ORAL ARGUMENT REQUESTED

No. 19-1214

In The

United States Court of Appeals for the District of Columbia Circuit

JOHN M.E. SAAD,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review from the Securities and Exchange Commission

BRIEF FOR PETITIONER JOHN M.E. SAAD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. The following parties appeared before the SEC:

- John M.E. Saad
- Financial Industry Regulatory Authority

Rulings Under Review. The following ruling of the SEC in Admin. Proc. File No. 3-13678r is under review in this appeal:

- August 23, 2019, Opinion of the Commission (Release No. 86751), JA 171.
- August 23, 2019, Order Sustaining Disciplinary Action Taken by FINRA (Release No. 86751), JA 191.

No official citation exists for these documents.

Related Cases: The case on review was previously before this Court in *Saad v. SEC*, 718 F.3d 904 (D.C. Cir. 2013), and *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017). In both instances this Court remanded the petition to the SEC for further proceedings. There are no related cases.

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GLOSSARY

JA	Joint Appendix
FINRA	Financial Industry Regulatory Authority
SEC	Securities and Exchange Commission

STATEMENT REGARDING ORAL ARGUMENT

Petitioner John M.E. Saad respectfully requests oral argument. Petitioner believes that oral argument would aid the Court because this appeal raises an important question of first impression regarding the scope of a consequential Supreme Court opinion.

INTRODUCTION

In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court issued a seminal decision instructing courts how to distinguish between "punitive" and "remedial" sanctions. *Kokesh* set forth "two principles" of punitive sanctions: *First*, punitive sanctions punish a "wrong to the public," rather than a "wrong to the individual." *Id.* at 1642 (citation omitted). *Second*, punitive sanctions are at least partly "imposed for punitive purposes" such as deterrence, rather than solely for remedial purposes such as compensation. *Id.* at 1643–45.

Courts around the country are only beginning to grapple with the full implications of *Kokesh*. This case presents one such area in need of review. Mr. Saad is a former securities professional who was permanently barred from the securities industry by the Financial Industry Regulatory Authority (FINRA) for misappropriating $1,144 from his former employer, nearly 15 years ago. FINRA could have imposed a range of more limited sanctions, such as a temporary suspension, censure, or fine. Instead, FINRA imposed a lifetime bar on Mr. Saad—the most extreme sanction possible. The Securities and Exchange Commission (SEC) upheld Mr. Saad's lifetime bar as an appropriate "remedial" sanction. Recognizing that this conclusion was potentially at odds with *Kokesh,* this Court remanded to the SEC with instructions to consider whether its order was affected by *Kokesh*.

On remand, the SEC adhered to its conclusion that the permanent bar is appropriately remedial. This conclusion cannot be squared with *Kokesh,* which makes clear that Mr. Saad's lifetime bar is punitive. This is true under both principles set out by *Kokesh*, because the bar both punishes a "wrong to the public" and serves the "punitive purposes" of deterrence, incapacitation, and retribution.

Indeed, the facts of this case underscore the wisdom of the *Kokesh* framework. After all, it would be odd to suggest that such a severe and disproportionate penalty—a lifetime ban for a misappropriation of a small sum nearly 15 years ago—should be viewed as "remedial." This Court should reverse the SEC's order.

JURISDICTIONAL STATEMENT

This is a petition for review of an SEC order sustaining disciplinary action taken by FINRA. The SEC issued its order on August 23, 2019, JA 171, and Mr. Saad filed a timely petition for review on October 17, 2019. This Court has appellate jurisdiction pursuant to 15 U.S.C. § 78y.

STATEMENT OF THE ISSUE

In light of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), did the SEC err in upholding Mr. Saad's lifetime bar as a "remedial" sanction?

STATUTES AND REGULATIONS

Relevant statutory provisions are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

Mr. Saad was previously employed as a regional director in the Atlanta office of Penn Mutual Life Insurance Company ("Penn Mutual") and was registered with Penn Mutual's broker-dealer affiliate, Hornor, Townsend, & Kent, Inc., a FINRA member firm. *Saad v. SEC*, 873 F.3d 297, 300 (D.C. Cir. 2017) ("*Saad II*").[1] In July 2006, Mr. Saad was scheduled to take a business trip to Memphis, but it was canceled at the last minute. *Id.* He subsequently submitted false receipts to Penn Mutual for air travel to Memphis, a two-night stay at a Memphis hotel, and a cell phone. *Id.* At the time, Mr. Saad was suffering from severe personal and professional distress, due to the frequent hospitalization of one of Mr. Saad's one-year-old twins and his declining sales at Penn Mutual. *Id.* at 301.

Shortly thereafter, a Penn Mutual administrator discovered the false receipts, and Mr. Saad's employment was terminated. *Id.* at 300. Investigators from the National Association of Securities Dealers ("NASD"), FINRA's predecessor,

[1] The background section of this brief is based on this Court's recitation of the facts in *Saad II*. Mr. Saad reserves the right to clarify and correct the underlying facts should it become procedurally appropriate to do so. For example, the Court stated in passing that Mr. Saad submitted two false expense reports. *Saad II*, 873 F.3d at 300–01. Mr. Saad maintains, however, that there was at most one false expense report (because the relevant receipts were submitted within a single month). JA 031–32, 71, 103–04.

proceeded to investigate the false receipts, and Mr. Saad made misrepresentations in response to their questions. *Id.* at 300–01.

B. Procedural History

FINRA brought a disciplinary proceeding against Mr. Saad in September 2007. *Saad II*, 873 F.3d at 301. In its complaint, FINRA alleged "Conversion of Funds" in violation of FINRA Rule 2010 (formerly NASD Rule 2110), but did not charge Mr. Saad with making false statements or obstructing its investigation. *Id.*; JA 100. The hearing panel found that Mr. Saad violated Rule 2010 by misappropriating $1,144 from his employer, Penn Mutual. JA 100.

FINRA has statutory authority to impose a range of sanctions including "expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction." 15 U.S.C. § 78*o*-3(b)(7). FINRA imposes suspensions ranging from ten days to two years. *See, e.g.*, FINRA Sanction Guidelines 99 (2019), *available at* https://www.finra.org/rules-guidance/oversight-enforcement/sanction-guidelines. With respect to misappropriation, however, FINRA adheres to a policy of imposing the most severe punishment—a lifetime bar—regardless of the amount involved and regardless of whether an investor was harmed. *See* FINRA Sanction Guidelines 36. Following this policy, FINRA permanently barred Mr. Saad from associating with any FINRA member firm in any capacity. JA 109. The National

Adjudicatory Council ("NAC") affirmed the sanction. JA 120. Mr. Saad appealed to the SEC, which in turn affirmed the NAC, concluding that the permanent bar was an appropriate sanction because it "serve[d] a remedial rather than punitive purpose." JA 135.

Mr. Saad appealed to this Court. The Court granted Mr. Saad's petition for review, remanding for the SEC to address "potentially mitigating factors asserted by Saad and supported by evidence in the record," and noted that the SEC may affirm a FINRA sanction only if it is remedial rather than punitive. *Saad v. SEC*, 718 F.3d 904, 913 (D.C. Cir. 2013) ("*Saad I*").

On remand, the SEC returned the case to the NAC with instructions to reconsider Mr. Saad's permanent bar. JA 138–39. The NAC concluded that there were no mitigating factors it was willing to recognize and that a permanent bar "remaine[d] appropriate." JA 141. Mr. Saad appealed to the SEC, which again affirmed, finding aggravating but no mitigating factors. JA 165–69. The SEC concluded that the permanent bar was "remedial, not punitive," reasoning that it "serves important deterrent objectives" and is "necessary to protect FINRA members, their customers, and other securities industry participants." JA 169.

Mr. Saad again appealed to this Court. The Court first held that the SEC reasonably evaluated the aggravating and mitigating factors in Mr. Saad's case. *Saad II*, 873 F.3d at 298–99. The Court remanded, however, "[w]ith respect to the permanent bar," and directed the SEC "to determine in the first instance whether *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), has any bearing on Saad's case." *Id.* at 299. Judge Millett and then-Judge Kavanaugh each wrote separately, with Judge Millett questioning whether remand was proper, and Judge Kavanaugh arguing that remand was necessary. *Id.* at 307 (Millett, J., dubitante); *id.* at 304 (Kavanaugh, J., concurring). In Judge Kavanaugh's view, *Kokesh* rendered Mr. Saad's lifetime bar "punitive," thereby foreclosing the SEC's conclusion that the bar was permissible as a "remedial" sanction. *Id.* As Judge Kavanaugh understood it, *Kokesh* confirmed the intuitive proposition that it makes "little sense" to describe expulsions or suspensions as "remedial," when such sanctions "do not provide a remedy to the victim." *Id*. at 304–05. The third member of the panel, Chief Judge Garland, joined the Court's opinion remanding the case but did not join either separate opinion.

On remand, the SEC once again upheld Mr. Saad's lifetime bar. JA 190. It first reiterated (at JA 175) that it could uphold the bar only if it is "remedial," not "punitive." It then concluded (at JA 176–85) that, despite the Supreme Court's instructions in *Kokesh* on the distinction between remedial and punitive sanctions, *Kokesh* has no relevance to FINRA bars. This appeal followed.

STANDARD OF REVIEW

This Court "'reviews the SEC's conclusions regarding sanctions to determine whether those conclusions are arbitrary, capricious, or an abuse of discretion,'" and it "'will reverse'" a sanctions order "'if the remedy chosen is unwarranted in law.'" *Saad I*, 718 F.3d at 910 (quoting *Siegel v. SEC*, 592 F.3d 147, 155 (D.C. Cir. 2010)). Where the SEC's decision involves "pure questions of law," such as the meaning or application of a Supreme Court decision, this Court reviews those questions de novo. *NRDC, Inc. v. SEC*, 606 F.2d 1031, 1048–50 & n.24 (D.C. Cir. 1979); *see also Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("[W]e must decide *de novo* the precise impact of" the "Supreme Court's narrowing opinions"), *vacated on other grounds*, 524 U.S. 11 (1998); 5 U.S.C. § 706(1) (requiring a reviewing court to "decide all relevant questions of law").

SUMMARY OF ARGUMENT

I. By statute, FINRA is authorized to impose "appropriate[]" sanctions for rules violations, and the SEC is tasked with reviewing whether those sanctions are "excessive or oppressive." 15 U.S.C. §§ 78*o*-3(b)(7), 78s(e)(2). This Court, the SEC, and FINRA all agree that this language permits FINRA to impose "remedial," but not "punitive," sanctions on individuals like Mr. Saad.

After *Kokesh*, however, Mr. Saad's permanent bar cannot be upheld as a "remedial" sanction. In the course of finding that disgorgement is a "penalty" under 28 U.S.C. § 2462, *Kokesh* offered a general definition of "penalty" that "g[ave] rise to two principles" for distinguishing between punitive and remedial sanctions: *First*, a penalty punishes a "wrong to the public" rather than a "wrong to the individual," such that the harm is "to the public at large" rather than to a "private plaintiff" with a "private injury." 137 S. Ct. at 1642–43. *Second*, a penalty is "imposed for punitive purposes," such as "retributive or deterrent purposes" rather than to "compensat[e] a victim for his loss" or "restore the status quo." *Id.* at 1642–43, 1645 (citation omitted). Critically, a sanction is punitive if it is motivated "even in part" by punitive purposes—regardless of whether it also serves other, non-punitive purposes. *Id.* at 1645 (citation omitted).

Applying *Kokesh*'s principles here, Mr. Saad's permanent bar is punitive. *First*, the bar punishes a "wrong to the public," because, much like disgorgement in *Kokesh*, it was designed to punish the violation of rules that exist to "protect[] investors," "safeguard[] the integrity of the markets," and "promot[e] economic and social policies," "independent of the claims of individual investors." *Id.* at 1642–43 (citations omitted); *see* JA 159 (2015 NAC Decision) ("Saad's remaining in the industry, which relies so heavily on personal integrity in matters both great and small, poses serious risks to the investing public."); JA 169 (2015 SEC Decision) (concluding "a bar is necessary to protect FINRA members, their customers, and other securities industry participants"). *Second*, the bar was at least partially "imposed for punitive purposes," including deterrence, incapacitation, and retribution. *Kokesh*, 137 S. Ct. at 1643–45; *see* JA 159 (2015 NAC Decision) ("A bar . . . will protect the public from future harm at [Mr. Saad's] hands and deter others in the industry from engaging in similar misconduct."); JA 169 (2015 SEC Decision) ("We also agree with FINRA that a bar in this situation serves important deterrent objectives and reaffirms long-standing FINRA policy that such dishonesty by members or their associated persons will not be tolerated."). Accordingly, the SEC's order upholding Mr. Saad's permanent bar as a "remedial" sanction is "unwarranted in law" and must be reversed. *Saad I*, 718 F.3d at 910.

II. The SEC upheld Mr. Saad's lifetime bar primarily because it decided that *Kokesh* has no relevance to whether a FINRA bar is punitive or remedial. *First*, the SEC concluded (at JA 176–85) that *Kokesh* is confined to its specific context and thus has no application beyond determining whether a particular pecuniary sanction is a "penalty" under 28 U.S.C. § 2462. But *Kokesh* is not limited to § 2462. Its broad definition of "penalty" and resulting "two principles" speak "generally as to what constitute[s] a penal statute." *Brady v. Daly*, 175 U.S. 148, 155 (1899). Nor is *Kokesh* limited to pecuniary sanctions. *Kokesh* interpreted the meaning of "penalty" in a statute that applies equally to "any" penalty, "pecuniary or otherwise," 28 U.S.C. § 2462; it expressly invoked non-pecuniary penalties in its reasoning, 137 S. Ct. at 1642 (referring to "corporal or pecuniary" sanctions); and its logic applies equally to non-pecuniary sanctions, which can just as easily punish a "wrong to the public" and be imposed for "punitive purposes."

Second, the SEC determined (at JA 176) that even if *Kokesh* has some broader applicability, it still does not apply to FINRA bars because its guidance would be inconsistent with the statutory scheme. Specifically, the SEC reasoned that (1) FINRA is authorized by statute to expel or suspend members for rule violations, (2) applying *Kokesh* to FINRA sanctions would render all such sanctions categorically impermissible, and (3) therefore, *Kokesh* should not be read to apply to FINRA sanctions. But this reasoning rests on a false assumption: in reality, *Kokesh* would *not* render all bars and suspensions impermissible. For one thing, many debarments are remedial under *Kokesh* because they simply "restore the status quo" or punish a "wrong to the individual." 137 S. Ct. at 1642, 1645 (citation omitted). In addition, the statute prohibits only "excessive or oppressive" sanctions and thus could potentially be read to permit certain punitive sanctions, including expulsions and suspensions, so long as they are not excessive or oppressive. Such an approach would require this Court, the SEC, and FINRA to revisit the sanctions framework in an appropriate future case, but it could also, "[o]ver time," result in a "fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions." *Saad II*, 873 F.3d at 306 (Kavanaugh, J., concurring).

Finally, the SEC halfheartedly concluded (at JA 186–87) that, even if *Kokesh* applies to FINRA bars, Mr. Saad's bar is remedial, not punitive, because it "can be explained without invoking deterrence." But the SEC itself invoked deterrence in justifying Mr. Saad's bar. *See, e.g.*, JA 169 (agreeing with FINRA that "a bar in this situation serves important deterrent objectives"). More broadly, when a sanction is motivated by punitive purposes, the SEC cannot recast that sanction as remedial by insisting that its *ultimate* goal is some general objective like protecting the interests of investors. *See Kokesh*, 137 S. Ct. at 1643 (explaining that sanctions imposed to "protect the investing public by providing an effective deterrent to future violations" are punitive (citation omitted)).

ARGUMENT

I. MR. SAAD'S LIFETIME BAR IS IMPERMISSIBLY PUNITIVE.

In *Kokesh*, the Supreme Court set forth foundational principles for distinguishing between "punitive" and "remedial" sanctions. Under those principles, Mr. Saad's lifetime bar is punitive. Accordingly, the SEC's order—which upheld Mr. Saad's bar as "remedial"—is "unwarranted in law" and must be reversed. *Saad I*, 718 F.3d at 910.

A. The Current Legal Framework Does Not Permit FINRA to Impose Punitive Sanctions.

To promote the public interest and protect investors, Congress empowered national securities associations, together with the SEC, to regulate the activities of securities brokers and dealers. 15 U.S.C. § 78*o*-3(a). FINRA is one such association. Among other things, FINRA sets rules to prevent fraud, facilitate securities transactions, and promote a free and open market. *Id.* § 78*o*-3(b)(6). It also enforces those rules by ensuring that its members are "appropriately disciplined" for violations "by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction." *Id.* § 78*o*-3(b)(7).

At the same time, to protect the rights of individual members subject to disciplinary proceedings, Congress placed constraints on the sanctions FINRA may impose. In particular, Congress gave members the right to seek review by the SEC whenever FINRA imposes final disciplinary sanctions. *Id.* § 78s(d)(2). If the SEC finds during its review that a sanction is "excessive or oppressive," the agency "may cancel, reduce, or require the remission of such sanction." *Id.* § 78s(e)(2).

This Court has interpreted this statutory language to mean that the SEC has "an obligation" to "ensure its sanction [is] remedial rather than punitive." *Saad II*, 873 F.3d at 301. Otherwise, the sanction is "excessive or oppressive" and impermissible under the statute. *Id.*; *see also Siegel*, 592 F.3d at 157 ("[T]he [SEC] 'may impose sanctions for a remedial purpose, but not for punishment.'" (quoting *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C. Cir. 2005))); *PAZ Secs., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) ("*PAZ II*") ("We do not limit the discretion of the Commission to choose an appropriate sanction so long as its choice meets the statutory requirements that a sanction be remedial and not 'excessive or oppressive.'"). Following this guidance, the SEC and FINRA likewise require sanctions to be "remedial," not "punitive." *See* JA 175 ("[I]f a sanction is imposed for punitive purposes as opposed to remedial purposes, the sanction is excessive or oppressive and therefore impermissible."); FINRA Sanction Guideline 3 ("Sanctions in disciplinary proceedings are intended to be remedial."); *id.* at 2, 4 (directing FINRA adjudicators to "determin[e] remedial sanctions in each case" and "ensur[e] that the sanctions" are "not punitive").

B. *Kokesh* Defines Punitive Sanctions.

The Supreme Court's recent decision in *Kokesh* gave new direction on how to distinguish between "remedial" and "punitive" sanctions.[2] Courts have recognized that *Kokesh* announced broad principles that will have important implications in a number of contexts. *See United States v. Phattey*, 943 F.3d 1277, 1282–83 (9th Cir. 2019) (applying *Kokesh*'s principles to determine whether revocation of citizenship under the Immigration and Nationality Act is a penalty); *SEC v. Collyard*, 861 F.3d 760, 763 (8th Cir. 2017) (explaining that "*Kokesh* undermines [Eighth Circuit

[2] The SEC seeks to avoid this holding by focusing on a footnote in *Kokesh* in which the Court declines to opine on the broader question of whether federal courts have the authority to order disgorgement in SEC enforcement proceedings, noting that the "sole question presented" in *Kokesh* was whether disgorgement was subject to the limitations period. JA 173; *Kokesh*, 137 S. Ct. at 1642 n.3. The Supreme Court recently granted certiorari on this separate question and will soon provide authoritative guidance on whether the SEC can seek (and federal courts can order) disgorgement as an "equitable" remedy. *See Liu v. SEC*, No. 18-1501, 2019 WL 5659111, at *1 (U.S. Nov. 1, 2019) (mem.). Regardless, because disgorgement is not at issue here, the footnote provides no basis to disregard the Supreme Court's clear guidance regarding what constitutes a punitive sanction.

precedent holding] that a claim is not a 'penalty' simply because it's 'equitable'" and potentially implies that an injunction can constitute a penalty); *SEC v. Metter*, 706 F. App'x 699, 703 (2d Cir. 2017) (assuming that, "in light of [*Kokesh*], the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment").[3]

The Court in *Kokesh* ruled that disgorgement actions are subject to a federal statute that imposes a five-year statute of limitations on SEC actions to enforce any "penalty." 137 S. Ct. at 1639, 1645 (quoting 28 U.S.C. § 2462). The Court began by generally defining a "penalty" to be "a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Id.* at 1642 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)). "This definition," the Court continued, "gives rise to two principles" for identifying punitive sanctions: *First*, a penalty punishes a "wrong to the public" rather than a "wrong to the individual." *Id.* (quoting *Huntington*, 146 U.S. at 668). *Second*, a penalty is "imposed for punitive purposes." *Id.* at 1643. Applying both principles,

[3] *See also FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 433 (9th Cir. 2018) (O'Scannlain, J., concurring) (applying *Kokesh* to conclude that restitution under the Federal Trade Commission Act "would appear to be a penalty—not a form of equitable relief"); *Osborn v. Griffin*, 865 F.3d 417, 470 n.1 (6th Cir. 2017) (Merritt, J., dissenting) (observing that equitable disgorgement "may not even be applicable in SEC contexts for much longer in light of [*Kokesh*]").

the Court held that disgorgement constituted a "penalty," and was thus subject to the five-year statute of limitations. *Id.* at 1645.

1. In articulating its first principle of punitive sanctions, the Court explained what it means for a sanction to punish a "'wrong to the public'" rather than a "'wrong to the individual.'" *Id.* at 1642 (quoting *Huntington*, 146 U.S. at 668). "'[P]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State.'" *Id.* (quoting *Huntington*, 146 U.S. at 667). The Court noted that, when the SEC imposes a penalty, it "acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Id.* at 1643. Such actions are punitive because they implicate the SEC's "public policy mission of protecting investors and safeguarding the integrity of the markets" and "promot[ing] economic and social policies." *Id.* (citations omitted).

The Court also recognized that the role of victims in enforcement proceedings sheds light on whether a sanction punishes a public or private wrong. When the SEC punishes a wrong to the public, the Court reasoned, victims need not "support" or be "parties to the prosecution." *Id.* In contrast, when a monetary fine is "paid entirely to a private plaintiff" and is "'imposed [solely] for the purpose of redressing a private injury,'" it is "not a 'penalty,'" because a penalty "'refer[s] to something imposed in a punitive way for an infraction of a public law.'" *Id.* (first alteration in original) (quoting *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 421–22 (1915)).

2. Turning to its second principle of punitive sanctions, the Court explained what it means for a sanction to be "imposed for punitive purposes" rather than "remedial" purposes. *Id.* While *Kokesh* did not provide an exhaustive list of punitive and remedial purposes, it addressed several key motivations for sanctions and placed them in one category or the other.

The Court first held that deterrence is a punitive purpose. *Id.* "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, n.20 (1979)). To the contrary, "'[d]eterrence … has traditionally been viewed as a goal of punishment.'" *Id.* at 1643–44 (quoting *United States v. Bajakajian*, 524 U.S. 321, 329 (1998)). Thus, the "justification" that a sanction "is intended … to deter others' violations of the securities laws" "demonstrates" that it is "a punitive, rather than a remedial, sanction." *Id.* at 1645.

Second, the Court recognized that the purpose of protecting the public can be a punitive one. It explained that sanctions imposed to "protect the investing public by providing an effective deterrent to future violations" are punitive. *Id.* at 1643 (citation omitted). In other words, "protecting the public" is not a separate, non-punitive objective for a sanction; instead, punitive objectives like deterrence can be a *means* of protecting the public.

Finally, the Court identified retribution as a punitive purpose. Where a sanction serves "retributive … purposes," the Court reasoned, that sanction "'is punishment, as we have come to understand the term.'" *Kokesh*, 137 S. Ct. at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)); *accord Graham v. Florida*, 560 U.S. 48, 71 (2010) (identifying "retribution" as a "goal[] of penal sanctions"); *United States v. Slatten*, 865 F.3d 767, 819 (D.C. Cir. 2017) (identifying "retribution" as a "penological goal").

Turning to remedial purposes, the Court first identified compensation as a remedial purpose. The Court explained that when a sanction's purpose is to "compensat[e] a victim for his loss," it is remedial, not punitive. *Kokesh*, 137 S. Ct. at 1642–43. In contrast, "[w]hen an individual is made to pay a noncompensatory sanction to the Government" rather than "to victims" as a "consequence of a legal violation," that "payment operates as a penalty" and is not remedial. *Id.* at 1644.

Second, the Court suggested that the objective of restoring the status quo can be viewed as remedial. The Government had argued that disgorgement was a remedial sanction because it simply "'lessen[s] the effects of a violation' by 'restor[ing] the status quo.'" *Id.* The Court rejected that argument, but only because it failed on its own terms. In practice, disgorgement sometimes "does not simply restore the status quo" by "return[ing] the defendant to the place he would have occupied had he not broken the law," but rather "leaves the defendant worse off."

Id. at 1644–45; *accord Tull v. United States*, 481 U.S. 412, 422 (1987) (contrasting "[r]emedies intended to punish culpable individuals" with "those intended simply to extract compensation or restore the status quo").

The Court concluded by articulating a crucial criterion for distinguishing punitive sanctions from remedial ones: A sanction is a penalty if it is *even partially* imposed for punitive purposes. The Court recognized that "'sanctions frequently serve more than one purpose.'" *Kokesh*, 137 S. Ct. at 1645 (quoting *Austin*, 509 U.S. at 610). And it explained that only sanctions that serve *exclusively remedial* purposes are remedial. As the Court put it, "'[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* (quoting *Austin*, 509 U.S. at 621). Accordingly, a sanction is punitive "'if it constitutes punishment even in part.'" *Id.* (quoting *Bajakajian*, 524 U.S. at 331, n.6).

C. Mr. Saad's Lifetime Bar Is Punitive Under *Kokesh.*

"Under any common understanding of the term 'remedial,' expulsion and suspension of a securities broker are not remedial." *Saad II*, 873 F.3d at 304 (Kavanaugh, J., concurring). Instead, Mr. Saad's lifetime bar is punitive under both of *Kokesh*'s two guiding principles: The bar punishes a "wrong to the public" rather than a "wrong to the individual," and it was at least partially "imposed for punitive purposes." 137 S. Ct. at 1642–43 (citation omitted). The SEC thus erred in upholding Mr. Saad's lifetime bar as a "remedial" sanction.

1. Mr. Saad's lifetime bar punishes a "wrong to the public."

Mr. Saad was clearly punished for a wrong to the public, rather than a wrong to an individual. *See id.* As in *Kokesh*, FINRA and the SEC were concerned here with the violation of rules that are designed to "protect[] investors," "safeguard[] the integrity of the markets," and "promote economic and social policies," "independent of the claims of individual investors." *Id.* (citations & alterations omitted); *see* JA 159 (2015 NAC Decision) (explaining a bar "will protect the public" because Saad "poses serious risks to the investing public"); JA 169 (2015 SEC Decision) (concluding that Saad is a "threat to investors and other industry participants" and that "a bar is necessary to protect FINRA members, their customers, and other securities industry participants"). The SEC repeatedly emphasized that it considers debarment to be a necessary tool to "effectively regulate the securities industry." JA 183 (2019 SEC Decision); *see* JA 188 (concluding that FINRA bars are "[c]onsistent" with federal securities laws that implicate "'a national public interest' that makes it 'necessary to provide for regulation and control of such transactions and of practices and matters related thereto'" (quoting 15 U.S.C. § 78b)); JA 178 ("[B]arring Saad was necessary in light of 'the threat [he] would pose to investors and other securities industry participants were he to return to the industry.'" (quoting

Saad II, 873 F.3d at 303)); *id.* at 179 (defending "FINRA bars like the one imposed on Saad to protect the public from the risks he poses").

The SEC's approach to Mr. Saad's lifetime bar was consistent with its approach to lifetime bars generally. Such bars are usually imposed "to protect the public interest." *Seghers v. SEC*, 548 F.3d 129, 136 (D.C. Cir. 2008); *In the Matter of the Application of Stephen Grivas for Review of Disciplinary Action Taken by FINRA*, Release No. 34-77470, 2016 WL 1238263, at *7 (SEC Mar. 29, 2016) (explaining that FINRA's approach of routinely imposing permanent bars in conversion cases "reflects the judgment that, absent mitigating factors, conversion poses [a] substantial … risk to investors and/or the markets"). Accordingly, such bars are "imposed [as] punishment for an offense committed against the State," redressing "an infraction of a public law" rather than "a private injury." *Kokesh*, 137 S. Ct. at 1642–43 (citation omitted).

The lack of victim involvement further confirms that Mr. Saad's bar was not imposed to punish a "wrong to the individual." *Id.* (citation omitted). As with disgorgement, debarment "may proceed even if victims do not support or are not parties to the prosecution." *Id.* at 1643; *see* FINRA Oversight, *available at* http://www.finra.org/industry/enforcement (explaining that FINRA may initiate investigations from many varied sources such as "examination findings," anonymous tips, "automated surveillance reports," and "referrals from other regulators or other FINRA departments"); *see also PAZ II*, 566 F.3d at 1175 (upholding permanent bar for violation that caused no "direct harm to consumers"). Indeed, the SEC never even discussed the interests of Mr. Saad's former employer when it upheld the lifetime bar. Nor do FINRA's Sanction Guidelines give any consideration to a victim's particular injury: To the contrary, in conversion cases, a permanent bar is the standard sanction "regardless of [the] amount converted" and whether an investor was harmed. *Saad II*, 873 F.3d at 299. For example, in another pre-*Kokesh* decision, FINRA imposed and SEC affirmed a permanent bar of a FINRA member who had converted less than $750 from her employer. *In the Matter of the Application of Denise M. Olson for Review of Disciplinary Action Taken by FINRA*, Release No. 75838, 2015 WL 5172954, *1–*3 (SEC Sept. 3, 2015). The absence of any victim participation or consideration makes clear that in Mr. Saad's case, as in other debarment proceedings, the SEC acted "in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Kokesh*, 137 S. Ct. at 1643 (citation omitted).

2. Mr. Saad's lifetime bar was "imposed for punitive purposes."

Mr. Saad's lifetime bar also was "imposed for punitive purposes," including deterrence, incapacitation, and retribution. *Id*. And even if the presence of other, non-punitive purposes could render the sanction remedial—which, under *Kokesh*, it cannot—no such remedial purposes motivated Mr. Saad's lifetime bar.

a. *First*, deterrence at least partially motivated Mr. Saad's lifetime bar. In pursuing "the penological goal of general deterrence," the "government essentially seeks to make an example of an offender through punishing him so that other potential offenders are intimidated into refraining from committing the contemplated crime." *Slatten*, 865 F.3d at 819. Here, both FINRA and the SEC expressly invoked general deterrence to justify Mr. Saad's lifetime bar. FINRA observed that a "bar … is an appropriate remedial sanction that will … deter others in the industry from engaging in similar misconduct." JA 159. And the SEC "agree[d] with FINRA that a bar in this situation serves important deterrent objectives and reaffirms long-standing FINRA policy that such dishonesty by members or their associated persons will not be tolerated," JA 169, and reiterated that "general deterrence 'may be considered as part of the overall remedial inquiry,'" JA 187 (citation omitted).

The focus on deterrence in Mr. Saad's case is consistent with the approach that FINRA and the SEC usually take to permanent bars. *Saad II*, 873 F.3d at 299 (recognizing that FINRA's Sanction Guidelines direct FINRA to consider "the need … to deter future misconduct" in "determining the appropriate sanction"). As just discussed, permanent bars are FINRA's standard sanction for conversion of any amount even when investors are not harmed. *See supra* at pp. 20–21. Here, Mr. Saad was charged with misappropriating $1,144 but was given the most severe punishment possible—a lifetime permanent bar. By making the "most severe" sanction the standard punishment regardless of the severity of individual misconduct, FINRA and the SEC plainly seek to deter similar misconduct by others. *See, e.g.*, *In the Matter of the Application of Blair Alexander West for Review of Disciplinary Action Taken by FINRA*, Release No. 34-74030, 2015 WL 137266, at *10-11, 13 (SEC Jan. 9, 2015) (sustaining bar in part to "deter[] other securities professionals"); *see PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("*PAZ I*") (noting that permanent bars are "the most severe, and therefore apparently punitive sanction.").

Second, incapacitation at least partially motivated Mr. Saad's lifetime bar. Like deterrence and retribution, "incapacitation" is indisputably a punitive objective. *See, e.g.*, *Graham*, 560 U.S. at 71 (referring to "incapacitation" as a "goal[] of penal sanctions"); *United States v. Godoy*, 706 F.3d 493, 496 (D.C. Cir. 2013) (similar). The "penological goal" of incapacitation is to prevent an individual who "pose[s] a danger to society … from committing more crimes." *Slatten*, 865 F.3d at 818–19. And the reasoning of FINRA and the SEC in this case reveals that they intended to protect the public, in part, by incapacitating Mr. Saad and preventing him from reoffending. FINRA suggested that "Saad's remaining in the industry … poses serious risks to the investing public" and concluded that a bar will "protect the public from future harm … and deter others." JA 159. The SEC agreed, explaining that "Saad's actions … demonstrate that he … would pose a continuing and unacceptable threat to investors and other industry participants if not barred." JA 169. Such punitive considerations frequently serve as a basis for debarment orders. *See Saad II*, 873 F.3d at 310 (Millett, J., dubitante) (citing cases in which debarment was imposed "to protect" customers, investors, or the public); *supra* at pp. 19–20.

Finally, retribution at least partially motivated Mr. Saad's lifetime bar. The "penological goal" of "retribution" focuses on the "personal culpability" of the offender and "allows society to express its condemnation of" his behavior "and to seek restoration of the moral imbalance caused by" his actions. *Slatten*, 865 F.3d at 819 (quoting *Graham*, 560 U.S. at 71). Here, the SEC repeatedly justified a lifetime bar by focusing on Mr. Saad's personal culpability and thus on whether he deserved the sanction. *See, e.g.*, JA 167; JA 169 (observing that the circumstances do not "mitigate [Mr. Saad's] responsibility"); JA 169 (Mr. Saad's "actions betray a dishonest character"). Such considerations are plainly retributive in nature.

b. *Kokesh* recognized that a sanction "frequently serve[s] more than one purpose," but so long as it "cannot fairly be said *solely* to serve a remedial purpose," that sanction "is punishment." 137 S. Ct. at 1645 (quoting *Austin*, 509 U.S. at 610). Thus, even if Mr. Saad's lifetime bar were also motivated by a remedial purpose, it would still be a punitive sanction as long as "it constitutes punishment even in part"—which it plainly does. *Id.* (quoting *Bajakajian*, 524 U.S. at 331, n.6). As it happens, however, Mr. Saad's lifetime bar was not motivated by *any* remedial purpose.

First, Mr. Saad's lifetime bar was not imposed for the purpose of "compensation." *Id*. at 1644. *Kokesh* explained that when a sanction is imposed solely to "compensat[e] a victim for his loss," it is remedial, not punitive. *Id.* at 1642. But Mr. Saad's lifetime bar provides no compensation to anyone, much less to his former employer. As Judge Kavanaugh recognized, "expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses." *Saad II*, 873 F.3d at 305 (Kavanaugh, J., concurring).

Second, Mr. Saad's lifetime bar was not imposed for purposes of "restor[ing] the status quo." *Kokesh*, 137 S. Ct. at 1644 (citation omitted). *Kokesh* suggested that a sanction may be remedial where it "simply returns the defendant to the place he would have occupied had he not broken the law." *Id.* But a lifetime bar generally does not "restore the status quo; it leaves the defendant worse off." *Id.* at 1645. Prior to the misappropriation, the status quo was that Mr. Saad was a broker-dealer permitted to associate with FINRA member firms. The sanction for his misconduct left Mr. Saad "worse off" than before the misappropriation by permanently barring Mr. Saad from "associating with any FINRA member firm in any capacity." *Saad II*, 873 F.3d at 301. Accordingly, Mr. Saad's lifetime bar cannot be characterized as restorative. Indeed, this case illustrates that, at least in the typical case, "the term 'remedial' makes little sense when describing the expulsion or suspension of a securities broker." *Id*. at 304 (Kavanaugh, J., concurring).

II. THE GROUNDS FOR THE SEC'S DECISION ARE INVALID.

Despite *Kokesh*'s clear guidance on how to distinguish punitive from remedial sanctions, the SEC upheld Mr. Saad's lifetime bar as "remedial." In reviewing the SEC's decision, this Court "must judge the propriety of such action solely by the grounds invoked by the agency" and "is powerless to affirm the administrative action" on any other basis. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see, e.g.*, *Horne v. Merit Sys. Prot. Bd.*, 684 F.2d 155, 157 (D.C. Cir. 1982) (same). Here, the SEC offered three grounds for its decision: It determined that *Kokesh* has no relevance to FINRA bars, first (JA 176–85) because it viewed the holding in *Kokesh* as limited to a single statute, and second (JA 175–76) because it considered *Kokesh* to conflict with FINRA's governing statute. Finally, the SEC concluded (JA 186–87) that even if *Kokesh* applies to FINRA bars generally, Mr. Saad's bar still would not be punitive. Each of these grounds misinterprets and disregards *Kokesh*. The SEC is bound by authoritative decisions of the Supreme Court and cannot revise the scope of those precedents, even if it disagrees with the reasoning of a decision or disapproves of its implications.

A. *Kokesh* Is Not Limited to a Single Statute of Limitations or a Single Category of Sanctions.

The SEC first (at JA 176–85) interpreted *Kokesh* as limited to the specific context in which it was decided: the statute of limitations that applies under § 2462 when the SEC seeks to enforce a pecuniary sanction. But *Kokesh* announced general principles to distinguish between "punitive" and "remedial" sanctions, and those principles are not confined to § 2462 and pecuniary sanctions.

1. Kokesh is not limited to § 2462.

a. The notion that *Kokesh* is confined to § 2462 is unfounded. The opinion makes plain that it is articulating *general* principles and then applying them to the situation at hand. The analysis begins with a general definition of penal sanctions. *See Kokesh*, 137 S. Ct. at 1642 ("A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[se] against its laws.'" (alteration in original) (quoting *Huntington*, 146 U.S. at 667)). The Court then observes that "[t]his definition gives rise to two principles" as to whether a given sanction "operates as a penalty." *Id*. And it concludes that the "[a]pplication of the foregoing principles readily demonstrates that SEC disgorgement constitutes a penalty within the meaning of § 2462." *Id*. at 1643 (emphasis added). *See also id*. at 1642 (noting that "[t]his Court has applied these principles in construing the term 'penalty'" (emphasis added)).

More generally, the Court's opinion is replete with broad and transsubstantive statements about the nature of punitive and remedial sanctions. *See, e.g., id.* ("[W]hether a sanction represents a penalty turns in part on whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." (citation omitted)); *id*. ("[P]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." (citation omitted)); *id*. ("[A] pecuniary sanction operates as a penalty only if it is sought for the purpose of punishment, and to deter others from offending in like manner—as opposed to compensating a victim for his loss." (citation omitted)); *id*. at 1643 ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective." (citation & alterations omitted)); *id*. at 1644 ("When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty."); *id*. (noting that "SEC disgorgement … bears all the hallmarks of a penalty"). This language makes it apparent that the opinion is not somehow confined to one statutory provision. *See, e.g.*, *Browning-Ferris Indus. of Cal., Inc. v. Nat'l Labor Relations Bd.*, 911 F.3d 1195, 1215 (D.C. Cir. 2018) (criticizing the dissent for dismissing "[t]he Supreme Court's analysis," which was "was necessary to [its] decision" and thus binding on the court).

The origin of *Kokesh*'s definition of "penalty" and resulting "two principles" confirms their general application. Both first appeared in *Huntington v. Attrill*, 146 U.S. 657 (1892), a case that had nothing to do with § 2462. *Huntington* itself derived its definition of "penalty" from "the municipal law of England and America" and drew on general guidance from Blackstone about the nature of penal laws. *See id.* at 666–69 (distinguishing between punitive purposes, such as "deter[ring] others from offending," and remedial ones (citation omitted)).

Moreover, after announcing the definition of "penalty" from *Huntington*, *Kokesh* proceeded to illustrate its application by discussing another early case that also had nothing to do with § 2462, *Brady v. Daly*, 175 U.S. 148 (1899). Like *Kokesh*, *Brady* drew on *Huntington*'s "very full discussion of the meaning of the word 'penal,'" which "sp[oke] generally as to what constituted a penal statute." *Id.* at 155.

b. The SEC offered several reasons (at JA 176–85) not to apply *Kokesh*'s foundational principles outside of § 2462. None is availing.

First, the SEC (at JA 181–82) relied on pre-*Kokesh* authority for the proposition that the meaning of "penalty" can vary by context. *See Life & Cas. Ins. Co. of Tenn. v. McCray*, 291 U.S. 566, 574 (1934); *see also United States v. Ursery*, 518 U.S. 267, 278–88 (1996); *Tull*, 481 U.S. at 424. Because the meaning of "penalty" can vary by context, the SEC asserted, there is no reason to apply *Kokesh* beyond the specific context of § 2462.

This is misguided. It is unremarkable that context can determine whether a given sanction is punitive. For example, a sanction that is driven by punitive purposes in one situation might be driven by compensatory purposes in another situation. But in both cases, the same *framework* would apply for determining whether a particular sanction is "punitive" or "remedial."

Indeed, the analysis in the cases cited by the SEC resembles *Kokesh*. For example, *McCray* upheld a statute authorizing a fixed award of damages. 291 U.S. at 570. In doing so, the Court differentiated between sanctions "designed as reparation to sufferers from wrongs" and sanctions that are "recoverable in vindication of the public justice of the state."[4] *Id.* at 573–74.

[4] Similarly, in *Tull* the Court distinguished between sanctions "intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo." 481 U.S. at 422. Because the sanction at issue in *Tull* was "intended not simply to disgorge profits but also to impose punishment," the Court concluded that it was punitive, not equitable. *Id.* at 423. Finally, in *Ursery*, the Court held only that civil forfeiture "d[id] not constitute a punishment under the Double Jeopardy Clause," relying heavily on the history of the Clause and recognizing that "'a long course of adjudication in this Court carries impressive authority.'" 518 U.S. at 278–79 (quoting *Gore v. United States*, 357 U.S. 386, 392 (1958)). The Court did not cite *Huntington* or disavow *Kokesh*'s two principles. To the contrary, it reasoned that civil forfeiture was unique because "it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture." *Id.* at 284 (identifying "compensating the Government" as a "nonpunitive purpose").

In any event, even if pre-*Kokesh* authority applied a different framework than *Kokesh*—which, again, it did not—that would not entitle the SEC to ignore or minimize *Kokesh*. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 n.10 (D.C. Cir. 1986) (criticizing the dissent for relying on an older Supreme Court opinion and "disregard[ing] the Supreme Court's more recent pronouncements"); *United States v. Pryba*, 502 F.2d 391, 407 (D.C. Cir. 1974) (foreclosing reliance on Supreme Court precedent when inconsistent with a "more recent decision").

Second, the SEC suggested (at JA 185) that, in effect, the outcome in *Kokesh* was driven by practical considerations. In its view, the Court held that disgorgement was "punitive" only because otherwise there would have been no time limit on disgorgement actions. In contrast, the SEC reasoned, the Court held in *Hudson v. United States*, 522 U.S. 93 (1997), that a remedy was *not* punitive where its practical concerns *were* otherwise addressed. The SEC concluded that, because FINRA does not have unlimited authority to impose lifetime bars, it is "unnecessary to limit any FINRA overreach" here by applying *Kokesh* to render FINRA bars punitive. JA 185.

But *Kokesh* was not driven by the Court's preferred outcome, or—as the SEC put it (at JA 185)—based solely on the necessity of limiting SEC "overreach." To the contrary, *Kokesh* never even mentioned the concerns that the SEC highlights. Indeed, it is not even clear that the Court would have needed to characterize disgorgement as a penalty in order to ensure that there would be a time limit on disgorgement actions. After all, § 2462 also expressly applies to forfeiture actions, and Mr. Kokesh's lead argument was that "SEC disgorgement claims seek 'forfeiture.'" *See* Br. of Petitioner, *Kokesh v. SEC*, at 12-22.

In any event, it *is* necessary to police FINRA overreach, and this case illustrates why. Nearly 15 years ago, Mr. Saad misappropriated $1,144 from his employer by submitting false receipts at a time when he was suffering severe personal and professional distress. *See* JA 101–02. This misappropriation formed the sole basis of FINRA's disciplinary proceeding. *See* JA 110–13. Yet despite the small amount involved and the lack of any harm to customers, FINRA imposed its most severe sanction and permanently barred Mr. Saad from the industry, determining that he could never again be trusted as a securities professional.[5] FINRA's decision in Mr. Saad's case thus reflects its choice to make permanent

[5] This stands in stark contrast to the lesser sanctions FINRA has imposed on individuals who caused far greater harm. *See, e.g.*, FINRA Letter of Acceptance, Waiver, & Consent re: Michael D. Jackson, No. 2017055684102, at 2–3, https://bit.ly/2GrQPEj (agreeing to a six-month suspension for carrying "out forty-two option strategies comprising more than one hundred transactions" without communicating with the customer and losing "virtually all of her money"); FINRA Letter of Acceptance, Waiver, & Consent re: Deming Anthony Payne, No. 2017055718001, at 2–3, https://bit.ly/312PwFh (agreeing to a 90-day suspension for processing wire transfer requests received via email from someone impersonating the customer, which resulted in the customer losing nearly $750,000, falsely attesting to verbal verification from customer, and instructing another employee to falsely attest to verbal verification).

debarment the standard sanction for conversion of any amount, without regard to proportionality between the offense and the sanction, without regard to whether investors were harmed, and without allowing for any chance of redemption. *See Saad II*, 873 F.3d at 299.

Third, the SEC determined (JA 182–84) that *Kokesh* must be limited to § 2462 because otherwise it would render punitive all sanctions with deterrent "effects." Because all sanctions have some deterrent effects, the SEC reasoned, it would be absurd to consider any sanction in any context punitive based on the "mere presence of a deterrent effect." JA 183.

The SEC simply misreads *Kokesh*, which actually *acknowledged* that a sanction can have a deterrent effect without being punitive. The Court explained that "sanctions imposed for the *purpose* of deterring infractions of public laws are inherently punitive." 137 S. Ct. at 1643 (emphasis added). And in discussing the meaning of "punitive purposes," the Court explained that the "incidental effect" of a sanction is distinct from the sanction's "purpose." *Id.* For example, disgorgement is punitive because deterrence is "not simply an incidental effect" of the sanction, but rather its "primary purpose." *Id.* (citation omitted). In short, *Kokesh* itself completely defuses the SEC's concern, as post-*Kokesh* decisions have recognized. *See Phattey*, 943 F.3d at 1283 (distinguishing between "the purpose of revocation proceedings," which "is to revoke a wrongfully obtained benefit," and the "deterrent effect as a practical matter"); *Collyard*, 861 F.3d at 765 (concluding that "the deterrent purpose of SEC disgorgement differs from the deterrent effect of this injunction," and reasoning that deterrence was the "primary purpose" of disgorgement but only an "incidental effect" of an injunction).

Finally, the SEC cautioned (at JA 184) that applying *Kokesh* beyond § 2462 would undermine pre-*Kokesh* authority permitting professional debarments in a variety of contexts. *See, e.g.*, *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938) (stating in dicta that debarments are "remedial sanctions"); *PAZ I*, 494 F.3d at 1065–66 (permitting "general deterrence" to "be considered as part of the overall remedial inquiry" for debarment (citation omitted)); *West v. SEC*, 641 F. App'x 27, 30 (2d Cir. 2016) (similar).

These concerns are misguided on several levels. First, the mere fact that a Supreme Court decision is important and consequential, *see supra* at pp. 13–14 & n.3, is not grounds for disregarding the ruling. Moreover, even if a particular sanction must be regarded as punitive under *Kokesh*, that conclusion may not have any significant consequences. For instance, *Kokesh* does not undermine cases holding that professional debarment does not violate the Ex Post Facto or Double Jeopardy Clauses. *See, e.g.*, *United States v. Dyer*, 908 F.3d 995, 1001 (6th Cir. 2018) (holding after *Kokesh* that SEC civil disgorgement is not a criminal punishment under the Double Jeopardy Clause). These cases turn on whether a particular sanction is civil or criminal, and a penalty can be either civil or criminal. *See Saad II*, 873 F.3d at 305 (Kavanaugh, J., concurring) (noting the distinction between "the question of whether a sanction is a penalty" and "[t]he question of whether a penalty is civil or criminal"). Accordingly, in these doctrinal areas, no consequences will flow solely from a determination that a particular sanction is "punitive." *See Hudson*, 522 U.S. at 99–96 (holding that prosecution after debarment did not violate the Double Jeopardy Clause because debarment was not "so punitive" as to be a criminal, rather than civil, sanction); *Hawker v. People of New York*, 170 U.S. 189, 193 (1898) (holding that debarment did not violate the Ex Post Facto Clause because the state was "simply defin[ing] the qualifications of one who attempts to practice medicine"); *see also Smith v. Doe*, 538 U.S. 84, 92 (2003) (holding that sex offender registration requirements were a civil, not criminal, sanction under the Ex Post Facto Clause).

2. Kokesh is not limited to pecuniary sanctions.

The SEC also concluded that *Kokesh* has no relevance to non-pecuniary sanctions. In its view, "*Kokesh* discussed the test for considering a pecuniary sanction to be a penalty and said nothing about nonpecuniary sanctions." JA 181. But just as *Kokesh* is not limited to § 2462, it is not limited to pecuniary sanctions.

To begin, *Kokesh* interpreted the meaning of "penalty" in a statute that treats pecuniary and non-pecuniary penalties equally. That statute "applies to any 'action, suit or proceeding for the enforcement of *any* civil fine, penalty, or forfeiture, pecuniary *or otherwise*.'" *Kokesh*, 137 S. Ct. at 1641 (emphasis added) (quoting 28 U.S.C. § 2462). Far from distinguishing between pecuniary and non-pecuniary penalties, the statute expressly directs courts to treat them the same. The rules that *Kokesh* set forth for one type of "penalty" thus apply equally to "any" type of penalty, "pecuniary or otherwise." 28 U.S.C. § 2462; *see United States v. Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998) ("[W]e construe § 2462 as applying to non-monetary penalties."); *see also Phattey*, 943 F.3d at 1282 (analyzing whether revocation of citizenship qualifies as a penalty "[u]nder the principles set out in *Kokesh*").

Moreover, *Kokesh* expressly invoked non-pecuniary penalties in its reasoning. It began with a definition of "penalty" that includes non-pecuniary sanctions: "A 'penalty' is a 'punishment, *whether corporal or pecuniary*, imposed and enforced by the State, for a crime or offen[s]e against its laws.'" *Kokesh*, 137 S. Ct. at 1642 (emphasis added) (quoting *Huntington*, 146 U.S. at 667). This definition provided the foundation for the Court's entire decision. *See supra* at p. 14.

Additionally, the two principles that followed from the Court's definition of "penalty" logically apply equally to pecuniary and non-pecuniary sanctions. *First*, both pecuniary and non-pecuniary sanctions can punish a "wrong to the public." *Kokesh*, 137 S. Ct. at 1642. Just as the SEC "acts in the public interest, to remedy a harm to the public at large" when it seeks disgorgement, it can do the same when it seeks non-pecuniary sanctions like debarment. *Id.* at 1643 (citation omitted); *see supra* at pp. 19–21. *Second*, both pecuniary and non-pecuniary sanctions can be imposed for "punitive purposes." *Id*. Just as the SEC seeks disgorgement for the purpose of "protect[ing] the investing public by providing an effective deterrent to future violations," it can seek non-pecuniary sanctions like debarment for the same purpose. *Id.* (citation omitted); *see supra* at pp. 21–23.

It is no answer to say that only pecuniary sanctions can have a valid "compensatory" purpose. First, non-pecuniary sanctions actually *can* be compensatory. For example, restorative injunctions can require a party to take actions that compensate the government. *See Telluride*, 146 F.3d at 1246 (holding that an injunction to restore damaged wetlands was not a penalty under § 2462 because it sought "compensation" to the government by "making the injured party whole"). Second, non-pecuniary sanctions can serve another remedial purpose: restoring the status quo. *See Phattey*, 943 F.3d at 1283 ("[T]he purpose of denaturalization is to remedy a past fraud by taking back a benefit to which the alien is not entitled and thus restoring the status quo ante."); *Telluride*, 146 F.3d at 1246 (reasoning that the injunction was imposed "to restore only the wetlands damaged by [the defendant's] acts to the status quo or to create new wetlands for those that cannot be restored"). Third, the *Kokesh* test does not turn on whether a sanction does (or can) have a remedial purpose. Instead, the question is whether the sanction is motivated, even in part, by punitive purposes. 137 S. Ct. at 1645.

B. There Is No Conflict Between *Kokesh* and the Statute.

The SEC also concluded (at JA 175–76) that *Kokesh* cannot apply to FINRA bars because, in its view, the result would be inconsistent with the statutory scheme. In particular, Congress directed FINRA to include in its rules the ability to "appropriately discipline[]" members who violate "the rules of the association," including by "expulsion, suspension, … [and] being suspended or barred from being associated with a member." 15 U.S.C. § 78*o*-3(b)(7). Applying *Kokesh* here, the SEC reasoned, would render all such bars punitive and thus invalid. Accordingly, the SEC concluded that *Kokesh* cannot apply in this context, because a sanction that Congress expressly authorized cannot be categorically impermissible.

This conclusion is false because at least some expulsions and suspensions *are* permissible, non-punitive sanctions under the proper reading of *Kokesh*. But, as a threshold matter, the question of precisely how *Kokesh* should be reconciled with the statute is not before this Court. As such, the Court need not dwell on this question now and can leave the project of working out those details to a future case.

1. This case does not require this Court to consider which expulsions or permanent bars remain permissible under Kokesh.

As the following sections demonstrate, there are multiple ways of allowing FINRA to impose suspensions and expulsions in some cases—thereby giving effect to Section § 78*o*-3(b)(7)—without contradicting *Kokesh*. In particular, some bars and suspensions should be viewed as remedial under *Kokesh*; and some punitive sanctions may ultimately be found to be permissible under the statute. But the SEC cannot raise any such argument with respect to *this* bar, so there is no reason for this Court to focus on the issue.

a. First, any such contention would be foreclosed by the law-of-the-case and law-of-the-circuit doctrines. The SEC could not now argue that Mr. Saad can appropriately be subject to a punitive bar, because this Court has previously held in this case that the SEC has "an obligation" to "ensure its sanction [is] remedial rather than punitive." *Saad II*, 873 F.3d at 301 (citing *Saad I*, 718 F.3d at 913). "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Relatedly, the law-of-the-circuit doctrine also precludes a subsequent panel from revisiting the *Saad II* panel's conclusion that Mr. Saad's lifetime bar cannot be upheld as punitive. "[W]hen both doctrines are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case." *See, e.g.*, *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996); *id.* (citing *United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984), for the proposition that "when a prior panel in the same circuit has decided an issue, law-of-the-circuit doctrine supplants law-of-the-case doctrine and precludes reconsideration of that decision in a subsequent appeal, even if the second panel believes the first was wrong").

By the same token, the SEC could not now argue that Mr. Saad's bar was motivated by purely remedial purposes, and is therefore remedial under *Kokesh*. That is because the Court has previously noted that the bar was motivated by deterrence. *Saad II*, 873 F.3d at 302 ("[T]he Commission reasoned that a permanent bar was the appropriate remedy in Saad's case because it 'serves important deterrent objectives and reaffirms long-standing FINRA policy that such dishonesty by members or their associated persons will not be tolerated.'" (citation omitted)). Accordingly, any argument to that effect is also foreclosed.

b. Furthermore, under the *Chenery* doctrine, this Court can uphold the SEC's action only on the grounds offered by the SEC itself. Here, the SEC concluded that Mr. Saad's bar was remedial, and that *Kokesh* was irrelevant. *See* JA 175 ("[I]f a sanction is imposed for punitive purposes as opposed to remedial purposes, the sanction is excessive or oppressive and therefore impermissible."); JA 190 ("We hold that *Kokesh* has no bearing on our determination that the bar … [is] 'remedial, not punitive.'"); FINRA Sanction Guidelines 1, 3. This Court therefore cannot uphold Mr. Saad's lifetime bar on the grounds discussed in the following sections, because the SEC did not rely on those grounds below. *See Chenery*, 332 U.S. at 196; *Horne*, 684 F.2d at 157; *supra* at p. 26.[6]

c. *Finally*, FINRA forfeited these arguments by failing to raise them below. *See Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (concluding government forfeited an argument by not raising it before the Board of Immigration Appeals); *see also Xu Sheng Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 97 n.2 (2d Cir. 2007) (similar); *Bowden v. United States*, 106 F.3d 433, 438–39 (D.C. Cir. 1997) (concluding the government forfeited a defense by failing "to raise the issue in the administrative process"). In its SEC briefing, FINRA never argued that Mr. Saad's bar is remedial under the *Kokesh* framework, or that certain punitive sanctions might be permissible. It is too late to inject those arguments into the case now.

In short, in some future case FINRA and the SEC might develop a new framework for imposing bars and suspensions without running afoul of *Kokesh*. But

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[6] To be sure, SEC also held that the bar would not be a penalty even if *Kokesh* applied. JA 186. However, its misguided arguments, *see infra* at pp. 50–53, were entirely distinct from those discussed below, *see infra* at pp. 42–44.

they have not attempted to do so in this case. As such, this Court does not need to consider what that framework should eventually look like.[7]

2. Not all bars are punitive.

In any event, the purported inconsistency between *Kokesh* and the statute is illusory. Any such inconsistency would arise only if *Kokesh* implied that *all* expulsions and suspensions are impermissible. But while Mr. Saad's lifetime bar is punitive under *Kokesh*, many other debarments are not. Accordingly, applying *Kokesh* to FINRA bars leaves FINRA free to order non-punitive expulsions or suspensions in appropriate cases, consistent with Congress's direction in § 78*o*-3(b)(7).

First, many expulsions and suspensions may be remedial because they simply "restore the status quo" by "return[ing] the defendant to the place he would have occupied had he not broken the law." *Kokesh*, 137 S. Ct. at 1644-45; *accord Tull*, 481 U.S. at 422. For instance, some individuals become securities professionals by submitting applications that do not disclose facts that would render them ineligible to associate with a FINRA member in the first place. In such cases, expulsion would return the individual "to the place he would have occupied" had he not submitted an

[7] At a minimum, if this Court were to allow FINRA and the SEC to develop such a new regime, and if FINRA and the SEC were to seek to apply that new regime to Mr. Saad on remand, he would be entitled to relitigate his lifetime bar under those newly developed standards.

incomplete application, rather than leave him "worse off." *Kokesh*, 137 S. Ct. at 1644; *see Phattey*, 943 F.3d at 1283 (holding that revoking citizenship was not a penalty where it "remed[ies] a past fraud by taking back a benefit to which the alien is not entitled and thus restor[es] the status quo ante"). The SEC routinely upholds expulsions and suspensions in precisely such circumstances. *See, e.g.*, *In the Matter of the Application of Joseph S. Amundsen for Review of Disciplinary Action Taken by FINRA,* Release No. 34-69406, 2013 WL 1683914, at *5, 8, 12 (SEC Apr. 18, 2013) (approving a FINRA permanent bar where the applicant improperly concealed that his CPA license had been revoked and an injunction had been entered against him; the injunction rendered him statutorily disqualified); *In the Matter of the Application of Richard A. Neaton for Review of Disciplinary Action Taken by FINRA*, Release No. 34-65598, 2011 WL 5001956, at *1, 12, 13 (SEC Oct. 20, 2011) (approving a FINRA permanent bar where the applicant improperly concealed that his license to practice law had been suspended and then revoked; one agent for a FINRA member firm "testified that he never would have hired" the applicant if he had been aware of the concealed information); *In the Matter of the Application of Robert D. Tucker for Review of Disciplinary Action Taken by FINRA*, Release No. 34-68210, 2012 WL 5462896, at *9, 12–13 (SEC Nov. 9, 2012) (approving a FINRA suspension where the applicant improperly concealed "serious financial problems";

the failure to disclose "undermined [member] firms' ability to screen his fitness to associate with them").

Second, other expulsions and suspensions may be remedial because they punish a "wrong to the individual" rather than a "wrong to the public." For instance, a tailored remedy that prohibits an individual from associating with the specific entity that he harmed, such as a former employer whose funds he misappropriated, may punish a wrong to "the individual" rather than "the public."

Of course, Mr. Saad's permanent bar does not fall into either of these categories. He did not conceal information that originally disqualified him from associating with a FINRA member. Nor did FINRA tailor Mr. Saad's bar to prevent him only from associating with his former employer, the victim of his misappropriation. Therefore, while other FINRA expulsions and suspensions may be remedial, Mr. Saad's lifetime bar is clearly punitive.

3. The statutory scheme could be interpreted to permit certain punitive bars.

a. It could also be argued that this Court should consider revising its rule regarding remedial sanctions. In other words, now that *Kokesh* has established that the concept of "remedial" sanctions is narrower than some decisions of this Court had assumed, this Court may reexamine whether some punitive sanctions are permissible.

Recall the two main parts of the statute that together set forth FINRA's enforcement duties and the SEC's review obligations: *First*, Congress directed FINRA to set rules for securities brokers and dealers to promote the public interest and protect investors, 15 U.S.C. § 78*o*-3(a), (b)(6), and to then enforce those rules by "appropriately disciplin[ing]" members for violations "by expulsion, suspension, … or any other fitting sanction," *id.* § 78*o*-3(b)(7). *Second*, Congress gave disciplined members a right to seek review by the SEC, *id.* § 78s(d)(2), and provided that the agency "may cancel, reduce, or require the remission of such sanction" if it finds that sanction to be "excessive or oppressive," *id.* § 78s(e)(2). *See supra* at pp. 11–12.

This statutory language could be interpreted to give FINRA the authority to impose "appropriate[]" punitive sanctions—including expelling members for rules violations—so long as those sanctions are not "excessive or oppressive." This appears to be the interpretation of the statutory scheme that Judge Kavanaugh adopted in *Saad II*. *See* 873 F.3d at 306 (Kavanaugh, J., concurring) ("[T]he SEC may still approve an expulsion or suspension if such a FINRA-imposed sanction is an appropriate (that is, not 'excessive or oppressive') penalty in particular cases."). This view is reasonable because, as courts have held, not all penalties are "excessive or oppressive." *See, e.g.*, *Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013) (holding that a civil "penalty" was not "excessive" under the Excessive Fines Clause); *NL Indus., Inc. v. Dep't of Transp.*, 901 F.2d 141, 145 (D.C. Cir. 1990) (holding that a monetary "penalty" was not "excessive" under the Hazardous Materials Transportation Act); *Castle v. Rubin*, 78 F.3d 654, 659 (D.C. Cir. 1996) (holding that termination was not an "excessive penalty" for plagiarism under Title VII); *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (upholding a "penalty" for violating a regulation for transportation rates as not "so severe and oppressive" as to violate the Due Process Clause); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974) (upholding a forfeiture "penalty" as not "unduly oppressive").[8]

As Judge Kavanaugh recognized, the problem with mischaracterizing punitive sanctions as remedial is that doing so permits FINRA to impose its harshest sanction by default, without regard to the magnitude of individual misconduct. Under the current system, FINRA and the SEC are "able to simply wave the 'remedial card' and thereby evade meaningful judicial review of harsh sanctions they impose on

[8] There may also be other interpretations of the statute that would permit the SEC to uphold appropriate punitive sanctions. *See Saad II*, 873 F.3d at 308 (Millett, J., dubitante) (noting that the SEC "may" alter excessive or oppressive FINRA sanctions under the governing statute); *but see PAZ II*, 566 F.3d at 1176 (referring to the "statutory requirements that a sanction be remedial and not 'excessive or oppressive'").

specific defendants." *Saad II*, 873 F.3d at 306 (Kavanaugh, J., concurring). "If FINRA and the SEC must justify expulsions or suspensions as punitive," they "will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive." *Id.* "Over time, a fairer, more equitable, and less arbitrary system of FINRA and SEC sanctions should ensue." *Id.*

While FINRA and the SEC would be responsible for developing the contours of that system in the first instance, any framework for imposing "appropriate" punitive sanctions that are not "excessive or oppressive" would have to incorporate the traditional constraints that attend the imposition of punishment: proportionality and meaningful judicial review. 15 U.S.C. §§ 78*o*-3(b)(7), 78s(e)(2). "[T]he Eighth Amendment's protection against excessive … punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportionate to [the] offense.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). For instance, in the Excessive Fines context, the "touchstone" of the constitutional inquiry "is the principle of proportionality," such that the nature of the punishment "must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334; *see also Collins*, 736 F.3d at 526 (identifying four factors to determine whether a penalty is disproportionate and thus excessive).

Under such a system, disproportionate sanctions like the one in this case would, appropriately, receive much more stringent scrutiny than they do now. At a minimum, FINRA and SEC would be required to explain why the most severe penalty in their arsenal is an appropriate response to an employee's misappropriation of a small amount of money from an employer.

In sum, it could be argued that the pre-*Kokesh* regime was maladjusted in two partially offsetting respects. On the one hand, the SEC and FINRA were limited to *only* remedial sanctions (when, arguably, some punitive sanctions should also be permitted under the statute). On the other hand, as *Kokesh* demonstrates, the definition of "remedial" was far too broad, ultimately allowing the agencies to impose disproportionate penalties that should have been foreclosed under the statute. As Judge Kavanaugh recognized, *Kokesh* overruled this Court's precedents on the second issue, while also potentially allowing it to change course on the first issue. Thus, the Court could ultimately arrive at a regime where some punitive sanctions are permissible, but only if they are proportionate.

b. To be sure, this Court's precedents confine FINRA and the SEC to remedial sanctions. But *Kokesh* arguably empowers this Court to revisit those decisions in order to permit the SEC and FINRA to craft a new framework for imposing punitive sanctions in an appropriate future case. When a decision of the Supreme Court has "undermined the analysis" of a prior panel, that panel's holding "is no longer binding on a court of appeals." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 976, 978 n.11 (D.C. Cir. 1988). A later panel simply is not bound by an earlier decision where "an intervening development 'ha[s] removed or weakened the conceptual underpinnings from the prior decision.'" *United States v. Burwell*, 690 F.3d 500, 504 (2012) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

Here, *Kokesh* arguably "undermined the analysis" and "weakened the conceptual underpinnings" of this Court's prior decisions interpreting the phrase "excessive or oppressive" under § 78s(e)(2) to forbid punitive sanctions. In those decisions, this Court reasoned that Congress, in § 78s(e)(2), directed the SEC to review sanctions "with 'due regard for the public interest and the protection of investors.'" *PAZ I*, 494 F.3d at 1065–66 & n.* (quoting 15 U.S.C. § 78s(e)(2)). For that reason, the Court found a "substantive requirement that the sanction be remedial rather than punitive," and concluded that expulsions were permissible if ordered "as a means of protecting investors." *Id.* (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)). But *Kokesh* undercuts this understanding of the difference between remedial and punitive sanctions. *Kokesh* made clear that a sanction is punitive if it is imposed to "protect the . . . public by providing an effective deterrent to future violations." 137 S. Ct. at 1643 (citation omitted); *see also supra* at pp. 15–16. Accordingly, it is no longer permissible to rely on a sanction's purpose of protecting the public to find that a sanction *is* remedial, much less to find a substantive requirement that a sanction *must be* remedial. The *PAZ I* Court interpreted § 78s(e)(2) under the assumption that permanent bars are generally remedial. If it had been aware that such bars are often punitive, as the Court made clear in *Kokesh*, it might not have limited FINRA to imposing remedial sanctions only. *See supra* at p. 12. A later panel of this Court is free to harmonize cases like *PAZ* with *Kokesh* as needed.[9]

There are multiple ways of reconciling *Kokesh* and the statute, but as discussed *supra* at pp. 42–44, the Court need not analyze their precise relationship in this case.

C. Mr. Saad's Lifetime Bar Cannot Be Characterized as Remedial Under *Kokesh*.

Finally, the SEC halfheartedly concluded that, even if *Kokesh* applies to FINRA bars, Mr. Saad's lifetime bar is remedial, not punitive, because it "can be explained without invoking deterrence." JA 186–87. In particular, the SEC would

[9] While *Kokesh* thus permits a panel to revisit prior precedent prohibiting FINRA from imposing any "punitive" sanctions, it would also be appropriate to seek en banc endorsement of such a decision under *Irons v. Diamond*, 670 F.2d 265, 267–68 & n.11 (D.C. Cir. 1981). *See In re Sealed Case No. 97-3112*, 181 F.3d 128, 143 (D.C. Cir. 1999) (explaining "stare decisis simply has no applicability if a prior precedent has been altered by an intervening decision from a higher court," but that a three-judge panel may choose to "use an *Irons* footnote to secure full-court endorsement before ruling that an intervening Supreme Court decision has overruled a circuit precedent"); Policy Statement on *En Banc* Endorsement of Panel Decisions (Jan. 17, 1996), *available at* https://bit.ly/2ORvrNh.

explain the sanction as necessary to protect "investors and other industry participants." JA 187. This argument is a nonstarter.

First, as this Court already recognized, the SEC admitted that deterrence was a purpose of Mr. Saad's lifetime bar. *See Saad II*, 873 F.3d at 302 ("[T]he Commission reasoned that a permanent bar was the appropriate remedy in Saad's case because it 'serves important deterrent objectives and reaffirms long-standing FINRA policy that such dishonesty by members or their associated persons will not be tolerated.'"); *supra* at p. 22. Thus, regardless of whether other FINRA bars "can be explained without invoking deterrence," Mr. Saad's cannot be.

It is irrelevant that the SEC will not uphold FINRA bars based "solely" on the need for general deterrence. JA 187. *Kokesh* held that a sanction is punitive if it is motivated by deterrence "'even in part,'" and Mr. Saad's lifetime bar was so motivated. 137 S. Ct. at 1645 (quoting *Bajakajian*, 524 U.S. at 331, n.6); *see supra* at pp. 22–23. It was also motivated by retribution and incapacitation, *see supra* at pp. 23–24, further demonstrating that it is punitive.

Nor is it sufficient for the SEC to insist that its real purpose is protecting investors. JA 187. As *Kokesh* explained, SEC sanctions that are imposed to "protect the investing public *by providing an effective deterrent* to future violations" are punitive. 137 S. Ct. at 1643 (emphasis added) (citation omitted). In other words, a punitive sanction that is meant to serve the public interest is still a punitive sanction.

This is not surprising, as the punitive/remedial distinction would collapse if the government could circumvent it simply by invoking the public interest.

The bulk of the SEC's contrary authority precedes *Kokesh* and is therefore unilluminating. And the one post-*Kokesh* decision cited by the SEC (at JA 187) does not support its position. In *SEC v. Collyard*, the Eighth Circuit held that an injunction that prohibited an individual from violating the law was not a "penalty." 861 F.3d at 764-65; *see also see also SEC v. Gentile*, 939 F.3d 549, 554 (3d Cir. 2019) (similarly concluding that "properly issued and framed" obey-the-law injunctions are remedial under *Kokesh*); *Kokesh*, 137 S. Ct. at 1640 (referring to typical injunctions that bar "future violations of securities laws"). *Collyard* is an application of *Kokesh* which is not on point here.

An injunction which merely requires an individual to obey the law can hardly be said to be retributive, as it does not deprive the individual of anything that she would otherwise be entitled to have or do. And as for deterrence, it is true that such an injunction can have some deterrent effect on the enjoined individual, but the Eighth Circuit concluded that this effect is merely incidental to the sanction, and does not constitute its motivating purpose. *Collyard*, 861 F.3d at 765. Accordingly, the Eighth Circuit held, such an injunction is "not imposed 'for the purpose of punishment' or to 'deter others from offending in like manner.'" *Id.* at 764 (quoting *Kokesh*, 137 S. Ct. at 1642). This conclusion does not affect this case; as discussed above, Mr. Kokesh's bar is indisputably rooted in punitive motivations such as deterrence.

* * *

Congress has empowered FINRA and the SEC to police the behavior of securities professionals to protect the integrity of the industry. Congress has also safeguarded the interests of those professionals by creating a fair system of review to ensure that resulting sanctions are not "excessive or oppressive." What Congress has not done is permit the SEC to "simply wave the 'remedial card' and thereby evade meaningful judicial review of harsh sanctions they impose on specific defendants." *Saad II*, 873 F.3d at 306 (Kavanaugh, J., concurring). Yet that is precisely what the SEC did in Mr. Saad's case. After *Kokesh*, the SEC can no longer do so, because it is no longer possible to conclude that Mr. Saad's lifetime bar is remedial rather than punitive.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the SEC upholding Mr. Saad's lifetime bar as a remedial sanction.

Dated: February 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2020, I caused true and correct copies of the foregoing document to be served on counsel for all parties of record via the Electronic Case Filing (ECF) service.

Dated: February 26, 2020

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STATUTORY ADDENDUM

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15 U.S.C. § 78*o*-3. Registered securities associations

(a) Registration; application

An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Determinations by Commission requisite to registration of applicant as national securities association

An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

…

(6) The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the association.

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. …

15 U.S.C. § 78s. Registration, responsibilities, and oversight of self-regulatory organizations

…

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

> **(A)** if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or
>
> **(B)** if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

…