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5 v. :

6 SECURITIES AND EXCHANGE :

7 COMMISSION, :

8 Respondent. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, April 18, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:11 a.m.

16 APPEARANCES:

17 ADAM UNIKOWSKY, ESQ., Washington, D.C.; on behalf of the
18 Petitioner.

19 ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;
21 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning first in Case 16-529, Kokesch v. The
5 Securities and Exchange Commission.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM UNIKOWSKY

8 ON BEHALF OF THE PETITIONER

9 MR. UNIKOWSKY: Mr. Chief Justice, and may
10 it please the Court:

11 The government contends it can bring
12 sovereign enforcement actions seeking backwards-looking
13 monetary liability based on conduct dating back forever
14 with no statute of limitations at all. That position
15 both contradicts the text of Section 2462 and is
16 antithetical to legal traditions dating back to the
17 early Republic.

18 CHIEF JUSTICE ROBERTS: I guess your
19 phraseology is technically correct, but the government
20 says there's a multifactor analysis that a court would
21 go through to determine that maybe the government's
22 brought its action too late.

23 MR. UNIKOWSKY: Your Honor, I -- actually,
24 the government doesn't really take that position because
25 it contends that laches does not apply to the government

1 at all. So the government's supposed equitable
2 restriction -- or at least the government has taken that
3 position in every court, and certainly does not
4 contradict that position in its brief.

5 So the government's view is that there's
6 some kind of equitable limitation that only applies at
7 the remedial stage after the trial and the remedial
8 stage is already over. So the person's already stood
9 trial after, you know, 10, 20, 30 years after the
10 incident. And even then, it's a pretty weak equitable
11 restriction.

12 I think the recent Wiley case kind of
13 illustrates this restriction in action where the
14 government sought 22 years of prejudgment interest at a
15 very high interest rate. And the government -- and --
16 excuse me -- the district court said that because the
17 SEC was partially responsible for the delay, it was
18 going to apply a somewhat lower prejudgment interest
19 rate that lowered the amount of prejudgment interest
20 from 200 to \$100 million, and that is not really an
21 adequate substitute for a statute of limitations in our
22 view.

23 So we think that a statute of limitations is
24 necessary for actions to be dismissed pretrial. And we
25 think that also our position falls within the heartland

1 of the word "forfeiture." We ask the Court to apply the
2 ordinary definition of forfeiture, which has not changed
3 between the 19th century and today. It's an order
4 requiring turnover of money or property to the
5 government as a result of wrongdoing.

6 Edwards --

7 JUSTICE SOTOMAYOR: Counselor, before the
8 1970s -- and you haven't shown me anything to the
9 contrary -- forfeiture was an in rem proceeding where
10 the property was attached; the money, the bank account,
11 a piece of property, a home, whatever, but it was not a
12 personal action against an individual. So how do we get
13 from that traditional understanding which governed this
14 statute to your meaning today? Because there is a vast
15 difference between in rem and in personam actions.

16 MR. UNIKOWSKY: Well, I'd give two responses
17 to that. First of all, I would -- I would dispute a
18 premise that there was no concept of in personam
19 forfeitures before 1970. I think that there was. For
20 instance, as the government itself says in its brief, an
21 in personam money judgment in the form of a fine was
22 considered a forfeiture.

23 And so the government has this odd position
24 where --

25 JUSTICE SOTOMAYOR: A fine has -- I mean,

1 forfeit -- disgorgement is an equitable remedy on
2 getting back money that doesn't belong to you. A fine
3 is a payment in addition to the conduct that you
4 committed. So there is a difference there.

5 MR. UNIKOWSKY: Right. I --

6 JUSTICE SOTOMAYOR: That begs the question.

7 MR. UNIKOWSKY: Well, I agree with you,
8 Justice Sotomayor. The position I'm trying to say is
9 that the government says that the word "forfeiture"
10 encompasses these in personam money fines, and also
11 encompasses these in rem turnovers of tainted property,
12 and disgorgement is kind of right in between those two
13 forfeitures the government recognizes.

14 So like a fine, it's an in personam payment
15 of money, and like an in rem forfeiture, it's a turnover
16 order of tainted property to the government. And so
17 it's somewhat gerrymandered, in our view, that kind of
18 one and three would be forfeiture, but not two.

19 And the other thing is I would -- you know,
20 historically, I actually think that there were in
21 personam forfeitures of the value of money. So we give
22 the example of this old customs fine -- forfeitures,
23 excuse me -- which are actually quite similar to today's
24 disgorgement. If you violated the customs laws, you had
25 to pay, not necessarily just the property that was

1 illegally imported, but the value of it. And those were
2 historically called forfeitures as well.

3 JUSTICE GINSBURG: Mr. Unikowsky, whatever
4 the history, certainly disgorgement was not in the days
5 of the common law what it is today. Yet the SEC has
6 been asking for this kind of relief now for, what, over
7 30 years?

8 Has there been any effort, any activity in
9 Congress to make this clear, one way or another, whether
10 disgorgement fits with forfeiture?

11 MR. UNIKOWSKY: No, there hasn't, because
12 really, the SEC's efforts to seek these -- what we view
13 as stale disgorgements are quite new.

14 So, for instance, the government says that
15 in 1990, Congress implicitly ratified its position about
16 the statute of limitations. We boiled the oceans and
17 could not find a single case, ever, before 1990, in
18 which the government had sought these forfeitures from
19 beyond 5 years. None.

20 JUSTICE KENNEDY: Is it clear that the
21 district court has statutory authority to do this? I --
22 I understand that in cases where the aggrieved party is
23 before the court, there can be equitable remedies under
24 State law and so forth to afford restitution, at least.

25 Is -- is there specific statutory authority

1 that makes it clear that the district court can
2 entertain this remedy?

3 MR. UNIKOWSKY: There's no specific
4 statutory authority. So we've never challenged the
5 capacity of the district court to seek disgorgement;
6 we've just said that there's a time limitation. When
7 disgorgement began in the 1970s, the SEC was seeking
8 that as an implied remedy. There's no statute that says
9 the SEC can seek disgorgement. There may be -- sorry.

10 CHIEF JUSTICE ROBERTS: Do you have any idea
11 what percentage of time -- how often a district court
12 does direct that the disgorgement go to a victim as
13 opposed to the government?

14 MR. UNIKOWSKY: There -- one of the amicus
15 briefs, the American Investment Council, quotes
16 numbers -- and I haven't personally checked their
17 accuracy -- of something like \$800 million out of
18 6 billion. The 6 billion includes penalties, although
19 by statute, penalties also have to go to victims.
20 Again, I haven't personally verified the accuracy of
21 those numbers.

22 But I think it's quite pertinent, actually,
23 that the biggest money disgorgements tend to be in these
24 Foreign Corrupt Practices Act cases where the government
25 gets often multi-hundred millions of dollars'

1 disgorgement on the gains derived from having bribed
2 foreign officials. And those aren't compensatory at
3 all. Those -- those moneys are just deposited in the
4 treasury.

5 JUSTICE SOTOMAYOR: Can we go back to the
6 authority? 78u, which is the only authority I can
7 imagine, says, "A court may grant any equitable relief
8 that may be appropriate or necessary for the benefit of
9 investors." If they are not doing -- if they're not
10 doing restitution, how could that be the basis of
11 disgorgement?

12 MR. UNIKOWSKY: So that statute was enacted
13 30 years after the SEC already started seeking
14 disgorgement. So the SEC, I don't think, views that as
15 the -- the fountain of its judicial authority to do it,
16 given that it had been doing it for so long before that.
17 I think some of the --

18 JUSTICE SOTOMAYOR: Well, I'll let your
19 adversary tell me what the source of their power is, but
20 I -- I -- it is unusual.

21 MR. UNIKOWSKY: I -- we do argue at some
22 length in our brief that it doesn't genuinely count as
23 an equitable form of relief. And it's notable that the
24 government really doesn't --

25 JUSTICE SOTOMAYOR: Would you tell me why

1 you think this is punitive?

2 MR. UNIKOWSKY: Sure.

3 JUSTICE SOTOMAYOR: What are your best
4 arguments? I've read your brief, but the government
5 responded to some of them in -- in, well, somewhat
6 persuasive ways. So what do you think remains as your
7 strongest argument as to why it's punitive and not
8 restorative?

9 MR. UNIKOWSKY: Well, Your Honor, first of
10 all, I think the legal standard is that if it has
11 components of both a penal and remedial remedy, it's
12 considered penal. So the question is whether it has
13 some penal component. I think that the answer is yes,
14 because when one defines the purpose of the disgorgement
15 remedy, it's to -- it's to create -- it's to ensure that
16 someone doesn't benefit from wrongdoing. But when you
17 say that, you are talking about wrongdoing; in other
18 words, the -- the purpose of the remedy is to impose
19 unpleasant legal consequences of wrongdoing.

20 JUSTICE SOTOMAYOR: But that's every --
21 restitution is that way, and you don't think of
22 restitution as punitive.

23 MR. UNIKOWSKY: I agree, Your Honor. But I
24 think in restitution, you can define a purpose
25 independent of the person's wrongdoing, which is to say

1 that there's a victim and we want to compensate that
2 victim. So you can define a purpose of that remedy
3 that's independent of redressing the wrongdoing of the
4 individual.

5 JUSTICE SOTOMAYOR: It's a question I'm
6 going to ask your adversary, but what do you see as the
7 difference between -- besides the statute of
8 limitations, what's the difference between restitution
9 and disgorgement?

10 MR. UNIKOWSKY: Well, I think that
11 restitution historically was a judgment requiring money
12 to go to the victim. So, for instance, there's this old
13 case called Porter, which we talk about, in which the
14 district court actually orders a landlord who charged
15 illegally high rents to pay money to the tenants. That
16 was the judgment. It wasn't like disgorgement, which is
17 this noncompensatory remedy that goes straight to the
18 government, and the government has the discretion to put
19 it in the treasury or not, wherever -- however it
20 chooses. Restitution was a remedy in which the victim
21 gives -- excuse me -- the wrongdoer gives money to the
22 victim. So --

23 JUSTICE GINSBURG: So if we had that, if we
24 had this working only when the money goes to the victim,
25 the government doesn't get it, would your -- then your

1 statute of limitations argument fail if this is just a
2 remedy for victims?

3 MR. UNIKOWSKY: I would probably be making a
4 different argument in that case. I'd be arguing that
5 the private statute of limitations applies. There's
6 some old cases from the 19th century that hold that if
7 the government is just bringing an action standing in
8 the shoes of a private plaintiff, then private statutes
9 of limitations are applicable. And, actually, in the --

10 JUSTICE KAGAN: What is the private statute
11 of limitations?

12 MR. UNIKOWSKY: I -- I think it would be the
13 two years and then five-year statute of repose, but
14 I'm -- I'm not certain of that, but I think that that's
15 probably what it would be. But it's interesting to note
16 that several years ago in the '90s, a litigant made that
17 argument. And it's a case called Rind from the Ninth
18 Circuit. And the SEC successfully persuaded the Ninth
19 Circuit that really didn't -- disgorgement was not a
20 compensatory remedy. It wasn't about compensation.

21 JUSTICE SOTOMAYOR: What's the name of that
22 case?

23 MR. UNIKOWSKY: Rind. It's from the Ninth
24 Circuit. We cite it in the reply brief.

25 And so the government is trying to sort of

1 have it both ways. When people are arguing that it's
2 compensatory, the Commission says it isn't. When people
3 are arguing that it isn't, which we argue here, which is
4 consistent with many briefs the SEC has cited from
5 the -- has filed in lower courts, the SEC is saying that
6 it is. It's sort of defining disgorgement in this
7 twilight zone of sometimes compensatory, sometimes not,
8 and trying to avoid statutes of limitations applicable
9 to both types of remedies.

10 JUSTICE ALITO: Well, this case puts us in a
11 rather strange position, because we have to decide
12 whether this is a penalty or a forfeiture. But in order
13 to decide whether this thing is a penalty or a
14 forfeiture, we need to understand what this thing is.
15 And in order to understand what it is, it would
16 certainly be helpful and maybe essential to know what
17 the authority for it is.

18 So how do we get out of that -- out of that
19 situation? How do we decide whether it is a penalty or
20 a forfeiture without fully understanding what this form
21 of this remedy or this, whatever it is, where it comes
22 from and -- and its exact nature?

23 MR. UNIKOWSKY: I think that -- I agree the
24 Court has to decide that question. I mean, what we
25 advocate is just look at disgorgement as it's actually

1 being applied in the real world in the lower courts.

2 And so, for instance, we give a bunch of
3 examples where the Commission is seeking disgorgements
4 going beyond restoring the person to the status quo
5 ante. So the SEC's position is that you've got to
6 disgorge money that went to everyone, not just you. So
7 in tipper or tippee situations, in insider trading
8 cases, the tipper has to disgorge all the money that
9 went to the tippee. And so I -- I mean, I don't think
10 the Court --

11 JUSTICE SOTOMAYOR: Well, I don't know why
12 that proves anything. If I commit a crime and take my
13 proceeds and give half of it to Justice Breyer --

14 (Laughter.)

15 JUSTICE SOTOMAYOR: I don't know what I was
16 buying, but I bought something. I got the benefit just
17 because I was able to direct it. So I don't know that
18 that moves me.

19 MR. UNIKOWSKY: Well, but that -- what --
20 the example I gave is beyond cases where you just direct
21 the money. It's just a tipper who gives information to
22 a tippee and never has control over any of the money at
23 all, and the tippee trades on it and gets some money,
24 the tipper has to disgorge money, which he never even
25 controlled.

1 And so I -- and to answer Justice Alito's
2 question, I think that it's true that there's some
3 dispute about what disgorgement is, where it comes from.
4 We argue it's not genuinely equitable, and the
5 government doesn't really defend its equitable nature.
6 I think the Court should take disgorgement as it finds
7 it right now in the lower courts.

8 JUSTICE ALITO: Well, why don't we take it
9 as we find it in this particular case? So is there any
10 difficulty in identifying the victims in this particular
11 case and ensuring that the money that was
12 misappropriated from them by your client goes to them
13 and not into the government's coffers?

14 MR. UNIKOWSKY: So I believe on the -- on
15 the facts of this case, the disgorgement is a penalty as
16 well as a forfeiture. And the reason why is that it's
17 true that -- I -- I actually don't know if the victims
18 are readily identifiable. But whether they are or not,
19 we don't think it really matters ultimately, because
20 this remedy is a remedy that ultimately goes to the
21 government in the first instance, which it can direct it
22 however it wants to. It's not a judgment in favor of
23 the victims at all. And so --

24 JUSTICE ALITO: But, again, we don't know.
25 How do we know that the government has the authority to

1 direct it wherever it wants?

2 MR. UNIKOWSKY: That's the authority the
3 government's been asserting for several decades that the
4 lower courts have been asserting. And --

5 JUSTICE GINSBURG: I thought -- I thought
6 the government's position was that they must give it to
7 the victim, if feasible.

8 MR. UNIKOWSKY: Well --

9 JUSTICE GINSBURG: It may or may not be
10 possible to find the victims. They may be dead. But I
11 thought the government's position was no, this is not
12 just simply our discretion on whom we will shed our
13 grace; but if it's feasible, it goes to the victim.

14 MR. UNIKOWSKY: That is absolutely not the
15 government's position. The government's position,
16 consistently in numerous lower court briefs, is that it
17 has the discretion to decide or the district court has
18 the discretion to decide. There's no legal requirement
19 that this money be distributed. The government has
20 taken the position, for instance, that because
21 disgorgement is not compensatory, victims don't even
22 have standing to challenge how the disgorgement is
23 distributed. And it's also taken the position that
24 there is no legal requirement at all, as opposed to a
25 discretionary rule, to distribute the money. And --

1 yes.

2 JUSTICE GINSBURG: Well, we'll ask the
3 government what their position is, whether it's totally
4 in their discretion whether they want to give this to
5 victims or keep it all.

6 MR. UNIKOWSKY: I -- I should add, there's
7 the -- there are certain Fair Fund rules that require,
8 not in -- it's not applicable to -- necessarily to this
9 case. But there are certain rules that direct that
10 money be put in funds that ultimately can go to victims.

11 But we think this is all immaterial because,
12 first of all, the money in the first instance goes to
13 the government, just like civil penalties also in the
14 first instance go to the government and there's still
15 penalties.

16 And second of all, I just urge the Court to
17 read the government's many, many lower court briefs
18 where it takes the position over and over again for
19 litigation benefit that disgorgement is not a primarily
20 compensatory remedy.

21 JUSTICE KENNEDY: The case is presented to
22 us as if disgorgement is this category we must adopt.
23 And correct me if it's mistaken, but it seems to me that
24 the parties seem to order -- argue a categorical rule.
25 It's always a penalty or it's always not a penalty. It

1 seems to me that maybe we can give guidance as to when
2 it is a penalty and -- and if -- am I correct that
3 that's the way the case is presented to us, it's all or
4 nothing?

5 MR. UNIKOWSKY: Yeah. So I think that as a
6 matter of both doctrine and practicality, it should be
7 all or nothing. First of all, doctrinally, I think that
8 the Court should look at the definition of disgorgement
9 rather than how it applies in a particular case.

10 And there are also practical problems.

11 JUSTICE KENNEDY: But it's not a statutory
12 term.

13 MR. UNIKOWSKY: Well, that is true, but I --
14 I think that there are problems within a particular
15 case, looking how monies are directed.

16 But I just want to step back and say that
17 our position is, even just looking at the facts of this
18 case, this disgorgement is both a forfeiture and a
19 penalty.

20 JUSTICE KENNEDY: Because?

21 MR. UNIKOWSKY: It's a forfeiture because
22 it's an order requiring Petitioner to turn over his
23 money as a result of wrongdoing. I think it's very
24 natural to say, Petitioner was required to forfeit \$34.9
25 million to the government because he did something

1 wrong, as found by a jury.

2 In fact, forfeiture of proceeds of illegal
3 activity are -- those statutes, such as 29 U.S.C.
4 853(a)(1) are essentially identical to disgorgement.
5 The government's brief identifies no differences, no
6 material differences between those forfeiture of
7 proceeds statutes and disgorgement. And when Congress
8 enacted those statutes, it called them forfeiture.

9 Now, it's true those statutes are pretty
10 new, but the reason Congress uses the word "forfeiture"
11 is that it falls within the definition of a forfeiture.

12 So I give an example of an injunction. So
13 school desegregation or prison de-crowding orders, those
14 are injunctions. They're new injunctions, they didn't
15 exist in 1830, but they're still injunctions. And in
16 the same way, these forfeitures of proceeds, which are
17 identical in every way to disgorgement, as far as we can
18 tell, were called forfeitures.

19 So even just focusing on the facts of my
20 client's case, ignoring all those other cases from the
21 Second Circuit, the remedy against the Petitioner was
22 essentially identical to the forfeiture of proceeds
23 statutes that have been enacted, and so it's a
24 forfeiture as well. And it's also quite similar to the
25 old statutes involving forfeitures of the proceeds of

1 customs offenses.

2 So I'm very happy on the facts of this
3 particular case to defend our position that this is a
4 forfeiture and as well as a penalty, I would say.

5 In response to Justice Sotomayor's question,
6 I have to say that the penal versus remedial dispute,
7 there's a certain "angels on the head of a pin" quality
8 of whether something is really penal or not. I think
9 the best way to answer this question is to look at,
10 historically, what was the reason and the purpose of
11 that taxonomy.

12 And it's actually quite clear historically,
13 and the government doesn't even agree -- disagree with
14 this, that historically, there were basically two
15 categories of money payments to the government. There's
16 compensatory payments and there's punitive payments.
17 And, in fact, there's this case called Brady v. Daly,
18 which, in fact, this Court held applied to Section 2462,
19 in a subsequent case called Chattanooga, where the Court
20 says that a payment to a victim is remedial, and the
21 same payment to the government, in the context of the
22 qui tam action, is punitive. And those are the two
23 categories.

24 And so we think that that is what Congress
25 had in mind when it enacted 2462. It knew of two

1 categories, compensatory and penal. Compensatory
2 remedies go to victims -- or -- or intended to
3 compensate the government for its own harm, and penal
4 remedies are not intended to compensate --

5 JUSTICE KAGAN: But that -- but that might
6 suggest something along the lines of what Justice
7 Ginsburg suggested, that if the government, in fact,
8 puts this money into the hands of victims, then it is
9 compensatory; whereas if the government keeps it, it's
10 not. And that the rule should follow, depending on
11 which is true.

12 MR. UNIKOWSKY: So I think that the
13 government takes this money in the first instance, and I
14 don't think that the way the government happens to
15 distribute the money should affect the statute of
16 limitations. And, again, I -- I point the Court to the
17 many briefs that the government has cite -- filed for
18 the last 20 years, emphasizing that this isn't
19 compensatory.

20 JUSTICE SOTOMAYOR: It gets more complicated
21 than that, because the money goes to the court --

22 MR. UNIKOWSKY: Yes.

23 JUSTICE SOTOMAYOR: -- according to the
24 government, and it's the court that decides how the
25 money will be paid out, correct?

1 MR. UNIKOWSKY: So this -- it depends.
2 There's -- there's one statute on Fair Funds, and in
3 some cases, you have disgorgements that go into there,
4 and there's a Sarbanes-Oxley statute that directs the
5 SEC to distribute that.

6 JUSTICE SOTOMAYOR: And then the question
7 becomes what you answered earlier, which is, if it's
8 being paid to the victim, is it really restitution as
9 opposed to disgorgement. And if it's restitution, is it
10 compensatory damages subject to the existing statute of
11 limitations.

12 MR. UNIKOWSKY: Right. So if this was
13 genuine restitution, in other words, if the district
14 court entered a judgment and the judgment was the
15 government is standing in the shoes of a private
16 plaintiff, and there was a judgment in favor of some
17 class of victims, then it's possible that a different
18 set of statute of limitations would come into play. And
19 that's the statute of limitations for private
20 plaintiffs.

21 We cite an old case called Beebe in our
22 reply brief, in which the Court holds that, in that
23 case, those statutes of limitations are imported as
24 against the government. But because the government has
25 been arguing for decades that that's the wrong rule,

1 both in the context of the statute of limitations and
2 many other contexts.

3 Like, for instance, you know, the question
4 of whether disgorgement is equitable, we quote a brief
5 that the Commission filed in Eighth Circuit, where it
6 says, the reason that disgorgement is equitable is that
7 it's not restitution. It's not compensatory. The
8 government says that criminal restitution judgments are
9 completely irrelevant to the calculation of disgorgement
10 because it's not compensatory. As I mentioned, the
11 government's position is that victims don't even have
12 standing to challenge the way these funds are
13 distributed because disgorgement is not compensatory.

14 So I think that the SEC should be taken at
15 its word and taking the positions they've been taking
16 for decades. And because the SEC has taken that
17 position that this is not restitution, the fact that
18 sometimes the SEC can distribute the money to the
19 victims shouldn't affect the nature of the remedy as the
20 SEC has been arguing for a long time.

21 JUSTICE GORSUCH: Well, the same thing is
22 true in the criminal context, right? I mean, we have
23 criminal forfeitures where the money goes to the
24 government and sometimes it's distributed to victims,
25 but we don't doubt that those are penal in nature.

1 MR. UNIKOWSKY: I -- I agree, Justice
2 Gorsuch. And, in fact, in -- in the case the Court
3 recently heard on Section 853(a)(1), the government
4 emphasized in its brief that in many cases forfeitures
5 can go to victims of crime. But still, that is still a
6 traditional punishment.

7 And, in fact, penalties -- Sarbanes-Oxley
8 has a statute that says -- excuse me, Sarbanes-Oxley has
9 a provision that says that even civil penalties in many
10 cases, must go to victims. But not that doesn't mean
11 it's not a penalty, because it's not a restitutionary
12 judgment for the victim. It's money that goes to a
13 government official who can distribute it to victims,
14 but it's still ultimately a payment to the government.

15 JUSTICE GORSUCH: So does everything turn on
16 whether the government labels a -- a particular
17 disgorgement civil versus criminal?

18 MR. UNIKOWSKY: No, Your Honor. We think
19 that -- well, we agree that both -- you know, clearly
20 Section 2462 applies to -- in fact, it only applies to
21 civil remedies. The word "civil" is right there in the
22 statute. So that is a statute of limitations applicable
23 to -- to civil remedies. And we think that this is a
24 civil forfeiture or penalty because it's ultimately in
25 the first instance a payment to the government.

1 And because the government has successfully
2 opposed the argument that disgorgement is a form of
3 restitution, I think it should be taken at its word.

4 And this is a payment to the government and so the
5 restrictions against payments to the government apply.

6 JUSTICE SOTOMAYOR: Could Congress pass a
7 statute giving the SEC the authority to bring these
8 actions for however long a period Congress chooses?

9 MR. UNIKOWSKY: Yes. So Section 2462 has
10 language that says something to the effect of, unless
11 otherwise specified by Congress.

12 And we don't -- we're not making a
13 constitutional argument. Congress can enact unlimited
14 statutes of limitations, we just don't think it did
15 that. And we also think that, just looking at the
16 historical perspective as well as related statutes, the
17 Court -- and it would be very surprising if this didn't
18 have a statute of limitations.

19 What's so odd about the government's
20 position is that, really, everything else in this area
21 has a statute of limitations. So just to give a few
22 examples. 853(a)(1), which is forfeiture of the
23 proceeds of crime, very similar to this, has a statute
24 of limitations, as does the civil actions for
25 forfeitures of proceeds.

1 Compensatory actions by the government also
2 have statutes of limitations. So if the government sues
3 someone for conversion to get money back, there's a
4 statute of limitations for that.

5 Private causes of action, under the
6 securities laws, also have statutes of limitations. And
7 all of those actions in some way could be characterized
8 as trying to get money back that was taken away.

9 So, essentially, what the government is
10 saying is there's this implied remedy that's kind of
11 right in between everything. And, therefore, there's no
12 statute of limitations at all, because it kind of fits
13 somewhere and it's slightly different from everything.
14 And that's just not a particularly plausible position in
15 our view.

16 I mean, there's been a lot of questions from
17 the bench today about whether this is like restitution.
18 We've said it isn't, but I think a more salient point is
19 that restitution is also subject to statute of
20 limitations. So the government's position that by sort
21 of wedging disgorgement in between all these other
22 things, it could bring actions unlimited in time we view
23 as quite an implausible position.

24 I'd just like to say one more word about
25 some of the government's inconsistencies in its

1 positions, because the government really has taken the
2 position in its brief that disgorgement is a penalty for
3 some reasons and not others.

4 So, for instance, take taxes. The
5 government's position is that if Petitioner wants to
6 deduct this award from his taxes, he can't do that. And
7 the reason why, per the government, is that disgorgement
8 is a penalty. That's what they say. And the -- the IRS
9 has taken this position, and I thought the government
10 might just say in its brief, or the SG's office, we're
11 not going to agree with the IRS. We can state the
12 position of the government.

13 And they could have done that, but they
14 actually don't do that. The IRS stands -- or, excuse
15 me, the government stands by that position, that it is a
16 penalty for purposes of this statute, but it is not a
17 penalty on his taxes. And the government says -- why?
18 The government says that there's this unspecified
19 textual and purposive differences, which it does not
20 elaborate upon.

21 JUSTICE GINSBURG: I thought the government
22 took the position that you could deduct expenses, if the
23 measure of what is turned over is the ill-gotten gains,
24 then money made to reduce those costs incurred in -- in
25 making those gains, should be deducted. I didn't think

1 the government was saying -- I think the -- the court of
2 appeals said that, but that seemed to me quite wrong.

3 MR. UNIKOWSKY: I think the government's
4 position -- and they can clarify if this is incorrect --
5 is that disgorgement, such as this disgorgement, is a
6 penalty for his taxes but is not a penalty for
7 Section 2462 purposes, simultaneously.

8 And it's also true for bankruptcy law. The
9 question is -- the words "fine," "penalty," and
10 "forfeiture" are in the Federal bankruptcy statute, and
11 the government's position really is that disgorgement is
12 not dischargeable because it is a fine, penalty, or
13 forfeiture, but it is not a fine, penalty, or forfeiture
14 for purposes of the limitation period.

15 And it's true that there's a separate
16 provision for securities disgorgements in the bankruptcy
17 laws, but that doesn't apply to the disgorgements under
18 other statutes, such as the statute in which the
19 government previously took the position in this Court
20 that disgorgement was a fine, penalty, or forfeiture.

21 So I think that citizens are entitled to
22 basic consistency from the regulators, which doesn't
23 seem to have happened in the context of disgorgement.

24 And I'd like to reserve my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MR. UNIKOWSKY: Thank you.

2 CHIEF JUSTICE ROBERTS: Ms. Goldenberg.

3 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

4 ON BEHALF OF THE RESPONDENT

5 MS. GOLDENBERG: Mr. Chief Justice, and may
6 it please the Court:

7 For almost 50 years, courts have been
8 ordering disgorgement in SEC enforcement actions to
9 remedy unjust enrichment and put a defendant in the
10 position he would have been in if he hadn't violated the
11 law. Courts sometimes send that money to the Treasury,
12 but when feasible, at the direction of the court, it's
13 distributed to the injured victims, either by the court
14 itself, by a trustee, by a receiver.

15 JUSTICE KAGAN: Ms. Goldenberg, in those 50
16 years, has -- has the SEC or has the Justice Department
17 ever set down in writing what the guidelines are for how
18 the SEC is going to use disgorgement and what's going to
19 happen to the monies collected?

20 MS. GOLDENBERG: I'm not aware that it has.
21 It's -- the SEC's policy -- it's been stated in various
22 court decisions -- to ask the court to distribute the
23 money wherever that is feasible. And in some
24 circumstances -- we've given an example of this in our
25 brief -- the SEC has said, well, we don't think it's

1 feasible and the court said, well, we think it is
2 feasible; this money is going to be distributed. So
3 it's ultimately in the control of the court.

4 JUSTICE KAGAN: I must say I find it unusual
5 that the SEC has not given some guidance to its
6 enforcement department or -- or that the Department of
7 Justice hasn't become involved in some way; that -- that
8 everything is just sort of up to the particular person
9 at the SEC who decides to bring such a case.

10 MS. GOLDENBERG: Well, as I say, I think
11 it's not up to the particular person at the SEC. The
12 SEC may seek disgorgement and may make a recommendation
13 to the court about what should happen to the amounts,
14 but I think it's ultimately up to the court. The court
15 is exercising equitable discretion and deciding whether
16 disgorgement should be ordered in the first place, and
17 if so, how much, and if disgorgement is ordered, what
18 should happen to that money and where it should go. So
19 I think that --

20 JUSTICE KENNEDY: Can -- can you give us any
21 indication -- can you give us any indication as in what
22 percentage of the cases the funds go to the victims?

23 MS. GOLDENBERG: I can, Your Honor. This
24 information isn't in the record and it also is not
25 completely derivable from SEC public reports, but I can

1 tell you that the SEC has calculated, looking back at
2 the years 2013 to 2016, that money collected on
3 judgments entered during those years was disbursed to
4 the Treasury 43 percent of the time. From 2013 to 2015,
5 it was 33 percent of the time. So it is very often
6 going to be the case that this money is going to get out
7 to victims.

8 My friend referred to an amicus brief that
9 talks about an SEC public report, that talks about
10 collection amounts and disbursement amounts, and that
11 report just is comparing apples and oranges because it's
12 talking about amounts that are collected as to judgments
13 in certain years and then amounts that are disbursed in
14 a particular year. So that report is not a good source
15 of information about this.

16 CHIEF JUSTICE ROBERTS: One reason we have
17 this problem is that the SEC devised this remedy or
18 relied on this remedy without any support from Congress.
19 If Congress had provided, here's a disgorgement remedy,
20 you would expect them, as they typically do, to say,
21 here's a statute of limitations that goes with it. And
22 including, as your friend says, usually a statute of
23 limitations and an accompanying statute of repose.

24 Now, it was a concern -- you know, Chief
25 Justice Marshall said it was utterly repugnant to the

1 genius of our laws to have a penalty remedy without
2 limit. Those were the days when you could write
3 something like that and it's about a statute of
4 limitations. It's utterly repugnant.

5 And it -- the concern, it seems to me,
6 is multiplied when it's not only no limitation, but it's
7 something that the government kind of devised on its
8 own. I mean, I think -- doesn't that cause concern?

9 MS. GOLDENBERG: No. I think I disagree
10 with some of the premises of that. That principle that
11 Your Honor articulated is a principle that relates to
12 penalties, which are punishments, and for the reasons --

13 CHIEF JUSTICE ROBERTS: Well, it's a little
14 circular, yeah.

15 MS. GOLDENBERG: Well, the reasons we do a
16 disgorgement isn't a penalty. It remedies unjust
17 enrichment and just takes the person back to where they
18 would have been.

19 And I also, I guess, would disagree with the
20 premise that Congress hasn't thought about this issue or
21 hasn't addressed it. It's true that the securities
22 statutes don't have a specific authorization that says
23 courts may order disgorgement. They give injunctive
24 power and they give power for equitable relief, and
25 that's the power the courts have relied on consistent

1 with this Court's decisions, like Porter and Mitchell,
2 in ordering disgorgement.

3 But, subsequent to the enactment of those
4 provisions, Congress has enacted many provisions that
5 talk about disgorgement, that express approval of
6 disgorgement, that showed that Congress understands
7 disgorgement --

8 CHIEF JUSTICE ROBERTS: Well, they're sort
9 of backing --

10 MS. GOLDENBERG: -- is something that courts
11 order, and that Congress approves of that. Sorry.

12 CHIEF JUSTICE ROBERTS: They're -- they're
13 sort of backing and filling. I mean, this remedy is out
14 there, and yes, they're saying this. But it does seem
15 to me that we kind of have a special obligation to be
16 concerned about how far back the government can go when
17 it's something that Congress did not address because it
18 did not specify the remedy.

19 MS. GOLDENBERG: Well, again, I think the
20 remedy is the equitable remedy that Congress did specify
21 when it gave that authorization to courts. But here is
22 where I think the narrow construction principle comes
23 into play. It's not the case that, as my friend
24 suggests, that you should sort of take a gestalt look at
25 the -- the world and say, well, it seems like Congress

1 meant to have covered a bunch of things with different
2 statutes of limitations, and so we should assume that
3 Congress meant to cover this also.

4 Under the narrow construction principle, you
5 need to look at each category that Congress has
6 enacted --

7 JUSTICE BREYER: Let's look at each
8 category.

9 MS. GOLDENBERG: I'm sorry.

10 JUSTICE BREYER: My question, what's
11 worrying me -- I'd like to know your answer to which you
12 have -- look, a city, to use a slightly farfetched
13 example, imposes a tax on houses and boats. Someone
14 comes along and says, I have a houseboat. It's not a
15 house. Houses don't go on water. Not a boat. Look at
16 the French windows, look at the venetian blinds. No
17 tax.

18 Now, I think that would last about five
19 minutes, that argument. All right? So I would like to
20 know from you a list of the categories,
21 characteristics -- characteristics, significant
22 characteristics, of disgorgement which are shared
23 neither by fines nor by forfeitures.

24 In what respect is disgorgement like neither
25 of those?

1 MS. GOLDENBERG: Both fines -- excuse me --
2 and forfeitures, in our view, are -- as used in this
3 statute, so looking at what Congress would have intended
4 when it enacted it in 1839 -- are punishments. And
5 disgorgement is not a punishment because it doesn't take
6 away anything that anyone was rightfully entitled to in
7 the first place. It just remedies unjust enrichment,
8 and it takes the defendant back into the position the
9 defendant would have been in if the defendant hadn't
10 engaged in a securities law violation in the first
11 instance.

12 JUSTICE BREYER: Those are the two.

13 MS. GOLDENBERG: And -- well, those are the
14 things I think that distinguish it, and --

15 JUSTICE BREYER: Well, those are the things
16 that distinguish it.

17 MS. GOLDENBERG: Yes.

18 JUSTICE BREYER: Now, let's look at those.

19 Punishment. It doesn't take -- it takes
20 away from somebody something he normally -- he would not
21 be rightfully entitled to.

22 So a person who is walking along the street
23 and commits a crime and is thrown into jail is not
24 deprived of his liberty. Hmm? I mean, I would think
25 his liberty is something he is normally rightfully

1 entitled to. And I would think it is a punishment to
2 put the person in jail. So I suspect that that
3 characteristic is not much of a distinguishing
4 characteristic --

5 MS. GOLDENBERG: Well, I --

6 JUSTICE BREYER: -- from a serious
7 punishment.

8 MS. GOLDENBERG: I think that -- I mean, I
9 think that's certainly true of depriving someone --

10 JUSTICE BREYER: Yes. And what you said
11 was --

12 MS. GOLDENBERG: -- of their liberty which
13 they're entitled to, but -- I'm sorry, Your Honor.

14 JUSTICE BREYER: No, no. Go ahead. I'm
15 more interested in what you say.

16 MS. GOLDENBERG: But disgorgement -- thank
17 you -- disgorgement doesn't do that. It doesn't take
18 away money that belonged to you, something you had
19 property right in. In this case, it's taking back --

20 JUSTICE BREYER: Yes. I agree --

21 MS. GOLDENBERG: -- money that the defendant
22 stole.

23 JUSTICE BREYER: -- disgorgement might not.
24 A punishment, you say, does take something away from you
25 that you're rightfully entitled to.

1 MS. GOLDENBERG: Often does, yes.

2 JUSTICE BREYER: Yes, often does. Sometimes
3 doesn't.

4 MS. GOLDENBERG: It can. And I think that's
5 one of the reasons why one would be --

6 JUSTICE BREYER: And here -- here you take
7 away things only that the person was not rightfully
8 entitled to.

9 MS. GOLDENBERG: That's correct.

10 JUSTICE BREYER: That's a difference.

11 MS. GOLDENBERG: Yes.

12 JUSTICE BREYER: Okay. I got that one. Is
13 there another way? Is there another one?

14 MS. GOLDENBERG: Well, I think they're all
15 along the same lines, which is that this is analogous to
16 restitution. It's analogous to the divestiture remedy,
17 which is in antitrust cases --

18 JUSTICE BREYER: A thing -- neither a fine,
19 nor a punishment -- I'm not being facetious, I'm -- I'm
20 trying to get it in my mind.

21 Neither a fine, nor a punishment takes from
22 someone a thing that he was not rightfully entitled to.

23 MS. GOLDENBERG: Well --

24 JUSTICE BREYER: But disgorgement takes from
25 the person a thing that he -- no. Sorry. The other way

1 around.

2 MS. GOLDENBERG: Yes. And maybe another way
3 to look at it --

4 JUSTICE BREYER: It takes away from a person
5 something that otherwise he would be rightfully entitled
6 to, and disgorgement takes away from a thing he would
7 not be rightfully entitled to.

8 MS. GOLDENBERG: And I think maybe
9 another --

10 JUSTICE BREYER: Have I got it now?

11 MS. GOLDENBERG: Yes, you do. And I think
12 another way to look at it that might be helpful is
13 that --

14 JUSTICE BREYER: Okay.

15 MS. GOLDENBERG: -- fines, penalties,
16 forfeitures, even damages, can put the defendant in a
17 worse position than the defendant would have been in --

18 JUSTICE GINSBURG: But is it --

19 MS. GOLDENBERG: -- if he had never --

20 JUSTICE GINSBURG: -- kind of an unreality
21 to that argument because here there was a fine. It was
22 a relatively modest amount compared to the huge amount
23 awarded for this disgorgement. So to say, oh, the --
24 the penalty, that's something added on, that's something
25 that he -- is he being punished by, say, 2 million.

1 But how much was the disgorgement in this
2 case?

3 MS. GOLDENBERG: \$35 million.

4 JUSTICE GINSBURG: \$35 million. So it's
5 much larger than the penalty.

6 MS. GOLDENBERG: It is, and that's because
7 the penalty was time limited under this Court's decision
8 in Gabelli. So the penalty only covered the five years
9 of conduct before the filing of the SEC's action,
10 whereas the disgorgement covered all of the bad conduct,
11 which went back further than five years.

12 JUSTICE SOTOMAYOR: Right. So --

13 MS. GOLDENBERG: And I think that's
14 something that's really critical. To point --

15 JUSTICE SOTOMAYOR: So what is the
16 difference from restitution?

17 MS. GOLDENBERG: Well, I think --

18 JUSTICE SOTOMAYOR: Why isn't this
19 restitution?

20 MS. GOLDENBERG: I think there's an analogy
21 to restitution. It is not dissimilar to restitution in
22 that both disgorgement and restitution are trying to put
23 the world back in joint when the world has been put out
24 of joint by something that the defendant has done.
25 So --

1 JUSTICE SOTOMAYOR: So if this is the
2 houseboat, why don't we call this restitution?

3 MS. GOLDENBERG: Well, it's not restitution
4 in full, because restitution goes back to the harmed
5 parties. And disgorgement sometimes goes back to the
6 harmed parties; sometimes doesn't. And we don't think
7 it's necessary that it does go back to the harmed
8 parties for it to escape from the reach of the statute
9 of limitations.

10 JUSTICE SOTOMAYOR: Now, in forfeiture,
11 you're tracing in some metaphysical way a pot that has
12 been wrongfully taken.

13 MS. GOLDENBERG: Yes.

14 JUSTICE SOTOMAYOR: And you are in
15 traditional forfeiture saying, give back that pot.

16 In this situation, we're not asking for that
17 pot. We don't care where the money comes from. We're
18 saying you're liable for a fixed money judgment that
19 you're going to give up. So how is that not the same as
20 a penalty? Because a penalty is saying to someone,
21 you've committed a wrong. We don't care what you did
22 with that pot that you got. We're not asking you in a
23 traditional forfeiture sense to turn that pot over.
24 We're asking you to give money from whatever sources you
25 may have, other sources, and pay for the wrong that you

1 did.

2 So isn't it analytically more like a penalty
3 than it is like making someone whole?

4 MS. GOLDENBERG: Well --

5 JUSTICE SOTOMAYOR: I think making someone
6 whole is a forfeiture. Give up the illegal gains you
7 got.

8 MS. GOLDENBERG: Well, that kind of
9 forfeiture, the proceeds forfeiture, didn't come into
10 the law until much, much later.

11 JUSTICE SOTOMAYOR: Doesn't matter. The
12 question --

13 MS. GOLDENBERG: But --

14 JUSTICE SOTOMAYOR: -- is --

15 MS. GOLDENBERG: Understood.

16 JUSTICE SOTOMAYOR: -- if it looks like a
17 forfeiture, why don't we treat it like a forfeiture?

18 MS. GOLDENBERG: Well, as I say, I would
19 like to talk about your -- your tracing point. But just
20 to make the point just to be clear, that proceeds
21 forfeiture didn't come into our law until 1978. That's
22 what says you got these proceeds from your crime; now
23 you have to give them up, you have to give them back.
24 And we don't think that forfeiture would have been
25 understood that way when this statute was enacted in

1 1839.

2 CHIEF JUSTICE ROBERTS: Was there --

3 MS. GOLDENBERG: With respect to your
4 tracing question, though --

5 CHIEF JUSTICE ROBERTS: All right. I'm
6 sorry.

7 MS. GOLDENBERG: Okay. It's true that there
8 isn't a tracing requirement for disgorgement. That's
9 true as among private parties as well. And, actually,
10 the restatement on unjust enrichment spells this out, I
11 think, you know, very, very well. It's that you're
12 trying to get the money back. Money is fungible. And
13 so there's not a tracing requirement the way that there
14 is in forfeiture, I think, basically for historical
15 reasons because of the history of in rem forfeiture.
16 But nevertheless, as between private parties,
17 disgorgement or restitution is not considered a penalty,
18 despite the absence of this tracing.

19 JUSTICE KENNEDY: But it's -- it's not clear
20 to me that you have limits. Suppose there are two
21 coconspirators and they misappropriate -- A
22 misappropriates \$100,000. He gives 90 to B, keeps 10
23 for himself. Doesn't the government take the position
24 that it can get a hundred back from A and 90 from B?
25 Isn't that your position consistently?

1 MS. GOLDENBERG: Well, I think our position
2 is that it depends. That --

3 JUSTICE KENNEDY: Pardon me?

4 MS. GOLDENBERG: It depends. Sometimes
5 joint and several liability would be appropriate, if
6 that's, I think, what Your Honor is asking, in that --
7 in that situation where you could make a defendant
8 essentially responsible for money that was taken by
9 someone else who was closely associated with them.

10 JUSTICE KENNEDY: Would you call that
11 disgorgement?

12 MS. GOLDENBERG: It can be called
13 disgorgement, but disgorgement doesn't inevitably extend
14 to that. In courts, in the exercise of their equitable
15 discretion, have rejected that in some cases. And so --

16 JUSTICE KENNEDY: But in -- in my
17 hypothetical, would you take the position that the
18 statute of limitations does apply? 100 from one, 90
19 from the other. That's a total of 190.

20 MS. GOLDENBERG: I -- I don't -- I'm not
21 sure that disgorgement would ever work that way,
22 actually, because there are deductions when money has
23 been recovered. For instance, if there's a private
24 damages action and money has been recovered, that's
25 deducted from disgorgement. So I must --

1 JUSTICE KENNEDY: My --

2 MS. GOLDENBERG: I think I might have
3 misunderstood the question.

4 JUSTICE KENNEDY: My understanding is that A
5 is liable for the full 100 -- \$100,000.

6 MS. GOLDENBERG: Right. Well, that would be
7 joint and several liability. That's not necessarily the
8 same thing as then recovering on top of that from
9 someone else.

10 JUSTICE KENNEDY: I agree.

11 MS. GOLDENBERG: Our position is that the
12 Court should decide whether the disgorgement in this
13 case falls within the scope of Section 2462 and leave
14 for another day the question of whether disgorgement
15 extends to situations like that. It would seem wrong to
16 us for the Court to assume that disgorgement is as broad
17 as courts have ever made it and to rule on that basis,
18 when perhaps the issue could come before this Court --

19 CHIEF JUSTICE ROBERTS: What about --

20 MS. GOLDENBERG: -- sometime in the future
21 and the Court would disagree.

22 CHIEF JUSTICE ROBERTS: What about the many
23 cases your client has filed in the lower courts taking
24 the opposite position?

25 MS. GOLDENBERG: I'm not sure that we have

1 taken the opposite position on anything.

2 CHIEF JUSTICE ROBERTS: Well --

3 MS. GOLDENBERG: We've certainly taken the
4 position consistently that --

5 CHIEF JUSTICE ROBERTS: Well, you've argued
6 that you --

7 MS. GOLDENBERG: -- 2462 --

8 CHIEF JUSTICE ROBERTS: You've argued that
9 disgorgement -- that they're not entitled to
10 equitable -- I don't remember if it's tolling or not
11 because disgorgement is -- is punitive?

12 MS. GOLDENBERG: No --

13 CHIEF JUSTICE ROBERTS: Not entitled to
14 deductions?

15 MS. GOLDENBERG: The brief --

16 CHIEF JUSTICE ROBERTS: -- the briefs that
17 were cited in your friend's reply --

18 MS. GOLDENBERG: Are you talking about the
19 tax in the bankruptcy --

20 CHIEF JUSTICE ROBERTS: Yeah.

21 MS. GOLDENBERG: -- situations?

22 Those involve different statutes. We have
23 not taken inconsistent --

24 CHIEF JUSTICE ROBERTS: No. I know. That's
25 not a very --

1 MS. GOLDENBERG: -- positions on 2462.

2 CHIEF JUSTICE ROBERTS: Well, you haven't
3 taken the same -- different positions under the same
4 statute, but we're talking about disgorgement in each
5 case. I gather your position would be if disgorgement
6 was required under the securities law, that's
7 remedial -- right? -- and -- and therefore is not
8 subject to the statute of limitations. But if that same
9 defendant tried to deduct that remedial relief, you
10 would say you can't do that because it's punitive.

11 So the same payment is characterized by your
12 client as remedial in one context and punitive in
13 another.

14 MS. GOLDENBERG: No, Your Honor. With
15 respect to taxes, we haven't taken a position. We've
16 noted, as my friend has noted, that there is an
17 unpublished, non-presidential memorandum from the IRS
18 that says that disgorgement in the SEC context sometimes
19 can be considered a fine or similar penalty --

20 CHIEF JUSTICE ROBERTS: In the SEC context?

21 MS. GOLDENBERG: I'm sorry. In the --

22 CHIEF JUSTICE ROBERTS: IRS.

23 MS. GOLDENBERG: -- in the IRS context. I
24 apologize, Your Honor.

25 CHIEF JUSTICE ROBERTS: Yes.

1 MS. GOLDENBERG: Sometimes can be considered
2 a fine under tax law, and sometimes isn't considered a
3 fine under tax law in situations, for instance, in which
4 the money goes back to the injured investors.

5 And so we think that it's perfectly --

6 CHIEF JUSTICE ROBERTS: So not only is it
7 one thing in one context, but something else in the
8 other context. Sometimes it's remedial and sometimes
9 it's punitive in each context.

10 MS. GOLDENBERG: Well, we think it's
11 legitimate to have different interpretations of
12 different statutes that have different language,
13 different purposes, different tools of statutory
14 interpretation, so different legislative history,
15 different provisions that surround them.

16 The way this Court --

17 JUSTICE KENNEDY: But you --

18 MS. GOLDENBERG: -- decides the case may
19 be --

20 JUSTICE KENNEDY: But you -- you have argued
21 for a categorical rule. Your -- your brief says
22 disgorgement in SEC actions is not a penalty.
23 Disgorgement is not a forfeiture. You're arguing a
24 categorical position.

25 MS. GOLDENBERG: We are arguing with respect

1 to this statute --

2 JUSTICE KENNEDY: Your answers to the
3 questions, you're saying, well, it depends.

4 MS. GOLDENBERG: No, no, Your Honor. I'm
5 sorry. I don't mean to be unclear about that.

6 Our argument is that under 2462, as the
7 terms "penalty" and "forfeiture" should be understood
8 under this Court's decision in Meeker, they both refer
9 to doing something punitive, that disgorgement is not a
10 penalty or a forfeiture under this provision. All I'm
11 saying now is that it's possible that there may be other
12 arguments to be made under other statutes. Even though
13 they contain the word "penalty," the way this Court
14 decides the case may affect that, and the --

15 JUSTICE KENNEDY: -- because the --

16 MS. GOLDENBERG: -- government may adjust
17 its positions accordingly.

18 JUSTICE GINSBURG: What is your answer to
19 the -- to the deduction there? Your friend said that
20 the government takes the position that you have to turn
21 over everything that you got and you can't have any
22 deduction for what it cost to -- to produce that.

23 MS. GOLDENBERG: For whether expenses can be
24 deducted?

25 JUSTICE GINSBURG: Yes.

1 MS. GOLDENBERG: Again, I think this is an
2 issue of the scope of disgorgement that's not before the
3 Court now. But the -- the analysis I think is best set
4 out in a Ninth Circuit decision called Wallenbrock,
5 which points out that sometimes expenses can be
6 deducted. For instance, if you have a legitimate
7 business that you're running and you just are skimming
8 some money out of your clients' accounts, but you really
9 do have legitimate business expenses, in that
10 circumstance, courts have allowed deduction of expenses
11 so as to make sure that you're just getting the unjust
12 enrichment.

13 If you're running a Ponzi scheme or
14 something of that nature and your whole business is a
15 fraud, in that circumstance, courts have not allowed
16 deduction of expenses because those expenses are really
17 just money that was stolen from the investors. And
18 so --

19 JUSTICE GORSUCH: Ms. Goldenberg, when we
20 get to the criminal context, this very same remedy of
21 disgorgement of everything is often called a forfeiture,
22 and it is a penalty; right? So why does it make a
23 difference that we just happen to be in the civil
24 context?

25 MS. GOLDENBERG: Well, there are forfeitures

1 and there is restitution in the criminal context.

2 That's certainly true.

3 JUSTICE GORSUCH: The very same remedy.

4 MS. GOLDENBERG: In circumstances -- well, I
5 don't think it's exactly the same. In circumstances in
6 which, for instance, the government forfeits things in
7 the criminal context and it eventually sends money back
8 to the victims, that's in the government's discretion
9 rather in the control of the Court.

10 JUSTICE GORSUCH: Right.

11 MS. GOLDENBERG: But what I think makes a
12 difference --

13 JUSTICE GORSUCH: So why does the form,
14 whether this is civil versus criminal, make all the
15 difference?

16 MS. GOLDENBERG: Well, this Court's
17 decision --

18 JUSTICE GORSUCH: And how do we ever know?
19 I mean, goodness gracious, the difference between civil
20 and criminal has vexed this Court for many years.

21 MS. GOLDENBERG: This Court's decision in
22 Kelly, I think, points out that the criminal context
23 really is somewhat different, and that this Court's
24 decision in Pasquantino, I think, suggests that the same
25 thing is true. In the Federal context, the decision in

1 Kelly --

2 JUSTICE BREYER: Wait, let's be more
3 specific about the question that Justice Gorsuch is
4 asking. You said the difference was that we are taking
5 with disgorgement, property, money, or the equivalent
6 that he, the defendant, did not rightly have. Perhaps
7 he stole it. Okay?

8 Now we have a criminal case. Judge, you
9 stole the Hope Diamond. I cannot take that value, which
10 you've gotten rid of the diamond, but you have several
11 million, I can't take that and give it to the victims.
12 I don't even know who they are. So I'm going to impose
13 a penalty, a fine, and the fine will equal the value of
14 the Hope Diamond. Is that a fine?

15 MS. GOLDENBERG: Well, I think that --

16 JUSTICE BREYER: You said it was a fine.

17 MS. GOLDENBERG: Yes, that would be --

18 JUSTICE BREYER: That would be a fine.

19 MS. GOLDENBERG: You could do something --

20 JUSTICE BREYER: And I think that's the
21 question that's being asked. If it is a fine, when the
22 judge sentences, your distinction, the main one between
23 disgorgement and fine or forfeiture, what happens to it?

24 MS. GOLDENBERG: Well, just to be clear, I
25 think what you're talking about now is proceeds

1 forfeiture. That would be the equivalent of what Your
2 Honor described in the criminal law. And I think in the
3 criminal context, it really is different. And this
4 Court's decision in Kelly explains that. The whole
5 purpose of a criminal proceeding is to punish.
6 Forfeiture is imposed as part of the criminal sentence
7 in a criminal proceeding as part of the punishment.

8 JUSTICE GORSUCH: And sometimes the money
9 goes to the victim and sometimes it doesn't. Just like
10 here.

11 MS. GOLDENBERG: Well, as I say, that's in
12 the government's discretion, and that is not like here.
13 Here, it's --

14 JUSTICE GORSUCH: Well, here we don't know,
15 because there's no statute governing it. We're just
16 making it up.

17 MS. GOLDENBERG: Well, I wouldn't say that,
18 Your Honor. There are almost 50 years of precedents on
19 how this should work, and I think the way it worked
20 is --

21 JUSTICE GORSUCH: Not in this Court.

22 MS. GOLDENBERG: -- is clear.

23 It's true that this Court doesn't have
24 precedent about disgorgement in the SEC context, but as
25 I pointed out earlier, the Court does have precedent in

1 other contexts --

2 JUSTICE ALITO: Are there any time -- are
3 there any time limits, and if so, where do they come
4 from?

5 MS. GOLDENBERG: The courts that have ruled
6 that there's no statute of limitations for disgorgement
7 have said that the district court can take into account,
8 as part of this exercise of equitable discretion that
9 I'm describing, the passage of time, and how much time
10 has passed and -- in deciding whether to order
11 disgorgement. And in deciding whether or not to --

12 JUSTICE ALITO: Well, I -- the courts say
13 that, but where -- what is the basis for it? Is this by
14 analogy to some traditional equitable remedy? Where --
15 where does that come from? Is it like laches? But
16 laches, you say, doesn't apply to the government?

17 MS. GOLDENBERG: That's true, laches doesn't
18 apply to the government. I think it is just the fact
19 that in exercising this kind of equitable discretion,
20 under the authority given in the statute, the court can
21 consider all kinds of facts and circumstances. And the
22 court is assessing things like is causation adequately
23 established? Is the amount adequately established?

24 The cases say over and over again, that what
25 the Court is trying to do is to get at unjust enrichment

1 and not to go beyond that because that would be a
2 penalty. So if the Court decides --

3 CHIEF JUSTICE ROBERTS: But that's only with
4 respect to -- that's only with respect to the amount of
5 the remedy, not with respect to liability. So 20 years
6 from the time that the fraud or whatever is committed,
7 the government can bring an action for disgorgement
8 against -- against the wrongdoer, and that action would
9 proceed, despite this equitable limitation you're
10 talking about.

11 MS. GOLDENBERG: Yes, that's true. But the
12 government has many incentives to move more quickly than
13 that. You don't see cases like that. And, in addition,
14 I think that it's clear that all along the way, since
15 disgorgement has been --

16 CHIEF JUSTICE ROBERTS: Well, if we -- if we
17 think that's inappropriate and bad, we're not going to
18 come out the other way because we trust the government
19 not to bring an action like that.

20 MS. GOLDENBERG: I'm not suggesting that
21 Your Honor should trust the government. What I'm saying
22 is that we're defending the status quo. This is the way
23 it's worked for almost a half a century, and I think if
24 there had been some --

25 CHIEF JUSTICE ROBERTS: No, no, this has

1 changed a lot after the Gabelli decision. That was your
2 answer to Justice Ginsburg, that why did you get this
3 huge amount from disgorgement and only a small amount
4 under the other thing. And you said, well, that was
5 because Gabelli said we have to be bound by a particular
6 construction of the statute of limitations. And if that
7 cut us off, now we're going to rely on disgorgement to
8 get all the money we -- that the Court said under
9 Gabelli, that you couldn't get.

10 MS. GOLDENBERG: I understand, Your Honor,
11 but Gabelli is actually an incentive for the SEC to move
12 faster, so that it gets the civil penalties. And,
13 actually, it is not true -- I think it's empirically not
14 true that the SEC's practices have changed since
15 Gabelli, that the SEC is somehow filing different kinds
16 of claims, or seeking disgorgement more often.

17 We can statistically show, if you compare
18 the amount in disgorgement vis-à-vis penalties in 2009
19 versus 2016, there's actually way more disgorgement
20 compared to penalties; over \$2 billion compared to only
21 \$300-some million in penalties in 2009, long before
22 Gabelli. So to the extent that Gabelli has shifted the
23 government's incentives, it's to move faster, so that
24 penalties are still on the table.

25 And something -- I really want to point out

1 something that's really important, I think, that the
2 facts of this case illustrate, which is that even if the
3 Court were to rule that Section 2462 covered
4 disgorgement, the government could still bring actions
5 more than five years after bad conduct, seeking
6 injunctions. It could still bring actions like this
7 action, more than five years after the earliest of the
8 bad conduct, seeking disgorgement and penalties.

9 And so it's not as if the defendant would be
10 protected from having to defend himself against claims,
11 from having to bring witnesses, from having to come
12 forward with evidence. This is not that kind of statute
13 of limitations. This is a statute of limitations about
14 remedies, not about actions.

15 CHIEF JUSTICE ROBERTS: If -- if the -- if
16 it's beyond the statutory limitation, I suspect that an
17 injunction would be kind of irrelevant unless the
18 conduct has continued that long.

19 MS. GOLDENBERG: Well, it's true that in
20 that such circumstance, you would show that there was
21 some danger of bad conduct in the future, but you would
22 use the existence of the bad conduct in the past as part
23 of that evidence.

24 So I think that there is not a danger
25 that -- that things are going to go awry here. Congress

1 has been aware this whole time, that disgorgement is
2 operating this way, including in pre-1990 cases that
3 were brought more than five years after the earliest of
4 the bad conduct.

5 I would like to emphasize one more time, if
6 I could, the narrow construction canon here, because I
7 think if the Court has any doubt about the meaning of
8 penalty and forfeiture, at the very least, those terms
9 are ambiguous. We've come forward with all kinds of
10 contemporaneous sources --

11 JUSTICE GORSUCH: We don't apply the canon
12 in criminal cases, so why should we apply it in a case
13 where the penalty is identical to what might be a
14 criminal penalty?

15 MS. GOLDENBERG: Well, it's true that it's
16 not applied in criminal cases, where there are other
17 canons that are at play, like the canon --

18 JUSTICE GORSUCH: Like lenity.

19 MS. GOLDENBERG: Well, right. And like the
20 canon against penalties that the Chief Justice was
21 referring to earlier. But that can't decide whether
22 something is a penalty or not in the first instance.
23 That would be a completely circular enterprise.

24 JUSTICE KAGAN: Do you agree or disagree --
25 I'm a little -- left a little bit unclear.

1 Mr. Unikowsky's standard is that if something is not
2 solely remedial, then it's a penalty. Do you agree with
3 that?

4 MS. GOLDENBERG: I don't disagree that if
5 something has a punitive aspect, then it can be a
6 punishment.

7 JUSTICE KAGAN: And you disagree with any
8 punitive aspect.

9 MS. GOLDENBERG: Well --

10 JUSTICE KAGAN: So if something is not
11 solely remedial, it is a penalty.

12 MS. GOLDENBERG: I disagree with the
13 principle that just because something has some deterrent
14 effect or deterrent purpose, that that makes it a
15 punishment, and that's a proposition that this Court has
16 rejected a number of times, in its decision in Hudson,
17 in its decision in Smith v. Doe, which is an ex post
18 facto case, and it has overruled a decision on that --
19 some of the decisions that Petitioner cites' relied on.

20 So the mere fact that something is deterrent
21 isn't enough to make it punitive. Damages are a
22 deterrent, injunctions are a deterrent. Lots and lots
23 of things are a deterrent.

24 JUSTICE KAGAN: Because I look at this
25 and -- and it seems to be a commonsensical kind of way

1 of looking at the way this remedy works, the way the SEC
2 has used it, is that it's trying to do a lot of things.
3 It's trying to compensate. It's trying to deter. It's
4 trying, to some extent, to punish misconduct that it --
5 it sees, you know, and that it's a little bit artificial
6 to try to tear them apart. And then if you accept Mr.
7 Unikowsky's standard, that suggests that he has the
8 better of the arguments.

9 So why is that wrong?

10 MS. GOLDENBERG: Well -- excuse me -- I
11 disagree that disgorgement is in any way intended to
12 punish, for the reasons that I was explaining to Justice
13 Breyer.

14 JUSTICE KAGAN: Yeah, but I guess -- I guess
15 when I said "punish," I don't mean to make that sound as
16 a conclusion. I mean just to say, it's tied to -- to
17 particular misconduct. So -- so it's -- it's very much
18 relating to a -- an offense.

19 MS. GOLDENBERG: It is, but that's because
20 that's the conduct that gave rise to the unjust
21 enrichment that needs to be remedied. And it is a
22 remedial thing to do to say to the defendant, you got
23 this money that you were never supposed to have. Let's
24 take it back and try to put the world back the way that
25 it was before. And, in many cases, we're going to go on

1 and then give it to the injured parties, and we're going
2 to put the world completely back to the way that it
3 should have been, if you hadn't acted.

4 The mere fact that somebody has engaged in
5 wrongdoing is not enough to make any consequence that
6 flows from that a punishment, or injunctions would be a
7 punishment, declaratory judgments would be punishments,
8 all kinds of things would be punishments that we
9 wouldn't consider to be a punishment.

10 And -- and so I think, again, there's at
11 least some ambiguity here about what Congress meant in
12 1839 about what penalty and forfeiture meant. And in
13 that situation, the narrow construction canon comes into
14 play in favor of the government, and resolves this case
15 in favor of the government.

16 Petitioner has suggested that the narrow
17 construction canon has no application here, because this
18 is not a situation in which the government is trying to
19 get back its own money or its own property. That is
20 just not correct, as a statement of how the narrow
21 construction canon works.

22 The very cases that Petitioner cites talk
23 about the rationale for the narrow construction canon
24 being the protection of public interest or public rights
25 and property. And one of the very cases the Petitioner

1 cites, the Badaracco case, was a case where the
2 government was acting in an enforcement capacity,
3 getting tax penalties from -- under a statute that is
4 described as a penalty statute.

5 So, again, I think it can't be --

6 JUSTICE GINSBURG: Narrow -- narrow
7 construction of what?

8 MS. GOLDENBERG: Narrow construction of
9 Section 2462, to say that the words "penalty" and
10 "forfeiture" should be understood narrowly, rather than
11 as Petitioner would have it, extremely broadly to cover,
12 basically, any payment that ever goes to the government
13 in any way. And once you construe them narrowly to mean
14 punishment, then disgorgement doesn't fall within the
15 scope of that.

16 And, again, I think it can't be that you can
17 sort of say, well, Congress would have meant to cover
18 this, if it had thought about it.

19 The canon, just as the canons that would
20 have to do with waivers of government sovereign immunity
21 and the like, says you have to look specifically at each
22 of the categories that Congress set up and see whether
23 the remedy that you're talking about falls within the
24 scope of that. And here, that's certainly not the case.

25 We know that Congress has been active in

1 this area; that Congress has passed a lot of statutes
2 that approve of disgorgement; that Congress has passed a
3 lot of statutes of limitations, including some that
4 apply to the SEC during the period in which disgorgement
5 has been ordered, and that Congress has never taken
6 action to cover disgorgement under a statute of
7 limitations, and Section 2462 --

8 JUSTICE KAGAN: Just -- just out of
9 curiosity, when -- I'm sorry.

10 CHIEF JUSTICE ROBERTS: No, please.

11 JUSTICE KAGAN: When -- when the SEC uses
12 this, is it usually going after continuing misconduct,
13 or does it sometimes really reach back into the past for
14 completed conduct?

15 MS. GOLDENBERG: It's usually relating to
16 continuing misconduct. There aren't very many cases
17 where the SEC has ever reached back more than five years
18 before the filing of the complaint. But in the ones
19 that -- that exist -- again, not a huge number -- they
20 are generally cases that are brought within five years
21 of some of the misconduct, as was true in this case.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Unikowsky, five minutes.

24 REBUTTAL ARGUMENT OF ADAM UNIKOWSKY

25 ON BEHALF OF THE PETITIONER

1 MR. UNIKOWSKY: Thank you, Mr. Chief
2 Justice. I'd just like to make a couple of quick
3 points.

4 First of all, the government's counsel
5 characterized our position as saying that we're relying
6 on some general gestalt about the implicit intent of
7 Congress. And I want to be emphatic, that is not the
8 position we're raising. We are relying on the text of
9 the statute. We think this is a forfeiture and is a
10 penalty under the dictionary definitions of those terms.

11 So first, the word forfeiture would just
12 cite the dictionary and say that it's an order to turn
13 over money or property to the government as a result of
14 wrongdoing, which this is. And we also point to the
15 real-world usage of forfeitures that are almost
16 identical to this.

17 And by the way, I point out that the
18 government says this is not forfeiture because it's not
19 punishment, but we cite lots of old sources dating back
20 to the 19th century in which courts were emphatic that
21 certain types of forfeitures, like these customs
22 forfeitures, which are very similar to disgorgement,
23 were remedial; they weren't even punitive. So we're
24 relying on the literal text of the word forfeiture and
25 the history the way this Court has interpreted that

1 word. And we think that disgorgement falls within that.

2 And it's true that disgorgement is not
3 identical to forfeitures in 1830, but it's the same way
4 that school desegregation injunctions are not identical
5 to injunctions from 19 -- 1830 either. But they're
6 still injunctions because they fall under the meaning of
7 that word. And in the same way, disgorgement is a type
8 of forfeiture.

9 Similarly, we rely on what the word penalty
10 means, accompanied by this Court's decision saying that
11 partially penal remedies are, in fact, considered
12 penalties for various legal purposes.

13 The word "penalty" means a negative --
14 negative consequence of wrongdoing because of that
15 wrongdoing. In other words, you did something bad,
16 you've got to pay money to the government because you
17 did something bad, as opposed to because you want to
18 compensate the victim, and that characterizes
19 disgorgement.

20 There's a jury finding that Petitioner
21 committed securities fraud. As a result, he has to give
22 money to the government. And it's true that the measure
23 of that money is the amount of money he gained, this
24 concept of tainted assets, but there's just no
25 historical record that that's somehow not a penalty.

1 As we mentioned, for instance, forfeiture of
2 the proceeds of crime is punitive. The government has
3 always said it's punitive. It's part of a criminal
4 sentence, and yet, it's essentially the same thing as
5 disgorgement. So we're happy to rely on the text in
6 this case.

7 I also want to talk about the dangers of
8 this implied remedy, because as there's some questions
9 from the bench that disgorgement seems to be an implied
10 remedy, there's no clear statutory authority. And the
11 danger of that is that disgorgement seems to keep
12 morphing in the government's briefs and positions.

13 So, for instance, the government always
14 claims, as I mentioned, in lower courts, that the
15 compensation is just an ancillary aspect of -- of
16 disgorgement, its primary function is not compensatory,
17 and did that to beat down a whole bunch of legal
18 arguments such as the argument that private compensatory
19 statutes of limitations apply.

20 And now in this Court, when we point out
21 those positions, the SEC says, well, it's sometimes
22 compensatory, sometimes isn't, but the fact that merely
23 sometimes we're compensating people, that's enough to
24 make it compensatory enough to fall outside of
25 Section 2462.

1 And by the way, the government counsel today
2 made very clear the SEC's position that it wants a
3 categorical rule under Section 2462. They don't want
4 that rule under bankruptcy law or tax law, because that
5 might decrease the amount of money that goes to the
6 Treasury. But under Section 2462, the government was
7 emphatic that it wants categorical rule: Disgorgement
8 is always, 100 percent of the time, not a penalty or
9 forfeiture under the statute.

10 So even in -- in these Foreign Corrupt
11 Practices Act cases where billions of dollars go into
12 the United States Treasury, and there's no prospect of
13 compensation to victims, the government says that's
14 disgorgement, and so that is not a penalty or
15 forfeiture. And that will be the government's position
16 if it prevails in this case.

17 And so I just don't think that the
18 government can define the remedy as sometimes
19 compensatory, sometimes not compensatory, and avoid
20 everything. And that's the danger of allowing the
21 government to bring implied remedies further back in
22 time precisely because they are implied, which is
23 essentially the government's position. Because it's an
24 implied remedy, Congress never enacted expressly, so
25 there's no statute of limitations; therefore, it has

1 more power to bring this remedy forever, and
2 characterizing it in different ways depending on the
3 litigation needs of the government.

4 I'd like to make one final comment about the
5 canon of construction, the narrow construction canon,
6 because, again, for 200 years, we haven't found any
7 cases in which the government had applied it in a case
8 like this one: A noncompensatory, backwards-looking
9 remedy to the government as sovereign. It just hasn't
10 applied it. And there's lots of -- that way. And
11 there's lots of cases in which the reverse canon of
12 construction has been used.

13 So we cite, for instance, the old Maillard
14 case and the old Adams case from the early Republic
15 where the Court is clearly saying that there's a
16 construction in favor of the statute of limitations
17 because, as Chief Justice Marshall said, it would be
18 utterly repugnant not to apply it.

19 We look at the Maillard case involving a
20 value customs forfeiture quite similar to this case in
21 which, again, the judge at the time -- it was a district
22 court -- refused to apply that canon because of the --
23 the court's view that it shouldn't apply in these
24 backwards-looking remedies.

25 And in fact, the Gabelli case itself I

1 believe is quite strong for us on this, because in that
2 case, if there was some pro-government canon, it
3 wouldn't treat -- the court wouldn't treat the
4 government worse off than private plaintiffs.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:12 a.m., the case in the
9 above-entitled matter was submitted.)

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