an 'unequivocal statutory command to federal courts not to entertain' an untimely claim." *Graham*, 21 F. Supp. 3d at 1308 (citing *Swain v. Pressley*, 430 U.S. 372 (1977)); *accord Williams v. Warden*, Fed. Bureau of Prisons, 713 F.3d 1332, 1339 (11th Cir. 2013) (holding

that the "phrase 'shall not entertain' [in 28 U.S.C. § 2255(e)] yields the conclusion that Congress intended to, and unambiguously did strip…the court of subject-matter jurisdiction—in these circumstances unless the savings clause applies.").

If the Court holds Section 2462 to be jurisdictional, then such jurisdiction would be lacking here. Under the rule of *Gabelli*, a claim accrues "when the plaintiff has a complete and present cause of action." 568 at 448 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). Put another way, "an action accrues when the plaintiff has a right to commence it." *Id.* at 448 (citation omitted). Here, the SEC alleged at trial that Petitioner's "scheme" was complete, at least as to one of the 13 customers at issue, by 2011. Therefore its claim expired in 2016.

Given the extensive role of the SEC in regulating the financial markets, defining the proper scope of the courts' subject matter jurisdiction to hear SEC enforcement actions is an important issue of law which the Court should settle.

II. WHETHER THE SEC MAY IMPOSE PENALTIES UNMOORED BY ACTUAL HARM RAISES AN IMPORTANT FEDERAL QUESTION NOT RESOLVED BY THE COURT'S PRIOR RULINGS

This Petition also seeks review of the Opinion below to the extent the court of appeals affirmed the district court's imposition of $1.95 million in civil monetary penalties against Petitioner, in disregard of the $150,000 statutory cap set by Congress in 15 U.S.C. § 77t(d)(2). After the SEC put its case to the jury as a "unitary" scheme, without differentiating among customers, it asserted penalties based on the notion, found nowhere in the text of § 77t(d)(2), that each affected customer should be treated as a separate "violation" under the statute. This contradicts not only the statutory cap on civil monetary penalties, but also the limitations of the Fifth and Eighth Amendments to the U.S. Constitution, as set forth by decisions of the Court. Here, Petitioner's gain from the alleged wrongdoing was held to be $107,5910, yet the civil penalty affirmed was more than 18 times that amount.

In 1990, Congress expanded the SEC's enforcement remedies, authorizing the agency to seek civil penalties in federal district courts for any violation of the federal security statutes. *See* Securities Enforcement Remedies and Penny Stock Reform Act, Pub. L. No. 101-429, §§ 101, 202, 104 Stat. 931, 932–33, 937–38 (1990) (codified at 15 U.S.C. §§ 77t, 78u-2). Under the statute, a third tier penalty (as opposed to first or second tier) may only be imposed if "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 77t(d)(2)(C)(II). The clear implication is that when

multiple investors are affected, the appropriate remedy is to upgrade the penalty from second to third tier, not to multiply it for each affected investor. Alternatively, the $150,000 cap may be exceeded to the extent of "the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. § 77t(d)(2)(C).

Indeed, Congress differentiated "violations" from "acts and omissions" in establishing penalties, and thus did not intend the terms to be interchangeable. While the statute authorizes the imposition of monetary penalties for each "violation" in civil actions, 15 U.S.C. § 77t(d), the monetary penalty the SEC can impose in administrative proceedings is instead based on each "act or omission." 15 U.S.C. § 80a-9(d)(2)(C).

Nothing in the Act suggests that Congress granted the SEC the power to seek statutory penalty caps applied on a "per victim" basis, which in most cases would render the cap limitless. "Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On the contrary,...a statutory silence on the granting of a power is a denial of that power to the agency." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring).

The court of appeals, however, did not agree, affirming penalties of more than 18 times the amount of actual injury, and holding that: "We have not previously held that the civil penalty for a securities fraud offense needs to be proportional to the

disgorgement amount." App. 24. The Opinion vests the SEC with the power to seek essentially limitless penalties for civil offenses, something neither Congress nor the Constitution contemplates.

Moreover, even if Congress did intend to leave it to the "discretion" of the district courts to decide what constitutes a "violation" (and thus whether the maximum penalty has any meaning at all), any penalty would still have to pass constitutional muster. The Court has been clear in its prior decisions that the safeguards of the Fifth and Eighth Amendments curb overly punitive fines and penalties. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (holding that grossly excessive punitive damage awards can violate Due Process Clause); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that punitive forfeiture violates Excessive Fines Clause of the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense"). Notably, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), the Court concluded that a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," but did not "cross the line into the area of constitutional impropriety."

In this case, the penalties imposed exceed 18 times Petitioner's gross monetary gain from the alleged wrongdoing. That not just crosses the line; it obliterates it. The Court should settle the law, consistent with Constitutional mandates, that a $1.95 million penalty is grossly disproportionate to the

$107,591 which Petitioner allegedly earned on the accused trades. The SEC must not use its vast power to seek civil penalties that contradict the Constitution and the authorizing statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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